

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

ARCTIC VILLAGE COUNCIL,
LEAGUE OF WOMEN VOTERS OF
ALASKA, ELIZABETH L. JONES, and
BARBARA CLARK,

Plaintiffs,

v.

KEVIN MEYER, in his official capacity
as the Lieutenant Governor of the State of
Alaska; GAIL FENUMIAI, in her official
capacity as the Director of the Alaska
Division of Elections; and ALASKA
DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-20-_____

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Clerk of the Trial Courts

COMPLAINT

1. This lawsuit concerns the burdens on the fundamental right to vote of organizational Plaintiffs' members and individual Plaintiffs during a deadly pandemic because the Alaska Division of Elections requires that Plaintiffs and eligible Alaskan voters who wish to cast absentee ballots by mail or by electronic transmission sign their absentee ballot envelopes in the presence of a notary or other official authorized to administer oaths or, alternatively, sign their ballots in the presence of a witness who is at least eighteen years old and obtain a signature from the witness ("Witness Requirement"). AS 15.20.081(d); AS 15.20.066(b)(2).

2. Individual Plaintiffs live alone, are immunocompromised, and have been self-isolating since the first cases of COVID-19 in Alaska became known and Organizational Plaintiffs have members who are in similar positions.

3. These voters cannot vote in person without a significant risk to their health because they reasonably fear that they may contract COVID-19 at the polls.

4. They also cannot vote by mail without a significant risk to their health because they are neither able to notarize their mail-in ballots nor find an individual who is at least eighteen years old to witness and attest to their mail-in ballots without potential exposure to COVID-19.

5. Alaska state law, thus, leaves these voters no recourse in the midst of a pandemic, leaving them with an untenable choice: risking their health and well-being to vote or not vote at all.

6. Neither is permissible. Plaintiffs and similarly situated voters have a right to protect their health and safety. But it is beyond question that the right to vote is a “precious” and “fundamental” right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). Even the most basic of other rights are “illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

7. Alaska’s Constitution expressly guarantees the right to vote as fundamental. Article V, Section 1 provides, in pertinent part, “Every citizen of the United States who is at least eighteen years old, who meets registration residency requirements which may be

prescribed by law, and who is qualified to vote under this article, may vote in any state or local election.” Alaska Const., art. V, § 1.

8. Article I, Section 1 guarantees that “all persons are equal and entitled to equal rights, opportunities, and protection under the law.” *Id.* art. I, § 1. The Alaska Constitution also enshrines absentee voting, “Methods of voting, including absentee voting, shall be prescribed by law.” *Id.* art. I, § 3.

9. Alaska’s requirement that Plaintiffs sign their absentee ballots “in the presence” of a witness and obtain a witness signature leaves Plaintiffs and their members and similarly situated Alaskans with no way to vote safely, and through no fault of their own.

10. This amounts to a significant unconstitutional burden on the right to vote of organizational Plaintiffs’ members and individual Plaintiffs during this pandemic.

11. Plaintiffs, thus, ask this Court to use its equitable powers to grant injunctive and declaratory relief ordering Defendants to not enforce the Witness Requirement in the upcoming November 2020 general election and direct boards of elections to not reject returned absentee ballots that do not satisfy the Witness Requirement and declare its application unconstitutionally burdensome on Plaintiffs’ right to vote during the COVID-19 pandemic.

PARTIES

Plaintiffs

A. Organizational Plaintiffs

12. Arctic Village Council (the “Tribe”) is a federally recognized Indian tribal government whose governing body is recognized by the Secretary of the U.S. Department of the Interior as Arctic Village. The Tribe exercises powers of self-governance and jurisdiction over its Neets’ąjį Gwich’in tribal members living in Arctic Village. The Tribe is responsible for the health, safety, and welfare of its members. Arctic Village Council sues in a representational capacity *parens patriae* on behalf of the affected tribal members it represents. Arctic Village is situated on the southern boundary of the Arctic National Wildlife Refuge, along the east fork of the Chandalar River and about 100 miles north of Fort Yukon, Alaska. The Tribe has been extremely concerned about the pandemic which has devastated Native communities all over the United States. The Tribe is aware that COVID-19-related deaths among Native communities is highest among any demographic group in the United States. In response to the pandemic, the Tribe has taken a series of drastic measures to prevent the spread of the virus that, if not contained, has the potential to decimate Arctic Village’s entire population. To that end, in March and April 2020, the Tribe put in place strict social distancing guidelines, closed tribal facilities to the public, ordered tribal staff to work from home, closed the Village to all outside visitors, and restricted air carrier passenger service to the Village. After a recent outbreak of COVID-19, the Tribe undertook even more drastic measures—a community-wide shelter in place

order that restricted all residents from gathering with any person outside of their households and prohibited residents from congregating at community facilities such as: the tribal office, the community hall, the village store, and the post office. The pandemic has severely restricted the ability of village members to vote in person, the predominant method of voting in past elections. Since the most recent outbreak and the shelter-in place order around May 16, 2020, the Tribe has had to restrict in-person voting because it requires members to congregate in close spaces. As a way to avoid person-to-person contact and promote safety, the Council is encouraging community members to vote by mail and leave their absentee ballots in their mailboxes for postal pick up. But Alaska's Witness Requirement serves as an absolute bar for many members who are self-isolating, do not have access to a notary because of shelter-in place requirements, and do not have any one at least eighteen years old to sign and witness their signing absentee ballots. Voting is important for the Arctic Village community because it allows them to exercise their voice in the democracy. If the Witness Requirement is not lifted for the upcoming general election, members of Arctic Village will not be able to vote in the upcoming general election and will be forced to choose between their right to vote and their health.

13. The League of Women Voter of Alaska ("LWVAK") is a nonpartisan political organization that works to encourage informed and active participation in government and to influence public policy through education and advocacy. LWVAK is an affiliate of the League of Women Voters of the United States. LWVAK has approximately 350 members throughout Alaska. Like the other Plaintiffs (and most

Americans), LWVAK's members have had their daily lives altered by COVID-19. Many of these members are adhering to strict social distancing protocols to avoid contracting or spreading the coronavirus. Many of LWVAK's members are senior citizens and are therefore particularly vulnerable to COVID-19 due to their age. Some of these members live by themselves and would have to violate distancing protocols to have their ballots witnessed. Thus, some of LWVAK's members are registered voters who, under the current law, will face a choice between risking their health in order to vote or not voting at all because of Alaska's Witness Requirement for absentee voting. LWVAK has diverted and will need to continue to divert resources from its voter registration, voter education, and voter mobilization activities towards advocating against and educating voters about the Witness Requirement, to prevent the Requirement from disenfranchising its members and the voters the organization serves. If mail voters were not required to have their mail-in ballot envelopes signed by a witness, LWVAK could spend less of its volunteer resources and time on educating voters about the witness requirement, and more on its other critical activities including registering voters without conducting in-person registration drives and educational events.

B. Individual Plaintiffs

14. Elizabeth L. Jones is seventy-one years old, lives alone in a log cabin in Fairbanks, Alaska, and has voted in person in every general election since she became eligible to vote 50 years ago. She is not able to vote safely in person in this year's general election because she is at high risk of contracting COVID-19. Ms. Jones is at increased risk

for severe illness from COVID-19 because of her age and because she has three underlying health conditions: she has high blood pressure, is obese, and is in the initial stages of chronic obstructive pulmonary disease or COPD. She has been self-isolating at her home since late February, only leaving her home when necessary and choosing curbside service for groceries, prescription drugs, garbage drop-off, and veterinarian service for her dog in order to avoid contact with others. Her daughter, who lives in Oklahoma, developed COVID-19, had severe symptoms, and eventually recovered. Ms. Jones is afraid that she will not be so lucky and may not survive the illness if she contracted it. Ms. Jones believes that the only way she can safely vote is by mail. Because she lives alone, she does not have access to anyone who is at least eighteen years old who could serve as a witness to her absentee ballot. She also does not have access to a notary anywhere near her and is not comfortable going into a notary office to get her absentee ballot notarized. Ms. Jones voted by mail in the August primary and had to ask her United States Postal Service (“USPS”) letter carrier to witness her ballot; however, because of a recent USPS directive, Ms. Jones’s letter carrier will not be allowed to witness her ballot in the general election. If the Witness Requirement remains in place for the upcoming general election, Ms. Jones will be forced to choose between her right to vote and an unacceptable risk to her health.

15. Barbara Clark is seventy-two years old and lives alone. She is a “super voter” and votes in every major election. She does not believe she can vote safely in person in this year’s general because she is at high risk of contracting COVID-19. She has two underlying health conditions that put her at increased risk for severe illness from COVID-19: high

blood pressure and obesity. She has been self-isolating at her home since early March, not even leaving to get food, which she gets delivered. She has left home only for other necessities such as a medical appointment and obtaining a COVID-19 test; she estimates that she has left her home for such necessities fewer than a dozen times in the last six months. Ms. Clark believes that the only way she can safely vote is by mail. Because she lives alone, she does not have access to anyone who is at least eighteen years old who could serve as a witness to her absentee ballot. She also does not have access to a notary anywhere near her and is not comfortable going into a notary office to get her absentee ballot notarized. If the Witness Requirement remains in place for the upcoming general election, Ms. Clark will be forced to choose between her right to vote and an unacceptable risk to her health.

C. Defendants

16. Defendant Kevin Meyer is sued in his official capacity as the Lieutenant Governor of the State of Alaska. As Lieutenant Governor, Defendant Meyer “control[s] and supervise[s] the division of elections” and “appoints a director of elections.” AS 15.10.105(a). The “director serves at the pleasure of the lieutenant governor.” *Id.* Defendant Meyer has an office located at 550 West 7th Avenue, Suite 1700, Anchorage, AK 99501.

17. Defendant Gail Fenumiai is sued in her official capacity as the Director of the Alaska Division of Elections. Under state law, the Director “provide[s] general administrative supervision over the conduct of state elections, and may adopt regulations

under AS 44.62 (Administrative Procedure Act) necessary for the administration of state elections.” AS 15.15.010. The Director also oversees general election administration by “act[ing] for the lieutenant governor in the supervision of central and regional election offices . . . and all other matters relating to the employment and training of election personnel, and the administration of all state elections as well as those municipal elections that the state is required to conduct.” AS 15.10.105(a). Defendant Fenumai is located at 240 Main Street, 4th Floor, Juneau, AK 99801.

18. Defendant the Alaska Division of Elections (“DOE”) “is the state agency charged with overseeing and administering elections in Alaska.” *Id.* Defendant is located at 240 Main Street, 4th Floor Juneau, AK 99801.

JURISDICTION AND VENUE

19. This Court has original jurisdiction over this action under AS 22.10.020 because Plaintiffs seek injunctive and declaratory relief in a civil action.

20. Venue is proper in the Third Judicial District of Alaska under Alaska Rule of Civil Procedure 3(c)(2) because one or more of the Defendants have offices in this District.

21. Venue is also proper in the Third Judicial District under Alaska Rule of Civil Procedure 3(c)(1) because one or more of Plaintiffs’ claims arise in this District.

FACTUAL ALLEGATIONS

A. COVID-19 Pandemic

22. The novel coronavirus, SARS-CoV-2, causes a deadly disease known as COVID-19. The World Health Organization (“WHO”) declared the COVID-19 disease a pandemic on March 11, 2020.

23. Since health officials observed the first known case of the COVID-19 disease in December 2019, COVID-19 has spread throughout the world. Globally, as of September 8, 2020, COVID-19 has infected more than 27 million individuals and has caused more than 881,400 deaths.

24. The COVID-19 pandemic has had an especially severe impact on the United States. The first known death in the United States caused by COVID-19 occurred in February 2020. Since then, the United States has observed more than six million official cases of COVID-19 and more than 188,000 deaths.

25. The virus that causes COVID-19 is highly contagious and spreads through a variety of ways, including the respiratory droplets that an infected person produces when they cough, sneeze, or talk; or through contact between individuals. The virus enters the body through the nose, mouth, or eyes, and then attaches to a protein, which then enters the cell and replicates. Each infected cell can release millions of copies of the virus before the cell breaks down and dies. An infected person who coughs and sneezes can leave respiratory droplets on surfaces where it can remain in an infectious state for several hours to days without a human host.

26. COVID-19 is a dangerous virus. In addition to the large number of deaths in the United States and throughout the world, the WHO estimates that as many as 20% of all individuals to become infected with the virus will require hospital treatment. Even COVID-19 patients who eventually recover from the disease can suffer serious long-term health impacts, such as damaged lung tissue, permanent loss of respiratory capacity, and damage to the kidneys, heart, and liver.

27. The risks of severe illness, complications, and death due to COVID-19 increase with age. Early COVID-19 data from China reported a fatality rate of 3.6% among individuals in their sixties, a fatality rate of 8.0% among individuals in their seventies, and a fatality rate of 14.8% among individuals over the age of eighty. Early epidemiologic data from the United States showed similar results.

28. In addition to age, several other underlying health factors increase the risks associated with COVID-19. People with underlying health conditions (such as heart disease, diabetes, and lung disease such as chronic obstructive pulmonary disease (COPD)), weakened immune systems, cancer or high blood pressure, and who are pregnant or obese are considered populations at an increased risk for severe illness from COVID-19.

29. COVID-19 also disproportionately impacts members of racial minority groups, such as Native Americans and Alaska Natives. For example, in Alaska, Native people make up 15.6% of the population but 43% of deaths. In Arizona, Native Americans make up 4% of the population and 12% of deaths. In New Mexico, they

account for only 9% of the population but nearly 54% of deaths—by far the starkest disparity. In Wyoming, they comprise 2% of the population but 43% of deaths. The alarming rates at which COVID-19 is killing Native Americans and Alaska Natives can be attributed to decades of discrimination in housing, employment, and health care. Today, ongoing discrimination in testing and treatment continues to fuel significant disparities in COVID-19 cases and outcomes.

30. The severity of the COVID-19 pandemic in the United States has prompted government officials to undertake drastic measures to combat the virus. President Trump declared a national emergency on March 13, 2020. The governors of all fifty states eventually declared states of emergency. These developments resulted in restrictions being placed on large gatherings, requests that people practice social distancing, and changes to election times and procedures.

31. The Centers for Disease Control and Prevention (“CDC”) urges Americans to adhere to social distancing measures (for example, staying home as often as possible and maintaining at least six feet of physical distance from other people when outside the home) to minimize person-to-person contact and reduce the spread of COVID-19. The CDC emphasizes that these measures are crucial for reducing an individual’s risk of becoming infected with the disease and for preventing the transmission of the disease throughout the population.

32. Public health experts anticipate that the virus that causes COVID-19 will continue to spread through the fall and winter given the low level of immunity to the

virus in the general population. CDC Director Robert Redfield warned in April that the combination of the COVID-19 pandemic and regular cold and flu season in the fall and winter could produce an even greater strain on hospitals and the health care system than the initial outbreak of the virus the United States has caused so far.

33. Given the likelihood that the COVID-19 pandemic will continue through the upcoming fall and winter, public health experts and other researchers have expressed concerns regarding the safety of in-person voting during the upcoming November 2020 election. In April 2020, Dr. Anthony Fauci, head of the National Institute of Allergy and Infectious Diseases, expressed concerns regarding a surge in COVID-19 cases in the fall. He stated that he “can’t guarantee” that in-person voting will be safe for the November election. A recent study from the National Bureau of Economic Research, using data from the Wisconsin state primary election in April 2020, found a statistically significant relationship between in-person voting and an increase in COVID-19 cases. Thus, eligible voters, particularly those voters in at-risk groups, face health risks for voting in person in upcoming elections.

B. COVID-19 in Alaska

34. On March 11, 2020, Governor Michael Dunleavy declared a public health emergency advising all state executive departments coordinate COVID-19 emergency responses.

35. Alaska's first known case of COVID-19 was on March 12, 2020. As of September 8, 2020, Alaska had more than 6,600 confirmed cases, and 39 resulting deaths. The numbers are only rising.

36. Anchorage Municipality in particular is one of the State's primary hotspots. As of September 8, 2020, Anchorage has 3,425 of Alaska's total cases and the majority of new cases in Alaska.

37. Due to the public health risks associated with COVID-19, the Governor issued a series of public health mandates with the goal of reducing person-to-person contact and slowing the spread of the disease. The Governor issued a public health mandate closing State-operated facilities to the public on March 17, 2020. On March 18, 2020, the Governor announced the temporary closure of bars and restaurants to the public. On March 19, 2020, the Governor directed doctors, hospitals, and surgical centers to temporarily postpone elective surgeries.

38. The Governor announced the closure of public and private schools on March 20, 2020. Although the original order was supposed to expire starting May 1, 2020, the Governor extended the closure of schools for the duration of the academic school year. Since then, many school districts, including the school districts in Anchorage, Juneau, and Fairbanks, have resumed fall classes with remote learning only.

39. On March 27, 2020, the Governor issued a public health order mandating all Alaska residents to practice social distancing and ordering the temporary closure of non-essential businesses to slow the spread of COVID-19 throughout the State. The same

day, the Governor ordered temporary restrictions on intrastate travel between different communities throughout the State.

40. Alaska began “phase one” of its plan to gradually re-open the state economy in late April. The State continues to encourage residents to practice social distancing and to avoid contact with others whenever possible.

41. Alaska has adopted travel-related restrictions requiring entrants to complete a traveler declaration form, arrive with proof of negative COVID-19 results or get tested for COVID-19 as soon as they arrive, and self-quarantine for at least fourteen days while waiting for test results.

42. Despite the easing of travel and stay-at-home restrictions at the state level, local boroughs and communities have enacted their own restrictions. On July 31, 2020, the Mayor of Anchorage ordered a “four week reset,” which limited the size of outdoor gatherings, mandated social distancing, and prohibited bars and restaurants from offering indoor service from August 3 to August 30, 2020. On August 28, 2020, the Mayor modified this order to allow bars and restaurants to operate at 50% capacity, while recognizing that there continues to be widespread community transmission and concerning outbreaks among vulnerable populations.

43. On April 30, 2020, Governor Dunleavy signed H.B. 124, which allows a remotely located individual to comply with personal appearance before a notary by using communication technology. The law provides that a notary may perform a notarial act using communication technology for a remotely located individual if the notary has (a)

personal knowledge of the identity of the individual; (b) obtained satisfactory evidence of the identity of the remotely located individual by oath or affirmation from a credible witness appearing before the notary; or (c) obtained satisfactory evidence of the identity of the remotely located individual by using a government-issued identification card, a credential analysis of the identification card and at least one type of identity proofing. The law goes into effect January 1, 2021.

44. Similarly, Fort Yukon adopted a local shelter-in-place order and curfew. The municipality also restricted intrastate travel except for cargo, essential workers, medical workers, and law enforcement.

45. Other local municipal and tribal governments that have adopted temporary social distancing and stay-at-home orders since the beginning of the pandemic include Coffman Cave, Juneau, Kake, Tenakee Springs, Thorne Bay, St. Paul, and Wrangell.

46. Several local municipal and tribal governments have also enacted restrictions or prohibitions on intrastate and interstate travel to and from their communities. These villages include Koyukuk, Venetie, Arctic Village, Chalkyitsik, Nulato, and Huslia, as well as Akiak, Adak, Ambler, Atka, Elim, Emmonak, Galena, Kake, Larsen Bay, McGrath, St. Michael's, Newhalen, St. Paul, Unalakleet, and Yakutat.

47. Plaintiff Arctic Village has strict social distancing guidelines in place since March and April and more recently, after an outbreak, a shelter-in-place order that restricts large gatherings outside of community members' homes.

48. Many other Alaska Native tribal governments have enacted similar self-isolation measures to protect the safety of their community members, particularly tribal elders who are at an increased risk for COVID-19 death due to their age and lack of immunity.

49. Tribal leaders, including Plaintiff Arctic Village Council, feel a heightened need to take these precautions because they believe local outbreaks have the ability to decimate their populations and quickly overwhelm under resourced tribal hospitals and healthcare facilities. At the same time, Tribal leaders are acutely aware that their communities are rural and not in close proximity to other major population centers with larger health care facilities.

50. State health officials are concerned that the hospital intensive care units will be overwhelmed sooner than anticipated, and, as a result, borough officials are considering implementing additional safety precautions to attempt to curb the dramatic increase in cases.

C. Vote-by-Mail and Absentee Voting in Alaska

51. Alaska's constitution enshrines the right to vote by mail: "Methods of voting, including absentee voting, shall be prescribed by law." Alaska Const. art. V, § 3.

52. Alaska's Democratic presidential primary election was originally planned for April 4, 2020. Given the onset of the COVID-19 pandemic and its associated health concerns, in-person voting for the Democratic primary was cancelled and the election was conducted by mail.

53. Alaska held its primary elections on August 18, 2020, and Alaska will hold its the general election on November 3, 2020. The Alaska Division of Elections intends to follow normal state protocols and will allow for in-person voting in the general election.

54. As an alternative to in-person voting, Alaskans are permitted to vote by mail, by fax, and online using absentee ballots.

55. State officials anticipate an increase in mail-in voting because of the ongoing COVID-19 pandemic.

Pre-COVID-19 Mail-In Voting

56. In Alaska, any qualified voter can vote absentee by mail, fax, or online without an excuse. AS 15.20.081(a). A voter can apply for an absentee ballot up until ten days before an election by sending the application over mail, fax, or scanning it to the director of the regional election office. AS 15.20.081(a)–(b). Another individual can apply for an absentee ballot on behalf of a qualified voter if that individual has a written general or special power of attorney. *Id.*

57. For domestic voters, the application for an absentee ballot must include the address or, if the application requests delivery of an absentee ballot by electronic transmission, the telephone electronic transmission number, to which the absentee ballot is to be returned, the applicant's full Alaska residence address, and the applicant's signature. *Id.*

58. After a local election office receives an absentee ballot application, the Director must send the voter an absentee ballot and other absentee voting materials by the

most expeditious mail service and as soon as the materials are ready for distribution. AS 15.20.081(c).

59. If the application requests electronic transmission of the absentee ballot, election officials must send the absentee ballot and other absentee voting materials by electronic transmission. AS 15.20.066.

60. Once the voter receives the absentee ballot, the voter must sign the voter certification in the presence of a notary or other official authorized to administer oaths or, if these are unavailable, then in the presence of a witness who is at least eighteen years old. AS 15.20.081(d).

61. An absentee voter must provide proof of identification or other information to aid in the establishment of the voter's identity, either at the time the voter applies for an absentee ballot or when the voter signs the voter certification. AS 15.20.081(f); 6 AAC 25.510.

62. A first-time voter who registered by mail or by facsimile or other electronic transmission and has not met the identification requirements when the voter registered, must provide either a copy of a driver's license, state identification card, current and valid photo identification, birth certificate, passport, or hunting or fishing license; or a copy of a current utility bill, bank statement, paycheck, government check, or other government document; any of these items must show the name and current address of the voter. AS 15.20.081(f).

63. An absentee voter who returns the absentee ballot by mail, whether provided to the voter by mail or by electronic transmission, must use first class mail service and mail the ballot to the election supervisor for the house district in which the voter seeks to vote. The ballot must be postmarked on or before election day. The election supervisor has to receive the ballot by the close of business on the tenth day after the election. AS 15.20.081(e).

64. An absentee voter who returns the absentee ballot by electronic transmission must either return the ballot to the Division of Elections by mail or by electronic transmission. If the voter returns the ballot by mail, the ballot must be postmarked on or before election day and the election supervisor must receive the ballot by the close of business on the tenth day after the election. If the voter sends the ballot by electronic transmission, the Division of Elections must receive it not later than 8:00 p.m. Alaska time on election day.

65. Under Alaska law, absentee counting boards cannot count absentee ballots that are missing an official or witness attestation. AS 15.20.203(b)(2).

Temporary Modifications to Mail-In Voting in Light of the COVID-19 Pandemic

66. For the August primary and November general elections, Alaska broadened its absentee ballot system and is now allowing anyone to request a ballot by email or fax.

67. Alaska has not lifted all barriers however—the Witness Requirement remains intact and voters still have to print out the ballot and either fax it or procure postage and mail it back to election offices.

68. Until recently, a voter could have an official from the USPS witness their ballot. But on August 13, 2020, the USPS informed the Director that postal service employees “are prohibited from serving as witnesses in their official capacity while on duty[.]”

69. For the November 3 general election, the deadline to receive mail-in absentee applications is October 24, 2020. The deadline to receive electronic transmission applications is November 2, 2020.

D. Burdens on Plaintiffs and Plaintiffs’ Members Right to Vote from the Application of Alaska’s Witness Requirement

70. On August 31, 2020, Defendants Fenumiai and Meyer were placed on notice that imposing the Witness Requirement in the upcoming general election violated the Article V, Section 1 and Article I, Section 1 of the Alaska Constitution during a pandemic.

71. On September 4, 2020, Defendants Fenumiai and Meyer responded that the Witness Requirement, AS 15.20.081(d), will remain in place for the upcoming general election and election boards will reject unwitnessed absentee ballots under AS 15.20.203(b)(2).

72. In the August primary election, 62,455 Alaskans requested absentee ballots. Officials predict that number will rise in the upcoming general election. In the primary election, 456 absentee ballots were rejected because of “improper or insufficient witnessing.”

73. There is no end in sight for the COVID-19 pandemic. Because the pandemic will continue into the fall and winter, Alaskan voters will risk exposure to COVID-19 if they wish to vote in person in the upcoming election.

74. And if they vote absentee, they stand to lose their right to vote if they are unable to comply with the Witness Requirement.

75. The Witness Requirement burdens Alaska Native voters in particular. As of 2019, the Census Bureau estimated American Indian and Alaska Native residents make up 15.6% of the citizen voting-age population. This population has also faced some of the highest COVID-19-related deaths in Alaska and the Nation.

76. Plaintiff Arctic Village Council's community members are under a strict shelter-in-place order that prohibits members of any household from gathering with anyone outside of their households including at public places like the post office. Voting by mail is the only way that Arctic Village Council's members can vote in the upcoming election as in-person voting is not an option for them. Because many members do not live with anyone at least eighteen years old, the Witness Requirement is an absolute bar to their voting.

77. The Witness Requirement significantly burdens older voters with underlying health conditions. As of 2018, approximately 18% of Alaska's population is made up of residents age sixty or older. As of late 2016, individuals sixty-five years old and over made up 13.2% of Alaska's citizen voting-age population.

78. Plaintiff League of Women Voters of Alaska has many members are senior citizens and are therefore particularly vulnerable to COVID-19 due to their age. Some of these members live by themselves and would have to violate distancing protocols to have their ballots witnessed. Thus, some of LWVAK's members are registered voters who, under the current law, will face a choice between risking their health in order to vote or not voting at all because of Alaska's witnessing requirement for mail voting. Furthermore, LWVAK has diverted and will need to continue to divert resources from its voter registration, voter education, and voter mobilization activities towards advocating against and educating voters about the witness requirement, to prevent the requirement from disenfranchising its members and the voters they serve.

79. Plaintiffs Ms. Jones and Ms. Clark are high-risk voters with underlying health conditions. They are self-isolating because of the pandemic. They do not have access to a notary or anyone at least eighteen years old to witness and sign their absentee ballots. Although Ms. Jones had her USPS letter carrier witness her primary ballot, that option is no longer available to her because the USPS recently issued a directive prohibiting postal service employees from witnessing ballots while on duty.

80. Forcing Plaintiffs' members and individual Plaintiffs to choose between risking their health and safety by increasing their potential exposure to COVID-19 and not participating in the election at all is an unconstitutional burden on Alaska citizens' fundamental right to vote.

81. Because it necessitates coming into contact with other individuals and increasing potential exposure to COVID-19, Alaska's Witness Requirement makes even absentee voting at home unsafe for self-isolating, high-risk individuals who must avoid contact with other people. For these individuals, not only is in-person voting foreclosed, so is absentee voting. Thus, the Witness Requirement unconstitutionally restricts the fundamental right to vote for these high-risk and self-isolating citizens.

82. Even if the State has an interest in preventing election fraud, the Witness Requirement does not achieve that objective, let alone present a narrowly tailored means of accomplishing that goal. Alaska is only one of just twelve states to have a witness requirement. Election fraud data throughout the United States suggests that states lacking a witness requirement can still administer a mail-in voting regime without a significant increase in fraud.

83. In the context of a pandemic, the Witness Requirement's burden on voters' ability to safely cast their absentee ballots significantly outweighs the benefits to the State in enforcing the Witness Requirement.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

Violation of the Right to Vote, Alaska Const., Art. V, § 1

84. Plaintiffs re-allege and incorporate by reference the allegations in the preceding paragraphs.

85. Article V, Section 1 of the Alaska Constitution guarantees the right to vote to all adult United States citizens residing in Alaska. When a state election law is alleged to cause a deprivation of this fundamental right, courts in this state analyze the constitutionality of the provision by weighing “the character and magnitude of the asserted injury to the rights” against the “precise interests put forward by the State as justification for the burden imposed by its rule.” *State v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005) (quoting *O’Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)).

86. To cast an absentee ballot, an Alaska voter must obtain the signature of a notary or other “person qualified to administer oaths,” or a witness at least eighteen years old at the time the voter executes the voter certificate on the ballot if a notary is not reasonably available. AS 15.20.081(d); *see also* 6 AAC 25.550. In the context of a global pandemic that has already claimed the lives of nearly two-hundred-thousand across the country and a significant number of Alaskans, and required social distancing of the entire population, Alaska’s Witness Requirement for absentee voting places a substantial and impermissible burden on Plaintiffs’ the fundamental right to vote in violation of Article V, Section 1 of the Alaska Constitution.

87. Making Plaintiffs, including those who are at increased risk of complications from COVID-19, choose between voting in person or coming into contact with a witness or notary, thereby risking their health and safety, or not voting at all

because they cannot safely secure the signature of a witness or notary, violates Plaintiffs' right to vote under Article V, Section 1 of the Alaska Constitution.

88. In the midst of an ongoing public health crisis, there is no state interest in favor of enforcing Alaska's mandatory notary and witness requirements that justifies the burden placed on Plaintiffs' constitutional right to vote. Defendants may not deprive Plaintiffs of their fundamental right to vote—secured by Article V, Section 1 of the Alaska Constitution—by enforcing the mandatory witness requirements for mail-in voting.

SECOND CAUSE OF ACTION

Violation of Equal Rights, Alaska Const., Art. I, § 1

89. Plaintiffs re-allege and incorporate by reference the allegations in the preceding paragraphs.

90. Article I, Section 1 of the Alaska Constitution guarantees that “all persons are equal and entitled to equal rights, opportunities, and protection under the law.” When a law that is alleged to violate the guarantee of equal rights, courts select a level of scrutiny on a sliding scale depending on the particular right or classification at issue. Courts employ a higher level of scrutiny when the challenged law implicates a fundamental right or suspect classification, and a lower level of scrutiny when less important rights or less suspect classifications are at issue. *See Alaska Pacific Ins. Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984).

91. The courts of this state have long recognized that the right to vote is a fundamental right under the Alaska Constitution. *See, e.g., Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982). Thus, courts in this state apply the strictest level of scrutiny under Article I, Section 1's sliding scale framework when the challenged law concerns the fundamental right to vote. *See Pelozo v. Freas*, 871 P.2d 687, 690 (Alaska 1994). Accordingly, courts will invalidate the complained-of statute unless the government provides a compelling state interest and there is no less restrictive alternative to the state's chosen means to achieve its objectives. *See Alaska Pacific Ins. Co.*, 687 P.2d at 269–70.

92. The Witness Requirement burdens Plaintiffs' right to vote during a pandemic because it forces them to choose between their health and the right to vote. It unequally allocates these burdens to eligible voters who are unable to feasibly secure a witness signature because they live alone, must self-isolate to avoid exposure to COVID-19, or both. In other words, the Witness Requirement treats a class of voters such as Plaintiffs or Plaintiffs' members (i.e., who are self-isolating, immunocompromised, and unable to locate a witness who is at least eighteen years old without exposing themselves to the virus) differently from those individuals who easily have access to a witness potentially because they live with the person.

93. Defendants do not have a compelling state interest in enforcing the Witness Requirement during a pandemic. Any purported interest in preventing voter fraud can be achieved through less restrictive means, especially when the application of the Witness

Requirement threatens to disenfranchise hundreds if not thousands of eligible, Alaska voters.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants and:

- i. Declare the Witness Requirement, codified at AS 15.20.066(b)(2) and 15.20.081(d), and 6 AAC 25.550 and 6 AAC 25.680, unconstitutional and invalid during the COVID-19 pandemic because it violates Plaintiffs' rights under Article V, Section 1 and Article I, Section 1 of the Alaska Constitution.
- ii. Preliminarily and permanently enjoin enforcement of the Witness Requirements during the COVID-19 pandemic;
- iii. Order Defendants to issue guidance instructing all state and local election officials to count otherwise validly cast mail-in ballots that do not comply with the Witness Requirements, for all Alaska primary, general, state, local, and municipal elections held during the COVID-19 pandemic;
- iv. Order Defendants to modify election materials, including mail-in ballots, to reflect the elimination of the Witness Requirements for the November 2020 general election and any future elections held during the COVID-19 pandemic and conduct a public education campaign concerning the elimination of the Witness Requirement in coordination with local officials

- before and during the absentee balloting period;
- v. Declare that Plaintiffs are the prevailing party and are constitutional public interest litigants under AS 09.60.010(c) and award them full reasonable attorneys' fees and costs, under applicable Alaska state statutes, including AS 09.60.010; and
- vi. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

Date: September 8, 2020



Natalie A. Landreth, Alaska Bar No.
0405020
Matthew N. Newman, Alaska Bar No.
1305023
Wesley James Furlong, Alaska Bar No.
1611108
NATIVE AMERICAN RIGHTS FUND
745 West 4th Ave., Suite 502
Anchorage, AK 99501
(907) 276-0680
nlandreth@narf.org
mnewman@narf.org
wfurlong@narf.org

*Counsel for Plaintiff Arctic Village
Council*

Stephen Koteff, Alaska Bar No. 9407070
Joshua A. Decker, Alaska Bar
No.1201001
Aadika Singh*
ACLU OF ALASKA FOUNDATION
1057 West Fireweed Lane, Ste.
207 Anchorage, AK 99503
(907) 263-2007
skoteff@acluak.org
jdecker@acluak.org
asingh@acluak.org

*Counsel for Plaintiffs League of
Women Voters of Alaska, Elizabeth
Jones, and Barbara Clark*

Ezra D. Rosenberg*
Pooja Chaudhuri*
Natasha Chabria*
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1500 K Street, NW, Ste. 900
Washington, D.C. 20005
(202) 662-8600
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
nchabria@lawyerscommittee.org

Counsel for all Plaintiffs

Dale E. Ho*
AMERICAN CIVIL LIBERTIES
UNION
125 Broad Street
New York, NY 10004
(212) 519-7866
dho@aclu.org

*Counsel for Plaintiffs League of Women
Voters Alaska, Elizabeth Jones, and
Barbara Clark*

*Pro Hac Vice forthcoming under Rule
81(a)(2)

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2020, I mailed by Certified Mail and emailed a true and correct copy of the foregoing to:

Kevin Meyer
Lieutenant Governor
P.O. Box 110001
Juneau, AK 99811-0001

550 West 7th Avenue, Suite 1700
Anchorage, AK 99501
kevin.meyer@alaska.gov

Gail Fenumiai
Director, Alaska Division of Elections
PO Box 110017
Juneau, AK 99811-0017
gail.fenumiai@alaska.gov

Clyde Ed Sniffen
Acting Attorney General
1031 West 4th Avenue, Suite 200
Anchorage, AK 99501
ed.sniffen@alaska.gov

By: 

Matthew Newman
Alaska Bar No. 1305023