

IN THE SUPREME COURT FOR THE STATE OF ALASKA

AUSTIN AHMASUK,

Appellant,

v.

DIVISION OF BANKING AND
SECURITIES,

Appellee.

Case No. S-17414

Superior Court No.: 3AN-18-06035CI

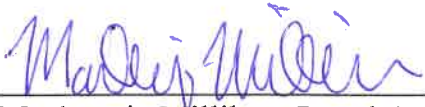
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The undersigned hereby certifies that on September 18, 2019 a true and correct copy of *Brief of Amici Curiae* and this *Certificate of Service* was sent to each attorney or party of record by U.S. First Class Mail at their address listed below:

Rob Schmidt
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501

Susan Orlansky
ACLU of Alaska
500 L Street, Suite 300
Anchorage, AK 99501

I further certify that the typeface used in the aforementioned documents is 13 point Times New Roman, in accordance with Appellate Rule 513.5(c)(2).

By: 
Mackenzie Milliken, Legal Assistant
Holmes Weddle & Barcott, P.C.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE JUDGE ANDREW PETERSON, PRESIDING

BRIEF OF AMICI CURIAE

Filed in the Supreme Court
for the State of Alaska on
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Meredith Montgomery, Clerk
Appellate Courts

By: _____
Deputy Clerk

Jahna M. Lindemuth
Alaska Bar No. 9711068
HOLMES WEDDLE & BARCOTT, PC
701 West 8th Avenue, Suite 700
Anchorage, Alaska 99501
Phone: (907) 274-0666
Fax: (907) 277-4657

Attorney for Amici Bristol Bay Native
Corporation, Calista Corporation, Cook
Inlet Region, Inc., and Doyon Limited

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Statutes

Alaska Statute 45.55.139 provides:

Reports of corporations.

A copy of all annual reports, proxies, consents or authorizations, proxy statements, and other materials relating to proxy solicitations distributed, published, or made available by any person to at least 30 Alaska resident shareholders of a corporation organized under Alaska law under 43 U.S.C. 1601 et seq. (Alaska Native Claims Settlement Act) that has total assets exceeding \$1,000,000 and a class of equity security held of record by 500 or more persons shall be filed with the administrator concurrently with its distribution to shareholders.

Alaska Statute 45.55.160 provides:

Misleading filings.

A person may not, in a document filed with the administrator or in a proceeding under this chapter, make or cause to be made an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

Regulations

3 Alaska Administrative Code 08.335 provides:

Requirements as to proxy

- (a) A proxyholder shall either attend the shareholders' meeting in person or execute a power of substitution so that the shares for which the proxyholder has proxies are represented at the meeting.
- (b) A proxyholder shall vote in accordance with any choices made by the shareholder or in the manner provided by the proxy when the shareholder has not specified a choice.
- (c) The proxy must

(1) indicate that the proxy is solicited on behalf of the board or, if solicited other than by the board, indicate the identity of the persons on whose behalf the solicitation is made;

(2) provide a specifically designated blank space for dating the proxy; and

(3) provide a means for the shareholder to specify by boxes a choice between approval or disapproval of each matter or group of related matters identified in the proxy as intended to be acted upon, other than the election of directors.

(d) A proxy may confer authority for matters on which a choice is not made by the shareholder if the proxy discloses how the shares represented by the proxy will be voted in each case.

(e) A proxy that provides for the election of directors must

(1) set out the names of the nominees for whom the proxy is solicited; and

(2) clearly provide one of the following:

(A) a box opposite the name of each nominee which may be marked to indicate that authority to vote for that nominee is withheld;

(B) an instruction that the shareholder may withhold authority to vote for a nominee by lining through or otherwise striking out the name of that nominee;

(C) a "ballot" type of selection in which the shareholder is permitted to award votes to selected nominees of the shareholder's choosing.

(f) A proxy may confer discretionary authority to vote only with respect to the following:

(1) matters which the persons making the solicitation do not know, a reasonable time before the solicitation, are to be presented at the meeting;

(2) approval of the minutes of the prior meeting if the approval does not amount to ratification of the action taken at that meeting;

(3) the election of a person to an office for which a bona fide nominee is named in the proxy statement and the nominee is unable to serve or for good cause will not serve;

(4) a proposal omitted from the proxy statement and proxy, if solicited for an annual meeting by participants other than the board; or

(5) matters incident to the conduct of the meeting.

(g) If action is to be taken on the election of directors and if the shareholders have cumulative voting rights, a proxy may confer discretionary authority to cumulate votes.

3 Alaska Administrative Code 08.345 provides:

Board Solicitations

(a) The solicitation of proxies on behalf of the board for an annual meeting must be preceded or accompanied by the annual report for the corporation's last fiscal year, unless

(1) the solicitation is made on behalf of the board before the annual report is available;

(2) solicitation is being made at the time in opposition to the board; and

(3) the board's proxy statement includes an undertaking to furnish the annual report to all shareholders being solicited at least 50 days before the date of the annual meeting.

(b) The solicitation of proxies on behalf of the board must be preceded or accompanied by a dated, written proxy statement including the following:

(1) if action is to be taken on the election of directors, a description of each nominee of the board who has consented to act if elected and of each director whose term of office will continue after the shareholders' meeting; each description must include

(A) name, age, and state and city of residence;

(B) all positions and offices presently and previously held with the corporation and its subsidiaries;

(C) the remaining term in office as director and all other periods of service as a director for the corporation and its subsidiaries;

(D) the total number of board meetings, including regularly scheduled and special meetings, and the number of meetings of committees on which the nominee or director served, and the percentage

attendance during the last fiscal year at meetings of the board, including regularly scheduled and special meetings, and meetings of committees on which the nominee or director served, including those meetings for which the absence was excused;

(E) the nature of any family relationship with any director, nominee, or executive officer of the corporation and its subsidiaries;

(F) business experience during the past five years, including

(i) principal employment or occupation;

(ii) the nominee's or director's employer; and

(iii) other directorships held for other entities;

(G) any of the following events that occurred during the past 10 years: voluntary or involuntary petition under any bankruptcy or insolvency laws, appointment of a receiver, pending criminal proceedings, except traffic violations or other minor offenses, conviction or plea of nolo contendere in a criminal proceeding, except traffic violations or other minor offenses, and the entry of any final judgment, order, or decree, not subsequently reversed or vacated, that the nominee or director engaged in unethical or illegal business practices, violated fiduciary duties, or violated securities laws; and

(H) financial transactions by the corporation since the beginning of the corporation's last fiscal year and presently proposed financial transactions by the corporation or its subsidiaries if

(i) the transactions in the aggregate exceed \$20,000;

and

(ii) the transaction is with the nominee, director, a member of the nominee's or director's family, or an entity, other than an affiliate of the corporation, where a nominee, director, or a member of the nominee's or director's family is employed by, is an officer or director of, or owns, directly or indirectly, an interest in the entity;

(2) a statement of all current compensation or other remuneration distributed or accrued and of all future compensation or other remuneration contributed during the corporation's last fiscal year on behalf of

(A) each of the five most highly compensated persons of the corporation, whether directors or officers for the director's or officer's

services in all capacities to the corporation and its subsidiaries, naming each such person; and

(B) all officers and directors as a group, stating the number of persons in the group without naming them; future remuneration contributed includes amounts that were reported in the corporation's annual report for the last fiscal year for annuity, pension, or retirement plans and for deferred compensation or profit sharing plans; information need not be furnished regarding costs for ordinary and necessary business expenses or for personal benefits, group life, health, hospitalization, or medical reimbursement plans that do not discriminate in favor of officers or directors of the corporation and that are available generally to all salaried employees;

(3) a brief description, including the purpose and amount, of financial transactions by the corporation or its subsidiaries since the beginning of the corporation's last fiscal year and any presently proposed financial transactions by the corporation or a subsidiary if

(A) the transactions in the aggregate exceed \$20,000; and

(B) the transaction is with a director, nominee, executive officer, or family member of a director, nominee, or executive officer, or is with an entity, other than an affiliate of the corporation, where the director, nominee, or executive officer or a family member is employed by, is an officer or director of, or owns, directly or indirectly, an interest in the entity;

(4) a brief description of all legal proceedings to which any director, nominee, or executive officer has been a party with interests adverse to the corporation or its subsidiaries during the last 10 years;

(5) if action is to be taken on the election of directors or other matters for which the financial statements are material to the exercise of prudent judgment, a description of the corporation's relationship with its independent public accountants; this description must include

(A) the name of the principal accountant for the last fiscal year;

(B) a statement indicating whether representatives of the principal accountant are expected to be present at the meeting with the opportunity of making a statement, if they desire, and with the responsibility of responding to appropriate questions;

(C) each professional service provided by the principal accountant and paid for by the corporation during the last fiscal year, such as preparation of corporate tax returns, preparation of personal tax returns, review of proposed corporate acquisitions, review of personal investments, or development of corporate data processing systems;

(D) the percentage relationship which the aggregate of the fees for all nonaudit services bears to the aggregate of fees for both audit and nonaudit services performed by the principal accountant and paid for by the corporation;

(E) each disagreement with the principal accountant in connection with audits of the last two fiscal years and any subsequent interim period if (i) the principal accountant has been changed since the date of publication or distribution of the proxy statement for the last annual meeting; and (ii) there have been disagreements on matters of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which, if not resolved to the satisfaction of the former principal accountant, would have caused the former principal accountant to make references to the disagreements in the audit report; the corporation must, at least 20 days before the date of publication or distribution of the proxy statement, furnish by certified mail its description of any disagreements to the former principal accountant; if the former principal accountant believes the description to be incorrect or incomplete, and if the former principal accountant forwards to the corporation, not later than 10 days of the date of the former principal accountant's receipt of the corporation's description, a brief written statement of the former principal accountant's view, the statement must be included in the corporation's proxy statement;

(6) a brief description of any arrangement, stating amounts, by which a director is compensated for all services as a director of the corporation and its subsidiaries, including any additional amounts payable for committee participation or special assignments; information need not be furnished regarding costs for ordinary and necessary business expenses or for personal benefits, group life, health, hospitalization, or medical reimbursement plans that do not discriminate in favor of officers or directors of the corporation and that are available generally to all salaried employees;

(7) a brief description of the board's leadership structure, including whether the same person serves as president and board chair, or as president and chief executive officer, the attendance policy for meetings, and a list of the board's committees, if any, performing audit, nominating, and compensation functions, the membership of each committee, the

number of meetings held by each committee during the last fiscal year, and a brief description of the functions actually performed by each committee;

(8) a brief description of the methods to be employed to solicit proxies, if other than by use of the mail, and a statement that solicitation is made on behalf of the board;

(9) a statement of the total amount estimated to be spent and the total already expended on the solicitation of proxies; expenditures include fees for attorneys, accountants, solicitors, and public relations or financial advisers and expenses for advertising, printing, transportation, litigation, or other expenses incidental to the solicitation; however, the following expenses may be excluded:

(A) the amounts which the corporation would normally spend on a solicitation for an election of directors in the absence of a contest; and

(B) the salaries and wages of regular employees and officers, if a statement to that effect is included in the proxy statement;

(10) a statement indicating who will bear the cost of solicitation and the total amount any participant, other than the board and the corporation, has contributed or has agreed to contribute, unless the participant is a contributor of less than \$500 in the aggregate;

(11) a statement describing any formal procedure or deadline limiting the shareholder's rights to revoke a proxy before its exercise;

(12) a statement of the number of shares outstanding and entitled to be voted at the meeting;

(13) a statement of the date on which the record of shareholders entitled to vote at the meeting will be determined; if the right to vote is not limited to shareholders of record on that date, the solicitation must indicate the conditions under which other shareholders may be entitled to vote;

(14) if action is to be taken on the election of directors and if the shareholders have cumulative voting rights

(A) a statement that they have the rights; and

(B) a brief description of those rights;

(15) for each matter that is to be submitted to a vote of the shareholders, other than the election of directors, a description of the

proposal, a statement of the vote required for its approval, and the name of any director who has notified the corporation in writing that the director intends to oppose the proposed action; for example, if action is to be taken on

(A) a proposed amendment to the articles of incorporation or bylaws, the description must include the reasons for and against the proposed amendment, the general effect of the amendment, and the names of any directors who oppose the amendment; or

(B) a proposed property transaction, in addition to identifying any directors who oppose the transaction, the description must

(i) outline the material features of the proposed transaction;

(ii) state the nature and amount of consideration and, to the extent practicable, outline the facts that bear on the question of the fairness of consideration; and

(iii) state the name and address of the other party or parties to the proposed transaction and the nature of any material relationship of the party or parties to the corporation, its subsidiaries, officers, or directors;

(16) a brief description of any substantial interest, direct or indirect, by shareholdings or otherwise, of each participant or executive officer in any matter to be acted upon at the meeting, unless the participant or executive officer owns shares in the corporation and would receive no extra or special benefit not shared on a pro rata basis by all other shareholders of the same class; and

(17) a brief description of the nominating procedures for board candidates.

(c) If a candidate included in a board solicitation or a candidate soliciting write-in votes does not engage in any additional proxy solicitations, the candidate may rely on inclusion in the board's proxy statement, but the candidate remains responsible for the accuracy and completeness of the information the candidate provided to the board. If, however, the candidate, whether recommended by the board or a candidate included on an open proxy, elects to engage in any additional solicitation, the candidate must comply with 3 AAC 08.355.

3 Alaska Administrative Code 08.355 provides:

Non-board solicitations

The solicitation of proxies on behalf of a participant, other than solicitations under 3 AAC 08.345, must be preceded or accompanied by a dated, written proxy statement including the following:

(1) the name of the corporation in respect to which proxies are being solicited;

(2) the name and address of each participant, including each proxyholder, who has joined or proposes to join in the solicitation;

(3) a statement indicating whether any of the participants in the solicitation has an arrangement or understanding with an entity for future employment by the corporation or future financial transactions to which the corporation will or may become a party, and a description listing the terms of and the parties to each arrangement or understanding;

(4) if action is to be taken on the election of directors, a description of each nominee of the participant who has consented to act if elected; each description must include, if applicable

(A) name, age, and state and city of residence;

(B) all positions and offices presently and previously held with the corporation and its subsidiaries;

(C) the remaining term in office as director and all other periods of service as a director for the corporation and its subsidiaries;

(D) the total number of board meetings, including regularly scheduled and special meetings, and the number of meetings of committees on which the nominee served, and the percentage attendance during the last fiscal year at meetings of the board, including regularly scheduled and special meetings, and meetings of committees on which the nominee served, including those meetings for which the absence was excused;

(E) the nature of any family relationship with any director, nominee, or executive officer of the corporation and its subsidiaries;

(F) business experience during the past five years, including

(i) principal employment or occupation;

(ii) the nominee's or director's employer; and

(iii) other directorships held for other entities; and

(G) any of the following events that occurred during the past 10 years: voluntary or involuntary petition under any bankruptcy or insolvency laws, appointment of a receiver, pending criminal proceedings except traffic violations or other minor offenses, conviction or plea of nolo contendere in a criminal proceeding, except traffic violations or other minor offenses, and the entry of any final judgment, order, or decree, not subsequently reversed or vacated, that the nominee engaged in unethical or illegal business practices, violated fiduciary duties, or violated securities laws;

(5) a brief description of financial transactions by the corporation, including purpose and amount, with that participant, a member of that participant's family, or any entity since the beginning of the corporation's last fiscal year and presently proposed financial transactions by the corporation with that person or entity if

(A) the transactions in the aggregate exceed \$20,000; and

(B) the participant in the solicitation or a member of the participant's family is a party to the transaction or is employed by, is an officer or director of, or owns, directly or indirectly, an interest in the entity who is a party to the transaction;

(6) a brief description of all legal proceedings to which each participant in the solicitation is a party with interests adverse to the corporation or its subsidiaries during the last 10 years;

(7) a brief description of the methods to be employed to solicit proxies, if other than by the use of the mail;

(8) a statement of the total amount estimated to be spent and the total already expended on the solicitation of proxies;

(9) a statement indicating who will bear the expense of solicitation, and the amount each participant in the solicitation has contributed or has agreed to contribute, unless the participant is a contributor of less than \$500 in the aggregate;

(10) a statement indicating whether reimbursement for solicitation expenses will be sought from the corporation; and

(11) if the proxy statement relates to any matter requiring notice to shareholders by law or to a special shareholders' meeting for which any participant in the solicitation sought shareholder signatures on a document calling for the special meeting

(A) a description of each matter which is to be submitted to a vote of the shareholders and a statement of the vote required for its approval; and

(B) a description of any substantial interest, direct or indirect, by shareholdings or otherwise, of each participant in the solicitation, or family member of that participant, in any matter to be acted upon at the meeting, unless the participant or family member owns shares in the corporation and would receive no extra or special benefit not shared on a pro rata basis by all other shareholders of the same class.

3 Alaska Administrative Code 08.365 provides:

Definitions relating to solicitation of proxies

For purposes of 3 AAC 08.305 - 3 AAC 08.365, the following definitions apply:

(1) "annual report" means a summary by the corporation of its business activities, results of operations, and financial condition for the last fiscal year, including consolidated financial statements confirming that the corporation's accounts were audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants, certified or licensed by a regulatory authority of the state or the United States as required by 43 U.S.C. 1601 - 1629;

(2) "board" means the board of directors of the issuer of shares for which a proxy is solicited;

(3) "contest" means an issue in which the board expects one or more solicitations to be made which will be subject to 3 AAC 08.355;

(4) "corporation" means the issuer of shares with respect to which a proxy is solicited;

(5) "entity" means an individual, sole proprietorship, partnership, joint venture, trust, association, firm, corporation, or other organization, whether or not operated for profit;

(6) "executive officer" means the president, secretary, treasurer, a vice president in charge of a principal business function, such as sales, administration, or finance, or any other person who performs similar policy-making functions for the corporation;

(7) "family" means an individual's spouse, parents, children, or siblings by blood or adoption;

(8) "financial transaction" means

(A) the buying, selling, or leasing of real or personal property or of an interest in real or personal property, including, but not limited to, an option, right of first refusal, or joint venture interest;

(B) the buying or selling of services;

(C) the loaning or borrowing of money or a preliminary commitment to that transaction; or

(D) any other transaction which is substantially similar in nature to those listed in this paragraph, excluding distributions mandated by 43 U.S.C. _ 1606(j), effective December 18, 1971;

(9) "last fiscal year" means the fiscal year of the corporation most recently completed before the date of the meeting for which proxies are to be solicited;

(10) "nominee" means a person who has consented to being named in a proxy statement and who has agreed to serve if elected;

(11) "participant"

(A) means the board and the corporation;

(B) means a nominee for whose election as director proxies are solicited;

(C) means a committee or group which solicits proxies or a member of the committee or group;

(D) means a person who finances, directly or indirectly, the solicitation of proxies, except a person who contributes not more than \$500 and who is not otherwise a participant;

(E) means a person who solicits proxies;

(F) does not include

(i) a person or organization retained or employed by a participant to solicit shareholders whose activities are limited to the performance of the person's duties in the course of employment;

(ii) a person who merely transmits proxy soliciting material or performs other ministerial or clerical duties;

(iii) a person employed by a participant in the capacity of attorney, accountant, or as an advertising, public relations, or financial adviser, whose activities are limited to the performance of the person's duties in the course of employment; or

(iv) a person regularly employed as an officer or employee of a participant who is not otherwise a participant;

(12) "proxy" means a written authorization which may take the form of a consent, revocation of authority, or failure to act or dissent, signed by a shareholder or his attorney-in-fact and giving another person power to vote with respect to the shares of the shareholder;

(13) "proxyholder" means a person to whom a proxy or power of substitution is given;

(14) "proxy statement" means a letter, publication, press release, advertisement, radio/television script or tape, or other communication of any type which is made available to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy;

(15) "shareholder" means one who is the holder of record of a share in the corporation;

(16) "solicitation" means

(A) a request to execute or not to execute, or to revoke a proxy; or

(B) the distributing of a proxy or other communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy;

(17) "electronic forum"

(A) means a forum that is created on and accessible by means of the Internet, and that allows communication among users;

(B) includes

(i) blogs or other websites that allow for the posting of reader comments; and

(ii) websites for social networking, websites for microblogging, and other forms of electronic communication through which users create communities on the Internet to share information, ideas, personal messages, videos, and similar content;

(18) "affiliate" has the meaning given in AS 10.06.990;

(19) "control" has the meaning given in AS 10.06.990;

(20) "minor offense" has the meaning given in Rule 2 of the Alaska Rules of Minor Offense Procedure;

(21) "residence" means residence for purpose of voting, as determined under AS 15.05.020;

(22) "subsidiary" has the meaning given in AS 10.06.990.

ISSUES PRESENTED

Are the definitions of “solicitation” and “proxy statement” in the proxy regulations governing Alaska Native Corporation elections properly interpreted to include communications advocating against voting a discretionary proxy? Are the proxy regulations constitutional if so interpreted?

INTEREST OF AMICI CURIE

Amici are four Alaska Regional Corporations – Bristol Bay Native Corporation, Calista Corporation, Cook Inlet Region, Inc., and Doyon Limited – formed under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-29g (1986 & Supp. 2019), and incorporated under the Alaska Corporations Code, AS 10.06. All four Amici hold annual elections that have long been regulated by the Division of Banking and Securities under the Alaska Native Claims Settlement Act Corporations Proxy Solicitations and Stock, AS 45.55.138, *et seq.*, and the proxy regulations promulgated thereunder.

STATEMENT OF THE CASE

This Court in *Meidinger v. Koniag, Inc.* held that Alaska’s proxy regulations are not unconstitutionally vague and do not violate the right to free speech under article 1, section 5 of the Alaska Constitution.¹ Nevertheless, Appellant argues that the definition of “solicitation” is overly broad and unconstitutional as applied to his letter to the newspaper, arguing against the use of discretionary proxies in the Sitnasuak Native Corporation (“SNC”) annual election, disparaging the “SNC 6,” and making the appeal “Please do not

¹ 31 P.3d 77, 84-85 (Alaska 2001).

vote a discretionary proxy in 2017.” [Exc. 8] Both the definitions of “solicitation” and “proxy statement” include communications to shareholders “reasonably calculated to result in the...withholding...of a proxy.”² Appellant argues for a hyper-technical, narrow interpretation of the definitions that would create an unworkable loophole, inserting uncertainty where there are currently clear standards about what qualifies as a proxy solicitation and a proxy statement. These definitions are constitutional, and good corporate governance requires that this Court reject Appellant’s invitation to judicially rewrite the definitions of “proxy statement” and “solicitation.”

STANDARD OF REVIEW

This Court reviews “an agency’s interpretation and application of its own regulations using the reasonable basis standard of review.”³ This Court defers to the agency unless its “interpretation is plainly erroneous and inconsistent with the regulation,”⁴ giving more deference to agency interpretations that are “longstanding and continuous.”⁵ This Court applies the substitution of judgment standard to questions of law, such as a constitutional challenge to a regulation.⁶

² 3 AAC 08.365(14), (16).

³ *Davis Wright Tremaine LLP v. State, Dept. of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

⁴ *Id.*, quoting *Kuzmin v. State, Commercial Fisheries Entry Comm’n*, 223 P.3d 86, 89 (Alaska 2009).

⁵ *Id.*, quoting *Marathon Oil Co. v. State, Dep’t of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

⁶ *Id.*

ARGUMENT

I. The Proxy Regulations Are Properly Interpreted to Regulate Communications Advocating That Shareholders Not Vote a Discretionary Proxy.

A. The applicable statutes and regulations

Alaska Statute 45.55.139 requires the contemporaneous filing with the Division of Banking and Securities (the “Division”) of all “annual reports, proxies, consents or authorizations, proxy statements, and all other materials relating to proxy solicitations distributed, published, or made available by any person to at least” 30 shareholders of an Alaska Native Corporation (“ANC”) organized under ANCSA, with assets exceeding \$1 million and more than 500 shareholders. Alaska Statute 45.55.160 prohibits any person from making a false or misleading statement in any such document that must be filed with the Division.

By regulation, “proxy” is defined as “a written authorization which may take the form of a consent, revocation of authority, or failure to act or dissent, signed by a shareholder or his attorney-in-fact and giving another person power to vote with respect to the shares of the shareholder.”⁷ “Solicitation,” the term thus far at issue, is defined as:

- (A) a request to execute or not to execute, or to revoke a proxy; or
- (B) the distributing of a proxy or other communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy.⁸

In addition to being a proxy solicitation, Appellant’s letter to the newspaper also constitutes a “proxy statement,” which is defined as “a letter, publication, press release,

⁷ 3 AAC 08.365(12).

⁸ 3AAC 08.365(16).

advertisement, radio/television script or tape, or other communication of any type which is made available to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy.”⁹

The plain language of both “solicitation” and “proxy statement” encompasses any communication, including letters to newspapers advocating that a discretionary proxy be withheld by not executing it for use at an upcoming shareholder meeting. As held by the Administrative Law Judge and the Superior Court, the Division of Banking and Securities’ interpretation of these regulations as applied to Appellant’s letter to the newspaper is reasonable.¹⁰ [Ex. 54-65, 67-78] The Division’s interpretation comports with reason, practicality, and common sense, considering the meaning of the language, its legislative history, and its purpose.¹¹

B. Purpose of good corporate governance at shareholder meetings

The proxy regulations as a whole, including what communications qualify as proxy solicitations or proxy statements that must be filed with the Division, can be best understood in the context of ANC shareholder meetings, such as the annual meetings where shareholders elect directors to manage the corporation.

Congress enacted ANCSA, 43 U.S.C. §1601 *et seq.*, in 1971 “to achieve a fair and just settlement of all aboriginal land [in Alaska] ... with maximum participation by Natives

⁹ 3 AAC 08.365(14).

¹⁰ *Davis Wright Tremaine LLP v. State, Dept. of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

¹¹ *Wilson v. State Dept. of Corrections*, 127 P.3d 826, 829 (Alaska 2006) (“We interpret a statute according to reason, practicality, and common sense, considering the meaning of its language, its legislative history, and its purpose... We apply a similar analysis in interpreting a regulation.”).

in decisions affecting their rights and property.”¹² ANCSA created 12 Alaska-based Alaska Native regional corporations and numerous more village corporations to which the federal government transferred land and money.¹³ While each regional and village corporation is incorporated under state law, ANCSA provides an overlay of controlling federal law and preempts certain state laws when a federal law applies. Thus, unlike other state corporations, an ANCSA corporation’s stock cannot be sold or otherwise transferred, except under very limited circumstances.¹⁴

In enacting ANCSA, Congress specifically exempted ANCs from regulation by the federal Securities and Exchange Commission (“SEC”).¹⁵ In addition to regular ANC shareholder meetings being subject to the state’s proxy laws, federal law expressly requires that any petition or solicitation to make changes to an ANC under federal law – for example, establishment of a settlement trust or the termination of ANCSA stock restrictions – must also comply with Alaska’s proxy laws.¹⁶

The Alaska legislature enacted Alaska Native Claims Settlement Act Corporations Proxy Solicitations and Stock,¹⁷ the proxy laws applicable only to ANCs, in the early 1970s, and the Division promulgated the proxy regulations at issue here in 1981.¹⁸ There are other state securities laws applicable to other state corporations.¹⁹

¹² 43 U.S.C. § 1601 note (Supp. 1995).

¹³ 43 U.S.C. §§ 1606, 1607.

¹⁴ 43 U.S.C. § 1606(h)(2008).

¹⁵ 43 U.S.C. §1625(a).

¹⁶ 43 U.S.C. §1629(b); *Broad v. Sealaska Corp.*, 85 F.3d 422, 429 (9th Cir. 1996).

¹⁷ AS 45.55.138, *et seq.*

¹⁸ *See* AAC Register 77 (eff. Jan. 4, 1981).

¹⁹ *See, e.g.*, AS 45.56.

The Division's proxy regulations recognize that boards of ANCs regularly solicit proxies on behalf of the board for elections of directors and other matters that will come before the shareholders at annual meetings, and there are specific regulations that apply to board proxy solicitations.²⁰ The use of proxies by most ANC boards is critical to achieve quorum, as most corporations' shareholders are not centralized in one location.²¹

In addition to the board, other shareholder groups or individual shareholders may also solicit proxies. Such solicitations must comply with the less onerous requirements in 3 AAC 08.355.

Under 3 AAC 08.335, a proxy (whether held by the board or a shareholder) generally can confer authority to vote on proposals only "if the proxy discloses how the shares represented by the proxy will be voted in each case." But a proxy may confer discretionary authority in certain limited circumstances. The most important and often used discretionary authority is the right to cumulate votes in the election of directors, if the proxy so authorizes.²²

While cumulative voting is usually used by an ANC board to elect as many board-endorsed candidates as possible, this Court's decision in *Rude v. Cook Inlet Region, Inc.*,²³ illustrates how cumulative voting works. In that case, Robert Rude and Harold Rudolph ran an independent campaign to elect themselves to the CIRI Board. While they received

²⁰ 3 AAC 08.345.

²¹ For example, in *Rude v. Cook Inlet Region, Inc.*, 322 P.3d 853, 858 (Alaska 2014), this Court noted that 38.5% of CIRI's shareholders live outside Alaska, in upholding CIRI's decision to rotate its meeting location to Washington state every third year.

²² 3 AAC 08.335(g).

²³ 322 P.3d 853, 856-57 (Alaska 2014).

sufficient votes to elect one of the two of them to the Board if they had been allowed to cumulate votes and put all votes behind one candidate, this Court affirmed the election inspector's decision that they had to split their votes equally because their proxy failed to confer discretionary authority to cumulate votes to one candidate, as required by the proxy regulations.²⁴

In addition to cumulative voting, discretionary voting can also be used to vote on “matters the persons making the solicitation do not know, a reasonable time before the solicitation, are to be presented at the meeting,”²⁵ as well as matters omitted from the board's proxy statement and proxy, “if solicited for an annual meeting by participants other than the board.”²⁶ As addressed by this Court in *Rude I*,²⁷ this regulation means that a board can use discretionary authority to vote for or against proposals made by independent shareholders or dissident groups on the floor of the meeting. But under the proxy regulations, a board cannot use discretionary authority to vote for their own proposals. A proxy must describe to shareholders what items the board or proxyholder knows will come up at the meeting and allow the shareholder to tell the board or other proxyholder how the shareholder wishes to vote on that item – yes or no.²⁸

Because shareholders cannot sell their shares, the primary way for them to express dissatisfaction with an ANC's management is by voting out directors they think are doing

²⁴ *Id.*

²⁵ 3 AAC 08.335(f)(1).

²⁶ 3 AAC 08.335(f)(4).

²⁷ 294 P.3d 76, 92 (Alaska 2012).

²⁸ 3 AAC 08.335(c)(3).

a poor job in managing the corporation. Shareholder meetings are therefore often very contentious, and disputed elections or controversial issues coming before the shareholders for a vote often involve spirited campaigns. In exercising their votes, it is extremely important that shareholders have accurate information, which is the very purpose of the proxy statutes and regulations. The statutory requirement to file with the Division proxy statements, proxy solicitations and all related documents, and the corresponding statutory requirement that these materials not include false and misleading statements, are critical to the conduct of fair and impartial corporate elections.²⁹

The Division is charged with monitoring ANC elections and other shareholder meetings.³⁰ While most complaints are resolved at the Division level, this Court has considered many times whether proxy solicitations or proxy statements were materially false or misleading in violation of AS 44.55.160 and the proxy regulations.³¹ There have

²⁹ AS 45.55.139; AS 45.55.160.

³⁰ The Division publishes guidance on the statutes and regulations governing proxies on its website, <https://www.commerce.alaska.gov/web/dbs/ANCSA.aspx>, and a guide specifically for shareholders: “Information for Shareholders of ANCSA Corporations.” https://www.commerce.alaska.gov/web/Portals/3/pub/ANCSA_booklet.pdf

³¹ *Brown v. Ward*, 593 P.2d 247, 248-50 (Alaska 1979) (proxy solicitations contained materially false and misleading statements in violation of common law (decided before adoption of proxy regulations); *Sierra v. Goldbelt*, 25 P.3d 697, 703-04 (Alaska 2001) (holding that proxy statement for elder stock program did not fail to disclose material facts or mislead shareholders); *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 84-85 (Alaska 2001) (corporation’s proxy statement describing settlement trust was not materially false or misleading); *Skaflestad v. Huna Totem Corp.*, 76 P.3d 391, 397 (Alaska 2003) (holding that corporation did not violate proxy laws by making false and misleading statements about proposed settlement trust); *Brown v. Dick*, 107 P.3d 260, 264- 265 (Alaska 2005) (affirming Division’s consent decree resolving alleged proxy violations concerning annual meeting where recall of the board and amendment of bylaws were at issue); *Henrichs v. Chugach Alaska Corp.*, 250 P.3d 531, 539-40 (Alaska 2011) (affirming jury finding of breach of fiduciary duty of director who violated proxy laws, and affirming five-year ban

also been a number of similar cases decided in federal court.³² None of these cases concerned the issue here – whether a communication qualified as a proxy solicitation or proxy statement that had to be filed with the Division.

Against this backdrop, the Division’s interpretation of “proxy solicitation” is entirely reasonable, and the interpretation advocated by Appellant is unworkable and impractical. According to Appellant, “the regulations should be read to require that, to be a proxy solicitation, a communication must solicit a proxy for or against a particular candidate or proxyholder.” [At. Br. 15] Thus, according to Appellant, unless the communication expressly identifies a particular candidate or proposal, it should not be considered a proxy solicitation or proxy statement subject to the proxy laws.

Keeping in mind that the purpose of the proxy laws are openness and transparency in elections, and that they are designed to protect the integrity of elections by making sure

from board); *Henrichs v. Chugach Alaska Corp.*, 260 P.3d 1036, 1044-45 (Alaska 2011) (holding that corporation did not violate proxy laws by failing to include former directors’ names and other information in proxy materials); *Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76, 91-98 (Alaska 2012) (affirming summary judgment that CIRI did not violate proxy laws and affirming summary judgment that dissident slate made false and misleading statements in proxy materials in violation of proxy laws); *Rude v. Cook Inlet Region, Inc.*, 322 P.3d 853, 856-58 (Alaska 2014) (holding that CIRI’s proxy materials did not violate law and the Rude proxy was properly interpreted to disallow cumulative voting).

³² *Broad v. Sealaska Corp.*, 85 F.3d 422, 429 (9th Cir. 1996)(“[T]he proxy solicitation materials comported with Alaska law, and [] plaintiffs failed to raise genuine issues of material fact as to whether they were misleading or omitted material facts.”); *Cook Inlet Region, Inc. v. Rude*, 2011 WL 13069989, Mar. 23, 2011 (unpublished amended order) (holding that Alaska proxy regulations apply to petitions to terminate alienability stock restrictions under ANCSA, and finding that Rude made materially false and misleading statements in proxy materials as a matter of law).

the shareholders have the best, most complete, and accurate information possible,³³ Appellant’s definition would create a loophole that could exclude many communications that may influence how a shareholder votes on a particular issue, and who the shareholder gives a proxy to. To give one example, a campaign to entirely boycott a shareholder meeting by calling on shareholders to sign no proxy would fall outside Appellant’s definition, allowing such a campaign to be based on lies or omissions that no one – not the Division nor the corporation – had the power to address. Such a campaign could be hugely disruptive to the integrity of the elective process and undermine good corporate governance.

Rather than looking at whether a communication contains certain magic words as advocated by Appellant, for example “Give your proxy *to Joe*, so he can vote *for Bob!*,” the regulations are drafted to capture communications that may impact the election by including communications “reasonably calculated to result in the procurement, withholding, or revocation of a proxy.” The regulations correctly focus on the impact of the communication rather than whether any particular words are expressly used.

Appellant also ignores the definition of “proxy statement,” because “solicitation” sounds more like a direct request to provide or withhold a proxy. A “proxy statement” is defined as “a letter, publication, press release, advertisement, radio/television script or tape, or other communication of any type which is made available to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or

³³ *Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76, 91-98 (Alaska 2012) (noting the public interest “in open, fully informed corporate democracy”).

revocation of a proxy.”³⁴ And under the statutes, “proxy statements, *and all other materials relating to proxy solicitations* distributed, published, or made available” to shareholders must be filed with the Division.³⁵ The proxy laws correctly recognize that communications that could impact the shareholders’ decisions on proxies must contain only truthful information, that required proxy disclosures must be made and that false and misleading information undermines the integrity of the election process.

Appellant tries to juxtapose his narrow definition excluding Appellant’s letter to the newspaper against “shareholders’ free speech rights to discuss corporate governance” generally. [At. Br. 18] This is a false juxtaposition. Shareholders always have the ability to comment on corporate governance, but if they do so in a context where their communication could impact whether shareholders give, withhold or revoke a proxy for a shareholder meeting, the communication has to be accurate, not false or misleading, and it must be filed with the Division so that the Division can ensure it is not false or misleading. And Appellant’s letter is not a close case. This is not a case where a shareholder was simply criticizing management. Appellant expressly advocated that shareholders not vote a discretionary proxy in a particular election.³⁶

³⁴ 3 AAC 08.365(14).

³⁵ AS 45.55.139.

³⁶ Appellant argues Judge Guidi’s order in another case not before this Court supports his interpretation. [At. Br. 20-22] From the limited record before this Court about that case, it does not appear that any communication at issue called on shareholders to not vote a proxy in a particular election. That order is not helpful here, and this Court should limit its review to the facts and law in this case only.

Appellant also misunderstands how discretionary proxies are used in elections, perhaps in order to lessen the impact of his letter making the appeal: “Please do not vote a discretionary proxy in 2017.” [Exc. 8] Appellant tries to make it sound like discretionary and directed proxies are of equal value, and used equally by the board and independent campaigns. As discussed above, while board proxies can give the option for directed votes, ANC boards rely heavily on the use of discretionary proxies to cumulate votes to elect as many board-endorsed candidates as possible. They also rely on discretionary proxies to vote on issues that may be introduced on the floor of the meeting by individual shareholders. Appellant’s letter to the newspaper can be fairly read as a call for shareholders not to sign the board proxy. While the SNC official proxy card allows directed votes to candidates, including non-board candidates,³⁷ the fine print on the proxy confers discretionary authority to vote on any other issue that comes before the board. [Exc. 11]

Appellant also implies that his letter did not advocate for a particular proposal that could go to the shareholders for a vote. [At. Br. 18-20] In making his argument that proxy solicitations must identify a candidate or proposal, Appellant tries to make it sound like the issue of discretionary voting was not an issue that could come before the shareholders for vote at the annual meeting. Appellant admits, however, that in the winter of 2015-16 he

³⁷ ANCs are split on whether the Board’s proxy should allow shareholders to direct votes to candidates not endorsed by the Board. While some ANCs include independent candidates on the proxy, other ANCs include only board-endorsed candidates, and allow shareholders to decide between directed or discretionary voting for only those candidates. This Court confirmed in *Rude I* that the Board proxy did not need to include independent candidates under Alaska’s proxy regulations. 294 P.3d at 88-89. But as a general matter, all ANC board proxies give discretion to the board to vote on new proposals that are introduced from the floor and are not part of the board’s proposals, if any.

and a group of other SNC shareholders petitioned to amend the SNC bylaws to eliminate discretionary proxies. [At. Br. 3, citing to Exc. 8, 13-14, 46] While the Board did not include the proposal on its proxy for the June 3, 2017 annual meeting, given this history it was likely that the issue could be raised by Appellant or another shareholder for vote from the floor of the meeting. SNC would then have the ability to use its discretionary votes to vote down any such proposal.

The Division's interpretations of "proxy solicitation" and "proxy statement" were reasonable and consistent with the plain language and purpose of the proxy regulations. The Division correctly applied the proxy laws to Appellant's letter to the newspaper calling on shareholders not to sign a discretionary proxy in the upcoming election.

II. The Definitions of "Proxy Statement" and "Solicitation" are Narrowly Tailored to meet a Compelling Government Interest.

This Court in *Meidinger* held that Alaska's proxy regulations are not unconstitutionally vague and do not violate the right to free speech under article 1, section 5 of the Alaska Constitution.³⁸ Appellant concedes, as he must, "that the interest in protecting the integrity of corporate elections may be sufficiently compelling to justify regulations on traditional proxy solicitations," and that "there also may be a compelling interest in ensuring that statements soliciting proxies are not materially misleading." [At. Br. 32]

Given the compelling interest in ensuring the integrity of ANC elections, and the need for shareholders to have the best, most complete, and accurate information possible

³⁸ 31 P.3d 77, 84-85 (Alaska 2001).

in deciding whether to give a proxy to the board or another shareholder, the proxy regulations are narrowly tailored in that they apply only to those communications “reasonably calculated to result in the procurement, withholding, or revocation of a proxy.”³⁹ The regulations correctly focus on impact of the communication rather than whether express words are used, and are designed to have an open and transparent process where proxies are not obtained through false promises or misleading information.

There is also no due process problem. ANC shareholders have been living under Alaska’s proxy regulations for almost 40 years. Anytime a shareholder uses the term “proxy” in a written communication in the context of a particular shareholder meeting, they are on fair notice to consider whether their communication is made under “circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy.”⁴⁰ All communications advocating for some type of action or inaction at a particular meeting – especially action or inaction concerning a proxy – may impact an election or other shareholder vote, and most shareholders who are politically active know that they must comply with the proxy regulations.

CONCLUSION

It has been almost forty years that the Division has regulated communications about ANC shareholder meetings to ensure that the elections are open and transparent, and that the shareholders have the best information possible in deciding how to vote or whether to give a proxy. There have been many small changes to the proxy laws over time, but the


³⁹ *Alaskans for a Common Language, Inc. v. Krtiz*, 170 P.3d 183, 198 (Alaska 2007).

⁴⁰ 3 AAC 08.365(14).

definition of “proxy statement” and “solicitation” have not changed. If Appellant desires a change to these terms, that change is best made through an administrative process at the Division level, where notice of any proposed change to the regulations can be given to allow all ANCs and interested parties the ability to comment on the proposed change. This is not a situation where the Court should legislate from the bench, and change a regulation that has worked well for decades.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 18 day of September 2019.

HOLMES WEDDLE & BARCOTT, PC

By: 

Janna M. Lindemuth
Alaska Bar No. 9711068