

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,

vs.

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-20-07858 CI

**ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION (CASE MOTION #1) AND DENYING DEFENDANTS' MOTION  
TO DISMISS (CASE MOTION #3)**

**I. INTRODUCTION**

There are two motions pending before this court: (1) Plaintiffs' *Motion for Preliminary Injunction*; and (2) Defendants' *Cross-Motion to Dismiss*. The court held oral argument on October 1, 2020.

As explained below, laches does not apply to defeat Plaintiffs' claims. With respect to their request for a preliminary injunction, Plaintiffs cannot meet the "balance of the hardships" test, but they have made a clear showing of probable success on the

merits. The court will issue a preliminary injunction eliminating the Witness Requirement for the 2020 General Election.

## **II. ISSUES PRESENTED**

Alaska law requires voters who vote absentee by mail or electronic means to either: (1) sign their ballot envelopes in the presence of a notary or other official authorized to administer oaths; or (2) sign their ballot envelopes in the presence of a witness 18 years old or older and to obtain a signature from the witness (“Witness Requirement”). Plaintiffs ask the court to declare application of the Witness Requirement unconstitutional during the pandemic, arguing that Ms. Jones, Ms. Clark, members of the Arctic Village Council, and members of the League of Women Voters of Alaska are particularly vulnerable to COVID-19 and should not be forced to choose between risking exposure to COVID-19 through complying with the Witness Requirement or forgoing their right to vote.

For their part, Defendants contend that Plaintiffs waited too long to seek relief from the court and that the doctrine of laches requires the court to dismiss their complaint. But if the court declines to do so, Defendants argue that Plaintiffs cannot meet either of the two standards for issuance of a preliminary injunction.

## **III. COVID-19**

In their filings, the parties provide background information on COVID-19. The court will not summarize all of this information, but for purposes of this decision, it is important to recognize that older individuals, immunocompromised individuals, and

members of racial minority groups are at a higher risk of contracting the disease and experiencing severe consequences. Statistics provided by Plaintiffs are illustrative of COVID-19's disproportionate impact on Alaska Natives: in Alaska, Indigenous people make up approximately 15.6% of the population but 43% of the deaths, at least as of September 7, 2020.<sup>1</sup>

#### **IV. VOTING BY ABSENTEE BALLOT**

Before voting in any elections, an individual must register to vote. In Alaska, an individual must be a citizen of the United States, be at least 18 years old within 90 days of completing a voter registration form, be a resident of Alaska, not be a convicted felon (unless unconditionally discharged), and not be registered to vote in any other state. An individual may register to vote in Alaska online, by paper, or in person.

Regardless of the method of registering, the voter must have a valid form of identification. To register online, an individual must have a valid Alaska driver's license or state ID card. If registering by paper, the Division of Elections will accept a copy of a current driver's license, state ID card, passport, or birth certificate. Any one of these forms of identification helps the Division in verifying the individual who is registering to vote.

There are several ways to vote in an election in Alaska, including absentee, early, special needs, and in-person. When voting absentee, voters must apply for a ballot by

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<sup>1</sup> Indigenous people have fared even worse in New Mexico (9% of the population but approximately 54% of the deaths) and Wyoming (2% of the population but 43% of the deaths). See Plaintiffs' *Motion for Preliminary Injunction* at 11.

submitting their application online, by email, by fax, or by mail. Voters can choose to receive their absentee ballot electronically or by mail. If received electronically, the voters must print out the absentee ballot and then return it by fax or mail once the voter has completed voting. Voters who choose to vote absentee by mail receive an absentee ballot package which includes a ballot, a secrecy sleeve for the ballot, a return envelope for the ballot, and an instruction sheet.

Overseas and military voters receive absentee ballots 45 days before an election, while other voters typically receive absentee ballots about 25 days before an election. Generally, absentee ballots, regardless of whether received electronically or by mail, must be witnessed by a notary, other official authorized to administer oaths, or an individual 18 years old or older.

When mailing absentee ballots, a voter may return the ballot to the Elections Division by any reasonable method. These include in-person delivery, placement in a secure ballot drop-box designated by the Division, or by placing the ballot in the mail. If mailing the ballot, the ballot must be postmarked on or before Election Day in order for the Division to accept it. Generally, the Division will only accept absentee ballots not meeting the postmark requirement if the witness signature is dated on or before Election Day. Absentee ballots are counted if they are received by mail up to ten days after the election date.

## V. ANALYSIS

### *1. Laches Does Not Apply to Bar Plaintiffs' Complaint*

In Case Motion #3, Defendants argue that laches applies in this case. To bar Plaintiffs' claim under the doctrine of laches, Defendants must show: (1) that the plaintiff has unreasonably delayed in bringing the action; and (2) that this unreasonable delay has caused undue harm or prejudice to the defendant.<sup>2</sup> The essence of the defense is not merely the lapse of time, but a lack of diligence in seeking relief.

As to unreasonable delay, Defendants argue that pandemic circumstances are neither new nor unforeseen, and that Plaintiffs should have recognized the impacts of COVID-19 on the Witness Requirement months ago and brought suit well before September 8, 2020. Defendants direct the court's attention to the COVID-19 timeline in Alaska (i.e., the Governor's declaration of an emergency, state health mandates, etc.); to Plaintiffs Jones's and Clark's efforts to avoid contact with others starting in late Feb/early March; and Arctic Village's various states of shutdown starting in March. According to Defendants, Plaintiffs were aware of the impacts of COVID-19 on the Witness Requirement months ago, when it might have been possible to re-print election materials, retrain temporary Division employees, and effectively educate the public about the changed requirement, if the court granted injunctive relief.

The court disagrees with Defendants. The pandemic has not been a static or predictable experience in Alaska or elsewhere. COVID-19 statistics have varied

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<sup>2</sup> *City & Borough of Juneau v. Breck*, 706 P.2d 313, 315 (Alaska 1985).

significantly since the Governor of Alaska declared a public health emergency on March 12, 2020. The number of COVID-19 cases and deaths rises and falls daily, not following any particular trajectory for any appreciable amount of time. With 20/20 hindsight, Plaintiffs would have filed suit earlier. But 20/20 hindsight is not required. The pandemic is a shifty beast, and Plaintiffs were not unreasonable to wait until early September to file suit. The court finds that Plaintiffs did not unreasonably delay in bringing their suit.

With respect to undue prejudice, Defendants contend that relief that would include modification or reprinting of absentee ballot packets would work undue harm or prejudice upon them. However, the court's September 30, 2020 order denying Plaintiffs' *Application for Temporary Restraining Order* made clear that the court would not require modification or reprinting of the absentee ballot packages.<sup>3</sup> Defendants further argue that retraining employees to disregard the lack of a witness signature and to continue processing absentee ballots without the witness signature would be significant and challenging. The court disagrees: the Division would simply inform employees processing ballots that no witness signature is required in the 2020 General Election, and

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<sup>3</sup> At oral argument on October 1, Defendants commented that, because the court denied Plaintiffs' *Application for Temporary Restraining Order*, the court necessarily found that Plaintiffs could not show probable success on the merits of their claims. The court disagrees. The *Application* did not seek the same relief as Plaintiffs' *Motion for Preliminary Injunction*. Rather, in their *Application*, Plaintiffs sought an order restraining distribution of absentee ballot packages so that, if the court granted their *Motion for Preliminary Injunction*, the packages could be modified to reflect elimination of the Witness Requirement. Because the court would not have ordered that type of relief in any event, the court denied the *Application*. In doing so, it was not reaching the merits of Plaintiffs' *Motion for Preliminary Injunction*.

direct them to disregard the lack of a witness signature. And, contrary to Defendants' position, the court believes a carefully targeted public education plan would alert the public to the elimination of the Witness Requirement for the 2020 General Election in a manner that would not confuse voters.<sup>4</sup>

Defendants also argue that disenfranchisement could result if the court granted Plaintiffs' *Motion for Preliminary Injunction*. Specifically, Defendants would seek review from the Alaska Supreme Court, and while the matter was pending, voters would return un-witnessed ballots. If the Alaska Supreme Court reversed this court, the un-witnessed ballots would be rejected, which would result in disenfranchisement of voters. However, past election cases suggest that the Alaska Supreme Court moves quickly in these types of cases, and it would likely render a decision in days, not weeks.

Naturally, if the court grants Plaintiffs' *Motion for Preliminary Injunction*, Defendants will have to take steps to communicate and implement the decision in a compressed timeframe. In that sense, there would be prejudice. But "no impact" is not the standard. Rather, Defendants must show *undue* harm or prejudice, and they have failed to do so.

In sum, Defendants have not met their burden to show that laches should be applied here.

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<sup>4</sup> Even if some voters did not learn that the Witness Requirement was eliminated, those voters would either make the personal decision to have their ballot envelopes witnessed or refrain from voting, which they would have done absent the court order anyway.

## ***2. Plaintiffs are Entitled to a Preliminary Injunction***

Alaska Civil Rule 65 governs preliminary injunctions. When analyzing whether to grant one, the court must first apply the “balance of hardships” standard. If Plaintiffs cannot meet that standard, the court considers whether there is a clear probability of success on the merits of Plaintiffs’ claims.<sup>5</sup>

As explained below, Plaintiffs cannot meet the “balance of the hardships” standard. However, they have made a clear showing of probable success on the merits.

### **a. Balance of Hardships Standard**

To obtain a preliminary injunction under the “balance of hardships” standard, Plaintiffs must show: (1) they will suffer certain and irreparable harm if the court does not issue the preliminary injunction; (2) the opposing party can be “adequately protected” if the injury is small compared to the moving party’s injury; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case. The issue raised cannot be “frivolous or obviously without merit.”<sup>6</sup>

Plaintiffs’ claims are not frivolous or obviously without merit: they seek elimination of the Witness Requirement for the 2020 General Election so that they will not have to choose between risking exposure to COVID-19 and exercising their fundamental right to vote.

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<sup>5</sup> See *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1272 (Alaska 1992); *Alsworth v. Seybert*, 323 P.2d 47,54 (Alaska 2014).

<sup>6</sup> *Id.* at 1273 (quoting *Messerli v. Dept. of Nat. Resources*, 768 P.2d 1112,1122 (Alaska 1989)).

As to harm, Plaintiffs Jones and Clark are elderly, live alone, and are immunocompromised. They are at a higher risk of contracting COVID-19 and experiencing severe consequences: if the Witness Requirement is not eliminated for the 2020 General Election, Plaintiffs Jones<sup>7</sup> and Clark will be forced to choose between voting and risking their health.<sup>8</sup> As to Plaintiff Arctic Village Council, the village has had a strict shelter-in-place order in place since members of the tribe contracted COVID-19 and brought the disease back to the village. Recalling the statistics above regarding the disproportionate impact of this pandemic on Alaska Natives, Plaintiff Arctic Village Council would face the untenable choice of lifting the shelter-in-place order to allow absentee voters living alone (approximately one-third of the village) to access an individual 18 years or older to witness their signature.<sup>9</sup> Finally, more than half of Plaintiff League of Women Voters in Alaska's members are senior citizens and many live

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<sup>7</sup> Plaintiff Clark had her primary ballot witnessed by her mail person. This is no longer possible because the United States Postal Service will no longer allow such witnessing by its employees.

<sup>8</sup> Defendants argue that Plaintiffs can take steps to protect their health by taking precautions against COVID-19 when obtaining a witness signature. This is true. However, such precautions are not a guarantee against contracting the disease. In addition, we do not know everything about the transmission of COVID-19 – for an elderly and immunocompromised individual, the unknown may generate additional anxiety in terms of obtaining a witness signature, even if precautions are taken.

<sup>9</sup> Defendants point to the steps the village took during the primary election to accommodate the Witness Requirement and suggest that Plaintiff Arctic Village Council can avoid any harm by simply doing the same thing again. For the primary election, the village temporarily lifted the lock-down order and the Second Chief of the village walked through the village to witness signatures for those who had not yet voted. But this view does not appreciate an individual's desire to avoid contact in the pandemic, nor does it recognize the importance of allowing the Council to decide how best to protect its community during this ever changing pandemic.

alone. Like Plaintiffs Jones and Clark, these members will be forced to choose between voting and risking their health.

Given the above, the court finds that Plaintiffs have shown that, if the Witness Requirement is not eliminated for the 2020 General Election, they will suffer certain and irreparable harm.

The “balance of the hardships” standard requires that Defendants be adequately protected. This means that the injury can be indemnified by a bond, or it is relatively slight in comparison to the injury which Plaintiffs will suffer if the injunction is not granted. For this prong, Defendants argue that, in *State, Div. of Elections v. Metcalfe*, the Alaska Supreme Court held there is simply no way for the state’s interests to be adequately protected if a preliminary injunction will prevent it from administering an election pursuant to its own election laws.<sup>10</sup> Plaintiffs contend that Defendants are over-reading the case. The court agrees with Plaintiffs, but certainly the case confirms that the state’s interest in administering an election pursuant to its own election laws is a very important one.

The court cannot say that the elimination of the Witness Requirement, even if only for the 2020 General Election, would be a slight injury. This is particularly true because, if the court eliminated the Witness Requirement, the Division will have to engage in some level of public education, alter its ballot review practices, and possibly even send

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<sup>10</sup> 110 P.3d 976, 979 (Alaska 2005).

out tens of thousands of new mailings to absentee voters, all while preparing for the General Election during a pandemic. This cannot be characterized as a “slight” injury.

Plaintiffs have not met the “balance of the hardship” standard.

### **b. Probable Success on the Merits**

Because Plaintiffs cannot meet the “balance of the hardships” standard, they must make a clear showing of probable success on the merits. Plaintiffs’ first claim is that, during the pandemic, the Witness Requirement impermissibly burdens Alaskans’ right to vote under Article 5, Section 1 of the Alaska Constitution.

The Alaska Supreme Court has adopted a balancing test where election laws are challenged, involving four steps: (1) determine whether the claimant asserted a constitutionally protected right; (2) if so, assess the character and magnitude of the asserted injury to the right; (3) weigh the precise interests put forward by the State as justifications for the burden imposed by its rule; and (4) judge the fit between the challenged legislation and the state’s interest in order to determine the extent to which those interests make it necessary to burden the plaintiff’s rights.<sup>11</sup> The test is a flexible one: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the state’s interest must be closer.<sup>12</sup>

Plaintiffs have asserted the constitutionally protected right to vote absentee. If the Witness Requirement is not eliminated, it will force Plaintiffs and other voters to choose

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<sup>11</sup> *State v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005).

<sup>12</sup> *Id.*

between risking their health by coming into contact with a witness or forgo their right to vote entirely.<sup>13</sup> This is a severe burden on Plaintiffs' fundamental right to vote.<sup>14</sup>

Defendants make a variety of arguments as to the precise interests that are served by the Witness Requirement, including protecting against voter fraud and preserving public confidence in the validity of absentee voting.

As to voter fraud, Defendants' briefing provides a lengthy example of such an instance, but the Witness Requirement played no role in detection of the fraud. When asked at oral argument whether the Witness Requirement had ever played a role in detecting fraud, counsel for Defendants could not identify any such instance in recent memory, and was not sure whether it had played a role in detection in the more distant past. Based on the record before it, the court cannot find that the Witness Requirement is an effective tool for detecting voter fraud. Moreover, according to the Heritage Foundation, voter fraud in Alaska is exceedingly rare, with only three reported cases, none of which involved ineligible voting.<sup>15</sup>

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<sup>13</sup> This topic is discussed *supra*.

<sup>14</sup> Plaintiffs want the court to apply strict scrutiny when analyzing the constitutionality of the Witness Requirement, which requires Defendants to show a compelling interest to justify infringement – strict scrutiny is utilized when the burden on a constitutionally protected right is severe. For their part, Defendants argue that the court should apply a heightened scrutiny test – application of this test would require the court to analyze whether the Witness Requirement imposes a substantial, as opposed to severe, burden on the right to vote. The court applies the strict scrutiny test in this order, but had the court applied a heightened scrutiny test, the court would have found that Defendants' interests do not justify infringement of Plaintiffs' right to vote because the Witness Requirement imposes a substantial burden on that right.

<sup>15</sup> See Plaintiffs' *Motion for Preliminary Injunction* at 22 (FN 67).

As for public confidence, the Witness Requirement may lend an air of formality to the absentee voting process, but other aspects of Alaska's election laws ensure the integrity of absentee voting, including the fact that voters are required to provide identification and sign absentee ballots under penalty of perjury, which carries a criminal penalty of up to ten years of incarceration.<sup>16</sup> The Witness Requirement does not even play a consistent role in verifying that the person who voted the ballot is who they claim to be. This is because a witness 18 years of age or older has no obligation to review the voter's identification, unlike a notary witness.

Defendants also argue that any last minute changes for the 2020 General Election will likely damage voter confidence in the integrity and consistency of the elections system as a whole. The court disagrees. Given the widespread effects of the pandemic on every aspect of daily life, voters would understand that, for this election only, it is important to protect individuals' rights to protect their health *and* to vote. Indeed, eliminating the Witness Requirement for this purpose could increase voter confidence in Alaska's elections system, showing that even during a pandemic, the state will maximize our citizens' opportunities to vote safely.

Given the above, Defendants' interests are not sufficiently compelling to justify burdening Plaintiffs' right to vote as safely as possible in the 2020 General Election. Plaintiffs have shown a clear likelihood of success on the merits of their claim that the

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<sup>16</sup> AS 12.55.125(d).

Witness Requirement impermissibly burdens Alaskans' right to vote under Article 5, Section 1 of the Alaska Constitution.

Because the court agrees with Plaintiffs that application of the Witness Requirement during the pandemic impermissibly burdens the right to vote, the court will not analyze Plaintiffs' claim under Article I, Section 1 of the Alaska Constitution, which guarantees equal rights, opportunities, and protection under the law to all persons.

## **VI. CONCLUSION**

Based on the above, the court GRANTS Plaintiffs' *Motion for Preliminary Injunction* (Case Motion #1) and DENIES Defendants' *Motion to Dismiss* (Case Motion #3).

By 4:30 p.m. tomorrow (October 6, 2020), the parties shall submit a stipulated order detailing how the court's order shall be implemented by the Division (i.e., how to communicate elimination of the Witness Requirement, etc.). If they cannot agree, each party shall submit a proposed order.

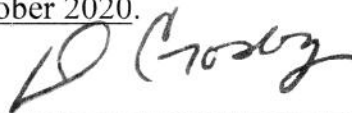
The filing(s) should include: (1) proposed language to be displayed on the Division's website and any other appropriate state websites; (2) proposed language to be utilized in social media (Facebook, Twitter, etc.); (3) a description of how radio and television may be used to communicate the court's decision; (4) discussion of whether it is viable to send an informational mailing to absentee voters, including when such a mailing could be ready; and (5) any other topics the parties believe to be relevant to

implementation of the order. The court will thereafter issue an order specifying how to implement elimination of the Witness Requirement for the 2020 General Election.<sup>17</sup>

**While this order grants Plaintiffs' Motion for Preliminary Injunction, an order eliminating the Witness Requirement for the 2020 General Election is not yet in effect.** This is for two reasons: (1) the court is providing an opportunity for the parties to submit a proposed preliminary injunction order or, in the alternative, to give the court input as to the parameters of the injunction; and (2) if Defendants seek review from the Alaska Supreme Court, they may wish to request a stay of this order – by delaying entry of the preliminary injunction order, the court may avoid confusion that would result from issuing an order eliminating the Witness Requirement, then staying it while the matter is before the Alaska Supreme Court.<sup>18</sup>

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 5 October 2020.



Dani Crosby  
Superior Court Judge

I certify that on 10/5/2020 a copy of the above was mailed to each of the following at their address of record:



S. Kodishew  
M. Rabonowitz

W. Furlong  
N. Landreth  
M. Newman  
L. Harrison  
M. Paton-Walsh

Judicial Assistant

<sup>17</sup> If necessary, the court will hold a status hearing to discuss the filings before issuing its order.

<sup>18</sup> The court is not granting a stay in this order; rather, it recognizes that a motion requesting one may be filed quickly, and thus the court attempts to maintain the status quo to the extent practical.