

**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-20-07858 CI

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ APPLICATION FOR A  
TEMPORARY RESTRAINING ORDER**

**I. INTRODUCTION**

“A manufactured emergency does not warrant emergency relief.”<sup>1</sup> By waiting until September 7 to file this lawsuit, and waiting until September 28 to request a temporary restraining order, the plaintiffs have manufactured an emergency where none need exist. The plaintiffs were on notice of the basic facts giving rise to this lawsuit—the pandemic and the absentee ballot witnessing requirement—months ago, and had ample opportunity to file this lawsuit in time for this Court to resolve it before the mailing of absentee ballots. And the plaintiffs were on notice a week ago, by September 21, that the Division

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<sup>1</sup> *Crookston v. Johnson*, 841 F.3d 396, 399 (6th Cir. 2016).

was preparing to send out absentee ballots as early as this week.<sup>2</sup>

Despite this, the plaintiffs have made an outrageous allegation, contrary to the evidence, that the Division's decision to send out absentee ballots earlier than the October 9 "target date" listed on its website is an effort to manipulate this lawsuit.<sup>3</sup> This is untrue.<sup>4</sup> In fact, state law requires the Division to send out absentee ballots as soon as they are ready,<sup>5</sup> and the absentee ballots arrived ahead of schedule.<sup>6</sup> Sending the ballots out as soon as possible is not only required by statute but has the added benefit of giving both the Division and voters a few extra days to complete an absentee voting process of unprecedented size.

The plaintiffs' delay in filing this lawsuit manufactured this emergency. Although the plaintiffs accuse the defendants of attempting to prevent this Court from providing meaningful relief if the plaintiffs prevail, it was the plaintiffs who chose to file this lawsuit weeks after the Division had already placed its final order for absentee ballot envelopes.<sup>7</sup> Even on the day that the plaintiffs filed, it was never possible for the

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<sup>2</sup> See Affidavit of Gail Fenumiai dated September 21, 2020 at paragraph 15 ("If possible, we intend to start sending out these absentee ballots as early as September 28.")

<sup>3</sup> Alaska Division of Elections, Election Dates and Hours, <https://www.elections.alaska.gov/Core/electiondatesandhours.php> ("Target date to begin mailing absentee by-mail ballots to all voters. - Friday, October 9, 2020").

<sup>4</sup> See Affidavit of Gail Fenumiai dated September 28, 2020 and accompanying this filing at paragraph 3.

<sup>5</sup> See AS 15.20.081(c).

<sup>6</sup> See Affidavit of Gail Fenumiai dated September 28, 2020 and accompanying this filing at paragraph 3.

<sup>7</sup> See Affidavit of Gail Fenumiai dated September 21, 2020 at paragraph 14.

plaintiffs to obtain the relief of reprinting absentee ballot materials.

Granting the plaintiffs the relief that they seek—not just a delay in mailing the ballots pending a decision but also some kind of alteration or insertion to the materials—will severely delay the mailing. In the primary, 422 absentee ballots were rejected because they were postmarked after election day and 66 were rejected because they arrived more than ten days after election day despite being postmarked on or before election day.<sup>8</sup> Together, these 488 ballots outnumber the 458 ballots that were rejected for lack of witnessing.<sup>9</sup> Thus, any delay in mailing absentee ballots risks disenfranchising voters, a harm just as irreparable as the harm the plaintiffs allege from the witnessing requirement. This Court should deny the plaintiffs’ motion for a temporary restraining order and allow the absentee ballots to be mailed as planned. If this Court ultimately rules in the plaintiffs’ favor, it is still free to fashion some form of relief that does not shorten the time that absentee voters have to vote.

## **II. THE STANDARD FOR ENTERING A TEMPORARY RESTRAINING ORDER IS SIMILAR TO THE STANDARD FOR ENTERING A PRELIMINARY INJUNCTION.**

A temporary restraining order is a process by which a plaintiff may obtain a court order in advance of a hearing on a motion for a preliminary injunction. To justify this extraordinary relief, the plaintiffs must demonstrate by sworn testimony that they will suffer “immediate and irreparable injury, loss, or damage ... before the adverse party or

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<sup>8</sup> See Exhibits C, D and E to Affidavit of Gail Fenumiai dated September 21, 2020.

<sup>9</sup> *Id.*

that party’s attorney can be heard in opposition.”<sup>10</sup>

The standard for a temporary restraining order is functionally similar to the standard for a preliminary injunction. “Where the injury [to the defendant] which will result from the temporary restraining order or the preliminary injunction is not inconsiderable and may not be adequately indemnified by a bond, a showing of probable success on the merits is required before a temporary restraining order or a preliminary injunction can be issued.”<sup>11</sup>

### **III. STATE LAW REQUIRES THE DIVISION TO SEND OUT ABSENTEE BALLOTS “AS SOON AS THEY ARE READY.”**

The October 9 “target date” for mailing absentee ballots listed on the Division’s website is just that: a “target date.”<sup>12</sup> The Division generally aims to have all absentee ballots sent on the 22nd day before the election at the latest, and therefore sets its “target date” to begin mailing a few days before that. The 22-day goal is not required by law, but the Division considers it to be a good benchmark, as it is the statutory deadline to send

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<sup>10</sup> Alaska R. Civ. P. 65(b).

<sup>11</sup> *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991). *See also* Alaska R. Civ. P. 65(c) (“No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”)

<sup>12</sup> *See* Alaska Division of Elections, Election Dates and Hours, <https://www.elections.alaska.gov/Core/electiondatesandhours.php> (“Target date to begin mailing absentee by-mail ballots to all voters. - Friday, October 9, 2020”). *See also* Affidavit of Gail Fenumiai dated September 28, 2020 and accompanying this filing at paragraph 2.

ballots in an all by-mail election.<sup>13</sup> This year, the Division has worked hard to prepare the thousands of additional absentee ballots requested by voters as expeditiously as possible, so as to give voters the greatest possible opportunity to return their ballots in time to count. As a result, it expects to be able to mail the majority of such ballots in the next week or so. And Alaska law directs the Division to begin sending out absentee ballots as soon as the absentee voting materials are ready.

Specifically, AS 15.20.081(c) states: “After receipt of an application, the director shall send the absentee ballot and other absentee voting material to the applicant by the most expeditious mail service...Except as provided [for earlier mailing to certain overseas and military voters], **the absentee ballot and other absentee voting material shall be sent as soon as they are ready for distribution.**” (Emphasis added). The plaintiffs have offered no legal justification for entering a temporary restraining order in defiance of this clear statutory mandate.

#### **IV. THE PLAINTIFFS’ MOTION SHOULD BE DENIED AS UNTIMELY**

Had the plaintiffs filed this lawsuit in a timely manner, this Court would have had time to hear the merits of this case before the absentee ballots were ready to be mailed. Leagues of Women Voters of other states were challenging the absentee ballot witnessing requirements in their own states between April and July.<sup>14</sup> Had the plaintiffs similarly filed this lawsuit during that same time period, they would not now find themselves in

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<sup>13</sup> See AS 15.20.800(c).

<sup>14</sup> See Defendant’s Opposition to Plaintiffs’ Motion for Preliminary Injunction and Cross-Motion to Dismiss at pages 25-26.

this position of having to ask for a temporary restraining order.<sup>15</sup>

And, even aside from the timeliness of the lawsuit, the temporary restraining order itself is untimely. The Affidavit of Gail Fenumiai, filed with this Court and served on plaintiffs last Monday September 21, clearly stated the Division intended to begin sending out absentee ballots this week, if possible. Paragraph 15 of the affidavit of Gail Fenumiai explained:

Although our target date for sending out in-state and domestic general election absentee ballots is October 9, we will begin sooner if possible given the very large volume of absentee voting we expect for the general election. We have already processed about 70,000 absentee ballot applications for the general election. If possible, **we intend to start sending out these absentee ballots as early as September 28.** (Emphasis added).

Additionally, this fact was expressly referenced in the defendants' opposition to the motion for preliminary injunction.<sup>16</sup> The plaintiffs' claim that this first came to their notice via Twitter yesterday is not credible. Furthermore, their claim that the Division is

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<sup>15</sup> The plaintiffs cite a consent decree entered into by the State of Minnesota, in which that state agreed to place stickers over the portions of its absentee ballot return envelopes that address the witnessing requirement in support of the idea that this Court should order the Division to do the same. But the lawsuit that led to that order was filed on May 13, 2020 and the consent decree was entered on August 3. Had the plaintiffs filed this case on May 13, there would have been no need to apply for a temporary restraining order. *See Plaintiff's Reply in Support of Motion for Preliminary Injunction and Opposition to Motion to Dismiss* at page 11 (citing *LaRose v. Simon*, State Court of Minnesota, Ramsey County, Case no. 62-CV-20-3149, Consent Decree Dated August 3, 2020).

<sup>16</sup> Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross-Motion to Dismiss at page 20 ("The Division expects to begin sending in-state and domestic absentee ballots by October 9 at the latest, but as early as the week of September 28, if possible").

trying to mail out absentee ballots as soon as possible as an effort to manipulate this case—rather than to facilitate voting—is outrageous and entirely unsupported. The Division is sending them early because the ballots are in the division’s possession and available to be mailed.<sup>17</sup> The plaintiffs’ suggestion that it was a litigation decision demonstrates a complete lack of insight into the time and effort required to prepare and complete these mailings, and willfully ignores the way in which the Division’s early mailing will help—not harm—Alaskan voters.

**V. THE PLAINTIFFS HAVE IDENTIFIED NO IRREPARABLE HARM THAT THEY WILL SUFFER FROM MAILING OF BALLOTS ON OCT. 2.**

The plaintiffs have only alleged that they will suffer irreparable harm from enforcement of the absentee ballot witnessing requirement. They have not alleged that they will suffer any irreparable harm if absentee ballots are mailed on October 2. The plaintiffs provided no affidavits addressing the specific issue of the date of mailing ballots with their Motion for a Temporary Restraining Order. This violation of Rule 65, alone, justifies denial of their motion.

If this Court ultimately enters the relief that the plaintiffs seek, and holds that the absentee ballot witnessing requirement is unconstitutional, the plaintiffs will not have to have their ballots witnessed, regardless of what is printed on the ballot return envelope. They will have suffered no irreparable harm simply from having received an envelope stating that witnessing is required. And they will have suffered no irreparable harm from

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<sup>17</sup> See Affidavit of Gail Fenumiai dated September 28, 2020 and accompanying this filing at paragraph 2.

the absence of an accompanying flyer saying that witnessing is not required.

There is no time to reprint the absentee ballot envelopes. And the plaintiffs' new, more specific proposals to add stickers or insert flyers with them are not administratively possible options.<sup>18</sup> In order for absentee voting to go forward, the Division must send out the mailing as planned. The plaintiffs have not alleged that they will suffer irreparable harm if the Division does so. The plaintiffs have only alleged that they will suffer irreparable harm if the ballot witnessing requirement is enforced.

**V. THE PLAINTIFFS ARE ACTUALLY ASKING THIS COURT TO DELAY MAILING OF ABSENTEE BALLOTS BY MORE THAN A FEW DAYS.**

As Director Gail Fenumiai testified in her affidavit of September 21, absentee ballots for the November 3 general election *must* go out in the envelopes that have already been printed, because it is too late to reprint them in time for absentee voting to take place before the November 3 election.<sup>19</sup> The plaintiffs now request a temporary restraining order against the Division sending out any more absentee ballots before this Court decides their pending motion for a preliminary injunction.<sup>20</sup> But the plaintiffs fail to recognize that simply delaying the mailing until this Court issues an order does not change their situation. If the Division sends out the ballots in their current format this

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<sup>18</sup> See Affidavit of Gail Fenumiai dated September 28, 2020 and accompanying this filing at paragraph 4.

<sup>19</sup> The envelopes must be ordered six weeks in advance and we are now six weeks from the election. See Affidavit of Gail Fenumiai dated September 21, 2020 at paragraph 7.

<sup>20</sup> Some ballots have already been sent. See Affidavit of Gail Fenumiai dated September 21, 2020 at paragraph 15.



Friday, or it if sends them out in their current format a week from Friday, the result is the same: the absentee ballots go out with return envelopes saying that witnessing is required. The only difference for the plaintiffs is that they have one week less in which to vote.

The only way for a temporary restraining order to have the effect the plaintiffs desire is if this Court *also* orders that the Division must include an flyer with the ballots saying that witnessing is not required or orders the Division to place stickers (possibly preprinted with information about dating the ballot) over the portions of the envelope that address witnessing, as the plaintiffs propose for the first time in their reply in support of their preliminary injunction motion.<sup>21</sup> If this were even administratively possible, which it does not appear to be, it would delay the absentee ballot mailing by additional days or weeks.<sup>22</sup> So the temporary restraining order that the plaintiffs seek would in fact prevent

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<sup>21</sup> See Reply in Support of Plaintiff’s Motion for Preliminary Injunction and Opposition to Defendants’ Motion to Dismiss at page 11. This Court should not consider new requests for relief made for the first time in a Reply brief. See *Danco Exploration, Inc. v. State, Dept. of Natural Resources*, 924 P.2d 432, 434 (Alaska 1996) (“new arguments presented for the first time in reply briefs are considered waived”). One reason for this rule is that raising new issues in a reply brief prejudices the defendants who did not have an opportunity to address it in their opposition to the motion.

<sup>22</sup> As described in the attached affidavit of Gail Fenumiai, it took four days to print the instruction sheet currently included with the ballots, so presumably an additional flyer would also take four days—after the wording was decided upon. But getting the flyer into the ballot envelope is another problem. The equipment that stuffs the envelopes cannot accommodate an additional item and it seals the envelope. So envelopes would have to be re-opened, stuffed, and re-sealed by hand, which isn’t feasible and the Division does not have staff available to do it in any case. Also as described in the accompanying affidavit, the Division does not have suitable stickers in stock and has no idea how long it would take to order or receive such things. And, again, it does not have the staff available to sticker envelopes in any case. See Affidavit of Gail Fenumiai dated September 28, 2020 and accompanying this filing at paragraphs 4-10.

absentee ballots from being mailed until well into October, almost certainly beyond the October 9 target date. This delay seriously risks disenfranchising voters who may then not have enough time to receive, vote and return their ballots.

This Court should deny the plaintiffs' motion for a temporary restraining order on this basis alone. A few days' delay in sending the absentee ballots, as currently designed and prepped for mailing, does not afford them any relief. And the relief they actually seek would result in a significantly longer delay in mailing the absentee ballots.

Absentee voting has already begun and must continue on schedule. For months, the Division has been working diligently to facilitate an unprecedented number of absentee ballot applications in the face of a pandemic and real-world concerns regarding the U.S. Postal Service's ability to timely process by-mail voting. Ballots must go out to voters promptly. Even if this Court ultimately rules in the plaintiffs' favor and grants a preliminary injunction, it must structure the relief so as not to delay the absentee voting process.

## **VI. THE DIVISION WILL SUFFER SUBSTANTIAL HARM THAT CANNOT BE INDEMNIFIED BY A BOND IF PREVENTED FROM MAILING THE ABSENTEE BALLOTS ON SCHEDULE**

The Division of Elections is expecting the largest absentee voter turnout in its history. It has already processed over 95,000 absentee ballot applications.<sup>23</sup> Voters can

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<sup>23</sup> See Fairbanks Daily News-Miner, Erin McGroarty, "Alaska to send out absentee ballots early to meet increased demand" (September 26, 2020) (available online at [http://www.newsminer.com/news/local\\_news/alaska-to-send-out-absentee-ballots-early-to-meet-increased-demand/article\\_b1117466-0048-11eb-bcce-f70731fb9e5e.html](http://www.newsminer.com/news/local_news/alaska-to-send-out-absentee-ballots-early-to-meet-increased-demand/article_b1117466-0048-11eb-bcce-f70731fb9e5e.html)).

vote and return their ballots as soon as they receive them. Once received, the Division has to log and process these ballots. The Division will be seriously harmed if this Court shortens the timeframe for it to complete these administrative tasks. And the Division does not have the capacity to take on any additional projects like re-stuffing envelopes by hand with new flyers or placing stickers on tens of thousands of absentee ballot return envelopes.<sup>24</sup>

Even more critical is the harm Alaska’s absentee voters stand to suffer from the plaintiffs’ proposed temporary restraining order. The Division is concerned about the capacity of the U.S. Postal Service to distribute the absentee ballots and return voted ballots in a timely manner.<sup>25</sup> These concerns are particularly serious in rural areas of the state. The concern related to the U.S.P.S. is twofold: ballots may be rejected because they were postmarked after election day and ballots may be rejected even though timely postmarked if they arrive more than ten days after election day.<sup>26</sup>

As noted above, in the recent 2020 primary election, more ballots were rejected

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<sup>24</sup> See Affidavit of Gail Fenumiai dated September 28, 2020 and accompanying this filing at paragraphs 6, 9.

<sup>25</sup> See e.g. New York Times, Luke Broadwater, “1 Million Primary Ballots Were Mailed Late, Postal Service Watchdog Says” (September 1, 2020) (available online at <https://www.nytimes.com/2020/09/01/us/politics/postal-service-late-ballots.html>); Anchorage Daily News, James Brooks, “Many Alaskans Sent Absentee Ballots Later than Recommended During the Primary” (available online at <https://www.adn.com/politics/2020/09/13/analysis-many-alaskans-send-absentee-ballots-later-than-recommended/>). See also United States Postal Service, Election Mail, <https://about.usps.com/what/government-services/election-mail/> (recommending absentee voters mail ballots at least one week in advance of deadline).

<sup>26</sup> Ballots mailed overseas are counted if received within 15 days. See AS 15.20.081(h)(2).

due to a mailing issue than due to lack of a witness signature. This was true even though the Division sent out the ballots two days before its “target date” for mailing those ballots.<sup>27</sup> Mailing the ballots as early as possible not only complies with state law, it also provides voters with the maximum possible amount of time in which to return their ballots by mail. If the mailing is delayed, there is a profound risk of harm to Alaska’s absentee voters.

Finally, the State has an “interest in the consistent administration of elections according to a considered statutory scheme.”<sup>28</sup> The statutory requirement that absentee ballots be sent as soon as materials are ready has not been challenged as unconstitutional. The plaintiffs are asking this Court to suspend the effect of an unchallenged, valid statute. It would be inappropriate for this Court to do so, with no legal justification and despite serious risk to the Alaskan electorate. Instead, this Court should give effect to the legislature’s intent that Alaskan voters get as much time as possible to cast their absentee ballots.

## V. CONCLUSION

The harm the Division, and Alaska voters, stand to suffer cannot be indemnified by a bond. And, for the reasons stated in the Defendants’ opposition to their underlying

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<sup>27</sup> See Affidavit of Gail Fenumiai dated September 28, 2020 and accompanying this filing at paragraph 2.

<sup>28</sup> *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 979 n. 11 (Alaska 2005).

motion, the plaintiffs have not shown probable success on the merits of their claim.<sup>29</sup> This Court should deny the motion for a temporary restraining order.

DATED September 28, 2020.

CLYDE “ED” SNIFFEN  
ACTING ATTORNEY GENERAL

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<sup>29</sup> See Defendant’s Opposition to Plaintiffs’ Motion for Preliminary Injunction and Cross-Motion to Dismiss at pages 39-50. The plaintiffs provide no new merits arguments in their application for a temporary restraining order.