IN THE SUPREME COURT FOR THE STATE OF ALASKA

AUSTIN AHMASUK, Appellant, v. DIVISION OF BANKING AND SECURITIES, Appellee. Superior court: 3AN-18-06035 CI	)	No. S-17414

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

REPLY BRIEF OF APPELLANT

Filed in the Supreme Court
for the State of Alaska on
this ____ of November, 2019.

Meredith Montgomery, Clerk
Appellate Courts

By:_____
Deputy Clerk

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Alaska Constitution, art. I, sec. 5

Freedom of Speech:
Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Alaska Constitution, art. I, sec. 7

Due Process:
No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

3 AAC 08.355. 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 AAC 08.365. Definitions relating to solicitation of proxies

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

(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;

(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;

STANDARDS OF REVIEW

The Division and the Amici urge deference to the Division's interpretation of its own regulations, but their briefs fail to address how the standard of review is affected when review involves a regulation that imposes a penalty and the interpretation implicates constitutional rights. [Ae. Br. 7; Am. Br. 2]

When a regulatory scheme that imposes a civil penalty is ambiguous – as the regulations at issue here are – this Court does not defer to the agency's interpretation and instead construes the regulations narrowly in favor of the accused.[1] And, when one possible interpretation of a regulation respects the constitutional rights of those who may be penalized and another interpretation does not, this Court adopts the regulation that avoids violating the constitution.[2]

For these two reasons, this is not a case where deference to the agency's interpretation is appropriate.

The Division and Amici agree that this Court applies its independent judgment to the constitutional questions raised in this appeal. [Ae. Br. 8; Am. Br. 2]

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[1] *See Alaska Public Offices Comm'n v. Stevens*, 205 P.3d 321, 326 (Alaska 2009) ("imprecise, indefinite, or ambiguous statutory or regulatory requirements must be strictly construed in favor of the accused before an alleged breach may give rise to a civil penalty") (footnote omitted)).

[2] *See Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 184 (Alaska 2009) (under the "canon of constitutional avoidance," this Court should "first ascertain whether a construction of the statute [or regulation] is fairly possible by which the [constitutional] question may be avoided" (internal quotation marks and footnote omitted)).

ARGUMENTS

I. AHMASUK'S LETTER WAS NOT A PROXY SOLICITATION UNDER ALASKA REGULATIONS.

Ahmasuk's opening brief provides the easiest way to resolve this case: to hold that a shareholder's letter addressing *types* of proxies is not a proxy solicitation within the meaning of the regulations in 3 AAC 08. [At. Br. 13-24] This interpretation accords with the plain language of the regulations and the common usage of the term "proxy solicitation"; it avoids adopting an interpretation that is unprecedented in reported cases; it narrowly construes the term in favor of the accused who is potentially subject to a penalty; and it avoids constitutional problems. [*Id.*]

The Division, of course, disagrees. It asserts that Ahmasuk's letter fits within the plain meaning of "a communication reasonably calculated to result in withholding of proxies." [Ae. Br. 9] The Amici concur with the Division. [Am. Br. 4]

There are two main problems with their position. First, neither evidence nor logic supports the conclusion that Ahmasuk's letter made it more likely that anyone would withhold a proxy. If anything, Ahmasuk's letter might be read by shareholders as an encouragement to get involved and not sit on the sidelines, resulting in more people returning proxies.

Second, the arguments of the Division and the Amici turn on an unprecedented interpretation of the phrase "withholding a proxy." Neither brief actually argues that Ahmasuk's letter was reasonably calculated to result in the withholding of proxies, as distinct from being reasonably calculated to result in shareholders withholding a *type* of

proxy [Ae. Br. 8; Am. Br. 4] – and that is not what the applicable regulations concern. The Division and the Amici have not explained why broadening the regulatory language is appropriate. A broad reading is inappropriate where regulations are ambiguous and a broad interpretation subjects shareholders to penalties.

The broad reading urged by the Division and Amici would sweep within the proxy solicitation regulations a vast array of communications far removed from the usual understanding of a "proxy solicitation."[3] Under the broad reading that any communication is a proxy solicitation if it makes it more or less likely that shareholders will return a proxy or a type of proxy, then every communication that encourages shareholders to "vote" or "come to the annual meeting" is a proxy solicitation. "Please vote in the next election" is reasonably calculated to result in more shareholders returning a discretionary proxy; "come to the annual meeting" is reasonably calculated to result in fewer shareholders returning a discretionary proxy – but neither of these communications has anything to do with informed voting, the purpose of the disclosure requirements. More important, these types of communications are plainly not what the Division intended to regulate when it wrote its regulations. Many sections of 3 ACC 08.355 (governing non-board solicitations) make no sense as applied to a communication that simply encourages people to get involved and

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[3] The Amici ask this Court also to consider the statute and definition related to "proxy statements." [Am. Br. 2-4, 10-11 (citing AS 45.55.139 and 3 AAC 08.365(14)] This is an argument the Division has never made. Ahmasuk was accused of and held liable for violating regulations governing "proxy solicitations," not "proxy statements." [Exc. 2-3 ¶¶ 2, 3, 5, 65] Switching to consideration of "proxy statements" is impermissible – but, substantively, focusing on this different (but closely related) definition would change nothing.

vote. And nothing in the record suggests that the Division ever has regulated those kinds of communications, despite the fact that they are reasonably calculated to result in the return or withholding of proxies.[4] If communications that encourage voting – i.e., returning a proxy – are not proxy solicitations, then communications that encourage returning a type of proxy that can be used by any candidate equally should not be proxy solicitations.

There is no principled way to distinguish encouragements to vote or to come to the meeting from Ahmasuk's letter if the regulations defining "proxy solicitations" are interpreted to make any communication a proxy solicitation if it reasonably may result in the return or withholding of proxies in general, as distinct from proxies for a particular candidate or proposition. Broadening the concept of "proxy solicitation" as the Division and Amici urge would impose filing and disclosure burdens on everyone – shareholder and corporation alike – who has no political message but just wants to increase participation in corporation affairs.[5]

The Amici would broaden the definition of "proxy solicitation" even further in two ways. Both suggestions should be rejected. First, the Amici would include all

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[4] *See, e.g.*, Exc. 13, 29-30 (Division did not investigate as a proxy solicitation the SNC newsletter, which encouraged participation in the electoral process).

[5] The Amici brief specifically discusses whether a campaign to boycott an election – i.e., not to return a proxy for anyone – should be regulated as a proxy solicitation. [Am. Br. 10] This example is far removed from the facts of this case. From Ahmasuk's perspective, the hypothetical serves mostly to point out the difficulty in drawing lines: If "don't vote at all" were to be considered a proxy solicitation, there would be no basis for concluding that "please vote" is not a proxy solicitation – and, as discussed above, such statements are far outside the usual understanding and historic regulation of "proxy solicitation."

communications that could influence how a shareholder votes on a candidate or an issue. [Am. Br. 10][6] Second, the Amici would classify as a proxy solicitation any communication that discusses an issue that *might* someday be put to shareholders for a vote. [Am. Br. 12-13] These two suggestions would make virtually all shareholder speech subject to regulation. Any passionate letter to the editor or Facebook post about how the corporation is being mismanaged easily could influence shareholders to vote against corporation-supported candidates in the next election. Any letter on a controversial proposal would be subject to regulation because the proposal someday might be the subject of a shareholder vote.

Besides unreasonably broadening the existing regulatory definition of "proxy solicitation," the Amici's proposed readings fail because they offer no line-drawing any clearer than the Division has offered. How could a shareholder know whether the Division would conclude that a particular Facebook post "could impact whether shareholders give, withhold or revoke a proxy" – particularly when candidates for the board and issues for the upcoming election have not even been announced? To stay on the right side of the law, shareholders would have to file every statement about corporate affairs with the Division, and be prepared to defend the accuracy of every sentence. The clear effect would be to squelch dissident speech, as shareholders will forgo speaking rather than risk a fine for not

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[6] *See also* Am. Br. 11 ("Shareholders always have the ability to comment on corporate governance, but if they do so in a context where their communications 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.").

complying with all the rules. This may be precisely what the Amici want, but this Court should not adopt an interpretation of the regulations that so severely restricts shareholder speech.

None of the cases the Division and Amici cite supports the broad reading of "proxy solicitation" that they ask this Court to adopt. Most concern communications that explicitly sought proxies supporting a specific candidate or position on which shareholders were being asked to vote; the rest concern communications that did not, standing alone, solicit a proxy but were determined by the finder of fact to be part of a campaign for proxies for an identifiable candidate or ballot proposition.[7] In contrast, Ahmasuk did not explicitly solicit

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[7] *See Broad v. Sealaska Corp.*, 85 F.3d 422, 429 (9th Cir. 1996) (addressing proxy solicitations for a specific proposition presented for shareholder vote); *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795-97 (2d Cir. 1985) (summarized at At. Br. 20 n.33); *Studebaker Corp. v. Gitlin*, 360 F.2d 692, 694-96 (2d Cir. 1966) (summarized at At. Br. 20 n.33); *Securities & Exchange Comm'n v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943) (summarized at At. Br. 20 n.33); *Cook Inlet Region, Inc. v. Rude*, 2011 WL 13069989 at *1 (D. Alaska Mar. 23, 2011) (addressing mailings specifically soliciting signatures for two petitions); *Krauth v. Executive Telecard, Ltd.*, 870 F. Supp. 543, 547 (S.D.N.Y. 1994) (addressing a letter from the corporation that urged shareholders not to vote their proxies based on materials sent by a dissident shareholder group but to wait until receiving the company's proxy solicitation materials that would be sent shortly, which the corporation acknowledged was part of a continuous plan that would end with an explicit solicitation for a specific proxy); *Rude v. Cook Inlet Region, Inc.*, 322 P.3d 853, 855 (Alaska 2014) (addressing proxy solicitations for specific candidates); *Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76, 80-81, 91-98 (Alaska 2012) (addressing proxy solicitation for a specific slate of candidates); *Henrichs v. Chugach Alaska Corp.*, 260 P.3d 1036, 1044-45 (Alaska 2011) (addressing claims concerning the formal proxy solicitation by the corporation); *Henrichs v. Chugach Alaska Corp.*, 250 P.3d 531, 533 (Alaska 2011) (addressing proxy solicitations in the context of referring to a proxy solicitation letter that encouraged election of specific candidates); *Brown v. Dick*, 107 P.3d 260, 264-65 (Alaska 2005) (addressing proxy solicitation statements focused on candidates and issues for a shareholder vote); *Skaflestad v. Huna Totem Corp.*, 76 P.3d 391, 393, 397 (Alaska 2003) (addressing materials mailed by the corporation to shareholders to explain a vote that would be presented in the formal proxy solicitation); *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 82-85 (Alaska 2001) (addressing

proxies for anyone, and no evidence indicated his letter was part of a campaign for proxies; the Division did not argue that below, and neither the ALJ nor the superior court found that his single letter was the beginning or any part of an organized campaign to solicit proxies for a particular candidate or proposition on which shareholders would be asked to vote.

For all the reasons set forth in the opening brief, and not refuted by the Division or Amici, this Court should give a narrow interpretation to "solicitation of proxies" as used in 3 AAC 08.355 and as defined in 3 AAC 08.365(12) and (16). This Court should hold that the term does not apply to communications that are not reasonably calculated to result in shareholders returning or withholding a proxy for a specific identifiable candidate, slate, proxyholder, or position on which shareholders are being asked to vote.

II. TREATING AHMASUK'S LETTER AS A PROXY SOLICITATION VIOLATES HIS RIGHTS OF DUE PROCESS AND FREE SPEECH.

A. APPLYING THE PROXY SOLICITATION REGULATIONS TO AHMASUK'S LETTER VIOLATES DUE PROCESS.

The Division errs in its assertion that, in *Meidinger v. Koniag, Inc.*,[8] this Court rejected the due process argument that Ahmasuk presents. [Ae. Br. 14] The only constitutional claim addressed in *Meidinger* was a facial challenge to the constitutionality of the proxy solicitation regulations under the First Amendment.[9] This Court did not

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proxy solicitations distributed by a dissident slate); *Sierra v. Goldbelt, Inc.*, 25 P.3d 697, 703-04 (Alaska 2001) (addressing proxy solicitations distributed by corporation); *Brown v. Ward*, 593 P.2d 247, 248-50 (Alaska 1979) (addressing mailings opposing the corporation and favoring a dissident running for the board).

8 31 P.3d 77 (Alaska 2001).

9 *See id.* at 84-85.

address due process issues at all, much less resolve the claim that Ahmasuk presents: whether, if the regulations are interpreted as the Division urges, the regulations are unconstitutionally vague as applied to a letter such as his that does not urge returning or withholding a proxy for a specific, identifiable person or issue on which shareholders will vote.

No reported case, including *Meidinger*, treats a communication akin to Ahmasuk's as a proxy solicitation.[10] Given the imprecision of the regulatory definition and the lack of guidance in the case law, it would be impossible to conclude, as the Division asserts, that Ahmasuk's letter "falls squarely within the . . . plain meaning" of "proxy solicitation." [Ae. Br. 17 (internal quotation marks omitted)]

The Division's claim that "Ahmasuk's conduct falls squarely within [the regulation's] scope" [Ae. Br. 17] is conclusory and fails to acknowledge why a reasonable shareholder – such as Ahmasuk – could read the regulations and not find that they give fair notice that a communication qualifies as a "proxy solicitation" even if it does not solicit a proxy for or against anyone.

The Division also misuses, or misunderstands, Ahmasuk's previous compliance with the Division's regulations when he authored a traditional proxy solicitation – i.e., a letter that urged the return of proxies to support a particular candidate. [Ae. Br. 17; *see* Exc. 5] The Division implies that this proves that Ahmasuk understood the regulations and

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[10] *See supra* n.7 (listing all the cases the Division and Amici cite in favor of their position that Ahmasuk's letter was a proxy solicitation).

therefore they must be adequately clear. [Ae. Br. 17] The more reasonable inference from Ahmasuk's experience is otherwise: He read the proxy solicitation regulations carefully. [Exc. 5-6] He understood they applied to him when he wrote to express support for a specific candidate, and he understood they did not apply when he wrote about a type of proxy that could be used to support either Board-endorsed or independent candidates. [Exc. 5-6, 39, 51] Ahmasuk is a conscientious shareholder of ordinary intelligence who tried to comply with the law. This one individual's reading of the regulations did not give him fair notice of how broadly the Division would interpret them.

The cases the Division cites, in its attempt to defend the supposed clarity of the proxy solicitation regulations, are not helpful. *Brandner*[11] and *Haggblom*,[12] the two primary cases it cites, involved entirely different regulatory schemes. Further, the conduct at issue in each case fell squarely within the definition of the prohibited or required conduct.[13] Thus, in neither case did this Court need to consider how the regulations in question might be interpreted at the periphery or whether a too-broad interpretation would violate due process rights.

Ahmasuk made a number of other points in his opening brief, to which the

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11 *Brandner v. Providence Health & Services – Washington*, 394 P.3d 581 (Alaska 2017) (addressing policy that required physicians to report any limitation, restriction, or condition with respect to the physician's practice imposed by a state board, health care entity, or agency).

12 *Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska 2008) (addressing ordinance that defined a dog as vicious if it bit someone "without provocation").

13 *See Brandner*, 394 P.3d at 591-92 (physician admitted knowing he was required to report the conditions placed on his license); *Haggblom*, 191 P.3d at 997 (dog bit a person who put her hand on the child gate that blocked the room in which the dog was confined).

Division's brief simply fails to respond. The appellee brief says nothing about the confusion that the Division's own personnel displayed when queried about how they would interpret and apply the regulations. [At. Br. 28; R. 734-35 (Tr. 61-65)] It says nothing about the demonstrated history of uneven enforcement of the regulation or the clear risk of arbitrary enforcement in the future. [At. Br. 29-30; *see* Exc. 64 n.54 (ALJ observed that the inconsistent interpretations the Division offered "lend[] support to Mr. Ahmasuk's contention that the regulation, as interpreted by the Division is too broad, and subject to inconsistent enforcement")] Finally, the Division's brief does not acknowledge the extra need for clear regulations where, as here, speech is involved. [At. Br. 30-31]

In short, the Division has not effectively refuted Ahmasuk's claim that, if the proxy solicitation regulations apply to his letter, then they are unconstitutionally vague as applied, and punishing him for violating the unclear regulations violates his right to due process. This Court should hold that Ahmasuk may not be penalized for violating these too-vague and overbroad regulations.

B. APPLYING THE PROXY SOLICITATION REGULATIONS TO AHMASUK'S LETTER VIOLATES HIS RIGHT TO FREE SPEECH.

The Division opens its argument with a discussion of *Meidinger*[14] and *Caucus Distributors*.[15] [Ae. Br. 18-20] Neither decision is apposite to the issues presented in this case.

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14 *Meidinger v. Koniag, Inc.*, 31 P.3d 77 (Alaska 2001).

15 *Caucus Distributors, Inc. v. State, Dep't of Commerce & Econ. Dev.*, 793 P.2d 1048 (Alaska 1990).

As already described, *Meidinger* involved a facial challenge to all proxy solicitation regulations; it was presented in the context of solicitation of proxies for a particular slate of candidates.[16] The decision does not address Ahmasuk's claim that the First Amendment and article I, section 5 of the Alaska Constitution are violated by applying the proxy solicitation regulations to a communication that does not solicit a proxy for or against a specific candidate, proxyholder, or position on which shareholders are being asked to vote.

Caucus Distributors involved supporters of a political candidate who raised funds by soliciting loans backed by promissory notes that they pressured people to sign.[17] The Division determined that the promissory notes fit within the definition of a security that must be registered or receive an exemption, and that the notes were obtained by fraud.[18] In its appeal to this Court, Caucus Distributors contended that the regulation of its speech violated the First Amendment. This Court rejected that argument, holding that the State may regulate, as securities, promissory notes of the type Caucus Distributors used, even where the fundraising supported a political candidate.[19] Ahmasuk's case does not involve loans, promissory notes, securities, or fundraising of any kind.

The Division's brief turns next to cases that involved pure commercial speech: advertising. [Ae. Br. 20-23] These cases are inapplicable in two important respects. First, Ahmasuk's speech was not commercial under the definition the U.S. Supreme Court used

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16 *See Meidinger*, 31 P.3d at 81, 84-85.

17 *See Caucus Distributors*, 793 P.2d at 1051-52.

18 *See id.* at 1052-53.

19 *See id.* at 1057-58.

in the key case the Division cites. In *Zauderer v. Office of Disciplinary Counsel*,[20] the Supreme Court explained that its commercial speech doctrine "rests heavily on the common-sense distinction between speech proposing a commercial transaction . . . and other varieties of speech."[21] Ahmasuk unquestionably did not engage in speech proposing a commercial transaction. His speech was not commercial under the Supreme Court's definition.

Second, the Division focuses on the portion of those cases that addressed "compelled disclosure."[22] That term refers to laws that require certain types of advertising or packaging to contain specific information or warnings.[23] Nothing of that nature is at issue here. The Division's extended discussion of *Zauderer* and *CTIA* is thus wholly unhelpful.

Even the Division at one point tacitly recognizes that the compelled disclosure cases cannot apply. A premise of those case is that only commercial speech is at issue.[24] The Division calls Ahmasuk's speech "mixed expressive and commercial speech" [Ae. Br. 24] – but its brief asks this Court to apply rules appropriate only for pure commercial speech.

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20 471 U.S. 626 (1985).

21 *Id.* at 637 (internal quotation marks omitted; ellipsis as in *Zauderer*).

22 *See* Ae. Br. 20-23, citing *Zauderer*, 471 U.S. at 650-53; *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 836, 841-48 (9th Cir. 2019); *Nat'l Electrical Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107, 113-16 (2d Cir. 2001).

23 *See Zauderer*, 471 U.S. at 650-51; *CTIA*, 928 F.3d at 841.

24 *See Zauderer*, 471 U.S. at 651 (disclosure requirement applies to "commercial advertising"); *CTIA*, 928 F.3d at 841 (parties agreed that the ordinance regulated "commercial speech"); *Nat'l Electrical Mfrs.*, 272 F.3d at 113 (association conceded that "only commercial speech is at issue").

[Ae. Br. 21, 24-25][25] Ahmasuk disagrees that his speech is commercial in any respect, but the Division's concession that it is even partly non-commercial is enough to make the compelled disclosure cases inapplicable.

Because the Division relies on the compelled disclosure cases, its brief never addresses the test that actually controls – namely, whether the government's regulation of speech like Ahmasuk's (1) serves a compelling state interest and (2) is narrowly tailored to serve that interest. [*See* At. Br. 33-34][26]

Ahmasuk showed in his opening brief that the Division has not established a compelling interest in regulating shareholder speech outside the traditional, narrow definition of "proxy solicitation" – i.e., a communication directed at the return or withholding of a proxy for a particular candidate, proposition, or proxyholder. [At. Br. 35-37] As discussed above, the Division's broad definition of "proxy solicitation" captures statements such as "vote in the election" or "come to the meeting," and the Division has not even attempted to establish a compelling interest in regulating these types of statements.

No compelling governmental interest justifies regulating the content of most speech.

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[25] As the case has developed, the State has retrenched on the level of protection it believes Ahmasuk's speech should receive. Initially, the Division treated Ahmasuk's speech as political. [R. 125-27] In the superior court, it called his speech "mixed expressive and commercial speech," but "entitled to full protection under the First Amendment." [R. 449] Now, the Division contends the speech is "mixed expressive and commercial speech" *without* the full protection the First Amendment grants to expressive speech. [Ae. Br. 24]

[26] The Amici acknowledge the correct test, but offer only a brief and conclusory analysis of how the test can be applied. [Am. Br. 13-14]

Most political speech is entirely unregulated for content. Even deliberately false statements are protected.[27] In most situations, the government may not set itself up as the truth police and must trust the marketplace of ideas, recognizing that the best response to speech that is false is not government regulation but speech that is true.[28] That *all* of the reported case law on proxy solicitations concerns speech that actually solicits a proxy for an identifiable candidate or proposition strongly suggests that speech outside those limits has not bothered other regulators, and there is no compelling need to regulate it.

The Division also has not met its burden of establishing that its interpretation of the proxy solicitation regulations is narrowly tailored to serve any compelling interest. [*See* At. Br. 37-39] Ahmasuk showed that narrower regulations easily can be drafted to serve the government's interests in protecting the integrity of corporate elections. [At. Br. 38] Narrowly defining "proxy solicitations" to mean statements that solicit the return of a proxy for or against an identifiable candidate, proposition, or proxyholder would serve the interest in promoting election integrity, without unduly infringing on shareholder speech. The

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27 *See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion); *281 Care Committee v. Arnesen*, 766 F.3d 774, 784-85 (8th Cir. 2014) (noting that *Alvarez* dealt with the regulation of "false speech in light of general First Amendment protections," but not specifically with political speech, which requires even greater protection than non-political speech).

28 *See Alvarez*, 132 S. Ct. at 2550 ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. . . . [S]uppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate discussion through content-based mandates."); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471-72 (6th Cir. 466, 471-72 (6th Cir. 2016) (noting that *Alvarez* rejected a rule that false speech is not protected by the First Amendment).

Securities and Exchange Commission, the federal counterpart to the Division, has made an informed decision that much narrower regulations governing shareholder speech suffice to achieve its purposes without risking running afoul of the First Amendment.[29] This demonstrates that the Alaska regulations, interpreted as the Division does, are not narrowly tailored to serve the government's compelling interests.

For all these reasons, and those set forth in the opening brief, this Court should conclude that the Division violated Ahmasuk's free speech rights by penalizing him for failure to submit disclosures to the Division although his communication did not urge the return of a proxy for or against a candidate, proposition, or proxyholder.

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[29] *See* 17 C.F.R. § 240.14a-1(*l*)(2)(iv)(A) [Exc. 31-33]; *see generally* At. Br. 38-39.

CONCLUSION

This Court should vacate the order finding that Ahmasuk violated proxy solicitation regulations, relying on one or more of the legal grounds set forth above:

- narrowly construed, the ambiguous Alaska proxy solicitation regulations do not apply to Ahmasuk's letter;
- application of the proxy solicitation regulations to Ahmasuk's letter violates his right to due process, because the regulations fail to provide fair notice that a letter addressing proxy types is a "proxy solicitation"; and/or
- application of the proxy solicitation regulations to Ahmasuk's letter violates his right to free speech because regulations that limit speech about proxy types are not narrowly tailored to serve a compelling government interest.

Respectfully submitted, this 7 day of November, 2019.

ACLU OF ALASKA FOUNDATION

Susan Orlansky [8106042]