

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

**Arctic Village Council, League of
Women Voters of Alaska, Joyce M.
Anderson, and Edward H. Toal, IV,**

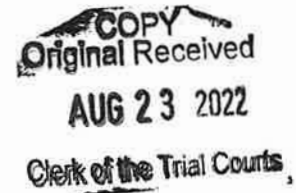
Plaintiffs

v.

**Gail Fenumiai, in her official capacity
as the Director of the Alaska Division of
Elections; Kevin Meyer, in his official
capacity as the Lieutenant Governor of
the State of Alaska; and Alaska
Division of Elections,**

Defendants.

No. 3AN-22-_____ CI



COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Arctic Village Council, League of Women Voters of Alaska, Joyce M. Anderson, and Edward H. Toal, IV, file this Complaint for Declaratory and Injunctive Relief against Defendants Gail Fenumiai, in her official capacity as the Director of the Alaska Division of Elections; Kevin Meyer, in his official capacity as the Lieutenant Governor of Alaska; and the Alaska Division of Elections. Defendants have unduly burdened Plaintiffs' right to vote and violated their right to procedural due process as guaranteed by the Alaska Constitution, Article V, Section 1, and Article I, Section 7, respectively, by failing to provide voters with

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

Page 1 of 28

timely notice and an opportunity to cure deficient ballot envelopes before the ballots they contain are rejected. Defendants will continue to violate voters' rights if not enjoined by this Court from doing so.

NATURE OF THE CASE

1. The right to vote “is fundamental to our concept of democratic government” and “is key to participatory democracy.” *Miller v. Treadwell*, 245 P.3d 867, 868-69 (Alaska 2010) (cleaned up). Alaskans exercise this fundamental right by voting in person or absentee by mail. Any Alaska voter may vote absentee for any reason. AS 15.20.010.

2. This year, 163,257 Alaska voters cast ballots by mail during the special primary election for U.S. Representative in June—Alaska’s first statewide all-mail election.¹ But more than 4.5% of these mail ballots were rejected by the Division of Elections.² All told, 7,468 Alaska voters were deprived of having their voices heard and their mail votes counted.³

¹ State of Alaska, Division of Elections, *Combined Ballot Count Report* (June 24, 2022), https://www.elections.alaska.gov/results/22SPECPRIM/CombinedBallotCountReport_6242022FINAL.pdf. (hereinafter “June 2022 Final Ballot Report”).

² *Id.*

³ *Id.*

Approximately two-thirds of all rejected ballots—3% of all ballots submitted—were rejected for ballot envelope deficiencies that could have been cured if Defendants had timely informed voters. These common but easily curable mistakes include: improper or insufficient witnessing; not providing a voter identifier or the voter identifier not matching voter records; or lack of a voter signature (“common mistakes”).⁴

3. In areas of the state with greater percentages of Alaska Native voters, the rejection rates were significantly higher. For example, in House District 38, encompassing the Bethel and the Lower Kuskokwim areas—in which, according to the 2020 Census, Alaska Native and American Indian individuals comprise approximately 83% of the district’s population—the rejection rate was well over 16%.⁵

4. Instead of notifying voters of these common mistakes when there was still time to cure them—before vote counts were finalized—the Division of Elections notified voters of rejected ballots only after the election was certified. This timeline rendered the notification

⁴ State of Alaska, Division of Elections, Absentee Review Board Report Details (June 22, 2022), https://www.alaskapublic.org/wp-content/uploads/2022/06/Absentee-Review-Board-Details_SW-6.21.2022-1.pdf (hereinafter “June 2022 Absentee Review Board Report”).

⁵ June 2022 Final Ballot Report at 7.

meaningless for purposes of the current election. Affected voters were disenfranchised because they were never given an opportunity to cure the reason the Division of Elections rejected their ballots—even when the Division of Elections discovered the inadvertent ballot envelope errors well before vote counts were finalized.

5. Alaska is in the midst of counting votes from the August special and primary elections and will hold a general election in November. It is virtually certain that many absentee voters again will be denied their right to have their vote count because of common mistakes that are easily curable with timely notice. Defendants' actions and inactions unduly burden the right to vote and violate the due process rights of voters guaranteed by the Alaska Constitution.

6. Simple procedures could provide timely notice and an opportunity to cure common mistakes discovered on ballot envelopes before vote counts are finalized and thus ensure that voters are not unlawfully deprived of their right to have their vote counted. The opportunity to cure is already offered by the Municipality of Anchorage during

municipal elections, *see* AMC 28.70.030(D), and is likewise provided by 24 other states.⁶

7. The Alaska Constitution requires Defendants to implement similar procedures to provide voters a timely and meaningful opportunity to correct curable ballot envelope errors before vote count deadlines.

JURISDICTION AND VENUE

8. This Court has jurisdiction to award declaratory and injunctive relief under AS 22.10.020(a) through (c) and (g).

9. Venue is proper here under Alaska Rule of Civil Procedure 3 and AS 22.10.030 because one or more Defendants has offices in this district, and because one or more Plaintiffs' claims arise in this district.

PARTIES

A. Plaintiffs

10. Arctic Village Council (the "Tribe") is a federally recognized Tribal government. Arctic Village is situated on the southern boundary

⁶ *See* Nat'l Conf. of State Legislatures, *States with Signature Cure Processes* (Jan. 18, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-15-states-that-permit-voters-to-correct-signature-discrepancies.aspx>.

LEAGUE OF WOMEN VOTERS OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: legal@alwv.org

of the Arctic National Wildlife Refuge, along the east fork of the Chandalar River and about 100 miles north of Fort Yukon, Alaska. The Tribe exercises powers of self-governance and jurisdiction over its Neets'ajj Gwich'in Tribal citizens living in Arctic Village. The Tribe is responsible for the health, safety, and welfare of its citizens. The Tribe sues in a representational capacity *parens patriae* on behalf of the affected Tribal citizens it represents, who include U.S. citizens 18 years of age and older who are registered to vote or eligible to register to vote in Alaska. Voting is important for the Arctic Village community because it allows members to exercise their voices in the democracy. Without the due process of timely notice and a meaningful opportunity to correct rejected absentee ballots, many Tribal citizens have been disenfranchised, and Tribal citizens likely will be disenfranchised in elections to come.

11. The League of Women Voters of Alaska ("LWV") is a nonpartisan political organization that works to encourage informed and active participation in government and to influence public policy through education and advocacy. LWV is an affiliate of the League of Women Voters of the United States. LWV has approximately 400 members throughout Alaska, the majority of whom are citizens 18 years of age and older who are registered to vote or eligible to register to vote in Alaska.

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

Page 6 of 28

Many of LWV's members have voted absentee in past elections and plan to vote absentee in the general election in November. In the past, some LWV members have had their absentee ballots rejected for the common mistakes that are the subject of this suit. LWV members are at a risk of being disenfranchised in the future by the lack of timely notice and a meaningful opportunity to cure those common mistakes. LWV has diverted and will need to continue to divert resources from its voter registration, voter education, and voter mobilization activities toward educating voters about the ballot envelope requirements that are the subject of this suit because LWV realizes that, without an opportunity to cure ballot envelope deficiencies, voters may be denied the right to have their vote count merely because they made an easily correctable mistake. If voters were given timely notice and an opportunity to remedy curable ballot envelope deficiencies, LWV could spend less of its resources and time on educating voters about ballot envelope requirements (because voters would not be immediately disenfranchised by honest mistakes) and more on its other critical activities including registering voters and educational events.

12. Joyce M. Anderson is an Anchorage resident who is registered to vote in Alaska. Ms. Anderson was Director of Elections and Voter Registration for the City of Minneapolis, Minnesota, for 15 years. After *Arctic Village v. Fenumiai*

COMPLAINT

Case No. 3AN-22-_____

moving to Anchorage in 1999, she was appointed to serve on the Municipality of Anchorage Election Commission from 2012 to 2021, which she chaired for six years. Ms. Anderson voted by mail in the special primary election for the U.S. House of Representatives, held in June 2022. When Ms. Anderson completed her ballot in the special primary election, she inadvertently included an incorrect voter identifier on her ballot envelope. Because of this mistake, Ms. Anderson's ballot was rejected, and her vote was not counted. Ms. Anderson was unaware of the mistake until she received a letter from the Division of Elections—after the special primary election had been certified—that her ballot had been rejected because of the inadvertent error. Ms. Anderson intends to vote by absentee mail-in ballot in Alaska's November general election. She is concerned that, should she make an inadvertent mistake on her absentee mail-in ballot, it will be rejected, despite the fact that she did not intend to make the mistake and despite the fact that the mistake would be likely curable. Ms. Anderson would be confident that her vote would count if the Division of Elections provided for a cure process for correctable ballot errors, and she would take prompt steps to correct any errors if they were brought to her attention. Having a say as a voter is important to her.

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

13. Edward H. Toal, IV, is an Anchorage resident who is registered to vote in Alaska. He has voted in almost every statewide election in Alaska since 1999. Mr. Toal voted by mail in the special primary election for the U.S. House of Representatives, held in June 2022. When Mr. Toal completed his ballot in the special primary election, he mistakenly thought that a witness signature was unnecessary because he believed that the Alaska Supreme Court had struck down the requirement in full. As a result, Mr. Toal did not have a witness sign his ballot. He discovered his mistake almost immediately after he mailed the ballot to the Division of Elections. He contacted the Division of Elections to attempt to cure the mistake, but he was told by Division of Elections staff that he would not be allowed to correct the oversight. Consequently, Mr. Toal's ballot was rejected, and his vote was not counted. Mr. Toal intends to vote by absentee mail-in ballot in Alaska's November general election. He is concerned that, should he inadvertently make a mistake on his absentee mail-in ballot, it will be rejected even though he does not intend to make a mistake and despite the fact that the mistake would be likely curable. Mr. Toal would be confident that his vote would count if the Division of Elections provided for a cure process for correctable ballot errors, and Mr. Toal would take prompt steps to correct any errors if they were brought to his attention. Having a say as a voter is important to him.

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

B. Defendants

14. Defendant Gail Fenumiai is the Director of the Alaska Division of Elections, and she is sued in her official capacity. Under AS 15.15.010, Ms. Fenumiai is the chief elections official for the State and is responsible for “the general administrative supervision over the conduct of state elections, and may adopt regulations under AS 44.62 (Administrative Procedure Act) necessary for the administration of state elections.” She is responsible for the supervision of regional election offices and all matters related to the training and employment of election personnel. AS 15.10.105(a).

15. Defendant Kevin Meyer is the Lieutenant Governor of Alaska, and he is sued in his official capacity. He is responsible for the control and supervision of the Alaska Division of Elections, including the appointment of the Director of the Alaska Division of Elections. AS 44.19.020.

16. Defendant the State of Alaska, Division of Elections, is an executive branch agency responsible for the administration of Alaska’s elections and enforcement of Alaska’s election laws.

ALASKA VOTING SYSTEMS FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: legal@alvaf.org

FACTUAL ALLEGATIONS

A. Alaska's Voter Signature, Identification Number, and Witness Requirements

17. Any Alaska registered voter may vote absentee by mail for any reason. AS 15.20.010. For a vote to be counted, the certificate on the back of the ballot envelope must comply with the following:

- **Voter Signature Requirement:** A voter must sign the ballot envelope. *See* AS 15.20.203(b)(1); 6 AAC 25.580(8).
- **Identification Number Requirement:** A voter must provide either a voter ID number, Alaska driver's license number, date of birth, or the last four digits of their Social Security number on their ballot envelope. *See* 6 AAC 25.510(b); 6 AAC 25.580(7).
- **Witness Requirement:** An absentee voter must have a witness "attest to the date on which the voter signed the certificate" on the ballot envelope in the witness's presence. AS 15.20.081(d); *see also* AS 15.20.203(b)(2); 6 AAC 25.570(a)–(b); 6 AAC 25.580(9).⁷

⁷ The Witness Requirement was enjoined by the court for the general election in November 2020 based on pandemic-related concerns. *See* Order Granting Plaintiffs' Motion for Preliminary Injunction and Denying Defendants' Motion to Dismiss, *Arctic Vill. Council v. Meyer*, No. 3AN-20-07858-CI (Alaska Super. Ct. Oct. 5, 2020), *aff'd*, 495 P.3d 313 (Alaska 2021).

The Division of Elections has reinstated the Witness Requirement: The special primary election in June 2022 and the special general/primary election in August both required witnessing for absentee ballots, and the Division of Elections will require a witness signature on absentee ballots for upcoming elections.

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

18. Since the Voter Signature, Identification Number, and Witness Requirement fields all concern details on the back of the ballot envelope, errors in these fields can be detected without ever opening the ballot envelope.

19. Voters must comply with all of the above requirements for the certificate on the ballot envelope to be deemed to be properly executed under Alaska law. *See* AS 15.20.081(d); 6 AAC 25.550 (“An absentee voter voting by mail must execute the certificate on the oath and affidavit envelope. To be properly executed, the certificate must include the voter’s signature and the signature of an official witness or signature of one individual 18 years of age or older attesting the ballot as required by AS 15.20.081(d).”).

20. If these ballot envelope requirements are not met, the absentee ballot will be automatically rejected by Defendants, the absentee ballot envelope will never be opened, and the voter’s vote will not be counted.

B. Voter impacts—particularly in Alaska Native communities—from lack of timely notice and an opportunity to cure

21. In the June 2022 special primary election, Defendants rejected 7,468 mail-in ballots.⁸ That amounts to over 4.5% of the total votes cast.

⁸ June 2022 Final Ballot Report at 8.

The most common reason (at least 2,724 ballots) was “improper or insufficient witnessing” (or violation of the Witness Requirement).⁹ Other curable reasons included “no [voter] identifier provided” (at least 1,556 ballots), “[voter] identifier does not match voter record” (at least 698 ballots), and “voter did not sign” (at least 443 ballots).¹⁰ Over 63% of rejected ballots—almost two-thirds of ballots rejected—were not counted because of ballot envelope defects that could have been easily cured if Defendants had provided the voter with timely notice and an opportunity to cure them. All told, almost 3% of Alaska voters were unnecessarily disenfranchised in the June 2022 election.

22. Alaska’s overall rejection rate of 4.5% stands in stark contrast to data showing that, nationwide, absentee ballot rejection rates were “consistently below 1.5%” from 2010 to 2018,¹¹ and just 0.79% in 2020.¹²

⁹ June 2022 Absentee Review Board Report at 18.

¹⁰ *Id.*

¹¹ U.S. Election Assistance Comm’n, *Vote by Mail Trends and Turnout in Six Election Cycles: 2008-2018* (Oct. 22, 2020), <https://www.eac.gov/vote-mail-trends-and-turnout-six-election-cycles-2008-2018>.

¹² Declan Chin, *A Deep Dive into Absentee Ballot Rejection in the 2020 General Election*, MIT Elections Performance Index (Dec. 16, 2021), <https://elections-blog.mit.edu/articles/deep-dive-absentee-ballot-rejection-2020-general-election>.

23. Regions with higher concentrations of Alaska Native voters were disproportionately disenfranchised and have borne the brunt of the Division's failure to provide timely notice and an opportunity to cure.

24. For example, House District 38 in the Bethel and Lower Kuskokwim area had a ballot rejection rate of nearly 17%.¹³

25. In the Bering Straits/Nome/Yukon Delta areas that make up House District 39, the rejection rate was over 14%.¹⁴

26. For the Arctic/Utqiagvik/Kotzebue region, House District 40, the rejection rate exceeded 12%.¹⁵

27. And in the Bristol Bay/Aleutians/Dillingham/Unalaska area, House District 37, the rejection rate was near 11%.¹⁶

28. Absent relief from this Court, thousands of Alaska voters in future elections—including disproportionately high numbers of Alaska Native voters—likely will be disenfranchised due to easily fixable common mistakes on their absentee ballot envelopes that can be detected and cured before vote counts are finalized.

¹³ June 2022 Final Ballot Report at 7.

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ *Id.* at 7.

C. The Alaska election calendar

29. There is often ample time between when the State receives a completed mail ballot and when the election results must be certified during which the Division of Elections could provide timely notice and a meaningful opportunity to cure to voters whose ballots are slated for rejection for common mistakes on ballot envelopes involving the Voter Signature, Identification Number, and Witness Requirements.

30. Alaska Statute 15.20.201(a) provides that “[n]o less than seven days preceding the day of election, the election supervisor, in the presence and with the assistance of the district absentee ballot counting board, shall review all voter certificates of absentee ballots received by that date.” That is, at least a week before election day, election officials must begin reviewing the certificates on the back of received mail ballot envelopes for compliance with the Voter Signature, Identification Number, and Witness Requirements.

31. Domestic absentee ballots are counted if they are postmarked by election day and received by the tenth day after the election, which is November 19 for the 2022 General Election. AS 15.20.081(e).

32. The district absentee ballot counting board has until “the 15th day following the day of the election” to “certify the absentee ballot review.” AS 15.20.201(c).

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

33. The Alaska election calendar thus provides ample time in which the State could provide voters with adequate notice and a meaningful opportunity to cure ballot envelope errors concerning the Voter Signature, Identification Number, and Witness Requirements *before* absentee ballots vote counts must be finalized.

34. Defendants currently do not notify voters that an absentee ballot will be rejected due to a common mistake that could be cured, or have a process to correct common mistakes, before the deadline for counting ballots.

D. Implementing a notice and cure process statewide

35. The Alaska Statutes neither prohibit nor explicitly provide for timely notice of and an opportunity to cure absentee ballot envelopes that are submitted without a proper voter signature, identifier, and/or witness attestation. Under existing Alaska law, election officials could immediately notify voters of any ballot envelope error they detect and provide an opportunity for cure. Ways in which a voter could be allowed to cure under existing law include, but are not limited to: (a) submitting a questioned ballot on election day, if the voter receives notice of a ballot envelope error before election day and is able to make it to a polling place on election day; or (b) filling out an affidavit supplying the missing information and returning it before the deadline for counting ballots.

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

36. One statute, AS 15.20.203(h) through (i), already requires notice by mail to voters of ballot envelope errors “not later than” 10 or 60 days after ballot review, depending on the type of election—but it does not prohibit *earlier* notice, such as notice as soon as ballot envelope errors are detected.¹⁷ That is, nothing in the Alaska Statutes prohibits an election worker from immediately flagging upon receipt any ballot envelope that has obvious missing elements from the Voter Signature, Identification Number, or Witness Requirements.

37. Current statutes governing the district absentee ballot counting review board provide as many as 22 days during which the board can review ballot envelopes and ensure their compliance with the Voter Signature, Identification Number, and Witness Requirements. And there is a five-day window in which even the voters who cast the last few timely absentee ballots (that is, ballots postmarked by election day and received by the tenth day after the election) can be provided adequate notice and a meaningful opportunity to cure before vote counts are due 15 days after the election under AS 15.20.201(c), which will fall on November 23 for the 2022 General Election.

¹⁷ Though AS 15.20.203(j) requires online notice of rejection be posted “not less than” 10 days or 60 days after the election, it does not prohibit earlier notice to the voter by mail, email, or telephone.

38. For in-person cure, Alaska law allows voters to vote a questioned ballot in person on election day if they have “already voted.”¹⁸ So, if a voter receives notice of a ballot envelope error before election day and can make it to a polling place on election day, they could simply vote a questioned ballot to have their in-person vote count, knowing that their mail ballot will *not* be counted.

39. For cure by mail, AS 15.20.203(b)(1) requires voters to execute a “certificate”—which is originally provided to voters on absentee ballot envelopes as described in AS 15.20.030—but that certificate could be replicated, such as by a cure envelope that could be mailed to voters with a notice stating that their original ballot envelope was not executed properly, or through a similar mechanism available online, among other possibilities permitted under Alaska law.

40. Notably, for ballot envelopes initially submitted without a witness signature, a cure certificate need not have the witness attest that he or she witnessed the voter mark the original ballot. Indeed, AS 15.20.081(d) requires voters to “mark the ballot in secret”—that is,

¹⁸ Alaska Division of Elections, *Voting at the Polling Place Election Day*, <https://www.elections.alaska.gov/Core/votingatthepollsonelectionday.php> (last visited Aug. 22, 2022). *See also* AS 15.20.207(c) (disallowing questioned ballots to be counted for voters who have already “voted at the same election”).

without the presence of a witness. The witness need only “attest to the date on which the voter signed the certificate,” which could be read to include a cure certificate.

41. As a result, implementing a timely notice and cure process—which is required for the existing statutes to be consistent with Alaska Constitution, Article V, Section 1, and Article I, Section 7—would be possible without violating any Alaska Statute or holding any Alaska Statute unconstitutional.

42. The Municipality of Anchorage already provides a notice and cure opportunity for mail ballots that are submitted without a voter ID or signature or with a voter signature that does not match the Municipality’s record of the voter’s signature. For the ballots submitted without listing a voter ID, the Anchorage Municipal Clerk simply mails the affected voter a letter stating that “Your Urgent Action Is Required for Your Vote to Count!” and asks the voter to provide a copy of their ID in an enclosed return envelope or bring the ID in person to the Municipality Election Center during regular business hours by a specified date. For ballots submitted without a voter signature, the notification letter includes the same urgent subject line and asks the voter to sign a cure form that contains a copy of a voter declaration confirming that the voter completed their ballot. The Municipality also

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

provides a cure process for mismatched voter signatures.¹⁹ These same processes could be modeled by the State to provide the relief requested here before vote counts are finalized.

43. Earlier this year Alaska legislators proposed a bill that would have clarified the opportunity for notice and cure under the Alaska Statutes: House Bill 267.²⁰ The Division of Elections submitted an official “Fiscal Note” on HB 267 that confirms the State’s expected cost of notice and cure: \$110,500 per election year.²¹ This is *de minimis* compared to the State’s nearly \$12 billion annual budget.²²

¹⁹ See Municipality of Anchorage, *Frequently Asked Questions* (July 15, 2022), <https://www.muni.org/departments/assembly/clerk/elections/pages/frequentlyaskedquestions.aspx>.

²⁰ H.B. No. 267, 32nd Leg., Second Sess. (Alaska 2022), https://www.akleg.gov/basis/get_documents.asp?session=32&docid=77973. Nothing about this proposed legislation should be read to suggest that notice and cure is not already allowed under the Alaska Statutes. Rather, the proposed legislation would simply make those provisions explicit. The bill did not face any documented opposition and was never rejected by any legislative vote. As of January 2022, it was referred to the House State Affairs Committee and no further action occurred before the end of the legislative session.

²¹ See 2022 Leg. Sess., *Fiscal Note* (Jan. 24, 2022), https://www.akleg.gov/basis/get_documents.asp?session=32&docid=77970.

²² See Office of Mgmt. & Budget, *Statewide Totals - Operating Budget (1159)* (June 28, 2022),

CLAIMS FOR RELIEF

COUNT I

Undue Burden on the Right to Vote Alaska Constitution, Article V, Section 1

44. Plaintiffs reallege and incorporate by reference paragraphs 1 through 43, as though fully set forth herein.

45. Article V, Section 1, of the Alaska Constitution guarantees the right to vote to “[e]very citizen of the United States who is at least eighteen years of age” and “who meets registration residency requirements which may be prescribed by law.”

46. When the constitutionally protected right to vote is challenged, Alaska courts “assess the character and magnitude of the asserted injury to the right[]” and weigh that against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *State v. Arctic Vill. Council*, 495 P.3d 313, 321 (Alaska 2021). Alaska courts then “judge the fit between the challenged legislation and the state’s interests in order to determine the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* (cleaned up). “This is a flexible test: as the burden on constitutionally protected rights becomes

https://omb.alaska.gov/ombfiles/23_budget/FY23Enacted_statewide_tots_6-28-22.pdf

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

Page 21 of 28

158028564.4

more severe, the government interest must be more compelling and the fit between the challenged legislation and the state's interest must be closer." *Id.*

47. Article V, Section 1, is violated by the current failure to provide an opportunity for notice and cure of any common mistake on a voter's ballot certificate. Without notice and cure, voters face a substantial, if not severe, burden—outright disenfranchisement—on the fundamental right to vote if they make a common and easily fixable mistake.

48. Rejecting mail ballots based solely on common mistakes without an opportunity to cure does not serve any important, let alone any compelling, state interest, particularly when (i) the State can otherwise verify a voter's eligibility to vote, (ii) state laws are already in place to detect and deter fraud, (iii) there is ample time to provide timely notice and a meaningful opportunity to cure, and (iv) election results will not be delayed by providing a short cure period. Thus, the burdens imposed on the fundamental right to vote by implementing the Voter Signature, Identification Number, and Witness Requirements without notice and an opportunity to cure outweigh any purported state interest in not providing any meaningful notice and opportunity to cure.

49. Many Alaska voters will suffer direct and irreparable injury if Defendants refuse to allow them an opportunity to cure the slated *Arctic Village v. Fenumiai*

COMPLAINT

Case No. 3AN-22-_____

ALASKA VOTERS' CONFEDERATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: legal@acthak.org

rejection of their mail ballot due to a missing signature from either the voter or a witness or because of a missing or inadvertently incorrect identification number.

50. Without relief from this Court, many more Alaska voters will be deprived of their right to vote in the 2022 General Election—as have been thousands in past elections.

COUNT II
Deprivation of Procedural Due Process
Alaska Constitution, Article I, Section 7

51. Plaintiffs reallege and reincorporate by reference paragraphs 1 through 50, as though fully set forth herein.

52. Article I, Section 7, of the Alaska Constitution provides that “[n]o person shall be deprived of life, liberty, or property without due process of law.”

53. The Alaska Supreme Court has held that “the Alaska Constitution’s due process clause must be flexibly applied by balancing three factors: the private interest affected by the official action; the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and finally, the government’s interest, including the fiscal and administrative burdens that additional or substitute procedural

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

Page 23 of 28

requirements would entail.” *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1026 (Alaska 2005) (cleaned up).

54. This standard is identical to the federal balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See *Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105, 1111 (Alaska 2002) (adopting the *Mathews* tripartite test). Courts across the nation have found that a failure to provide timely notice and a meaningful opportunity to cure deficient ballots violates due process under the *Mathews* test. See, e.g., *Democracy North Carolina v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020); *Self Advoc. Sols., N.D. v. Jaeger*, 464 F. Supp. 3d 1039 (D.N.D. 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); see also *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *2 (N.D. Ill. Mar. 13, 2006).

55. Having created an absentee voter statutory scheme through which qualified voters can exercise their fundamental right to vote, Alaska must provide these voters with constitutionally adequate due process protections. See *Martin*, 341 F. Supp. 3d at 1338; *Zessar*, 2006 WL 642646, at *2; *Raetzl v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990).

56. The lack of timely notice and an opportunity to cure ballots slated for rejection for envelope certificate errors fails to meet due

Arctic Village v. Fenumiai

process requirements under the *Mathews* standard. Here, the private interest at issue is the fundamental right to vote. Alaska's statutory regime, which does not provide for timely notice and meaningful opportunity to cure, has resulted in thousands of absentee ballots being rejected because absentee voters are not provided notice and opportunity to cure in a timely manner.

57. The risk of erroneous deprivation of a voter's fundamental right to vote is thus high, and the value of instituting additional procedures to cure such deficiencies is great and will serve to protect the fundamental right to vote.

58. The State's interest in protecting the integrity of elections is easily served while implementing a system that does not disenfranchise Alaska voters due to curable mistakes on their ballot envelope. Any administrative burdens that would be entailed by providing a system of timely notice and an opportunity to cure are likely to be minimal.

59. Many Alaska voters will suffer direct and irreparable injury if Defendants continue to refuse to provide an opportunity to cure the rejection of mail ballots that are missing a required signature or proper voter identifier. Without relief from this Court, these voters will be deprived of their right to vote in the 2022 General Election and beyond.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment:

a) Declaring that Defendants' failure to provide voters with timely notice and a meaningful opportunity to cure deficiencies under Alaska's Voter Signature, Identification Number, and Witness Signature Requirements for mail ballots violates Article V, Section 1, and Article I, Section 7, of the Alaska Constitution;

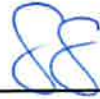
b) Preliminarily and permanently enjoining Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from implementing, enforcing, or giving any effect to the Voter Signature, Identification Number, or Witness Requirements without also providing a process by which voters will be timely notified and provided an opportunity to cure deficient mail ballot envelopes prior to the existing deadline for certifying vote counts;

c) Awarding Plaintiffs their costs, expenses, and reasonable attorneys' fees; and

d) Granting any other and further relief that this Court deems just and proper.

DATED: August 23, 2022.

Respectfully submitted,



Sarah L. Schirack
Alaska Bar No. 1505075
SSchirack@perkinscoie.com

Kevin R. Feldis
Alaska Bar No. 9711060
KFeldis@perkinscoie.com
PERKINS COIE LLP
1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
Telephone: 907-279-8561
Facsimile: 907-276-3108

*Counsel for League of Women Voters Alaska,
Joyce M. Anderson, and Edward H. Toal, IV*

Susan Orlansky
Alaska Bar No. 8106042
susano@reevesamodio.com
ACLU COOPERATING ATTORNEY
500 L Street, Suite 300
Anchorage, AK 99501
Telephone: 907-222-7117
Facsimile: 907-222-7199

Melody Vidmar
Pro hac vice application pending
mvidmar@acluak.org
AMERICAN CIVIL LIBERTIES UNION
OF ALASKA
1057 West Fireweed Lane, Suite 207
Anchorage, AK 99503
Telephone: 907-258-2006
Facsimile: 907-263-2016

Counsel for Plaintiffs

Arctic Village v. Fenumiai
COMPLAINT
Case No. 3AN-22-_____

Page 27 of 28

ARCTIC VILLAGE COUNCIL
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: legal@actvak.org

Megan R. Condon
Alaska Bar No. 1810096

mcondon@narf.org

Matthew N. Newman

Alaska Bar No. 1305023

mnewman@narf.org

Wesley James Furlong

Alaska Bar No. 1611108

wfurlong@narf.org

Sydney Tarzwell

Alaska Bar No. 1801001

tarzwell@narf.org

NATIVE AMERICAN RIGHTS FUND

745 West 4th Avenue, Suite 502

Anchorage, AK 99501

Telephone: 907-276-0680

Facsimile: 907-276-2466

Counsel for Arctic Village Council

Arctic Village v. Fenumiai

COMPLAINT

Case No. 3AN-22-_____

158028564.4

Page 28 of 28