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IN THE SUPREME COURT FOR THE STATE OF ALASKA

KEVIN MEYER, in his official capacity as Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections, and the STATE OF ALASKA, DIVISION OF ELECTIONS, Petitioners, v. ROBERT CORBISIER, Executive Director of Alaska State Commission for Human Rights, *ex rel.* B.L., Respondent.	Supreme Court Case S-18442

Superior Court Case No. 3AN-22-06525 CI

EMERGENCY PETITION FOR REVIEW

Alaska's seat in the U.S. House of Representatives has been vacant since the March 18, 2022 death of Congressman Don Young. Filling that seat requires a special primary election, followed by a special general election. The special primary election—Alaska's first by-mail statewide election—is scheduled to close tomorrow at 8:00 p.m. But this afternoon, the superior court issued an injunction preventing that election from being certified until the Division takes unspecified measures to provide visually impaired voters "a full and fair opportunity to participate in said election." [Order at 10] This will shut down the special primary election, with cascading scheduling consequences that will make an in-person special general election impossible. The Court should grant the petition for review and reverse the preliminary injunction.

BACKGROUND

I. Special Election Timeline

A vacancy in the office of United States Representative requires speedy special primary and general elections to fill the vacancy.[1] By statute, the special primary election must occur "not less than 60, nor more than 90, days after the vacancy," and the special general election follows on "the first Tuesday that is not a state holiday occurring not less than 60 days after the special primary election."[2] Faced with this requirement to conduct a statewide election within 90 days, the Division determined that it would conduct the special primary election by mail, as state law contemplates.[3] Time was simply inadequate to conduct a statewide *in-person* election, preparation for which normally takes seven months.[4]

The Division determined that it would conduct the special primary election on June 11, which is tomorrow.[5] That highly unusual date—a Saturday—was selected because it allows the State to combine the special general election with the *in-person* August 16 regular primary election and provide the most possible time between the two special elections.[6] The last possible date to certify the results of the special primary

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1 Affidavit of Gail Fenumiai at ¶ 2.

2 AS 15.40.140.

3 Fenumiai Aff. at ¶ 4; AS 15.20.800(a) (allowing elections by mail when they occur at a different time than a general, primary, or municipal election).

4 *Id.*

5 Fenumiai Aff. at ¶ 3.

6 *Id.*; AS 15.40.140.

election and combine the special general and regular primary elections is June 25.[7] That is because federal law requires the Division to send by-mail absentee ballots to overseas and military voters 45 days before the election, which is July 2.[8] The Division must know the results of the special primary before it can print those ballots. In order to finalize the ballot design, print the ballots, and meet the federal mailing deadline, the special primary must be certified on June 25. That is the same day as the withdrawal deadline for the regular primary election; the withdrawal deadline for the special general election is the following day.[9]

II. This lawsuit

The plaintiff, ASCHR's Executive Director, filed this case two days ago, Wednesday, June 8. The Complaint and the accompanying Application for Temporary Restraining Order asked the superior court to enjoin the Division "from certifying the results of the 2022 Special Primary Election until such time as visually impaired voters are given a full and fair opportunity to participate in such election." No more specific remedy was requested. Yesterday, the Division filed its Opposition to the motion for preliminary relief along with an Affidavit of Gail Fenumiai, the Division's director, explaining the voting options available to the visually impaired and the importance of keeping the election timeline on schedule. This morning, the Plaintiffs filed a lengthy Reply, raising extensive arguments not presented in their opening motion, and identifying

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7 Fenumiai Aff. at ¶ 21.

8 52 U.S.C. § 20302. *See also* AS 15.20.081(k).

9 Fenumiai Aff. at ¶ 21.

for the first time the precise accommodation they would like the Division to provide: "During the next 12 days," ASCHR would like the Division to distribute the voting tablets it uses for in-person elections "to more polling locations." Reply at 19. The superior court granted their preliminary injunction request at 4:30 this afternoon, but did not identify the specific measures that the Division must take to comply with the order.

The order allowing for additional voting after election day will delay the close of the election, and in turn, the certification of the election, which will have the effect of forcing the uncoupling of the special general election from the regular primary election on August 16. The public will be required to complete, as a result, a fourth election this year. And, by necessity,[10] it will be another statewide by-mail only election like the current one, except that it will also be the very first ranked choice election in state history. Alaska will remain unrepresented in the House beyond September. The harm to the public interest is extreme, and the Division thus files this emergency petition.

ARGUMENT

I. The Court should grant the petition for review.

This Court's discretionary review is warranted under at least two sections of Appellate Rule 402(b). Under (b)(1), postponement of review will result in injustice because after tomorrow, it will be too late for the Division to obtain meaningful review of the superior court's order. And under (b)(2), the superior court's decision involves

[10] Fenumiai Aff. at ¶ 25.

important questions of law on which there is substantial ground for difference of opinion, and immediate review will advance important public interests.

II. The Court should reverse the preliminary injunction.

Although the Court "review[s] the issuance of preliminary injunctions for abuse of discretion," it "review[s] de novo the superior court's legal determinations in issuing the preliminary injunction."[11] The Court should reverse the preliminary injunction because the superior court was wrong on the law and because, in these mid-election circumstances, the injunction is "the result of improvident exercise of judicial discretion."[12]

A "[p]laintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard."[13] But the lower "balance of hardships" standard applies only if the defendant can be "adequately protected"—that is, "only where the injury which will result from . . . the preliminary injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted."[14] The Court must "[a]ssume the defendant ultimately will prevail when assessing the harm to the

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11 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

12 *See id*. at n.11 (quoting *State v. Kluti Kaah Native Vill. of Copper Ctr*., 831 P.2d 1270, 1272 n.4 (Alaska 1992)).

13 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

14 *State v. Kluti Kaah Native Vill. of Cooper Center*, 831 P.2d 1270, 1273 (Alaska 1992) (quoting *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991)).

defendant from the injunction."[15] If the defendant cannot be adequately protected, the plaintiff must make a "clear showing of probable success on the merits."[16]

A. The plaintiff did not establish that it would suffer irreparable harm absent an injunction.

The superior court erred when it accepted the plaintiffs' inadmissible and purely speculative assertions of harm, in the absence of any actual supporting evidence, which is necessary to support the extraordinary remedy of a preliminary injunction. Plaintiffs provided no admissible evidence that any voter has actually been unable to cast a private ballot in this election. Instead, they provided two affidavits[17] that include, at best, hearsay accounts that some members of the visually impaired community found the online ballot marking option "too difficult or burdensome" to use. Such second-hand vague accounts of difficulty—however genuine and worthy of the Division's attention to make further improvements to the system—do not establish the kind of irreparable harm necessary to support an extraordinary injunction causing such far-reaching injury to the public interest.

B. The Superior Court erred in underestimating the harm to the defendants and in turn the public.

Here the superior court suggests—in a section heading—that the Division can be adequately protected, but then fails to explain how that is so. Indeed, the Court appears to recognize that "this election, and the one to follow, will be thrown into chaos if the Court

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15 *Alsworth*, 323 P.3d at 54.

16 *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (quoting *Kluti Kaah Native Vill.,* 831 P.2d at 1272).

17 One of these affidavits was provided just a few hours before the Division's opposition to the TRO was due and should not have been considered by the Court.

enters an injunction and thus delays certification," but simply dismisses this as "an unavoidable consequence of the situation" facing the Court. [Order at 8] But this is nonsense; the court could have avoided the chaos by correctly applying the preliminary injunction standard and denying this last minute motion.

Moreover, the court erred when it allowed a speculative hardship to a few to drown out the Division's plea that the public interest requires the election to proceed on schedule. Here, the unmitigatable harm to the Division—and in turn, the public—is the postponement of an election that has been underway for a month, with cascading consequences. The superior court's order, if upheld, will require the Division to conduct another expensive by-mail election unnecessarily, leaving Alaska's seat in the House vacant even longer. Notably, by preventing the special general election from being combined with the primary election, this injunction will impose the same difficulties on visually impaired voters for that election as is allegedly denying them their rights in this election, because a separate special general election would also have to be conducted by mail. There is simply not enough time to ship voting machines back from the polling locations after the regular August primary, reprogram them for a special general election, send them back out to polling places for an in-person general election, and then get them back again to the central locations and reprogram them for the November general

election.[18] Thus, the injunction harms the visually impaired specifically as well as the Alaskan electorate generally.

In sum, because the plaintiff has not established that it will suffer irreparable harm absent an injunction, and the harm to the State is extraordinary, the preliminary injunction should have been denied.

C. The plaintiff is not clearly likely to succeed on the merits because the Division provides a reasonable accommodation for visually impaired voters—online ballot marking—that federal courts have approved in similar cases.

Visually impaired Alaska voters can cast—and have been casting—completely secret ballots in tomorrow's election via two means. Those who live within traveling distance of the Division's 10 early voting locations can access the voting tablets at those locations through 8 p.m. tomorrow.[19] That covers the majority of Alaskans.

Second, all Alaska voters have the option of requesting an online ballot via email or phone. Voters will then receive a link to the online ballot website, along with an access code to log in. From there, the online ballot tool guides the voter through the ballot marking process. A visually impaired voter can use a screen reader tool—a free and widely available software tool used by visually impaired voters to access the internet—to have the ballot options read to them and select a candidate.[20] The online delivery tool

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[18] The State notes that because this possible "accommodation" was not identified by the plaintiff until it filed its reply this morning, Ms. Fenumiai's affidavit does not clearly explain this, but it is nevertheless true.

[19] Fenumiai Aff. at ¶¶ 11-12.

[20] Fenumiai Aff. at ¶¶ 13-17.

then creates a downloadable PDF of the ballot, which the voter can then print and return to the Division in the same fashion as a hand-marked paper ballot would be.[21]

The Fourth Circuit has held that this exact voting method was a reasonable accommodation that makes absentee mail voting accessible to visually impaired voters without compromising privacy.[22] And the Sixth Circuit has similarly cited Alaska's online delivery option as evidence that such accommodations—which plaintiffs in those federal cases requested—is reasonable.[23]

Here, the plaintiff's position effectively appears to be that Alaska cannot hold a by-mail election because visually impaired voters in Alaska allegedly experience some unspecified difficulty with methods affirmatively sought by similar voters in other states and approved by the federal courts. But the statutes that the plaintiff relies on only require changes that do "not pose an undue burden or require a fundamental alteration of their programs."[24] Requiring a state to turn a by-mail election into an in-person election is not a reasonable accommodation, it is a "fundamental alteration of [the] program." By-mail elections are specifically contemplated under state law for expedited situations like the present one; and no one has all the options that they typically have to vote in this election, because there are no polling places.

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21 *Id.*

22 *Nat'l Federation of the Blind v. Lamone*, 813 F.3d 494, 502, 508-09 (4th Cir. 2016).

23 *Hindel v. Husted*, 875 F.3d 344, 345 (6th Cir. 2017).

24 *See e.g.*, *California Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1237 (N.D. Cal. 2013).

Thus, the plaintiff has failed to show a probability of success on the merits and the injunction should also have been denied for that reason.

D. The balance of the equities and the public interest counsel strongly against upholding this injunction.

Finally, in an elections context, even if a plaintiff has shown irreparable harm and a probability of success on the merits—and here the plaintiff has shown neither—even that is not necessarily adequate given the magnitude of the harm to the public interest caused by enjoining an election. There is "simply no way for the state's interests to be adequately protected" where a preliminary injunction will "prevent the state from administering an election pursuant to its own election laws."[25] Under these circumstances, *even assuming* the plaintiffs face irreparable harm—which their evidence did not establish—an injunction is at best "a zero-sum event, where one party will invariably see unmitigated harm to its interests."[26]

As this Court explained last year in *State v. Galvin*,[27] "[i]f a statewide election is at stake, '[t]he public interest is significantly affected,' with hardship falling not only on the department running elections, but on all citizens of the state." In such circumstances, the "peril" to the public interest vitiates strongly against the granting of preliminary relief

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25 *Metcalfe,* 110 P.3d at 978-79. Similarly, the Ninth Circuit has recognized that "election cases are different from ordinary injunction cases" because "[i]nterference with impending elections is extraordinary." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003).

26 *Id.*

27 491 P.3d 325, 339 (Alaska 2021)

"even if" the plaintiff "satisfies the requirements of the probable success on the merits standard."[28]

E. Even if the plaintiff had met the standard for an injunction, the superior court should still have denied its request as impermissibly vague.

Courts should deny a preliminary injunction when the proposed injunction "lacks the specificity required to convey what management actions [the State] could take without risking contempt."[29] Here, the superior court's order lacks the requisite specificity; it orders only that the Division provide a "full and fair opportunity" for visually impaired voters. The Division currently provides this opportunity, in the form of tablets at early vote locations and the online ballot marking tool, and it cannot determine from the superior court's order what additional steps it must take to comply. The Division is left with no clear direction on how to conduct this election.

CONCLUSION

The superior court erred in concluding that the Plaintiffs established irreparable harm and a clear probability of success on the merits of their case. But even if such a showing was made, the court nevertheless erred when it failed to consider the

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[28] *Id.*

[29] *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 804 (Alaska 2015) (citing *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) ("[T]he specificity provisions of [the analogous federal rule] are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.")).

extraordinary weight of the public interest irreparably harmed by the injunction. The Division urges the Court to grant the petition and reverse.

DATED June 10, 2022.

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