

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT

ALYSE S. GALVIN,

Plaintiff,

v.

GAIL FENUMIAI, in her official capacity as  
DIRECTOR OF THE DIVISION OF  
ELECTIONS; and STATE OF ALASKA,  
DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-20-07991\_CI

**MOTION FOR TEMPORAY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION AND MEMORANUM IN SUPPORT**

The plaintiff moves for a temporary restraining order and preliminary injunction enjoining Defendants from printing and mailing ballots in direct contravention of (a) AS 15.15.030(5), which requires a candidate's party affiliation to be designated after the candidate's name, in addition to the candidate's nominating party; and (b) Article I, Section 5 of the Alaska Constitution, which guarantees the right to freedom of political association.

This lawsuit concerns the Alaska Division of Elections' abrupt decision to break from its established interpretation and application of AS 15.15.030(5) by omitting candidate party affiliation information from the ballot for the 2020 general election. The Plaintiff, congressional candidate Alyse Galvin, became aware of the change through a

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report published on Twitter on September 14, 2020. Her campaign then contacted the Division of Elections to inquire about the change after confirming the same on the Division of Elections website.

A failure to act now will not only result in thousands of illegally and unconstitutionally printed ballots being mailed to uniformed and overseas voters within the next few days, as detailed below, but also put Alaska's congressional election at risk of long, drawn-out post-election contest proceedings that could themselves reach the U.S. Congress. *See Edmondson v. Bellmon*, S. Rep. 94-597 (Senate Committee on Rules and Administration recommended declaring vacancy and holding special election due to irregularities and violations of Oklahoma law, including that U.S. Senate race was listed too low on ballot and thus may have altered election results). Notably, in other instances courts have required ballots to be reprinted.

## ARGUMENT

### **A. The omission of candidates' voter registration party affiliations contravenes AS 15.15.030(5).**

Alaska law mandates that the Director of the Division of Elections "prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections." AS 15.15.030. To that end, "[t]he names of the candidates and their party

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designations shall be placed in separate sections on the state general election ballot under the office designation to which they were nominated,” and “[t]he party affiliation, if any, shall be designated after the name of the candidate.” AS 15.15.030(5). The statute clearly contemplates two party indicators where applicable.

The Alaska Supreme Court’s decision in *State v. Alaska Democratic Party*, 426 P.3d 901 (Alaska 2018) required the Defendants to permit independent, non-partisan, and unaffiliated voter candidates to participate in Democratic primary elections. Since then, the Division of Elections has consistently followed AS 15.15.030(5) by indicating both the party by which each candidate was nominated—in a “separate section[.]”—and the voter registration party affiliation of each individual candidate with a parenthetical “after the name of the candidate.” *Id.*

Omitting candidates’ voter registration affiliation constitutes a clear violation of this directive, which “shall be followed when applicable.” AS 15.15.030. There is no statutory or legal basis for including only the nominating party, particularly when the statute specifically mandates that the “party affiliation, if any, shall be designated after the name of the candidate.” AS 15.15.030(5). Indeed, Defendants reportedly decided they would no longer include the information required by AS 15.15.030(5) in an eleventh-hour decision that Director Fenumiai made “unilaterally on Monday,” September 14, 2020.

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**B. The omission of candidates' voter registration party affiliations violates both Galvin and Alaska voters' constitutional right to freedom of political association.**

The Alaska Constitution grants every person the right to “freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” Alaska Const. art. I, § 5. This inherently guarantees the rights of people—and political parties—to associate together to achieve their political goals. *See State, Div. of Elec. v. Green Party of Alaska*, 118 P.3d 1054,1064-65 (Alaska 2005); *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982).

When an election law or procedure is challenged, Alaska courts first determine whether the claimant has in fact asserted a constitutionally protected right. *Green Party I*, 118 P.3d at 1061 (footnotes omitted) (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)). Next, the court must weigh and assess “the character and magnitude of the asserted injury to the rights,” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* Finally, courts must “judge the fit between the challenged legislation and the [S]tate’s interests in order to determine ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Id.* “This is a flexible test: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the [S]tate’s interest must be closer.” *Id.*; *see also Alaska Democratic Party*, 426 P.3d at 907 (applying this test to hold that the burden imposed by

the Division of Elections' prohibition on allowing independent and unaffiliated voters to run in Democratic primary elections was not justified given the Alaska Democratic Party's right to freedom of association pursuant to Alaska Const. Art. I, § 5).

As the Alaska Supreme Court has clarified, the Alaska Constitution is more protective of political associational rights than the federal constitution. *Id.* at 911. And the Supreme Court has struck down election laws that impinged upon the freedom of association in the political context on multiple occasions. For example, in striking a law that required voters to "fully affiliate themselves with a single political party or to forgo completely the opportunity to participate in that party's primary," the Court found that this "place[d] a substantial restriction on the political party's associational rights." *Green Party*, 118 P.3d at 1065.

Defendants' actions in omitting Galvin's voter registration affiliation from the ballot impinge upon Galvin's constitutionally-protected right to associate politically as a voter as well as through her party nomination. Defendants' actions also burden the associational rights of the non-partisan and independent Alaska voters who support Galvin, or who prefer to support other non-partisan or unaffiliated candidates based on their own political associations and affiliations. Defendants have failed to offer any justification for their actions, let alone any justification for the burdens imposed on the constitutionally-protected rights of Galvin and Alaska voters.

Because Defendants' interests in or justifications for omitting Galvin's voter registration affiliation from the ballot (to the extent they exist) are vastly outweighed by the burdens Defendants' actions impose on the rights to freedom of political association enjoyed by Galvin and all Alaska voters, Defendants' actions are unconstitutional and must be enjoined.

**C. Galvin is entitled to a temporary restraining order and preliminary injunctive relief.**

The legal standards governing temporary restraining orders and preliminary injunctions in Alaska are straightforward and set forth by rule. Under Alaska Rule of Civil Procedure 65(b):

A temporary restraining order may be granted without written or oral notice to the adverse party or the party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the party's attorney can be heard in opposition, and (2) the applicant's attorney certified to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required.

The Alaska Supreme Court applies two different tests, depending on the "the nature of the threatened injury," to determine whether a plaintiff is entitled to a preliminary injunction. *State, Division of Elections v. Metcalfe*, 110 P.3d 976, 978

(Alaska 2005).

If the plaintiff faces the danger of irreparable harm and if the opposing party is adequately protected, then we apply a balance of hardships approach in which the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit. If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a clear showing of probable success on the merits.

*Id.* (internal quotation marks and citations omitted). "The balance of hardships is determined by weighing the harm that will be suffered by the plaintiff if an injunction is not granted, against the harm that will be imposed upon the defendant by the granting of an injunction." *State v. Kluti Kaah Native Village*, 831 P.2d 1270, 1273-73 (Alaska 1992), quoting *A.J. Industries, Inc., v. Alaska Public Service Comm'n*, 470 P.2d 537, 540 (Alaska 1970), modified in other respects, 483 P.2d 198 (Alaska 1971).

Under either the "balance of the hardships" or "probable success on the merits" test, Plaintiff is likely to prevail because the requirements of AS 15.15.030(5) are clear and are not met on Defendants' current ballot, as detailed above and in Plaintiff's Complaint.<sup>1</sup>

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<sup>1</sup> To the extent that a bond is necessary to secure the parties' rights, Plaintiff is amenable to providing a reasonable bond.

Galvin will suffer irreparable harm unless the illegal and unconstitutional printing and mailing of ballots is enjoined immediately because, under federal statute, Defendants must mail ballots to uniformed and overseas voters within the next four days. *See Benesch v. Miller*, 446 P.2d 400, 401-02 (Alaska 1968). Federal law requires that absent stateside and overseas uniformed service members and overseas civilian voters be sent a ballot by no later than 45 days before election day. *See* 42 U.S.C. § 1971, *et seq.* For the November 3, 2020 general election, that deadline is this Saturday, September 19. Once the election has come and gone, serious injuries to Galvin's candidacy cannot be undone through monetary remedies. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2010); *Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at \*8 (N.D. Fla. Oct. 16, 2016).

Although Defendants have already begun the process of printing military and overseas ballots, the number of ballots that Alaska prints and sends to this limited category of voters is a relatively small number of ballots, overall. For example, in 2018, Alaska had 4,216 registered and eligible military and overseas voters, and only transmitted 4,173 military and overseas ballots. *See* U.S. Election Assistance Commission, *The Election Administration and Voting Survey 2018 Comprehensive Report* at Appendix B at 102 (June 2019),

[https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf); *see*



also U.S. Election Assistance Commission, *The Election Administration and Voting Survey 2016 Comprehensive Report* at Appendix B, 102 (2017), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2016\\_EAVS\\_Comprehensive\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf) (In 2016, Alaska sent out 9,647 military and overseas ballots). To the extent that Defendants must incur some expense or burden as a consequence of their brazen attempt to circumvent the law in violation of Plaintiff's and Alaska voters' rights to freedom of association, that expense or burden is justified to prevent a manifest injustice.

### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter a temporary restraining order in accordance with the proposed order, and subsequently enter a preliminary injunction to preserve the status quo and prevent the irreparable harm described herein before the parties can be heard on the merits.

DATED: September 16, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 16, 2020  
a true and correct copy of the foregoing  
document was sent via Email to:

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