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IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF ALASKA

DISABILITY LAW CENTER OF ALASKA, NATIVE PEOPLES ACTION COMMUNITY FUND, ALASKA PUBLIC INTEREST RESEARCH GROUP, ALEIJA STOVER, and CAMILLE ROSE NELSON, Plaintiffs, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF ALASKA and the STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3:20-cv-173-JMK

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Defendants deserve credit for steps taken in the midst of a historic pandemic to administer safe, secure, and accessible elections, and for their commitment to provide robust access. But Defendants' largely laudable actions do not make their selective mailing constitutional, or immunize Defendants from having to correct this outlier.

Defendants do not dispute that the mailing at issue made it easier only for voters 65 and older to vote absentee. Indeed, Defendants spent $50,485.55 to send those voters absentee ballot applications, along with helpful explanations about the absentee voting process.[1] Thus, it is undisputed that Defendants' action impacts voting and, on its face, discriminates "on account of age" while indirectly having an unacceptable disproportionate impact on non-white and rural voters.[2] These actions violate the U.S. and Alaska Constitutions and require immediate injunctive relief.[3]

In their opposition, Defendants make two substantive points—neither persuasive—and one critical omission. First, they claim that *Short v. Brown*

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[1] Declaration of Josh Applebee ¶ 10 [Applebee Decl.] (Docket 25).

[2] U.S. Const. amend. XXVI.

[3] Plaintiffs no longer seek preliminary injunctive relief with respect to their claims under the ADA and 52 U.S.C. § 10502 at this time, but reserve all rights to fully litigate them on the merits.

permits the discriminatory mailing.[4] But *Short* did not implicate the Twenty-Sixth Amendment; it involved dividing voters by geography, not age. Therefore, *Short* properly applied the *Anderson*/*Burdick* test, without considering how to analyze age-based discriminatory state action. Second, Defendants' novel justification for the mailing—"to encourage as many voters as possible to request absentee ballots through [the] new online system rather than by paper application"—is irrational.[5] Mailing 97,000 *paper* applications cannot encourage a shift to *online* applications—especially when the mailing *does not even mention* the new all-online portal.[6] Third, Defendants did not discuss *any* of the merits of Plaintiffs' claims under the Alaska Constitution, a concession affording the full relief Plaintiffs seek.

Finally, with regard to the three other injunction factors, Defendants claim that relief is unwarranted because an additional "mass mailing . . . could create a bureaucratic debacle in the general election."[7] But this is an exaggeration, because Plaintiffs only request that applications be sent to voters

[4] 893 F.3d 671 (9th Cir. 2018).

[5] Defendants' Opposition to Motion for Preliminary Injunction at 20 [hereinafter Opp.] (Docket 22).

[6] *See* Affidavit of Scott M. Kendall, Exhibit A at 2 [hereinafter Exhibit A] (Docket 14, page 5).

[7] Opp. 28 (Docket 22).

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who have not already otherwise applied for or received an application.[8] Further, Defendants chose to create this purported "debacle" by sending *paper* ballot applications directly to over 97,000 Alaskan voters selected "on account of age." Defendants cannot now claim that rectifying their unconstitutional mistake would result in "too many" applications. Indeed, in a pandemic there is no such thing as "too many" voters opting to vote absentee, regardless of how they apply. As Alaska's Chief Medical Officer Dr. Anne Zink recognizes, keeping Alaskans out of close contact with one another—impossible with crowded polling locations—is the most important COVID mitigation strategy.[9]

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[8] The Division of Elections lists 588,072 registered voters in Alaska. Alaska Division of Elections, Number of Registered Voters (Aug. 3, 2020) https://www.elections.alaska.gov/statistics/2020/AUG/VOTERS%20BY%20PARTY%20AND%20PRECINCT.htm. But because over 97,000 Alaskans have already received the discriminatory mailing, and the Division has received a historic number of absentee ballot applications, the number of mailings needed is likely to range between 300,000 and 400,000, not the approximately 500,000 Defendants submit. Applebee Decl. ¶ 11 (Docket 25); *see* Alaska Division of Elections, Primary & General Election Absentee & Questioned Ballot Statistics (Aug. 7, 2020), https://www.elections.alaska.gov/doc/info/statstable.php (showing approximately twice as many absentee ballots issued for the 2020 primary election as for the 2018 general election).

[9] *See* Declaration of Anne Zink ¶ 7 [Zink Decl.] (Docket 23).

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ARGUMENT

I. Defendants' Stated Reasons For The Discriminatory Mailing Cannot Meet Any Level Of Scrutiny.

Defendants only attempt to justify their discriminatory mailing under rational basis review.[10] Their concession means that if any one of Plaintiffs' claims is properly analyzed under a more exacting standard (they are, as explained below) then this court should conclude Plaintiffs are likely to succeed on the merits and entitled to a preliminary injunction.

But Defendants' mailing cannot survive even rational basis review for three reasons: (1) Defendants would have this court assess their actions based on a moment frozen in time, ignoring Alaska's current conditions; (2) there is sufficient funding, time, and resources to mail additional applications; and (3) the discriminatory mailing actually undercuts Defendants' stated goal of reducing paper applications.

First, Defendants argue that their May decision to mail absentee ballot applications only to voters 65 and older was justified based on then-current knowledge, ending the inquiry.[11] But Dr. Zink acknowledges that our "understanding of this virus is constantly evolving," and that the CDC has

[10] *See* Opp. 19-22 (Docket 22).

[11] Applebee Decl. ¶ 9 (Docket 25).

"revised its guidance" so that individuals over 65 no longer comprise a specifically-identifiable "at risk" group.[12] Dr. Zink does not dispute—nor could she—Plaintiffs' undisputed evidence that the virus is circulating much more widely today.[13] Given this worsening situation, it is irrational for Defendants to freeze their response to the ongoing pandemic in May for an election in November.[14] It is telling that Dr. Zink cannot and does not dispute that the more Alaskans who vote absentee, the safer all Alaskans are regardless of age.[15]

Second, Defendants acknowledge that neither cost nor logistics prevent them from mailing absentee ballot applications to voters who have not received one or otherwise applied.[16] Defendants assert that the bid process to send additional mailers will take "3-4 weeks," plus some additional time to actually

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[12] Zink Decl. ¶¶ 2-4 (Docket 23).

[13] Unfortunately, the prevalence of COVID-19 in Alaska continues to worsen even today. In less than three weeks, there have been 1,672 new resident cases identified in Alaska, and 8 additional deaths. *See* https://coronavirus-response-alaska-dhss.hub.arcgis.com/ (last visited Aug. 9, 2020) (reviewing cases between July 21—the day before Plaintiffs' motion was filed—and August 9).

[14] *Cf. Shelby County, Ala. v. Holder*, 570 U.S. 529, 550 (2013) (striking down Voting Rights Act provision that relied on outdated data because "current burdens must be justified by current needs").

[15] *See generally* Zink Decl. (Docket 23).

[16] *See* Opp. 27 (Docket 22).

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prepare the mailing.[17] Even assuming that timeline could not be shortened—and it likely can, if Defendants must respond to a court order—Defendants do not dispute that there is sufficient time to comply in advance of the general election.

Third, Defendants' current rationale for the selective mailing defies logic. Defendants state they want "to encourage as many voters as possible to request absentee ballots through its new online system rather than by paper application."[18] The logical flaw here is plain: by mailing 97,000 *more* applications that it otherwise would have, the State has *increased* the number of paper applications it is likely to receive. Moreover, to reduce the number of paper applications received, the mailing could have encouraged recipients to use the new all-online application, and only return the paper application if truly necessary—yet it said nothing of the sort.[19] Instead, Defendants' selective mailing has only one logically possible outcome: a net increase in paper ballot applications, due to an increase in paper ballot applications by those 65 and

[17] Applebee Decl. ¶ 11.

[18] Opp. 20 (Docket 22); *see also id.* at 2, 5, 21, 22, 27.

Elsewhere, Defendants also broadly call the selective mailing a "legitimate act of outreach." *Id.* at 2. Voter outreach in general is a valid state interest, but the question for this court is whether Defendants can justify this discriminatory form of outreach to only one group of voters and not another.

[19] Exhibit A at 2 (Docket 14, page 5).

older. There are certainly many ways to "encourage as many voters as possible" to use the online system, and Defendants' desire to do so makes sense. But that rationale cannot salvage the selective mailing because its logical outcome is *more* paper applications than if it had never happened.

In sum, this court should conclude that the discriminatory mailing cannot even satisfy rational basis review, let alone any heightened standard.

II. The Twenty-Sixth Amendment Prohibits Defendants' Selective Mailing.

The Twenty-Sixth Amendment's text is unequivocal: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."[20] It mirrors the text of voting rights Amendments like the Fifteenth, Nineteenth, and Twenty-Fourth.[21] And if, under identical language,

[20] U.S. Const. amend. XXVI; *see City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("In assessing the breadth of [a constitutional provision], we begin with its text."); *see also Bostock v. Clayton Cty., Ga.*, 140 S.Ct. 1731, 1737 (2020) ("When the express terms of a [provision] give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[21] Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 16-22 [hereinafter Motion] (Docket 13).

Compare U.S. Const. amend. XXVI ("*The right of the citizens of the United States*, who are eighteen years of age or older, *to vote shall not be denied or abridged by the United States or by any State on account of* age." (emphasis added)), *with id.* amend. XV ("*The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of* race, color, or previous condition of servitude." (emphasis added)); amend. XIX ("*The right of the*

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Defendants may not mail absentee ballot applications only to citizens of a certain race or gender, then they also may not mail absentee ballot applications only to citizens of a certain age.[22]

Defendants acknowledge this premise and note that "strict scrutiny would apply if the State were to mail absentee ballot applications to only voters of a certain race."[23] But they resist the logical conclusion by asserting that age, unlike race, is not a "suspect classification."[24] This argument ignores that, since the Twenty-Sixth Amendment's ratification in 1971, age has explicitly been a suspect classification when used to privilege one group's ability to exercise the right to vote over others.[25] Defendants' mailing therefore

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citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." (emphasis added)), amend. XXIV ("*The right of the citizens of the United States to vote* in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, *shall not be denied or abridged by the United States or any State* by reason of failure to pay any poll tax or other tax." (emphasis added)).

[22] Motion 16-22 (Docket 13).

[23] Opp. 19 (Docket 22).

[24] *Id.*

[25] *See Walgren v. Howes*, 482 F.2d 95, 102 (1st Cir. 1973) (noting, in a Twenty-Sixth Amendment case, that "the voting amendments would seem to have made the specially protected groups, *at least for voting-related purposes*, akin to a 'suspect class,'" entitled to heightened judicial scrutiny." (emphasis added)); *see also Harman v. Forssenius*, 380 U.S. 528 (1965) (holding a state may not require a voter to take *any* additional step to vote, including merely filing a certificate of residence, for failure to pay a poll tax); *Prewitt v. Wilson*, 242 Ky. 231, 235 (1932) (striking down a law requiring women, but not men, to pass a literacy test to vote).

discriminates along an expressly prohibited category. Therefore, it is subject to strict scrutiny like any other voting restriction based on prohibited classifications like race or gender, a hurdle Defendants concede cannot be cleared.

Defendants cannot escape this textually-required conclusion by pointing to other ways Alaskans may request absentee ballots and concluding that their availability means there is "no burden on the right to vote whatsoever" on those who did not receive the mailing.[26] This argument ignores what it means to "abridge" the right to vote.[27] As the Supreme Court has stated, "the term 'abridge' . . . necessarily entails a comparison."[28] In this context, a court asks whether the right to vote has been abridged "relative to what the right to vote ought to be."[29] If so, as here, "the status quo itself must be changed."[30] The new status quo is an absentee ballot application on every doorstep and a letter

[26] Opp. 13 (Docket 22).

[27] Motion 18-19 (Docket 13).

[28] *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333–34 (2000). The statutory interpretation aspect of *Reno* was superseded by statute, *see* 120 Stat. 577, § 2(b)(6) (2006)), and then that provision was rendered unconstitutional in *Shelby County*, 570 U.S. at 529. The *Reno* Court's constitutional interpretation of the word "abridge" remains good law.

[29] *Reno*, 528 U.S. at 333–34.

[30] *Id.*

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explaining the voting process for one group of older voters—but nothing for the younger cohort.

The Twenty-Sixth Amendment requires that the right to vote as it "ought to be" cannot be distributed unequally "on account of age." Indeed, equality was Defendants' initial commitment: to "enhance outreach efforts to ensure *all* Alaskans have the greatest access to vote in . . . 2020."[31] They have followed through in many respects.[32] But the selective mailing undermines their stated goal to maximize voting access for *all* Alaskans. Defendants have instead given older Alaskan voters a multi-step head start for the absentee ballot application process, and in doing so, they fall short of their own—and more importantly, the Twenty-Sixth Amendment's—articulation of "what the right to vote ought to be."

The selective mailing's unconstitutionality is illuminated by its contrast with Alaska's other, non-discriminatory voting-access programs. For example, voter registration is automatic for all who apply for a permanent fund dividend.[33] Additionally, all Alaska voters can obtain absentee ballots in many

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[31] Office of Lt. Governor Kevin Meyer, Press Release: State of Alaska to Focus on Ballot Access for August Primary (May 15, 2020) [hereinafter Meyer Press Release], https://ltgov.alaska.gov/newsroom/2020/05/state-of-alaska-to-focus-on-ballot-access-for-august-primary/ (emphasis added).

[32] *See generally* Declaration of Gail Fenumiai [Fenumiai Decl.] (Docket 24)

[33] Opp. 3 (Docket 22).

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ways: in person, by telephone, and online.[34] And voters can request absentee ballots without an excuse.[35] There should be no dispute that it would be unconstitutional and irrational to discriminate "on account of age" in any one of these programs.

The same principle applies to Defendants' discriminatory mailing. Sending absentee ballot applications to voters is just another means through which the state actualizes its citizens' right to vote. The Twenty-Sixth Amendment states that such actions cannot privilege one group of voters over another "on account of age." Therefore, Defendants' claim that the selective mailing is merely additional "outreach" to a subset of voters does not make it constitutional.

Defendants' additional argument that any action affecting absentee balloting does not implicate the constitutional right to vote rests on inapt or incorrectly decided cases.[36] Defendants primarily rely on *Short v. Brown*, but that case did not involve discriminatory state action under the Twenty-Sixth Amendment (or its civil rights analogs).[37] Instead, *Short* stands for the simple

[34] *Id.* at 4.

[35] *Id.*

[36] Opp. 12–19 (Docket 22).

[37] *Id.* at 14-17. Another case Defendants rely on, *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), actually supports Plaintiffs' claim. *See id.* at 19. The Seventh Circuit noted that the arguments "under the Twenty-Sixth Amendment (for age)"

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proposition that California's phased approached to all-mail elections—where some counties moved to all-mail elections sooner than others—survived constitutional scrutiny. The state action at issue in *Short* amounted to a *temporary* distinction among citizens based on *geography*, not *permanent* discrimination based on *age* (or any other constitutionally-protected class).[38] Accordingly, it made sense for the *Short* court to apply less scrutiny in finding the state action "not 'severe' enough to trigger strict scrutiny on the *Anderson/Burdick* scale."[39] In other words, the Ninth Circuit's conclusion that "the state's important regulatory interests are generally sufficient to justify reasonable, *nondiscriminatory* restrictions" arose in a different factual and legal context from this case.[40] It is neither binding nor persuasive.

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should be treated "the same as those under the Fifteenth Amendment (for race)." *Id.* at 673. But no heightened standard applied, because there was no express age discrimination, only discrimination against students. Still, the *Luft* court invalidated a provision under which "students are treated differently from other potential voters," because the difference was unjustified. *Id.*

[38] To actually be analogous to this case, Defendants here would have to have intended to mail out applications later to all of the under 65 voters. But Defendants have been clear that they intend never to mail such applications, making the discrimination permanent, and making *Short* even more factually distant from this case.

[39] *Short*, 893 F.3d at 678 (citation omitted).

[40] *Id.* at 676 (emphasis added) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Finally, although *Texas Democratic Party v. Abbott* addresses the Twenty-Sixth Amendment, it is equally unavailing.[41] There, the Fifth Circuit's motions panel misapplied *McDonald v. Board of Elections*[42]—a factually distinguishable, pre-Twenty-Sixth Amendment case—in concluding that a Texas law allowing voters 65 and older to vote absentee without an excuse did not implicate the right to vote.[43] Like Defendants here, the Fifth Circuit missed the point: State actions violate the Twenty-Sixth Amendment whenever they fail to "treat all citizens 18 years of age or older alike for all purposes related to voting,"[44] *not* because they deny a claimed right to vote by absentee ballot. Defendants and the Fifth Circuit are wrong that *Anderson/Burdick* supplants the more rigorous, text-based analysis governing discrimination claims under the Twenty-Sixth Amendment, just like the three other voting rights amendments. Plaintiffs do not claim that they have been deprived of a fundamental right to vote absentee. Instead, their claim tracks the Twenty-

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[41] 961 F.3d 389 (5th Cir. 2020).

[42] 394 U.S. 802 (1969).

[43] *Texas Democratic Party*, 961 F.3d at 404.

[44] *Jolicoeur v. Mihaly*, 488 P.2d 1, 12 (1971); *see also Colorado Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972) ("[T]he prohibition against denying the right to vote to anyone eighteen years or older by reason of age applies to the entire process involving the exercise of the ballot and its concomitants.").

Sixth Amendment's text: they claim their "right to vote" was "abridged" on "account of age."

Judge Ho's concurrence in *Texas Democratic Party* is a more useful guidepost for this court's analysis:

> The Twenty-Sixth Amendment forbids discrimination in voting "on account of age." Similarly, the Fifteenth Amendment forbids discrimination in voting "on account of race." The text of the Fifteenth Amendment closely tracks the text of the Twenty-Sixth Amendment. And it would presumably run afoul of the Constitution to allow only voters of a particular race to vote by mail. *See McDonald*, 394 U.S. at 807 (offering vote-by-mail on the basis of race would trigger "more exacting judicial scrutiny").[45]

That reasoning is correct and supports entry of an injunction in this case.[46]

The bottom-line is that all of Defendants' other programs treat voters of all ages the same, and Defendants re-committed to that practice in May.[47] But

[45] *Id.* at 416 (Ho, J., concurring).

[46] Judge Ho denied relief to the Texas plaintiffs on two grounds not presented here. First, the plaintiffs there "d[id] not mention the Fifteenth Amendment," though Plaintiffs stress it here. Second, the Texas case involved "two remedial alternatives"—taking away the benefit from older voters or giving it to younger voters—but, because of the nature of Defendants' action here, the only remedy in this case is sending absentee ballot applications and cover letters to everyone. *See id.* at 416–17. Judge Ho's reasoning thus supports entry of a preliminary injunction in this case.

[47] Notably, many of Defendants' election access efforts have only come about due to citizen initiatives and lawsuits, usually over the same objections of "impossibility" by the state. *See* Richard Mauer, Native Language Speakers Win Voting Rights Lawsuit Against State, Anchorage Daily News (updated Sept. 28, 2016), https://www.adn.com/politics/article/native-language-speakers-win-lawsuit-against-state/2014/09/03/. For example, properly translated ballots in

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then they went astray. Regardless of whether their intent with the selective mailing was noble or nefarious, Defendants violated the Twenty-Sixth Amendment's clear command.[48]

III. Defendants' Discriminatory Mailing Violates Both Equal Protection And Substantive Due Process Under The Alaska Constitution—Which Defendants Do Not Dispute.

Despite Plaintiffs' thorough explanation of why the mailing violates both equal protection and substantive due process under the Alaska Constitution,[49] Defendants failed to meaningfully address either claim,[50] only arguing that all of Plaintiffs' claims should be subject to rational basis review.[51] In the face of

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Alaska Native languages are available today only through litigation. *See* Order Re Interim Remedies (Docket 226) in *Toyukak v. Mallott*, 3:13-cv-00137-SLG (Sept. 22, 2014). And automatic voter registration became a reality after a successful citizen initiative. Fenumiai Decl. at ¶ 3 (Docket 24).

[48] Defendants fail to analyze the selective mailing under the *Anderson/Burdick* balancing test that would apply if the Twenty-Sixth Amendment did not, but it fails under that test as explained previously. *See supra* Section 1. Unlike the reasonable, statutory roll-out of statewide vote-by-mail in *Short*, the "precise interests put forward by the State as justifications" for this selective mailing are irrational or outdated, and so cannot support *any* burden on Plaintiffs' rights. *Anderson*, 460 U.S. at 789; *see supra* Section 1.

In addition, Proposed Amicus Curiae Honest Elections Project argues that the selective mailing somehow does not constitute state action. Proposed Brief of The Honest Elections Project at 13-20 [hereinafter Amicus] (Docket 26-1). But the challenge is to *Defendants' response* to the pandemic, not the existence of the pandemic in the first place. *See generally* Applebee Decl. (Docket 25); Fenumiai Decl. (Docket 24).

[49] Motion 25-33 (Docket 13).

[50] *See generally* Opp. (Docket 22).

[51] *Id.* 19-22.

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that failure and Plaintiffs' unchallenged—indeed, unchallengeable—view that the Alaska Constitution "affords greater protection to individual rights than the United States Constitution[,]"[52] this court should grant Plaintiffs' motion for a preliminary injunction on these two claims under the Alaska Constitution.

A. Defendants' Age-Based Mailing Violates Equal Protection Under the Alaska Constitution.

Defendants are correct that the Alaska Supreme Court has adopted a sliding-scale framework similar to *Anderson/Burdick* for determining how closely to scrutinize governmental infringements on the franchise.[53] But Defendants incorrectly assert that this framework mandates rational basis review here. They are wrong for at least two reasons.

First, the parties agree that strict scrutiny can apply to governmental restrictions when a fundamental constitutional right is infringed.[54] And as explained above, the Twenty-Sixth Amendment explicitly makes any abridgment of the right to vote "on account of age" unconstitutional, just like

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[52] *ACLU v. State*, 122 P.3d 781, 787 (Alaska 2005) (quoting *Malabed v. N. Slope Borough*, 70 P.3d 416, 420 (Alaska 2003)).

[53] Opp. 13 (Docket 22); *see Sonneman v. State*, 969 P.2d 632, 637 (Alaska 1998) (citing *O'Callaghan v. State*, 914 P.2d 1250, 1253-54 (Alaska 1996)).

[54] *See* Opp. 12-13, 19 (Docket 22).

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any abridgement of the right to vote "on account of race" or "on account of sex," which would be subject to strict scrutiny.[55]

Second, the framework adopted by the Alaska Supreme Court only permits rational basis review if the government's purpose is "to assure that elections are operated equitably and efficiently."[56] Here, by definition, Defendants' mailing was not "equitable," in either design or impact.[57] The mailing created two unequal classes of voters on account of age: those who received an absentee ballot application and explanatory letter, and those who did not. Strict scrutiny should therefore apply to Plaintiffs' equal protection claim under the Alaska Constitution for this reason as well.

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[55] *See Pub. Emps.' Ret. Sys. v. Gallant*, 153 P.3d 346, 349-50 (Alaska 2007) ("[W]hen a classification is based on a suspect factor (for example, race, national origin, or alienage) or infringes on fundamental rights (for example, voting, litigating, or the exercise of intimate personal choices) a classification will be upheld only when the enactment furthers a 'compelling state interest' and the enactment is 'necessary' to the achievement of that interest. We refer to this as the strict scrutiny standard." (footnote omitted) (citing *Gonzalez v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994); *State v. Ostrosky*, 667 P.2d 1184, 1192-93 (Alaska 1983))).

[56] *Sonneman*, 969 P.2d at 637 (quoting *O'Callaghan*, 914 P.2d at 1254).

[57] Defendants acknowledge that Plaintiffs' Complaint addresses the disparate racial and geographic impacts of the discriminatory mailing, but then fail to address them because they claim Plaintiffs did not discuss them in the initial motion. Opp. 19 (Docket 22). That is not correct. *See* Motion 29-30 (noting in support of equal protection violation that "[v]oters 65 years of age and older [are] also more likely to be white, and more likely to be located outside of rural Alaska.") (Docket 13); *see also* Amended Complaint (Docket 8-1) ¶¶ 8, 44-45, Counts IV-V.

Even under rational basis review, this court cannot ignore that the Alaska Constitution "affords greater protection to individual rights than the United States Constitution[.]"[58] And the disproportionate racial and geographic impact of Defendants' discriminatory mailing cannot be overlooked. Sending absentee ballot applications only to those 65 and over means Defendants provided assistance to *nearly double* the proportional share of white voters as nonwhite voters,[59] and rural Alaskan voters were similarly disadvantaged by Defendants' age-based mailing.[60]

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[58] *ACLU v. State*, 122 P.3d 781, 787 (Alaska 2005) (quoting *Malabed v. N. Slope Borough*, 70 P.3d 416, 420 (Alaska 2003)).

[59] Out of all white Alaskans, approximately 15% are 65 or older, while nonwhite Alaskans comprise only 7.63% of those 65 or older. *See* Alaska Department of Labor and Workforce Development, Spreadsheet of Alaska Population by Age, Sex, Race (Alone) and Hispanic Origin, July 2019 https://live.laborstats.alaska.gov/pop/estimates/data/AgeBySexByRaceAloneHispAK.xls (last accessed Aug. 7, 2020).

[60] *See* Alaska Department of Labor and Workforce Development, Alaska Population Overview: 2013 Estimates, at 6, 37, 75 (Feb. 2015), https://live.laborstats.alaska.gov/pop/estimates/pub/13popover.pdf (showing that 88% of Alaskans 65 and older live in urban areas, while approximately 20% of Alaska's population lives in rural areas).

Even Defendants' online portal has serious flaws when it comes to accessibility in rural Alaska. As Defendants concede, *nearly 30,000 eligible voters* lack a state ID card needed to access the new portal. Fenumiai Decl. ¶ 8 (Docket 24). Many, if not most, of those voters reside in rural Alaska. *See generally* Amended Complaint (Docket 8-1). Defendants' use and reliance on the online portal itself discriminates against rural Alaskans, huge numbers of whom have no access to reliable broadband or internet at all. *See* BroadbandNow, Internet Access in Alaska (last visited Aug. 9, 2020) (showing that approximately 148,000 Alaskans lack high-speed internet, and approximately 60,000 largely-rural Alaskans have no wired internet connection at all),

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Because Defendants' discriminatory mailing is illogical and therefore fails rational basis review,[61] because it has a disparate impact on nonwhite voters, and because of the Alaska's Constitution's independent and greater protections, this court should conclude that Plaintiffs are likely to succeed on the merits of their equal protection claim under the Alaska Constitution.

B. Defendants' Age-Based Mailing Violates Substantive Due Process Under the Alaska Constitution.

In addition to favorably construing Defendants' decision to not even respond to Plaintiffs' substantive due process claim,[62] there are independent reasons for this court to conclude that Defendants' discriminatory mailing violates substantive due process under the Alaska Constitution. After all, Defendants decided to mail absentee ballot applications to voters 65 and older without *any* statutory or regulatory authority. Because Defendants acted "unfair[ly], irrational[ly], and arbitrar[ily,]"[63] this court should conclude that Plaintiffs are likely to succeed on the merits of their substantive due process claim under the Alaska Constitution.[64]

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https://broadbandnow.com/Alaska#:~:text=Currently%2C%2079.8%25%20of%20Alaskans%20have,wired%20connection%20available%20at%20all.

[61] *See supra* Section I.

[62] *See generally* Opp. (Docket 22).

[63] *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 125 (Alaska 2019).

[64] Because of Defendants' age-based discrimination and the plain language of the Twenty-Sixth Amendment, strict scrutiny should apply. But even under

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IV. Plaintiffs Are Entitled To An Injunction Because They Will Be Irreparably Harmed, The Balance of Equities Tips In Their Favor, And An Injunction Is In The Public Interest.

Plaintiffs also meet the three equitable factors in the injunction analysis.

A. Defendants' Selective Mailing Irreparably Harms All Alaskan Voters Under The Age Of 65.

Defendants have created an unconstitutional and unlawful imbalance between the ability of Alaskans 65 and older versus those under 65 to safely exercise their voting rights. Defendants do not dispute that, if Plaintiffs have been harmed, it is irreparable absent an injunction.[65] Instead, they claim that Plaintiffs are not harmed at all, because "all Alaska voters can already apply for an absentee ballot."[66] Although true, it is not relevant to the analysis. The well-established harm comes both from Plaintiffs not having as ready access to absentee applications as older voters, as well as the stigmatic harm caused by all forms of discrimination. Indeed, Defendants ignore Ninth Circuit caselaw that, "[u]nlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute

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rational basis review, because Defendants lack a rational justification for ignoring well-established statutory and regulatory frameworks, this court should conclude that Plaintiffs are likely to prevail. *See supra* Section 1.

[65] Opp. 26–29 (Docket 22).

[66] *Id.* at 26.

irreparable harm."[67] After all, if Defendants' argument were correct, then there would equally be no irreparable harm in sending absentee ballot applications only to white voters or to men—which Defendants concede would be unconstitutional[68]—because, by Defendants' logic, the voters of the disfavored race or gender would still be able to "apply for an absentee ballot." That is not the law.

B. The Balance of Hardships Tips Sharply Towards Plaintiffs.

Defendants claim it would be a substantial hardship to provide an additional mailing to voters who have not received one because of "the potential impact of diverting potentially tens of thousands of Alaska voters from using the efficient online absentee ballot application in favor of paper forms that take significantly more effort to process."[69] But Defendants' own actions undermine this claim. No law or regulation required Defendants to engage in *any* affirmative outreach in this manner. But when they (wisely) decided to do so, Defendants mailed out 97,000 newly-printed *paper* ballot applications with cover letters that failed even to *mention* their preference that Alaskans apply online. And now they complain that treating voters of all ages the same would

[67] *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008).

[68] Opp. 19 (Docket 22).

[69] Opp. 27 (Docket 22).

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be impractical because it would result in too many paper applications. To the extent this is not a purely speculative problem,[70] it is one entirely of Defendants' own making.

Moreover, Plaintiffs are open to helping craft relief that would minimize any administrative burden while remedying the existing constitutional violations. For instance, the mailing's content could be altered to emphasize and encourage use of the online portal as the default by noting the paper application should be used only if the online portal is unfeasible. Additionally, Defendants have enough time that the mailings could be sent out in three or four "batches" separated in time, making the applications less likely to all come back at once. These measures would eliminate Defendants' claimed risk of processing delays while still remedying the differential hardships Defendants have left in place for younger voters relative to older ones.

C. A Preliminary Injunction Is In The Public Interest.

Finally, the public interest cuts heavily in favor of an injunction. Dr. Zink stated in her declaration that "social distancing" is among "[t]he most effective ways to minimize the spread of the disease."[71] And the best way to

[70] Defendants' declarations provide no actual evidence regarding Defendants' processing capacities.

[71] Zink Decl. at ¶ 7 (Docket 23).

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maintain physical distance in an election is for more people to vote by absentee ballot.

Defendants do not mention this aspect of the public interest, instead repeating the refrain that a new mailing could lead to a "bureaucratic debacle."[72] They conclude by advising this court not to "micromanage" the election,[73] but Plaintiffs wish to do nothing of the sort. Plaintiffs simply ask this court to ensure that Defendants comply with the U.S. and Alaska Constitutions and keep to their clear promise from only months ago: to "enhance [the State's] outreach efforts to ensure *all* Alaskans have the greatest access to vote" in these extraordinary times.[74] The public interest tips strongly in favor of providing every Alaskan information and assistance in voting by absentee ballot.

Finally, Defendants and proposed Amicus claim that *Purcell v. Gonzales* should prevent this court from changing the "rules" of the upcoming general election.[75] Their reliance on *Purcell* is misplaced. Plaintiffs' are not asking this court for an eleventh-hour change to the rules of an election; Plaintiffs' request is only for Defendants to mail younger voters the same absentee ballot

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[72] Opp. at 28 (Docket 22).

[73] *Id.*

[74] Meyer Press Release (emphasis added).

[75] 549 U.S. 1 (2006); *see* Opp. 28 (Docket 22); Amicus 20-27 (Docket 26-1).

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application which was sent to older voters. And, unlike *Purcell* and its progeny, Plaintiffs are not requesting that Defendants abandon enforcement of any law or regulation; instead, they ask for the correction of an *ad hoc* act of discretion which Plaintiffs challenged as quickly as possible. Thus, granting Plaintiffs' request cannot sow voter confusion because no substantive rules will be changed. Instead, the rest of the electorate would receive a version of the mailing, which would clarify the available means to obtain absentee ballots.

CONCLUSION

Defendants should be commended for the myriad ways they are helping voters and preparing for a safe and secure election. But Defendants have unconstitutionally discriminated against the majority of Alaskan voters by only mailing absentee ballot applications to older voters. This court should make this election even safer by entering a preliminary injunction without delay.

Dated this 10th day of August 2020, at Anchorage, Alaska.

/s/ Scott M. Kendall
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CERTIFICATE OF SERVICE

I hereby certify that, on the 10th day of August 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I further certify that this reply does not exceed 5,700 words. The total word count for this reply, pursuant to Local Civil Rule 7.4(a) and this court's order on overlength briefing (Docket 19), is 5,606 words.

/s/ Scott M. Kendall
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