IN THE SUPREME COURT FOR THE STATE OF ALASKA

AUSTIN AHMASUK, Appellant, v. DIVISION OF BANKING AND SECURITIES, Appellee.	)	No. S-17414

Superior court: 3AN-18-06035 CI

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

BRIEF OF APPELLANT

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

Meredith Montgomery, Clerk
Appellate Courts

By:_____
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AUTHORITIES PRINCIPALLY RELIED ON

Alaska Constitution, art. I, sec. 5

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

Alaska Constitution, art. I, sec. 7

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

3 AAC 08.307. Filing of proxy solicitation materials

(a) An annual report, proxy, consent or authorization, proxy statement, or other material relating to proxy solicitation required to be filed with the administrator under AS 45.55.139 shall be filed electronically, in digital media format, or in paper format. The filing must be similar in appearance to the material that is distributed to shareholders.

3 AAC 08.355. Non-board solicitations

The solicitation of proxies on behalf of a participant, other than solicitations under 3 AAC 08.345, must be preceded or accompanied by a dated, written proxy statement including the following:

(1) the name of the corporation in respect to which proxies are being solicited;
(2) the name and address of each participant, including each proxyholder, who has joined or proposes to join in the solicitation;
(3) a statement indicating whether any of the participants in the solicitation has an arrangement or understanding with an entity for future employment by the corporation or future financial transactions to which the corporation will or may become a party, and a description listing the terms of and the parties to each arrangement or understanding;
(4) if action is to be taken on the election of directors, a description of each nominee of the participant who has consented to act if elected; each description must include, if applicable
   (A) name, age, and state and city of residence;
   (B) all positions and offices presently and previously held with the corporation and its subsidiaries;

(D) the total number of board meetings, including regularly scheduled and special meetings, and the number of meetings of committees on which the nominee served, and the percentage attendance during the last fiscal year at meetings of the board, including regularly scheduled and special meetings, and meetings of committees on which the nominee served, including those meetings for which the absence was excused;

(E) the nature of any family relationship with any director, nominee, or executive officer of the corporation and its subsidiaries;

(F) business experience during the past five years, including

(i) principal employment or occupation;

(ii) the nominee's or director's employer; and

(iii) other directorships held for other entities; and

(G) any of the following events that occurred during the past 10 years: voluntary or involuntary petition under any bankruptcy or insolvency laws, appointment of a receiver, pending criminal proceedings except traffic violations or other minor offenses, conviction or plea of nolo contendere in a criminal proceeding, except traffic violations or other minor offenses, and the entry of any final judgment, order, or decree, not subsequently reversed or vacated, that the nominee engaged in unethical or illegal business practices, violated fiduciary duties, or violated securities laws;

(5) a brief description of financial transactions by the corporation, including purpose and amount, with that participant, a member of that participant's family, or any entity since the beginning of the corporation's last fiscal year and presently proposed financial transactions by the corporation with that person or entity if

(A) the transactions in the aggregate exceed $20,000; and

(B) the participant in the solicitation or a member of the participant's family is a party to the transaction or is employed by, is an officer or director of, or owns, directly or indirectly, an interest in the entity who is a party to the transaction;

(6) a brief description of all legal proceedings to which each participant in the solicitation is a party with interests adverse to the corporation or its subsidiaries during the last 10 years;

(7) a brief description of the methods to be employed to solicit proxies, if other than by the use of the mail;

(8) a statement of the total amount estimated to be spent and the total already expended on the solicitation of proxies;

(9) a statement indicating who will bear the expense of solicitation, and the amount each participant in the solicitation has contributed or has agreed to contribute, unless the participant is a contributor of less than $500 in the aggregate;

(10) a statement indicating whether reimbursement for solicitation expenses will be sought from the corporation; and

(11) if the proxy statement relates to any matter requiring notice to shareholders by law or to a special shareholders' meeting for which any participant in the solicitation sought shareholder signatures on a document calling for the special meeting

(A) a description of each matter which is to be submitted to a vote of the shareholders and a statement of the vote required for its approval; and

(B) a description of any substantial interest, direct or indirect, by shareholdings or otherwise, of each participant in the solicitation, or family member of that participant, in any matter to be acted upon at the meeting, unless the participant or family member owns shares in the corporation and would receive no extra or special benefit not shared on a pro rata basis by all other shareholders of the same class.

3 AAC 08.365. Definitions relating to solicitation of proxies

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

(12) "proxy" means a written authorization which may take the form of a consent, revocation of authority, or failure to act or dissent, signed by a shareholder or his attorney-in-fact and giving another person power to vote with respect to the shares of the shareholder;

(16) "solicitation" means

(A) a request to execute or not to execute, or to revoke a proxy; or

(B) the distributing of a proxy or other communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy;

STATEMENT OF JURISDICTION

Austin Ahmasuk appeals to the Supreme Court from the final decision of the superior court distributed on March 4, 2019. [Exc. 67-78] Notice of appeal was timely filed on March 29, 2019. This Court has jurisdiction over this appeal pursuant to AS 22.05.010(a) and (c).

ISSUES PRESENTED

(1) Does a letter to the editor of a newspaper that advocates against the use of discretionary proxies in an Alaska Native Corporation election for the board of directors, written and published when no candidates for election have been announced, qualify as a proxy solicitation under Alaska regulations?

(2) If such a letter is a proxy solicitation under Alaska's regulations, does application of these regulations to the letter violate a shareholder's constitutional rights of due process and free speech?

STATEMENT OF FACTS

The regulations at issue

This case centers on the application of Alaska's proxy solicitation regulations that relate to elections to the board of directors of an Alaska Native Corporation. The starting point must be the definitions at issue in this case. Alaska law defines "proxy" and "solicitation" in two paragraphs of 3 AAC 08.365, the regulation that defines terms used in other regulations of the Division of Banking and Securities. The definition sections state:

> "proxy" means a written authorization which may take the form of a consent, revocation of authority, or failure to act or dissent, signed by a shareholder or his attorney-in-fact and giving another person power to vote with respect to the shares of the shareholder[1]
>
> "solicitation" means
>
> (A) a request to execute or not to execute, or to revoke a proxy; or
>
> (B) the distributing of a proxy or other communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy[2]

If a communication is a proxy solicitation under these definitions, a number of substantive regulations apply. For purposes of this case, the pertinent ones are 3 AAC 08.307, which requires the distributor of a communication that qualifies as a proxy solicitation to file a copy of the solicitation with the Division concurrently with disseminating it to 30 or more shareholders; 3 AAC 08.355, which requires the distributor of a proxy solicitation to file certain disclosures with the Division before disseminating the proxy solicitation; and 3 AAC 08.315(a), which forbids making any material misrepresentation in a proxy solicitation.

Types of proxies allowed by Sitnasuak Native Corporation

Sitnasuak Native Corporation ("SNC") is an Alaska Native Corporation headquartered in Nome. [Exc. 16]

SNC holds periodic elections for members of its board of directors. Pursuant to SNC's bylaws, a shareholder has one vote per share times the number of seats for which a

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1 3 AAC 08.365(12).

2 3 AAC 08.365(16).

director is being elected. [Exc. 11] For example, in an election in which four directors will be elected, a shareholder with 100 shares has 400 votes. A shareholder may allocate these 400 votes entirely to one candidate or may split the votes in any proportion among up to four candidates. [*Id.*]

SNC's bylaws permit a shareholder to vote for board candidates in one of three ways: (1) the shareholder may vote in person at the annual shareholders' meeting; (2) the shareholder may mail in a directed proxy by which the shareholder selects a proxyholder but personally allocates his or her votes among the candidates; or (3) the shareholder may mail in a discretionary proxy by which the shareholder selects a proxyholder and authorizes the proxyholder to use his or her discretion at the annual meeting to allocate the shareholder's votes among the candidates on a particular slate. [Exc. 11, 14-15]

Discretionary proxies are used both by the Board of Directors, which typically nominates a slate of candidates, as well as by independent candidates who form a slate. In the 2017 election, for example, the Board nominated a slate of candidates and solicited discretionary proxies [Exc. 11], and a group calling itself Independent Shareholders also solicited discretionary proxies to support a different slate of candidates [Exc. 12].[3]

Discretionary proxies have been controversial among SNC shareholders. In the winter of 2015-2016, shareholders submitted a petition to amend the bylaws to eliminate discretionary proxies. [Exc. 8, 13-14, 46] That effort failed for lack of a quorum at the

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[3] The superior court erroneously treated discretionary proxies as an option available only to the corporation. [Exc. 68]

meeting at which the vote on the proposed bylaw amendment was scheduled. [Exc. 14] But some shareholders have continued to speak out against discretionary proxies [*e.g.*, Exc. 18, 22, 25-26], while SNC touts their advantages [*e.g.*, Exc. 14-15].

The letter at issue in this case

Austin Ahmasuk is a resident of Nome and a shareholder of SNC. [Exc. 5] He is among the shareholders who dislike discretionary proxies. On February 3, 2017, he emailed the Nome Nugget a letter to the editor that discussed some problems he perceives with discretionary proxies, and he urged shareholders not to vote a discretionary proxy in the next election. [Exc. 6, 9-10] Ahmasuk's letter also expressed his belief that some members of the current board (the "SNC 6") had used discretionary proxies in the past to alter the outcome of an election. [Exc. 9]

In February 2017, when Ahmasuk wrote his letter, no candidates had been announced for the next Board of Directors election. [Exc. 6] The next election would be held in conjunction with the annual shareholders' meeting, which would be scheduled for approximately five months later, in the summer of 2017. [Exc. 11] Ahmasuk did not know who the candidates in the next election would be. [Exc. 6, 51] There also was no pending ballot proposition related to discretionary proxies. Thus, his letter did not advocate a vote or a proxy for or against any candidate or ballot proposition. [Exc. 8-10]

Ahmasuk's letter to the editor was published in the Nome Nugget on February 9, 2017. [Exc. 8] In full, it read:

> The Village Corporation for Nome i.e. Sitnasuak Native Corporation (SNC) will soon be holding its annual election and shareholders will file for candidacy. SNC's shareholders have voiced time and time again that they

> do NOT want discretionary proxies used. Discretionary proxies are NOT required by any Alaskan law and there is NO law that prohibits an ANCSA corporation from prohibiting them for elections. Hundreds of SNC shareholders have said through public letters, social media, or through mailings that they do NOT want discretionary proxies used for elections. I believe SNC shareholders are realizing that discretionary proxies are harmful to our election process and are realizing in greater numbers such practices are disrespectful to our traditions. In 2015 and 2016 I and others spent many hours collecting signatures for a request for a special meeting to do away with discretionary proxies. We collected hundreds of signatures and we met a 10% requirement as required by Alaskan law to petition the SNC Board of Directors to consider doing away with discretionary proxies and to request a special meeting. You might ask yourself why all this commotion about discretionary proxies? Because I and others have thoroughly researched the issue and recognized there is a dramatic ethical argument about what is right and what is wrong with SNC's elections. Discretionary proxies have allowed single persons to use discretionary proxies to dramatically alter the outcome of an election for their singular goal. You know who they are they are members of the SNC 6. Please do NOT vote a discretionary proxy in 2017. Thank you. Austin Ahmasuk.

[Exc. 8; *see also* Exc. 69 (superior court decision legibly retyping the letter)]

On February 3, Jason Evans, a member of the SNC Board of Directors, submitted a complaint to the Division of Banking and Securities concerning Ahmasuk's letter. [Exc. 34-38][4] Evans contended that the letter was a proxy solicitation and that Ahmasuk violated the proxy solicitation regulations by not filing the required disclosures with the Division before disseminating a proxy solicitation and by making false and misleading statements in the letter. [Exc. 38] The complaint by SNC to the Division was part of a pattern: SNC has been aggressive about reporting its shareholders' perceived violations of the proxy regulations to the Division of Banking and Securities, and the Division has pursued these

[4] Ahmasuk's letter was not published until February 9. [Exc. 8] It is not clear how Evans obtained a copy of Ahmasuk's letter on February 3.

complaints.[5]

Administrative agency proceedings

An investigator with the Division of Banking and Securities responded promptly to Evans's complaint and contacted Ahmasuk to advise that the Division had opened an investigation. [R. 24] In a series of follow-up emails, the investigator demanded that Ahmasuk justify the truth of his assertions. [Exc. 42, 45, 48] Ahmasuk responded, contending first that the proxy solicitation regulations do not apply to his letter because it was published when there were no candidates and thus no proxies. [Exc. 47, 51] He called the law that purportedly prohibited him from publishing his letter without complying with the proxy solicitation regulations "nebulous" [Exc. 48], and he maintained that reading the regulations to apply to his letter would infringe on his right of free speech. [Exc. 39, 47] Notwithstanding his objections to treating his letter as a proxy solicitation, Ahmasuk also answered the investigator's questions, insisting that all his statements were truthful to the best of his ability to ascertain the facts. [Exc. 42-44, 46-47] With respect to the investigator's demand that he provide proof to support his assertion that discretionary proxies have allowed a single person to control the outcome of an election, Ahmasuk described the circumstances that supported his belief that this statement is true, but he explained that proving the assertion would require SNC to disclose election results, which

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[5] *See, e.g.*, Exc. 17-28. *See also In the Matter of Charles Fagerstrom*, Order No. 17-154-S (Mar. 29, 2019); *In the Matter of Barbara Mazonna*, Order No. 16-229-S (Apr. 19, 2017); *In the Matter of Charles Fagerstrom*, Order No. 16-97-S (June 28, 2016) (all available on the website of the Division of Banking and Securities, *https://www.commerce.alaska.gov/web/dbs/enforcementorders.aspx*).

so far it had declined to do. [Exc. 42-44, 46-47]

The Division rejected all of Ahmasuk's positions and issued a Cease and Desist Order, declaring that Ahmasuk had violated three sections of the proxy regulations, and imposing a civil penalty of $1500. [Exc. 1-3] All of the alleged violations presume that Ahmasuk's letter was a proxy solicitation. Under that assumption, the Division asserted that Ahmasuk violated 3 AAC 08.307 (based on his failure to file his letter with the Division concurrently with disseminating it), .315(a) (based on his making allegedly false or misleading statements in the letter), and .355 (based on his failure to file the disclosures that a shareholder is required to submit to the Division along with a proxy solicitation). [Exc. 2-3]

The Division advised that, if Ahmasuk did not consent to entry of the Cease and Desist Order, he needed to request a hearing. [Exc. 3][6] Ahmasuk did not consent to entry of the order, and he filed a timely request for a hearing. [Exc. 4] Again, he denied that his letter was a proxy solicitation, denied making any false statements, and asserted that his letter was political speech protected by the First Amendment. [*Id.*] After that, Ahmasuk obtained pro bono counsel to assist him. [R. 47-48]

The case was assigned to Administrative Law Judge (ALJ) Bride Seifert. [R. 7] With approval from the ALJ, Ahmasuk and the Division, through their respective counsel, agreed to brief the legal issues related to whether Ahmasuk's letter was a proxy solicitation and whether such a letter constitutionally could be subject to the proxy solicitation

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6 *See* AS 45.55.920(d).

regulations; they agreed that, pending decision of these legal questions, the Division would stay proceedings related to whether any of Ahmasuk's statements was false or misleading. [R. 56, 722-23 (Tr. 14-15[7])]

In accordance with the agreed-on schedule, Ahmasuk filed a motion for summary judgment. [R. 57-109] His motion addressed three main claims: (1) The proxy solicitation regulations should be interpreted not to apply to a letter such as Ahmasuk's, which discusses a type of proxy rather than supporting or opposing any candidate, particularly when the communication is published when no candidates have been announced. [R. 64-68] (2) Interpreting the regulations to apply to Ahmasuk's letter would deny him due process, as a reasonable shareholder would not interpret the proxy solicitation regulations to apply to a letter like Ahmasuk's. [R. 68-73] (3) Interpreting the regulations to apply to Ahmasuk's letter would violate his free speech rights, because the State has no compelling interest in regulating statements such as his, and any legitimate interest can be served through less restrictive regulations. [R. 73-78]

The Division opposed Ahmasuk's motion and in practical effect cross-moved for partial summary judgment in its favor on the legal issues. [R. 111-234] Ahmasuk filed a reply. [R. 236-45] The Administrative Law Judge held oral argument [R. 727-37 (Tr. 33-72)], then issued a written decision on December 29, 2017 [R. 251-62].

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[7] Transcripts of the proceedings before the administrative agency appear in the record of this case and are cited in this brief by the record page number, followed parenthetically with the specific page numbers of the transcript. The transcript of proceedings in the superior court is cited simply as "Tr. __."

The ALJ denied Ahmasuk's summary judgment motion and granted the Division's implicit cross-motion. [R. 251] The decision confirmed, as undisputed facts, that the letter was written and published two months before the identification of candidates and five months before the election; it did not advocate for or against any distinct outcome of the election; and it urged shareholders to vote their own votes rather than use a discretionary proxy. [R. 257] When the election was held later that year, Ahmasuk was not a candidate. [R. 252] The ALJ concluded that, even in light of these facts, Ahmasuk's letter fit within the regulatory definition of a proxy solicitation, because she considered it "reasonably calculated to result in the withholding of a discretionary proxy." [R. 257-59] She also noted that the single sentence in the letter that criticized use of discretionary proxies by the SNC 6 "might" cause shareholders in the next election "to withhold discretionary proxies from the Board's candidate slate, but not an independent slate." [R. 259][8] Finally, she concluded that applying the proxy solicitation regulations to Ahmasuk's letter does not violate his rights under the constitutional guarantees of due process or free speech. [R. 259-61]

Both parties desired the opportunity to get clarity from the courts on the legal issues, before conducting an evidentiary hearing on the alleged falsity of Ahmasuk's statements.

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[8] The ALJ's statement indicates that she assumed that the SNC 6 is a bloc that constitutes a majority of the SNC board, so that the next "Board's candidate slate" would necessarily be an "SNC 6 slate" – but the record contains no clear identification of the SNC 6 and whether it would control the selection of the next Board slate. The Division described the SNC 6 both as "a group of 6 current SNC Board members" [R. 124] and as "a group of potential board members." [R. 125]

[R. 739 (Tr. 81-82)] The postponement made sense, because the Division has no authority to investigate the truth of shareholder statements that are not contained within a proxy solicitation. Thus, at the parties' request, the ALJ bifurcated the administrative proceedings, creating one case to address the accusations that Ahmasuk disseminated a proxy solicitation without filing it with the Division and without making the necessary disclosures, and a second case to address the accusation that Ahmasuk made false and misleading statements. [R. 266, 743-44 (Tr. 96-99)] Proceedings related to the alleged falsity of some of Ahmasuk's statements were stayed pending final judicial resolution of whether Ahmasuk's letter legally constitutes a proxy solicitation. [R. 266]

Ahmasuk did not dispute that he did not either file his letter with the Division or submit the disclosures that are required with a proxy solicitation. [Exc. 6; R. 63-64] Therefore, if his letter was a proxy solicitation, he agreed he unwittingly violated 3 AAC 08.307 and .355 by failing to make these filings[9]; if the letter was not a proxy solicitation, those filings were not required.

Ahmasuk and the Division agreed that Ahmasuk would preserve his right to appeal the underlying legal issues surrounding whether his letter qualifies as a proxy solicitation. [R. 739 (Tr. 81-82)] To ensure that the agency's decision on the legal issues would be a final decision that would be ripe for appeal as of right, Ahmasuk agreed not to contest a sanction for the non-filing violations of a $1500 fine, all suspended on condition that he

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[9] That is, Ahmasuk always maintained that he intended to comply with the law and did not make those filings only because he understood that the regulations did not apply to his letter, given its content and timing. [Exc. 6; R. 64 n.6]

commit no other violation of the Alaska Securities Act for a period of five years. [R. 743 (Tr. 97-98)] The ALJ accepted that agreement and re-issued her summary judgment ruling as her final decision in the bifurcated case. [R. 744 (Tr. 99-100); Exc. 54-65] Her final decision found that Ahmasuk violated 3 AAC 08.307 and .355 by not filing his letter and the required disclosures with the Division, and imposed the agreed-on sanction. [Exc. 65]

To complete the administrative proceedings, Ahmasuk and the Division each filed a Proposal for Action with the Commissioner of the Department of Commerce, Community, and Economic Development. Ahmasuk asked the Commissioner to reject the ALJ's legal analysis [R. 274-87], and the Division asked him to adopt it. [R. 271-72] The Commissioner exercised his option not to review the ALJ's decision, allowing the ALJ's decision to stand as the final decision of the administrative agency. [Exc. 66][10]

Superior court proceedings

Ahmasuk timely filed his notice of appeal to the superior court. [R. 322-25] The parties rebriefed the legal issues to the superior court.[11] The superior court held oral argument [Tr. 2-29], then issued a written decision affirming the agency's final decision. [Exc. 67-78]

Ahmasuk then appealed to this Court.

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10 *See* AS 44.64.060(e), (f).

11 R. 559-98 (Ahmasuk's appellant's brief), 430-51 (Division's appellee brief), 407-21 (Ahmasuk's reply).

STANDARDS OF REVIEW

In an appeal from an administrative agency, this Court reviews the decision of the agency directly and gives no deference to the decision of the superior court that acted as an intermediate appellate court.[12]

This Court ordinarily reviews an agency's interpretation of its own regulations deferentially, reversing only if the interpretation is plainly erroneous and inconsistent with the regulation.[13] However, when a regulation that imposes a penalty is ambiguous, it must be construed narrowly in favor of the accused.[14] Further, when two alternative interpretations are both plausible but one would be unconstitutional, the Court may apply the doctrine of constitutional avoidance and adopt the interpretation that does not violate the constitution.[15]

This Court applies its independent judgment in deciding any constitutional

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12 *See Studley v. Alaska Public Offices Comm'n*, 389 P.3d 18, 22 (Alaska 2017).

13 *See Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

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

15 *See Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 184 (Alaska 2009) ("The canon of constitutional avoidance recommends that when the validity of an act of the [legislature] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle . . . [to] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (internal quotation marks & footnote omitted)); *see also Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013) (similar, but finding doctrine inapplicable because statute at issue was not ambiguous).

question.[16]

ARGUMENTS

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

A. AHMASUK'S LETTER WAS NOT A COMMUNICATION REASONABLY CALCULATED TO RESULT IN THE WITHHOLDING OF A PROXY.

The Division's enforcement officers contended, and the ALJ and superior court agreed, that Ahmasuk's letter to the Nome Nugget was a proxy solicitation under 3 AAC 08.365(16)(B). [Exc. 2, 60-63, 73-75] The ALJ and the court specifically deemed the letter a proxy solicitation under the part of the definition that includes "a communication to shareholders under circumstances reasonably calculated to result in the . . . withholding . . . of a proxy." [Exc. 60-63, 73-75][17]

This Court should find that the Division, through its staff and the ALJ, misinterpreted or misapplied the proxy solicitation definitions. In the simplest analysis, Ahmasuk's letter does not fit within the definition the Division relied on because he neither asked shareholders to withhold their proxies entirely nor to withhold their proxies from anyone in particular. Instead, he implicitly encouraged shareholders to exercise their right to vote by proxy; he expressly advocated using one type of proxy (directed) rather than

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16 *See Studley*, 389 P.3d at 22-23; *Squires v. Alaska Board of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 332 (Alaska 2009).

17 In its briefing to the ALJ, the Division contended the letter was a proxy solicitation under the part of the definition that refers to "revocation" of a proxy. [R. 121] This position could not be upheld. Since no proxies for the next election had been issued or returned, Ahmasuk's letter was highly unlikely to result in the revocation of a proxy.

another (discretionary) in a situation where both types of proxy could be used by any candidate. [Exc. 8] Later that year, both the corporation and an independent slate solicited discretionary proxies; only the official ballot, issued by the corporation, also offered the opportunity for shareholders to allocate their votes among particular candidates. [Exc. 11, 12]

The plain language of the regulation simply does not treat a communication as a proxy solicitation if it advocates using or not using a *type* of proxy. Under the Division's broad reading, a statement encouraging shareholders to come to the meeting and vote in person, rather than return a proxy, would be a "proxy solicitation," because the statement would be reasonably calculated to result in people withholding their proxies.

A proxy is essentially a contract or written agreement by which a shareholder grants another person authority to vote his or her shares at a meeting the shareholder will not attend.[18] A proxy, by definition, includes the name of the person that the shareholder is authorizing to vote on his or her behalf. A proxy solicitation is a communication that "solicits" a "proxy."[19] Logically, there cannot be a proxy solicitation when the communication does not even refer to a particular proxyholder or a proxy for or against a

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[18] *See* Jill A. Hornstein, *Proxy Solicitation Redefined: The SEC takes an incremental step toward effective corporate governance*, 71 WASH. U.L.Q. 1129, 1135 (1993); Exc. 14 (SNC newsletter states: "A proxy is a legal document authorized by Alaska State Law for a shareholder to give permission to another person (proxy holder) to vote their shares of stock.").

[19] *See https://definitions.uslegal.com/p/proxy-solicitation/* ("Proxy solicitation refers to a request that a corporate shareholder authorize another person to cast the share holder's vote at a corporate meeting.").

particular candidate or position.[20]

The plain language of the regulations should be read to require that, to be a proxy solicitation, a communication must solicit a proxy for or against a particular candidate or proxyholder. Because violation of the proxy solicitation regulations can result in a penalty, to the extent the regulations are ambiguous, they must be construed narrowly.[21]

Adopting the simple analysis that the definition of a proxy solicitation does not include a communication about a type of proxy would resolve this case entirely, resulting in dismissal of the case against Ahmasuk without reaching any of the other issues presented here.

B. THE DIVISION'S BROAD READING OF THE REGULATIONS IS UNPRECEDENTED.

Research has located no case that found that a communication constituted a "proxy solicitation" when it was not part of a deliberate effort to solicit proxies for or against an identifiable candidate or position being presented to shareholders for a vote. The broad reading used by the Division does not further the purpose of regulating proxy solicitations and instead tends to curtail speech about corporate affairs. A brief review of the history and purpose of the regulation shows why the Division's broad interpretation of "proxy

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20 *See, e.g., Bumgarner v. Williams Cos., Inc.*, 2016 WL 1717206 at *5 (N.D. Okla. Apr. 28, 2016) (unpublished) (statements that may be of interest to shareholders considering how to respond to a proxy solicitation are not themselves a proxy solicitation when the speaker is not requesting a proxy); *Taniguchi v. Ass'n of Apt. Owners*, 155 P.3d 1138, 1153 (Haw. 2007) ("a 'proxy solicitation' is generally defined as '[a] request that a corporate shareholder authorize another person to cast the shareholder's vote at a corporate meeting'" (quoting BLACK'S LAW DICTIONARY at 1263)).

21 *See Stevens*, 205 P.3d at 326.

solicitation" is unwarranted.

1. Historical background to Alaska's regulations

Alaska's proxy solicitation regulations apply only to Alaska Native Corporations, which are exempt from regulation by the federal Securities and Exchange Commission.[22] The Alaska regulations were adopted in 1981.[23] The definition of "solicitation" was taken from the SEC regulation in effect at that time.[24] The Alaska definitions of "proxy" and "solicitation" have not been modified since they were adopted.[25]

The SEC modified its definition of "solicitation" in 1992 in response to considerable public controversy that suggested that the older definition (on which the Alaska definition is based) tended to deter shareholders who were not soliciting proxies from discussing corporate performance and was being used unconstitutionally to regulate speech protected by the First Amendment.[26] The SEC's revised definition exempts from regulation most shareholder communications in public media, except when the shareholder is seeking

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22 *See* 43 U.S.C. § 1625(a); 3 AAC 08.305.

23 *See* AAC Register 77 (eff. Jan. 4, 1981).

24 *Compare* 3 AAC 08.365(16) *with* former SEC Rule 14a-1 (version of Rule 14a-1 in effect in 1981 is reprinted in Hornstein, *supra* n.18, at 1130 n.7).

25 *Compare* 3 AAC 08.365(12), (16) (Register 77) *with* 3 AAC 08.365(12), (16) (Register 217) (published in 2016).

26 *See* Hornstein, *supra* n.18, at 1143-50; Robert S. Frenchman, *The Recent Revisions to Federal Proxy Regulations: Lifting the ban on shareholder communications*, 68 TUL. L. REV. 161, 163 (1993) ("[T]he SEC concluded that its accumulated regulations created unnecessary regulatory impediments and significantly discouraged discussions among shareholders of corporate performance and other matters of direct interest to all shareholders." (internal quotation marks omitted)).

proxy authority.[27]

Alaska did not modify its definition of "solicitation," so the concerns expressed about the overbreadth and questionable constitutionality of the pre-1992 SEC definition of "solicitation" apply to the current Alaska definition, if it is interpreted broadly rather than narrowly.

2. The purpose of the Alaska regulations is to promote informed corporate democracy.

The fundamental purpose of the Alaska regulations governing proxy solicitations sent to shareholders of Alaska Native Corporations is the same as the SEC's purpose in regulating proxy solicitations sent to shareholders of publicly traded corporations: to ensure that those who solicit proxies fully and accurately disclose to shareholders information that is critical to their informed voting.[28] The purpose is *not* to regulate all expressions of opinion about the governance of Native Corporations, even if the speech ultimately might influence a shareholder's vote in an upcoming election. Reading the Alaska regulations

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[27] *See* 17 C.F.R. § 240.14a-1(*l*)(2)(iv)(A) (commonly referred to as "SEC Rule 14a-1"), reprinted at Exc. 31-33; *see generally* Frenchman, *supra* n.26, at 179 ("Recognizing that the broad definition of solicitation and the massive costs of conducting a regulated solicitation had 'a chilling effect on [the] discussion of management performance,' the Commission, in June of 1991, proposed the disinterested persons exemption. This reform provides a broad exemption from proxy delivery and disclosure requirements for unaffiliated shareholders that are not seeking proxy authority." (quoting *Regulation of Communications Among Shareholders*, 57 Fed. Reg. 48,276, at 48,279 (Oct. 22, 1992) (footnotes omitted)).

[28] *See Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76, 87 (Alaska 2012) (noting that proxy solicitation rules further "fully informed corporate democracy"); Hornstein, *supra* n.18, at 1138 (original focus of SEC rules was to ensure that management and others who solicited proxies fully disclosed to shareholders critical voting information).

too broadly expands the power of the Division far beyond what is necessary to achieve any legitimate purpose in regulating speech.

Over the years, the SEC – and courts interpreting SEC regulations – struggled to find the balance that would adequately regulate speech directed at influencing shareholders' votes in proxy contests but not unduly infringe on shareholders' free speech rights to discuss corporate governance.[29] In Alaska, because the Division has not amended its regulations in the way the SEC has, it falls to the courts to interpret the existing regulations in accordance with their purpose and with the constitution.

3. The common understanding of "proxy solicitation" does not encompass communications that are not designed or reasonably calculated to encourage shareholders to sign or not sign proxies for an identifiable proxyholder.

Consistent with the narrow conception of a proxy solicitation as a communication seeking a proxy for an identifiable proxyholder, all the reported decisions from this Court on proxy solicitations involved express solicitations for proxies to support a specific candidate or slate or a specific vote on a ballot proposition.[30] Neither the Division nor the

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[29] *See* Hornstein, *supra* n.18, at 1143-50; *see generally Brown v. Ward*, 593 P.2d 247, 257 n.9 (Alaska 1979) (Connor, J., dissenting) (Writing before the Alaska regulations were adopted, he argued in favor of a court-adopted rule governing proxy solicitations which "permits vigorous debate rather than one which stifles it," and noted that this is "particularly important in the case of native corporations. The shareholders of those corporations may not have a high degree of business experience. To impose rigid, constrictive rules as to proxy solicitations may lead to the stifling of effective communication between dissident shareholders and other shareholders.").

[30] *See Rude*, 294 P.3d at 80; *Skaflestad v. Huna Totem Corp.*, 76 P.3d 391, 393 (Alaska 2003); *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 81 (Alaska 2001); *Brown*, 593 P.3d at 248-49.

ALJ found that Ahmasuk's letter was reasonably calculated to persuade shareholders to return a proxy for or against a candidate or ballot proposition, only that it was reasonably calculated to persuade shareholders not to return one type of proxy. [Exc. 2, 60-63][31] Applying the regulation to this type of communication was an unreasonable interpretation.

In finding that Ahmasuk's letter qualified as a proxy solicitation, the ALJ was influenced by cases that, using a "totality of circumstances" test, found communications were proxy solicitations even though they were issued before candidates were announced and formal proxy solicitations began. [Exc. 58-60] The "totality of circumstances" test is problematic legally, because it does not give clear guidance to shareholders on which communications will and will not be considered proxy solicitations.[32] However, even without reaching the legal problems inherent in a flexible, multi-factor test, this Court readily can determine that the cases the ALJ cited all differed materially from the present case. In each of the cited cases, the communication deemed to be a proxy solicitation was part of a sequence of communications, typically the beginning of an effort to solicit proxies for a particular proxyholder.[33] Ahmasuk's letter was not a part of such an effort. His letter

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31 The ALJ also found that, as a result of Ahmasuk's letter, shareholders "*might* choose to withhold discretionary proxies from the Board's candidate slate, but not from an independent slate." [Exc. 62 (emphasis added)] However, finding that shareholders "might" react in a particular way is not equivalent to finding that the communication was "reasonably calculated" to achieve that result.

32 Consequently, this type of analysis presents both a due process problem through the failure to give clear notice of what is prohibited and a free speech problem, given the likelihood of deterring speech at the margins that actually is not subject to regulation. These constitutional problems are discussed *infra* in Argument II.

33 *See Gas Natural, Inc. v. Osborne*, 624 Fed. Appx. 944, 950-52 (6th Cir. 2015) (unpublished) (principally addressing a letter by an ousted corporate board chair, which

stood alone; he did not follow it with other communications that culminated in a traditional proxy solicitation for a particular candidate or proxyholder.

In contrast to the ALJ's analysis that adopted a broad definition of "proxy solicitation," a superior court judge in another recent case endorsed the narrow, commonsense interpretation of the regulations that Ahmasuk urges this Court to adopt – where there cannot be a proxy solicitation unless the communication is part of an effort to obtain proxies for or against an identifiable candidate or position on which shareholders will vote. In that case, *Calista Corporation v. Don*,[34] the corporation alleged that three defendants made false and misleading statements in communications that constituted

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criticized management and sought support for his own reinstatement as a manager, sent three weeks before the annual meeting; the appeals court found the letter was reasonably calculated to result in withholding or revoking proxies for the management's slate of candidates, particularly since the writer admitted that the letter urged shareholders not to support the company's slate; two letters sent after the election also qualified because they were part of the same solicitation process, given efforts to void the election); *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795-97 (2d Cir. 1985) (addressing newspaper and radio advertisements that were published less than two months before the shareholder meeting by a shareholder who was engaged in a proxy contest; the communications nominally were directed to voters scheduled to vote on a political issue (whether the city should end its contract with Long Island Lighting), but the appeals court held they might qualify as communications reasonably calculated to affect shareholder votes – so the court remanded for further discovery); *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 694, 696 (2d Cir. 1966) (applying proxy solicitation regulations to shareholder who solicited affidavits from other shareholders for the purpose of obtaining sufficient signatures to request a list of all shareholders to use in a planned proxy context); *Securities & Exchange Comm'n v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943) (involving letters to shareholders expressly asking them not to sign proxies for the company and to revoke any proxies they had signed, sent by someone who also intended to solicit proxies for himself; absent that fact, the court stated it would "have great doubt" whether the SEC had authority to regulate the letters).

[34] 3AN-18-06788CI, Order Denying TRO and Preliminary Injunction (June 4, 2018). A copy of the decision was provided to the superior court in this case and is available at R. 698-703.

"proxy solicitations." [R. 699] Before considering whether the statements were false or misleading, the assigned superior court judge, Judge Andrew Guidi, analyzed whether the statements were proxy solicitations at all. He found they were not, in large part because no evidence showed that any of the defendants "requested, sought or obtained either a proxy or the revocation of a proxy." [*Id.*] The communication that fell closest to the line was a Facebook posting that called on "fellow Yupics" to vote out a current board member. [R. 702] But, Judge Guidi explained, even this was not a proxy solicitation because it did not "ask for anyone's proxy, nor urge anyone to revoke a proxy," and no evidence established that the speaker obtained any proxies or proxy revocations. [*Id.*] Thus, under Judge Guidi's analysis, the Facebook posting was "not legally sufficient to fall within the ambit of the proxy regulation law." [*Id.*]

Judge Guidi offered a thoughtful explanation of why a narrow interpretation of "proxy solicitation" is appropriate:

> Criticism of corporate conduct that is communicated to shareholders indirectly, through a public statement or news interview, and which occurs in proximity to a shareholder vote but is not targeted specifically to shareholders, does not expressly or impliedly seek a proxy or to revoke a proxy, does not reference a shareholder vote, and does not make any recommendation as to how shareholders should vote, is not, in this court's opinion, actionable as a false or misleading proxy solicitation.
>
> General criticism of the board's actions cannot reasonably be construed as directing the shareholders to vote a particular way. Criticism very well may influence a shareholder's opinion of incumbent board members, and therefore influence how the shareholder will vote, but criticism does not equate to solicitation. If it did, absurd results would abound, especially during an election season. All dissent could easily be met with litigation, which would have a chilling effect on all potential dissenters. Even those that have legitimate, truthful criticisms of the board would be exposed to the risk and cost of litigation, and this would be so even if they ultimately prevail

> in the lawsuit. Shareholders as a whole would be deprived of healthy debate while the incumbent board members enjoy insulation from any criticism. The answer to questionable criticism should be information, discussion and debate, not lawsuits.

[R. 702-03]

Judge Guidi's analysis is persuasive. Applied in this case, it means this Court should focus first on whether Ahmasuk actually sought a proxy from anyone, or asked anyone to revoke or withhold a proxy. Because he did not, this Court should determine that his letter to the editor does not meet the definition of a "proxy solicitation." To the extent this Court finds the regulatory definition unclear or ambiguous, susceptible of alternative plausible interpretations as to the breadth of the term "proxy solicitation," this Court should prefer the narrow definition that favors the accused and avoids any constitutional problems.[35]

4. The regulatory scheme as a whole supports the narrow interpretation of what qualifies as a "proxy solicitation."

In interpreting regulations, this Court often looks to the regulatory scheme as a whole to determine the intended meaning of a disputed term. Even where an express definition is stated, other language in the regulatory scheme may refine or limit its meaning. This Court has said:

> [I]n ascertaining the plain meaning of a statute, the court must look to the particular language at issue, as well as the language and design of the statute as a whole. And when a statute or regulation is part of a larger framework

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35 *See Alaska Public Offices Comm'n v. Stevens*, 205 P.3d 321, 326 (Alaska 2009); *see generally supra* at 12 & n.15 (citing cases that discuss the doctrine of constitutional avoidance), *infra* at 25-39 (discussing the due process and free speech violations presented by a broad interpretation of "proxy solicitation").

> or regulatory scheme, even a seemingly unambiguous statute must be interpreted in light of the other portions of the regulatory whole.[36]

Although that quote refers to "statutes," other cases apply the same principle to the interpretation of regulations.[37]

This state's comprehensive scheme of regulations governing proxy solicitations is set forth at 3 AAC 08.305–.365.[38] Fairly read, as a whole, this chapter of regulations governs requests to provide or withhold a proxy that will be voted for or against a particular candidate or ballot proposition; the regulations as a whole do not apply to communications related to *forms* of proxies or to communications that applaud or criticize conduct by corporate managers. The most obvious illustration of this is 3 AAC 08.335(a) and (b), which state the requirements for how a proxyholder must conduct himself or herself by voting as directed in the proxies he holds; the regulation makes no sense if there can be a proxy solicitation where no proxyholder is named. Likewise, the disclosures required under 7 AAC 08.355 presume that the solicitation refers to a plan to solicit proxies; among other mandatory disclosures, it requires a description of the methods to be used to solicit proxies and an estimate of the amount to be spent.[39] Indeed, all the regulations in the section

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36 *Federal Deposit Ins. Corp. v. Laidlaw Transit, Inc.*, 21 P.3d 344, 351 (Alaska 2001) (internal quotation marks, brackets, and footnotes omitted); *see also Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1127 (Alaska 2017) (rejecting one party's request to construe a statutory subsection in violation of and without reference to the regulatory whole).

37 *See, e.g., Alaska Ctr. for the Env. v. State, Office of the Governor*, 80 P.3d 231, 243 (Alaska 2003); *Millman v. State*, 841 P.2d 190, 194-95 (Alaska App. 1992).

38 The related statutes are AS 45.55.139 and .160.

39 *See* 3 AAC 08.355(7), (8).

implicitly presume that the communication supports or opposes a specific, identifiable candidate or position on an issue on which shareholders will vote.

The Division acted unreasonably in adopting an interpretation that proxy solicitation rules apply to public statements about the election process and types of proxies, but that do not encourage a vote for or against a particular candidate or slate.

5. Conclusion

This Court should hold that the ALJ erred as a matter of law in treating Ahmasuk's letter as a proxy solicitation. The Court should reverse the decision of the superior court upholding the ALJ's decision that granted judgment in favor of the Division; this Court should direct entry of judgment for Ahmasuk.

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

If this Court concludes that only a broad interpretation of the definition of "proxy solicitation" is possible under rules of construction and that Ahmasuk's letter must be treated as a proxy solicitation, then this Court must consider whether that broad interpretation, applied to Ahmasuk's speech, violates his rights under the due process and free speech guarantees of the Alaska Constitution.[40] Federal constitutional cases may inform this Court's decision, since the Alaska Constitution may be no less protective of individuals' rights than the federal constitution. This Court also may interpret provisions

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40 *See* Alaska Constitution, art. I, §§ 5, 7.

of the state constitution to be more protective than their federal counterparts.[41]

As discussed below, the Court should conclude that applying Alaska's proxy solicitation regulations to Ahmasuk's letter violates the Alaska Constitution's guarantees of both due process and free speech.

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

The United States Supreme Court described the basic procedural due process right in the following words:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment."[42]

A regulation violates due process if it "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[43] Clarity in defining what people legally may and must not do is particularly important if speech is at issue: "When speech is involved,

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41 *See Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972) ("[A]lthough sound analysis requires that we look to the various federal precedents that have interpreted provisions of the federal constitution that parallel Alaska's constitution, we are not necessarily limited by those precedents in expounding upon Alaska's constitution."); *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970) ("[W]e are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.").

42 *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (internal citations omitted).

43 *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

rigorous adherence to those [clear notice] requirements is necessary to ensure that ambiguity does not chill protected speech."[44]

This Court applies the same principles in interpreting the Alaska Constitution.[45]

A violation of Alaska's proxy solicitation regulations can result in severe consequences, both criminal and civil: up to five years in prison[46] and up to a $25,000 civil fine.[47] Although only civil sanctions were ever at issue in this case, the same definition of "proxy" and "solicitation" apply to criminal and civil cases. And the same due process analysis applies to criminal ordinances and civil regulations.[48] Thus, before someone such as Ahmasuk may be penalized criminally or civilly for violating the proxy solicitation regulations, this Court must ensure that he received fair notice of what he is forbidden from doing.

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44 *Id.* at 253-54.

45 *See, e.g., F/V American Eagle v. State*, 620 P.2d 657, 663 (Alaska 1980) ("A statute or regulation is impermissibly vague when the language is so indefinite that the perimeters of the prohibited zone of conduct are unclear, violating rights to due process because the law fails to give adequate notice of what type of conduct is prohibited." (internal quotation marks omitted)); *State v. Erickson*, 574 P.2d 1, 20 & n.125 (Alaska 1978); *Marks v. City of Anchorage*, 500 P.2d 644, 647 (Alaska 1972) ("Because of the chilling effect that overbroad laws have on the exercise of constitutional rights, . . . broad prophylactic rules are suspect and precision of regulation must be the touchstone[.]" (internal quotation marks and brackets omitted)).

46 *See* AS 45.55.925(a).

47 *See* AS 45.55.920(b), (c).

48 *Compare, e.g., Marks*, 500 P.2d at 652-53 (invalidating criminal ordinance because it was unconstitutionally vague) *with F/V American Eagle*, 620 P.2d at 663 (quoting *Marks* when analyzing a civil fishing regulation); *see Fox Television Stations*, 567 U.S. at 253-58 (quoted *supra* in text) (applying the due process right to fair notice in a case involving civil penalties).

The Division's interpretation of the proxy solicitation regulations as applicable to Ahmasuk's letter violates the guarantee of due process in at least three ways: (1) the Division's definitions of "proxy" and "solicitation" fail to give clear notice that a letter such as his qualifies as a proxy solicitation; (2) the broad and unclear definition of "proxy solicitation" has resulted in a history of discriminatory and uneven enforcement; and (3) because the ambiguous definition of "proxy solicitation" restricts expressive speech, it tends to chill protected speech.

1. The regulations defining "proxy" and "solicitation" fail to give fair notice of what conduct is required and prohibited.

A person of ordinary intelligence who reads the proxy solicitation regulations does not readily understand that they apply to communications that do not refer to an identifiable person who is soliciting proxies for a particular candidate or particular position on a ballot proposition.

Ahmasuk, for example, is a person of ordinary intelligence; he read the regulations and did not understand them in the way that the Division believes they should be interpreted. [Exc. 5-6] In another election season, when Ahmasuk wished to communicate with fellow shareholders to advocate support for particular candidates, he read the regulations and understood that his communications would be "proxy solicitations." [Exc. 5] However, in 2017, when he wished to encourage shareholders to use directed proxies rather than discretionary proxies, he again consulted the regulations and concluded they do not apply to a communication that does not name any candidates or potential proxyholders – particularly when the communication is issued months before any candidates are

announced.[49] The definitions in 3 AAC 08.365(12) and (16) failed to give at least this one person of ordinary intelligence fair notice of what kind of speech is considered a "proxy solicitation."

Ahmasuk's confusion is not surprising. The confusion is shared by the Division personnel who are charged with enforcing the regulations. When the ALJ posed hypotheticals during oral argument, the Division representatives with whom their counsel consulted could not say for certain where the line falls between statements that are and are not proxy solicitations. According to the Division's counsel, the Division's representatives thought some of the hypotheticals fell into a "gray area" or "gray territory." [R. 734-35 (Tr. 61-65); *see also* Exc. 64 n.54 (ALJ noted that the Division's responses during the oral argument appeared to be at odds with the Division's decisions in other cases)]

The Division and the ALJ seemed influenced by the fact that Ahmasuk's letter contained not just comments about discretionary proxies but a specific request not to use such proxies. [Exc. 60-63; R. 734-35 (Tr. 61-65)] But if Ahmasuk could not easily determine whether a letter disparaging a type of proxy would become a proxy solicitation, he equally could not determine whether such a letter would be a proxy solicitation if it also contained a sentence expressly asking shareholders not to use that type of proxy.

Ahmasuk had no fair notice that the proxy solicitation rules applied to his letter.

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[49] *See* Exc. 6, 39 ("[b]ecause there was no proxy I do not believe I or anyone is subject to proxy solicitation rules"), 47 ("there is no PROXY and thus there is no infraction if there is no proxy"), 51 (initial response to the notice of investigation pointed out that SNC had not yet issued a proxy or even a notice of candidacy filing and no one knew who the candidates would be).

Punishing him for not complying with the regulations violates his guarantee of due process.

2. The Division's interpretation of "proxy solicitation" invites arbitrary and uneven enforcement.

When even the regulators cannot be sure what will be defined as a "proxy solicitation," arbitrary enforcement becomes a real risk. Recent history confirms that the risk here is not purely theoretical. The ALJ acknowledged this. [Exc. 64 n.54 (observing that the inconsistent interpretations that the Division had offered "lend[] support to Mr. Ahmasuk's contention that the regulation, as interpreted by the Division, is to broad, and subject to inconsistent enforcement")]

In this case, the Division insists that Ahmasuk's letter is a proxy solicitation because it advocates against using one type of proxy. [R. 734-35 (Tr. 62-65); Tr. 19, 21] The Division has taken the same stance regarding similar communications by other SNC shareholders. [Exc. 17-19, 25-26]

By contrast, the Division has *not* investigated SNC, even when it used its newsletter to communicate to shareholders its view that discretionary proxies have "benefits for all shareholders," but did not simultaneously file the newsletter with the Division as required for a proxy solicitation. [Exc. 14-15, 29-30] Although the SNC newsletter does not encourage use of discretionary proxies quite as explicitly as Ahmasuk's letter discourages their use, fairly read the SNC newsletter is reasonably calculated to result in their use [Exc. 14-15], and consequently also should be treated as a proxy solicitation if Ahmasuk's letter qualifies as one.

This type of uneven enforcement is likely to continue so long as the proxy

solicitation regulations remain unclear and open to standardless interpretation by Division staff.

3. The Division's interpretation of the proxy solicitation regulations threatens to chill protected speech.

Rigorous adherence to clear notice requirements is essential when regulations limit speech, since an ambiguous regulation can chill protected speech. People unsure of when they must comply with the proxy solicitation regulations may opt not to speak out, rather than assume the burden of making the disclosures required for a proxy solicitation and assuming the risk of having to defend the truth of every assertion. When speech is regulated, "broad prophylactic rules are suspect and precision of regulation must be the touchstone."[50]

A clear and narrow definition of "proxy solicitation" would ensure that both shareholders and corporate representatives can speak freely about general issues of corporate governance – including election procedures and proxy types – without the trouble of making disclosures to the Division in accordance with 3 AAC 08.307 and .355 and opening themselves to prosecution if someone challenges their statements as false or misleading. Similarly, shareholders and corporate representatives would know that they need to adhere to the rules when their communications advocate support for particular candidates or proxyholders.

Absent clear guidelines, shareholder speech, in particular, is likely to be stifled. The

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50 *Marks*, 500 P.2d at 647 (internal quotation marks and brackets omitted); *see Fox Television Stations*, 567 U.S. at 253-54.

corporations have attorneys and staff to provide research and guidance on when the proxy solicitation rules must be followed. Shareholders generally do not. Complying with the filing and disclosure requirements can be time-consuming and confusing for a layperson.[51] To stay legal and avoid a fine, shareholders will tend to remain silent when their intended communication is in a "gray area," rather than assume the burden of complying with the regulations when it is unclear whether their speech qualifies as a proxy solicitation.

Because the regulations do not provide clear guidance, are subject to arbitrary and uneven enforcement, and tend to suppress lawful speech, this Court should hold that the Division's treatment of Ahmasuk's letter as a proxy solicitation violates his guarantee of due process. This Court should reverse the superior court decision upholding the agency order penalizing Ahmasuk for violating these too-vague regulations.

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

In *Meidinger v. Koniag, Inc.*,[52] this Court held that Alaska's proxy solicitation regulations do not violate the free speech clause of Alaska's constitution.[53] Hence, it is important to be clear what Ahmasuk is arguing and how his position is not inconsistent with *Meidinger*.

Ahmasuk does not contend that all proxy solicitation regulations are unconstitutional because they impose some limits on speech about corporate elections. He

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51 *See* 3 AAC 80.355.

52 31 P.3d 77 (Alaska 2001).

53 *See id.* at 84-85.

accepts that the interest in protecting the integrity of corporate elections may be sufficiently compelling to justify regulations on traditional proxy solicitations, those at the core of the definition, which advocate voting for or against a particular candidate or proposition that is being put to a shareholder vote. In that situation, there may be a compelling interest in requiring disclosures so that shareholders can know who is speaking and what interests they may have in the outcome. In that situation, there also may be a compelling interest in ensuring that statements soliciting proxies are not materially misleading.[54] Ahmasuk's case does not require confronting these issues.

Meidinger, in contrast to this case, addressed alleged false statements in the solicitation of votes for a particular slate of candidates and for a proposition subject to shareholder vote.[55] It was in that context, and apparently in a case with minimal briefing on the issue, that this Court stated that proxy solicitation regulations do not violate Alaska's free speech clause.[56] *Meidinger* leaves ample room for this Court to declare that the regulations that are legitimate in many instances are overbroad and unconstitutional as applied to speech such as the letter at issue here. In other words, Ahmasuk asks this Court to hold only that the proxy solicitation regulations are overbroad to the extent that they attempt to regulate speech that is not specifically concerned with influencing proxies for or against identifiable candidates or particular propositions that are subject to a shareholder

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54 *But see infra* at 36 (discussing cases that establish that, outside of pure commercial speech, government ordinarily may not prohibit speech on the ground that it is false).

55 *See Meidinger*, 31 P.3d at 81.

56 *See id.* at 84-85.

vote.

Ahmasuk's letter is classic political speech, notwithstanding that it concerns the politics of a Native Corporation rather than the politics of a city. The freedom of political speech is at the core of the protections afforded by the First Amendment.[57] At the administrative agency level, the Division did not dispute that Ahmasuk's speech was political. [R. 125-27] In the superior court, the Division contended that Ahmasuk's speech "is appropriately characterized as mixed expressive and commercial speech, not political speech" [R. 449], but in the same paragraph it conceded that Ahmasuk's speech "is entitled to full protection under the First Amendment." [*Id.*][58]

"Full protection under the First Amendment" means that, to justify a restriction on speech, the government must establish both a compelling interest and that the regulation is narrowly tailored to serve that interest.[59] State law is no less demanding. The Alaska

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[57] *See McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 191 (2014) (plurality opinion) ("There is no right more basic to our democracy than the right to participate in electing our political leaders."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) (making clear that political speech is greatly protected and that "core political speech need not center on a candidate for office" but includes advocacy on issues); *In re Primus*, 436 U.S. 412, 434 (1978) ("Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs."); *Alsworth v. Seybert*, 323 P.3d 47, 56 (Alaska 2014) ("The First Amendment broadly protects the freedom of expression upon public questions.") (internal quotation marks and footnote omitted).

[58] The Division cited *City of Skagway v. Robertson*, 143 P.3d 965, 970 (Alaska 2006) ("[S]peech that is commercial in the abstract does not retain its commercial character 'when it is inextricably intertwined with otherwise fully protected speech.'" (quoting *Riley v. National Fed. of the Blind*, 487 U.S. 781, 796 (1988)), and *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 965 (9th Cir. 2012) (holding that telephone directories that include substantial non-commercial speech are entitled to full First Amendment protection).

[59] *See McCutcheon*, 572 U.S. at 197; *Marks*, 500 P.2d at 646 ("'[B]ecause First

Constitution "'protects free speech at least as broad[ly] as the U.S. Constitution and in a more explicit and direct manner.'"[60] The government has the burden to justify any restriction.[61]

Because the Division has never denied that regulation of speech characterized as a proxy solicitation must meet the "compelling interest" and "narrowly tailored" tests, the characterization of Ahmasuk's speech as political, commercial, or some mix of the two may not matter. But, if it does, this Court should determine first that Ahmasuk's letter *is* political speech and is *not* commercial speech.

To support the claim that Ahmasuk's letter is, at least in part, commercial speech, the Division relied on the fact that SNC is a for-profit corporation that pays dividends to its shareholders. [R. 449] But Ahmasuk's advocacy against a type of proxy had no commercial aspect whatsoever. Unlike shares in the for-profit corporations regulated by the SEC, shares in Alaska Native Corporations cannot be sold. [R. 118] Many Native Corporations pay dividends to their members, but that cannot make every comment that

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Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity.'" (quoting *In re Primus*, 436 U.S. at 432-33 (internal quotation marks from *Primus* omitted))).

60 *Alsworth*, 323 P.3d at 56 (quoting *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 198 (Alaska 2007) (internal quotation marks and footnotes from quote omitted).

61 *See Alaskans for a Common Language*, 170 P.3d at 208-09; *Messerli v. State*, 626 P.2d 81, 84 (Alaska 1981) ("Once a fundamental right under the constitution of Alaska has been shown to be involved and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgement in question was justified by a compelling governmental interest." (internal quotation marks and footnote omitted)).

advocates for a particular board candidate, much less every comment about the types of proxies the corporation allows, "commercial" speech, any more than comments about absentee and early voting or advocacy for a candidate for the Alaska state legislature would be "commercial" speech merely because the legislator will vote on how large a Permanent Fund Dividend check to approve in an upcoming year.

Given the nature of Ahmsuk's speech and the Division's concession that "full First Amendment protection" applies, the proxy solicitation regulations applied to Ahmasuk's letter cannot be sustained unless the Division establishes a compelling interest in regulating statements about proxy types *and* that any regulation of such speech is narrowly tailored to serve that compelling interest.

1. The Division has not shown a compelling interest in regulating shareholder speech outside the traditional, narrow definitions of "proxy" and "solicitation."

The Division has never asserted a compelling reason for limiting communications about types of proxies. Thus, the free speech clause requires that Ahmasuk (and other shareholders) be permitted to espouse their views on proxy types freely, without the burden of having to submit their letters and Facebook posts to the Division along with the disclosures required for a proxy solicitation,[62] and without fear that they might be investigated and required to demonstrate the truth of every assertion they make about proxies, if the corporation complains to the Division because it does not like what they

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62 Those burdens of the disclosure regulation can be substantial. *See* 3 AAC 80.355.

wrote.[63]

Ensuring the truth of all speech about the types of proxies that shareholders of a Native Corporation may use is *not* a compelling ground for restricting speech. The First Amendment protects even speech that is demonstrably false.[64] In most contexts, the law presumes that a free flow of ideas is preferable to the government having any role in regulating speech.[65]

The ALJ gave short shrift to Ahmasuk's free speech challenge, because she believed his letter fell within the core speech that the Division may regulate as a proxy solicitation; she also did not believe she was required to consider whether the regulation is too broad as potentially applied to other speakers. [Exc. 64 n.55)] The ALJ was wrong in both respects.

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63 *See* Exc. 42, 45, 48 (Division's investigator asked Ahmasuk to provide him the proof that his assertions were true); *see also Calista*, Order Denying TRO and Preliminary Injunction at 5-6 (discussing the burdens of being subject to suit – another option available to a corporation that contends a shareholder violated the proxy solicitation regulation – even when the shareholder ultimately prevails) [R. 702].

64 *See United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion) ("[T]he common understanding [is] that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."); *281 Care Committee v. Arneson*, 766 F.3d 774, 784-85 (8th Cir. 2014) (noting that *Alvarez* dealt with "false speech in light of general First Amendment protections," but not with political speech, which requires even greater protection than nonpolitical speech).

65 *See Alvarez*, 567 U.S. at 727-28 ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. . . . [S]uppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471-72 (6th Cir. 2016) (noting that *Alvarez* rejected a rule that false speech is not protected by the First Amendment). *See also Calista*, Order Denying TRO and Preliminary Injunction at 5-6. [R. 702-03]

First, as discussed above, Ahmasuk's speech does not fall within the unambiguous core of speech soliciting proxies for an election for which a compelling reason for regulation might be established. Second, even if it did, Ahmasuk still could assert the regulations' overbreadth as they would be applied to others. When dealing with free speech issues, a litigant has standing to challenge the constitutionality of a statute or regulation even if it is not unconstitutional as applied to him.[66] The exception to the usual standing rules "is necessary to avoid chilling the rights of those who may refrain from protected speech in order to avoid prosecution."[67]

This Court should find that the Division has not demonstrated a compelling justification for applying the proxy solicitation regulations to communications about proxies that do not solicit proxies for a particular candidate, proposition, or proxyholder.

2. The Division has not shown that the proxy solicitation regulations are narrowly tailored to serve any compelling state interest.

Even when the government has a compelling interest that justifies imposing regulations on speech, it must draft those regulations as narrowly as possible to serve the state's compelling interest without unduly limiting free speech.[68] The Division has not met

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66 *See Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-57 (1984) ("Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." (internal quotation marks omitted)); *Smith v. State, Dep't of Corrections*, 872 P.2d 1218, 1223 n.9 (Alaska 1994) (overbreadth doctrine creates standing to challenge statutes that chill the exercise of First Amendment rights of others); *Moore v. State*, 298 P.3d 209, 214 (Alaska App. 2013).

67 *Moore*, 298 P.3d at 214.

68 *See In re Primus*, 436 U.S. at 432-33 (quoted *supra* at n.57); *Trask v. Ketchikan*

that test. It is easy to describe much narrower ways in which the Division could accomplish its goal of protecting the integrity of Native Corporation elections. For instance:

- The proxy solicitation definitions could be rewritten (or definitively re-interpreted) to apply only to communications that specifically support or oppose identifiable individual candidates or propositions being put to a shareholder vote. That definition would regulate the speech most likely to have an impact on an election, without curtailing other shareholder speech about the governance of the corporation. Speech that merely addresses types of proxies and speech that comments, favorably or unfavorably, on the management of a Native Corporation would not be regulated as proxy solicitations.

- The regulations that apply to shareholder speech could be rewritten to follow the approach used by the federal Securities and Exchange Commission. Since 1992, the SEC has excluded from the definition of "proxy solicitation" any communication by a shareholder that states his or her own opinion about how the shareholder intends to vote and the reasons for that vote, when those statements are made in a public forum, in broadcast media, or in a newspaper or other bona fide publication disseminated on a regular basis.[69] With years of experience, the SEC has determined that the integrity of shareholder voting can be adequately protected without regulating such speech. In light of the fact that the exemption has not been removed since it was adopted in 1992, this Court can infer that

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Gateway Borough, 253 P.3d 616, 621 (Alaska 2011); *Alaskans for a Common Language*, 170 P.3d at 207-08.

[69] *See* 17 C.F.R. § 240.14a-1(*l*)(2)(iv)(A) (SEC Rule 14a-1) [copy available at Exc. 31-33].

the SEC has found that public expression of individual views, even if based on a misperception of underlying facts, is readily answered in the public forum, and such expressions need not be restricted by government regulation. The SEC adopted this rule in part to avoid the First Amendment concerns that are raised by a facially very broad definition of "solicitation."[70]

The existence of these less restrictive alternatives establishes that the current proxy solicitation regulations, as interpreted by the Division, are not narrowly tailored to protect the integrity of corporate elections and thus application of the Division's proxy solicitation definition to Ahmasuk unconstitutionally infringes on his free speech rights. This Court should reverse the superior court's decision upholding the Division's imposition of a penalty on Ahmasuk, and should direct entry of judgment for Ahmasuk.

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[70] *See Regulation of Communications Among Shareholders*, 57 Fed. Reg. 48,276, at 48278-79 (Oct. 22, 1992); Hornstein, *supra* n.18, at 1153-54; Frenchman, *supra* n.26, at 181-82.

CONCLUSION

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

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

Respectfully submitted, this 17 day of July, 2019.

ACLU OF ALASKA FOUNDATION

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