IN THE SUPREME COURT OF THE STATE OF ALASKA

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

Trial Court Case No. **3AN-18-06035 CI**

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE JUDGE ANDREW PETERSON, PRESIDING

APPELLEE'S BRIEF

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U.S. CONSTITUTION

United States Constitution First Amendment: Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ALASKA CONSTITUTION

Alaska Constitution Article 1, Section 5. Freedom of Speech.

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

ALASKA STATUTES

AS 45.55.139. Reports of corporations.

A copy of all annual reports, proxies, consents or authorizations, proxy statements, and other materials relating to proxy solicitations distributed, published, or made available by any person to at least 30 Alaska resident shareholders of a corporation that has total assets exceeding $1,000,000 and a class of equity security held of record by 500 or more persons and that is exempted from the registration requirements of AS 45.55.070 by AS 45.55.138, shall be filed with the administrator concurrently with its distribution to shareholders.

REGULATIONS:

3 AAC 08.365(16). Definitions relating to solicitation of proxies.

(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

17 C.F.R. 240.14a-1(l). Solicitation of Proxies.

§ 240.14a-1. Definitions.

Unless the context otherwise requires, all terms used in this regulation have the same meanings as in the Act or elsewhere in the general rules and regulations thereunder. In addition, the following definitions apply unless the context otherwise requires:

(l) *Solicitation.* (1) The terms "solicit" and "solicitation" include:

(i) Any request for a proxy whether or not accompanied by or included in a form of proxy:

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

(iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

(2) The terms do not apply, however, to:

(i) The furnishing of a form of proxy to a security holder upon the unsolicited request of such security holder;

(ii) The performance by the registrant of acts required by § 240.14a-7;

(iii) The performance by any person of ministerial acts on behalf of a person soliciting a proxy; or

(iv) A communication by a security holder who does not otherwise engage in a proxy solicitation (other than a solicitation exempt under § 240.14a-2) stating how the security holder intends to vote and the reasons therefor, provided that the communication:

(A) Is made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, or newspaper, magazine or other bona fide publication disseminated on a regular basis,

(B) Is directed to persons to whom the security holder owes a fiduciary duty in connection with the voting of securities of a registrant held by the security holder, or

(C) Is made in response to unsolicited requests for additional information with respect to a prior communication by the security holder made pursuant to this paragraph (l)(2)(iv).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under AS 22.05.010(c) over this appeal from the March 4, 2019 decision of Superior Court Judge Andrew Peterson.

ISSUES PRESENTED

(1) Is the statement, "Please do NOT vote a discretionary proxy in 2017," published in the sole newspaper of a corporation's headquarter town, reasonably calculated to result in shareholders withholding discretionary proxies?

(2) Do ANCSA proxy solicitation filing requirements satisfy the compelled disclosure standards in *Zauderer v. Office of Disciplinary Counsel*[1] and other free speech precedent?

STATEMENT OF THE CASE

I. Introduction.

Appellant Austin Ahmasuk is a shareholder of Sitnasuak Native Corporation, a for-profit corporation organized under the Alaska Native Claims Settlement Act. Alaska Native Corporations are regulated as corporations almost exclusively by state law, which is administered by the Division of Banking and Securities. The State's corporation statutes include a requirement that solicitations of proxies must be filed with the Division concurrently to being communicated to shareholders.[2] A proxy solicitation includes "a

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1 471 U.S. 626 (1985).

2 AS 45.55.139.

request to execute or not to execute" a proxy; or a "communication to shareholders" that is "reasonably calculated" to result in the withholding of a proxy.[3]

In 2016, Mr. Ahmasuk wrote a letter to the Nome Nugget editor and filed it with the Division as a proxy solicitation, with the required disclosures. In 2017, Mr. Ahmasuk wrote a second proxy solicitation—this time urging shareholders to "NOT vote a discretionary proxy in 2017"—also published as a letter to the editor in the Nome Nugget. But Mr. Ahmasuk did not file the 2017 letter with the Division. The Division received and investigated a complaint about the 2017 letter. The Division determined that the 2017 letter was a proxy solicitation that had not been contemporaneously filed with the Division, and that the letter was false and misleading. An Administrative Law Judge and the superior court affirmed the Division's decision.

The Court should affirm because Mr. Ahmasuk's letter falls well within the definition of proxy solicitation, and required disclosures in the securities field satisfy any level of constitutional scrutiny. Affirming is also consistent with the federal regulation and trial court decision relied on by Mr. Ahmasuk.

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[3] 3 AAC 08.365(16). This definition of proxy solicitation is substantially identical to the federal definition of proxy solicitation found in 17 C.F.R. § 240.14a-1(l)(1) &(3): "Any request to execute or not to execute, or to revoke, a proxy; or the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." As discussed below, the federal definition of proxy solicitation has been substantially similar since at least 1952.

II. The Alaska Native Claims Settlement Act resulted in the creation of corporations organized under and governed by state law.

Under the Alaska Native Claims Settlement Act (ANCSA) the United States Secretary of the Interior divided Alaska into twelve geographical regions. [Exc. 80] These regions, and certain Alaska Native villages, formed corporations under state law known as Alaska Native Corporations or ANCs. [Exc. 80] Alaska Natives are the shareholders of ANCs, which are for-profit entities. ANCs provide diverse monetary and non-monetary services to shareholders. [Exc. 80] These include dividends that are often crucial sources of income and "are often considered the most important benefit shareholders receive from the corporations." [Exc. 120] Many ANCs also provide an additional elder benefit, educational scholarships, memorial benefits, charitable donations, employment opportunities, economic development, and other opportunities. [Exc. 120-30] ANCs have diverse financial portfolios, including investments and activities in the petroleum industry, government contracting, real estate, engineering, information technology, telecommunications, environmental science, tourism, aerospace, and natural resources. [Exc. 96]

ANCSA does not provide a federal role for monitoring ANCs, so Alaska has been charged with overseeing these for-profit corporations under its state securities laws and regulations. State securities law authorizes the State to regulate, among other things, proxy solicitations.[4] All annual reports, proxies, or similar materials, which are made

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[4] AS 45.55.139.

available by any person to at least 30 Alaska resident shareholders of an ANC that has at least $1 million in total assets and at least 500 shareholders must be filed with the Division concurrently with the distribution to shareholders.[5] Administrative regulations provide that a proxy solicitation is "(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."[6]

III. In 2016 and 2017, Mr. Ahmasuk published letters to the editor containing proxy solicitations for his native corporation.

Sitnasuak Native Corporation (SNC) is the largest village corporation in the Bering Straits region and is headquartered in Nome, Alaska. [Exc. 16] It has almost 2,900 shareholders. [Exc. 16] SNC and its shareholders (to the extent the shareholders are soliciting proxies) are required to comply with Alaska Statute 45.55.139 because SNC has 500 or more shareholders and total assets exceeding $1,000,000.[7]

Mr. Ahmasuk is a shareholder of SNC. In 2016, he wrote a letter to the editor to the Nome Nugget that addressed SNC proxies; he also sought out and received assistance

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5 *Id.*

6 3 AAC 08.365(16).

7 AS 45.55.139 provides, "A copy of all annual reports, proxies, consents or authorizations, proxy statements, and other materials relating to proxy solicitations distributed, published, or made available by any person to at least 30 Alaska resident shareholders of a corporation that has total assets exceeding $1,000,000 and a class of equity security held of record by 500 or more persons and that which is exempted from the registration requirements of AS 45.55.070 by AS 45.55.138, shall be filed with the administrator concurrently with its distribution to shareholders."

from the Division in filing that letter to the editor as a proxy solicitation. [Exc. 202-214] In 2017, Mr. Ahmasuk sent another letter to the Nome Nugget editor that was published on February 9. Mr. Ahmasuk did not file the 2017 letter to the editor with the Division. In part, Mr. Ahmasuk's 2017 letter to the editor stated:

> 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 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.

[Exc. 8] Mr. Ahmasuk's letter thus explicitly urged SNC shareholders not to vote discretionary proxies in the upcoming annual election. Discretionary proxies allow the holder of the proxy to vote the grantor's shares however the proxy holder desires.[8]

IV. The Division received and investigated a complaint about Mr. Ahmasuk's 2017 letter to the editor.

On February 9, 2017, the Division received a request that it investigate Mr. Ahmasuk's potential violations of Alaska law and associated regulations. [Exc. 34-38] The complainant wrote that Mr. Ahmasuk's 2017 letter to the editor constituted a proxy solicitation, that the letter was seen by more than thirty shareholders, and that the letter contained false and misleading statements. [Exc. 171] The complainant asserted that the false and misleading statements were related to the use and/or misuse of discretionary proxies by SNC shareholders. [Exc. 171]

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8 *See* Fletcher's Cyclopedia of Corporations § 2060 (2018).

Between February 10 and March 2, 2017, Leif Haugen, a Financial Examiner for the Division, investigated the complaint, including several contacts with Mr. Ahmasuk. [Exc. 155-170] On March 13, the Division issued a Temporary Cease and Desist Order to Mr. Ahmasuk for his violations of AS 45.55.139, 3 AAC 08.307, 3 AAC 08.315(a), and 3 AAC 08.355. [Exc. 1-3] The Temporary Cease and Desist Order also stated that Mr. Ahmasuk was subject to a civil penalty of $1,500 for his violations of Alaska statutes and regulations.

Mr. Ahmasuk appealed and requested a hearing before the Office of Administrative Hearings. [Exc. 4] He listed three grounds for a hearing: (1) the First Amendment protected his letter from regulation, (2) his letter was not a proxy solicitation, and (3) his letter was not false or misleading. [Exc. 4]

Counsel for the parties agreed to brief the legal issues of whether the letter to the editor was a proxy solicitation and, if so, whether the State could regulate the letter consistent with Mr. Ahmasuk's free speech rights. [Tr. 29-30] The parties set aside the issue of whether Mr. Ahmasuk's statement contained false and misleading misstatements. [Tr. 29-30]

Mr. Ahmasuk moved for summary judgment, arguing that the statement was not a proxy solicitation and, even if it was, the Division's enforcement actions violated his rights to due process and free speech. [R. 57] The Division opposed the motion, and its opposition was the functional equivalent of a cross-motion for summary judgment. [Exc. 173] Administrative Law Judge Bride Seibert ruled in the Division's favor, finding

that the letter was a proxy solicitation, and concluding that the Division's enforcement of its regulations did not violate Mr. Ahmasuk's constitutional rights. [Exc. 54-65]

Mr. Ahmasuk appealed to the superior court. Superior Court Judge Andrew Peterson affirmed ALJ Seibert's ruling in all respects. [Exc. 67-78] In particular, the court found Mr. Ahmasuk's arguments regarding what constitutes a proxy solicitation "an unreasonable reading and interpretation of the regulatory scheme as a whole." [Exc. 74] The court also noted that, in contrast to being vague, the proxy filing regulations are "clear and instructive as to what conduct is prohibited." [Exc. 76] Regarding Mr. Ahmasuk's free speech concerns, the court ruled that "whether a proxy solicitation is directed towards a particular candidate or ballot proposition or towards a particular type of proxy" does not alter the government's compelling interest in regulating the speech. [Exc. 77]

STANDARDS OF REVIEW

When interpreting a regulation that involves agency expertise, appellate courts will apply the "reasonable basis" test, under which the Court "will defer to the agency unless its interpretation is plainly erroneous and inconsistent with the regulation."[9] If a question of law does not involve agency expertise, the "substitution of judgment" test

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

applies.[10] Questions of fact are reviewed for substantial evidence.[11] Questions of law are reviewed de novo.[12]

ARGUMENT

I. Mr. Ahmasuk's letter asking shareholders not to execute discretionary proxies was a proxy solicitation.

Administrative regulations provide that a proxy solicitation is "(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."[13]

Mr. Ahmasuk's letter falls well within this definition of a proxy solicitation because it urges shareholders not to vote discretionary proxies. It references SNC's upcoming election, it asserts that discretionary proxies have certain disadvantages, it alleges that the "SNC 6"—a group of individuals whose identity is generally known to SNC shareholders—has misused discretionary proxies, and then it concludes by urging, "Please do NOT vote a discretionary proxy in 2017." [Exc. 8] The letter was written by a person with a history of interest in SNC governance, who had previously filed a letter to the editor with the Division. [Exc. 202-214] It was published in the sole newspaper in the town where SNC is headquartered. [Exc. 8] It contains a call to action to SNC

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10 *Id.*

11 *Id.*

12 *Tesoro v. State, Dep't of Revenue*, 312 P.3d 830, 837 (Alaska 2013).

13 3 AAC 08.365(16).

shareholders to "NOT vote a discretionary proxy." [Exc. 8] Taken as a whole, the letter to the editor is a call to action to SNC shareholders to withhold discretionary proxies. This falls well within the plain language of 3 AAC 08.365(16), which encompasses a communication reasonably calculated to result in withholding of proxies.

Treating Mr. Ahmasuk's statement as a proxy solicitation is also consistent with federal precedent. Alaska's definition of proxy solicitation is substantially identical to the federal definition.[14] A leading federal case interpreting when a statement is a proxy statement is *Long Island Lighting Co. v. Barbash*, in which the Second Circuit held that "[t]he question in every case is whether the challenged communication, seen in the totality of the circumstances, is 'reasonably calculated' to influence the shareholders' votes."[15] In that case, the defendants opposed the plaintiffs' construction of a nuclear power facility.[16] The defendants published an advertisement in a newspaper and ran radio advertisements criticizing the plaintiffs' corporate management and encouraging area citizens to replace the for-profit utility with a municipally-owned utility.[17] The trial court ruled that statements that appear in general communications that are indirectly addressed

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14 17 C.F.R. § 240.14a-1(l)(1) &(3): "Any request to execute or not to execute, or to revoke, a proxy; or the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." The federal definition of proxy solicitation has been substantially similar since at least 1952.

15 779 F.2d 793, 798 (2nd Cir. 1985), *quoting Securities and Exchange Comm'n v. Okin*, 132 F.2d 784, 786 (2nd Cir. 1943).

16 *Id.* at 794.

17 *Id.*

to shareholders cannot be proxy solicitations, but the Second Circuit reversed. The Second Circuit analyzed the federal regulation's reference to "other communications" made "under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy."[18] The court ruled that proxy solicitations include "communications which may indirectly accomplish such a result[,]" and that "[d]eciding whether a communication is a proxy solicitation does not depend upon whether it is 'targeted directly' at shareholders."[19]

Another federal court determined that a communication was a proxy solicitation under facts similar to this case, where the board sent a letter urging shareholders to not execute a proxy "until you receive the company's proxy materials."[20] That case involved a dispute between a board slate and an opposition slate of directors.[21] The opposition slate sent out a proxy solicitation.[22] The board sent a letter to shareholders urging shareholders to not vote a proxy until they received the board solicitation.[23] Like Mr. Ahmasuk here, the board asserted that the communication was not a proxy because it asked shareholders not to grant a proxy.[24] But the court ruled that the statement urging shareholders to not issue a proxy was "reasonably calculated to result in the withholding

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18 *Id.* at 795-96.

19 *Id.*

20 *Krauth v. Executive Telecard, Ltd.*, 870 F.Supp. 543, 547 (1994).

21 *Id.* at 544.

22 *Id.*

23 *Id.* at 545-46.

24 *Id.* at 547.

of proxies and as such was a solicitation."[25] The court noted other decisions discussing communications that are part of a "continuous plan" being a proxy solicitation even if the communication does not expressly call for a proxy.[26] But, the court noted, "[t]his case *does* contain express reference to the proxy and is thus an easier case. One need not look to the underlying plan to find that the newsletter sent in this case was a solicitation."[27]

Mr. Ahmasuk points to a recent decision by Judge Guidi as calling for a different result in that case. But Judge Guidi's decision in *Calista Corp. v. Don, et al.*,[28] is not to the contrary. Besides not being before this Court, not having the underlying record, and not having been investigated by the Division, that case involved meaningfully different facts. Calista issued a public censure of its board chair. [Exc. 193] The board chair issued a statement countering the censure, and he and his attorney were interviewed on the radio regarding the censure. [Exc. 193] One shareholder posted on Facebook a call to vote out a particular board member. [Exc. 194]

Judge Guidi ruled that the statements regarding the censure were made in defense of the board chair's reputation, and not in regard to soliciting proxies. [Exc. 193] The statements by the attorney for the board chair did not reference an election and he spoke only about a board member who was not up for reelection. [Exc. 193] Regarding the shareholder Facebook post to "vote out" a board member, Judge Guidi said it was a

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25 *Id.* at 547.

26 *Id. citing Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2nd Cir. 1966).

27 870 F.Supp. at 547 (emphasis in original).

28 Superior Court Case No. 3AN-18-06788 CI [Exc. 190-195].

"closer question." [Exc. 194] Judge Guidi noted that the Facebook post did not "ask for anyone's proxy, nor urge anyone to revoke a proxy, and no evidence has been provided showing he has otherwise obtained any proxies or proxy revocations." [Exc. 193]

Judge Guidi concluded, reasoning "[c]riticism of corporate conduct that is communicated to shareholders indirectly, 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." [Exc. 194] That is all in contrast to Appellant's solicitation here, referencing an election, discussing alleged board misconduct with discretionary proxies, and specifically calling on shareholders to "NOT vote a discretionary proxy in 2017." [Exc. at 8] Appellant's conduct was reasonably calculated to result in the withholding of discretionary proxies under Judge Guidi's *Calista v. Don* analysis.

In this case, Mr. Ahmasuk's letter expressly calls for the withholding of a proxy: "Please do NOT vote a discretionary proxy in 2017." [Exc. at 8] Discretionary proxies allow the holder of the proxy—in this case the board of directors—to vote the grantor's shares however the proxy holder desires.[29] Mr. Ahmasuk had his call to action published in the primary newspaper in SNC's region. [Exc. 8] Mr. Ahmasuk is active in SNC governance matters and has previously filed solicitation materials. [Exc. 5-7, 202-214]

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29 *See* Fletcher's Cyclopedia of Corporations § 2060 (2018).

The Division's interpretation of "proxy solicitation" to include a widely published letter urging shareholders to withhold a proxy is consistent with the language of the regulation and case law. The Division's interpretation is entitled to judicial deference as having a "reasonable basis" within the Division's expertise.[30] The Division has had near exclusive jurisdiction to regulate ANCs as corporations since 1981. [Exc. 80] The Division has been involved in many hundreds of ANC disputes, including proxy solicitations, election disputes, corporate reports to shareholders, and other matters. The Division has the expertise to analyze the context in which Mr. Ahmasuk made his statement, what was said, and the particular medium in which he said it. The Court should hold that the Division's interpretation of its regulation concluding Mr. Ahmasuk's letter was a proxy solicitation has a reasonable basis and it is supported by substantial evidence.

Mr. Ahmasuk argues that interpretation under federal exemptions from proxy solicitations changes the result in this case. [At. Br. at 18] That is incorrect. Federal law exempts from proxy solicitations a shareholder saying how he intends to vote and why, as long as he "does not otherwise engage in a proxy solicitation."[31] Mr. Ahmasuk would not qualify for this exemption because he "otherwise engage[d] in a proxy solicitation" by urging other shareholders to withhold proxies. The federal exemption does not allow a shareholder to broadly and overtly campaign other shareholders to withhold a particular

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30 *Davis Wright Tremaine LLP v. State*, 324 P.3d at 299.

31 17 C.F.R. § 240.14a-1(l)(4).

proxy in an upcoming election.

II. Alaska's proxy solicitation regulations (and the federal rules on which they are based) are not unconstitutionally vague.

Mr. Ahmasuk alternatively argues that Alaska's regulations defining proxy solicitations are unconstitutionally vague. [At. Br. at 27] This Court has already ruled against Mr. Ahmasuk's position. In *Meidinger v. Koniag*, Meidinger argued that Alaska's proxy solicitation regulations were vague, overbroad, and violated his right to free speech.[32] This Court rejected this argument, calling it "unsupported by any case law involving proxy solicitations."[33] Mr. Ahmasuk attempts to distinguish *Meidinger* because that case involved a solicitation for a particular slate of candidates. [At. Br. at 31-2] Whether the solicitation calls for electing specific candidates or withholding discretionary proxies, both are solicitations. As Judge Peterson noted below, the language of the proxy solicitation regulation contemplates a solicitation including a withholding of proxies, including a call to withhold discretionary proxies. [Exc. 74]

Far from being novel, Alaska's proxy solicitation language is based on the federal Securities and Exchange Commission's Rule 14a-1, which has had functionally identical language to that contained in the Alaska regulations since at least 1952.[34] The 1952 version of Rule 14a-1 defined a solicitation as: "(1) any request for a proxy whether or not accompanied by or included in a form of proxy, (2) any request to execute or not to

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32 31 P.3d 77, 84-85 (Alaska 2001).

33 *Id.* at 85.

34 17 F.R. 11431 (1952).

execute, or to revoke, a proxy, or (3) the furnishing of a form of proxy to security holders under circumstances reasonably calculated to result in the procurement of a proxy." Mr. Ahmasuk cites to no cases, and the State is not aware of any, holding that this sixty-plus-year-old language—which is applicable to the entire American securities industry—is unconstitutionally vague.

Even if the Court accepted Mr. Ahmasuk's invitation to find "room" [At. Br. at 32] to deviate from this Court's holding in *Meidinger*, his void-for-vagueness arguments still fail. In *Brandner v. Providence Health & Services – Washington*, the Court explained that "[a] statute, rule, or policy may be deemed impermissibly vague for either of two discreet reasons: It fails to provide people of ordinary intelligence a reasonable opportunity or fair notice to understand what conduct it prohibits; or it authorizes or encourages arbitrary and discriminatory enforcement."[35]

In *Brandner*, a physician appealed after Providence discharged him for violating its policy that that doctors report "any limitations, restrictions, or conditions of any sort imposed by a state board, health care entity or agency with respect to the practitioner's practice."[36] Brandner had not disclosed that the State Medical Board had required him to undergo psychiatric and medical evaluations after making a threat involving a gun to the Governor's office. Brandner had the examinations performed, which examinations concluded there was no evidence indicating he was unfit to practice medicine. Brandner

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35 394 P.3d 581 (2017).

36 *Id.* at 591.

argued that Providence's policy was impermissibly vague and did not clearly require him to report this information to Providence. This Court disagreed, ruling that Providence's policy clearly required Brandner to report the State Medical Board's examination condition on his practice, and that the evidence did not show arbitrary enforcement.[37] Similarly here, Alaska's proxy solicitation definition clearly covers Mr. Ahmasuk's conduct.

The Court has held that statutes, both civil and criminal, were not overly vague in a variety of contexts. In *Haggblom v City of Dillingham*,[38] the Court considered a city ordinance requiring that any animal that bites a person without "provocation" be euthanized. Haggblom took her dog to work and kept the dog in her office behind a child gate.[39] A coworker attempted to enter the office, and the dog bit her as she reached for the gate.[40] The city initiated proceedings to have the dog euthanized.[41] Haggblom argued that the "provocation" requirement was overly vague.[42] This Court ruled that, whatever gray areas the "provocation" requirement may have, "this case falls squarely within the phrase's plain meaning."[43] Haggblom also argued that the ordinance was arbitrarily enforced. The officer in charge of enforcing the ordinance answered "yes" when asked,

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37 *Id.*

38 191 P.3d 991 (2008).

39 *Id.* at 994.

40 *Id.* at 994.

41 *Id.*

42 *Id.* at 997.

43 *Id.*

"isn't it true that you're basically determining what provocation is [,] based on your own judgment?"[44] The court held that government having enforcement discretion does not mean a law is being enforced arbitrarily.[45] The court commented, "[e]nforcement of criminal laws of necessity involves some degree of discretion."[46]

As in *Haggblom* and *Brandner*, Alaska's proxy solicitation definition is not unconstitutionally vague, and Mr. Ahmasuk's conduct falls squarely within its scope. A proxy solicitation includes a "communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy."[47] Mr. Ahmasuk published a statement in the largest newspaper of SNC's region that specifically implored shareholders, "Please do NOT vote a discretionary proxy in 2017." [Exc. 8] Just one year earlier he had filed a letter to the editor as a proxy solicitation. [Exc. 202-214] As with the dog bite in *Haggblom*, whatever gray areas "reasonably calculated to result in the procurement, withholding, or revocation of a proxy" may have, Mr. Ahmasuk's conduct "falls squarely within the phrase's plain meaning."[48]

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44 *Id.* at 998.

45 *Id.*

46 *Id. quoting Larson v. State*, 564 P.2d 365, 372 (Alaska 1979).

47 3 AAC 08.365(16).

48 191 P.3d at 997.

III. Requiring Mr. Ahmasuk to simultaneously file his proxy solicitation with its publication does not violate his free speech rights.

A. This Court has twice rejected free speech challenges to Alaska securities regulations.

This Court has twice held that registration requirements involving securities do not violate the right to freedom of speech. As noted above, in *Meidinger* this Court held that there was no precedent that proxy solicitation regulations violated free speech protections.[49] In so holding, this Court quoted the statement in *Ohralik v. Ohio State Bar Association* that, "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as . . . corporate proxy statements. . . . [T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[50]

This Court reached a similar conclusion in the context of registering securities in *Caucus Distributors v. Dep't of Commerce*.[51] In that case, the appellants were fundraisers for longtime political activist Lyndon LaRouche.[52] They engaged in distributing publications of a social, economic, and political nature, and fundraising through sales, donations, and loans.[53] The loans were non-negotiable, unsecured promissory notes.[54]

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49 31 P.3d at 84-5.

50 436 U.S. 447, 456 (1978).

51 793 P.2d 1048 (1990).

52 *Id.* at 1050-51.

53 *Id.*

54 *Id.* at 1051.

Two Alaskan investors complained to the Division that they had been defrauded when they loaned money backed by promissory notes from Caucus Distributors.[55] The Division ruled that promissory notes of the kind issued by Caucus were regulated by the Alaska Securities Act and had to either be registered or had to receive an exemption, and that the notes were obtained by fraud.[56] The Division therefore issued a cease and desist order.[57] Caucus appealed, arguing that the First Amendment protected their fundraising, regardless of whether their statements were true.[58] This Court rejected the argument that fraudulent speech regulated by the Division was protected by the First Amendment: "The first aspect of Caucus' argument is meritless. A state has a compelling interest in protecting the public from fraudulent practices, even where the purpose underlying those fraudulent practices is protected by the First Amendment."[59]

The court then considered whether the requirement that Caucus register its promissory notes as securities violated the First Amendment where Caucus was fundraising for political speech.[60] The court, citing U.S. Supreme Court precedent, noted "[t]he fact that under this cease and desist order, Caucus will have to register future borrowing from supporters, even assuming a lack of deceit, does not impermissibly

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55 *Id.* at 1051-52.

56 *Id.* at 1052-53.

57 *Id.* at 1053.

58 *Id.* at 1057.

59 *Id.* at 1057.

60 *Id.* at 1057-58.

impinge on its first Amendment activities."[61]

The core holding from *Caucus*, as relevant here, is that requiring even core political speech to comply with securities law survives constitutional review.[62] Registering as a security is more difficult than the filing of a proxy solicitation at issue here.[63] Therefore, as in *Caucus*, requiring Mr. Ahmasuk to file a proxy statement survives constitutional review regardless of whether his solicitation was false and misleading.

B. Compelled commercial disclosures, such as those required in a proxy filing, do not violate free speech rights.

This case is also consistent with a line of cases holding that compelled disclosure of factual, non-controversial information does not violate free speech protections. In *Zauderer v. Office of Disciplinary Counsel,* the U.S. Supreme Court evaluated the constitutionality of Ohio's disclosure requirements for attorney advertising.[64] An attorney was disciplined for "advertising his availability on a contingent-fee basis," without

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61 *Id.* at 1058 *citing NAACP v. Alabama*, 357 U.S. 449, 463-64 (1958) *and Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). The court distinguished its ruling from *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) striking down a law requiring charitable solicitors to disclose what percentage of contributions went toward charitable activities. The court specifically noted that the "disclosure required to [register the security or obtain an exemption] passes constitutional muster under *Riley*."

62 *See, also Caucus Dist., Inc. v. Maryland Securities Cmmr.*, 577 A.2d 783, 792 (Md. 1990) (under substantially identical facts to the Alaska *Caucus* case holding that securities registration laws survive constitutional scrutiny because "[t]he state interest in protecting against securities fraud is legitimately served by the registration, disclosure, and antifraud provisions of the Act.").

63 *Cf.* 3 AAC 08.345 (ANCSA proxy solicitation filing requirements) *and* 3 AAC 08.080-.230 (securities registration requirements).

64 471 U.S. 626, 650-3 (1985).

including the required disclosure that "clients will have to pay costs even if their lawsuits are unsuccessful."[65] The Court held that commercial disclosure requirements "trench much more narrowly" on a speaker's interests than "flat prohibitions on speech," warranting different treatment than commercial speech restrictions.[66] The Court did express some concern that "unjustified or unduly burdensome disclosure requirements" could chill "protected commercial speech," but it held that the rights of the speaker "are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[67]

The Ninth Circuit recently aligned its opinion with those of the First, Second, Third, and Sixth Circuits, holding that the *Zauderer* test applied for compelled commercial disclosures even "where the disclosure does not protect against deceptive speech."[68] In *CTIA—The Wireless Ass'n v. City of Berkeley*, the court upheld a city

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65 *Id.* at 652. The attorney advertised that clients would owe no legal fees if there was no recovery, but he failed to distinguish between legal fees and costs, which would mislead the perspective client into thinking a losing case would be "entirely free of charge." *Id.*

66 *Id.* at 651.

67 *Id.* at 651. "The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed." *Id.* at 653.

68 *CTIA—The Wireless Ass'n v. City of Berkeley, CA*, 928 F.3d 832, 843 (9th Cir. 2019). "Several of our sister circuits . . . have unanimously concluded that the *Zauderer* exception for compelled speech applies even in circumstances where the disclosure does not protect against deceptive speech." *Id.* (citing *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2001). *See Nat'l Elec. Mfrs. Ass'n v. Sorrell,* at 113-114 ("Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not

ordinance requiring cell phone retailors to disclose to prospective buyers that carrying cell phones against their bodies could cause them to exceed the federal government's recommended exposure limit of radio-frequency radiation.[69] Retailors had to prominently display the city's notice on a poster, or provide the notice in a handout for consumers.[70]

CTIA, a cell phone trade organization, argued that the compelled disclosure violated the First Amendment.[71] The city of Berkeley argued for review under *Zauderer*,[72] While CTIA argued for more stringent scrutiny.[73] The court agreed with the city that *Zauderer* applied because the ordinance placed no restriction on speech, and was instead just a compelled commercial disclosure.[74]

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offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.").

69 *CTIA v. Berkeley*, at 837-8.

70 *Id.* at 838.

71 *Id.* at 836, 838.

72 *Id.* at 842-3.

73 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563–64 (1980) (commercial speech restrictions must: (1) "concern lawful activity and not be misleading"; (2) "the asserted governmental interest [must be] substantial"; (3) the regulation of the speech must "directly advance[e] the governmental interest," and; (4) the regulation must not be "more extensive than is necessary to serve that interest."

74 *Id.* at 843.

The *Zauderer* test, according to the Ninth Circuit, requires that compelled disclosures be "'reasonably related' to a substantial government interest," and involve "'purely factual and uncontroversial information' that relates to the service or product provided."[75] It found that protecting public health and safety of consumers was a substantial government interest, and that the disclosure requirement (though CTIA argued that radio-frequency radiation from cell phones had not been proven to be dangerous) was reasonably related to the government's interest.[76]

CTIA also argued that the Berkeley City Council's compelled disclosure was "unduly burdensome," citing *American Beverage Association v. City & County of San Francisco,*[77] where the court ruled against a compelled health warning covering twenty percent of advertisements for certain sugar-sweetened beverages and set off by a rectangular border.[78] The court distinguished CTIA's case from *American Beverage* by noting that Berkeley's ordinance requiring a prominently posted notice or a handout (to which the retailer may add additional information so long as that information is distinct from the compelled disclosure), was a "minimal requirement" that "did not threaten to drown out messaging by cell phone retailers subject to the requirement."[79]

Mr. Ahmasuk takes the position that his proxy solicitation was political speech.

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75 *Id.* at 842.

76 *Id.* at 845-7.

77 916 F.3d 749, 757 (9th Cir. 2019).

78 *Id.* at 848-9.

79 *Id.* at 849.

[At. Br. 33] The State views the letter as mixed expressive and commercial speech. But in either case, *Zauderer* held that even for protected commercial speech where there are compelled disclosures it is appropriate to compare the minimal burden of disclosure against the State's interest in informed corporate governance.[80]

In this case, the requirement that Mr. Ahmasuk file his proxy solicitation with the Division is reasonably related to the substantial government interest of protecting the shareholders from deception and being informed about who is soliciting a proxy. The modest amount of information solicitors must email to the Division is a minimal requirement that does not drown out the message of solicitors.[81] Mr. Ahmasuk does not need to publically post a compelled disclosure. He does not have to recite a state-prescribed script while attempting to get his message out. He need only file his disclosure directly with the Division; his speech is not drowned out by the filing requirement.

Here, if Mr. Ahmasuk's statements are materially misleading, *Caucus* makes clear that misleading statements in a proxy solicitation are not First Amendment protection. If Mr. Ahmasuk's statements are true, needing to file a proxy solicitation survives constitutional review because of the state's interest in preventing fraud and the minimally intrusive act of filing a proxy solicitation statement, which Mr. Ahmasuk has done

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80 471 US. at 651 ("We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.").

81 *See Caucus Distributors,* at 1057–8, where requiring a political organization to register fundraising loans as securities was held to pass constitutional muster. Registering a note as a security is far more burdensome than the concurrent filing process for proxy solicitations in Alaska.

before.[82] Under *Zauderer* and its progeny, requiring a person soliciting proxies to make certain non-controversial, factual disclosures to the Division does not violate free speech rights.

CONCLUSION

The regulation defining proxy solicitations has been in a functionally identical form nationwide for at least six decades. It is not unconstitutionally vague. And requiring filing of proxy solicitations survives First Amendment review under *Caucus Distributors v. Dep't of Commerce.* The Court should affirm.

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82 At the administrative level the parties separated out whether Appellant's statements were false or misleading. But even if Appellant's statements were true, the State may constitutionally enforce proxy filing regulations.