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

Randall Kowalke,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
David Eastman et al,	)	
	)	
	)	
Defendant.	)	
	)	Case No. 3AN-22-07404 CI

DECISION AND ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION, DENYING REQUEST TO REMOVE REPRESENTATIVE EASTMAN FROM THE BALLOT, AND ORDERING THE DIVISION TO DELAY CERTIFYING RESULT FOR HOUSE DISTRICT 27.

The Disqualification for Disloyalty clause of the Alaska Constitution mandates that, "No person who advocates, or who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the United States or of the State shall be qualified to hold any public office of trust or profit under this constitution."[1] Randall Kowalke alleges that Representative David Eastman is barred by this clause from holding public office due to his membership in the Oath Keepers.

Kowalke has asked this court to grant a preliminary injunction declaring that Representative David Eastman is ineligible for public office and ordering the Division of Elections to remove his name from the ballot. Kowalke argues that he has presented sufficient facts at this early stage in the case to show that he has a clear probability of succeeding on his claim. Representative Eastman responds that the Oath Keepers' by-laws do not call for the violent overthrow of the government and that Kowalke has not presented sufficient evidence to justify an injunction. The Division also opposes the requested injunction and argues that it

[1] Art. XII, § 4.

is both too late to remove Representative Eastman's name from the ballot and that requiring the Division to do so would undercut the public's confidence in the fair administration of the election.

I. Facts Alleged

To support his request for a preliminary injunction, Kowalke submitted affidavits from himself and Matthew Kriner. Kowalke attached to his affidavit the letter he received from the Division denying his complaint, his own letter to the Division lodging the complaint, as well a printed article from Representative Eastman's website in which Representative Eastman addressed his membership in the Oath Keepers and the events that occurred at the United States Capitol on January 6, 2021.[2] Kowalke also attached an affidavit from Matthew Kriner, a Senior Research Scholar at Middlebury University's Center on Terrorism, Extremism, and Counterterrorism.[3] That affidavit explained why, in Kriner's opinion, the Oath Keepers were an organization who advocated for the violent overthrow of the United States government.[4] Kriner points to the arrest and conviction of multiple Oath Keepers members, including those in leadership positions, for their role in the events on January 6. He also points to violent rhetoric attributed to members of the Oath Keepers as well as their armed participation in standoffs with federal law enforcement in 2014 and 2016.[5]

Representative Eastman argued that the organization was distinct from specific individuals within it, and that the organization as a whole does not advocate for the overthrow of the United States government. Representative Eastman points to the group's by-laws, included as an attachment to his affidavit.[6] The group's by-laws require an oath to uphold the United States Constitution,

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[2] Kowalke Affidavit at 2 and attached Exhibits 1, 2, and 3.
[3] Kriner Affidavit at 2.
[4] *Id.* at 2-3.
[5] *Id.* at 3-4.
[6] Eastman Affidavit at 2 and Attachment A.

among other membership criteria.[7] Representative Eastman also stated in his affidavit that he donated to the Oath Keepers in 2009 and received a "Life Membership Commemorative Certificate" in the mail, but that otherwise has not interacted with the group since that time.[8] He stated that he believes that the organization is no longer active.[9] Representative Eastman also emphasized that he has taken multiple oaths to uphold the United States Constitution and does not support any group that advocates for the violent overthrow of it.[10] Finally, Representative Eastman emphasized that he did not participate in any "protest, violence, or other criminal activity" while he was in Washington D.C. on January 6.[11]

The Division argued that granting the injunction and ordering Representative Eastman's name removed from the ballot would harm the public's interest in an orderly election. The Division Director submitted an affidavit explaining the processes the Division undertakes to create ballots and program voting machines.[12] She explained that it would not be possible to remove a candidate from the House District 27 ballot at this time without significantly impacting the rest of the contests in the general election.[13] Furthermore, doing so would cause the Division to miss the September 24 deadline to mail ballots to overseas voters.[14] Finally, the Division informed the court that although it was not possible to remove a candidate's name from the ballot at this time, the Division could "withdraw" a candidate from the ranked-choice tabulation any time before results are certified.[15] In that event, "no votes would go to the withdrawn

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[7] *Id.*
[8] *Id.* at 2-3.
[9] *Id.*at 3.
[10] *Id.* at 3.
[11] *Id.* at 2.
[12] Fenumiai Affidavit at 1-3.
[13] *Id.*
[14] *Id.* at 3.
[15] *Id.* at 4.

candidate" and instead "votes for that candidate would go to the voters' next-highest choices."[16]

In response to Eastman's arguments, Kowalke submitted a supplemental affidavit authored by Kriner opining that the Oath Keepers had not disbanded.[17] Kriner also stated that the by-laws were most likely written by the founder of the oath keepers, Elmer Stewart Rhodes, who had been indicted in January, 2022 on federal charges of seditious conspiracy.[18] Kriner stated that the membership requirements in the by-laws were seldom if ever enforced.[19] Kowalke also filed an affidavit authored by Jonathan Lewis, a research fellow with the Program on Extremism at George Washington University.[20] In the affidavit, Lewis stated that his program had compiled over 40,000 pages of original materials gathered from the federal prosecutions of persons who participated in the January 6 events at the United States Capitol and also conducted dozens of interviews.[21] Lewis stated that 32 members of the Oath Keepers had been charged with federal crimes related to the indicted conspiracy.[22] According to his affidavit, nine of those members have since pled guilty to related charges.[23] Additionally, Lewis detailed violent rhetoric attributed to members of the Oath Keepers leadership leading up to January 6.[24]

The court heard the parties' arguments on September 20, 2022, and took the matter under advisement. On September 21, the court requested additional information from the parties related to the timing of when certification of the House District 27 results would have to occur and whether those results could be

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[16] *Id.*
[17] Supplemental Kriner Affidavit at 1.
[18] *Id.* at 3. Kriner provided the following web address to access a copy of the indictment: https://www.justice.gov/opa/press-release/file/1462481/download.
[19] *Id.*
[20] Lewis Affidavit at 2.
[21] *Id.* at 2-3.
[22] *Id.* at 6-7.
[23] *Id.* However, the information provided did not include what charges were pled to nor the factual bases for those convictions.

certified later than and separate from the other election contests in November. This Decision and Order now follows.

II. Discussion

a. Whether an Injunction Should be Granted

Alaska Civil Rule 65 governs preliminary injunctions. There are two standards that the court may use when considering whether to grant a preliminary injunction. Which standard applies is determined by the "nature of the threatened injury."[25]

The court applies a "balance of the hardships" approach when the plaintiff faces the danger of irreparable harm and the opposing party can be adequately protected."[26] Irreparable harm "should not be inflicted" and is a harm which no court can reasonably redress "because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages."[27] Adequate protection exists where the resulting injury to the defendants can be indemnified by a bond or "where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted."[28] The balance of hardships is determined by weighing the harm that will be suffered by the plaintiff if an injunction is not granted, against the harm that will be imposed upon the defendant by the granting of an injunction.[29] In this case, Representative Eastman cannot be adequately protected by a monetary bond if the injunction were granted because he would be

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[24] *Id.* at 4-6.
[25] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).
[26] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).
[27] *State v. Galvin*, 491 P.3d 325, 333 (Alaska 2021) (citations omitted).
[28] *Metcalfe*, 110 P.3d at 978-979 (citing *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991).
[29] *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1272–73 (Alaska 1992).

unable to run for office in the November election.[30] In line with this, none of the parties have argued that the balance of the hardship standard applies in this case.[31]

Where the injury to the plaintiff is "less than irreparable or if the opposing party cannot be adequately protected," the plaintiff must make "a clear showing of probable success on the merits."[32] The party seeking a preliminary injunction has the burden to support their request.[33]

In order to prevail on his claim that Representative Eastman is barred from public office by the disqualification for disloyalty clause, Kowalke must show that Representative Eastman "aids or belongs" to the Oath Keepers. He must also present evidence that the Oath Keepers are a "party or organization or association which advocates . . . the overthrow by force or violence of the government of the United States or of the State."[34]

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[30] *See e.g. State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978–79 (Alaska 2005) ("Even assuming that Metcalfe faced "irreparable injury," we see simply no way for the state's interests to be adequately protected. We have said that such protection exists where "the injury that will result from the injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted." Here, a preliminary injunction will prevent the state from administering an election pursuant to its own election laws.")

[31] Kowalke argues that he does face irreparable injury. However, he does not argue that Representative Eastman can be adequately protected nor has he pursued an injunction under the "balance of hardships" standard. The court will therefore not address whether Kowalke faces irreparable harm.

[32] *Metcalfe*, 110 P.3d at 978 (*citing Kluti Kaah.*, 831 P.2d at 1272 n. 4).

[33] *Randle v. Bay Watch Condo. Ass'n*, 488 P.3d 970, 974 (Alaska 2021) *and State v. Norene*, 457 P.2d 926, 934 n.5 (Alaska 1969) ("The applicant has the burden of showing his right to injunctive relief by evidence and that irreparable injury will result if the injunction is not granted ....").

[34] Kowalke also argued that he would show that the Division erred when it denied his complaint and placed Representative Eastman's name on the ballot. This element is not necessary to entitle Kowalke to relief. The Division argued during its motion to dismiss that it is required by its regulation to only review documents in the public record and the court declined to rule on whether that interpretation was reasonable. Kowalke has also emphasized that his complaint is not an administrative appeal. In seeking a preliminary injunction, Kowalke has produced significantly more information on the Oath Keepers than what the

i. Aiding or Belonging to the Oath Keepers

Representative Eastman's affidavit and answer to the complaint acknowledge that he contributed to the Oath Keepers in 2009 and received a "Life Member Certificate."[35] Additionally, Kowalke has provided an article written by Representative Eastman and published on "davideastman.org".[36] In the article, Representative Eastman wrote that he would not condemn the law-abiding members of the Oath Keepers, while also stating that those who broke the law must be punished.[37] Representative Eastman also acknowledged that he had a "slight connection" to the organization, "having applied for membership more than a dozen years ago and never attended a meeting."[38] A fair reading of the article is that Representative Eastman would not, despite pressure from other members of the Legislature, disavow his prior association with the Oath Keepers. That association was described as being a "Life Member" of the organization. Based upon the information currently available to this court, Kowalke has shown a clear probability of success on the merits of this element.

ii. Organization or association which advocates the overthrow by force or violence of the government of the United States

It is readily apparent that the Oath Keepers are an "organization" or "association" with by-laws, leadership, dues, and tens-of-thousands of members. Kowalke and Representative Eastman differ on whether the organization advocates for the overthrow of the United States by force or violence.

Division considered when it denied his complaint. It is therefore possible for the Division to have not erred in applying its own regulations when deciding the complaint and also for Kowalke to show a clear probability of success on the merits in this action for declaratory and injunctive relief.

[35] Eastman Affidavit at 1 and Answer at ¶¶ 1 and 13.

[36] Kowalke Affidavit, Exhibit 3.

[37] Kowalke Affidavit, Exhibit 3 at 1.

[38] *Id.* at 2.

Kowalke has provided the court with affidavits from two researchers as well as information from a federal indictment that includes evidence that multiple members of the Oath Keepers, including their president Mr. Rhodes, planned to disrupt the United States Congress when it was certifying election results and that they did so by means of force. The affidavits also include information that the actions on January 6 were planned by members of the Oath Keepers, acting under the name of the group. An organization is defined not only by its by-laws, but also by the actions and statements of those who purport to lead it. And the limited evidence before the court appears to show that the Oath Keepers are an active organization with an interim-president who is serving "in lieu of Mr. Rhodes until he is released."[39] This implies that the Oath Keepers' current leadership has not disavowed its prior leaders' and members' criminal actions[40] on January 6. This supports Kowalke's argument that the Oath Keepers are an organization that advocates the overthrow of the United States government. Based upon this information and the other information from the affidavits detailed above, Kowalke has made the required showing necessary for a preliminary injunction. The court emphasizes that this analysis is based upon a limited record and after the testimony of no witnesses, and it does not represent a final decision in this case.[41]

Having found that Kowalke has shown a probability of success on the merits, the court will now turn to what, if any, relief is warranted at this time.

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[39] Supplemental Kriner Affidavit at 2, quoting Kellye SoRelle the Oath Keeper's general counsel and acting president.

[40] At least 9 members of the Oath Keepers have pled guilty to charges related to their actions on January 6. Lewis Affidavit at 6.

[41] Trial on the merits of the claims, following full discovery by the parties, will begin on December 12, 2022.

b. How any relief ordered impacts the public's interest in an orderly election, the voters' ability to choose their representative, and the parties' interest in fairly litigating this case.

In *State v. Galvin*, the Alaska supreme court held that "even if a party requesting preliminary injunctive relief satisfies the requirements of the probable success on the merits standard, a court has the discretion to deny the requested relief if granting it would imperil the public interest."[42] This factor may be "especially important when a requested preliminary injunction threatens the public's interest in an orderly election."[43] In reaching this decision, the court noted that the "United States Supreme Court directs courts, when 'exercising their sound discretion' whether to grant an injunction, to 'pay particular regard for the public consequences.'"[44] Further, when considering whether to grant relief that would impact an election, "a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws."[45] In making this determination, the focus is not just on the parties. Rather, the court must consider the interests of the affected citizens of the state.[46]

The Division argues that the court should deny the requested preliminary injunction because granting it would undercut the public's interest in an orderly election. Specifically, the Division states that there is not enough time to alter the ballots due to the impending election and the processes required to administer it. The Division raises many of the same concerns expressed in the *Galvin* case regarding the timing for mailing overseas ballots as well as the complexity of

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[42] 491 P.3d 325, 339 (Alaska 2021).
[43] *Id.* at 338.
[44] *Id. quoting Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).
[45] *Id.* at 339 *quoting Reynolds v. Sims*, 377 U.S. 533, 585 (1964)
[46] *Id. citing Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("[O]ur law recognizes that election cases are different from ordinary injunction cases. Interference with impending elections is extraordinary ...." (citation omitted)).

reprogramming the voting machines.[47] The Division has unique expertise in what is needed to successfully administer a statewide election, and the court does not have any contrary evidence that would support finding that redesigning the ballot is feasible. This factor therefore strongly weighs against ordering Representative Eastman's name removed from the ballot, especially if alterative relief is available. The court will therefore not order the Division to remove Representative Eastman's name from the ballot.

Additionally, even without the public interest analysis discussed above, the court would not grant the relief requested by Kowalke. Removing Representative Eastman's name from the ballot at this stage would effectively decide the matter in Kowalke's favor. This is because if Representative Eastman's name were removed from the ballot but he was then to prevail at trial, he would not be able to run for the office he now seeks. Essentially, Representative Eastman would lose at the outset of the case before he had a full and fair opportunity to defend himself. For this additional reason, the court declines to order the Division to remove Representative Eastman's name from the ballot.

However, this does not end the court's public interest analysis because the court must consider the impact of this decision on the public.[48] Kowalke argues that the voters in House District 27 have an interest in choosing who represents them in the legislature that is impacted by this case. If Representative Eastman is reelected in November but then is ultimately found to be ineligible to serve, then the voters in House District 27 will not be able to choose his replacement. This is because when there is a vacancy in the legislature, the governor appoints a qualified person to fill the position.[49] For this reason, deciding what relief to order requires the court to balance the public's interests discussed above—both in an orderly election and to determine who represents them—with Kowalke's interest

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[47] Fenumiai Affidavit at 1-3 and *Galvin*, 491 P.3d at 338-39 and 341-43.
[48] *Galvin*, 491 P.3d at 338.

in pursuing appropriate injunctive relief. In turn, those interests must be balanced with Representative Eastman's interest in having a full and fair opportunity to defend against this suit.

To meet this balance, the court is mindful that one of the primary purposes "of a preliminary injunction is to maintain the status quo."[50] To that end, the court requested additional information from the Parties regarding whether it would be possible to delay certifying the results for the House District 27 race without impacting certification of the remaining races. The parties responded on September 22. The Division submitted a brief as well as a supplemental affidavit from Division Director Fenumiai. The Division explained that if ordered by the court, it would be possible to delay certifying the race for state representative in House District 27. The Division outlined a procedure through which certification could be delayed until after trial in this case. A short delay is feasible and would not delay the legislature's work because representatives are not sworn in until session begins. The Division correctly points out that deadlines will be short in this case and any delay must also account for appellate litigation and a potential remand. The court will therefore endeavor to expedite the trial in this matter to the maximum extent possible that is consistent with due process.

Assuming that this case goes to a trial on the merits and Representative Eastman prevails in his election, there are two potential scenarios.[51] First, if Representative Eastman wins his election and also prevails at trial, he will be certified the winner of the race. Second, if Representative Eastman wins his election but loses at trial, the Division can re-tabulate the ranked choice results and

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[49] AS 15.40.320.

[50] *Martin v. Coastal Villages Region Fund*, 156 P.3d 1121, 1126 (Alaska 2007) *citing United States v. Guess,* 390 F.Supp.2d 979, 984 (S.D.Cal.2005) ("A preliminary injunction is 'a device for preserving the status quo and preventing the irreparable loss of rights before judgment.'") (citing *Sierra On–Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1422 (9th Cir.1984)).

a new winner can be certified. Under either scenario, the voters of House District 27 have a say in who represents them.

Representative Eastman argued in his supplemental brief that any order singling out his election and delaying certification could improperly influence the election in House District 27. The court acknowledges that uncertainty surrounding the procedures and timing of an election is never desirable. But the court finds that any additional prejudice to him is speculative and likely no more prejudicial than the impact that already exists because of this litigation.

This situation is unprecedented and the court must attempt to balance the competing rights and interests implicated by this litigation. Among the options available, the relief prescribed in this Order most appropriately maintains the status quo, protects the rights of the parties, and allows for the voters in House District 27 to select their representative regardless of the specific outcome of this litigation.

III. Conclusion

For the reasons stated above, the court GRANTS Kowalke's motion for a preliminary injunction, but DENIES the request to order the Division to remove Representative Eastman from the ballot. Instead, pursuant to the preliminary injunction in this case, the court ORDERS the Division to delay certification of the race for representative of House District 27 until after trial in this matter and further order of the court.[52]

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[51] If Representative Eastman does not prevail in the unofficial tabulation, then this Order will be revisited.

[52] The court defers to the Division's knowledge regarding how best to implement this order and so therefore adopts the procedures suggested by the Division on page 6 of its Supplemental Brief filed September 22, 2022.

DONE this 22nd day of September, 2022, at Anchorage, Alaska.

Jack R. McKenna
Superior Court Judge

I certify that on 9/22/22
a copy of the above was mailed to
each of the following at their
addresses of record:
SFletcher, TFlynn,
JDavis, LHarrison,
Jmiller
C. Ferntheil
Judicial Assistant