

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

CHRIS DUKE, RANDY ELDGE, )  
STEVE STRAIT, and KATHRYN )  
WERDAHL, )

Plaintiffs, )

v. )

STATE OF ALASKA DIVISION OF )  
ELECTIONS, and GAIL FENUMIAI, )  
in her capacity as Director of the )  
Division of Elections )

Defendants. )

Case No. 3AN-22-08794CI

**ORDER ON PRELIMINARY INJUNCTION AND DISMISSAL**

**I. INTRODUCTION**

Chris Duke, Randy Eldge, Steve Strait, and Kathryn Werdahl (collectively, “Plaintiffs”) pray for declaratory and injunctive relief against the State of Alaska Division of Elections and Gail Fenumiai, Director of the Division of Elections (collectively, the “Division”). The Division opposes Plaintiffs’ preliminary injunction and cross move to dismiss Plaintiffs’ claims. Intervenor, Jennifer Armstrong, also opposes Plaintiffs’ motion and joins the Division’s cross-motion. For the reasons set forth below, the Plaintiffs’ demand for preliminary injunction is DENIED and Division’s cross motion is GRANTED, and Plaintiffs’ claims are dismissed without prejudice.

## II. FACTS

Plaintiffs claim House of Representatives for House District 16 candidate, Jennifer Armstrong, is not qualified to run for office because she has not been a resident of Alaska for the constitutionally required time period.<sup>1</sup> Plaintiffs argue that Armstrong had not become a resident of the State of Alaska until June 7, 2019.<sup>2</sup> Plaintiffs contend to be eligible to run for office, Armstrong would have had to have been a resident on or before June 1, 2019.<sup>3</sup> Accordingly, Plaintiffs contend the Division cannot certify the November 2022 general election until Armstrong's eligibility is confirmed.<sup>4</sup>

The Division and Armstrong argue that Alaska election contest statutes provide precise procedure in which challengers may raise objections to a candidate's legitimacy and Plaintiffs' contest falls outside of this framework.<sup>5</sup> The Division and Armstrong therefore argue Plaintiffs are not entitled to a preliminary injunction.<sup>6</sup> Concurrently, the Division and Armstrong also contend Plaintiffs' claims as to Armstrong's eligibility are either moot or not yet ripe and should be dismissed.<sup>7</sup>

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<sup>1</sup> Plaintiff's Complaint for Declaratory and Injunctive Relief, Oct. 31, 2022 (hereinafter "Plaintiff's Complaint") at 4-5, ¶ 7-18, 23 (citing Alaska Const. Art. II, § 2).

<sup>2</sup> *Id.* at 4, ¶ 18.

<sup>3</sup> *Id.* at 6, ¶ 27, 28.

<sup>4</sup> *Id.* at 6, ¶ 1-2.

<sup>5</sup> Opposition to Plaintiff's Motion for Preliminary Injunction and Cross Motion to Dismiss, Nov. 4, 2022 (hereinafter "Defendants' Opposition") at 2-4; Intervenor's Opposition to Motion for Preliminary Injunction and Joinder in Defendants' Cross Motion to Dismiss, Nov. 8, 2022 (hereinafter "Intervenor's Opposition") at 6-7.

<sup>6</sup> Defendants' Opposition at 9-13; Intervenor's Opposition at 7-9.

<sup>7</sup> Defendants' Opposition at 13-15; Intervenor's Opposition at 9-10.



### III. LEGAL STANDARD

#### a. *Alaska election contest law.*

Alaska Statute § 15.25.042 and the relevant regulations promulgated in subsection (a) provide for the process by which a challenger may dispute eligibility of a candidate prior to commencement of the general election. Per subsection (a), the Director must determine the eligibility of a candidate within thirty days of receiving that complaint, by regulations promulgated under Alaska Administrative Code tit. 6 § 25.260. This regulation provides that any person may challenge a candidate's eligibility no later than ten days after the filing deadline of the office the candidate seeks election.<sup>8</sup> A candidate files his or her intent to run for election by submitting a declaration.<sup>9</sup> In relevant part, a prospective candidate's declaration is taken under oath and must state the length of the candidate's residency in the candidate's state and district.<sup>10</sup> The candidate is also required to meet the requisite citizenship requirements.

To be a member of the legislature in Alaska, the member must be a qualified voter and a resident of Alaska for a minimum of three years and of the candidate's district for at least one, immediately preceding his or her filing of declaration.<sup>11</sup> Under AS 01.10.055, a person is a resident of Alaska if they are "physically present with the intent to remain in

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<sup>8</sup> 6 AAC § 25.260(a).

<sup>9</sup> AS § 15.25.030.

<sup>10</sup> AS § 15.25.030(a)(8)-(9).

<sup>11</sup> Alaska Const. art. II, § 2.

the state indefinitely.”<sup>12</sup> Intent is demonstrated by maintaining residence for a minimum of thirty days and providing “other proof” of that intent, which includes proof the person is not claiming residency elsewhere.<sup>13</sup>

Alaska Statute § 15.20.540-.560 provides for the process by which a challenger may raise a dispute as to a candidate’s legitimacy, post-election. For grounds to challenge nomination or election of a candidate, AS § 15.20.540 provides, “[a] defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition . . . when the person certified as elected or nominated is not qualified.” That contest must be raised in the superior court “10 days after completion of state review.”<sup>14</sup> Ballot counting begins “as soon as practicable” once the election is complete, “not later than sixteen days after an election.”<sup>15</sup> Certification of ballot counting review is carried out by the Director of Elections.<sup>16</sup> Together, these steps constitute “completion of state review.”<sup>17</sup>

*b. Preliminary Injunction.*

Rule 65 of the Alaska Rules of Civil Procedure govern preliminary injunctions. Preliminary injunctions are “dependent on the nature of the threatened injury.”<sup>18</sup> The

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<sup>12</sup> AS 01.10.055(a).

<sup>13</sup> AS 01.10.055(b)(1)-(2).

<sup>14</sup> AS § 15.20.550.

<sup>15</sup> AS § 15.15.440.

<sup>16</sup> AS § 15.15.450.

<sup>17</sup> AS § 15.15.450; See AS. § 15.80.010(4); See also AS § 15.10.105.

<sup>18</sup> *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).



“balance of hardships” test is applied where plaintiff’s harm is found to be “irreparable” and the opposing party is “adequately protected.”<sup>19</sup> If the plaintiff’s harm is less than irreparable, or the opposing party cannot be adequately protected, the plaintiff must make a “clear showing of probable success on the merits” to be granted relief.<sup>20</sup> The Supreme Court of Alaska has declared that “[i]rreparable harm is an injury which should not be inflicted and which, ‘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, cannot receive reasonable redress in a court of law.’”<sup>21</sup>

In *Winter v. Nat. Res. Def. Council, Inc.*, the Supreme Court of the United States emphasized that injury must be “*likely* in the absence of an injunction”—a mere “possibility” of irreparable harm is therefore, insufficient.<sup>22</sup> With regard to adequate protection of the defendant, the Supreme Court of Alaska has declared “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.’”<sup>23</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *State v. Galvin*, 491 P.3d 325, 333 (Alaska 2021) (citing *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, n.5 (Alaska 1992)).

<sup>22</sup> 129 S. Ct. 365, 367 (2008) (emphasis in original).

<sup>23</sup> *State, Div. of Elections v. Metcalfe*, at 979 (quoting *State v. United Cook Inlet Drift Ass’n*, 815 P.2d 378 (Alaska 1991)).

*c. Declaratory Relief.*

Declaratory relief is available to a complainant in the case of an actual controversy to declare the party's rights and legal relations, whether or not relief can be sought.<sup>24</sup> The superior court may only decide cases that are "ripe and not moot."<sup>25</sup> A claim is ripe when such a controversy is of "sufficient immediacy and reality," deserving of declaratory judgment.<sup>26</sup> A claim is moot when there is no longer "a present, live controversy."<sup>27</sup>

*d. Motion to dismiss.*

Under Alaska Rules of Civil Procedure, generally, complaints are "liberally construed" and not to be dismissed unless there is no doubt that the plaintiff cannot substantiate his claims with facts that would entitle him to relief.<sup>28</sup> "To survive a motion to dismiss, a complaint need only allege a set of facts consistent with and appropriate to some enforceable cause of action."<sup>29</sup>

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<sup>24</sup> AS § 22.10.020(g).

<sup>25</sup> *Young v. State*, 502 P.3d 964, 969 (Alaska 2022) (quoting *State v. Am. C.L. Union of Alaska*, 204 P.3d 364 (Alaska 2009)).

<sup>26</sup> *Alaska Com. Fishermen's Mem'l in Juneau v. City & Borough of Juneau*, 357 P.3d 1172, 1176 (Alaska 2015) (quoting *State v. Am. C.L. Union of Alaska*, 204 P.3d 364 (Alaska 2009)).

<sup>27</sup> *Young v. State*, at 969 (citing *Fairbanks Fire Fighters Ass'n, Loc. 1324 v. City of Fairbanks*, 48 P.3d 1165 (Alaska 2002)).

<sup>28</sup> AK R. Civ. P 12(b)(6); *Larson v. State, Dep't of Corr.*, 284 P.3d 1, 6 (Alaska 2012).

<sup>29</sup> *Id.* (citing *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253-54 (Alaska 2000) (internal quotations omitted)).



#### IV. DISCUSSION

*a. Plaintiffs cannot show irreparable harm.*

Plaintiffs' primary contention regarding irreparable harm is if the Division certifies Armstrong and she is later found to be ineligible, the Governor will choose the Representative.<sup>30</sup> It is their contention that certification of ballots where an ineligible candidate is in the race delegitimizes the democratic process and harms the Plaintiffs as well as the general public.<sup>31</sup> Plaintiffs support this assertion by citing AS § 15.40.320, which provides for the governor's obligation to fill a legislative vacancy by appointment.<sup>32</sup> In addition, Plaintiffs argue the intricacies of the (then) upcoming election and the tight timeframe in which their claims must be decided, demonstrates the urgency they are entitled to through grant of a preliminary injunction.<sup>33</sup> Plaintiffs also maintain their primary concern is maintenance of the "status quo," supporting this argument by citing to a sworn affidavit by Director Fenumiai where she details the process for delaying certification on eligibility grounds.<sup>34</sup>

First, Plaintiffs mischaracterize AS § 15.40.320. This provision is neither meant to permanently fill a vacant seat in the Alaska legislature, nor is it meant to take the place of

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<sup>30</sup> Memorandum in Support of Motion for Preliminary Injunction, Oct. 31, 2022 (hereinafter "Plaintiff's Motion"), at 6.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* n. 18; See AS § 15.40.320 ("When a vacancy occurs in the state legislature, the governor, within 30 days, shall appoint a qualified person to fill the vacancy. However, if the remainder of the term of the predecessor in office will expire or if a vacancy in the state senate will be filled by a special election before the legislature will next meet, convene, or reconvene, the governor may not fill the vacancy.").

<sup>33</sup> Plaintiff's Motion at 4.

<sup>34</sup> *Id.* at 4-5.

clear procedural requirements pertaining to election contests. Alaska law clearly indicates that any person may challenge a candidate's eligibility either ten days after their declaration<sup>35</sup> or once the election results have been certified.<sup>36</sup> In the case of the former, the Director reviews public documents relating to the candidate's eligibility by a preponderance of the evidence.<sup>37</sup> If the Director finds evidence does not support the candidate's eligibility, the Director then issues her determination that the candidate is either eligible or ineligible.<sup>38</sup> An eligible candidate would then be permitted to continue her race, where an ineligible candidate would not. In either instance, an administrative decision at this stage may be challenged.<sup>39</sup> In the case of the latter, the superior court reviews the merits of the contest after state review and determines the proper recourse.<sup>40</sup>

Second, the court need not consider the timing and urgency Plaintiffs claims is necessary for review. As previously described, Alaska law sets forth a process to contest a candidate's eligibility, and the appropriate time to bring an action is ten days after the candidate's declaration<sup>41</sup> or after state review.<sup>42</sup>

Finally, Plaintiffs take Director Fenumiai's statements out of context in their "status quo" argument. Director Fenumiai's affidavit was secured by the Office of the Attorney

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<sup>35</sup> 6 AAC § 25.260(a).

<sup>36</sup> AS § 15.20.540.

<sup>37</sup> 6 AAC § 25.260(d).

<sup>38</sup> 6 AAC § 25.260(f)-(i).

<sup>39</sup> *Miller v. Treadwell*, 245 P.3d 867, 871 (Alaska 2010).

<sup>40</sup> AS § 15.20.550.

<sup>41</sup> AS § 15.25.042; 6 AAC § 25.260.

<sup>42</sup> AS § 15.20.540-.560.



General in the matter of *Randall Kowalke v. David Eastman et al.* That case involved different provisions of the Alaska Constitution presently at issue, namely Art. XII, § 4. It is indeed possible for the Director to delay certification of election results, particularly when “disqualification for disloyalty” is at issue—the object of Director Fenumiai’s September 22, 2022 testimony.<sup>43</sup> However, that is not the case here, and using those statements to bolster an argument in this case mischaracterizes such a hypothetical.

*b. The Division will not be adequately protected if the court grants Plaintiffs’ preliminary injunction.*

The Supreme Court of Alaska has made clear that the state’s interests in administering an election pursuant to its laws is not “slight” and a preliminary injunction will invariably interrupt this interest.<sup>44</sup> In *State, Division of Elections v. Metcalfe*, Metcalfe challenged the constitutionality of AS 15.60.010(21), which set forth a three percent threshold for party recognition on an election ballot.<sup>45</sup> Metcalfe sought injunctive relief, which the superior court granted, and the Alaska Supreme Court reversed.<sup>46</sup>

Applying the test in evaluating circumstances that support preliminary injunction, the Court found the opposing party’s interests—in this case, the state’s interests—would not be adequately protected if the Division was required to include a candidate’s name on the ballot despite their noncompliance with AS 15.60.010.<sup>47</sup> The Court ultimately found an

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<sup>43</sup> Plaintiff’s Exhibit 3.

<sup>44</sup> *State, Div. of Elections v. Metcalfe*, at 978-79.

<sup>45</sup> *Id.* at 978; AS 15.60.010(21) renumbered AS § 15.80.010(27).

<sup>46</sup> *State, Div. of Elections v. Metcalfe*, at 978.

<sup>47</sup> *Id.* at 978-79.

interruption of legitimate and constitutional election laws constituted inadequate protection of the state's interest.<sup>48</sup> Following *Metcalf*, this court finds the Division will not be adequately protected if it were to grant Plaintiffs' preliminary injunction and usurp Alaska election laws. As such, Plaintiffs must show they will be successful on the merits of their case.<sup>49</sup>

*c. Plaintiffs cannot show success on the merits.*

As the Division correctly points out, Plaintiffs are contesting the election after one door has closed and another is not yet open; they do not bring their claim under any established means to challenge elections. Indeed, Plaintiffs raise contentious factual assertions that may invalidate Armstrong's candidacy, but that is not for the court to decide at this stage. Plaintiffs did not file their claim with the Director ten days after Armstrong filed her declaration.<sup>50</sup> Plaintiffs remaining avenue for relief has not yet become ripe.<sup>51</sup>

Plaintiffs, however, insist that their claims hinge wholly on constitutional grounds.<sup>52</sup> To support this argument, Plaintiffs cite *Walleri v. City of Fairbanks* to persuade the court to shift the lens through which their claims should be viewed.<sup>53</sup> They argue "whether a cause of action should be deemed an election contest [] turns on the remedy sought. If

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 978.

<sup>50</sup> Defendants' Opposition at 5; Intervenor's Opposition at 4, 7.

<sup>51</sup> Defendants' Opposition at 12; Intervenor's Opposition at 6-7.

<sup>52</sup> Consolidated Reply in Support of Motion for Preliminary Injunction and Opposition to Defendants' and Intervenor's Motion to Dismiss Nov. 10, 2022 (hereinafter "Reply") at 5.

<sup>53</sup> Reply at 7.



granting the remedy would defeat the public interest in the stability and finality of election results,” the cause of action is required to comply with election contest procedures.<sup>54</sup> As such, Plaintiffs argue election contest law does not apply to their case because they do not contest the result of the election, only the constitutionality of Armstrong’s name on the ballot.<sup>55</sup> *Walleri* and the facts relevant to Plaintiffs’ claims are distinguishable.<sup>56</sup>

Alaska law is clear: there is a statutory framework in place to preserve the integrity of fair elections for both candidates and incumbents. Armstrong remains a candidate until the certified results declare her the victor. The laws that apply to her standing as a candidate are Alaska Statute § 15.25.042 and Alaska Statute § 15.20.540-.560. Plaintiffs failed to timely file their grievance with the Director after Armstrong’s declaration filing. Plaintiffs’ claims are also not ripe because state review of the November 2022 general election had not concluded by the time of Plaintiffs’ filing. Directly addressing Plaintiffs’ constitutional claims, they correctly point out that the law that applies to a legislator’s standing to hold

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<sup>54</sup> *Id.* (citing *DeNardo v. Municipality of Anchorage*, 105 P.3d 136, 140 (Alaska 2005) (quoting *Walleri v. City of Fairbanks*, 964 P.2d 463, 466 (Alaska 1998)) (emphasis added).

<sup>55</sup> *Id.*

<sup>56</sup> *Walleri v. City of Fairbanks*, 964 P.2d 463 (Alaska 1998). In *Walleri*, Walleri brought a claim against the City of Fairbanks and city officials claiming the terms a ballot measure to approve the sale of utilities to a private business interest presented to voters after counsel passed an ordinance approving the sale were at odds with the language of the actual contract and in violation of Fairbanks Code. The superior court deemed Walleri’s four claims “election contest” and were dismissed because Walleri failed to comply with election contest procedure under the Fairbanks Code. The Supreme Court of Alaska reversed the superior court’s decision finding that any claim “regarding” an election does not automatically subject it to election contest procedure. The Supreme Court concluded that Walleri’s claims did not constitute election contest because his claims neither “challenge the validity of the election result” nor did they “implicate the public policy favoring the stability and finality of such results.”

office is Article II, § 2 of the Alaska Constitution. However, Armstrong is not a legislator<sup>57</sup> and cannot become a legislator until the election process is complete.

*d. Plaintiffs are not entitled to declaratory relief.*

As previously described, declaratory relief is only available for an actual, live controversy and intended to declare a party's rights and legal interests regardless of whether relief can be sought.<sup>58</sup> Here, as the Division and Armstrong correctly point out, Plaintiffs' case is moot as it relates to AS § 15.25.042 and unripe as it relates to AS § 15.20.540-.560.<sup>59</sup>

*a. Division's motion to dismiss.*

Based on the foregoing, this court finds that Plaintiffs' claims must be dismissed because it is procedurally flawed. Plaintiffs cannot substantiate their claims with facts that would entitle them to relief because there is no statutory procedure under Alaska law to permit it. As a result, Plaintiffs' case is dismissed.

## CONCLUSION

Based on the foregoing, this court finds Plaintiffs' demand for preliminary injunction is DENIED and Division's cross motion is GRANTED, without prejudice.

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<sup>57</sup> Alaska Const. art. II, § 2 ("A *member* of the legislature shall be a qualified voter who has been a resident of Alaska for at least three years and of the district from which elected for at least one year, immediately preceding his filing for office. A senator shall be at least twenty-five years of age and a representative at least twenty-one years of age.") (emphasis added).

<sup>58</sup> AS § 22.10.020.

<sup>59</sup> Defendants' Opposition at 13-15; Intervenor's Opposition at 6-7.



Dated this 18<sup>th</sup> day of November, 2022, at Anchorage Alaska.

11/18/2022



Hon. Herman G. Walker, Jr.  
Superior Court Judge

I certify that on 11/18/2022  
a copy of the above was emailed to:

S. Stone / R. Moses / T. Flynn /  
M. Paton-Walsh / S. Kendall / S. Gottstein

  
C. Hess, Judicial Law Clerk for Judge Walker