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

RANDALL KOWALKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
DAVID EASTMAN,	)
STATE OF ALASKA DIVISION OF ELECTIONS, and	)
GAIL FENUMIAI,	)
	)
Defendants.	)
	)

Case No. 3AN-22-07404 CI

DEFENDANT DAVID EASTMAN'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant David Eastman ("Representative Eastman"), by and through the Law Offices of Joseph Miller, LLC, and hereby files this Motion to Dismiss or, in the alternative, Motion for Summary Judgment. Plaintiff's Complaint should be dismissed under Alaska Civil Rule 12[1] as this Court does not have jurisdiction to hear this matter, Plaintiff does not have standing, Plaintiff has failed to state a claim for which relief may be granted, and/or Plaintiff has failed to join an indispensable party. In the alternative, this Court should find that there is no material question of fact that

[1] *See* Civil Rule 12(b)(1), 12(b)(6), 12(b)(7), and 12(h)(3).

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Representative Eastman has not violated Article XII, Section 4 of the Alaska Constitution and should not be disqualified from his elected office.

This Court has no jurisdiction to hear Plaintiff's Claims

Plaintiff concedes that at the time this action was filed, Representative Eastman was already a serving member of the Alaska House of Representatives. Complaint at ¶10. Plaintiff concedes that Representative Eastman was elected to the House in 2016 and was seated in 2017, and re-elected in 2018 and again in 2020. Complaint at ¶ 11. Thus, at the time the Complaint was filed, the Alaska House of Representatives had already seated Representative Eastman multiple times, determined that he was qualified to serve in the House, and had accepted his oath of office pursuant to Article XII § 5 of the Alaska Constitution. In that oath, Representative Eastman solemnly swore "to support and defend the Constitution of the United States and the Constitution of the State of Alaska." Alaska Const. art. XII, § 5.

Plaintiff now argues that the House of Representatives erred when it accepted Representative Eastman's qualifications and oath in 2017, 2019, and 2021 because, years earlier, in 2009, Representative Eastman made a donation to an organization by the name of Oath Keepers and has declined to disavow his membership. Complaint at ¶ 14. While Plaintiff relies on media reports and opinions of individuals (who have not been qualified as experts) to argue that recent actions by members of that organization qualify Oath Keepers as an organization that "advocates the overthrow by force or violence of the

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government of the United States" within the meaning of Alaska Constitution article XII, § 4, he has offered no evidence that the organization itself has taken such a position. On the contrary, his own proffered experts readily acknowledge that the bylaws of the organization expressly forbid membership to one who advocates the overthrow of the government by force or violence.

Plaintiff now seeks to have this Court overrule the Alaska House of Representative's decisions in 2017, 2019, and 2021 to seat Representative Eastman and accept his qualifications and oath of office. Plaintiff is not even a member of the district in which Representative Eastman has been running for election, and was not permitted to vote for or against Representative Eastman in either the 2022 primary or general elections.[2] Complaint at ¶¶ 5, 7. Yet he seeks to have this Court cancel the votes of those Alaskan citizens who voted for Representative Eastman in each of the two most recent elections, and determine on its own authority whether a sitting member of the Alaska State Legislature shall continue in office.

This Court, however, has no jurisdiction to interfere with the House of Representative's judgment as to the qualifications of its members. That decision is committed exclusively to the House of Representatives by section 12 of Article II of the Alaska Constitution. Section 12 provides: "Each [house] is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members." This provision makes the House of Representatives the *exclusive*

[2] The last time Plaintiff was able to vote for or against Representative Eastman was in 2020, the same election cycle in which Plaintiff campaigned unsuccessfully to replace Representative Eastman in the legislature.

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judge of the qualifications of its members, subject only to federal constitutional rights. The Court has no jurisdiction to interfere with this matter that the Constitution delegates exclusively to the House of Representatives.

This Court has already held that section 4 of article XII, the provision on which Plaintiff relies for his claim, is a measure that defines the qualifications for office.[3] The sanction specified by the section is that the individual in violation is not "qualified" to hold office. Section 4 applies to every "public office of trust or profit" under the state constitution, and the judicial branch may enforce its provisions, in an appropriate action, against non-legislative officers. *Cf. State v. Marshall*, 633 P.2d 227, 231 (Alaska 1981) (applying of a forfeiture sanction against *local* office holders). But for *elected members of the Legislature* – an separate branch of government – the Alaska Supreme Court has recognized that there may well be significant separation of powers concerns, *id.*, although it did not need to reach the issue in *Marshall* because the office at issue in the case was a local office.

The Court did note that other state supreme courts confronted with similar claims against members of the state legislature have ruled that the judiciary has no role because the question was one for the legislature alone. *Id*. (*citing Dinan v. Swig*, 112 N.E. 91, 92, 93 (Mass.1916) and *Combs v. Groener*, 256 Or. 336, 472 P.2d 281, 282-83 (1970)).[4]

[3] The Division of Elections disputes this and has preserved this question for appeal.

[4] The Supreme Court suggested that since the office forfeiture penalty applied to other offices, the separation of powers problem created a difference in treatment due to the fact that executive and local officers would still be subject to judicial enforcement of the sanction. *State v. Marshall*, 633 P.2d at 231. Any asymmetry, however, is due to the provision of the state constitution that confers exclusive authority on the state Legislature to judge the qualifications of its members.

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In *Dinan*, the Massachusetts court construed a provision of its constitution that is similar to the Alaska Constitution. The Massachusetts provision made its House of Representatives the judge of the qualifications of its own members. *Dinan v. Swig*, 223 Mass. at 517. According to the Massachusetts court, this was an exclusive vesting of jurisdiction in the state legislature and no other department of government had authority to adjudicate any issues of member qualifications. The Oregon court came to the same conclusion in *Combs.* 256 Or. at 337. *Accord Mapp v. Lawaetz*, 883 F.2d 49, 52-55 (3rd Cir. 1989) (concerning authority of territorial legislature to judge qualifications of members of the Virgin Islands legislature).

In *Malone v. Meekins*, 650 P. 2d 351 (Alaska 1982), the Alaska Supreme Court had the opportunity to examine the judicial power to enforce or review the operation of legislative rules. At issue in the case was another provision of Article II, § 12 of the Alaska Constitution – the power of the legislature to choose its own officers. The former Speaker of the House was contesting his ouster from that position, raising questions of sufficiency of the vote and the procedure used for convening the legislative session at which the vote took place. *Id*. 354. To determine whether the case raised a nonjusticiable political question (such that judicial intervention would violate separation of powers), the court considered three elements: 1) whether there was a "textually demonstrable commitment of the issue to a coordinate political department;" 2) whether judicial intervention would express lack of respect owed to a coordinate branch; and 3)

the need to adhere to a political decision already made. *Id*. at 357. The court noted any one or more of these elements is sufficient to find a nonjusticiable political question. *Id*.

Here, all three factors are present. First, like the selection of officers, the question of the qualifications of the members is textually committed to the Legislature and the Legislature alone. Article II, §12 of the Constitution provides, "Each [house] is the judge of the election and *qualifications* of its members and may expel a member with the concurrence of two-thirds of its members." *See also* AS 24.05.070. This is the same section of the Alaska Constitution that was at issue in *Malone*. The immediately preceding sentence gives each house the power to choose its officers. Both sections commit these questions expressly and exclusively to each house of the legislature. There is simply no room for judicial participation in the question.

Because the question is committed exclusively to the Legislature, judicial intervention will express a lack of respect that is owed to the Legislature in general and the House of Representatives in particular. Only the House has authority to rule on the qualifications of its members. Usurpation of this authority by the courts would directly interfere with the inner workings of the Legislature.

Finally, as Plaintiff noted, Representative Eastman was first elected to the House of Representatives in 2016 and seated in 2017. He was re-elected and served as a member of the legislature following the 2018 and 2020 elections as well. The House of Representatives has therefore already accepted Representative Eastman as qualified to sit in the House multiple times and has accepted his oath of office as adequate demonstration

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that he supports and defends the constitutions of the United States and the State of Alaska. Separation of powers precludes this Court from entertaining an attempt re-adjudicate those questions.

The qualifications of Representative Eastman to serve in the House of Representatives is a question on which the state constitution grants exclusive jurisdiction to the House of the Representatives itself. This Court has no jurisdiction to interfere with these decisions of the House and the case must be dismissed. *Wanamaker v. Scott*, 788 P.2d 712, 714 n. 2 (Alaska 1990) ("a court which does not have subject matter jurisdiction is without power to decide a case").

Plaintiff Lacks Standing to Bring this Case

With respect to Plaintiff's attempt to bar Representative from being seated after his victory in the election held last month, Plaintiff lacks standing. For claimants seeking relief in Alaska courts for alleged state or local government wrongdoing, a plaintiff must establish at least one of two types of standing: (1) interest-injury and/or (2) citizen-taxpayer. *See, generally, Keller v French*, 205 P3d 299, 302-305 (Alaska 2009). For claims against an individual not named in any official capacity – such as Count 1 of the Complaint against Defendant David Eastman – the only type of standing available is interest-injury. On the other hand, citizen-taxpayer standing presumes an allegation of government wrongdoing, and the remedy sought is against a government defendant and/or public official defendant in his or her official capacity.

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Here, Plaintiff has failed to allege any specific, individualized injury, nor has he alleged any such injury on behalf of a third party unable to bring the claim on his or her own. *See L. Project for Psychiatric Rts., Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010); *see also Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) ("a plaintiff must have an interest adversely affected by the conduct complained of"). Plaintiff must, therefore, meet the requirements of "citizen-taxpayer standing" to be able to maintain this action. *L. Project for Psychiatric Rts., Inc.*, 239 P.3d at 1255.

Under citizen-taxpayer standing, the inquiry often comes down to whether the plaintiff bringing the litigation is the "appropriate litigant to seek adjudication" of the issues raised in the case. *Id.* This looks to whether there are individuals more directly affected than the current plaintiff. *Trustees for Alaska*, 736 P.2d at 329. The question is whether there are other potential litigants who are "'arguably more directly concerned.'" *Keller v. French*, 205 P.3d 299, 303 (Alaska 2009). There need be no showing that those "more directly concerned" individuals will actually bring a case. Instead, the question is whether they would be precluded from doing so if they thought their rights were being violated. *Id*. This satisfies the "rule of judicial self-restraint" that is protected by the standing inquiry. *L. Project for Psychiatric Rts., Inc.*, 239 P.3d at 1255. Finally, "[t]he controlling inquiry . . . in all standing cases [is] whether the plaintiff had a sufficient personal stake in the outcome of the controversy." *Hoblit v. Commissioner of Natural Resources*, 678 P.2d 1337 (Alaska 1984).

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Plaintiff concedes that he is no longer in the district that Representative Eastman is seeking election to represent. Complaint at ¶¶ 8, 5. Plaintiff is in District 10 and Representative Eastman recently stood for election to represent District 27. Plaintiff can have little or no interest in the qualifications of representatives of other districts or in nullifying the votes of citizens in other districts. Assuming *arguendo* that the qualifications clause of article XII, § 4 affects the individual rights of any voter, the appropriate voter to bring the case would be one in the district which Representative Eastman seeks to represent. If any voter is an appropriate litigant to bring this case, only a voter in District 27 would be able to claim a sufficient personal stake to satisfy the requirements of citizen-taxpayer standing.[5] Voters in other districts, like Plaintiff, do not have a sufficient interest to maintain litigation concerning the qualifications of the representative for District 27.

However, article XII, § 4 of the Constitution does not implicate the individual rights of any voter in any district. This section speaks to qualifications to hold office. As noted above, the House of Representatives is the exclusive judge of the qualifications of its members. Alaska Const., Art. II, § 12. The members of the House, and only the members of the House have a sufficient interest necessary to support standing under citizen-taxpayer standing. It is irrelevant that the members of the House declined to take action against Representative Eastman in the last legislative session, and have yet to express an interest in bringing a challenge to Representative Eastman's qualifications

[5] Note argument, *infra*, the only House members have sufficient interest to support standing, here.

when the new session convenes in January. The inquiry is whether they would be precluded from doing so if they thought their rights were being violated. *Keller*, 205 P.3d at 303. If members of the House are unlikely to bring litigation regarding Representative Eastman's qualifications, it is because the constitution gives them another remedy (and because doing so would be barred by the First Amendment under the circumstances presented here). As discussed above, the House itself is the exclusive judge of the qualifications of its members.

Similarly, the Division of Elections can afford no relief. Only the House of Representatives has the authority to judge the qualifications of its members. Alaska Const., art. II, § 12. Representative Eastman has served continuously as a member of the legislature since 2017. At no time during the past six years in which Representative Eastman has been a member of the legislature has the House determined that he was disqualified from holding office. So Plaintiff's real complaint is against the House of Representatives, not the Division of Elections. And that claim, as noted above, is not justiciable.

In any event, Plaintiff does not have standing to litigate that Complaint. Plaintiff's action should therefore be dismissed because he lacks standing – he is not the appropriate litigant to bring a claim against Representative Eastman under section 4 of article XII of the Alaska Constitution.

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Count I of Plaintiff's Complaint must be Dismissed for Failure to Join an Indispensable Party

Plaintiff's Complaint seeks to disqualify Representative Eastman from office for his purported violation of Article XII, Section 4 of the Alaska Constitution. Specifically, Kowalke seeks to "prohibit [Representative Eastman] from serving in public office due to his membership in the Oath Keepers . . ." Complaint at ¶31. To effectuate this relief, this Court would have to order the legislature to remove Representative Eastman from his current District 10 legislative seat to which he was elected in 2020. And since Representative Eastman appears to have received a majority of votes from District 27 on November 8, 2022, Kowalke's requested relief would also require this Court to order the legislature not to seat Representative Eastman in January 2023.[6]

"An indispensable party is one whose interest in the controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over such party." *State, Dep't of Highways v. Crosby*, 410 P.2d 724, 725 (Alaska 1966). Unfortunately for Kowalke, he did not name the Alaska State House of Representatives as a party to this action and the deadline to join parties here has long-since lapsed. Thus, no mandamus may issue. His claim under Count 1 must therefore be dismissed under Civil Rules 12(b)(7) and 19.

[6] This assumes that the Division's Motion for Summary Judgment is granted and certification of the 2022 election occurs.

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Plaintiff has Failed to State a Claim for which Relief may be Granted as the First Amendment Prohibits Enforcement of Article XII, § 4 of the Alaska Constitution for mere Advocacy or Group Membership

Free Speech and Association rights are also implicated by Kowalke's attempt to disqualify Representative Eastman. The Alaska Constitution, including the disqualification clause of Article XII, Section 4, was adopted in 1956 at the height of the anti-communist "red scare" and the McCarthyism of the House Un-American Activities Committee. *See* John Eastman Affidavit ¶ 29, filed herewith. The language of the disqualification clause itself, which was included to comply with the proposed Enabling Act (S.49 and H.R.2535) that had been introduced in Congress, mirrored that of the Smith Act, which had been adopted in 1940 to impose criminal penalties on those who advocated for the overthrow of the U.S. Government by force or violence. Act of June 28, 1940, 76th Cong., 2nd Sess., Ch. 439, 54 Stat. 670 (codified at 18 U.S.C. § 2385). *Id.*[7] A year after the disqualification clause was ratified as part of the new Alaska Constitution, the Supreme Court severely curtailed the scope of the Smith Act, holding in a series of cases that mere advocacy – even advocacy of overthrowing the government by force or violence – was protected by the First Amendment unless the advocacy crossed the line from advocacy as an abstract doctrine to advocacy of "concrete action for the forcible overthrow of the Government." *Yates v. United States*, 354 U.S. 298, 320 (1957); *see also Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reiterating that the First Amendment protected "mere advocacy" of the necessity of a resort to violence as a

[7] Dr. Eastman's affidavit references the re-codification of the Act that occurred in 1948, but the Act was originally adopted in 1940.

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means of accomplishing political reform, as "distinguished from incitement to imminent lawless action").

Although the Smith Act is a criminal statute, the Supreme Court has applied the same principles in the identical context presented by this case, namely, eligibility for legislative office. In *Bond v. Floyd*, 385 U.S. 116 (1966), the Supreme Court held that the First Amendment prohibited the Georgia legislature from refusing to seat Julian Bond because of his allegedly treasonous anti-war statements and support of similar statements expressed by the organization of which he was a member, the Student Nonviolent Coordinating Committee ("SNCC"). By the time the case was decided in 1966, the SNCC, under the leadership of Stokely Carmichael, had moved away from the "nonviolent" views espoused by the Reverend Martin Luther King, Jr., toward "Black power" as "a movement that will smash everything Western civilization has created," as the editors at History.com have described it.[8] Yet because Bond's own statements did not expressly "demonstrate any incitement to violation of law," he could not have been convicted for them "consistently with the First Amendment." *Id.* at 134. And neither could he be excluded from office for his exercise of First Amendment rights. "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy," the Court held. *Id.* at 135-36; *see also Alsworth v. Seybert*, 323 P.3d 47, 58 (Alaska 2014) (holding that elected officials enjoy the same free speech rights as their critics in the

[8] https://www.history.com/topics/black-history/stokely-carmichael

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citizenry); *VECO Int'l, Inc. v. Alaska Pub. Offs. Comm'n*, 753 P.2d 703, 710 (Alaska 1988) ("[t]he right to act in concert with others for political purposes is protected by the first amendment to the United States Constitution and by the free speech provision of the Alaska Constitution, article I, section 5") (citation omitted).

Under these precedents, Representative Eastman's current membership in Oath Keepers, on the uncontested facts at issue here, is protected by the First Amendment, both against criminal indictment and exclusion from office.

Alternatively, Summary Judgement Should Be Granted Because, As a Matter of Law Based on Uncontested Facts, Representative Eastman is not in violation of Article XII, § 4 of the Alaska Constitution

Plaintiff Kowalke alleges in his Complaint that Defendant David Eastman, a member of the Alaska House of Representatives, is a "member of 'Oath Keepers,' a militia group that supports the violent overthrow of the United States government." Complaint at ¶ 1. Representative Eastman has acknowledged that he was a "member" of Oath Keepers, Eastman Affidavit,[9] filed September 15, 2022, at ¶ 2, but Plaintiff offers no admissible evidence to support his allegation that Oath Keepers is either a "militia group" or that it "supports the violent overthrow of the United States government." Rather, he cites unsworn newspaper stories and reports, which are not admissible evidence, Complaint at ¶¶ 13, 17, and the fact that charges for "seditious conspiracy" have been brought against a few members of Oath Keepers, though not the organization

[9] Representative Eastman's Affidavit, filed September 15, 2022, is hereby integrated by reference in support of this alternative motion for summary judgment.

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itself, *id.* ¶ 16. He subsequently attempted to bolster those allegations with affidavits by political partisans, *see* John Eastman Affidavit ¶ 20, but the affidavits themselves assert only that some members of the Oath Keepers organization have threatened force or violence and have been charged with crimes related to the January 6 events at the U.S. Capitol. Kriner Affidavit, filed August 29, 2022, at ¶ 5; Lewis Affidavit, filed September 19, 2022, at ¶¶ 9-14. Indeed, in a supplemental affidavit, Plaintiff's affiant Kriner acknowledged that Oath Keepers *as an organization* forbids membership to those who advocate for the overthrow of the government by force or violence. Kriner Supp. Affidavit, filed September 19, 2022, at ¶ 6. That admission is dispositive, and although Kriner attempts to mitigate that dispositive fact by asserting that there is no vetting process to review the membership limitation and that it is not a consistently enforced bylaw, he offers no support for those claims.

In short, Kowalke has offered no evidence Representative Eastman has advocated for the overthrow of the government by force or violence, or that he is a member or otherwise gives aid to an organization that so advocates. The bald allegations in his Complaint are insufficient to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' … Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 557 (2007)); *Nevitt v. Meadow Lakes Cmty. Council Inc.*, No. S-17970, 2022 WL 854682, at *5 (Alaska Mar. 23, 2022)

(applying *Iqbal* standard to motion to dismiss under Alaska rules of civil procedure). But even if the Complaint's allegations themselves could be deemed sufficient to state a cause of action, Plaintiff's failure subsequently to provide supporting evidence, and the acknowledgment by his own affiant that the organization to which Representative Eastman belongs prohibits membership to those who advocate for the overthrow of the government by force or violence, requires summary judgement in favor of Representative Eastman.

Conclusion

This Court should not deprive Representative Eastman's constituents of their sacred right to choose who will represent them in the State Legislature. Nor should this Court tamper with the constitutional authority delegated to the legislature. For this and the foregoing reasons, Plaintiff's claims should be dismissed in their entirety.

DATED this 15th day of November 2022, at Fairbanks, Alaska.

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By: s/ Joseph Miller – Bar Number 9511067
Attorney for Representative Eastman

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

RANDALL KOWALKE, *Plaintiff*, vs. DAVID EASTMAN; STATE OF ALASKA DIVISION OF ELECTIONS; and GAIL FENUMIAI, *Defendants*	Case No.: 3AN-22-07404-CI

AFFIDAVIT OF JOHN C. EASTMAN

JOHN C. EASTMAN, being duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 and have been called upon to serve as an expert in this litigation.
2. Despite having the same last name, I am to the best of my knowledge not related to Representative David Eastman, one of the defendants in this case.
3. I am currently a Senior Fellow at The Claremont Institute and Director of the Institute's Center for Constitutional Jurisprudence. I am also a founding partner with the Constitutional Counsel Group law firm. I am an attorney licensed to practice law in California and the District of Columbia, and am admitted to the bar of the Supreme Court of the United States as well as the

bars of the United States Courts of Appeal for the First, Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits and the United States District Courts for the Central, Southern, Northern, and Eastern Districts of California and the District of Colorado.

4. I have a J.D. from the University of Chicago, an M.A. and Ph.D in Government from the Claremont Graduate School, and a B.A. in Politics and Economics from the University of Dallas.

5. Following my graduation from the University of Chicago law school, I served as a law clerk for Judge J. Michael Luttig on the U.S. Court of Appeals for the Fourth Circuit, and then as a law clerk for Justice Clarence Thomas on the Supreme Court of the United States.

6. Following my clerkships, I practiced with the international law firm of Kirkland & Ellis.

7. In 1999, I began teaching at the Chapman University School of Law (now Chapman University Dale E. Fowler School of Law) and also founded the Center for Constitutional Jurisprudence, a public interest law firm affiliated with The Claremont Institute.

8. During my 22 years on the Chapman law faculty, I became a tenured professor, was the Salvatore Professor of Law & Community Service, and served as the Law School's Dean from 2007 to 2010, during which time I also held the Donald P. Kennedy Chair in Law.

9. Attached as Exhibit 1 to this affidavit is my resume, which includes a list of my publications.

10. The primary focus of my teaching was Constitutional Law, including the structure of the Constitution and various constitutional rights courses such as First Amendment law. I also regularly taught courses in Property and Legal History and co-directed the law school's Supreme Court clinic.

11. In my role as founding Director of The Claremont Institute's Center for Constitutional Jurisprudence, I have participated in more than 200 cases of constitutional significance before the Supreme Court of the United States, the Circuit Courts of Appeals, and state courts of last resort. I have also represented twenty different clients before the Supreme Court of the United States, including several governmental bodies—the States of South Dakota and Arizona; the Legislative leadership of the State of North Carolina; legislators of the State of Nevada; and Maricopa County, Arizona.
12. I have frequently been called upon to give expert testimony before legislative committees in the U.S. Congress as well as the state legislatures of Arizona, California, Colorado, Florida, and Georgia.
13. Much of my practice has centered on the rights protected by the First Amendment of the U.S. Constitution (and as that Amendment has been incorporated and made applicable to the States by the Fourteenth Amendment). I served as co-counsel at the Supreme Court in the successful First Amendment challenge to California's law mandating that pro-life clinics post information about obtaining abortions, for example. *National Institute of Family and Life Advocates, et al. v. Becerra*, No. 16-1140 (S.Ct. 2017). I successfully represented the Lincoln Club of Orange County, California in its First Amendment challenges to restrictive campaign finance regulations imposed by several southern California cities. *E.g.*, *The Lincoln Club of Orange County, et al. v. City of Irvine, California*, 292 F.3d 934 (9th Cir. 2002). And I have represented both the Claremont Institute's Center for Constitutional Jurisprudence and a number of other organizations as *amicus curiae* in numerous First Amendment cases before the Supreme Court, including *Americans For Prosperity v. Becerra*, No. 19-251*; Thomas More Law Center v. Becerra,* No. 19-255. *Arlene's Flowers v. Washington*, No. 19-333; *Klein v. Oregon Bureau of Labor*, No. 18-547; *Janus v. Am. Fed. Of*

State, Cnty, and Municipal Employees, No. 16-1466; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111; *Arlene's Flowers v. Washington*, No. 17-108; *Friedrichs v. California Teachers Association*, No. 14-915 (2016); *Center for Competitive Politics v. Harris*, No. 15-152 (2015); *Dariano v. Morgan Hill Unified Sch. Dist.*, No. 14-720; *Susan B. Anthony List v. Driehaus*, No. 13–193 (2014); *Knox v. Service Employees Internat'l Union, Local 1000* (2011); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Doe v. Reed*, 561 U.S. 186 (2010); *F.C.C. v. Fox Television Network, Inc., et. al*, 129 S.Ct. 1800 (2009); *California Democratic Party, et al. v. Jones*, 530 U.S. 567 (2000); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

14. I am the co-author of three constitutional law textbooks (and served as primary editor for the second and third editions): The American Constitutional Order: History, Cases, and Philosophy; The History, Philosophy, and Structure of the American Constitution; and Individual Rights and the Constitution. The latter includes extensive historical and case law material on the First Amendment.

15. In preparation for this affidavit, I have reviewed the substantive pleadings in the case (and the source materials referenced therein) as well as the Alaska constitutional convention of 1955-56 and the Enabling Act that was introduced in Congress in 1955. In addition, I have reviewed the publicly-available mission statement and bylaws of Oath Keepers, the 2 affidavits of Matthew Kriner and the affidavit of Jonathan Lewis submitted by Plaintiff in this case, the affidavits of Representative David Eastman submitted by Defendant Eastman in this case, and federal election contribution records available online from the Federal Election Commission. I have also re-familiarized myself with Supreme Court case law addressing First

Amendment rights and, because the Alaska Supreme Court has held that the Alaska Constitution "protects free speech at least as broadly as the U.S. Constitution and in a more explicit and direct manner," *Alsworth v. Seybert*, 323 P.3d 47, 56 (Alaska 2014), I have also reviewed Alaska case law.

16. In my expert opinion, disqualifying Representative Eastman from office pursuant to Article XII, Section 4 of the Alaska Constitution, under the circumstances presented here, would violate Representative Eastman's freedom of speech and association as protected by both the First Amendment to the U.S. Constitution (as incorporated and made applicable to the states by the Fourteenth Amendment) and by Article I, Section 5 of the Alaska Constitution. Moreover, to the extent statements made in the exercise of Representative Eastman's legislative duties are implicated in any such disqualification determination, the legislative immunity provision of the Alaska Constitution, Article II, Section 6, would also be violated. I base this opinion on the following:

17. Article XII, Section 4 of the Alaska Constitution disqualifies from office any 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...." Representative Eastman's uncontested affidavit demonstrates that he himself does not, and has not, advocated for the overthrow by force or violence of either the government of the United States or of the State. Indeed, as his uncontested affidavit demonstrates, he has repeatedly sworn an oath to uphold the Constitution of the United States and the Constitution of the State of Alaska.

18. Representative Eastman has acknowledged that he belongs to the Oath Keepers association, but far from being an organization which advocates the overthrow of the government by force or violence, the organization quite explicitly disavows any such purpose, barring membership to anyone "who

advocates, or has been or is a member, or associated with, any organization, formal or informal, that advocates the overthrow of the government of the United States or the violation of the Constitution thereof....” and describing its mission is fulfilling the oath its members each swore “to support and defend the Constitution against all enemies, foreign and domestic.” Oath Keeper Bylaws §§ 8.02(a); 8.05 (Eastman Aff. Ex. A).

19. I am aware of the counter view espoused by Plaintiff’s affiants Matthew Kriner and Jonathan Lewis but, in my opinion, neither is entitled to much weight.

20. Kriner is a Senior Research Scholar at the Middlebury Institute of International Studies at Monterey’s Center on Terrorism, Extremism, and Counterterrorism. The Institute is a decidedly left-of-center academic institute that has published numerous reports describing the supposedly violent advocacy of “right-wing extremist” organizations but, to my knowledge, not a single report addressing the violence committed by organizations on the left of the political spectrum such as Antifa and Black Lives Matter. Instead, it has excoriated groups on the right that counter-protest the violence engaged in by those organizations. Of those among its leadership who have donations recorded with the Federal Election Commission, 100% of their donations have been to Democrat candidates or Democrat-supporting organizations. The Institute’s Dean and Vice President for Academic Affairs, Jeff Dayton-Johnson, is a multiple donor to Biden for President and ActBlue in 2020, for example. Patricia Szasz, Dean of Academic Innovation, is also a regular contributor to ActBlue. William Potter, Director of the Institute’s James Martin Center for Nonproliferation Studies, is recorded as having made 26 donations to ActBlue, DNC Services, and Joe Biden for President since 2019. Jason Scorse, Director of the Institute’s Center for the Blue Economy, made 429 donations to ActBlue,

Obama for President, Elizabeth Warren, MoveOn.org, Hillary Clinton, Emily's List, SwingLeft, and numerous other Democrat candidates since 2006. Jason Blazakis, Director of the Institute's Center on Terrorism, Extremism, and Counterterrorism, is a 2020 donor to Biden for President and a 2018 donor to ActBlue. Jeff Knopf, Program Chair for the Institute's Nonproliferation and Terrorism Studies program, made 29 donations to ActBlue, DSCC, DNC Services, Biden for President, Hillary Clinton, and other Democrat candidates since 2014. Jason Martel, Program Chair for the Institute's TESOL/TFL program, is a 2020 donor to ActBlue, earmarked for Bernie Sanders for President. David Wick, Associate Professor in the program, is a 2020 donor to ActBlue, earmarked for Biden for President. Anne Campbell, Program Coordinator for the Institute's Joint MPA/International Education Management program, is a 2019 and 2020 donor to ActBlue, including an earmarked donation for Elizabeth Warren for President. Christiane Abel, Program Head of the Institute's French Translation and Interpretation program, is a regular donor to ActBlue and a 2020 donor to Biden for President. Alex Newhouse, the principal author of a number of the Institute's reports on "right-wing extremism," is likewise a regular contributor to ActBlue and has contributed to Democrat candidates such as President Joe Biden as well as candidates on the far left of the political spectrum such as Democrat Senator Elizabeth Warren and Socialist Senator Bernie Sanders.

21. Kriner claims that the Oath Keeper Bylaws provisions identified above are not "consistently enforced," but he provides no evidence for that claim other than the fact that several people who are (or have been) members of the organization have been *indicted* (though not convicted) for "seditious conspiracy." Kriner Supp. Aff. ¶ 7 (citing *United States v. Rhodes*, No. 22-cr-15 (D.D.C., Indictment filed Jan. 12, 2022). The trial is currently

underway, but even assuming Rhodes and the few other members of the reported 38,000 members of the Oath Keepers organization are convicted on that charge – they are, after all, entitled to a presumption of innocence – the seditious conspiracy law, 18 U.S.C. § 2384, covers conduct broader than that covered by Article XII, Section 4 of the Alaska Constitution, and the charging indictment merely alleges that the defendants conspired "by force to prevent, hinder, and delay the execution of any law of the United States," not that they advocated the use of force to "overthrow" the government. Indictment, *United States v. Rhodes et al.*, No. 1:22-cr-00015 (D.D.C., filed Jan. 12, 2022). Moreover, even if the charges against Rhodes and his few alleged co-conspirators had included the "overthrow" provision of the seditious conspiracy law, and even if they were convicted of such a charge, Kriner offers no evidence that the Oath Keepers' bylaws would not be enforced and their membership revoked.

22. Kriner cites government allegations of actions by a handful of Oath Keeper members that remain hotly disputed—Defense counsel in one of the cases described the Indictment as "an obscenely one-sided, selectively edited, and inaccurate representation of their actions and statements." Motion to Dismiss, p. 6 n. 2, Dkt. # 84, *United States v. Caldwell*, No. 22-cr-15-APM (D.D.C., filed April 12, 2022).[1] The jury trial in the case began on September 27, 2022 and is still underway.[2] In any event, Kriner has not

[1] Available at https://storage.courtlistener.com/recap/gov.uscourts.dcd.239217/gov.uscourts.dcd.239217.84.0.pdf. The Motion to Dismiss was denied on June 28, 2022, without the court disputing the allegation of FBI involvement. Memorandum Opinion and Order, Dkt. #176, *United States v. Rhodes*, No. 22-cr-15 (D.D.C., June 28, 2022), available at https://storage.courtlistener.com/recap/gov.uscourts.dcd.239208/gov.uscourts.dcd.239208.176.0_6.pdf,

[2] See Court docket at https://www.courtlistener.com/docket/62601653/united-states-v-rhodes-iii/?page=2.

provided any evidence to tie Representative Eastman to those alleged actions.

23. Kriner also errouneously claims that Representative Eastman "defended his presence at the January 6th Insurrection," falsely attributing Eastman's presence at a rally at the Ellipse in back of the White House on the morning of January 6, 2021, with the incursion that occurred later that afternoon at the U.S. Capitol nearly two miles away. He also claims that Representative Eastman's facebook links to "antifa" involvement in the Capitol incursion are "demonstrably false," but the links contain rather stunning photographic evidence and eyewitness testimony that contradict Kriner's "demonstrably false" claim. At the very least, these matters are very much in factual dispute and, significantly, evidence of FBI involvement (infiltration and even instigation, comparable to its now-acknowledged involvement in the Governor Whitmer kidnapping plot) has also surfaced in formal court filings. *See* Motion to Dismiss, p. 6 n. 2, Dkt. # 84, *United States v. Caldwell*, No. 22-cr-15-APM (D.D.C., filed April 12, 2022).[3]

24. Lewis asserts that Representative Eastman "espoused the violent goals of the Oath Keepers both before and after their role in the January 6 Capitol Siege," but provides no source for that defamatory claim. He accuses Representative Eastman of having "white supremacist rhetoric and [an] antisemitic worldview," assertedly based on "public reporting," but again provides no source for the claim. He claims that Eastman's views have "increasingly aligned him with the Oath Keepers' embrace of fascism," but likewise provides no support for the claim that either Eastman or the Oath Keepers has "embrace[d] ... fascism." He chastises Eastman for noting that

[3] Available at https://storage.courtlistener.com/recap/gov.uscourts.dcd.239217/gov.uscourts.dcd.239217.84.0.pdf

President Biden's warning to unvaccinated Americans that "Our patience is wearing thin" was earily similar to Adolp Hitler's similar warning to Czechoslovakia in 1938 on the eve of his occupation of the Sudentenland that "my patience is now at an end," and falsely implied (as numerous left-wing twitter posts had falsely claimed) that that was somehow proof that Eastman was endorsing Hitler. He accuses Eastman of "promoting the openly antisemitic 'Protocols of Zion'"—again without citation of any source—and of taking a photograph in front of an Adolf Hilter quotation, without disclosing that the photo was taken at the Holocaust Museum and published by Representative as part of an article condemning those "who would relegate the Holocaust to history." *See* David Eastman, *Something Troubled Me about Biden's Speech, So I Returned to the Holocaust Museum and Found This* (Oct. 6, 2021).[4]

25. Lewis then recites a littany of allegations that have been made against Oath Keeper founder Stewart Rhodes and a handful of other Oath Keeper members without once connecting any of those allegations to Representative Eastman, or providing any evidence that if the allegations are proved in court, that the Oath Keeper organization would not enforce its own bylaws. Moreover, one such allegation—that "Rhodes published a letter on the Oath Keepers website 'advocating for the use of force to stop the lawful transfer of presidential power,'" is quite clearly not credible. Although Lewis purports to quote directly from the letter, he does not provide a copy and it is inconceivable that Rhodes would have described the transfer of power as "lawful," given his well-publicized views of election illegality and fraud. *See*, *e.g.*, Holmes Lybrand and Hannah Rabinowitzi, *Oath Keepers leader*

[4] Available at https://davideastman.org/articles/something-troubled-me-about-bidens-speech-so-I-returned-to-the-holocaust-museum-and-found-this/.

testifies 2020 election was 'unconstitutional,' paints himself as anti-violence, CNN (Nov. 5, 2022).

26. In short, these affidavits should be discounted for what they are—partisan spin against the views of, and attacks on, political opponents.

27. Even if Rhodes and the dozen or so other members of Oath Keepers were to be convicted on the "seditious conspiracy" charges currently pending against them, and even if those charges actually alleged advocating the use of force to "overthrow" the government, the organization itself would have to repudiate its explicit bylaw prohibition on membership to anyone who advocates the use of force or violence to overthow the government. What the organization would do in such an eventuality remains at this point speculative.

28. Yet even were the organization to alter its bylaws and take up advocacy of overthrowing the government by force or violence, only the continued association with the organization *after* such advocacy had begun would disqualify someone from office under the explicit text of Article XII, Section 4. What Representative Eastman would do in such an eventuality is therefore also purely speculative.

29. And even were all that speculation to come to pass, it is important to recognize the First Amendment constraints on mere advocacy. The Alaska Constitution, including the disqualification clause of Article XII, Section 4, was adopted in 1956 at the height of the anti-communist "red scare" and the McCarthyism of the House Un-American Activities Committee. The language of the disqualification clause itself , which was included to comply with the proposed Enabling Act (S.49 and H.R.2535) that had been introduced in Congress, mirrored that of the Smith Act, which had been adopted in 1948 to impose criminal penalties on those who advocated for the overthrow of the U.S. Government by force or violence. Act of June 25,

1948, 80th Cong., 2nd Sess., Ch. 645, § 2385, 62 Stat. 808 (codified at 18 U.S.C. § 2385). A year after the disqualification clause was ratified as part of the new Alaska Constitution, the Supreme Court severely curtailed the scope of the Smith Act, holding in a series of cases that mere advocacy – even advocacy of overthrowing the government by force or violence – was protected by the First Amendment unless the advocacy crossed the line from advocacy as an abstract doctrine to advocacy of "concrete action for the forcible overthrow of the Government." *Yates v. United States*, 354 U.S. 298, 320 (1957); *see also Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reiterating that the First Amendment protected "mere advocacy" of the necessity of a resort to violence as a means of accomplishing political reform, as "distinguished from incitement to imminent lawless action").

30. Although the Smith Act is a criminal statute, the Supreme Court has applied the same principles in the identical context presented by this case, namely, eligibility for legislative office. In *Bond v. Floyd*, 385 U.S. 116 (1966), the Supreme Court held that the First Amendment prohibited the Georgia legislature from refusing to seat Julian Bond because of his allegedly treasonous anti-war statements and support of similar statements expressed by the organization of which he was a member, the Student Nonviolent Coordinating Committee ("SNCC"). By the time the case was decided in 1966, the SNCC, under the leadership of Stokely Carmichael, had moved away from the "nonviolent" views espoused by the Reverend Martin Luther King, Jr., toward "Black power" as "a movement that will smash everything Western civilization has created," as the editors at History.com have described it.[5] Yet because Bond's own statements did not expressly "demonstrate any incitement to violation of law," he could not have been

[5] https://www.history.com/topics/black-history/stokely-carmichael.

convicted for them "consistently with the First Amendment." *Id.* at 134. And neither could he be excluded from office for his exercise of First Amendment rights. "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy," the Court held. *Id.* at 135-36. *See also Alsworth*, 323 P.3d at 58 (holding that elected officials enjoy the same free speech rights as their critics in the citizenry); *VECO Int'l, Inc. v. Alaska Pub. Offs. Comm'n*, 753 P.2d 703, 710 (Alaska 1988) ("The right to act in concert with others for political purposes is protected by the first amendment to the United States Constitution and by the free speech provision of the Alaska Constitution14, article I, section 5.").

31. Under these precedents, Representative Eastman's current membership in Oath Keepers is protected by the First Amendment, both against criminal indictment and exclusion from office.

32. The applicability of the disqualification clause is several steps removed from the circumstances presented here. First, Oath Keepers *as an organization* (and not just some individual members) would have to expressly advocate for the *imminent* overthrow of the government by force or violence, and then Representative Eastman would have to retain his membership or otherwise provide aid despite that express advocacy. Alternatively, individual members (even members with leadership roles) would have to have been found to have expressly advocated for the *imminent* overthrow of the government by force or violence (and not just be alleged to have done so, via an indictment). Then, upon convinction of such a charge, Oath Keepers *as an organization* would have to repudiate its existing bylaws and embrace such activity. And then, as above, Representative Eastman would have to retain his membership or otherwise give aid despite the organization's adoption of that express illegal advocacy.

33. Accordingly, as noted in ¶ 16 above, it is my expert opinion that disqualifying Representative Eastman from office pursuant to Article XII, Section 4 of the Alaska Constitution, under the circumstances presented here, would violate Representative Eastman's freedom of speech and association as protected by both the First Amendment to the U.S. Constitution (as incorporated and made applicable to the states by the Fourteenth Amendment) and by Article I, Section 5 of the Alaska Constitution. Furthermore, to the extent statements made in the exercise of Representative Eastman's legislative duties are implicated in any such disqualification determination, the legislative immunity provision of the Alaska Constitution, Article II, Section 6, would also be violated.

END OF AFFIDAVIT.

DATED this 14th day of November, 2022, at Santa Fe, New Mexico.

John C. Eastman

SUBSCRIBED AND SWORN TO before me on this 14th day of November, 2022, at Santa Fe, New Mexico.

ESTEVAN GUTIERREZ
Notary Public - State of New Mexico
Commission # 1129402
My Comm. Expires August 27, 2024

Notary Public for the State of New Mexico

My commission expires 08/27/2024