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

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| RANDALL KOWALKE,<br><br>Plaintiff,<br><br>v.<br><br>DAVID EASTMAN, STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI in her official capacity as Director of Elections,<br><br>Defendants. | ) | Case No. 3AN-22-07404 CI |

**STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

## I. Introduction

Now that discovery is complete, the Division of Elections and its Director Gail Fenumiai (collectively "the Division") move for summary judgment. This Court must enter judgment in favor of the Division on Mr. Kowalke's claims against it, regardless of the merits of Mr. Kowalke's claims against Rep. Eastman. The evidence confirms that the Division did not violate any law in rejecting Mr. Kowalke's administrative complaint challenging Rep. Eastman's eligibility and in allowing Rep. Eastman's name to remain on the ballot.

This Court previously denied the Division's motion to dismiss under the unique standards governing such motions.[1] In denying reconsideration, the Court concluded

[1] *See Larsen v. State*, 284 P.3d 1, 4 (Alaska 2012) ("[A] complaint must be liberally construed and a motion to dismiss under Rule 12(b)(6) is viewed with disfavor and should rarely be granted.").

that the Division is "required by [AS 15.25.042 and 6 AAC 25.260] to determine whether a person is qualified for service in the legislature based upon the qualifications and disqualifications for office set out in the Alaska Constitution—including whether the person is ineligible under the Disqualification for Disloyalty clause."[2] Because the complaint alleged that "the Division improperly determined that Eastman was eligible for office," and the Court assumed for purposes of deciding the Motion to Dismiss that all allegations in the complaint would be proven true, the Court allowed Mr. Kowalke's case against the Division to proceed.[3]

The Division now moves for summary judgment under the law as interpreted by this Court in its prior orders. There is no dispute of material fact regarding the Division's involvement in this matter, and the Division is entitled to judgment in its favor. The Division followed AS 15.25.042 and, using the process created by 6 AAC 25.260, properly determined by a preponderance of the evidence before it that Rep. Eastman was not disqualified from office for disloyalty under Article XII, § 4 of the Alaska Constitution.

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[2] Order (Oct. 7, 2022) at 2. Mr. Kowalke cited neither of these authorities in his complaint, but the Court read the complaint broadly to include them. Order Denying Division's Motion to Dismiss for Failure to State a Claim (Sept. 12, 2022) at 6. The Division maintains, as argued in its motion to dismiss, that AS 15.25.042 and 6 AAC 25.260 only require the Division to consider challenges to candidates' *qualifications*, like age and residency, not challenges based on *disqualifications*, including disqualification for disloyalty under Article XII, § 4 of the Alaska Constitution. The Division does not repeat that argument here, but preserves it for purposes of appeal.

[3] Order Denying Division's Motion to Dismiss for Failure to State a Claim (Sept. 12, 2022) at 11.

This is true regardless of the outcome of the trial of Mr. Kowalke's claims against Rep. Eastman. Even if this Court ultimately finds Rep. Eastman to be disqualified based on a larger body of evidence obtained through civil discovery and trial, that will not change the fact that the Division's decision was proper based on the process it followed under controlling law and regulation. The Division's process was appropriately completed before the primary election, and the Division has no other involvement in a challenge to the qualifications of a candidate outside of an election contest, which is both unripe and which Mr. Kowalke lacks standing to file.[4] Mr. Kowalke cannot sidestep the election contest process by suing the Division directly to recertify an election based on candidate qualifications where the Division has indisputably followed the controlling statute and regulation governing pre-election eligibility challenges. This Court must grant summary judgment to the Division on the claims against it.

## II. The Division has met the legal standard for summary judgment.

A court must grant summary judgment when there are no disputes of material fact and the moving party is entitled to judgment as a matter of law.[5] The moving party bears the burden to show the lack of material factual disputes.[6] If the moving party meets that burden, the opposing party has the burden to provide admissible evidence

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[4] *See* AS 15.20.550 (election contests to be filed within ten days after certification of the election, and only a "defeated candidate or 10 qualified voters may contest the nomination or election of any person…")

[5] *Christensen v. Alaska Sales & Servs., Inc.*, 335 P.3d 514, 516 (Alaska 2014).

[6] *Id.* at 517.

disputing the moving party's evidence.[7] Mere assertions of fact in pleadings or memoranda are insufficient to create a genuine dispute of material fact.[8] "[U]nsupported assumptions and speculation" cannot create a genuine dispute of material fact.[9]

## III. There are no disputes of fact material to Mr. Kowalke's claims against the Division.

Discovery has now closed. Both the deadline for written discovery requests and lay witness depositions have passed, and neither Mr. Kowalke nor Rep. Eastman has produced any evidence or named any witness to testify contrary to the following facts, sworn to by the Division's witness Gail Fenumiai.[10]

On May 31, 2022, the Division received a timely declaration of candidacy for Rep. Eastman to run for Alaska House of Representatives for District 27.[11] Based on the declaration, Rep. Eastman was qualified for that office and the Division certified him to appear on the primary election ballot. On June 10, before the June 11 deadline, the Division received a letter from the plaintiff Mr. Kowalke challenging Rep. Eastman's

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7 *Id.* at 519-520.

8 *Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76, 86 (Alaska 2012) (quoting *State, Dep't of Highways v. Green*, 586 P.2d 595, 606 n.32 (Alaska 1978)).

9 *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 661 (Alaska 2006) (quoting *French v. Jadon, Inc*., 911 P.2d 20, 25 (Alaska 1996)).

10 A copy of the Division's responses to Mr. Kowalke's discovery requests, verified by Ms. Fenumiai, is attached to this motion as Exhibit A.

11 A copy of the declaration, redacted pursuant to AS 15.07.195, is attached to this Motion as Exhibit B.

eligibility to appear on the ballot based on Article XII, § 4 of the Alaska Constitution and the Fourteenth Amendment to the U.S. Constitution.[12]

Division Director Gail Fenumiai was responsible for assessing and responding to this complaint. Division staff had previously reviewed Rep. Eastman's declaration of candidacy and voter registration record when certifying him to appear on the ballot, and Ms. Fenumiai knew that there was nothing in those records to indicate that Rep. Eastman was ineligible to run for the District 27 seat in the Alaska House of Representatives. She also considered whether any public records on file with the State might exist relevant to Mr. Kowalke's eligibility challenge but was not aware of any.

Based on media reporting, she was generally aware that Rep. Eastman had publicly acknowledged being a member of the Oath Keepers organization and attending then-President Trump's rally in Washington D.C. on January 6, 2021. But she had no knowledge to suggest that Rep. Eastman had publicly acknowledged the remainder of Mr. Kowalke's allegations, specifically that the Oath Keepers "advocates the overthrow by force or violence of the government of the United States" or that Rep. Eastman "has given aid and comfort to participants in the January 6 insurrection against the government of the United States." Further, even assuming the allegations that Rep. Eastman had publicly acknowledged were true—specifically that he is a member of the Oath Keepers and attended the Washington D.C. rally on January 6, 2021—she concluded those allegations did not provide a basis to find Rep. Eastman ineligible,

[12] A copy of Mr. Kowalke's letter is attached to this Motion as Exhibit C.

without more. Therefore, she concluded by a preponderance of the evidence before her, that Rep. Eastman was an eligible candidate.

Ms. Fenumiai prepared and sent a response to Mr. Kowalke accordingly on June 20.[13] Mr. Kowalke did not attempt to appeal that decision, and Rep. Eastman's name appeared on the primary election ballot on August 16. He advanced out of the primary and his name appeared on the general election ballot of November 8. Unofficial results as of the date of filing show Rep. Eastman in first place in his district with more than fifty percent of first choice votes.[14] The Division will continue to count absentee ballots until November 23, so that statistic is subject to change.

## IV. Legal Background

It is crucial for the Court to understand the carefully crafted constitutional, statutory, and regulatory structure of Alaska's elections, the pieces of which weave together to form the fabric of elections administration in Alaska. Allowing this lawsuit to proceed against the Division, once it has been indisputably established that the Division complied with governing law and regulation, would tear that fabric. And it would undermine Article V, § 3 of the Alaska Constitution, which charges the legislature with designing Alaska's election system by law, and with prescribing "[t]he

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[13] That response is attached to this Motion as Exhibit D.

[14] Alaska Division of Elections, "2022 General Election; Election Summary Report November 8, 2022; Unofficial Results," available online at https://www.elections.alaska.gov/results/22GENR/ElectionSummaryReportRPT.pdf (last visited Nov. 14, 2022).

procedure for determining election contests." Creating a novel, judicial cause of action to serve the same purpose as an election contest would undermine that authority.

### A. The Alaska Constitution states the qualifications for and disqualifications from service in the Alaska Legislature.

Article II of the Alaska Constitution governs the state legislature. Article II, § 2, titled "Members: Qualifications" provides that:

> 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.

Regarding disqualifications to serve in the Alaska Legislature, Article II, § 3, titled "Disqualifications," provides that no legislator may hold any other office or position of profit under the United States or the State while serving.[15] Article II, § 2 incorporates by reference the standards for voter qualifications. Article V of the Alaska Constitution governs elections and suffrage, and similarly provides for qualifications and disqualifications of voters in separate sections.[16]

Article XII of the Alaska Constitution, titled "General Provisions" contains a further disqualification provision that applies to any public office in Alaska, not just

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[15] It also provides that "[d]uring the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member."

[16] *See* Article V, § 1 "Qualified Voters" and Article V, § 2 "Disqualifications."

membership in the legislature. Article XII, § 4, titled "Disqualification for Disloyalty," states:

> 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.

**B. The Article XII, § 4 disloyalty clause is a product of the Red Scare.**

The disloyalty clause of Alaska's Constitution has a circuitous history, coming to Alaska's statehood movement from Hawaii's where it was first introduced in response to anti-Communist sentiments.

In 1949, Hawaii had been advocating for statehood unsuccessfully for decades.[17] In that year, enabling act bills before Congress failed in large part due to an extensive dock worker strike.[18] Statehood opponents claimed that the striking union was led by Communists.[19] The Chair of the Senate Committee on Interior and Insular Affairs reported to that Committee that Communists were "operating chiefly through the … Union," and referred to the strikes organized by the union as a "premeditated campaign of sabotage."[20] He also referred to the president of the union as the "unseen Communist dictator of the Territory of Hawaii."[21] His report raised alarms that Communism had a

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17 *See* Roger Bell, *Last Among Equals: Hawaiian Statehood and American Politics* 37, 44 (2019).

18 *Id.* at 176, 187-89.

19 *Id.*

20 81 Cong. Rec. 8171 (1949).

21 *Id.*

"firm grip on the economic, political, and social life of the Territory of Hawaii" and that the Territory had become "one of the central operations bases and a strategic clearinghouse for the Communist campaign against the United States of America."[22] He recommended that statehood for Hawaii be deferred "indefinitely."[23]

The next year, Congress again considered statehood for Hawaii. The Senate Committee on Interior and Insular Affairs amended the pending statehood enabling act to include language that would ultimately find its way into Alaska's Constitution:

> The constitution shall be republican in form and… *shall provide that no person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of the State of Hawaii or of the United States shall be qualified to hold any public office under the State constitution.*[24]

The Senate committee explained that it was "convinced that the people of Hawaii generally are alert to the importance of guarding against Communist infiltration," but that this language would "provide a barrier against it."[25]

Hawaii's Constitutional Convention, held later that same year, duly included this provision. Convention debates reflect the understanding that it was meant to prevent

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22 *Id.*

23 *Id.*

24 *Committee on Interior and Insular Affairs, Statehood for Hawaii*, S. Rep. No. 1928, at 2 (1950) (emphasis added). This language has similarities to the Smith Act, passed in 1940, which was interpreted to apply to the Communist party. *See Dennis v. United States*, 341 U.S. 494, 497 (1951) ("The indictment charged the petitioners with willfully and knowingly conspiring [] to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence").

25 *Id.* at 8-9.

Communists from holding office.[26] Hawaii ratified a constitution at this Convention, but still failed to secure passage of an enabling act in Congress.[27]

Later, in the mid-1950s, when Alaska was also seeking statehood, joint Alaska-Hawaii enabling act bills were introduced in Congress.[28] These bills maintained the disqualification for disloyalty language first added for Hawaii in 1950. The joint Alaska-Hawaii enabling act bills pending in Congress at the time of Alaska's Constitutional Convention required that the language be included in both states' constitutions.[29] The disloyalty clause was subject to very little debate at Alaska's Constitutional Convention—the delegates only acknowledged that the clause was required by the pending enabling act.[30]

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[26] *See, e.g.,* Debates in the Committee of the Whole, *in* 2 *Proceedings of the Constitutional Convention of Hawaii 1950*, 770, 771800, 801 (Haw. Att'y Gen. and Haw. Pub. Archives ed. 1960).

[27] Today, Hawaii's constitution includes a disloyalty clause that differs from Alaska's. Hawaii Constitution, Article 16, § 3 ("No person shall hold any public office or employment who has been convicted of any act to overthrow, or attempt to overthrow, or conspiracy with any person to overthrow the government of this State or of the United States by force or violence.").

[28] *See* Gruening, Ernest H., *The Battle for Alaska Statehood*, 60 (1967).

[29] S.49, 84th Cong. §§102, 203 (1955). *See also* "Constitutional Convention Files," "Background Materials," 180.7 Enabling Bills in Congress, available online at https://akleg.gov/pages/constitutional_convention.php.

[30] *See* "Alaska Constitutional Convention Part 1, Proceedings: November 8 – December 12, 1955," at 2289-90 ("The other section is an antisubversive section which is required, as we understand it, one of the required clauses of this constitution, and that is Section 3."); *id* at 2791 ("Section 3 is the standard clause which states that no person who does not agree with our ideals and our institutions, and our form of government shall attempt to overthrow the government by violence or support any organization or association which advocates such overthrow. Now, while it is easy to say those things, it is very hard to determine, as you all know, by actual practice what would be considered either subversive or treason, so the clause, however, is the one that is mandatory and required in the constitution.") (available online at

### C. The Alaska Constitution directs the legislature to provide a procedure for determining election contests.

The Alaska constitution directs the Alaska Legislature to provide for administration of elections. Accordingly the Alaska Legislature designed a process requiring candidates to provide information to the Division establishing that they meet the qualifications for office—but not requiring candidates to provide information to the Division to establish that they are not *dis*qualified—before being placed on the ballot.[31] The legislature also created a limited process to challenge candidates' eligibility for office before the primary election.[32] After a candidate is placed on the ballot, the legislature provided only one more opportunity to challenge their qualifications—in an election contest, after the election if the candidate wins.[33]

The Alaska Constitution empowers the legislature to provide for the administration of state elections. Article V, § 5, "General Elections," states:

> Methods of voting, including absentee voting, shall be prescribed by law. Secrecy of voting shall be preserved. The procedure for determining election contests, with right of appeal to the courts, shall be prescribed by law.

The Alaska Legislature complied with this mandate through Title 15 of the Alaska Statutes. Alaska Statute 15.25.030 requires all candidates for state legislature to file a "declaration of candidacy." In the declaration of candidacy, candidates state under

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https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf).

31 AS 15.25.030.

32 AS 15.25.042.

33 AS 15.20.540 *et seq.*

oath their status as a qualified voter, their residency, and their age, tracking the qualifications provisions of Article II, § 2.[34] The declaration of candidacy does not require the candidate to provide any information or make any representations regarding the standards for disqualification under either Article II, § 3 or Article XII, § 4. It does not inquire into the candidate's current employment, memberships or associations, or personal beliefs.

Immediately following the declaration of candidacy statute, AS 15.25.042—which is central to this case—allows a voter to challenge a candidate's eligibility. It requires the Division to respond within 30 days of the complaint and defers to the Division the task of designing the administrative process for such complaints by regulation. As this Court as recognized, the statutes do not give the Division the power to subpoena evidence or administer oaths.[35]

The elections process designed by the legislature contains only one other opportunity to challenge a candidate's eligibility: an election contest after the election, if the candidate is elected. Following the constitutional directive in Article V, § 3 that the "procedure for determining election contests…shall be prescribed by law," the legislature enacted AS 15.20.540. It provides that "A defeated candidate or 10 qualified voters may contest the nomination or election of any person … (2) when the person

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[34] *See* Exhibit A.

[35] Order Denying Division's Motion to Dismiss for Failure to State a Claim (Sept. 12, 2022) at 8.

certified as elected or nominated is not qualified as required by law."[36] In the next section, AS 15.20.550, the legislature set a tight deadline for filing an election contest: ten days after completion of the state board review (the final step in the election process which coincides with certification of the results). That section also provides that election contests are heard in superior court. The next section, AS 15.20.560, provides the remedies available:

> The judge shall pronounce judgment on which candidate was elected or nominated …. The director shall issue a new election certificate to correctly reflect the judgment of the court…. If the court decides that no candidate was duly elected or nominated, the judgment shall be that the contested election be set aside.

Thus, the legislature set restrictions on the time to file an election contest and who may file an election contest. The legislature also specified the venue and limited the relief available in an election contest. The legislature provided no other opportunity to challenge the certification of an election based on the qualification of candidates.

## V. The undisputed facts demonstrate that the Division complied with AS 15.25.042 and 6 AAC 25.260 in denying Mr. Kowalke's administrative complaint.

This Court has concluded that "state law clearly mandates that, 'If the director receives a complaint regarding the eligibility of a candidate for a particular office, the director *shall* determine eligibility under regulations adopted by the director.'"[37] The

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[36] Like 6 AAC 25.260, this statute refers to "qualifications," not "disqualifications," but presumably this Court's holding that there is no legal distinction between these terms under 6 AAC 25.260 would also apply to AS 15.20.540.

[37] The complaint did not allege, and this Court has not held, that the Alaska Constitution directly places any duty on the Division to enforce this clause. Any duty on the Division must

Court cited AS 15.25.042 as the relevant state law and 6 AAC 25.260 as the regulation adopted by the director. The undisputed facts show that the Division fully complied with both these directives. Although the Division maintains that AS 15.25.042 is best read not to require it to consider eligibility challenges based on *disqualifications*, the Division nonetheless actually considered the merits of Mr. Kowalke's complaint and undertook that analysis "to the extent these constitutional provisions apply."[38]

Alaska Statute 15.25.042 states:

> (a) If the director receives a complaint regarding the eligibility of a candidate for a particular office, the director shall determine eligibility under regulations adopted by the director. The director shall determine the eligibility of the candidate within 30 days of the receipt of the complaint. (b) Except as provided in (c) of this section, the director shall determine the eligibility of the candidate by a preponderance of the evidence. (c) If a candidate for the legislature has been registered to vote at any time during the 12 months preceding the filing of the declaration of candidacy in a district other than the district in which the declaration of candidacy has been filed, the director may not determine that a candidate is eligible except under a standard of clear and convincing evidence. (d) A person may not be a resident of two districts at the same time.

The immediately following statute, AS 15.25.043, provides additional rules and guidance regarding the Division's process for determining a candidate's residency. However, no statute provides any guidance or other process for the Division to determine a candidate's loyalty to the government.

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arise from statute, pursuant to the mandate in Article V, § 3 that the legislature provide for the administration of elections by law.

[38] Exhibit C.

Pursuant to the directive in AS 15.25.042 that that the director "shall determine eligibility *under regulations adopted by the director,*" the Division adopted regulation 6 AAC 25.260. The undisputed facts show that the Division followed every command in that regulation in deciding Mr. Kowalke's complaint. Part (a) of that regulation states:

> (a) Any person may question the eligibility of a candidate who has filed a declaration of candidacy … by filing a complaint with the director. A complaint regarding the eligibility of a candidate must be received by the director not later than the close of business on the 10th day after the filing deadline for the office for which the candidate seeks election.

Part (c) of the regulation specifies that the Division will not consider campaign finance matters but "only those issues in the complaint related to candidate qualifications established by the United States Constitution, the Alaska Constitution, or the Alaska Statutes."[39] Particularly relevant to this case, part (d) provides:

> Upon receipt of a complaint, the director will review any evidence relevant to the issues identified in the complaint which is in the custody of the division, including the candidate's registration record or declaration of candidacy, and including, in the discretion of the director, any other document of public record on file with the state. Based on the review of the public documents, the director will determine whether a preponderance of evidence supports or does not support the eligibility of the candidate.

In response to Mr. Kowalke's complaint, the Division indisputably followed this procedure to the letter. Upon receipt of the complaint, Director Fenumiai first considered whether Rep. Eastman's registration record or declaration of candidacy would contain relevant information. Because the declaration of candidacy as designed

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[39] This Court has already rejected the Division's argument that the word "qualifications" in this section does not include "disqualifications," despite their clearly distinct treatment in Alaska's constitution and statutes. Order Denying Division's Motion to Dismiss for Failure to State a Claim (Sept. 12, 2022) at 11.

by the legislature in AS 15.25.030 does not inquire into a candidate's memberships, associations, or personal views, the Division's records contained no information relevant to Mr. Kowalke's complaint. Section (d) of the regulation also instructs the director to consider whether other relevant public records might exist, which Director Fenumiai did and was aware of none.[40] Mr. Kowalke identified no public record that he believes Director Fenumiai should have considered and no such record been revealed in discovery.

The final section of 6 AAC 25.260 clarifies that nothing in the regulation "limits the authority of the director to evaluate a candidate's eligibility for office." This subsection does not *require* the director to consider materials outside the public record, but gives her discretion to do so when she considers it appropriate. Exercising that discretion in response to Mr. Kowalke's complaint, Director Fenumiai also considered information that was generally publicly known even though it did not appear in any public agency record. Specifically, she considered Rep. Eastman's acknowledged attendance at then-President Trump's speech in Washington D.C. on January 6, 2021, and his acknowledged membership in the Oath Keepers.[41] So the Division did not stick its head in the sand, but engaged with the substance of Mr. Kowalke's complaint based on the portions of it that Rep. Eastman had publicly acknowledged.

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[40] If Mr. Kowalke had sued Rep. Eastman before filing the administrative complaint and obtained a judgment against Mr. Eastman declaring that he is ineligible for public office, that would have been a highly relevant public document that the Division could have considered under 6 AAC 25.260.

[41] Exhibit A.

Subsection (d) of the regulation instructs that "[b]ased on the review of the public documents, the director will determine whether a preponderance of evidence supports or does not support the eligibility of the candidate."[42] Director Fenumiai followed this command by determining that a preponderance of the evidence supported Rep. Eastman's eligibility for the office he sought. The remaining subsections of the regulation provide instructions that either do not apply here or were indisputably followed. The Division thus followed both AS 15.25.042 and 6 AAC 25.260, as interpreted by this Court, and properly evaluated whether Rep. Eastman was disqualified from office by Article XII, § 4 on the record before it.

There can be no dispute that the Division made the correct determination based on the information in its possession. No information in the Division's possession—beyond the bare allegations in Mr. Kowalke's complaint—supported the conclusion that the Oath Keepers, as an organization, advocates the violent overthrow of the state or federal government. Nor did any information in the Division's possession suggest that Rep. Eastman himself engaged in any form of violent or insurrectionist behavior on January 6, 2021. The fact that this Court has ordered an eight-day trial—at which the parties propose collectively to call forty-four witnesses on this topic—bears out this point. There was no acknowledged, publicly-available information before the Division proving the thrust of Mr. Kowalke's complaint about Rep. Eastman.

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[42] 6 AAC 25.260.

To the extent that Mr. Kowalke takes the position that the Division had a duty to conduct a free-wheeling investigation of his complaint outside of the constraints of statute and regulation, this Court should reject that argument. By giving the Division only 30 days to respond to complaints, and failing to give the Division investigatory tools such as subpoena power or the power to administer oaths, the legislature clearly did not contemplate such an exercise. The legislature also explicitly deferred to the Division to design the administrative process by regulation, and the Division did so. Given the Division's lack of investigative powers and short timeframe to respond, the Division properly crafted the regulation to limit the record in this administrative process to its own records and public records of other agencies.[43] This is also a reasonable policy choice for this stage in the elections process. It could be a poor allocation of limited resources for the Division to investigate further than its own records and public records in considering the qualifications of candidates who may have little or no chance of success in the election. Although there were few other candidates in Rep. Eastman's race, the special primary election conducted a few months ago featured 48 candidates, only four of whom would advance to the general election, and only one actually be elected.[44]

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[43] And, as this Court has acknowledged, it must defer to the Division's own interpretation of its governing statutes and regulations. Order Denying Division's Motion to Dismiss for Failure to State a Claim (Sept. 12, 2022) at 10.

[44] And, in the event a candidate advances out of the primary or wins the general election, AS 15.20.540 *et seq.* allows for challenge to the candidate's qualifications in superior court.

In conclusion, there is no dispute of material fact that the Division properly followed AS 15.25.042 and 6 AAC 25.260 in reviewing and denying Mr. Kowalke's complaint, even accepting this Court's ruling that these provisions required the Division to consider disloyalty challenges. This is not a situation in which the record before the Division clearly demonstrated that Rep. Eastman was disqualified from office but the Division denied Mr. Kowalke's complaint in the face of that evidence. This Court should therefore grant summary judgment in favor of the Division.

## VI. Denying summary judgment to the Division on these facts undercuts the Legislature's constitutional authority to provide for election contests by law.

A complaint to the Division under AS 15.25.042 is not the only process created by the legislature for challenging a candidate's eligibility for office. Pursuant to its constitutional mandate to establish a procedure for election contests, the legislature created a second way to challenge candidate qualifications, to be conducted in superior court in the event that the challenged candidate is actually elected.[45] Unlike the Division, superior courts are courts of general jurisdiction, well-equipped to compel evidence and resolve factual disputes. In the event that a candidate wins an election, this robust procedure exists to test their qualifications for office at that point.

Article V of the Alaska Constitution governs elections, and provides that the procedure for election contests "shall be prescribed by law."[46] The procedure for

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[45] Again, according to this Court's prior rulings, the word "qualifications" in AS 15.20.540 would encompass disloyalty under Article XII, § 4.

[46] Alaska Constitution Article V, § 3.

contesting the result of an election—including seeking an order that the Division re-certify the election or conduct a new election—is provided for in statute.[47] Given that the Division indisputably followed statutory and regulatory procedure in placing Rep. Eastman on the ballot, this Court should not allow Mr. Kowalke to sidestep the election contest statutes by suing the Division for re-certification of the election outside of the constraints of the election contest statutes.

The Alaska Supreme Court has in the past rejected attempts to sidestep election contest procedures. In *Miller v. Treadwell*, an unsuccessful candidate sued the Division directly rather than filing an election contest, but the Supreme Court applied the election contest standards regardless.[48] The Court wrote:

> It may be that certain legal issues could properly be brought to us pre-election or during an election with appropriate requests for declaratory and even injunctive relief. But the legislature has created two specific legal proceedings for any election challenges that would normally apply to many of the issues in this case—an election contest and a recount appeal.[49]

The Court concluded that the candidate "cannot avoid the avenues established by the legislature to challenge elections," despite the candidate's insistence that the case was for declaratory and injunctive relief, not an election contest.[50]

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47 *See* AS 15.20.540 *et seq.*

48 *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010). The plaintiff in that case is counsel for Rep. Eastman in this case.

49 *Id.* at 874.

50 *Id.* at 876.

The only Alaska Supreme Court cases in which parties have sued the Division directly regarding placement of a candidate on the ballot have involved only the procedural requirements for filing for office; none have involved the candidate's constitutional qualifications or disqualifications for office.[51] And the only two Alaska Supreme Court cases involving constitutional disqualifications address dual office holding, and were filed directly against the disqualified official.[52] Neither involved the Division at all. Both cases found the official disqualified and entered judgment against the official directly.[53] The Court did not order the official's employer to terminate their employment or order the legislature to expel the official—the Court placed the responsibility on the official to take the necessary steps to remedy the situation.

In this case, where the undisputed facts have shown that the Division followed its own statutes and regulations, this Court should not allow Mr. Kowalke to proceed with an independent lawsuit for declaratory and injunctive relief against the Division. Any

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[51] *See, e,g., Silides v. Thomas,* 559 P.2d 80 (Alaska 1977) (regarding Division's decision that candidates did not substantially comply with filing requirements and could not appear on the ballot); *Falke v. State*, 717 P.2d 369 (Alaska 1986) (regarding Division's decision that candidate had timely filed declaration of candidacy and could appear on the ballot); *State, Div. of Elections v. Metcalfe*, 110 P.3d 976 (Alaska 2005) (regarding Division's decision that candidate had not met requirements to be nominated to primary election ballot and could not appear on the ballot); *State v. Jeffery*, 170 P.3d 226 (Alaska 2007) (regarding Division's decision that judicial retention candidates had not timely filed declarations of candidacy and could not appear on the ballot).

[52] *See Begich v. Jefferson*, 441 P.2d 27 (Alaska 1968); *Warwick v. State ex rel. Chance*, 548 P.2d 384 (Alaska 1976).

[53] *Begich*, 441 P.2d at 29; *Warwick*, 548 P.2d at 386.

challenge to the qualifications of an elected candidate that would result in re-certification of the election must follow the election contest procedure.

The legislature, carrying out its constitutional mandate, placed crucial limitations on the election contest procedure. The legislature restricted the time to file an election contest, who may file an election contest, and what relief can result from a successful election contest.[54] These restrictions avoid the situation in which the Division now finds itself, locked in pre-election litigation, engaging in motion practice, responding to discovery, and otherwise expending time and money on litigation about the qualifications of a candidate who may or may not win the election. The legislature was careful to design the process so that only the qualifications of a successful candidate could be challenged, and the Division would not be required to engage in pre-election litigation.

Furthermore, Mr. Kowalke is not qualified to file an election contest. The legislature intentionally designed election contests to *prevent* a single voter from challenging the election process in the way that Mr. Kowalke attempts to do here.[55]

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[54] Although this Court ultimately settled on the relief of delay of certification and potential re-certification, that is not the relief that Mr. Kowalke originally sought, and the Division had to expend significant time and effort—including providing affidavits of the Director—in arguing and providing information to the Court about possible forms of relief. If this were an election contest, the appropriate relief would be already settled by statute.

[55] That is not to say that Mr. Kowalke—or someone else—could not bring a claim against Rep. Eastman directly for an injunction against him holding public office. *See Warwick*, 548 P.2d at 386*; Begich*, 441 P.2d at 29. But the only way to involve the Division and to seek re-certification of an election is through an election contest.

Unfortunately, this Court's rulings in this case have already encouraged other plaintiffs to improperly attempt to sidestep the election contest procedure. The Division recently received service of *Duke v. State* in which four voters have sued the Division to challenge the residency qualifications of a candidate for the Alaska Legislature.[56] Like Mr. Kowalke, those plaintiffs seek to delay certification and enjoin the Division from certifying the election for the challenged candidate. Their motion for preliminary injunction cited this Court's rulings in this case and attached materials filed in this case. Whether a candidate meets residency qualifications is a quintessential election contest matter, and recertification of an election is a quintessential election contest remedy. And yet those plaintiffs were emboldened by this Court's rulings in this case to sue the Division before the election seeking an injunction against certification of a candidate, rather than wait until after the outcome of the election to file an election contest, as the legislature intended.

In short, denying the Division's motion for summary judgment on these facts would undercut the election contest statutes. No plaintiff would bother to coordinate with nine other voters and wait until after the election to sue the Division over a candidate's qualifications or disqualifications. If a single voter can sue at any time to challenge a candidate and obtain the same relief that is available in an election contest, or seek additional relief, why wait until after the election or coordinate with others? This Court must grant the Division's motion for summary judgment or eviscerate

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[56] The complaint is attached as Exhibit E to this Motion.

Article V's mandate that the legislature—not the judiciary—provide for election contests by law.

## VII. History and policy support the Division's position.

In deciding cases involving the prohibition on dual office holding, the Alaska Supreme Court has stated a policy "favor[ing] the eligibility of citizens to seek public office, especially elective office."[57] "[O]ne of the fundamental rights of citizenship is the right to vote, embodying the right of free choice of candidates. Restriction on those who may run for office impinge on that right."[58] Requiring the Division step outside the procedures set out in statute and regulation and conduct open-ended investigations into candidates' loyalty to the State and United States would run contrary to those policies.

Ruling against the Division would also contravene the policy in favor of encouraging people to run for elective office.[59] The Alaska Supreme court "recognize[s] that citizens should be interested in and seek public office. Public service and concern for the welfare of our citizenry is essential if we are to have a viable state government."[60] To get on the ballot already requires broad disclosures of financial and other personal information. But the legislature has *not* seen fit to require potential candidates to disclose their memberships, associational connections, or the advocacy and mission of those memberships and connections. To require the Division to

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57 *Warwick*, 548 P.2d at 388-89.

58 *Id.*

59 *Id.*

60 *Begich*, 441 P.2d at 35.

investigate these questions—unbounded by any statutory or regulatory process and without proper investigatory tools—could deter qualified individuals from running for office. The knowledge that a 200-word administrative complaint filed by any personal or political adversary could result in a freewheeling, unregulated investigation into a person's memberships and associations could easily deter people from running, even if they felt confident they would ultimately be exonerated.

When considering the precedent that this Court will set when it rules on this Motion, this Court should be mindful of the history behind our Disqualification for Disloyalty clause. This history should caution this Court to rule that the Division's role in assessing candidate loyalty is properly limited by statute and regulation, rather than ruling that the Division must conduct unregulated investigations outside of the structure created by the legislature and the Division's own regulatory process. This Court should also be mindful of candidates' rights to freedom of speech and association under the state and federal constitutions.[61]

Finally, granting the Division's Motion for Summary Judgment will not render Article XII, § 4 unenforceable. Even if this Court grants the Division's motion, Mr. Kowalke may proceed in his claims against Rep. Eastman directly. If Mr. Kowalke proves his claims, he can seek an injunction against Rep. Eastman holding *any* public office—not just membership in the Alaska Legislature—until circumstances change

[61] *See* Alaska Constitution Article I, §§5, 6; United States Constitution Am. 1.

such that he is no longer disqualified.[62] Such an injunction would be more in keeping with the text of Article XII, § 4, which does not address elections, candidacy, or even specifically membership in the legislature. It would also be consistent with Alaska Supreme Court precedent regarding the Alaska Constitution's other disqualification provision, related to dual office holding.[63] There is also no dispute that the House of Representatives could remove Rep. Eastman as a member based on Article XII, § 4 on the vote of two thirds of its members at any time.[64] Thus, the clause remains valid and enforceable despite the limited—and in this case properly-executed—role of the Division in enforcing it under AS 15.25.042 and 6 AAC 25.260.

**VIII. Conclusion.**

This Court should grant summary judgment in favor of the Division of Elections and its Director Gail Fenumiai.

DATED November 15, 2022.

TREG R. TAYLOR
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62 Such an injunction would then be a public document that the Division could properly consider under 6 AAC 25.260 in the event that Rep. Eastman were to again file for office.

63 *See Begich*, 441 P.2d at 27; *Warwick*, 548 P.2d at 384.

64 *See* Alaska Constitution Article II, § 12; AS 24.05.070.