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

CHRIS DUKE, RANDY ELEDGE, STEVE STRAIT, AND KATHRYN WERDAHL, Plaintiffs, v. STATE OF ALASKA DIVISION OF ELECTIONS and GAIL FENUMIAI Defendants.	)	Case No. 3AN-22-08794 CI

OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND CROSS MOTION TO DISMISS

I. Introduction

Four qualified voters have filed suit to challenge the eligibility of a candidate for the Alaska House of Representatives, alleging that the candidate was not a resident of the State of Alaska for three years before she filed her declaration of candidacy and is therefore not qualified for office under Article II, sec. 2 of the Alaska Constitution. They have moved this Court for an order enjoining the Division of Elections from certifying the result of the election in this House District race until the Court has ruled on the candidate's qualifications for office. This Court should deny the motion and dismiss the complaint because it is not the proper vehicle to bring this challenge. The only procedure available to plaintiffs is to file an election contest after the election if Ms. Armstrong wins. Because the plaintiffs clearly lack a cause of action to sustain this suit, the Division does not oppose expedited consideration and responds to the motion

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

for preliminary injunction on an expedited basis. The Court's expedited dismissal of this suit would also serve the public interest by delaying any challenge to Ms. Armstrong's qualifications until after the certification of the general election, as required by law.

II. Background

A. Alaska law provides two opportunities to challenge a candidate's eligibility.

Alaska law provides two opportunities to challenge the eligibility of a candidate to serve in an elected office: the first occurs immediately after the filing deadline on June 1 of an election year; the second occurs after certification of election results.

Alaska Statute 15.25.042 and 6 AAC 25.260 address when and how the Division investigates a candidate's eligibility for the position sought. Alaska Statute 15.25.042 provides that:

> (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 first subsection of AS 15.25.042 directs the Division to promulgate regulations to govern this process. The Division did so in 6 AAC 25.260, creating a

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

process designed to be resolved before the primary election. It sets a clear deadline for complaints: ten days after the candidate filing deadline.[1] The filing deadline is the date by which each candidate must file a declaration of candidacy setting out their basic eligibility for the position they seek: that they are a resident of Alaska, of the relevant district, and for how long; that they meet the citizenship and age requirements for the office; and that they are a qualified voter as required by law.[2] By setting a 10-day clock running from the filing deadline, 6 AAC 25.260 gives the public a reasonable but brief period to review a candidate's declaration and challenge the candidate's representations that they meet these eligibility criteria. The candidacy filing deadline before a primary is June 1.[3] Because complaints may be received up to 10 days later and the Division must make its determination within 30 days of receiving a complaint, complaints will be resolved by July 11,[4] well in advance of the primary on the third Tuesday in August.[5] Absent a successful eligibility complaint under this process, the candidate will appear on the ballot—the Division has no further role in assessing a candidate's eligibility.

The next opportunity to challenge the eligibility of a candidate is an election contest after the election result is certified. The Alaska Constitution provides that the

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

1 6 AAC 25.260(a).

2 AS 15.25.030.

3 AS 15.25.040(a).

4 6 AAC 25.260(a); AS 15.25.042(a).

5 AS 15.25.020.

"procedure for determining election contests . . . shall be prescribe by law,"[6] and Alaska Statutes 15.20.540–.560 prescribes these procedures. Alaska Statute 15.20.540 provides that one of the grounds for an election contest is "when the person certified as elected or nominated is not qualified as required by law."[7] The other grounds are "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election," and "any corrupt practice as defined by law sufficient to change the results of the election."[8] An election contest may only be filed by a "defeated candidate or 10 qualified voters"[9] "within 10 days after the completion of the state review."[10] The superior court has wide discretion to fashion a remedy in an election contest. Alaska Statute 15.20.560 provides that "[t]he judge shall pronounce judgment on which candidate was elected or nominated . . . . If the court decides that no candidate was duly elected or nominated, the judgment shall be that the contested election be set aside . . . ." Thus, pursuant to the constitution, the legislature created an election contest process that specifies who may file one, when they may file it, the venue, and the relief available.

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PHONE: (907) 269-5100

6 AK Const. Art. V, sec. 3.

7 AS 15.20.540(2).

8 AS 15.29.540(1) and (3).

9 AS 15.20.540.

10 AS 15.20.550; AS 15.15.450.

B. Jennie Armstrong filed her declaration of candidacy in June and the Division did not receive any timely eligibility complaints.

Jennie Armstrong filed a declaration of candidacy on June 1, 2022, to run for election to the State House of Representatives in House District 16. The declaration states that she has been an Alaskan resident since May 20, 2019, and includes a certification that "the information in this Declaration of Candidacy . . . is true and complete." The Division did not receive any complaint regarding Ms. Armstrong's eligibility for office within ten days of the candidate filing deadline. Ms. Armstrong's name appeared on the ballot in the August primary election. As a top-four candidate in the primary election, Ms. Armstrong advanced to the general election, which is already underway. Her name appears on the ballots that voters are currently voting.

III. Legal Standards

A. Preliminary injunction

A preliminary injunction is "considered 'an extraordinary remedy never awarded as of right.'"[11] Preliminary injunctions are "harsh remedies" used to "preserve the status quo" when necessary to prevent "the irreparable loss of rights before judgment."[12]

Under Alaska law, a "[p]laintiff may obtain a preliminary injunction by meeting

[11] *State v. Galvin*, 491 P.3d 325, 338 (Alaska 2021) (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008)).

[12] *Martin v. Coastal Vills. Region Fund*, 156 P.3d 1121, 1126 & n.4 (Alaska 2007) (quoting *United States v. Guess*, 390 F.Supp.2d 979, 984 (S.D. Cal. 2005)).

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either the balance of hardships or the probable success on the merits standard."[13] The balance of hardships standard applies when the plaintiff establishes three factors: (1) the plaintiff is faced with irreparable harm, (2) the opposing party is adequately protected, and (3) the plaintiff raises "serious and substantial questions going to the merits of the case."[14] When the opposing party's interests cannot be adequately protected, the party seeking relief must make "a clear showing of probable success on the merits of the dispute before a court may grant the preliminary injunction."[15]

Each of these standards requires the plaintiff to demonstrate that he will suffer irreparable harm in the absence of a preliminary injunction.[16] Without irreparable harm, there is simply no reason for a court to truncate its usual procedures and attempt to quickly assess the merits of a case on an abbreviated record. Although language in a handful of Alaska cases suggests that a party whose harm is "less than irreparable" might be able to obtain a preliminary injunction,[17] the Alaska Supreme Court has never

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PHONE: (907) 269-5100

13 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

14 *Id.*

15 *Galvin*, 491 P.3d at 333 (internal quotations omitted).

16 *Miller v. Atkinson*, 365 P.2d 550, 552 (Alaska 1961).

17 *See Galvin*, 491 P.3d at 333 ("Where the harm is not irreparable, or where the other party cannot be adequately protected, then the moving party must show probable success on the merits."); *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (same).

actually approved of such an injunction.[18] And such an injunction would be inappropriate, as language in other Alaska Supreme Court cases makes clear.[19]

Consistent with this logic, irreparable harm is "[p]erhaps the single most important prerequisite" for a preliminary injunction under federal law.[20] As the U.S. Supreme Court explained in *Winter v. Natural Resources Defense Council, Inc*., its "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction."[21] A mere "possibility" of irreparable harm is insufficient—the plaintiff must show that irreparable harm is "likely" without an injunction.[22] As the Court explained, "[i]ssuing a

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[18] *See Galvin*, 491 P.3d at 333 (plaintiff faced irreparable harm in absence of injunction and Court affirmed denial of injunction on grounds that State could not be adequately protected and plaintiff failed to establish probable success on merits); *Metcalfe*, 110 P.3d at 979 ("issuance of this injunction is a zero-sum event, where one party will invariably see unmitigated harm to its interests.").

[19] *See VECO Int'l, Inc. v. Alaska Pub. Offices Comm'n*, 753 P.2d 703, 718 (Alaska 1988) ("VECO could have sought to enjoin the state from enforcing the Campaign Disclosure Act. That would require a showing of irreparable harm, among other things."); *Miller v. Atkinson*, 365 P.2d 550, 552 (Alaska 1961) (preliminary injunctive relief is available "to enjoin acts of the defendant which will cause irreparable injury to the personal or property rights of the plaintiff" and "to call into action this extraordinary power required a clear showing of the irreparable injury for which there was no other adequate remedy").

[20] *See* 11A Wright & Miller Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief.").

[21] 555 U.S. 7, 22 (2008).

[22] *Id*.

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PHONE: (907) 269-5100

preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[23]

B. Motion to dismiss

To survive a motion to dismiss under Alaska Rule of Civil Procedure 12(b)(6), a complaint must "allege a set of facts consistent with and appropriate to some enforceable cause of action."[24] When determining whether a complaint has sufficiently stated a claim on which relief can be granted, courts liberally construe the complaint and assume all factual allegations can be proven as true.[25] But legal conclusions and unwarranted factual inferences in the complaint are not presumed true.[26] In reviewing a motion to dismiss, courts generally do not consider matters outside the complaint, but may consider attachments to the complaint.[27]

IV. Argument

This lawsuit is premised on a simple misunderstanding of Alaska election law which expressly provides a process for parties to challenge a candidate's qualifications

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[23] *Id*. *See also* 42 Am. Jur. 2d Injunctions § 9 ("As is true of injunctions generally, a preliminary injunction is seen as an extraordinary remedy that should be issued cautiously").

[24] *Larsen v. State,* 284 P.3d 1, 6-7 (Alaska 2012).

[25] *Id.*

[26] *Dworkin v. First Nat. Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968) ("Well pleaded allegations of the complaint are deemed admitted for purposes of [a 12(b)(6)] motion but unwarranted factual inferences and conclusions of law are not considered admitted in resolving the merits of such motions.").

[27] *Larsen,* 284 P.3d at 6-7.

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for office *after* the election result is certified: an election contest under AS 15.20.540(2). Unless they challenge a candidate's qualifications within ten days of the candidate's declaration of candidacy, parties may only file an election contest; they may not challenge a candidate's qualifications at any other time. The plaintiffs also appear to believe that if they show that Ms. Armstrong is not "qualified as required by law"[28] after the election result is certified, the governor will be entitled to name a replacement for her if she wins. But this too is incorrect. AS 15.20.560 provides for the remedy of recertification of the election, which is essentially the remedy the plaintiffs seek here.

Because the election contest statute establishes the appropriate—and, at this point, only—vehicle to bring the plaintiffs' challenge and because Ms. Armstrong has not even won the election yet, the plaintiffs cannot show either the irreparable harm required to obtain a preliminary injunction or that they have raised a substantial question on the merits, much less a clear probability of success. Therefore, this Court should deny their motion for a preliminary injunction. And for the same reasons, the Court should also dismiss the complaint because this Court lacks jurisdiction to hear this premature election contest and the plaintiffs have not met the statutory requirements to file an election contest.

A. The plaintiffs are not entitled to a preliminary injunction.

The plaintiffs assert that the Court must enjoin certification of the election because "if Defendants certify Armstrong as the winner of the election and she is later

[28] AS 15.20.540(2).

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found to be ineligible as alleged in Plaintiffs' complaint, the voters of House District 16 will not get to choose their representative. Rather, the Governor will choose for them." [Mot. at 6] Not so. Election results are certified "[u]pon completion of the state ballot counting review,"[29] and an election contest may be brought "within 10 days after completion of the state review."[30] The election contest statutes expressly contemplate a contest based on a challenge to a candidate's qualifications like the one made by the plaintiffs here.[31] Thus, the election contest statutes provide the means for the plaintiffs to challenge Ms. Armstrong's qualifications *after* certification if she is elected. An injunction is thus not necessary to protect their interest in challenging Ms. Armstrong's qualifications.

And if Ms. Armstrong wins but a court rules in an election contest that she is not qualified, it will have broad discretion to fashion an appropriate remedy, including the authority to order the Division to re-certify the election for the runner-up candidate or to order a new election.[32] The result would not be that the governor would appoint a representative for House District 16.[33] This means that the plaintiffs will not be harmed

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29 AS 15.15.450.

30 AS 15.20.550.

31 *See* AS 15.20.540(2).

32 *See* AS 15.20.500.

33 The plaintiffs cite AS 15.40.320 as authority for their claim that the governor would get to choose a replacement if Ms. Armstrong is found ineligible after being certified as the winner of the election. [Mot. at 6] But that statute applies "when a vacancy occurs in the state legislature" not when an election contest is successful. The remedies in an election contest are provided for in AS 15.20.560 and include ordering the Division to issue a new election certificate or ordering the election to be set aside.

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by allowing certification to proceed consistent with state law. And, since they do not claim any other harm that might follow from certifying the election result, they are not entitled to a preliminary injunction.

The plaintiffs also dismiss the harm to the Division stemming from an injunction in this matter, asserting erroneously that "by their own admissions" the defendants have conceded that they would not suffer any harm from an injunction. [Mot. at 5, 6] But the plaintiffs support this dubious proposition with a quotation from Director Fenumiai's affidavit from a different case acknowledging that "[i]t is feasible for the Division to delay certifying the results from the House District 27 race until after trial, while certifying all the other results as planned." [Mot. at 6, Ex. 3 at ¶ 3] That affidavit was prepared in response to a court order directing the Division to respond to questions about whether certain actions would be feasible. That something is "feasible" does not mean that it can be accomplished without harm. The Alaska Supreme Court has held that "the state's interest in the consistent administration of elections according to a considered statutory scheme"[34] cannot be adequately protected if the Division is enjoined, requiring plaintiffs to meet the probability of success on the merits standard to obtain an injunction.

The plaintiffs' failure to show that they face irreparable harm is sufficient to preclude a preliminary injunction here, but even if they could show some cognizable harm, they have failed to raise even a substantial question on the merits—let alone show

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[34] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 979, n.11 (Alaska 2005).

a clear probability of success—because their complaint improperly attempts to challenge an election result outside the "avenues established by the legislature to challenge elections."[35]

As explained above, there are two ways to challenge the residency qualifications of a candidate. First, "any person" can file a complaint with the Division questioning the eligibility of a candidate if the complaint is "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."[36] Second, "a defeated candidate or 10 qualified voters may contest the nomination or election of any person"[37] by bringing an election contest action in superior court "within 10 days after the completion of the state review."[38]

Rather than take either of these approaches, the plaintiffs are attempting to bring a challenge to a candidate's qualifications outside the established legal process. They may not do this. Alaska law does not provide for a pre-election challenge to a candidate's eligibility failed more than 10 days after the candidate filing deadline. The proper procedure for plaintiffs at this point is to file an election contest *after the election* if Ms. Armstrong wins.

Alaska Statute 15.20.540 requires at least "10 qualified voters"—or a defeated candidate—to file an election contest. This complaint was filed by only four qualified

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ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

35 *See Miller v. Treadwell*, 245 P.3d 867, 876 (Alaska 2010).

36 6 AAC 25.260(a).

37 AS 15.20.540.

38 AS 15.20.550.

voters, so the plaintiffs will need to persuade either Ms. Armstrong's defeated opponent—assuming she wins—or six other qualified voters in order to bring an election contest. But the fact that they currently lack the minimum number of voters required to bring an election contest is not a basis to permit them to bring a declaratory judgment action instead. To the contrary, it is another reason why this complaint is improper and does not present even "serious and substantial questions going to the merits of the case."[39] The plaintiffs cannot evade the statutory requirements for an election contest by dressing it up as a declaratory judgment action. If that were permissible, AS 15.20.540(2) would serve no purpose. A declaratory judgment action is not an end-run around other statutory causes of action.[40] Because no statutory authority exists for the court to consider this challenge to Ms. Armstrong's eligibility before the election, the plaintiffs have not established a probability of success on the merits, or even presented a substantial question.

The plaintiffs have thus failed to meet their burden at every step of the preliminary injunction test. Because the plaintiffs are not entitled to a preliminary injunction, the Division asks the Court to deny their motion.

B. This Court should dismiss the complaint.

"Courts should decide cases only when a plaintiff has standing to sue and the

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39 *Alsworth*, 323 P.3d at 54.

40 *See Miller v. Treadwell*, 245 P.3d 867, 876-77 (Alaska 2010) (noting that certain claims must be brought as an election contest and holding that a plaintiff "cannot avoid the avenues established by the legislature to challenge elections.").

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PHONE: (907) 269-5100

case is ripe and not moot."[41] As explained above, this complaint is a premature election contest filed by fewer than the required 10 qualified voters under AS 15.20.540. Four qualified voters do not have standing to bring an election contest and thus the complaint should be dismissed either under Alaska Civil Rule 12(b)(1) for lack of jurisdiction. Alternatively, if the Court does not read the 10-voter minimum as a jurisdictional requirement, it would constitute an essential element of an election contest claim and the lack of enough voters as plaintiffs would require dismissal of the complaint under Civil Rule 12(b)(6) for failure to state a claim.

The Court also lacks jurisdiction because this election contest is not yet ripe in that we do not yet know whether Ms. Armstrong will win the election. There is no such thing as an election contest to disqualify a *defeated candidate*. Alaska Statute 15.20.540(2) applies only "when the person *certified as elected* or nominated is not qualified as required by law."[42] Because the election has already begun and Ms. Armstrong's name cannot be removed from the ballot, the Court can only grant any relief to the plaintiffs *if Ms. Armstrong wins the election*. As the Alaska Supreme Court has noted "the central concern of ripeness 'is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at

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PHONE: (907) 269-5100

41 *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 368 (Alaska 2009).

42 *See* AS 15.20.540(2).

all.'"[43] And an election is the quintessential example of a contingent event. Unless and until Ms. Armstrong prevails in the November 8 election, the question of her qualifications for office is not ripe.

V. CONCLUSION

Because an election contest is the proper vehicle to challenge Ms. Armstrong's qualifications for office—if she wins—the plaintiffs have failed to show an irreparable harm that could justify a preliminary injunction. And because this lawsuit is a premature election contest which is not yet ripe, they cannot show a probability of success on the merits. Therefore, their motion for a preliminary injunction should be denied and their complaint should be dismissed pursuant to Alaska Civil Rule 12(b)(1) and (6) for lack of jurisdiction and failure to state a cause of action at this time.

DATED November 4, 2022.

TREG R. TAYLOR
ATTORNEY GENERAL

By*: /s/ Margaret Paton Walsh*
Margaret Paton Walsh
Alaska Bar No. 0411074
Thomas S. Flynn
Alaska Bar No. 1910085
Assistant Attorneys General

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
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[43] *Brause v. State, Dept. of Health & Social Services*, 21 P.3d 357, 359 (Alaska 2001) (quoting 13A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3532, at 112 (2d ed. 1984)).