

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

3 CHRIS DUKE, RANDY ELEDGE,
4 STEVE STRAIT, AND KATHRYN
5 WERDAHL,

6 Plaintiffs,

7 v.

8 STATE OF ALASKA, DIVISION OF
9 ELECTIONS AND GAIL FENUMIAI,

10 Defendants.

Case No. 3AN-22-8794CI

11 **INTERVENOR’S OPPOSITION TO MOTION FOR PRELIMINARY**
12 **INJUNCTION AND JOINDER IN DEFENDANTS’**
13 **CROSS MOTION TO DISMISS**

14 **I. INTRODUCTION**

15 Intervenor-Defendant Jennie Armstrong (“Armstrong”) is a candidate for House
16 District 16.¹ She hereby opposes the Plaintiffs’ Motion for Preliminary Injunction, and
17 joins in Defendants Division of Elections’ and Director Gail Fenumiai’s (“Defendants”)
18 Cross Motion to Dismiss this case.

19
20
21
22 ¹ Counsel for Armstrong filed an unopposed Motion to Intervene on November 1,
23 2022. The Court has yet to rule on that motion, likely because the Defendants have
24 exercised a Notice of Change of Judge peremptorily challenging Superior Court Judge
25 Ian Wheelles, and Judge Yvonne Lamoureux was only assigned the case today.
26 Nevertheless, Intervenor was asked by the Judge Wheelles’ judicial assistant to respond
to the Plaintiffs’ Motion for Preliminary Injunction, constructively making them a party.

1 Plaintiffs have no cause of action. Plaintiffs should know that this challenge was
2 clearly filed both too late *and* too early, and that their suit is therefore not a legitimate use
3 of the courts. If this case was meant to challenge Armstrong’s eligibility to appear on the
4 ballot, 6 AAC 25.260 required such a challenge to be filed by June 11, 2022. If this case
5 is meant to challenge to Armstrong’s qualification to be seated as a legislator, it cannot
6 be filed until she is certified as the winner, assuming she wins the race. Instead, Plaintiffs
7 curiously filed this case on October 31, while early voting had already begun, and just
8 over one week before election day.

10 It is beyond dispute that this challenge is procedurally defective as filed. So why
11 was this case filed? For one reason: to serve as a late-breaking campaign stunt intended
12 to misinform voters and disrupt Armstrong’s campaign for office. It will not work. And
13 this Court should not reward Plaintiffs’ misuse of the legal system by attempting to find
14 some way to reach the merits of a case that has none. Rather, this Court should promptly
15 DENY Plaintiffs’ Motion for Preliminary Injunction and GRANT the Defendants’ Cross
16 Motion to Dismiss this fatally-defective complaint.

1 **II. ARGUMENT**

2 **A. Plaintiffs’ Sole Motivation For Filing This Facially-Defective Suit Is**
3 **Apparently To Impact The Outcome Of The Election For House**
4 **District 16.**

5 As discussed later in this brief, it is beyond dispute that there is no legal recourse
6 to challenge Armstrong’s qualifications at this time.² So, why would anyone decide to
7 impose a burden on the court system’s resources — even seeking the extraordinary
8 remedy of a preliminary injunction — if such an effort is ultimately doomed to fail? This
9 question is answered both by the timing of this complaint *and* by the identity of the
10 Plaintiffs.

11 First of all, the timing of this litigation is extraordinarily suspect. Having
12 apparently known about these allegations for weeks³ or months,⁴ Plaintiffs curiously
13 waited until early voting had already started, just days before election day, to file this
14 case. Second, the identity of the Plaintiffs sheds additional light on their motivations. Of
15 the four named plaintiffs, three are reported as donors to Armstrong’s opponent in House
16 District 16, Liz Vazquez (“Vazquez”).⁵ One of the four Plaintiffs has actually donated

17
18
19
20
21 ² See *infra* Section II.C and accompanying text.

22 ³ An article was posted on the political blog “The Alaska Landmine” on October 13,
2022.

23 ⁴ The Alaska Landmine cited a post of Armstrong’s on Instagram from June 2019.

24 ⁵ This information was verified via the Alaska Public Offices Commission website
on November 7, 2022:

25 <https://aws.state.ak.us/ApocReports/CampaignDisclosure/CDIncome.aspx>

1 nearly \$2,000 to Vazquez. Whether or not the Plaintiffs coordinated with Vazquez,⁶ their
2 motivation to assist in her campaign is clear.

3 Accordingly, it is obvious that not only was the dubious timing of this Complaint
4 procedurally defective, it was filed with an intent to disrupt the election in House District
5 16 by confusing voters as to whether Ms. Armstrong is qualified for office.

6
7 **B. Armstrong Was Properly Certified By Defendants As A Candidate,**
8 **And The Weight Of Evidence Will Make It Clear That Plaintiffs'**
9 **Challenge Is Without Merit.**

10 On June 1, 2022, Ms. Armstrong filed to run for election to Alaska's House of
11 Representatives in District 16. Her sworn declaration correctly states that she has been a
12 resident of Alaska since May 20, 2019, meaning she had been a resident for more than
13 three years prior to filing. There were no timely complaints filed regarding her
14 qualifications. The Division of Elections acted lawfully in certifying her candidacy. She
15 appeared on the August primary ballot and qualified for the general election as the leading
16 vote-getter in her race.

17
18
19
20 ⁶ Because three of the four Plaintiffs are significant donors to Vazquez, it seems
21 unlikely that she is unaware or unsupportive of their activities, especially because she
22 incorporated these same baseless allegations as part of her campaign messaging on
23 October 31, the same day the Complaint was filed:

24 *see e.g.* <https://twitter.com/vazquezAKhouse/status/1587217874191515648?s=20>

25 Additionally, Plaintiffs claim to be public interest or constitutional litigants, making the
26 issue of whether Vazquez or some aligned entity is actually the one financing this
litigation a discoverable issue regarding any possible award of attorneys' fees.

1 On October 31, 2022, Plaintiffs filed this case. The key evidence to support their
2 case appears to be little more than an Instagram post from mid-June 2019 in which
3 Armstrong says “last weekend, I moved to Alaska” — a vague statement that Plaintiffs
4 contend disqualifies her from fulfilling the three-year residency requirement.⁷ First of
5 all, although Armstrong uses her Instagram as a journal of sorts, she does not necessarily
6 post entries the same day she writes them. Secondly, and more importantly, Armstrong
7 can and will produce a vast amount of evidence confirming her sworn statement that she
8 became an Alaska resident on May 20, 2019.⁸ That evidence will include:

- 10 • Sworn statements by Armstrong, family members, and friends;
- 11 • Contemporaneous emails and text messages confirming her residency date;
- 12 • Other social media (including Instagram) confirming her residency date;
- 13 • Contemporaneous time-stamped photos including Armstrong; and
- 14 • Plane tickets confirming Armstrong’s location in Alaska at relevant times.

15 Since Plaintiffs’ counsel has apparently pored over Ms. Armstrong’s social media
16 accounts, they are likely aware of many of these materials. However, reaching the merits
17
18
19
20

21 ⁷ See Plaintiffs’ Exhibit 1 to Motion for Preliminary Injunction.

22 ⁸ Because this entire case is procedurally defective, that evidence will not be
23 submitted in this proceeding so as to avoid unnecessarily converting Defendants’ Motion
24 to Dismiss into a Motion for Summary Judgment. See e.g., *Reed v. Municipality of*
25 *Anchorage*, 741 P.2d 1181 (Alaska 1987). As a matter of law, Plaintiffs are not entitled
to relief pursuant to their Complaint. If an election contest is properly filed at a later date
by other, eligible Plaintiffs, Ms. Armstrong is prepared to submit such evidence.

1 of this case does not appear to be their goal. If they believed they could win on the merits,
2 Plaintiffs would not have filed this case in its defective form at an improper time.

3 **C. Alaska Law Allows For Two Different Times, And Two Different**
4 **Methods, To Challenge A Candidates' Qualifications For Office—**
5 **Plaintiffs Chose Neither.**

6 **1. The law regarding challenges to candidate eligibility.**

7 Alaska law allows two opportunities to challenge a candidate's eligibility. First,
8 an eligibility challenge can be filed with the Division of Elections within ten days of the
9 June 1 candidate filing deadline.⁹ The deadlines in that process are intended to allow a
10 reasonable amount of time for opponents or members of the public to research the
11 candidates before filing a complaint, while still allowing for the orderly administration of
12 the election without the delays or disruptions that would occur if such complaints were
13 allowed throughout the campaign.

14
15 The second opportunity to challenge a candidate's eligibility arises once an
16 election is certified. At that time, an "election contest" can be filed against a winning
17 candidate.¹⁰ There are several potential grounds for filing an election contest, but relevant
18 here is that one specific basis for challenge is that the winning candidate "is not qualified
19 as required by law."¹¹ However, an election contest must be brought by either a losing
20

21
22
23 ⁹ See AS 15.25.042; 6 AAC 25.260(a) for the details of the complaint process. See
24 also AS 15.25.040(a) for the filing deadline.

25 ¹⁰ See AS 15.20.540-.560.

26 ¹¹ AS 15.20.540(2).

1 candidate or by ten qualified voters,¹² and it must be brought within ten days *after*
2 completion of the State review that precedes certification.¹³

3 **2. Application to Plaintiffs’ complaint and motion for preliminary**
4 **injunction.**

5 Plaintiffs’ Complaint, and their Motion for Preliminary Injunction, are defective
6 on their faces. There is no dispute that Plaintiffs did not file a complaint within ten days
7 of the June 1 deadline. Nor is there any dispute that the election has not yet been certified,
8 which makes any election contest unripe. Accordingly, of the two available and legally
9 permissible ways to challenge Armstrong’s eligibility for office, Plaintiffs chose neither.
10

11 Additionally, Plaintiffs’ defective complaint cannot be cured by the passage of
12 time. The Complaint is not an election contest; rather, it is vaguely styled as a request for
13 “declaratory and injunctive relief” that lacks a basis in any statutory or other authority.
14 For example, Plaintiffs’ complaint does not cite any election contest statutes. Finally, the
15 Complaint *cannot* be turned into an election contest because it lacks the necessary
16 plaintiffs — either a “defeated candidate or 10 qualified voters” — that are required by
17 law.¹⁴
18
19
20
21

22 ¹² AS 15.20.540.

23 ¹³ AS 15.20.550 (setting the 10-day deadline for election contests); AS 15.15.450
24 (describing the process of certification immediately following the Division’s state ballot
counting review).

25 ¹⁴ AS 15.20.540.

1 **D. Because The Entire Legal Premise Of This Lawsuit Is Defective,**
2 **Plaintiffs’ Motion For Preliminary Injunction Must Be Denied And**
3 **The Complaint Should Be Dismissed With Prejudice.**

4 **1. Plaintiffs do not qualify for a preliminary injunction.**

5 A preliminary injunction is “an extraordinary remedy never awarded as of right.”¹⁵

6 It is a high bar to obtain such relief, and in order to do so the requestor must meet “either
7 the balance of hardships or probable success on the merits standard.”¹⁶ To satisfy the
8 balance of hardships test, three factors must all be met: (1) the requesting party must be
9 faced with irreparable harm; (2) the opposing party must be adequately protected; and (3)
10 the requestor must raise serious and substantial questions going to the merits of the case.¹⁷

11 When the opposing party’s interests cannot be adequately protected, the requestor is
12 obligated to demonstrate probable success on the merits of the dispute before an
13 injunction can be granted.¹⁸

14 Regardless of the test applied, the requesting party *must* demonstrate *both* that they
15 will suffer irreparable harm *and* that they have a reasonably meritorious case. In this
16 case, Plaintiffs can show neither. Because they chose not to initially challenge
17 Armstrong’s qualifications for office in June, the election contest statute provides the only
18 potential pathway for Plaintiffs to obtain relief. Armstrong has not yet won the election,
19 20 21

22 ¹⁵ *State v. Galvin*, 491 P.3d 325, 338 (Alaska 2021) (citation omitted).

23 ¹⁶ *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

24 ¹⁷ *Id.*

25 ¹⁸ *Galvin*, 491 P.3d at 333 (citation omitted).

1 meaning the Plaintiffs cannot yet show irreparable harm, or any harm at all. Furthermore,
2 Plaintiffs' complaint is utterly defective and does not meet the substantive or procedural
3 requirements of an election contest, meaning they have not raised (and cannot raise)
4 substantial questions going to the merits of the case.

5 *If and when* Armstrong wins this election, and when Defendants certify that result,
6 an election contest — however baseless — can be filed. Plaintiffs will have to locate an
7 additional six qualified voters, or Vazquez herself will need to file a contest in her own
8 name, but that pathway will become available at that time. At present, Plaintiffs have no
9 harms to protect against and no competent complaint upon which to seek relief. Plaintiffs
10 have failed in every conceivable way to qualify for the injunction that they request.
11 Accordingly, the Motion for Preliminary Injunction must be denied.
12

13
14 **2. Plaintiffs' complaint lacks any legal foundation and should be dismissed.**

15 In addition to denying the Motion for Preliminary Injunction, this Court should
16 dismiss Plaintiffs' Complaint with prejudice. The Complaint is either a candidate
17 eligibility challenge that has been filed five months too late, or it is a defectively-
18 constructed election contest that has been filed several weeks too early. Either way, this
19 is not a case through which this Court can even consider providing relief.
20

21 Plaintiffs can prove no set of facts under which they are entitled to relief for the
22 simple reason that Armstrong has yet to be certified as the winner, which makes dismissal
23

1 of Plaintiff’s Complaint appropriate.¹⁹ For the same reasons, Plaintiffs do not have
2 standing to sue and the “controversy” underlying the case — whether Armstrong wins the
3 election — is not yet ripe. Accordingly, there is no controversy for this Court to decide,
4 and it lacks jurisdiction to consider it.²⁰ Given the defects inherent in the Complaint’s
5 timing and construction, this Court *cannot* issue a declaratory judgment in this case.²¹

6
7 **III. CONCLUSION**

8 There are proper vehicles to challenge Armstrong’s eligibility: either through a
9 timely candidate eligibility complaint or — if Armstrong prevails — a properly-drafted
10 election contest. Although counsel for Plaintiffs have familiarity with such proceedings,
11 they chose not to utilize them. Instead, they have wasted the Court’s resources on what
12 appears to be a last-minute campaign stunt, never intended to arrive at the merits of
13 Armstrong’s residency. Such behavior should not be rewarded.

14
15
16 ¹⁹ See, *Dep’t of Health & Soc. Servs., Div. of Family & Youth Servs. v. Native Vill. Of Curyung*, 151 P.3d 388, 396 (Alaska 2006) (A motion to dismiss is appropriate if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”) (internal quotations and citations omitted); *see also Lingley v. Alaska Airlines, Inc.*, 373 P.3d 506, 520 (Alaska 2016) (Requiring that, to avoid dismissal “... a plaintiff still must ‘set forth allegations of fact consistent with some enforceable cause of action on any possible theory’ because a defendant must have ‘fair notice of the claim and the grounds upon which [the complaint] rests.’”) (citations omitted).

20
21
22 ²⁰ See, *State v. ACLU of Alaska*, 204 P.3d 364, 368 (Alaska 2009).

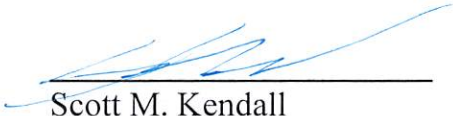
23 ²¹ See, *Borer v. Eyak Corp.*, 507 P.3d 49, 57-58 (Alaska 2022). (“Alaska’s declaratory judgment act requires there be an ‘actual controversy’ for a court to issue declaratory relief. This requirement ‘reflects a general constraint on the power of courts to resolve cases,’ cautioning that courts should not ‘resolve abstract questions of law.’ Ripeness is an element of the ‘actual controversy’ requirement.”) (citations omitted).

1 This suit is, at best, a defective and premature election contest that is not yet ripe.
2 As such, Plaintiffs cannot show either irreparable harm or probable success on the merits.
3 Additionally, this suit fails to state a claim over which this Court has jurisdiction.

4 Accordingly, Intervenor-Defendant Jennie Armstrong respectfully requests that
5 this Court DENY Plaintiffs' Motion for Preliminary Injunction, and GRANT Defendants'
6 Cross Motion to Dismiss. Plaintiffs' case should be dismissed with prejudice.
7

8 CASHION GILMORE & LINDEMUTH
9 Attorneys for Jennie Armstrong

10
11 DATE: November 8, 2022


12 Scott M. Kendall
13 Alaska Bar No. 0405019

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that a copy of the
16 foregoing was served via email on
17 November 8, 2022, on the following:

18 Stacey C. Stone
19 Holmes, Weddle & Barcott, P.C.
20 sstone@hwb-law.com

21 Richard Moses
22 Holmes, Weddle & Barcott, P.C.
23 rmoses@hwb-law.com

24 Margaret Paton-Walsh
25 Thomas S. Flynn
26 Alaska Department of Law
margaret.patonwalsh@alaska.gov
Thomas.flynn@alaska.gov

CASHION GILMORE & LINDEMUTH

By: s/Jennifer Ditcharo