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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, in her official capacity as Director of the Division of Elections,

Defendants.

Case No. 3AN-22-08794 CI

CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' AND INTERVENOR'S MOTION TO DISMISS

I. Plaintiffs have stated a claim upon which relief may be granted.

Defendants and Ms. Armstrong (hereinafter referred to as "Intervenor") have moved for dismissal under Alaska R. Civ. P. 12(b)(6). In their legally deficient motions, they baselessly argue that Plaintiffs' complaint fails to state a claim for which

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relief can be granted because Plaintiffs both waited too long and filed too early to garner the relief they seek.

For a complaint to survive a Rule 12(b)(6) motion, the complaint merely needs to allege a set of facts "consistent with and appropriate to some enforceable cause of action."[1] The test is one of legal sufficiency.[2] Well-pleaded allegations are accepted as true for the purposes of the motion.[3] "If within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient."[4]

Alaska Const. Art. II, § 2 mandates that each member of the state legislature "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." There is no dispute that within the four corners of the complaint at issue, that Plaintiffs have successfully pointed to a constitutional provision that is alleged to have been violated, and therefore, Plaintiffs have stated a claim for which relief can be granted. This court has jurisdiction to determine as a matter of law where there has

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1 *Trask v. Ketchikan Gateway Borough*, 253 P.3d 616, 621 (Alaska 2011); *See also Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 253 (Alaska 2000); *Odom v. Fairbanks Mem'l Hosp.*, 999 P.2d. 123, 128 (Alaska 2000).

2 *See, e.g., Dworkin v. First Nat'l Bank of Fairbanks*, 444 P.2d 777 (Alaska 1968) (the Supreme Court dismissed a complaint for failure to state a claim where the complaint did not disclose adequate information as to the basis for the claims).

3 *Id.*

4 *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1973).

been unconstitutional action. There is also no dispute that, if taken as true as the court must do here, Plaintiffs have pleaded a set of facts that prove Intervenor is not constitutionally qualified to hold the office she seeks.

a. *The constitutional claim is timely.*

The only dispute here, with respect to the joint cross-motions to dismiss, is whether there are specific and limited timeframes and/or limits in which constitutional claims can be brought. While certain statutes have been adopted to ensure timely elections, this type of constitutional claim is not limited nor restricted to being brought within short, specified time periods. Defendants and Intervenor have failed to point to any authority to the contrary.

Defendant and Intervenor's arguments rest upon the proposition that there is a only a cumulative twenty day window– ten days under 6 AAC 25.260(a) and ten days under AS 15.20.540 – in which to Plaintiffs, or anyone for that matter, can contest the qualifications of a candidate for the state legislature under Alaska Const. Art. II, § 2. This necessarily means that they argue that the constitution's protections only apply when the legislature and/or administrative agencies of this state decide they apply.

Essentially, Defendants and Intervenor argue that there are periods of time throughout the year – indeed the vast majority of the year – in which constitutional claims are stale and/or not yet ripe. However, they have failed to point to *any* authority which limits Alaskans' rights to litigate constitutional claims to set time-periods or

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requires Alaskans to exhaust certain remedies prior to availing themselves of the jurisdiction of this court. While they have cited to statutory and regulatory authority, they have completely failed to address how the same limits the Plaintiffs' constitutional claims.

This is because there are no time limits and/or statutes of limitation that pertain to the particular provision of the constitution of this state at issue here – none. It would require a constitutional amendment to impose said limitations upon Alaska Const. Art. II, § 2, not a statute or a regulation as Defendants and Intervenor argue.

For example, assuming *arguendo* that Intervenor received the most votes and was sworn-in on the scheduled date in January 2023, and Plaintiffs subsequently discovered her illegal behavior,[5] a claim such as that presented in the instant matter would not fall within the prescribed time limits under AS 15.20.540 and 6 AAC 25.260(a). So consistent with their arguments now, Defendants and Intervenor would have to argue that Plaintiffs have no viable cause of action and that the constitution somehow no longer applies to members of the legislature until the filing deadline for the next election. Apart from its absurdity, said argument – which is identical to the argument they now make – is wholly unsupported by any provision of the constitution or any judicial interpretation of the same.

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5 *See* AS 11.56.210 (defining unsworn falsification in the second degree).

Here, the constitutional challenge to Intervenor's eligibility is applied to a set of facts which will result in substantial harm to the voters of House District 16 if the court grants the motions to dismiss. But the court cannot do so because the pleaded facts, which must be taken as true, prove, for the purposes of said motions to dismiss, that Intervenor cannot sit in the state legislature.

Therefore, Plaintiffs have stated a claim for which relief can granted. And because there are no time limits to this particular constitutional challenge, Defendants' and Intervenor's arguments as to the simultaneous staleness and un-ripeness of this claim are deficient, flawed, and inaccurate.

b. Administrative exhaustion does not apply.

Defendants and Intervenor have also seemingly argued, without saying it directly, that Plaintiffs failed to exhaust administrative remedies – challenging Intervenor's eligibility under 6 AAC 25.260(a). But Plaintiffs' claims are wholly rooted in the constitution and are therefore wholly justiciable outside of the election itself. The Alaska Supreme Court has held that "as a general matter, exhaustion is required if a statute or regulation provides for administrative review. Certain pure issues of law, most notably constitutional issues [and] certain questions of statutory validity, are within the special expertise of the court . . . ."[6]

[6] *RGB Bush Planes, LLC v. Kirk*, 340 P.3d 1056, 1061 (Alaska 2015) (internal citations omitted).

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And even if the court were to find that Plaintiffs should have exhausted administrative remedies, the Supreme Court has "recognized that the exhaustion of administrative remedies . . . is not absolute, and that it may, in appropriate cases, be dispensed with . . . ."[7] First, it would have been impossible for Plaintiffs to challenge Intervenor's eligibility under 6 AAC 25.260(a) because they were unaware during the relevant time period that she had lied about her residency.

And second, the incredibly short time period with which to bring a challenge under 6 AAC 25.260(a) is inconsistent with Alaska Const. Art. II, § 2. Intervenor is either eligible or ineligible under this section of the Constitution. Whether her ineligibility was challenged under 6 AAC 25.260(a) does not affect the same. Therefore, to the extent the court may find that Plaintiffs should have exhausted administrative remedies, the court should recognize that they "are not absolute" and "should be dispensed with."

c. *This is not an election challenge and Plaintiffs have correctly cited the law.*

Defendants and Intervenor argue that Plaintiffs are impermissibly attempting to contest the election prior the specified time period to do so. But this is not an election contest, this is a challenge to Intervenor's constitutional qualifications to sit as a

member of the state legislature. In *Walleri v. City of Fairbanks*, the Supreme Court explained that

> [w]hether a cause of action should be deemed an election contest . . . turns on the remedy sought. If granting the remedy would defeat the public interest in the stability and finality of election results, it is appropriate to deem the cause of action an election contest and to require compliance with the procedures for such contests.[8]

Defendants have pointed to AS 15.20.560 to argue that Plaintiffs have an incorrect understanding of election law. But what Defendants failed to say, is that AS 15.20.560 gives the superior court wide discretion to fashion a remedy after a successful election contest.[9] Yes, the court can set the election aside, but given the short of amount of time between an election contest and the beginning of the session, the court could – and most likely would – just declare a vacancy once it finds that Intervenor is not constitutionally qualified to hold the office she seeks.[10]

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[7] *Municipality of Anchorage v. Higgins*, 754 P.2d 745,747 (1988) (quoting *Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982)).

[8] *DeNardo v. Municipality of Anchorage*, 105 P.3d 136, 140 (Alaska 2005) (quoting *Walleri v. City of Fairbanks*, 964 P.2d 463, 466 (Alaska 1998)).

[9] *See Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972) (holding that the court has the power to order a new election).

[10] It should also be noted that the court could order a new election. It can be surmised that Defendants would certainly argue that the court should just declare a vacancy to avoid their having to administer another election. It should also be noted that Intervenor would likely be eligible to run in said election. In short, she should not be rewarded for defrauding the state and committing crimes while by lying about the date of her residency on public documents.

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But this is not an election contest. This is a constitutional challenge. Nor should this case be converted into an election contest because the remedy sought by Plaintiffs will not undermine the public's interest in stable and final election results.[11] In actuality, the remedy sought by Plaintiffs will actually lead to much more stable and much more final election results by adjudicating the case on its merits prior to their being a final, certified election result.

In order to treat this complaint as an election contest, this court must find that Plaintiffs are seeking to overturn the results of an election.[12] But there are no results to overturn, which is why the court cannot do so. Further, the lack of an election result is exactly why this complaint is wholly justiciable outside of the election, as opposed to an election contest.

II. Plaintiffs have met their burden and a preliminary injunction is necessary.

One of the primary purposes "of a preliminary injunction is to maintain the status quo."[13] And the status quo is what Plaintiffs seek during the pendency of this case. They are not seeking to remove Intervenor from the ballot. They are not asking the court to declare a winner for the election of House District 16. They are simply

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11 *See* Exhibit 3, pgs. 1-3, ¶ ¶ 3-8.

12 *See DeNardo*, 105 P.3d at 141 (stating that it is proper to convert a complaint to an election contest when the parties are attempting to overturn election results).

13 *Martin v. Coastal Villages Region Fund*, 156 P.3d 1121, 1126 (Alaska 2007).

seeking to maintain the status quo – the lack of a certified election result – until their case is decided its merits.

Additionally, and as Plaintiffs previously pointed out, maintaining the status quo will not adversely affect Defendants. Defendant Fenumiai swore in an affidavit provided in a case pertaining to candidate eligibility 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."[14] Defendant Fenumiai also explained in said affidavit the process for delaying the certification of election results and how the votes would be tabulated in either of the following scenarios: that the challenged candidate was found to be ineligible or that the challenged candidate was found to eligible.[15]

It should also be noted that maintaining the status quo would not adversely affect Intervenor because she will be in exactly the same place she was in when the complaint was filed, which was the exact same place she was in when she moved to intervene. Nor would it affect the voters of House District 16, who would also be in the same place they were in when this complaint was filed, which is the same place they were in when they voted. It would also be in the interest of judicial economy to allow for adjudication without having to also possibly contest the election.

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14 *See* Exhibit 3, pg. 1, ¶ 3.

15 Exhibit 3, pgs. 1-3, ¶¶ 4-8.

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Further, Plaintiffs have demonstrated probable success on the merits. While Intervenor has attempted to address the merits by simply asserting that she can produce evidence, Intervenor instead strategically chose not to produce any such evidence in opposition to the motion. In short, Plaintiffs successfully showed their probable success on the merits.

Defendants have pointed to *Galvin* in furtherance of their argument against the grant of a preliminary injunction. However, the plaintiff in *Galvin* did not present any evidence, she only cross examined the Division Director. The ballots were due to be mailed out the day of the evidentiary hearing. Ultimately, the court denied her injunction because the *balance* of hardships did not weigh in her favor—granting her an injunction significantly imperiled public interest in ensuring an organized election, and as such, outweighed any harm to her candidacy.[16]

But here, the voters of House District 16 merely seek delay of the certification of the results pending the hearing of this matter pertaining to the eligibility of a candidate. Further, they have sufficiently pleaded information – evidence – that greatly supports their claim, unlike the plaintiff in *Galvin*. Their interest in certifying the results, and for that matter Intervenor's interest in a quick certification, are outweighed by the voters' right to choose an eligible representative and not have the court and/or governor choose for them.

Plaintiffs have met their burden and the court should grant their motion for a preliminary injunction. Plaintiffs face irreparable harm and Defendants are adequately protected. And there exists a very real risk that Intervenor – a person who is not constitutionally qualified to sit in the state legislature – will win an election, will have that election certified, and will be sworn-in. To the voters of House District 16, this is a great and irreparable harm which will most likely force the voters of said house district to cede their power to choose their own member of the state house to the governor.[17]

III. CONCLUSION

For the reasons discussed above, Plaintiffs have met their burden and the court should grant the motion for preliminary injunction. Also as discussed above, Defendants and Intervenor have failed to meet their burden under Alaska R. Civ. P. 12(b)(6). Accordingly, the court should deny their cross-motions to dismiss.

DATED this 10th day of November, 2022, at Anchorage, Alaska.

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16 *State v. Galvin*, 491 P.3d 325, 331 (Alaska 2021)

17 *See* AS 15.40.320.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November 2022, a true and correct copy of the foregoing was sent to the following via E-mail:

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CHRIS DUKE, RANDY ELEDGE, STEVE STRAIT, and KATHRYN WERDAHL,

Plaintiffs,

v.

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

Defendants.

Case No. 3AN-22-08794 CI

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DENYING DEFENDANTS' AND INTERVENOR'S CROSS-MOTION TO DISMISS

The Court, having considered Plaintiffs' Motion for a Preliminary Injunction and the Defendants' and Intervenor's Cross-Motions to Dismiss, and any opposition thereto, HEREBY **ORDERS** that:

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The Plaintiffs' Motion for a Preliminary Injunction is GRANTED. Defendants are ENJOINED from certifying the election results of House District 16 until further order of the court.

The Defendants' and Intervenor's Motions to Dismiss are DENIED.

DATED this _____ day of _____, 2022, at Anchorage, Alaska.

_____
Hon. Herman G. Walker, Jr.
SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE
I hereby certify that on this 10th day of November 2022, a true and correct copy of the foregoing was sent to the following via E-mail:

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