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Attorneys for Plaintiff Randall Kowalke

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RANDALL KOWALKE,)
)
)
 Plaintiff,)
)
 vs.)
)
 DAVID EASTMAN, STATE OF)
 ALASKA, DIVISION OF ELECTIONS,)
 and GAIL FENUMIAI in her official)
 capacity as Director of Elections)
)
 Defendant.)

Case No. 3AN-22-07404 CI

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I. PRELIMINARY STATEMENT

The relevant facts are indisputable. David Eastman is a member of the "Oath

Keepers.”¹ The Oath Keepers is a militia group that supports the violent overthrow of the United States government.² Eastman is currently a representative in the Alaska Legislature and is seeking reelection.³ The Alaska Constitution is clear that no one who belongs to a group which advocates for the violent overthrow of the state or federal government is qualified to hold public office.⁴ Based on these indisputable facts, this Court should now issue a preliminary injunction removing Eastman’s name from the General Election ballot for House District 27.

II. PROCEDURAL POSTURE AND TIMING OF ELECTIONS

On Monday, August 1, 2022, in-person voting in the State primary elections began.⁵ The primary election day and deadline for absentee ballots was on August 16, 2022. The Division of Elections has targeted September 6, 2022 as its deadline to certify the general election ballot.

The Division of Elections has a target date to mail absentee by-mail ballots by October 14, 2022. The General Election Day is November 8, 2022.

The Division of Elections has failed and refused to remove Eastman from the

¹ David Eastman, [Here I stand, I can do no other, so help me God](https://davideastman.org/articles/here-i-stand-i-can-do-no-other-so-help-me-god/), DavidEastman.org (January 30, 2022), <https://davideastman.org/articles/here-i-stand-i-can-do-no-other-so-help-me-god/> (Attached as Exhibit 3).

² Affidavit of Matthew Kriner, pages 3-4.

³ Alaska Division of Elections, House District 27 Final Candidate List (July 27, 2022), <https://www.elections.alaska.gov/candidates/?election=22prim&seat=house-27>.

⁴ Alaska Constitution, art. XII, Sec. 4.

⁵ All dates related to the upcoming election are based on the Division of Elections’ Election Calendar, available at <https://www.elections.alaska.gov/Core/electioncalendar.php> (last viewed on August 26, 2022).

ballot even though it knows of all of the relevant facts.⁶ The Division's logic and analysis for its decision are non-existent.⁷

III. STATEMENT OF FACTS

David Eastman is an Alaska State House Representative for District 10, seeking election in District 27.⁸ Mr. Eastman is also a "life member" of the Oath Keepers,⁹ and has been since 2009.¹⁰

The Oath Keepers is an organization that openly advocates for the forceful overthrow of the U.S. Government.¹¹ The Oath Keepers' practice of opposing the federal government with force has occurred multiple times, including in the 2014 Bundy Ranch standoff, during the 2016 occupation of the Malheur Natural Refuge, and most recently in the January 6, 2021 Insurrection.¹² The Oath Keepers has made clear through its actions that it is willing and able to use force against the United States government when it believes the government has acted against its wishes.¹³

The violent acts of the Oath Keepers on January 6 were planned.¹⁴ The Justice Department has brought sedition charges against the leader of the Oath Keepers and

⁶ Exhibit 1.

⁷ Exhibit 1.

⁸ Alaska Division of Elections, House District 27 Final Candidate List (July 27, 2022), <https://www.elections.alaska.gov/candidates/?election=22prim&seat=house-27>.

⁹ Exhibit 3.

¹⁰ Exhibit 3.

¹¹ Affidavit of Matthew Kriner, page 3.

¹² Affidavit of Matthew Kriner, page 4.

¹³ Affidavit of Matthew Kriner, page 4.

¹⁴ Affidavit of Matthew Kriner, page 5.

some of its members for “plann[ing] to stop the lawful transfer of presidential power by January 20, 2021, which included multiple ways to deploy force.”¹⁵

Mr. Eastman was present at the rally in Washington, D.C. on January 6, 2021.¹⁶ And, since the events of the January 6, 2021 insurrection, Mr. Eastman has maintained his membership in the Oath Keepers.¹⁷ Despite the concrete evidence that the Oath Keepers is an organization which advocates for the overthrow of the government by force, Mr. Eastman has affirmed his ongoing membership.

IV. ARGUMENT AND AUTHORITIES

A. Plaintiff Is Entitled to Preliminary Injunctive Relief.

1. The Legal Standard for Preliminary Injunctive Relief.

In Alaska, “[a] party may obtain preliminary injunctive relief under one of two standards: the balance of hardships standard or the probable success on the merits standard.”¹⁸ Mr. Kowalke’s request for a preliminary injunction requiring that Eastman be removed from the General Election ballot meets the more difficult probable success on the merits standard.

This standard requires a plaintiff to show probable success on the merits, though

¹⁵ Affidavit of Matthew Kriner, page 3; *United States of America v. Elmer Steward Rhodes III, et. al.* Grand Jury Indictment, page 3 (January 12, 2022).

¹⁶ Affidavit of Matthew Kriner, page 5; David Eastman, What it Meant to be in Washington, DC on January 6th, DavidEastman.org (January 8, 2022), <https://davideastman.org/articles/what-it-meant-to-be-in-washington-dc-on-january-6th/>.

¹⁷ Affidavit of Matthew Kriner, page 5.

¹⁸ *State v. Galvin*, 491 P.3d 325, 332 (Alaska 2021); *see also* AS § 09.40.230 (Authorization for injunction).

a court should still “avoid [extensive] involvement in the merits of the issues between the parties,” as a preliminary injunction decision is usually based on an incomplete . . . record. Moreover, an early ruling on the merits “would ultimately result in forcing the court to rule on the merits of the case twice,” potentially leading to inconsistent results. The goal of a preliminary injunction is merely to ensure a fair playing field for full litigation of the case’s merits later.¹⁹

If probable success on the merits is shown, then the court has the discretion to grant a preliminary injunction.²⁰

The Alaska Supreme Court recently upheld an election-related preliminary injunction under the probable-success-on-the-merits standard in *State v. Arctic Village Council*.²¹ In that case the Division of Elections instituted a witness requirement on mail-in ballots for the 2020 election during the COVID-19 pandemic. The plaintiffs challenged this requirement and sought a preliminary injunction against the witness requirement on September 8, less than two months before the November 3 election.²² Even though the superior court found that the plaintiffs did not meet the hardship standard for a preliminary injunction due to the State’s lack of adequate protection, the court granted a preliminary injunction based on the plaintiffs’ probable success on the merits.²³ The Supreme Court affirmed the injunction, holding that the State’s interests — though legitimate — were not “sufficiently compelling to justify burdening

¹⁹ *Id.* at 333 n.28 (quoting *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm’n*, 470 P.2d 537, 540 (Alaska 1970)).

²⁰ *State v. Arctic Vill. Council*, 495 P.3d 313, 320 (Alaska 2021).

²¹ 495 P.3d 313, 320 (Alaska 2021).

²² *Id.* at 316.

²³ *Id.* at 320.

[p]laintiffs' right to vote as safely as possible in the 2020 General Election."²⁴

2. Mr. Kowalke Passes the Probable-Success-On-the-Merits Standard for Injunction.

Mr. Kowalke has a high likelihood of success on the merits of his claims in this lawsuit. Consequently, a preliminary injunction should be granted removing Eastman from the 2022 General Election ballot.

The Alaska Constitution is clear:

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.²⁵

This is such a straightforward constitutional provision that there is very little legislative history on its addition to the Alaska Constitution.²⁶ In fact, the only substantive reference to the "disqualification for disloyalty" clause was an update from committee that it was included and was "more or less mandatory and probably not controversial."²⁷ Of course someone actively participating in or belonging to a group

²⁴ *Id.* at 320, 326.

²⁵ Alaska Constitution, art. XII, Sec. 4.

²⁶ "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. [The Court] look[s] to the plain meaning and purpose of the provision and the intent of the framers." *State of Alaska; Office of the Governor, Mike Dunleavy v. Alaska Legislative Council*, S-17666/17785 page 12 (August 12, 2022) (internal quotations removed).

²⁷ Alaska Constitutional Convention, Day 42, December 19, 1955, page 1103 (available at <https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2042%20-%20December%2019%201955%20-%20Pages%201089-1142.pdf>).

advocating for the use of force to overthrow the state or federal government cannot simultaneously be serving in public office. And once it has been established that a person is disqualified to hold public office under the provisions of the Constitution's disloyalty clause, that "person is not qualified for membership in the legislature."²⁸

Mr. Eastman's "life time" membership in the Oath Keepers violates the plain language of the Alaska Constitution's Disqualification for Disloyalty clause and thus makes him ineligible to hold public office. After all, the indisputable facts establish that Oath Keepers is a group that advocates for the use of force to overthrow the federal government.²⁹ The use of the term "advocate" (versus, for example, "actively participate in") shows that the framers of the Alaska Constitution intended a low tolerance for disloyalty, even if the individual or the organization itself was not actively engaged in violence or insurrection. This is in contrast to the United States Constitution, which requires that the individual has "engaged in insurrection or rebellion [. . .] or given aid or comfort to the enemies thereof."³⁰ Even the U.S. Constitution's disloyalty provision requiring that one "engage" in insurrection does not necessitate that an "individual personally commit an act of violence. [. . .] '[E]ngage' includes overt actions and, in certain limited contexts, words used in furtherance of the insurrections and associated

²⁸ AS § 24.05.060.

²⁹ Affidavit of Matthew Kriner, page 3.

³⁰ U.S. Const. amend. XIV, § 3. This constitutional provision for disqualification was recently upheld as enforceable. *Cawthorn v. Amalfi*, 35 F.4th 245, 257-261 (4th Cir. 2022); *Greene v. Raffensperger*, 2022 U.S. Dist. LEXIS 70961, at *75 (N.D. Ga. April 18, 2022).

actions.”³¹ Alaska’s Constitution is less tolerant in that it only requires advocacy, and only membership in a group that advocates for force or violence. The Oath Keepers organization goes well past Alaska’s constitutional bar by both advocating for *and* participating in the violent attempts to overthrow the United States government.³²

It is not uncommon for the Division of Elections or Alaska’s courts to declare candidates ineligible for the ballot if they do not comply with constitutional and statutory requirements, notwithstanding the “personal hardship” that may result from one’s ineligibility.³³ For example, the Supreme Court upheld the Division of Elections’ finding that two judges up for retention were ineligible for public office as judges due to their failure to strictly comply with a filing deadline.³⁴ In that case, as here, the statutory and constitutional language was clear and consequently a “personal hardship” to the judges, no matter how “bitter,” was still the appropriate outcome since they were clearly ineligible to serve.³⁵ Similarly, George C. Silides was removed from the 1976 election ballot, even though the Supreme Court found that perfect compliance

³¹ *David Rowan, et. al v. Marjorie Taylor Greene*, 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia May 6, 2022); *see United States v. Powell*, 65 N.C. 709, 713 (1871) (“the word engage implies and was intended to imply a voluntary effort to assist the insurrection, or rebellion”); *Worthy v. Barrett*, 63 N.C. 199, 203 (1869) (defining engage as “voluntarily aiding the rebellion by personal service or by contributions, other than charitable, of anything that was useful or necessary in the [rebellion]”).

³² Affidavit of Matthew Kriner, pages 2-6.

³³ *See Silides v. Thomas*, 559 P.2d 80, 83-84 (Alaska 1977) (Supreme Court striking 3 candidates’ names from 1976 ballot due to ineligibility while appeals were pending).

³⁴ *State v. Jeffery*, 170 P.3d 226, 237 (Alaska 2007).

³⁵ *Id.*

with the filing requirements was not required.³⁶ In this case the Constitution and statutory language are clear, and it would be in line with precedent to issue a preliminary injunction removing Eastman from the ballot.

Without deciding the full merits of this case, this Court can safely conclude the high probability of success in establishing that Mr. Eastman has violated the Alaska Constitution's disloyalty clause and is ineligible for public office. For that reason, the issuance of a preliminary injunction finding Mr. Eastman ineligible to run and removing him from the ballot is proper.

3. Granting the Preliminary Injunction Is in Line With Precedent Across the Country.

Not only is a grant of such a preliminary injunction appropriate relief under Alaska law, similar injunctions have been granted across the country. The additional expense or time involved to correct a ballot has not been a barrier to courts requiring the government to correct them. Even when ballots listing ineligible candidates have already been printed, courts regularly order election officials to reprint ballots and sometimes even to re-transmit amended absentee ballots.³⁷ Courts have also required

³⁶ See *Silides v. Thomas*, 559 P.2d 80, 86 (Alaska 1977).

³⁷ See, e.g. *Erlandson, et al. v. Kiffmeyer, et al.*, 659 N.W.2d 724 (Minn. 2003) (ordering state to print and mail out new absentee ballots after U.S. Senate candidate died only weeks before upcoming election, and to replace him with new nominee); see also, *In re Green Party of Tex.*, 630 S.W.3d 36, 40 (Tex. 2020) ("We recognize that changes to the ballot at this late point in the process will require extra time and resources to be expended by our local election officials. [. . .] And an added expense is not sufficient justification to deny these candidates that access."); *Taylor v. Kobach*, 300 Kan. 731, 738-739 (2014) (requiring removal of candidate's name from ballot same day that ballots had to be finalized); *New Jersey Democratic Party, Inc. v. Samson*, 175 N.J. 178, 199 (2002) (allowing relief of new ballots even after overseas

elections be postponed when the election authority has failed to appropriately correct ballots in time for the general election.³⁸ This Court's granting of a preliminary injunction would be in line with courts across the country that have ordered injunctions and changes to the ballot leading up to an election in order to ensure accuracy and adherence to the relevant laws.

V. CONCLUSION

For the foregoing reasons, Mr. Kowalke should be granted a preliminary injunction that requires Eastman to be removed from the State General Election ballot for House District 27 due to ineligibility as a candidate.

DATED this 29th day of August, 2022

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ballots had been mailed out since simple remedy for those late ballots is to accept overseas absentee ballots later than otherwise permitted); *LaRouche v. Secretary of State*, 822 S.W.2d 632, 634 (Tex. 1992) ("The fact that the printing of ballots has begun does not extinguish LaRouche's right to appear on those ballots."); *State ex rel. Peacock v. Latham*, 170 So. 475 (1936) (compelling county board of elections to reprint ballots in compliance with writ of mandamus).

³⁸ *Tsosie v. Navajo Bd. Of Election Supervisors*, SC-CV-68-14 (Navajo Oct. 23, 2014); *see New Jersey Democratic Party, Inc. v. Samson*, 175 N.J. 178, 199 (2002).