James J. Davis, Jr., AK Bar No. 9412140
Savannah Fletcher, AK Bar No. 1811127
NORTHERN JUSTICE PROJECT, LLC
406 G Street, Suite 207
Anchorage, AK 99501
(907) 308-3395 (telephone)
(866) 813-8645 (fax)
Email: jdavis@njp-law.com
Email: sfletcher@njp-law.com

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

PLAINTIFF'S OPPOSITION TO STATE DEFENDANTS' MOTION FOR RECONSIDERATION

This case raises a legal question of vital importance to Alaska's voters: Does the Division of Elections have a duty to investigate and determine whether a potential candidate is ineligible for public office under the Disloyalty clause of the Alaska Constitution? Because the Division has taken the surprising but absolute position that

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645

it has *no role* whatsoever in enforcing the Disloyalty clause, the issue before this Court is a threshold question of first impression,[1] on which Mr. Kowalke is seeking declaratory relief from this Court.[2]

On September 12, 2022 — only one business day after oral argument on the Division's motion to dismiss — this Court issued an extremely thorough and well-reasoned opinion holding that plaintiff Randall Kowalke "has stated a claim against the Division because if Representative Eastman is barred from office by the Disqualification for Disloyalty clause then the Division is required by statute to enforce that prohibition." This Court's ruling was based on a careful review and straightforward application of the Division's own governing statutes and regulations, which require the Division to assess and verify a candidate's "eligibility" for public

---

[1] This Court has not been asked to review the Division's investigation in this particular eligibility challenge, because the Division, based on its erroneous interpretation of the law, did not perform an investigation in rejecting Mr. Kowalke's complaint. Rather, the Division "assum[ed]" that Mr. Kowalke's allegations were "true," and "determined that they do not—without more—provide a basis to prevent Representative Eastman from running for state office." Complaint at Ex. 1. The reason for the Division's determination became clear when it later argued in its motion to dismiss that it has no authority to enforce the Disloyalty clause.

[2] The Alaska Declaratory Judgment Act, AS 22.10.020(g), gives this Court "the power to issue declaratory judgments in cases of actual controversy." *Kanuk v. State, Dep't of Natural Res.*, 335 P.3d 1088, 1100 (Alaska 2014) (citation omitted). A declaratory judgment is appropriate where, as here, it would "clarify and settle legal relations, and to terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* at 1101 (citations and internal quotation marks omitted). Contrary to the Division's argument, Mr. Kowalke's claim is not about imposing "liability" or "strict liability" on the Division (Motion for Recon. at 2, 4), but about getting clarity from the Court on the proper interpretation of the relevant laws.

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645

office.[3] Contrary to the Division's argument, this Court's ruling was *not* "independent[] of the process created in AS 15.25.042 and 6 AAC 25.260,"[4] but was explicitly based on the Court's interpretation of those very provisions.

The Division now seeks reconsideration of this Court's ruling. The Division's motion — which rehashes the same baseless arguments that were thoroughly considered and rejected by this Court — is disrespectful to the Court's herculean effort in deciding this question of first impression on a highly expedited basis. In the process, the Division also mischaracterizes Mr. Kowalke's claim and this Court's rulings, feigns confusion, and seeks an advisory opinion on a "parade of horribles" that are not even implicated in this case.

The Division's motion first repeats the mantra from prior briefing and at oral argument that "Mr. Kowalke's complaint did not allege the Division did anything wrong . . . ."[5] To be clear, what the Division did wrong is that it failed to investigate whether Representative Eastman is ineligible for public office under the Disqualification for Disloyalty clause — because he is a member of an extremist organization that advocates for the violent overthrow of the federal government — despite the constitutional, statutory, and regulatory command to do so. And there is no dispute on this point, because the Division has candidly told this Court that its official policy is that it does *not* investigate eligibility challenges under the Disloyalty clause.

---

3 AS 15.25.042; 6 AAC 25.260(j).

4 Motion for Recon. at 2.

5 *Id.* at 1.

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645

In its order denying the Division's motion to dismiss, this Court recognized that the Division's faux-confusion about the nature of Mr. Kowalke's claim is anything but genuine. Indeed, this Court found that "the Division's arguments regarding the relevant statutory and constitutional provisions show that it was provided adequate notice of Kowalke's claims."[6]

The Division also argues that "Mr. Kowalke's complaint does not allege, and the Court's order does not suggest, that the Division had a legal duty to do anything differently in assessing Rep. Eastman's eligibility to appear on the ballot."[7] To the contrary, this Court interpreted Mr. Kowalke's "claim brought against the Division to allege that the Division failed to properly analyze whether Representative Eastman is barred by the Disqualification for Disloyalty clause as well as the relevant statutes and regulations related to how elections are administered."[8] And this Court concluded that the Division is "required by state law and its own regulation to determine whether a person is qualified for service in the legislature based upon the qualification and disqualifications for office set out in the Alaska Constitution—including whether the person is ineligible under the Disqualification for Disloyalty clause."[9] This Court thus rejected the Division's argument that "it does not have a role in applying the

---

6 *Id.* at 6.

7 Motion for Recon. at 1-2.

8 Order Denying Division's Motion to Dismiss for Failure to State a Claim at 6-7.

9 *Id.* at 7.

Disqualification for Disloyalty clause when a person declares their candidacy for public office."[10] This Court did not "overlook" anything or "misconceive" Mr. Kowalke's claim;[11] its analysis of Mr. Kowalke's claim and the applicable law was spot on.

The rest of the Division's arguments are an attempt to scare this Court into thinking that it created "a vague, unworkable cause of action" by raising various hypothetical scenarios that are not even present in this case. As such, the Division is improperly seeking an advisory opinion from this Court.[12]

For example, the Division argues that "[t]he Court's reasoning suggests that Mr. Kowalke could have brought this lawsuit even if he had never filed an administrative complaint under 6 AAC 25.260 . . . ."[13] But Mr. Kowalke *did* file an administrative complaint, and this Court's order did not purport to decide (because it was not raised in this case) the complicated legal question of whether a voter must exhaust administrative remedies by filing a complaint under 6 AAC 25.260 before seeking relief in court. That question will have to be decided in another case where it is squarely raised by the facts.

The Division also argues that it is not clear from this Court's order whether the ineligible candidate must also be sued for a "cause of action to lie against the

---

10 *Id.*

11 Alaska R. Civ. P. 77(k)(1)(i)-(ii).

12 *See, e.g., Young v. State*, 502 P.3d 964, 971 (Alaska 2022) (holding that courts should not issue "an advisory opinion on a hypothetical set of facts").

13 *Id.* at 2.

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645

Division."[14] But here, Mr. Kowalke sued *both* Representative Eastman and the Division, so the question of whether the candidate is a necessary party is purely academic and was irrelevant to deciding the Division's motion to dismiss.

Finally, the Division argues that this Court's order "opens the courthouse doors to plaintiffs who would otherwise have missed statutory deadlines to file administrative complaints or election contests."[15] This Court's order does no such thing; it does not even purport to address the question of *when* an action under the Disloyalty clause must be filed. Here, Mr. Kowalke filed his administrative complaint with the Division more than two months *before* the August 16 primary election, thus complying with the Division's requirement "to address complaints regarding a candidate's eligibility *before* ballots are printed for the *primary* election."[16]

In short, it is not this Court's job, nor would it be appropriate under our system of law, for this Court to decide in advance every possible hypothetical scenario in which an action might be brought under the Disloyalty clause. Under the facts presented here, the Court correctly held that Mr. Kowalke had stated a claim that the Division violated its duty to investigate Representative Eastman's eligibility and to remove him from the ballot, due to his admitted membership in Oath Keepers. The Division's motion for reconsideration should be denied.

DATED this 23rd day of September, 2022

---

14 *Id.* at 3 n.3.

15 *Id.* at 4.

16 *Id.* at 3.

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645

NORTHERN JUSTICE PROJECT, LLC
Attorneys for Plaintiff

By: s/Savannah Fletcher
Savannah Fletcher, ABA No. 1811127
James J. Davis, Jr., ABA No. 9412140

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing document were served via EMAIL at or before 10:00 am on:

Lael Harrison and Thomas Flynn
State of Alaska, Department of Law
Lael.harrison@alaska.gov
Thomas.flynn@alaska.gov
Courtesy copy emailed to: nomi.saxton@alaska.gov

Joseph Miller
Law Offices of Joseph Miller, LLC
info@aklaw.us
millerlaw@acsalaska.net

s/Savannah Fletcher
Signature

September 23, 2022
Date

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645