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

Randall Kowalke,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
David Eastman at al,	)	
	)	
	)	
Defendant.	)	
	)	Case No. 3AN-22-07404 CI

Order Granting in Part and Denying in Part Representative Eastman's Motion to Dismiss and Motion for Summary Judgment

Defendant David Eastman has filed a motion asking this court to dismiss the claims brought against him by Plaintiff Randall Kowalke. Representative Eastman argues that the court lacks jurisdiction to hear this action, that Kowalke lacks standing, that Kowalke failed to join an indispensable party—namely, the Legislature, and that the conduct at issue is protected by the First Amendment to the United States Constitution. In the alternative, Representative Eastman argues that he is entitled to summary judgment. Kowalke opposes. The court grants in part Representative Eastman's motion to the extent that Article XII, § 4 of the Alaska Constitution would bar him from holding office for either himself or the Oath Keepers engaging in conduct or speech protected by the First Amendment. As explained below, the court therefore interprets Alaska's disloyalty clause as applying only to unprotected speech and conduct. The court denies the remainder of the motion to dismiss and the motion for summary judgment.

I. Analysis

a. Motion to Dismiss

i. The court has jurisdiction to hear this case.

Representative Eastman first argues that the court lacks jurisdiction to decide this case because the Alaska Constitution grants the Legislature exclusive authority to judge the qualifications of its members. Article II, § 12 states in part that the House of Representatives "is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members." Representative Eastman also points the court to caselaw from other states to argue that courts should defer to the legislature in deciding suits such as this one.

However, relevant to this action Representative Eastman is not a member of the 33rd Legislature. Instead, he is a candidate for office whose qualifications for public office were challenged prior to the primary election. Alaska's statutes, as passed by the legislature, explicitly create a role for the executive and judicial branches in administering and reviewing elections, including whether a candidate is qualified for office. Prior to an election, the Division of Elections determines the qualifications of a candidate, and "any person" may question that determination.[1] If a complaint is filed, a party may bring an administrative appeal following a final determination by the Division.[2] And following an election, an election contest may be brought that is heard by the courts.[3] The courts may

[1] AS 15.25.042.
[2] AS 22.10.0202(d).
[3] AS 15.20.540--560.

also hear a recount appeal.[4] Under this statutory framework, the court has jurisdiction to hear a case challenging a candidate's qualifications to hold public office.

Furthermore, the Alaska supreme court has previously heard similar suits challenging legislator's qualifications. In *Begich v. Jefferson*, both the State and a private plaintiff sued sitting legislators seeking declaratory and injunctive relief related to their working as teachers while also being sitting legislators.[5] Similarly, in *Warwick v. State ex rel. Chance* the Alaska supreme court decided a suit brought by the chairman of the legislative council in order to have the court declare that a member of the legislature was disqualified under Article II, § 5 from serving as a state commissioner following their service in the legislature.[6] More recently, in *Miller v. Treadwell*, the Alaska supreme court recognized in dicta the possibility that "certain legal issues could properly be brought to [court] pre-election or during an election with appropriate requests for declaratory and even injunctive relief."[7] Based upon the statutes and caselaw discussed above, the court finds that it has jurisdiction to hear this action.

ii. Kowalke has standing to bring this action.

Representative Eastman next argues that Kowalke does not meet the requirements to have interest-injury standing because he cannot point to any

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[4] AS 15.20.510.
[5] 441 P.2d 27, 29 (Alaska 1968).
[6] 548 P.2d 384, 386 (Alaska 1976)("The Chairman of the Legislative Council of the Alaska State Legislature, on behalf of the state, filed the suit on September 8, 1975. The case was commenced in the Supreme Court as an 'Original Application for an Action in the Nature of a Writ Quo Warranto'. We remanded the case to the superior court to be handled on an expedited basis. The trial court granted summary judgment in favor of plaintiffs on November 3, 1975.").

specific harm and Kowalke is not a voter in House District 27. Kowalke responds that he does meet the standard for interest-injury standing because all Alaskans are empowered by statute and regulation to bring eligibility complaints, and all Alaskans have an interest that would be harmed if an unqualified individual served in the state legislature.

Under the interest-injury approach to standing used by Alaska courts, "a plaintiff must have an interest adversely affected by the conduct complained of. Such an interest may be economic, or it may be intangible, such as an aesthetic or environmental interest."[8] The Alaska supreme court has explained that the "degree of injury to the interest need not be great; [t]he basic idea ... is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."[9] Kowalke also points the court to the Alaska supreme court's decision in *Carpenter v. Hammond*.[10] In that case, Carpenter challenged the legislative reapportionment for a district she did not reside in. The Governor argued that Carpenter lacked standing because she did "not reside in or near the challenged district but resides and votes in Anchorage" and that "that a plaintiff in a reapportionment suit has no standing to assert the rights of voters in a district in which the plaintiff does not reside or vote."[11] Carpenter responded that the "[p]roposed district lines violated "a specific constitutional limitation and that the

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[7] 245 P.3d 867, 874–75 (Alaska 2010).
[8] *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) (internal citations omitted).
[9] *Id.* (Internal quotations and citations omitted).
[10] 667 P.2d 1204 (Alaska 1983).

disputed transaction (the drawing of election district lines) arguably [would] have a significant impact on the state."[12] The court held that "the dispute over District 2 has been fully briefed, argued at trial and on appeal, and there is no one in a better position than Carpenter to litigate these issues. In our view, Carpenter also meets the standing criteria."[13]

Here, Kowalke is an Alaskan voter who filed an eligibility complaint with the Division. The relevant regulation states that "anyone" may file an eligibility complaint.[14] Following that complaint being denied, he filed this action. His complaint is based upon a constitutional challenge to the qualifications of a candidate for the state's House of Representatives. The House obviously has a significant impact on the state and the court has previously noted that all Alaskans have an interest in having only qualified candidates hold public office.[15] The court finds that Kowalke has met the minimal requirements to show an interest and that he will pursue the question out of a question of principle. He therefore meets the minimal requirements for standing required by Alaska law.

iii. The Legislature is not an indispensable party to this action.

Representative Eastman argues that this case should be dismissed because the Legislature is an indispensable party to this action. He argues that if Kowalke were to prevail, the court would need to order the legislature to remove him from office to provide the relief sought. "An indispensable party is one whose interest in the controversy before the court is such that the court cannot

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[11] 667 P.2d at 1208.
[12] *Id.*
[13] *Id.*
[14] AS 15.25.042 and 6 AAC 25.260.

render an equitable judgment without having jurisdiction over such party."[16] Here, the court may afford Kowalke the equitable relief he requests via the current parties to this litigation. Pursuant to the preliminary injunction entered in this case, the Division has not certified the general election results. If Kowalke prevails on his claims at trial, the court can order the Division to re-tabulate the results and declare a different winner in House District 27. Additionally, the court could enter a permanent injunction barring Eastman from office until such time as he is no longer disqualified from holding public office by Article XII, § 4 of the Alaska Constitution. The legislature is therefore not an indispensable party to this action and their absence does not require dismissal.

iv. Article XII, § 4 of the Alaska Constitution must be interpreted and applied consistent with the protections afforded by the First Amendment to the United States Constitution.

Representative Eastman further argues that some of the speech and conduct described in Article XII, § 4 of the Alaska Constitution are protected under the First Amendment to the United States Constitution. On this, Representative Eastman and Kowalke agree that Alaska's Disqualification for Disloyalty clause must be interpreted consistent with the protections of the First Amendment. As described below, the court will therefore interpret Article XII, § 4 as applying only to unprotected association, speech and conduct.

The Disqualification for Disloyalty clause mandates that, "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

[15] See Order Granting Motion to Change Venue.

United States or of the State shall be qualified to hold any public office of trust or profit under this constitution."[17] The First Amendment to the United State Constitution requires that Congress and the states "shall make no law abridging the freedom of speech."[18]

The Supreme Court of the United States has examined when speech directed at overthrowing the government is protected. The court has written that "it is within the power of the Congress to protect the Government of the United States from armed rebellion."[19] The court's decisions distinguish between "advocacy and teaching of concrete action for the forcible overthrow of the Government", which is not protected, and speech related to "principles divorced from action", which is protected by the First Amendment.[20] Thus, Kowalke must show that the Oath Keepers are an organization that advocates concrete action to overthrow the government of the United States by force or that they have actually engaged in such conduct.[21] It will not be enough to show that they have

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[16] *State, Dep't of Highways v. Crosby*, 410 P.2d 724, 725 (Alaska 1966).
[17] Art. XII, § 4.
[18] The First Amendment does not apply directly to the states, but rather has been incorporated through the Fourteenth Amendment Due Process Clause. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n. 1 (1996).
[19] *Dennis v. United States*, 341 U.S. 494, 501 (1951).
[20] *Yates v. United States*, 354 U.S. 298, 320, 77 S. Ct. 1064, 1077, 1 L. Ed. 2d 1356 (1957).
[21] Kowalke must also show that Representative Eastman "aids or belongs" to the Oath Keepers. This potentially implicates Representative Eastman's freedom of association. However, there is no right to associate for purposes not protected by the First Amendment. *See Salvation Army v. Dep't of Cmty. Affs. of State of N.J.*, 919 F.2d 183, 199 (3d Cir. 1990) ("[T]he right to expressive association is a derivative right, which has been implied from the First Amendment in order to assure that those rights expressly secured by that amendment can be meaningfully exercised. Thus, there is no constitutional right to associate for a purpose that is not protected by the First Amendment.").

discussed the overthrow of the government merely on stated principles divorced from action.

b. Motion for Summary Judgment

Finally, Representative Eastman asks that the court grant him summary judgment in his motion to dismiss is not granted. He argues that Kowalke has not presented sufficient admissible evidence to support his claim that the Oath Keepers are an organization that advocates for concrete action to overthrow of the United States government by force. Representative Eastman does not dispute that there is sufficient evidence to find that he is a member of the Oath Keepers.

Summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[22] "If a prima facie case is established by the movant, then the nonmoving party must set forth specific facts showing that admissible evidence could be produced that reasonably tends to dispute or contradict the moving party's evidence in order to demonstrate the existence of a dispute of material fact and prevent entry of summary judgment."[23] "The party opposing summary judgment need not produce all of its evidence but instead must only show the existence of a genuine factual dispute."[24] "In rendering its summary judgment determination, the court should examine the pleadings, affidavits, and discovery answers to

[22] Alaska R. Civ. P. 56.
[23] *Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007).
[24] *Meyer v. State, Dep't of Revenue, Child Support Enf't Div. ex rel. N.G.T.*, 994 P.2d 365, 367 (Alaska 1999).

ascertain whether any genuine issues of material fact exist."[25] "Any admissible evidence in favor of the nonmoving party concerning a material fact is sufficient to render summary judgment inappropriate."[26]

In opposition to Representative Eastman's motion, Kowalke has provided the court with hundreds of pages of exhibits. These include opinions from the two experts that Kowalke plans to call at trial, newspaper articles, and indictments and convictions of various members of the Oath Keepers. Kowalke also asked the court to take judicial notice that the Oath Keepers' founder, Stewart Rhodes, was convicted on charges of seditious conspiracy in relation to the events on January 6, 2021. The evidence submitted is sufficient to create a genuine dispute of fact as to whether the Oath Keepers are an organization that has advocated for concrete action designed to overthrow by force the United States government. Representative Eastman's motion for summary judgment is therefore denied.

c. Both defendants argue that this suit has negative public policy implications, but it is not the court's role to decide on the wisdom of the Disqualification for Disloyalty clause or the procedures set out for enforcing it in the Alaska Statutes

Representative Eastman has repeatedly urged the court to consider whether barring someone from office via the Disqualification for Disloyalty clause is wise. The Division has also made public policy arguments urging the court to consider the effect of applying that provision. However, it is not the court's place to decide on the wisdom of the disqualification for disloyalty clause, nor is it the

[25] *Id.*

[26] *Greywolf* at 1241.

court's role to make policy. Instead, when a claim is filed implicating constitutional and statutory provisions, the court must interpret and apply the Alaska Constitution as it was drafted by its framers and ratified by the people of this state. The court must also interpret and apply the statutes passed by the legislature and signed into law by the executive.

Here, the Alaska Constitution bars from office anyone who aids or belongs to an organization that advocates for the overthrow by force of the United States government. Alaska law grants the Division the responsibility to determine whether candidates for public office are eligible as set out by the United States Constitution, the Alaska Constitution, and the Alaska Statutes.[27] It is not the court's role to make public policy decisions or prescribe how the Division should review candidate eligibility. Nor can the court substitute its judgment for the properly enacted laws of this state. If the current state of the law is unwise or against public policy—a subject on which the court does not and cannot express an opinion—it is the role of the voters of Alaska, the legislature and the Division to change the relevant statutes and regulations.

II. Conclusion

For the reasons stated above, Representative Eastman's motion to dismiss and motion for summary judgment are denied. The court partially grants Representative Eastman's motion to the extent that the Disqualification for Disloyalty clause will be interpreted and applied at trial in harmony with the protections afforded by the First Amendment.

[27] AS 15.25.042 and 6 AAC 25.260(c).

DONE this 9th day of December, 2022, at Anchorage, Alaska.

Jack R. McKenna
Superior Court Judge

I certify that on 12/09/2022
a copy of the above was mailed to
each of the following at their
addresses of record:
G Dudukgian, S Fletcher,
J Davis, T Flynn, L Harrison,
J Miller

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