

anc.law.ecf@alaska.gov

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

RANDALL KOWALKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DAVID EASTMAN, STATE OF ALASKA,	)	Case No. 3AN-22-07404CI
DIVISION OF ELECTIONS, and GAIL	)	
FENUMIAI in her official capacity as	)	
Director of the Division of Elections,	)	
	)	
Defendants.	)	

**MOTION TO DISMISS STATE DEFENDANTS**  
**Alaska R. Civ. P. 12(b)(6)**

Defendants the State of Alaska Division of Elections and Division Director Gail Fenumiai (collectively, “the Division”) move to dismiss the complaint against them for failure to state a claim on which relief may be granted.<sup>1</sup>

The plaintiff, Randall Kowalke, alleges that Representative David Eastman is disqualified from holding public office in Alaska because he is a member of the Oath Keepers.<sup>2</sup> Mr. Kowalke’s complaint focuses on Rep. Eastman’s conduct and alleges only one cause of action against the Division: violation of Alaska Statute 24.05.060.<sup>3</sup> Mr. Kowalke claims that this statute requires the Division to find that Rep. Eastman is

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
JUNEAU BRANCH  
P.O. BOX 110300  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600  
FAX: (907) 465-2520

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<sup>1</sup> Alaska R. Civ. P. 12(b)(6).  
<sup>2</sup> Complaint at pp. 6, ¶ 28.  
<sup>3</sup> Complaint at pp. 7-8, ¶¶ 1-7.

not eligible to run for office and, presumably, to bar Rep. Eastman from the ballot on that basis.<sup>4</sup>

But AS 24.05.060 does not give the Division the power or duty to investigate whether a candidate has engaged in disloyal conduct that disqualifies him from office and to bar him from the ballot for disloyalty to the United States or the State of Alaska. That statute does not govern election administration, and it does not task the Division with applying or enforcing its disloyalty standard. The complaint thus fails to state a claim against the Division under AS 24.05.060.

Nor does the complaint state a claim against the Division under the laws that do govern the administration of elections. Alaska Statute 15.25.042 and 6 AAC 25.260 address when and how the Division investigates a candidate's eligibility for the position sought. In June, Mr. Kowalke challenged Rep. Eastman's eligibility for state office using this administrative process and the Division cited these provisions in denying his administrative complaint.<sup>5</sup> Yet Mr. Kowalke's complaint before this Court does not mention these provisions or purport to appeal the administrative decision under Appellate Rule 602. Regardless, the factual allegations in the complaint would not support a claim that the Division erred. The Division's appropriately narrow role under these provisions is to confirm a candidate's basic eligibility for an elected office—such

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<sup>4</sup> Complaint at pp. 7-8, ¶¶ 2-5. The complaint seeks “declaratory and injunctive relief” against the Division but does not specify the nature of the injunctive relief sought.

<sup>5</sup> Complaint at Exhibit 1.

as age, residency and citizenship—based on review of public agency records, not to investigate candidates’ political associations for disloyalty. The Division is not equipped for that task.

The Division of Elections is a nonpartisan, nonpolitical agency charged with administering elections. Public confidence in its integrity is central to its mission.<sup>6</sup> Requiring the Division to investigate a candidate’s political associations for disloyalty to the United States or the State of Alaska—whether under AS 24.05.060 or other laws—would threaten the public’s perception of the Division’s political neutrality. The complaint fails to state any claim against the Division, and this Court should dismiss the Division from this lawsuit under Alaska Rule of Civil Procedure 12(b)(6).

### LEGAL STANDARD

To survive a motion to dismiss under Alaska Rule of Civil Procedure 12(b)(6), a complaint must “allege a set of facts consistent with and appropriate to some enforceable cause of action.”<sup>7</sup> When determining whether a complaint has sufficiently stated a claim on which relief can be granted, courts liberally construe the complaint and assume all factual allegations can be proven as true.<sup>8</sup> But legal conclusions and unwarranted factual inferences in the complaint are not presumed true.<sup>9</sup> In reviewing a

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<sup>6</sup> AS 15.10.105(b) (“It is essential that the nonpartisan nature, integrity, credibility, and impartiality of the administration of elections be maintained”).

<sup>7</sup> *Larsen v. State*, 284 P.3d 1, 6-7 (Alaska 2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Dworkin v. First Nat. Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968) (“Well pleaded allegations of the complaint are deemed admitted for purposes of [a

motion to dismiss, courts generally do not consider matters outside the complaint, but may consider attachments to the complaint.<sup>10</sup> Thus, for purposes of this motion, this Court may assume all factual allegations in Mr. Kowalke’s complaint are true and need not look beyond the complaint itself and the exhibit filed with it.

The complaint makes few factual allegations regarding the Division. Paragraphs 26-27 allege that in June of this year the Division received, reviewed, and denied an administrative complaint in which Mr. Kowalke alleged that “Mr. Eastman was ineligible as a candidate under the Alaska Constitution’s disloyalty clause due to his membership in the Oath Keepers, which is an organization that advocates for the violent overthrow of the federal government.”<sup>11</sup> The Division’s denial letter is attached to the complaint as an exhibit. The only remaining factual allegations related to the Division are characterizations of that denial letter, which speaks for itself.<sup>12</sup>

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12(b)(6)] motion but unwarranted factual inferences and conclusions of law are not considered admitted in resolving the merits of such motions.”).

<sup>10</sup> *Larsen*, 284 P.3d at 6-7

<sup>11</sup> Complaint at p. 6 ¶ 26.

<sup>12</sup> The denial letter is attached to the complaint for the Court’s independent review, so the Court does not have to accept as true characterizations like “The Division[’s] analysis made no sense whatsoever.” Complaint at p. 6, ¶ 27.

## ARGUMENT

### I. **Alaska Statute 24.05.060 does not give the Division the power or duty to bar candidates from the ballot for disloyalty.**

The complaint alleges only one cause of action against the Division: violation of AS 24.05.060.<sup>13</sup> That statute is part of Title 24, which governs the legislature, and which—like the Alaska Constitution<sup>14</sup>—has separate sections on “Qualifications of members” and “Disqualifications.” The “Qualifications” section, AS 24.05.030, provides the basic age and residency criteria that make a person eligible to serve:

A member of the legislature shall be a qualified voter who has been a resident of the state for at least three years and of the district from which elected for at least one year immediately preceding filing for office. A senator shall be at least 25 years of age and a representative at least 21 years of age at the time of taking the oath of office.

The “Disqualifications” section of Title 24—that is, AS 24.05.060, which the complaint invokes here—provides that a person meeting these basic eligibility criteria may nonetheless be “disqualified to hold public office” under the disloyalty provision in Article XII, § 4 of the Alaska Constitution or any statutes implementing it:

A person is not qualified for membership in the legislature who is disqualified to hold public office under the provisions of art. XII, § 4, Constitution of the State of Alaska, and as it may be implemented by law.

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<sup>13</sup> Complaint at pp. 7-8, ¶¶ 1-7.

<sup>14</sup> See AK Const. Art. II, § 2 (entitled “Members: Qualifications”) and § 5 (entitled “Disqualifications”).

Article XII, § 4 of the Alaska Constitution, entitled “Disqualification for disloyalty,” provides the language that Mr. Kowalke argues disqualifies Rep. Eastman from holding office:

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.

Although AS 24.05.060 and Article XII, § 4 establish that a person is disqualified from serving in the legislature if they engage in this kind of disloyal conduct, nothing in Title 24 or the Alaska Constitution gives *the Division of Elections* a role in enforcing this disqualification standard. The Division cannot exclude a candidate’s name from the ballot without clear authority, which AS 24.05.060 does not grant. The statute’s text does not mention the Division, or ballots, or candidates, or even elections at all. And it is contained in Title 24, which governs the legislature, rather than in Title 15, which establishes the powers and duties of the Division to administer elections. The Division cannot violate a statute that does not command it to do (or refrain from doing) anything.

Although perhaps the legislature could enact a statute instructing the Division to investigate candidates for disqualifying disloyalty and bar them from the ballot, it has not clearly done so with AS 24.05.060. In fact, the very next section of Title 24 provides for enforcement of AS 24.05.060 by the legislature itself. Alaska Statute 24.05.070 provides, consistent with Article II, § 12 of the constitution, that:

Each house 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.

The legislature can use this authority to expel a disqualified member at any time, regardless of whether that person is running for reelection. This is consistent with AS 24.05.060, which does not tie disqualification to candidacy or elections.

The legislature could use this authority to investigate and remove Rep. Eastman for disloyalty if it chose to—indeed, the House of Representatives apparently considered removing him from his committee assignments on this basis during its most recent session.<sup>15</sup> Although ultimately the legislature did not take action to expel Rep. Eastman from office, it indisputably has the power to do so under AS 24.05.070 and Article II, § 12 of the constitution.

The legislature is much better suited to the task of applying Article XII, § 4’s “Disqualification for disloyalty” standard than the Division of Elections would be. To administer elections effectively and fairly, the Division must remain politically neutral.

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<sup>15</sup> See House Journal, Alaska State Legislature, Thirty-Second Legislature, Second Session, January 31, 2022 at 1734. A recording of these proceedings is available online at <https://www.ktoo.org/gavel/video/2022011167/house-floor-session/>. The recording shows that after tabling a motion to remove Rep. Eastman from his committee assignments, at approximately minute 52, Majority Leader Rep. Tuck read Alaska Constitution Art. XII, § 4 into the record, showing that legislators were considering its disqualification standard. The connection between the effort to remove Rep. Eastman from his committee assignments and Art. XII, § 4 was further described in contemporaneous media accounts. See James Brooks and Nathaniel Herz, Alaska House considering action against Rep. David Eastman, ‘life member’ of group linked to Jan. 6 Capitol riot, *Anchorage Daily News* (February 4, 2022), available at <https://www.adn.com/politics/alaska-legislature/2022/01/26/alaska-house-considering-action-against-rep-david-eastman-life-member-of-group-linked-to-jan-6-us-capitol-riot/>. See also House Committee on Military and Veterans Affairs, February 10, 2022 (recording, schedule and documents available at [https://www.akleg.gov/basis/Meeting/Detail?Meeting=HMLV%202022-02-10%2013:00:00#tab2\\_4e](https://www.akleg.gov/basis/Meeting/Detail?Meeting=HMLV%202022-02-10%2013:00:00#tab2_4e)) (taking testimony regarding Oath Keepers organization).

Assessing a candidate’s basic eligibility under the age and residency qualifications is the kind of politically neutral task appropriate for the Division, but applying Article XII, § 4’s *disqualification* standard is not: that requires evaluating what “part[ies] or organization[s] or associations[s]” a person “aids or belongs to” and whether their activities constitute “advocat[ing]” the “overthrow by force or violence of the government of the United States or of the State.” This may in many cases be an uncertain or politically fraught call to make, particularly where—as here—it concerns a sitting legislator whom the legislature has declined to expel. Looking beyond state agency records to scrutinize and pass judgment on a candidate’s political associations could not only imperil the public’s perception that the Division is politically neutral, but—as explained further below—the Division lacks the procedures and resources necessary to perform such a factual investigation.

Because AS 24.05.060 does not mention elections and is located outside of Title 15, the Court should not interpret it to implicitly require the Division to perform the politically fraught task of enforcing it. The complaint thus states no claim against the Division under AS 24.05.060, the only statute it invokes.

**II. The Division correctly applied its laws and regulations and denied Mr. Kowalke’s administrative complaint.**

Even if Mr. Kowalke had invoked the statutes and regulations governing the Division and the administration of elections, his complaint still would not state a claim against the Division on which this Court could grant relief. Title 15 governs elections



and dictates when and how the Division places a candidate's name on the ballot. It does not provide for the removal of a candidate's name under the circumstances here.

Alaska Statute 15.25.042 and 6 AAC 25.260 carve out a narrow role for the Division to evaluate candidates' eligibility to be on the ballot. If the Division receives an administrative complaint about a candidate's eligibility, it must issue a decision within 30 days and its review is limited to state agency records. This Division review is designed to verify the qualifications that can be readily determined from state records, like citizenship, age, and residency. Here, the Division properly conducted that review and properly denied Mr. Kowalke's administrative complaint about Rep. Eastman.

**A. Alaska law provides a brief and limited administrative process for pre-election challenges to a candidate's eligibility for office.**

The statute in Title 15 about candidate eligibility complaints, AS 15.25.042, contemplates a quick administrative process primarily concerned with a candidate's residency. Its first subsection instructs the Division to accept a complaint about a candidate's eligibility and to issue a determination within 30 days.<sup>16</sup> The remaining three subsections focus on residency: determinations must be made "by a preponderance of the evidence," unless the candidate registered to vote in the last year in a district other than the district the candidate seeks to represent.<sup>17</sup> In that case, the determination that a candidate is eligible must be made by "clear and convincing evidence."<sup>18</sup> The

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<sup>16</sup> AS 15.25.042(a).

<sup>17</sup> AS 15.25.042(b), (c).

<sup>18</sup> AS 15.25.042(c).

final subsection provides, “A person may not be a resident of two districts at the same time.”<sup>19</sup> This statutory 30-day timeframe and preoccupation with residency supports a narrow process, not a wide-ranging investigation of a candidate’s political allegiances.

The first subsection of AS 15.25.042 also directs the Division to promulgate regulations to govern this process. The Division did so in 6 AAC 25.260, creating a process which—consistent with the statute—is limited in both time and scope.

The regulation creates a quick process designed to be resolved before the primary election. It sets a clear deadline for complaints: ten days after the candidate filing deadline.<sup>20</sup> The filing deadline is the date by which each candidate must file a declaration of candidacy setting out their basic eligibility for the position they seek: that they are a resident of Alaska, of the relevant district, and for how long; that they meet the citizenship and age requirements for the office; and that they are a qualified voter as required by law.<sup>21</sup> By setting a 10-day clock running from the filing deadline, 6 AAC 25.260 gives the public a reasonable but brief period to review a candidate’s declaration and challenge the candidate’s representations that they meet these eligibility criteria.

This quick timeline ensures that this process will be resolved before the primary election. The candidacy filing deadline before a primary is June 1.<sup>22</sup> Because complaints may be received up to 10 days later and the Division must make its determination

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<sup>19</sup> AS 15.25.042(d).

<sup>20</sup> 6 AAC 25.260(a).

<sup>21</sup> AS 15.25.030.

<sup>22</sup> AS 15.25.040(a).

within 30 days of receiving a complaint, complaints will be resolved by July 11,<sup>23</sup> well in advance of the primary on the third Tuesday in August.<sup>24</sup>

In addition to limiting the timeframe for administrative complaints, the regulation limits the materials that the Division must review in resolving them. A complaint must be limited to 200 words, briefly stating the nature of the challenge.<sup>25</sup> To resolve it, the Division reviews its own records, including the candidate's declaration of candidacy and voter registration records.<sup>26</sup> In its discretion, the Division *may* review public documents of other state agencies.<sup>27</sup> For example, a candidate's records on file with the Permanent Fund or Division of Motor Vehicles may contain information allowing the Division to verify the candidate's age, residency, and citizenship. The regulation also creates an opportunity for a candidate to provide additional information to demonstrate eligibility, but only if the Director's initial review of public agency records fails to find a preponderance of evidence that the candidate is eligible.<sup>28</sup>

This quick, limited-scope process is designed to verify a candidate's residency, age, citizenship, and voter qualifications, not to delve into the complex and politically fraught question of "Disqualification for disloyalty" under Article XII, § 4. Alaska

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<sup>23</sup> 6 AAC 25.260(a); AS 15.25.042(a)

<sup>24</sup> AS 15.25.020.

<sup>25</sup> 6 AAC 25.260(b).

<sup>26</sup> 6 AAC 25.260(d).

<sup>27</sup> *Id.*

<sup>28</sup> 6 AAC 25.260(e)-(g).

Statute 15.25.042 merely requires the Division to assess a candidate’s “eligibility,” and 6 AAC 25.260 similarly instructs the Division to assess candidates’ “eligibility” and “qualifications.” Whether a candidate is *eligible*—i.e., meets the age and residency *qualifications* set forth in AS 24.05.030—is a different question from whether the candidate who meets these criteria is nonetheless *disqualified* from holding office due to disloyal conduct under Article XII, § 4. Moreover, neither the statute nor the regulation contemplates an open-ended evidentiary inquiry or fact-finding by the Division. Alaska Statute 15.25.042 requires the Division to make a decision within thirty days and does not give it the power to subpoena witnesses or evidence, or to administer oaths.<sup>29</sup> The legislature would not have required the Division to investigate and bar candidates from the ballot for disloyalty without giving it the investigatory tools and the time to do so.<sup>30</sup> And as mentioned above, requiring the Division to perform this kind of politically complicated investigation could threaten the public’s perception of its neutrality.

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<sup>29</sup> This stands in contrast to AS 15.13.045 which gives the Alaska Public Offices Commission the authority to “issue subpoenas, administer oaths, hold hearings, and conduct investigations.” This also stands in contrast to other states’ procedures for challenging a candidate’s eligibility to appear on the ballot. *See, e.g. Greene v. Raffensperger*, 2022 WL 1136729 (N.D. Ga. 2022) at \*1-2 (describing comprehensive administrative procedures for pre-election candidate qualification contests in Georgia, including discovery and hearing before an Administrative Law Judge).

<sup>30</sup> Another way to challenge a candidate’s eligibility is found in AS 15.20.540, which allows a defeated candidate or ten qualified voters to bring a post-election challenge in court on the grounds that “the person certified as elected or nominated is not qualified as required by law.” The Division takes no position here on whether AS 15.20.540 would allow an election contest on the basis that the nominated or elected candidate was disqualified from the position by Article XII § 4 of the Alaska Constitution or AS 24.05.060.

Alaska Statute 15.25.042 and 6 AAC 25.260 therefore give the Division a narrow role in assessing candidate eligibility.

**B. The Division properly followed Alaska law and regulation in denying Mr. Kowalke’s administrative complaint.**

Before filing this lawsuit, Mr. Kowalke filed an administrative complaint with the Division under AS 15.25.060 and 6 AAC 25.260, which the Division denied.<sup>31</sup> Mr. Kowalke has not alleged that the Division violated either AS 15.25.042 or 6 AAC 25.260 in processing his complaint, nor is the complaint styled as an appeal of the administrative denial.<sup>32</sup> The Division issued its decision on June 20, which would have given Mr. Kowalke time to appeal it before primary ballots were printed and mailed.<sup>33</sup> Instead, he did not appeal, and he waited until July 29 to file this lawsuit. Even if the complaint were styled as an administrative appeal, the Division did not err, and the complaint does not allege facts that would warrant reversal. Mr. Kowalke thus fails to state a claim against the Division on which relief can be granted.

The Division properly followed its procedures when processing Mr. Kowalke’s administrative complaint. The Division rendered a decision well within 30 days as required by AS 15.25.060(a). The Division applied the “preponderance of the evidence”

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<sup>31</sup> See Complaint, Exhibit 1.

<sup>32</sup> The Division’s denial of Mr. Kowalke’s complaint was a final agency decision, which he does not appeal in this lawsuit. He makes no reference to an appeal of agency action, and he asserts superior court jurisdiction under subsections (c) and (g) of AS 22.10.020, as opposed to subsection (d) which confers jurisdiction over administrative appeals. Complaint at p. 2, ¶ 3.

<sup>33</sup> Complaint, Exhibit 1.

standard as required by AS 15.25.060(b).<sup>34</sup> And in accordance with 6 AAC 25.260(d), the Division reviewed “any evidence relevant to the issues identified in the complaint which is in the custody of the division.” Nothing in the complaint before this Court would support a conclusion that the Division erred in concluding, by a preponderance of the evidence, that Rep. Eastman meets the basic eligibility qualifications.

And even assuming the Division had to look beyond the basic eligibility qualifications and consider whether Rep. Eastman was *disqualified* from office for disloyalty—something the administrative process is not well designed for, as explained above—the Division still did not err. Mr. Kowalke’s administrative complaint made allegations beyond what the Division could substantiate by reviewing public agency records.<sup>35</sup> As the Director explained, the Division has no information in its own records about the Oath Keepers organization or Rep. Eastman’s attendance at the January 6, 2021 rally in Washington, D.C. and is unaware of any relevant records held on file with other state agencies.<sup>36</sup> Even if Rep. Eastman’s membership in the Oath Keepers were a matter of public record documented in state agency files, which Mr. Kowalke has not alleged, the goals of the Oath Keepers as an organization and the significance of those goals under Article XII, § 4 are certainly not. Although Mr. Kowalke’s complaint before this Court makes allegations about these topics, it does not allege that any information

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<sup>34</sup> See Complaint, Exhibit 1.

<sup>35</sup> See Complaint at p. 6, ¶ 26.

<sup>36</sup> Complaint, Exhibit 1.

to substantiate these allegations is contained in the records of the Division or other state agencies.

Mr. Kowalke's complaint before this Court cites news articles and blog posts in support of his allegations about the Oath Keepers and Rep. Eastman,<sup>37</sup> but these are not the type of public agency records the Division must consider under 6 AAC 25.260, even if Mr. Kowalke had provided them to the Division with his administrative complaint, which he did not. It would be completely inappropriate for the Division to exclude a candidate from the ballot based on unverified and unsworn statements in news articles and blog posts cherry-picked by the complainant in this limited administrative process.<sup>38</sup> Nor can these news articles and blog posts provide a basis for the Court to reverse the Division's decision after the fact. An administrative complaint to the Division is not the proper forum for a free-wheeling investigation into a candidate's political associations. The Division is not authorized or equipped in a 30-day administrative process to determine who is and who is not disloyal to the United States of America. The Division followed its statutes and regulations in denying Mr. Kowalke's administrative complaint, and the complaint before this Court fails to state a claim otherwise.

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<sup>37</sup> Complaint at pp. 3-5, nn. 1-9.

<sup>38</sup> Further, unlike the limited administrative proceeding under 6 AAC 25.260, an election contest in superior court under AS 15.20.540 or a legislative process to remove a member from office under AS 24.05.070 are public proceedings conducted on the record in full public view.

## CONCLUSION

Because the complaint fails to state any claim against the Division, this Court should dismiss the Division and its director from this lawsuit under Alaska Rule of Civil Procedure 12(b)(6). To be clear, the Division and its director simply request that this Court dismiss them as defendants and take no position on any of Mr. Kowalke's claims directly against Rep. Eastman.

DATED August 12, 2022.

TREG R. TAYLOR  
ATTORNEY GENERAL

By: /s/ Lael Harrison  
Lael Harrison  
Alaska Bar No. 0811093

/s/ Thomas S. Flynn  
Thomas S. Flynn  
Alaska Bar No. 1910085  
Assistant Attorneys General

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
JUNEAU BRANCH  
P.O. BOX 110300  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600  
FAX: (907) 465-2520