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

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

STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Having ruled that AS 15.25.042 and 6 AAC 25.260 require the Division to consider whether a candidate is disqualified from office by Article XII Section 4 of the Alaska Constitution,[1] this Court must now decide exactly what that process entails. Does the law require the Division to undertake an unlimited, free-ranging investigation into a candidate's beliefs and associational affiliations? Or does the law only require the Division to identify and review its own records and public records of other state agencies on a quick turnaround while preparing for an upcoming primary election? The text of the statute and regulation, as well as precedent, reason and policy, support the

[1] The Division accepts that ruling for purposes of this Motion for Summary Judgment but reserves the right to appeal it.

latter interpretation. This Court should hold that the Division did everything the law required it to do and therefore grant summary judgment in favor of the Division.

A. There are no disputes of material fact.

Though the Division does not agree with Mr. Kowalke's tone, the facts about the Division's involvement as recited in Mr. Kowalke's opposition to the Division's motion for summary judgment are largely accurate.[2] The opposition attempts to manufacture a few factual disputes, but these points are actually undisputed.

First, Mr. Kowalke points out that the Division had a copy of the first federal indictment against Stewart Rhodes in its possession at the time it decided Mr. Kowalke's administrative complaint.[3] This is true. The Division received 24 substantively identical complaints about Rep. Eastman, including Mr. Kowalke's. One of those complaints—not Mr. Kowalke's—attached a copy of the first Rhodes indictment. But that indictment does not allege that the Oath Keepers as an organization advocates the overthrow by force or violence of the United States government. Although it alleges that the Oath Keepers founder and other members committed seditious conspiracy, it describes the Oath Keepers organization as "a large but loosely organized collection of individuals, some of whom are associated with militias."[4]

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[2] Mr. Kowalke filed a joint opposition to both the Division's Motion for Summary Judgment and Rep. Eastman's Motion for Summary Judgment. The Division takes no position on either Rep. Eastman's motion or Mr. Kowalke's opposition to it.

[3] Opp. Br. at 14.

[4] Opp. Br. Exhibit 14 at ¶3.

And, contrary to Mr. Kowalke's claims, a federal indictment is not evidence of anything. Mr. Kowalke misreads *Moore v. Hartman,*[5] which holds only that return of an indictment by a grand jury gives rise to a "rebuttable presumption" of "probable cause" for the indictment in a subsequent civil case.[6] It certainly does not establish *any* allegations in the indictment by a preponderance of evidence—which is a higher standard than probable cause—much less *every* specific allegation.

Second, Mr. Kowalke suggests that there is a discrepancy between representations in the Division's reply brief in support of its Motion to Dismiss and its Motion for Summary Judgment regarding the extent to which the Division considered, or could consider, material outside the public record.[7] But Mr. Kowalke employs highly deceptive selective quotation to create this alleged "discrepancy." The full quote from the Division's reply in support of its Motion to Dismiss is: "Mr. Kowalke's opposition cites a blog post and an affidavit from a private researcher in support of his factual allegations. Neither of these documents were before the Division during the administrative process, nor are they proper material for the Division to consider under 6 AAC 25.260 even if they had been."[8] This is an accurate statement that is in no way at

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[5] Opp. Br. at 22.

[6] 571 F.3d 62, 67-68 (D.C. Cir. 2009) ("the district court was incorrect in holding that an indictment is conclusive evidence of probable cause in a retaliatory prosecution action").

[7] Opp. Br. at 20.

[8] State Defendants' Reply to Plaintiff's Opposition to State Defendants' Motion to Dismiss (Sept. 6, 2022) at 5.

odds with the factual record the Division relies on in support of summary judgment. Although the Division Director did consider facts publicly acknowledged by Rep. Eastman to be true, she did not consider the opinions of private researchers or blog posts. There is no dispute of material fact here.

B. The Law of the Case doctrine is inapplicable before final judgment or appeal.

Mr. Kowalke argues that some or all of the Division's arguments are foreclosed by the "law of the case" doctrine.[9] But the law of the case doctrine applies *only* to "issues that have been adjudicated in a previous appeal in the same case and to issues that have been fully litigated in the superior court and as to which no timely appeal has been made."[10] It does *not* apply to any superior court ruling before entry of final judgment or before adjudication of the issue on appeal.[11] For example, in *Gold Dust Mines, Inc. v. Little Squaw Gold Mining Co.*, the superior court granted summary judgment to a party, but later partially reversed itself before entry of final judgment.[12] The Alaska Supreme Court found no error, stating, "[t]he law of the case doctrine is of

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9 Opp. Br. at 17.

10 *Jones v. Jones*, 505 P.3d 224, 231 (Alaska 2022).

11 *See, e.g.*, *Gold Bylers Alaska Wilderness Adventures, Inc. v. City of Kodiak*, 197 P.3d 199, 206 (Alaska 2008) ("when one superior court judge makes a ruling, that superior court judge is succeeded by another superior court judge on the same case, and the subsequent judge declines to follow a previous order from the prior judge we have held that the [law of the case] doctrine does not apply."); *Williams v. Fagnani*, 228 P.3d 71, 74 (Alaska 2010) (denial of a petition for rehearing does not establish law of the case).

12 299 P.3d 148, 156 (Alaska 2012).

limited relevance in evaluating the superior court's decision to vacate a pre-trial ruling, and it does not apply here."[13] Thus, if this Court did choose to change any of its prior rulings, the law of the case doctrine would not render that inappropriate because none of those rulings have been finalized by an intervening judgment and appeal.

But the Division does not intend this motion to challenge the Court's prior rulings. For purposes of this Motion, the Division accepts this Court's prior rulings and moves for summary judgment consistent with them.[14] However, it appears that Mr. Kowalke and the Division interpret this Court's prior rulings differently. In his opposition to the Division's motion, Mr. Kowalke argues that this Court's prior rulings essentially create a strict liability standard for the Division: *i.e.* if Mr. Kowalke succeeds on his claims against Rep. Eastman, he also succeeds on his claims against the Division.[15] In Mr. Kowalke's view of this Court's ruling, it does not matter whether the Division undertook an extensive investigation or no investigation; all that matters is whether the Division reached the same result as later reached by this Court after trial. Thus, Mr. Kowalke argues, the Division's liability is "inextricably intertwined" with Rep. Eastman's.[16]

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13 *Id.* at 158.

14 The Division disagrees with the Court's decision not to dismiss the complaint for the reasons stated in its Motion to Dismiss, but preserves that issue for appeal rather than relitigating it here.

15 Opp. Br. at 18 ("[I]f Mr. Kowalke prevails against Rep. Eastman at trial, he will be entitled to an injunction requiring *the Division* to re-tabulate the ranked choice results and certify a new winner of the election.") (Emphasis in original).

16 *Id.* Mr. Kowalke also argues the Division is an "indispensable party" to his case against Rep. Eastman, but that makes no sense under the language of the Constitution.

The Division originally interpreted this Court's denial of its Motion to Dismiss similarly and moved for reconsideration on the basis that created an untenable standard for the Division.[17] Mr. Kowalke opposed the motion, describing the Division's concerns as a "parade of horribles that are not even implicated in this case."[18] Mr. Kowalke clarified his position: "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…despite the constitutional, statutory, and regulatory command to do so."[19] Thus, Mr. Kowalke disclaimed any intent to hold the Division strictly liable for Rep. Eastman's eligibility and dismissed the Division's concerns that this was the implication of his position.

This Court denied reconsideration and clarified that its prior order denying the Division's Motion to Dismiss "does not present that issue."[20] The Court reiterated its prior ruling as being: "The Division is therefore required by the law to determine whether a person is qualified for service in the legislature based upon the qualifications and disqualifications for office set out in the Alaska Constitution—including whether

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Id. at 18. Article XII, Section 4 clearly applies to all officials, whether or not elected, and at any time, not just during elections season. The Division of Elections cannot be an indispensable party to a claim that an individual is disqualified under that provision—if it were, then claims could only be made against elected officials and only during election cycles, which would make no sense.

17 State Defendants' Motion for Reconsideration (Sept. 14, 2022) at 2-3.

18 Plaintiff's Opposition to State Defendants' Motion for Reconsideration (Sept. 23, 2022) at 3.

19 *Id.*

20 Order (Oct. 7, 2022) at 1.

the person is ineligible under the Disqualification for Disloyalty clause."[21] Thus, after reconsideration, the Division now understands this Court's prior ruling to be that the Division had a legal duty to consider Mr. Kowalke's administrative complaint based on the Disqualification for Disloyalty clause (contrary to the Division's position in its Motion to Dismiss), not that the Division's liability is directly tied to Rep. Eastman's qualifications as ultimately determined by the Court after trial.

The Division's liability cannot and should not be "inextricably intertwined" with Rep. Eastman's, for all the reasons previously stated in the Division's Motion for Reconsideration of the denial of its Motion to Dismiss. Consistent with this Court's prior rulings and Mr. Kowalke's own representation of his claims against the Division, Mr. Kowalke must prove that the Division violated the law in order to prevail against the Division.

C. The Division did everything the law requires it to do.

This Court should grant summary judgment in favor of the Division because the Division properly followed the law in considering Mr. Kowalke's administrative complaint and deciding it based on the preponderance of the evidence before it. In his opposition to Rep. Eastman's Motion for Summary Judgment, Mr. Kowalke concedes that, even now after months of discovery, there is a dispute of material fact as to whether the Oath Keepers is an organization that advocates the overthrow by force or

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[21] *Id.* at 2.

violence of the government of the United States.[22] Mr. Kowalke describes this question as a "battle of the experts."[23] And yet, in opposition to the Division's motion, he argues that the Division was *legally required* to have resolved this dispute of fact in his favor, within thirty days, on its own, through an open-ended investigation without any guidance from statute or regulation. Even this Court is not expected to resolve factual disputes on that basis, but has the benefit of adversarial presentation of evidence, as well as the authority to administer oaths and subpoena evidence.

Mr. Kowalke misunderstands the thrust of the Division's point that he has failed to identify any public records on file with the State, overlooked by the Division in its administrative process, that would have substantiated his complaint against Rep. Eastman. Mr. Kowalke correctly argues that it is not up to an administrative complainant to identify relevant public documents for the Division to review under 6 AAC 25.260.[24] But it *is* up to a plaintiff in a civil lawsuit to prove his case against a defendant. And that is what Mr. Kowalke has failed to do here. In order to prove his claim that the Division was legally required to find Rep. Eastman disqualified under 6 AAC 25.260, he must identify some public record on file with a state agency that the Division erroneously failed to locate and consider that would have compelled that result, but he has not.

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22 Opp. Br. at 41.

23 *Id.* at 43.

24 *Id.* at 21.

Mr. Kowalke further faults the Division for failing to consider any records regarding the Oath Keepers organization not already on file with a state agency.[25] But the plain language of 6 AAC 25.260 states: "Upon receipt of a complaint, the director will review any evidence relevant to the issues identified in the complaint which is in the custody of the division…, and including, in the discretion of the director, any other document of public record *on file with the state*."[26] The regulation does not require the Division to interview individuals, review the websites or publications of private organizations, or undertake any of the other forms of investigation that Mr. Kowalke suggests the Division should have done.

And the Court must keep in mind that all of the unspecified investigatory steps that Mr. Kowalke advocates must take place very early in the election process, and that Mr. Kowalke's position leaves many critical questions unanswered. Is there any limit to the efforts the Division must undertake to investigate the loyalty of a candidate for a primary election—who may very well lose the election a few weeks later, mooting the entire inquiry? Having exhausted all possible avenues to investigate the allegations, must the Division then also go out in search of contrary evidence that might *support* Rep. Eastman's candidacy as well? Where does it all end?

This is the fundamental question that this Motion for Summary Judgment presents to this Court. Having ruled that the Division is required to consider the

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25 *Id.* at 14.

26 Emphasis added.

Disqualification for Disloyalty clause under AS 15.25.042 and 6 AAC 25.260, this Court must now decide to what lengths the Division is required to go in that process. As explained in the Division's underlying Motion for Summary Judgment, the best reading of the statute and regulation is that the Division properly completed the limited administrative process contemplated by those laws.

D. In substance, this is an election contest.

Labels aside, Mr. Kowalke is asking this Court to certify an election for a losing candidate on the basis that the winning candidate is disqualified, which is the domain of an election contest. Alaska Statute 15.20.540 authorizes election contests "contest[ing] the … election of any person" on the grounds that "the person certified as elected…is not qualified as required by law." Alaska Statute 15.20.560 states that, at the conclusion of an election contest, the "judge shall pronounce judgment on which candidate was elected" and the Division "shall issue a new election certificate to correctly reflect the judgment of the court."

Mr. Kowalke's arguments to the contrary are circular, self-contradictory, and place form over substance. At times in his briefing, Mr. Kowalke argues that his claim is not an administrative appeal, and yet he argues his claim is not an election contest because he is not suing the Division to recertify the election based on Rep. Eastman's disqualification, but rather he is suing the Division for reaching the wrong result in

deciding his administrative complaint under 6 AAC 25.260.[27] Which would, of course, be equivalent to an administrative appeal.

Mr. Kowalke also argues that his claim is not an election contests because, at the time he filed his complaint before the primary election, Rep. Eastman was not an "elected candidate."[28] But if Rep. Eastman were not ultimately elected, Mr. Kowalke's claim would immediately become moot. Arguing that his claim is not an election contest because it could have been mooted before ripening into a proper election contest is nonsensical.

Finally, Mr. Kowalke argues that his claim is not an election contest because he is seeking *delay* of certification of the election and then certification for a different candidate rather than *recertification* of the election.[29] This obviously places form over substance. Mr. Kowalke is demanding that the Division certify the election for someone other than the winner. There is no substantive difference between Mr. Kowalke's demanded relief and recertification of the election.

The Alaska Supreme Court has soundly rejected prior efforts to re-package election contests into lawsuits for declaratory and injunctive relief.[30] Further, the superior court recently granted the Division's motion to dismiss a pre-election challenge to a candidate's residency qualifications on the grounds that it was a premature election

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27 Opp. Br. at 23-24.

28 *Id.* at 23.

29 *Id.*

30 *See, e.g., Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

contest. As described in the Division's underlying motion for summary judgment, the plaintiffs in that case referred to this case in support of their arguments that their lawsuit was procedurally proper, but the superior court denied their arguments and granted the Division's motion to dismiss.[31]

E. The Court should consider policy in its deciding this novel legal issue.

This Court has already ruled that the Division has a duty to consider eligibility complaints based on the Disloyalty Clause, and the Division accepts that ruling for purposes of this Motion. But this Court must now decide the *scope* of what the Division is required to do in that process, which is a completely novel question of Alaska law. Is the Division required to undertake a boundless investigation unguided by any specific statute or regulation? Or a limited review of its own records and, in the discretion of the Director, public records on file with other state agencies? Mr. Kowalke argues that policy has no place in this decision, but he is wrong. This Court should "adopt the rule of law that is most persuasive in light of precedent, reason and policy."[32] As there is no precedent on this question, this Court should properly consider reason and policy. The Division's numerous policy arguments are persuasive, and Mr. Kowalke entirely fails to rebut them or offer any countervailing considerations.

F. Conclusion

This Court should grant the Division's motion for summary judgment.

DATED December 6, 2022.

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31 Dismissal attached to this brief as Exhibit E.

32 *Kohlhaas v. State*, 518 P.3d 195, 1103-4 (Alaska 2022).

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