

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’  
SUPPLEMENTAL BRIEF**

Pursuant to this Court’s order of September 21, 2022, the Division of Elections and its Director Gail Fenumiai submit this supplemental brief and affidavit regarding “[1] how ranked-choice voting would work if a candidate were to be ‘withdrawn’ after ballots were printed but prior to certification... [2] whether it would be feasible for the Division to delay certifying the results from House District 27 until after a trial in this case without impacting certification of the other results of the general election... [and 3] the requirements for when House District 27’s results would ultimately need to be certified.”<sup>1</sup>

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<sup>1</sup> Order dated September 21, 2022. For the reasons stated in its opposition to the motion for preliminary injunction and at oral argument, the Division maintains that Mr. Kowalke is not entitled to a preliminary injunction.

The attached Supplemental Affidavit of Gail Fenumiai details the steps the Division can take as a practical matter in response to a court order. First, it is important to understand that the act of certification is the execution of an official document after vote tabulation and State Review Board review of a race are complete, and happens separately from those processes.<sup>2</sup> Typically, certification happens immediately after those processes are complete, but there is no practical barrier to delaying it.

Regarding tabulation, the Division can “withdraw” a candidate from the ranked-choice voting tabulation after ballots are printed and voted, such that the final ranked-choice result would be tabulated without that candidate even though the candidate appeared on the ballot.<sup>3</sup> “Withdrawing” the candidate means that votes for that candidate would be eliminated and the voter’s next ranked choice vote would be counted instead.<sup>4</sup> The Division could do this before certifying the results of the race, or even after certification if ordered by a court to re-tabulate and re-certify the race.<sup>5</sup> The Division can also tabulate and certify the final results of all other races on the House District 27 ballot without running ranked-choice tabulation of the race for representative of that District or certifying the results of that race.<sup>6</sup>

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<sup>2</sup> Supplemental Affidavit of Gail Fenumiai at ¶¶ 4, 8. *See also* AS 15.15.440 and .450.

<sup>3</sup> *Id.* at ¶¶ 7-8.

<sup>4</sup> *Id.* a ¶7.

<sup>5</sup> *Id.* at ¶8. Re-certifying a previously certified election is the relief contemplated by AS 15.20.560 as a result of a successful election contest.

<sup>6</sup> Supplemental Affidavit of Gail Fenumiai at ¶ 3, 8.

But the Division cannot tabulate and certify the final results of the other races without counting the first-choice votes for representative of House District 27. First-choice votes for all races are counted at the same time, before the Division determines which races must continue to ranked-choice voting tabulation.<sup>7</sup> The Division can only delay ranked-choice tabulation for Rep. Eastman’s race; it cannot delay counting first-choice votes, which would be counted and reported as “unofficial results.”<sup>8</sup>

Regarding timing, although there are no constitutional or statutory deadlines for certification,<sup>9</sup> the Alaska Legislature will convene for its 33rd session on Tuesday January 17, 2023,<sup>10</sup> when members “who are certified as being elected” will be seated.<sup>11</sup> If a winner is not certified by then, presumably District 27 would lack representation until a winner is certified. The Division understands that this Court chose the December 12 trial week with the intent of resolving the trial and any appeals before January 17, 2023. But all trials—and jury trials in particular—come with inherent potential for

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<sup>7</sup> *Id.* at ¶ 6.

<sup>8</sup> *Id.* at ¶ 8.

<sup>9</sup> AS 15.15.440 and .450 provide that the State Review Board must begin its process as soon as practicable and no later than 16 days following the election. It continues its work until completed, at which point the Director certifies the results. The language seems to allow for the possibility that not all races will be certified simultaneously.

<sup>10</sup> AS 24.05.080.

<sup>11</sup> AS 24.05.160.

delay.<sup>12</sup> Further, the parties and this Court have no control over the appellate schedule, and it is also possible for an appeal to result in a remand for further proceedings.<sup>13</sup> If certification were further stayed pending appeal or further proceedings on remand, District 27 would lack representation in the Alaska House of Representatives until this case is fully resolved.<sup>14</sup> This would not only harm the residents of House District 27, but could potentially delay organization of the House of Representatives.

Another consideration is that deadlines to request recounts and file election contests begin to run on the date of certification.<sup>15</sup> Once a recount or a contest is filed, those processes can take anywhere from a few days to several weeks to complete, depending on whether they result in appeals to the Alaska Supreme Court.<sup>16</sup> A recount or election contest could be filed after late certification that, if successful, could result in changing the outcome of the election and having to seat a new representative for House District 27 if the recount or contest is not resolved before January 17. Any delay in

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<sup>12</sup> Delays in jury trials can occur for legal reasons such as mistrial or lengthy jury deliberations, or for practical reasons such as extreme weather or the spread of illness among the jury panel.

<sup>13</sup> Jury trials in particular may give rise to appeals based on jury instructions, evidentiary rulings, and the like which may result in remand for a new trial if successful.

<sup>14</sup> Alternatively, if certification were not stayed pending appeal and Rep. Eastman wins the election and is seated prior to completion of the appeal or further proceedings on remand, it is not clear whether or how AS 24.40.031 regarding stay of civil cases against sitting legislators could come into play.

<sup>15</sup> See AS 15.20.430; AS 15.20.550.

<sup>16</sup> See AS 15.20.430-.530; AS 15.20.540-.560.

certification should account for the possibility of a recount or election contest before the Legislature convenes.

If this Court were to order the Division to delay certification of the race for representative of House District 27 until after trial, the Division would complete every part of the election process with Rep. Eastman as a candidate and withhold only the final step of certification. Thus, the Division would count first-choice votes and, if no candidate receives more than 50% of the vote, tabulate the ranked-choice result for the House District 27 race with Rep. Eastman in it. The Division would have the result reviewed by the State Review Board and report it as an “unofficial” result pending the outcome of trial. Assuming Rep. Eastman is the winner in the unofficial result,<sup>17</sup> if he prevails at trial the Division would certify the result. If Mr. Kowalke prevails, the Division would re-tabulate the ranked choice result for the race after withdrawing Rep. Eastman so that votes for him are counted for the voter’s next ranked choice. The State Review Board would then promptly reconvene to review the result, and the Division would certify it.<sup>18</sup>

In conclusion, it is possible, as a practical matter, to delay certification of the race for representative of House District 27 until after trial without delaying certification of the other races on the House District 27 ballot. Assuming that the trial occurs as scheduled and final judgment is entered on December 16 or shortly thereafter,

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<sup>17</sup> In the event that Rep. Eastman is not the winner in these unofficial results, that could also change the posture of this case.

<sup>18</sup> Ex. 1 at ¶ 8.

certification could account for the outcome of the trial and occur in advance of the next legislative session. However, delaying certification would leave little room for error or delay in the pretrial and trial schedule and could lead to problems if any appeals or proceedings on remand were not fully resolved by January 17 or if the certified result were subject to a successful recount or election contest.

DATED September 22, 2022.

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