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

LA QUEN NAAY ELIZABETH MEDICINE CROW, AMBER LEE, KEVIN MCGEE, Plaintiffs, v. DIRECTOR CAROL BEECHER, in her official capacity, LT. GOVERNOR NANCY DAHLSTROM, in her official Capacity, and the STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants, DR. ARTHUR MATTHIAS, PHILLIP IZON, AND JAMIE R. DONLEY, Intervenors.	)	Case No. 3AN-24-05615 CI

INTERVENORS'/SPONSORS' TRIAL BRIEF

The Intervenors', sponsors of the 22AKHE initiative petition, Dr. Arthur Matthias, Phillip Izon, and Jamie Donley (hereafter "Sponsors"), hereby provide their trial brief as set forth below.

INTRODUCTION

This case involves the Plaintiffs' challenge to the Lt. Governor's certification of the initiative petition, 22AKHE—an initiative to resume political primary elections and to do away with ranked choice voting—for the general election ballot in November 2024. In 2020 Ballot Measure No. 2, the initiative that revised Alaska's historical long-term election

system by eliminating political party primaries and implementing ranked choice voting, passed by a mere 3,781 votes (the vote count was 174,032 Yes to 170,251 No).[1] Alaska held a general election under the newly adopted system in 2022, and as a result saw a candidate that finished fourth in the June 11, 2022, special primary election (following the death of Congressman Don Young),[2] end up finishing first and winning the November 8, 2022, general election[3] and thereby becoming the first democrat to hold that office in nearly fifty years, and only the third in Alaska's history.[4] Following the November 2022 general election, many Alaskans were dissatisfied with the new election system.

In November 2022, the Sponsors began the initiative application process to return Alaska to its prior historical elections system.[5] After the Lt. Governor approved the initiative application and issued petition booklets, the Sponsors found public support for 22AKHE to be overwhelming. Although the work of collecting necessary signatures was rigorous, it was not difficult for the Sponsors to convince Alaskans to support the

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[1] *See* https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_(2020).

[2] *See* https://ballotpedia.org/United_States_House_of_Representatives_special_election_in_Alaska,_2022_(June_11_top-four_primary).

[3] *See* https://ballotpedia.org/United_States_House_of_Representatives_election_in_Alaska,_2022.

[4] *See* https://reason.com/2022/08/31/alaska-elected-a-democrat-to-congress-for-the-first-time-in-50-years/. The new no-party primary and ranked choice voting system resulted in two republican candidates being on the general election ballot (something that would not have happened under the historical system), and thus splitting the vote so that Mary Peltola went from fourth place to first.

[5] The Sponsors did not seek to repeal the so-called "dark money" or campaign disclosure portions of Ballot Measure No. 2 from 2020.

initiative.[6] Within the allotted one-year period,[7] the Sponsors gathered a total of 41,349 signatures from willing subscribers from all forty (40) of Alaska's House Districts—of those subscriptions the Division qualified 37,043 as having come from registered Alaskan voters who timely and correctly filled out their subscriptions[8]—a margin of 10,338 (qualified subscriptions).

Trying to deprive Alaskans of the opportunity to once again vote on the new election system, Plaintiffs filed this action to knock 22AKHE off the ballot. In the claims that have survived summary judgment thus far, Plaintiffs threw out a morass of salacious allegations. Freely using the word "fraud" and highlighting the imperfect circulating conduct of "a handful of circulators at least … some of the time,"[9] Plaintiffs want the court to reject enough booklets and subscriber signatures to disqualify the initiative from the ballot and thus disenfranchise the qualified Alaskan voters who signed the 22AKHE petition booklets. Plaintiffs have admitted that it is their burden to prove, on a booklet-by-booklet and/or signature-by-signature basis, that 22AKHE should not be qualified for the November 2024 general election ballot. The problem with the Plaintiffs' case, however, is

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[6] The pool of 170,251 voters who opposed the ranked choice voting system in 2020—a number that exceeded the 26,705 signatures required to qualify 22AKHE for the November 2024 general election ballot by 6.3 times—were energized to support the initiative and get it on the ballot so that Alaskans could once again vote over no-party-primary/ranked choice system.

[7] AS 15.45.140.

[8] *See* Stipulation, Ex. 10. As seen from the Division's Coding on Stipulation, Ex. 10, some subscriptions were not counted for technical reasons, because (a) the subscriber failed to provide an address, (b) they had signed more than once, (c) they provided no sign date, (d) they provided no I.D., (e) they signed before they later registered to vote; (f) they printed their name only and gave no signature, or (g) they signed after the petition book had already been certified.

[9] Costa Dep. p. 102.

that they do not have evidence to support their ambitious and frankly outrageous allegations.

I. FACTS

The Sponsors filed a ballot measure application on November 23, 2022.[10] The measure that the Sponsors filed, designated by the State of Alaska, Division of Elections (hereafter "Division") as 22AKHE, is designed to eliminate open primaries and ranked choice voting, thus returning Alaska to the traditional election system it had throughout its statehood prior to the passage of Ballot Measure 2 in 2020—a system that included political party primaries followed by a general election in which each registered voter was allowed to vote once for the single candidate of their choice for each elected office on the ballot.[11]

The Division certified the Sponsors' initiative application on January 20, 2023,[12] and thereafter, issued petition booklets to the Sponsors on February 8, 2023.[13] The deadline for the Sponsors to file their initiative petition was one-year from when the Lt. Governor notified them that petitions were ready for delivery to them[14]—this deadline fell on February 7, 2024.[15] The Sponsors found the public support among Alaskans for 22AKHE to be overwhelming. Between February 8, 2023, and January 11, 2024, the

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10 *See* Stipulation and Proposed Order for Expedited Deadlines and Resolution (hereafter "Stipulation"), § II.1.
11 *See* https://www.elections.alaska.gov/petitions-and-ballot-measures/petition-status/.
12 Stipulation, § II.3.
13 *Id.* at § II.4.
14 AS 15.45.140(a).
15 Stipulation, § II.50.

Sponsors, aided by the efforts of over 700 volunteers[16] and by a contractor, Top Fundraising Solutions ("TFS"), and its handful of paid circulators, for a short period of time during October-November, gathered 41,349 signatures from willing subscribers from all forty (40) of Alaska's House Districts—of these subscriptions the Division qualified 37,043 as having come from registered Alaskan voters who timely and correctly filled out their subscriptions.[17] The required number of subscriptions under AS 15.45.150(a)(1) was only 26,705—the Sponsors exceeded this total by 14,644 (submitted subscriptions) and 10,338 (qualified subscriptions).

Finding a "a handful of circulators"[18] who "at least … some of the time,"[19] did not handle their petition booklets perfectly, Plaintiffs ask the court to reject petition booklets wholesale or worse, the entirety of 22AKHE. What the Plaintiffs have found, however, is nowhere near what is necessary to disqualify 22AKHE from the ballot. After taking nearly fifteen circulators' depositions, the Plaintiffs found booklets that were wither shared between more than one circulator (sometimes between a husband and wife), or left at a

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16 The volunteers in this case were not professional paid circulators, but rather Alaskan citizens who came forward and donated their time and effort to assist in obtaining subscriptions from their fellow Alaskans on 22AKHE petitions. *See* Sponsors' Initial Disclosures (attached hereto), pp. 1-2.

17 *See* Stipulation, Ex. 10. As seen from the Division's Coding on Stipulation, Ex. 10, some subscriptions were not counted for technical reasons, because (a) the subscriber failed to provide an address, (b) they had signed more than once, (c) they provided no sign date, (d) they provided no I.D., (e) they signed before they later registered to vote; (f) they printed their name only and gave no signature, or (g) they signed after the petition book had already been certified.

18 Costa Dep. p. 102.

19 Costa Dep. p. 102.

static location (so that perhaps there was no circulator present when voters signed[20]), that if they were all rejected (which the proof at trial will show is not appropriate), the total signatures eliminated would be a mere 1,404 and statewide and 22AKHE would still qualify in 33 of 40 house districts (three more than necessary).

Realizing that their proof on a booklet-by-booklet basis is inadequate to disqualify 22AKHE, Plaintiffs have banked their entire case on an expert witness, Mr. John Costa. But the problem for Plaintiffs is that Mr. Costa (1) bases much of his analysis on circulating practices that are perfectly legal in Alaska—principally the 3+ simultaneous petition booklet circulation; (2) has no evidence to offer of actual circulator impropriety or fraud; (3) has no qualifications to analyze and challenge voters' or circulators' signatures (and in any event, has no opinions to express to the effect that any voters' or circulator's signatures were forged); (4) is not claiming that voters did not sign the pertinent petition booklets on the large single-day collection dates; and lastly (5) merely wants to recite to the court the content of affidavits and deposition transcripts that he has read—materials that when taken as a whole simply identify the booklets containing the 1,404 signatures[21] that, if rejected, are insufficient to disqualify 22AKHE.

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[20] Although, Plaintiffs do not have an iota of evidence to demonstrates that petition booklets left at a static location were actually signed by qualified voters while unattended—their proof (videos and photographs) simply shows books unattended and not voters placing signatures into the booklets.

[21] Second Amendment and Supplement to Ex. B submitted regarding the Sponsors' cross-motion for summary judgment.

II. LAW

The law has been briefed extensively for the court in the Sponsors' Opposition and Cross-Motion for Summary Judgment (amended) (filed May 10, 2024); the Sponsors' Reply Re: Cross-Motion for Summary Judgment (filed May 24, 2024); Renewed Motion for Summary Judgment (filed June 10, 2024).

Plaintiffs admittedly bear the burden of proof at trial to challenge petition booklet-by-petition booklet and/or voter signature-by-voter signature, and to amass enough booklet and signature disqualifications to make a difference in the signature count on 22AKHE—"Plaintiffs bear the burden of proving by a preponderance of the evidence that particular booklets or signatures are invalid."[22] Even if Plaintiffs' meet this burden as to individual petition booklets, the remedy that Plaintiffs' seek (disqualifying the booklets, eliminating innocent qualified voters' signatures, and thus disenfranchising innocent qualified voters based upon circulator conduct that the voters knew nothing about), is unconstitutional in violation of the First Amendment and Alaska Const, Art. 11. The entirety of this case is to be conducted and decided bearing in mind the Alaska Supreme Court's repeated directive that the initiative statutes and their provisions are to be interpreted and applied—resolving doubts as to technical deficiencies or failures to comply with the exact procedural requirements—so as to accomplish the purpose of letting "the people [be] permitted to vote and express their will on the proposed legislation."[23]

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[22] Plaintiffs' Combined Opposition/Reply to cross-motion for summary judgment, p. 31 (filed May 22, 2024).

[23] *North West Cruiseship Ass'n, Inc. v. State*, 145 P.3d 573, 577-578 (Alaska 2006).

III. EVIDENTIARY ISSUES

The Sponsors will call several witnesses to testify to establish that the overall and predominant circulating practices of the Sponsors and their force of hundreds of volunteer circulators, was innocent, well-intentioned, and consistent with AS 15.45.130.

A. Videos

1. Plaintiffs

Plaintiffs have listed several videos as trial exhibits. The videos must be authenticated to be admitted, and even if authenticated the audio portions of the videos must be excluded as hearsay and double hearsay.[24]

2. Sponsors

The sponsors have a few videos to offer as evidence that demonstrate the large signature collecting events that they held that garnered large single day signature collections.

B. Photographs

1. Plaintiffs

[24] *See* Sponsors' Second Motion in Limine (Videos) (filed June 14, 2024).

Plaintiffs have listed several photographs as trial exhibits. The photographs must be authenticated to be admitted.[25]

2. Sponsors

The Sponsors have a few photographs to offer as evidence that demonstrate the large signature collecting events the Sponsors held that garnered large single day signature collections.

C. Handwriting Opinions

Plaintiffs want to use Mr. Costa to analyze handwriting and signatures on petition booklets, something he has no education, training or experience for so as to qualify him to offer expert opinions in that regard.[26] Mr. Costa should not be permitted to offer expert opinions regarding handwriting or signature analysis or comparisons. Nor do his opinions qualify as lay opinion—he has no familiarity with any of the handwriting or signatures of any of the people he has highlighted and thus cannot claim to compare what he has seen to their actual handwriting and signatures (like the spouse identifies the husband's handwriting because she has seen it numbers of times).[27]

IV. REMEDIES

The Sponsors have extensively briefed the law regarding constitutionally permissible and impermissible remedies. *See* Sponsors' Opposition and Cross-Motion for Summary Judgment (filed May 10, 2024); Sponsors' Reply Re: Cross-Motion for

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25 *See* Sponsors' Second Motion in Limine (Videos) (filed June 14, 2024).
26 Costa Dep. pp. 15, 18, 26, 27-28.
27 *See*, *e.g.*, *United States v. Hines*, 55 F. Supp.2d 62, 70 (D. Mass. 1999).

Summary Judgment (filed May 24, 2024); and Renewed Motion for Summary Judgment (filed June 10, 2024).

V. PLAINTIFFS' EXPERT MR. COSTS HAS OFFERED NO OPINIONS OF CONSEQUENCE

In his expert witness report ("Report"), Plaintiffs' expert witness Mr. Costa did not identify evidence of, nor offer opinions to the effect that there were in fact, improprieties or fraud in the 22AKHE signature gathering campaign—nor did he opine that he had seen actual evidence of such.[28] Mr. Costa testified in his deposition as follows:

> "Q. Okay. And again, in the nature of eQual's business, what you're doing is you're looking for these kinds of indicators that stick out to you so you can bring them to the attention of the sponsors and say, here's something you should look into?
>
> A. That's exactly right.
>
> Q. You don't draw conclusions to say, we are convinced that there was a forgery; you simply point it out to the sponsors and say, you should look into it, you make up your mind?
>
> A. That's -- that is usually how it goes, yes.
>
> Q. And that's what you did in this case, too, right?
>
> A. That's right. I mean, I think I tried to be as clear as possible in my report that, you know, we're providing analysis that is looking at patterns, you know, ultimately based on numbers and flagging these things as potentially suspicious, and, you know, I think in the ordinary course of our work this is the kind of thing that would be brought to the attention of the sponsor, yes.
>
> Q. Sure. Because you guys at eQual, you're not forensic investigators who go out and find evidence of fraud or impropriety; you look on the face of the

[28] Costa Dep. pp. 34-35. Mr. Costa's deposition transcript was recently filed with the Sponsors' supplemental filing regarding summary judgment.

> petition booklets to find indications that there are things that should be looked into or investigated, right?
>
> A. That's right.
>
> Q. So at the end of performing one of your contracts for one of your clients, you're not going to go to your client and say, we found evidence of fraud, here it is; you're going to say, here are things that create flags for us, you should look into it, right?
>
> A. Yes.[29]

Plaintiffs contacted Mr. Costa around April 1, 2024,[30] retained him on April 19, 2024,[31] provided him the 641 22AHE petition booklets shortly thereafter,[32] and asked him to review those booklets and provide opinions based upon that review alone.[33] Mr. Costa

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29 *Id*.

30 Costa Dep. p. 29.

31 Costa Dep. p. 8 ("Q. The contract that you signed with Mr. Kendall is dated April 19, 2024; is that correct? A. That sounds right."), pp. 29,

32 Costa Dep. p. 52.

33 Costa Dep. p. 10-12 ("Q. Okay. Thank you. So you were contacted to try to provide, I think I heard you say, the standard sort of service that eQual provides? A. In terms of analyzing signatures, yes, and their validity…. Q. Okay. So the business of eQual, as I understand it -- you correct me if I'm wrong – is that you guys typically come in to assist sponsors of initiatives around the country to provide quality control service to them so that they can get an assessment of how likely their initiative package is to succeed once it's submitted to the appropriate state's authority, the Secretary of State or, in Alaska, the Lieutenant Governor, correct? A. That's correct. Q. And then as part of this quality control service, what you all do is you review the -- I don't know what they're called in other states, but in Alaska they're called petition booklets with the signatures? A. That's right…. Q. … So you told me what Mr. Kendall asked you, he wanted you to do. What did you agree to do? A. We agreed to analyze all of the signatures that had been submitted by the proponents to the State and to specifically look for issues that seem like they may be, number one, in conflict with the State's judgments of how -- you know, approval of those signatures. So essentially catching things -- you know, the State obviously did a very thorough review job, but, you know, essentially making sure that nothing can slip through the cracks and that there weren't any outstanding validity issues that should be considered; and secondly, to evaluate the activity of circulation of the petition to see if there were any patterns that appear to be suspicious."); *see also* Costa Dep. p. 35 ("Q. Sure. Because you guys at eQual, you're not forensic investigators who go out and find evidence of fraud or impropriety; you look on the face of the petition booklets to find indications that there are things that should be looked into or investigated, right? A. That's right.").

then completed his review of the petition booklets and provided a report on June 3, 2024, that contains his opinions based upon having reviewed nothing other than the 641 22AKHE petition booklets.[34]

Mr. Costa and his company did no investigation for circulating improprieties or fraud related to 22AKHE beyond or behind the petition booklets:

> Q. …. But the scope of your work was to review the face of the petition books, whatever number they were?
>
> A. That's right.
>
> Q. Okay. You weren't hired to go out and investigate otherwise beyond the petition books to look for evidence of impropriety or fraud, were you?
>
> A. No. The scope of our analysis was entirely contained to the petition books, the data surrounding state's judgment of petition signatures, and our own analysis of the facial information contained within the petition books.
>
> Q. And you didn't actually purport to go and do any investigation outside the face of the petition books, did you?
>
> A. No.[35]

Mr. Costa formed no opinions about whether the 3+ petition booklet circulation practices that he observed (from the face of the booklets—meaning a circulator having 3 or more booklets circulating at any given time), is evidence of impropriety or fraud. He

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[34] Costa Dep. p. 102. ("Q. So what I hear you saying to me is that you received petition booklets back in April or so, you reviewed those, you formulated opinions, you wrote a report, provided it on June 3rd of 2024, and then two days ago the plaintiffs gave you additional material and now your opinion has changed? A. I think my opinion has become – has evolved….").

[35] Costa Dep. p. 40.

acknowledged there could be perfectly innocent explanations for the practice of circulating 3+ booklets at a time, a practice that is not prohibited by Alaska law:

> Q. Would you agree with me that there can be perfectly innocent explanations for why a circulator might have three or more petition booklets active in any given sets of date?
>
> A. I think that there can be. Yes, I do agree.
>
> Q. So like if a circulator just is an ambitious person and thinks they're going to go collect lots and lots of signatures and so they take, let's say, five blank books and they put them in their backpack and they -- as they encounter people, they reach in their backpack, pull out a book and collect signatures, and then when they get the signatures, they put it back in their backpack, and as they encounter more people, they're just not careful to grab one they haven't already put signatures in and they start another one, and they're all their books, they're not somebody else's books, they're not sharing them with anybody else, is there anything wrong with that?
>
> A. There's nothing specifically wrong with what you just described….
>
> Q. …. There's nothing about what I described to you and asked you to assume in terms of a circulator, the one with the books in her backpack, there's nothing about what she's doing that is actually an impropriety in terms of how she's collecting signatures, right?
>
> A. If she's doing exactly what you described in fact?
>
> Q. Right.
>
> A. No. Sure.
>
> Q. Nothing fraudulent about it?
>
> A. Doesn't seem like it.
>
> Q. Okay. What if you had a member of the grassroots campaign, a volunteer, a citizen volunteer, who is delivering blank booklets to different locations so people will have a supply so they can use them to collect signatures, and as she's delivering those booklets, she encounters an opportunity to collect signatures and she doesn't want to pass up the

opportunity to get those signatures, so she takes one of the blank books out of the books she's delivering and collects those signatures and then assigns that book to herself and it becomes another one of her books, anything wrong with that?

A. Specifically I don't think there – sounds like there's nothing wrong with that, no.

Q. There's no impropriety there, is there?

A. No.

Q. No fraud?

A. It doesn't sound like it.

Q. Okay. What if you have a circulator who has a number of -- again, ambitious circulator thinks, I'm going to fill a whole bunch of books and so they take a number of books and then they use individual ones of their books when they go to certain locations.· Like this is my book that I use when I'm at church, this is the one I use when I go to REI.· This is the one I use when I go to this location, the Alaska Club or whatever, because I think people that are there think a certain way and they might see names they recognize and they might be more inclined to sign, so that's my reasoning and I think, you know what, I'm going to take a different book to these different locations.· Any impropriety?

A. I don't believe there's any impropriety with that behavior, but the behavior sounds incredible to me.

Q. Really? Any fraud?

A. What's that?

Q. Any fraud involved?

A. If that was actually happening, then I don't think there's anything specifically fraudulent about that, no.[36]

….

[36] Costa Dep. pp. 61-63.

Q. Okay. That's fair. Let me ask you a better question then.

You didn't draw a conclusion that the three-plus booklet circulation somehow is proof that there was impropriety?

A. First of all, I didn't conclude anything specifically about the three-plus booklets….[37]

And with respect to the instances of signatures collected in booklets after the dates of self-certification (Mr. William Quantick being the principal example), he had no opinions that there had been fraud:

Q. You're not expressing an opinion that accuses Mr. Quantick of trying to defraud the Division of Elections, are you?

A. I would like to clarify once again that the extent of my opinion in this report is surrounding activity that, based on the data I had available to me at the time, suggests reason to be suspicious. Nowhere in my report have I accused anybody specifically of fraudulent activity.

Q. Okay. Because you couldn't point to any evidence that you would say, that's evidence of fraud, could you?

A. I think it is evidence as suspicion.[38]

With respect to his observations that a few circulators had large signature gathering days, he testified that he is not claiming the voters did not sign the booklets in which their names appear or that signatures were forged:

Q. Do you believe the voters on those booklets on those large collection of signature days did not sign their names?

A. No, I never said that.

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37 Costa Dep. pp. 66-67.

38 Costa Dep. p. 94.

> Q. Do you have any evidence that the voters' signatures were forged on those days?
>
> A. No. No.[39]

Further, with respect to Plaintiffs' allegations that there are instances where the Sponsors' may have perhaps exercised less care than they might have in supervising their hundreds of volunteer citizen circulating force, Mr. Costa admitted that it is difficult to manage a gross roots circulating force, and that a lack of care in supervision is different than intentional impropriety or fraud:

> Q. Sure. Would you agree with me that it's a difficult task to manage the field force of circulators in a grassroots signature-gathering initiative effort?
>
> A. I would.
>
> Q. And why is that?
>
> A. There are a lot of logistical considerations that need to be kept in clear focus, you know, from the items that you just mentioned, you know, everything from the management of petition booklets to, you know, events, to their turn-in, to, you know, getting them back in boxes to turn in to the State.
>
> Q. And another thing that makes that effort of sort of managing the grassroots circulating effort difficult is that you're dealing with circulators who are inexperienced?
>
> A. I think that is true….
>
> Q. Sure. Would you agree with me that the degree to which you've trained your circulating force and whether you've done a good enough job to train this force of citizen volunteers to go out and do what they're supposed to do when they're collecting signatures and whether you've maybe not done quite as good of a job as you should have been, that's a whole lot different than saying that the leadership of a campaign were deliberately trying to defraud someone or

[39] Costa Dep. p. 78.

deliberately collect signatures incorrectly, isn't it? Those are two entirely different things?

A. I would agree with that.[40]

Plaintiffs' recent attempt to alter Mr. Costa's opinions does not change anything in regard to the Sponsors' plan with respect to an expert witness—the only thing Mr. Costa is purporting to do with the new material is to recite what he has read or seen (things that are already in evidence). Despite Plaintiffs' having possessed affidavits, videos, and photographs regarding shared or unattended petition booklets since April 2024,[41] Plaintiffs waited until June 11, 2024, to provide the materials to Mr. Costa,[42] which was eight days after June 3, 2024, when (1) Mr. Costa completed his report; (2) the report was filed with the court, together with Plaintiffs' Notice of Categories, in an attempt to stave off summary judgment; and (3) the report was disclosed to the Sponsors. Moreover, in addition to the affidavits, videos and photographs, between May 20-31, 2024, Plaintiffs had taken a total of fourteen depositions, the transcripts of which they also did not provide to Mr. Costa until June 11, 2024.[43]

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40 Costa Dep. pp. 44-45.

41 The Sponsors filed the material with their cross-motion for summary judgment on May 10, 2024. *See* Sponsors' Cross-Motion for Summary Judgment, pp. 24-25 and n. 65 (The booklets were identified in Plaintiffs' Initial Disclosures, First and Second Interrogatory Answers, and the Affidavits of Derek Aplin; Alexander Susky; Angela Chiapetta; Alec "Allison" Dill; Marcie Wilson; Brooke Reinsch; Valerie Kenny; and Gregory Lee (all but one dated in April, and the last dated in May), and related videos, and photographs).

42 Costa Dep. p. 70 ("Q. This is information that was given to you on June 11th, two days ago? A. That's correct. Q. Nothing -- none of that material was given to you or reviewed by you before you wrote your report and submitted it, right? A. A hundred percent true."); *see also* Ex. F.

43 Costa Dep. pp. ("A. …. the presentation of additional evidence that was given to me a couple of days ago…."); *See also* Ex. F.

After receiving the belated material, Mr. Costa then changed his opinions (or as he put it, his opinions "evolved").[44] Mr. Costa now relates that he has seen things in the affidavits, videos, photographs, and deposition transcripts he was belatedly given on June 11, 2024—essentially just reciting what the affidavits and depositions say (with those materials identifying petition booklets that, as the Sponsors have argued in their cross-motion, do not contain enough signatures to alter the count sufficiently to disqualify 22AKHE from the November 2024 ballot). In any event, what Mr. Costa is attempting to do now is not to offer expert opinion, but instead to simply recite the content of ultimately inconsequential affidavits and deposition testimony—trying to wrap them in the aura of expert opinion, and hopefully camouflage Plaintiffs' inadequate proof and unsupported case.

The court does not need Mr. Costa to read the affidavits and deposition transcripts or describe the photographs or videos. The court can read and review the material by itself (the affidavits are part of the summary judgment record), and then decide that Plaintiffs' proof is not sufficient to disqualify 22AKHE from the ballot. For expert opinion to be admissible, it must offer help or assistance to the trier of fact. Expert testimony can be helpful to the trier of fact even if the trier of fact is capable of resolving the relevant issue on its own (like this court), but the testimony must advance the trier of fact's understanding to some degree.[45] Mr. Costa's mere reciting of affidavits and deposition testimony that the

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[44] Costa Dep. p. 102.

[45] See *Barton v. North Slope Bor. Sch. Dist.*, 268 P.3d 346, 350-51 and nn. 8-9 (Alaska 2012) (citing *INA Life Ins. Co. v. Brundin*, 533 P.2d 236, 243 (Alaska 1975); *Getchell v. Lodge*, 65 P.3d

court can read for itself is not helpful and does not advance the court's understanding. Moreover, "Civil Rule 37 'affords trial courts broad power to enforce discovery orders by the use of sanctions,' including orders 'prohibiting [a] party from introducing designated matters in evidence.'" *See* Plaintiffs' Motion in Limine (Tr. Ex. 3008), p. 6 and nn. 26, 27.

With respect to Mr. Izon or Ms. Mikaela Emswiler, they are perfectly entitled to testify to their understanding of circulating requirements as they participated in and led parts of the 22AKHE signature gathering campaign. Nothing about the Sponsors' offering of Mr. Izon's and/or Ms. Emswiler's understandings—establishing their innocent and non-fraudulent states of mind—constitutes the offering of expert opinions. In any event, at this point in time it is completely unknown what types or areas of lay opinion might be called for at trial. A motion in limine at this point is completely premature.

CONCLUSION

For all the above reasons, and based upon evidence presented at trial (if necessary), Plaintiffs will ask that the court uphold the peoples' right to enact the bill contained within 22AKHE by initiative under Alaska Const., Art. 11.

50, 56 (Alaska 2003) ("To be admissible[,] expert opinion testimony must be helpful to the jury."); *Osborne v. Hurst*, 947 P.2d 1356, 1362 (Alaska 1997) ("[t]he true criterion [for determining whether a person qualifies as an expert witness] is whether the jury can receive appreciable help from this particular person on this particular subject") (quoting *Crawford v. Rogers*, 406 P.2d 189, 192 (Alaska 1965)); *Barrett v. Era Aviation, Inc.*, 996 P.2d 101, 103 (Alaska 2000) (quoting *Ferrell v. Baxter*, 484 P.2d 250, 267 (Alaska 1971)).

Dated this 17th day of June 2024.

Law Offices of Kevin G. Clarkson, LLC

By *Kevin Clarkson*

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I certify that on June 17, 2024,
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