

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

LA QUEN NÁAY ELIZABETH  
MEDICINE CROW, AMBER LEE, and  
KEVIN MCGEE,

Plaintiffs,

vs.

DIRECTOR CAROL BEECHER, in her  
official capacity, LT. GOVERNOR  
NANCY DAHLSTROM, in her official  
capacity, and the STATE OF ALASKA,  
DIVISION OF ELECTIONS,

Defendants,

vs.

DR. ARTHUR MATHIAS, PHILLIP  
IZON, and JAMIE R. DONLEY,

Intervenors.

**PLAINTIFFS' SUPPLEMENTAL  
RESPONSE TO INTERVENORS'  
MOTION TO CONVERT**

Case No.: 3AN-24-05615CI

**I. INTRODUCTION**

Intervenors' invocation of the First Amendment in support of their Motion to Convert is untimely, nonsensical, and without support.<sup>1</sup> This Court should discard this argument and proceed — as many superior courts have in the past — to weigh the evidence in this case and make decisions based upon that evidence.

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<sup>1</sup> See generally Intervenors/Sponsors' Reply Regarding Motion to Convert the Case into an Administrative Appeal (May 20, 2024) [hereinafter Intervenors' Reply].

In reality, the voters with the constitutional right to sign an initiative petition have already consummated that right by signing a 22AKHE petition booklet. No one — not the State Defendants, nor the Plaintiffs — have interfered with that right. Accordingly, there can be no First Amendment right implicated at this stage. Moreover, those voters’ exercise of that right does not immunize Intervenors’ entire signature petition operation from *any* scrutiny, especially when credible allegations of fraud and the mishandling of signatures have been raised.

Intervenors’ eleventh-hour attempt to shield their faulty petition campaign from *any* form of scrutiny — by Plaintiffs, Defendants, or anyone — cannot succeed because it directly conflicts with binding Alaska Supreme Court precedent. This Court should reject Intervenors’ First Amendment arguments, and DENY their motion to convert.<sup>2</sup>

## II. DISCUSSION

### A. Petitioning For A Ballot Measure Or Constitutional Amendment Is Protected Political Speech, But That Does Not Prevent The Activity From Being Regulated To Prevent Fraud Or Mistakes.

Intervenors primarily rely on the United States Supreme Court case *Meyer v. Grant* to argue that this Court lacks any ability or discretion to *even consider* evidence and allegations related to defective signatures and unlawful circulator methods.<sup>3</sup> Intervenors’ reliance is woefully misplaced. The facts in *Meyer* are easily distinguishable, and as

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<sup>2</sup> Plaintiffs have provided this supplemental response pursuant to this Court’s order. *See* Order Regarding Briefing and Expedited Consideration of Intervenors’ Motion to Convert and Plaintiffs’ Motion to Compel at 2 (May 23, 2024).

<sup>3</sup> *See generally* 486 U.S. 414 (1988).

described later herein, the Alaska Supreme Court has frequently approved of superior courts considering those rights, making factual findings, and balancing those rights against violations of the law.<sup>4</sup>

In *Meyer*, the U.S. Supreme Court was faced with a challenge to Colorado’s *outright ban* on paying petition circulators.<sup>5</sup> Colorado residents are allowed to propose ballot measures and amendments to their state constitution, but one section of state law made it *a felony* to pay petition circulators *any* amount of money.<sup>6</sup>

Accordingly, the *Meyer* case involved: (1) a State action that, essentially; (2) made the qualification of ballot measures and constitutional amendments all but impossible. *That* is what the U.S. Supreme Court found violated the First Amendment in *Meyer*, because the State law violated the rights of potential sponsors. But critically, the *Meyer* Court *itself* acknowledged the important and legitimate interest that the government has in ensuring the authenticity of petition signatures and preventing fraud.<sup>7</sup> That interest is precisely what Plaintiffs’ challenge in this case seeks to investigate and uphold.

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<sup>4</sup> See *infra* Section II.C and accompanying text.

<sup>5</sup> See *Meyer*, 486 U.S. at 415.

<sup>6</sup> See *id.*; see also former Colorado Rev. Statute 1-40-110 (1980) (“Any person, corporation, or association of persons who directly or indirectly pays to or received from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-104, C.R.S. (1973).)”

<sup>7</sup> See *Meyer*, 486 U.S. at 426 (holding that the State’s recognized interest in protecting the integrity of the initiative process and preventing fraud does not justify the

*Meyer* makes it clear that the criminalization of all paid signature gathering was a State action that significantly impeded the ability of sponsors to qualify a ballot measure, and the State of Colorado was unable to articulate any state interest justifying that burden. But that burden is not at issue here. The factual portion of this case concerns whether certain signatures are valid, and whether signatures were gathered in a manner that complied with the minimal certification requirements mandated by Alaska law.<sup>8</sup> Plaintiffs’ inquiry is not a burden; it is a necessary part of Alaska’s overarching scheme related to ballot measures, recalls, and referenda.<sup>9</sup> To find that no inquiry into the validity of a petition is allowed would render *all* of these signature validity and petition handling statutes utterly meaningless.

**B. Petition Signers’ Constitutional Rights Are A Factor To Be Balanced Against The Scope Of The Remedy For Violations, But Do Not Block Any Review Whatsoever Of Whether Violations Actually Occurred.**

Intervenors’ argument would necessarily require this Court to conclude that — no matter how serious or irregular a violation was committed by a petition circulator —

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ban on paying circulators because “[n]o evidence has been offered to support the speculation that [a paid circulator might be tempted to disregard their duty to verify the authenticity of signatures on a petition], and we are not prepared to assume that a professional circulator – whose qualifications for future assignments may well depend on a reputation for competence and integrity – is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot”).

<sup>8</sup> See Plaintiffs’ Motion for Summary Judgment at 2 (Apr. 24, 2024); see also AS 15.45.130.

<sup>9</sup> See generally AS 15.45. et seq.

courts must nevertheless count the signature of every voter who signed an otherwise defective petition. This is clearly not the law in Alaska, nor anywhere else. In prior cases, the Alaska Supreme Court has already acknowledged the constitutional right to pursue legislation by initiative, and has balanced that right against laws regulating the process.<sup>10</sup>

For example, in *Northwest Cruiseship Association of Alaska, Inc. v. State*, the Alaska Supreme Court upheld the Division’s decision to invalidate petition signatures based on a failure to include a then-required disclaimer on each page of each petition booklet stating that the circulator was being paid, and by who.<sup>11</sup> To be clear, unlike the Plaintiffs’ case here, there was no risk or allegation in *N.W. Cruiseship* that these signatures were in any way invalid or not certified; the issue there was simply that subscribers had not been presented with a legally-required disclaimer at the time they signed.

In *N.W. Cruiseship*, although the individual signers were not responsible for the failure to include the legally-required disclaimers, all of the signatures that were directly impacted by the violation were nevertheless discarded.<sup>12</sup> This holding alone eviscerates the Intervenors’ argument. Because it shows that the Alaska Supreme Court upheld the way the Division “balanced” the signers’ constitutional rights against the legal

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<sup>10</sup> See generally *N.W. Cruiseship Ass’n of Alaska, Inc. v. State*, 145 P.3d 573 (Alaska 2006).

<sup>11</sup> See *id.* at 578.

<sup>12</sup> See *id.*

requirements for ballot measures, by only disqualifying signatures on pages where the paid-for-by disclaimer was missing.<sup>13</sup> Stated differently, the *N.W. Cruiseship* Court confirmed that enforcing the legal requirements for circulators that are articulated in AS 15.45.130 do not violate the constitution.

**C. Alaska Superior Courts Routinely Consider Evidence In Proceedings Impacting Constitutional Rights Exercised Regarding Elections, And That Practice Has Been Upheld By The Alaska Supreme Court.**

Intervenors appear to argue that this Court is *completely prohibited* from engaging in any factual inquiry regarding the authenticity of signatures or the validity of petition booklets.<sup>14</sup> This is not the case. Just because constitutional rights are exercised does *not* mean that there can be no subsequent inquiry regarding whether that right was exercised *within the bounds of the law*.<sup>15</sup> In fact, the Alaska Constitution itself acknowledges that even the fundamental right to free speech can result in negative legal consequences.<sup>16</sup>

Plaintiffs agree that the Intervenors had the constitutional right to pursue their petition, and that individual voters had their own constitutional rights to sign the petition.

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<sup>13</sup> See *id.*

<sup>14</sup> See generally Intervenors' Reply.

<sup>15</sup> Intervenors suggest that any purported exercise of the First Amendment would absolutely immunize a person from any legal process or repercussions related to those actions. Were that true, the torts of libel and slander would not even exist, but they do. See *e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964). Additionally, certain types of speech (like "incitement" or "obscenity") are not protected. See *e.g.*, *Brandenburg v. Ohio* 395 U.S. 444 (1969); *Miller v. California*, 413 U.S. 15 (1973).

<sup>16</sup> See Alaska Const. Art. I, § 5 ("Freedom of Speech: Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." (emphasis added)).

But the exercise of those rights does not somehow block the ability to investigate whether their rights were exercised lawfully. The petition still needed to be circulated properly, and there must be sufficient safeguards to confirm that individual voters' signatures are authentic and certified in accordance with the law.<sup>17</sup>

Intervenors' argument fails because Alaska courts have held evidentiary proceedings or bench trials on election-related issues impacting fundamental constitutional rights many times in the past. Those prior proceedings have included whether: (1) ballot measure signatures were gathered lawfully;<sup>18</sup> (2) individual voters' ballots should count in a disputed primary election;<sup>19</sup> (3) an individual was a qualified

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<sup>17</sup> See AS 15.45.130.

<sup>18</sup> See *N.W. Cruiseship Ass'n of Alaska*, 145 P.3d at 576 (adopting and citing with approval the superior court's factual findings and conclusions of law in upholding summary judgment). The exact process followed by the superior court in that case, and approved by the Alaska Supreme Court, would be prohibited under the Intervenors' interpretation of AS 15.45.240.

<sup>19</sup> See *Nageak v. Mallott*, 426 P.3d 930, 940 & 941 n.25 (Alaska 2018) (holding that, even though individual voters had no intention to break the law, that the superior court can "look past the ballot" and consider outside facts to determine whether individual ballots were properly counted; the Court reached this decision despite acknowledging that "[t]he right of the citizen to cast his ballot and thus participate in the selection of those who control his government is one of the fundamental prerogatives of citizenship").

candidate for office;<sup>20</sup> and (4) individuals were qualified residents for purposes of voting in local elections.<sup>21</sup>

All of these cases involved factual inquiries regarding the exercise of fundamental rights, and in every one those factual inquiries were upheld by the Alaska Supreme Court. The First Amendment does not prohibit courts from considering whether a constitutional right was lawfully exercised.

**D. The Potential Disqualification Of Petition Signatures Does Not Violate “Exacting Scrutiny.”**

There is an entire statutory framework dedicated to ensuring that petitions in support of referenda, recalls, and ballot measures are conducted in an orderly, timely, and legitimate fashion.<sup>22</sup> In this case, Plaintiffs will present evidence that numerous 22AKHE petition booklets were circulated in violation of statutory requirements, and that certain circulators falsely certified that they complied with those requirements.<sup>23</sup> If certifications

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<sup>20</sup> See *Vazquez v. State*, 544 P.3d 1178, 1192-93 (Alaska 2024) (upholding the superior court’s “factual findings, supported by the record” — following a bench trial on disputed facts — that an individual met the residency requirements of article II, section 2 of the Alaska Constitution). Although the *Vazquez* decision has limited precedential value on the issue of Alaska’s residency test, there was no implication by any of the three justices that the superior court’s bench trial was improper. In fact, even the dissenting justice acknowledged “the deference we accord to the superior court’s findings of fact.” See *id.* at 1193 (Carney, J. dissenting) (citation omitted).

<sup>21</sup> See *Lake & Peninsula Borough Assembly v. Oberlatz*, 329 P.3d 214, 222-23 (Alaska 2014) (acknowledging the outcome of a bench trial regarding the residency of five individual voters, and upholding the outcome based on the “particular deference” due to credibility findings).

<sup>22</sup> See AS 15.45. et seq.

<sup>23</sup> See AS 15.45.130(1)-(8).



on petition booklets are proven to be false,<sup>24</sup> the Division is prohibited from counting any signatures within them.<sup>25</sup>

Although ballot measure activities represent a core political speech activity, that right is not without limit or regulation. Limitations on ballot measure activity must satisfy “exacting scrutiny.”<sup>26</sup> In order to satisfy exacting scrutiny, the State must demonstrate a sufficiently important interest and employ a means “narrowly tailored” to serve that interest.<sup>27</sup>

Here, the statutory requirements of having booklets circulated by a single circulator, and that all signatures must be obtained in that circulator’s actual presence, are directly related to the State’s recognized “compelling interest in ‘ensuring the integrity of

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<sup>24</sup> In *Resource Development Council, Inc. v. Vote Yes for Alaska’s Fair Share*, the Alaska Supreme Court upheld petitions that were certified despite non-compliance with a statutory \$1 per signature limit on paid signature gathering. See 494 P.3d 541, 551 (Alaska 2021). But that decision is distinguishable here, because the \$1-per-signature limit was challenged and found to have been *sui generis* unconstitutional. Our Supreme Court determined that the Division could “certify petitions that did not comply with an unconstitutional requirement.” *Id.* at 554 (emphasis added). The key distinction is that, in this case, there has been no finding (and no argument raised) that the requirements that a single circulator must carry a petition, or that this single circulator must personally witness every signature in a petition booklet, is unconstitutional. Indeed, the Supreme Court’s discussion about the State’s “compelling interest” in “preventing fraud” indicates that those requirements would indeed be upheld. *Id.* at 553.

<sup>25</sup> See *id.* (stating, in relevant part, that “the lieutenant governor may not count subscriptions on petitions not properly certified”).

<sup>26</sup> See *id.* at 551.

<sup>27</sup> See *id.*

the election process and preventing fraud.”<sup>28</sup> In order to have some assurance that signatures are genuine and not fraudulent, the State’s requirement that an individual circulator swear that all signatures were made in their actual presence is a narrowly tailored and rational requirement.<sup>29</sup>

Intervenors nevertheless argue that there can be *no* investigation by this Court into whether circulators broke the law and fraudulently certified petitions.<sup>30</sup> But this cannot be the case. Courts have necessarily made factual determinations prior to applying the statutory requirements to circulator behavior.<sup>31</sup> And the Alaska Supreme Court has previously upheld the disqualification of signatures based on circulators’ violation of AS 15.45.130 by not including a paid-for-by disclaimer on a signature page.<sup>32</sup> The lack of a disclaimer is a much more minor issue than the issues raised by the facts in this case, which involve false certifications that undermine the very validity of the petition booklets. It is only once those facts are determined that this Court can apply the law to determine which signatures are disqualified by Intervenors’ circulators’ unlawful activities.

Finally, it is important to note that Intervenors do not actually challenge the constitutionality of the statutory requirements that signatures be made in the “actual

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<sup>28</sup> See *id.* at 553 (quotation omitted).

<sup>29</sup> See AS 15.45.130.

<sup>30</sup> See *generally* Intervenors’ Reply.

<sup>31</sup> See *generally* *N.W. Cruiseship Ass’n of Alaska*, 145 P.3d 573.

<sup>32</sup> See *id.* at 588 (upholding the Division’s decision to reject signatures on all pages “that did not include the identity of the payor of the circulators”).

presence” of a circulator, or that petition booklets cannot be shared among multiple individuals.<sup>33</sup> Indeed, they would have no basis to do so; these requirements are closely related to preventing fraud serve the State’s “compelling interest,”<sup>34</sup> and the Alaska Supreme Court has confirmed that “[a] circulator must be physically present when the signer signs the petition booklet.”<sup>35</sup> And because Intervenors do not challenge the validity of those requirements, they cannot object to this Court determining whether violations of those statutory requirements actually occurred.<sup>36</sup>

The requirements that signatures must be made in a circulator’s presence, and that only one circulator may certify each petition booklet, are closely tailored requirements serving the State’s compelling interest of preventing fraud and conducting orderly elections. Exacting scrutiny is therefore easily satisfied. And the only way that these requirements have any meaning is for this Court to consider evidence related to potential violations and determine which petition booklets, if any, are invalid because of a failure to follow those statutory requirements.

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<sup>33</sup> See AS 15.45.130(2)-(3).

<sup>34</sup> See *Res. Dev. Council*, 494 P.3d at 553 (citations omitted).

<sup>35</sup> See *N.W. Cruiseship Ass’n of Alaska*, 145 P.3d at 588 (citing AS 15.45.130(3)).

<sup>36</sup> Interestingly, under the Intervenors interpretation of the law they themselves violated hundreds of petition signers’ rights by failing to turn in twenty-four (24) 22AKHE petition booklets, and by failing to return an additional two petition booklets that they had retrieved to “cure” them.

The Alaska Supreme Court’s approval of the disqualification of signatures in *N.W. Cruiseship* for lack of a disclaimer (following the superior court’s factual findings regarding that violation) dictates the outcome here.<sup>37</sup> This Court must review the evidence and make its own factual determinations in light of the statutory requirements applicable to petition circulation.

### III. CONCLUSION

As this Court has indicated, it may soon be faced with evidence of fraudulent and unlawful petition activity, as well as facially defective signatures. At that time, it may be tasked with balancing such defects with the constitutional rights of the signers of those petition booklets. But as the Alaska Supreme Court held in *N.W. Cruiseship*, the enforcement of valid statutes governing the signature petition process can be employed to disqualify signatures, even when the defects are not necessarily the fault of the individual signer.<sup>38</sup>

This Court should reject Intervenors’ First Amendment argument outright, and DENY Intervenors’ motion to convert.

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<sup>37</sup> See *N.W. Cruiseship Ass’n of Alaska*, 145 P.3d at 588.

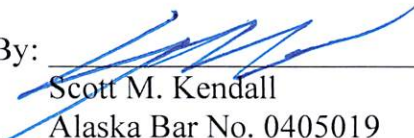
<sup>38</sup> See *id.*

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DATED this 24<sup>th</sup> day of May, 2024.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via email on May 24, 2024, on the following:

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