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

ALASKA DEMOCRATIC PARTY and ANITA THORNE, Plaintiffs, v. CAROL BEECHER, in her official capacity as DIRECTOR OF THE DIVISION OF ELECTIONS and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	)	Case No. 3AN-24-08665CI

OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The defendants, Director Carol Beecher and the Division of Elections, oppose the plaintiffs' emergency motion for a temporary restraining order and preliminary injunction filed Wednesday afternoon. Plaintiffs seek an order directing the Division to remove Eric Hafner from the general election ballot. Those ballots have been finalized and sent to the printer. They include Mr. Hafner among the four candidates for the U.S. House of Representatives because two candidates who received more votes than he did in the primary withdrew.

The plaintiffs' motion does not seek to temporarily restrain or preliminarily enjoin anything. What they seek is an immediate ruling on the merits, permanently removing Mr. Hafner from the ballot. The Division—and the public—would suffer certain irreparable harm if this Court ordered him removed; the Division would have to

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stop printing ballots and print new ones, causing it to miss state and federal deadlines and jeopardizing the success of the entire general election.

Moreover, the plaintiffs have not shown they are likely to succeed on the merits. Their complaint is in reality an election contest challenging the primary election results. But it does not comply with state law and should be dismissed for that reason. And each of the plaintiffs' claims fail. Mr. Hafner filed a complete declaration of candidacy. He is qualified to *run* for Congress, even if he might not become eligible to *serve* in that office, because he must be an "inhabitant" of Alaska "when elected," not when placed on the ballot. The Division cannot disqualify a candidate now based on the likelihood, however strong, that he may not become qualified to serve by Election Day.

The plaintiffs' statutory argument about the withdrawal statute, AS 15.25.100(c), also fails. That statute is best read to require successive replacement of withdrawn candidates, so that in the event of withdrawals, four remaining candidates advance to the general election wherever possible.

The Court should deny the plaintiffs' motion for a mandatory injunction because the harm to the Division and the public far outweighs any possible harm to the plaintiffs, who cannot succeed on the merits of their claims.

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I. Background

Mr. Hafner filed a complete declaration of candidacy for the seat of U.S. Representative in May 2024.[1] He listed a residence address in Washington, D.C. and requested that he be designated as affiliated with the Democratic Party.[2] He certified that the information he provided was true and that "if elected, I shall be an inhabitant of the State of Alaska."[3] No one challenged his eligibility as a primary election candidate.[4]

Mr. Hafner placed sixth out of 12 candidates in the primary election, which was certified on September 1.[5] The five candidates who finished ahead of him were Representative Mary Peltola, Nick Begich, Lieutenant Governor Nancy Dahlstrom, Matthew H. Salisbury, and John Wayne Howe.[6] As "the four candidates receiving the greatest number of votes,"[7] the first four of these were set to advance to the general election. When Lieutenant Governor Dahlstrom withdrew from the race on August 27, Mr. Howe advanced to become a top-four candidate in her place and Mr. Hafner was at that point in fifth place.[8] Then Mr. Salisbury also withdrew on August 30, moving Mr.

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1 Affidavit of Carol Beecher ("Beecher Aff."), Exhibit A (Declaration of Candidacy).

2 *Id.*

3 *Id.*

4 AS 15.25.042; 6 AAC 25.260.

5 Beecher Aff. ¶ 3-6; https://www.elections.alaska.gov/results/24PRIM/ElectionSummaryReport.pdf.

6 *Id.*

7 AS 15.25.100(a); *see* AS 15.25.010.

8 Beecher Aff. ¶ 5; AS 15.25.100(c).

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Hafner from the fifth position to the top four as well.[9] He will appear on the general election ballot with the affiliation "Registered Democrat."[10]

The Division completed the weeks-long project of programming the election project and finalized the general election ballot designs on September 4.[11] The final ballots were sent to the printer on September 5.[12] The printer began work printing the ballots the Division will use to test election equipment and the 700,000 ballots required for the general election.[13] The Division needs the test ballots by September 11 to begin printing the ballots for uniformed and overseas voters.[14] State and federal law require the Division to mail ballots to uniformed and overseas voters by September 21—a Saturday—meaning they must be mailed on Friday, September 20.[15] Printing all of the ballots will cost the State about $300,000 and take about two and a half weeks.[16] If the Division were to stop printing and re-print ballots without Mr. Hafner as a candidate, it would incur additional costs, up to the complete cost of the printing project. Changing

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9 Beecher Aff. at ¶ 6.

10 *See* https://www.elections.alaska.gov/election/2024/Primary/SampleBallots/HD1.pdf; 6 AAC 25.214(c) (effective July 11, 2024) ("A candidate for federal office may be designated on the ballot as affiliated with the political party or political group with which the candidate is registered as affiliated in the state in which the candidate is registered to vote.").

11 Beecher Aff. at ¶ 2-4.

12 Beecher Aff. at ¶ 6.

13 *Id.* at ¶ 8, 15.

14 *Id.* at ¶ 8, 9, 14.

15 *Id.* at ¶ 11; 52 USC 20302(a)(8); AS 15.20.081(k), (l).

16 Beecher Aff. at ¶ 15.

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the ballots at this juncture would result in the State missing state and federal mailing deadlines.[17] And the Division might also be unable to complete its testing of election equipment and the printing of replacement ballots in time, threatening the administration of the general election.[18]

The plaintiffs filed their complaint and motions for injunctive relief and expedited consideration Wednesday afternoon. They allege that Mr. Hafner is in federal prison in New York and "slated to be released" in 2036.[19] As far as the plaintiffs know, he has never been an Alaska resident.[20]

Plaintiffs assert that Mr. Hafner is not qualified to run for Congress or to advance into the top four based on a series of factual and legal arguments. They contend that he cannot run because he did not provide an accurate residence address on his declaration of candidacy[21] and a date as required by AS 15.25.030(a)(6).[22] Alternatively, they contend that Mr. Hafner is not qualified to run because he "cannot possibly" comply with the federal constitutional requirement that he be an "inhabitant" of Alaska "when elected."[23] They argue that because Mr. Hafner is not qualified for those reasons, the

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17 *Id.* at ¶ 16.

18 *Id.*

19 Complaint ¶ 26.

20 *Id.* at ¶ 28.

21 *Id.* at ¶ 33.

22 *Id.* at ¶ 52–58.

23 *Id.* at ¶ 44–51; U.S. Const. art. I, sec. 2, cl. 2.

candidate who finished behind him, Gerald Heikes, should advance instead.[24] Alternatively, the plaintiffs argue that even if Mr. Hafner is qualified to run, his advancement to the general election ballot violates AS 15.25.100(c) because in their view, the statute allows only one fifth place candidate replacement when a top-four candidate withdraws, and not subsequent replacements.[25]

The plaintiffs' motion argues that they are likely to succeed on the merits of these claims[26] and seeks an order directing the Division to remove Mr. Hafner from the ballot.[27] They argue that they face irreparable harm if he remains on the ballot because his candidacy will "complicate" their efforts to elect their preferred candidate, Representative Peltola, and "damage [her] competitive prospects."[28] They believe that Mr. Hafner's candidacy will "confuse" voters and "divert" votes from Representative Peltola because some voters might rank only Mr. Hafner.[29] Finally, the plaintiffs argue that Mr. Hafner's designation as a "Registered Democrat" would harm the Alaska Democratic Party's right to free association.[30]

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24 Compl. at ¶ 50–51, 58.

25 *Id.* at ¶ 37–43.

26 Memorandum in Support of Emergency Motion for Temporary Restraining Order and Preliminary Injunction at 5 (Sept. 4, 2024).

27 *Id.* at 13; Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Sept. 4, 2024); Proposed Temporary Restraining Order at 1 (Sept. 4, 2024).

28 Mem. at 2, 6, 10.

29 *Id.* at 10–11.

30 *Id.* at ¶ 35.

II. Legal Standard

A preliminary injunction is "considered 'an extraordinary remedy never awarded as of right.'"[31] Such injunctions are "harsh remedies" that "preserve the status quo" when necessary to prevent "the irreparable loss of rights before judgment."[32] "Mandatory" injunctions requiring a party to act (as opposed to "prohibitory" injunctions preventing action to change the status quo) are particularly disfavored: "a mandatory injunction will seldom be granted before final hearing, and should be granted only in extreme or exceptional cases and with great caution."[33]

Under Alaska law, a "[p]laintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard."[34] The balance of hardships standard entitles the plaintiff to an injunction if three showings are made: (1) the plaintiff is faced with irreparable harm, (2) the opposing party is adequately protected, and (3) the plaintiff raises "serious and substantial questions going to the merits of the case."[35] But where the opposing party's interests cannot be adequately protected, the party seeking relief must make "a clear showing of probable success on the merits of the dispute before a court may grant the preliminary

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[31] *State v. Galvin*, 491 P.3d 325, 338 (Alaska 2021) (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008)).

[32] *Martin v. Coastal Vills. Region Fund*, 156 P.3d 1121, 1126 & n.4 (Alaska 2007) (quoting *United States v. Guess*, 390 F.Supp.2d 979, 984 (S.D. Cal. 2005)).

[33] *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1274 n.9 (Alaska 1992) (quoting 42 Am.Jur.2d Injunctions § 21 (1969)) (internal alterations omitted).

[34] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

[35] *Id*.

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injunction."[36] The same standards apply for a temporary restraining order.[37]

Both standards require the plaintiff to demonstrate that he will suffer irreparable harm without a preliminary injunction.[38] The crucial difference between these standards is the impact of the requested injunction on *the defendant's* interests.[39] Where those interests can be adequately protected, an injunction may issue under the balance of hardships standard without a showing that plaintiffs' claim will likely succeed. But if the defendant's interests cannot be protected, a showing of probable success on the merits is required.[40] And in an elections case, "a court has the discretion to deny the requested relief if granting it would imperil the public interest" in "a timely, successful election," even if the plaintiff has shown probable success on the merits.[41]

Without irreparable harm, there is no reason for a court to truncate its usual procedures and quickly assess the merits of a case on an abbreviated record. Holding accelerated mini-trials on the merits of every case at a very early stage would lead to hasty, erroneous decisions.[42] Although language in a handful of cases suggests that a

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36 *State v. Galvin*, 491 P.3d 325, 333 (Alaska 2021).

37 *Alsworth*, 323 P.3d at 54.

38 *Id.*; *Miller v. Atkinson*, 365 P.2d 550, 552 (Alaska 1961).

39 *Alsworth*, 323 P.3d at 54-56.

40 *Id.*

41 *Galvin*, 491 P.3d at 338-39.

42 *See A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970) modified, 483 P.2d 198 (Alaska 1971) ("The necessity of avoiding litigation of the merits at this early stage stems from two factors. First a ruling on the merits in an action for preliminary relief would be premature, since it would usually be based on an incomplete complete record and made with an insufficient amount of time. Second, a

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party whose harm is "less than irreparable" might be able to obtain a preliminary injunction,[43] the Alaska Supreme Court has never actually approved of such an injunction.[44] And other cases make clear that an injunction in the absence of irreparable harm would be inappropriate.[45]

Consistent with this logic, irreparable harm is "[p]erhaps the single most important prerequisite" for an injunction under federal law.[46] As the U.S. Supreme Court explained in *Winter v. Natural Resources Defense Council, Inc*., its "standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is

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ruling at this early stage would ultimately result in forcing the court to rule on the merits of the case twice—once at the preliminary stage and once in the final adjudication.").

[43] *Galvin*, 491 P.3d at 333 ("Where the harm is not irreparable, or where the other party cannot be adequately protected, then the moving party must show probable success on the merits"); *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (same).

[44] *See Galvin*, 491 P.3d at 333 (plaintiff faced irreparable harm in the absence of a preliminary injunction and Court affirmed denial of preliminary injunction on grounds that State could not be adequately protected and plaintiff failed to establish probable success on merits); *Metcalf*, 110 P.3d at 979 ("issuance of this injunction is a zero-sum event, where one party will invariably see unmitigated harm to its interests").

[45] *VECO Int'l, Inc. v. Alaska Pub. Offices Comm'n*, 753 P.2d 703, 718 (Alaska 1988) ("VECO could have sought to enjoin the state from enforcing the Campaign Disclosure Act. That would require a showing of irreparable harm, among other things."); *Miller*, 365 P.2d at 552 (preliminary injunctive relief is available "to enjoin acts of the defendant which will cause irreparable injury to the personal or property rights of the plaintiff" and "to call into action this extraordinary power required a clear showing of the irreparable injury for which there was no other adequate remedy").

[46] *See* 11A Wright & Miller Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief.").

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likely in the absence of an injunction."[47] A mere "possibility" of irreparable harm is insufficient—the plaintiff must show that irreparable harm is "likely" without an injunction.[48] As the Court explained, "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[49]

III. Argument

A. The balance of harms overwhelmingly favors the Division and the public.

The plaintiffs' primary argument about harm is that Mr. Hafner's candidacy might hurt the re-election prospects of their preferred candidate, Representative Peltola, because some voters might be "confuse[d]" and choose to rank Mr. Hafner but not Representative Peltola in the general election.[50] It is true as a general matter that an incorrect decision to include or not include a candidate on a ballot can cause irreparable harm to candidates and voters.[51] But as the plaintiffs implicitly acknowledge, Alaska's

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47 555 U.S. 7, 22 (2008).

48 *Id.*

49 *Id.*; *see also* 42 Am. Jur. 2d Injunctions § 9 ("As is true of injunctions generally, a preliminary injunction is seen as an extraordinary remedy that should be issued cautiously").

50 Mem. at 10–11.

51 *See, e.g.*, *Graveline v. Johnson*, 747 F. App'x 408, 415 (6th Cir. 2018) ("Plaintiffs would face a substantial harm if a stay were granted: Graveline's name would not appear on the ballot and the voter plaintiffs would be unable to vote for him."); *id.* at 418 (Griffin, J., dissenting) ("Absent a stay at this juncture, irreparable harm will occur to the State of Michigan, its public interest, and to the qualified

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ranked choice voting system significantly mitigates that harm because, unlike a single choice election, voters may rank as many or as few of the candidates as they like.[52] The plaintiffs speculate that some voters might forego their right to rank more than one candidate, and they speculate in turn that votes might therefore be "divert[ed]" from Representative Peltola. But the plaintiffs, like Representative Peltola herself, are free to encourage voters to rank more than one candidate. The Alaska Supreme Court has rejected the notion that voters are unable to accurately indicate their preferences in a ranked choice election.[53] A voter who ranks only Mr. Hafner, despite having the opportunity to rank other candidates, expresses a preference that *only* he be elected. That vote has not been diverted from anyone.

Any harm to the plaintiffs' interests are even more minimal under the specific facts here. Given Mr. Hafner's lack of campaign efforts and the extremely small number of primary votes he received, the chances of his presence on the ballot impacting the election are very small.[54]

The plaintiffs also argue that Mr. Hafner's appearance on the ballot "would irreparably harm the Alaska Democratic Party's associational rights[] by suggesting that

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candidates . . . by the irreversible decision to place an unqualified candidate on the general election ballot who will garner votes from the qualified candidates.").

[52] Mem. at 10–11; AS 15.15.360(a)(2); AS 15.58.020(a)(13).

[53] *Kohlhaas v. State*, 518 P.3d 1095, 1123 (Alaska 2022).

[54] *Cf. De La Fuente v. S.C. Democratic Party*, 164 F. Supp. 3d 794, 804 (D.S.C. 2016) (holding that the alleged harm to a prospective candidate in being left off the ballot was "negligible" because he was "not actively campaigning" and his prospects of winning any delegates were "minimal").

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they are affiliated with a convicted felon who is ineligible to serve and with whom they have no relationship."[55] This argument has no bearing on the relief the plaintiffs seek, which is not removal of Mr. Hafner's chosen party affiliation from the ballot but rather, removal of his name entirely. If Mr. Hafner qualifies to appear on the ballot, he, like every other candidate, may identify "the political party or political group with which [he] is registered as affiliated," or state that he "would prefer a nonpartisan or undeclared designation placed after his name on the ballot."[56] The Alaska Supreme Court has expressly approved of this system.[57] The plaintiffs cannot establish irreparable harm by reasserting an argument the Court rejected just two years ago.[58]

Weighed against the speculative and minimal harm to the plaintiffs, the harm to the Division and the public if an injunction were entered would be severe. A court order to remove Mr. Hafner from the ballots would upset the Division's tight timeline of preparations for the general election in two months, causing the Division to miss both state and federal deadlines. The Division would have to stop the printing process that is currently underway. Discarding and re-printing ballots would incur additional costs. The Division would be unable to mail ballots to overseas voters in time, limiting their ability

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55 Mem. at 11.

56 *Kohlhaas*, 518 P.3d at 1101 (citing AS 15.25.030; AS 15.25.060).

57 *Id.* at 1109–11.

58 In *Kohlhass*, the plaintiffs argued that "allowing candidates to designate a party on the ballot violates [the party's] associational rights" because it "leads to forced association" with people who may not support the party's platform. *Id.* at 1109. The Court held that displaying party affiliation creates "scant burden on a party's associational rights" because "the ballot expressly disclaims" the notion that political parties endorse candidates who register as affiliated with them. *Id.*

to vote and putting the Division in violation of state and federal law.[59] Any late or mid-election changes could lead to voter confusion and reduce the public's confidence in elections.

Simply put, the injunction the plaintiffs request would threaten the successful administration of the entire election. Delay in printing ballots would in turn delay testing of election equipment and mailing of ballots, all while diverting the Division's resources from the other components of the upcoming election. The public has an overriding interest in the administration of the general election, particularly in a presidential election year.[60] Because "an impending election is imminent and [the] State's election machinery is already in progress," the public interest cannot be adequately protected from the threat an injunction would pose to the election.[61]

B. The plaintiffs do not seek temporary relief, but a ruling on the merits.

The plaintiffs' motion superficially seeks only preliminary relief, but in fact, they seek nothing less than a ruling in their favor, on the merits, two days after filing their complaint. The plaintiffs ask that the Division be ordered to print new ballots without Mr. Hafner included. That order would be a mandatory and, practically speaking, permanent injunction, requiring the Division to reject Mr. Hafner's candidacy and

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59 Beecher Aff. at ¶ 16; *see also Galvin*, 491 P.3d at 330.

60 *Galvin*, 491 P.3d at 334 ("[T]he harm to the Division lay not just in the burden of reprinting the ballots themselves, or even the risk of missing statutory deadlines, but in the danger that the Division might not be able to successfully conduct a timely election. The harm to the Division's interests was therefore also a harm to the interests of Alaskan voters and other political candidates.").

61 *See id.* at 334, 339.

remove him from the ballot. Even if the Division could pull off that ballot change and all the associated work in time to conduct a successful election, the parties and the courts certainly could not further litigate the question in time to reverse course *again*. The plaintiffs' request for injunctive relief is in reality a request for a final ruling.

C. Plaintiffs cannot succeed on the merits of their claims.

Given the irreversible harm to the Division and the public, "a clear showing of probable success on the merits," at a minimum, is required to support injunctive relief.[62] And the final nature of the injunction plaintiffs request means the Court should not grant relief based on anything less than *actual* success on the merits, supported by evidence.[63] Indeed, the Alaska Supreme Court has held that "the hazard that granting the injunction would pose to the public interest in a timely, successful election" supports denying an injunction to change the ballot even if a plaintiff's claim is very strong.[64] Whatever the standard applied, the plaintiffs' claims here fall very short.

1. The plaintiffs' complaint should be dismissed because it is an election contest that does not comply with AS 15.20.540.

Most of the plaintiffs' claims allege that Mr. Hafner is not a qualified candidate in the general election.[65] As such, their complaint is an election contest challenging the results of the primary election, authorized by AS 15.20.540. That statute allows "a defeated candidate or 10 qualified voters [to] contest the nomination or election of any

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62 *Id.* at 333 (internal quotations omitted).

63 *See Kluti Kaah*, 831 P.2d at 1274 n.9.

64 *Id.* at 338.

65 *See, e.g.*, Mem. at 2.

person" on the ground that "the person certified or elected is not qualified by law."[66] The plaintiffs do not include a "defeated candidate," or any candidate, and include just one qualified voter, rather than 10.[67] The complaint should be dismissed for this reason.

The Alaska Constitution provides that the "procedure for determining election contests . . . shall be prescribed by law,"[68] and AS 15.20.540–.560 provides these procedures. Alaska Statute 15.20.540 provides that one of the grounds for an election contest is that a successful candidate is not qualified.[69] Although the term "nominated" no longer refers to candidates who are nominated by political parties in partisan primaries, it still refers to the top four candidates nominated in open, nonpartisan primaries.[70] Only a "defeated candidate or 10 qualified voters"[71] may file an election contest "within 10 days after the completion of the state review."[72] The superior court has wide discretion to fashion a remedy in an election contest. Alaska Statute 15.20.560 provides that "[t]he judge shall pronounce judgment on which candidate was elected or nominated . . . . If the court decides that no candidate was duly elected or nominated, the judgment shall be that the contested election be set aside . . . ." Thus, pursuant to the

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66 AS 15.20.540. *See* AS 15.25.010 (providing that candidates "shall be nominated in a primary election"); AS 15.25.090 (providing that provisions for elections contests apply to primary elections).

67 AS 15.20.540; *see* Compl. at ¶ 7.

68 AK Const. art. V, sec. 3.

69 AS 15.20.540(2).

70 AS 15.25.; AS 15.25.090.

71 AS 15.20.540.

72 AS 15.20.550; AS 15.15.450.

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constitution, the legislature created an election contest process that specifies who may file one, when they may file it, and the relief available.

The plaintiffs filed their complaint within ten days of the Division's certification of the results of the primary election on September 1. They challenge Mr. Hafner's qualifications and seek an order that he was not properly nominated for the general election—in short, they contest the result of the primary election. But the plaintiffs do not include enough registered voters to file an election contest. Regardless of the likelihood of success on the merits, the plaintiffs' claims should be dismissed under AS 15.20.540. Recognizing, however, that this case is expedited, and the plaintiffs might be able to amend their complaint to add nine other plaintiffs, the Division nevertheless addresses the merits of the plaintiffs' individual claims.

2. Mr. Hafner filed a complete declaration of candidacy.

The plaintiffs assert that Mr. Hafner's declaration of candidacy is deficient and claim that Division should have disqualified him at the outset,[73] even though they did not challenge his eligibility at the time. It seems, however, that the plaintiffs reviewed Mr. Hafner's statement for the election pamphlet, not his declaration of candidacy.[74] His declaration was complete, and the Division properly certified him as a candidate.

All those who wish to appear on the ballot in the primary election must file a declaration of candidacy.[75] The declaration must include the candidate's residence

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73 Compl. at ¶ 52–57.

74 *Id.* at ¶ 33.

75 AS 15.25.030(a).

address.[76] The Division provides different declaration of candidacy forms for federal legislative, state legislative, and state executive offices.[77] The form for federal legislative offices requires candidates to provide current residence addresses and allows them to provide different mailing addresses for themselves and their campaigns.[78]

Mr. Hafner correctly completed his declaration of candidacy.[79] Based on a document they found online; the plaintiffs claim that he provided an address that could only be a mailing address. But Mr. Hafner provided what appears to be a residence address in Washington, D.C., along with mailing addresses for himself and his campaign.[80] Mr. Hafner's declaration of candidacy provides no basis to disqualify him now that he has advanced to the general election.

3. Mr. Hafner is qualified to run for the office of U.S. Representative despite doubts that he will be qualified to serve.

Next, the plaintiffs argue that Mr. Hafner is not qualified to run because they assume he will still be in federal prison and not an "inhabitant" of Alaska "when elected," as required by the federal constitution.[81] But as unlikely as it may be that Mr. Hafner is released in time, neither the plaintiffs nor the Division can know now whether

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76 AS 15.25.030(a)(6).

77 https://www.elections.alaska.gov/candidates/file-for-candidacy/.

78 Beecher Aff., Ex. A.

79 *See id.*

80 *Id.* To the extent the requirement for a date that residency at an address began, AS 15.25.030(a)(6), applies to federal candidates, it is irrelevant to their qualifications, as discussed below.

81 U.S. Const. Art. 1, sec. 2, cl. 2.

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Mr. Hafner will be an inhabitant on or before Election Day, two months from now. To disqualify a candidate because he is not currently an inhabitant or appears unlikely to become one would add to the exclusive list of Constitutional qualifications and engage in speculation.

Members of the U.S. House of Representatives must be twenty five years old, a citizen for at least seven years, and "when elected, be an Inhabitant of that State in which he shall be chosen."[82] The term "inhabitant" is broader than "resident" and includes those absent from a state for some time.[83] A candidate is "elected," for these purposes, on Election Day.[84] States may not add to this exclusive list of congressional qualifications.[85]

The plaintiffs contend that Mr. Hafner is in federal prison in New York serving a term that will not end until 2036. Thus, they claim that he cannot possibly meet the constitutional residency requirement and should be disqualified now. But they offer only the allegations in their complaint in support of those factual assertions.[86] Although "facts shown by affidavit or by verified complaint" can support entry of preliminary relief,[87] here the plaintiffs seek a ruling that will have the same effect as a final judgment. This Court should not make findings about Mr. Hafner's status, potentially

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82 *Id.*

83 *Schaefer v. Townsend*, 215 F.3d 1031, 1036 n.5 (9th Cir. 2000).

84 *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589 (5th Cir. 2006).

85 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995).

86 Mem. at 8.

87 Alaska R. Civ. P. 65(b).

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upending the entire general election, without admissible evidence of these basic facts.

This Court also should not attempt to predict the future in the way the plaintiffs suggest. However unlikely these scenarios may be, the Court cannot say—particularly without evidence—whether Mr. Hafner might be released,[88] pardoned,[89] successful on appeal,[90] or otherwise free to become an inhabitant of Alaska some other way. In his declaration of candidacy, Mr. Hafner certified to the Division that he would meet the residency requirement. However unlikely that may be in *his* case, the Division must treat him the same way it would treat any other qualified candidate who affirms an intention to meet the residency requirement by Election Day.

The Fifth Circuit Court of Appeals addressed a similar situation and kept the candidate on the ballot. That court considered whether a congressional candidate was disqualified because he moved out of state after the primary and before the general election. The candidate stated that he had no intention of returning or of serving in Congress.[91] The plaintiff argued that he must remain on the ballot because he could move back to Texas in time for Election Day.[92] Recognizing that the constitutional qualifications for Congress are "exclusive and cannot be enlarged by the states," the

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88 *See* https://alaskabeacon.com/2024/09/03/a-meeting-at-an-eagle-river-brewery-helped-put-a-convicted-felon-on-alaskas-u-s-house-ballot/ (quoting Mr. Hafner's belief that he will be released in time under "compassionate release").

89 *See https://www.adn.com/politics/adn-politics-podcast/2024/09/04/alaska-democratic-party-sues-to-remove-the-name-of-incarcerated-man-from-us-house-ballot/* (quoting Mr. Hafner's mother saying he could be pardoned).

90 *Id.* (quoting a statement saying he is appealing his sentence).

91 *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 585 (5th Cir. 2006).

92 *Id.*

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Fifth Circuit agreed.[93] Requiring that the candidate reside in Texas before Election Day would add to these qualifications.[94] And "conclusively" establishing inhabitancy "when elected," as required by Texas law, could be impossible.[95] "[I]t is almost always possible for a person to change their residency: to move to the state in question before the election, thereby satisfying the Qualifications Clause."[96] The court could not know "prospectively" whether the candidate would be qualified on Election Day, so he was qualified remained on the ballot.[97]

This Court similarly should not add a requirement that a candidate's future inhabitancy be established conclusively. Candidates cannot be removed from the ballot because they may not—or even probably will not—qualify. They can be removed only if they actually do not qualify. That is why other circuit courts have upheld the removal of presidential candidates who do not meet the Constitution's age[98] or citizenship[99] requirements. Both of these attributes can be definitively determined at the time a

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93 *Id.* at 589 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995)).

94 *Id.* at 589–90, n.10.

95 459 F.3d at 592 n.17.

96 *Id.* at 592.

97 *Id.* at 590; *Schaefer v. Townsend*, 215 F.3d 1031, 1036 (9th Cir. 2000) ("This specific time at which the Constitution mandates residency bars the states from requiring residency before the election.").

98 *Lindsay v. Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014) (excluding a presidential candidate from the ballot because she was 27 years old, not 35 or older, as required by the constitution); U.S. Const. art. II, sec. 1, cl. 5.

99 *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (excluding a presidential candidate from the ballot because he was a naturalized, not natural born citizen, as required by the constitution); U.S. Const. art. II, sec. 1, cl. 5.

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candidate files for office. The candidate will either be old enough when she is elected to office or will not be. And no candidate who is a naturalized citizen could become a natural born citizen. Residency—unlike age and natural born citizenship—can change.

Until Election Day, Mr. Hafner is qualified to run for congress. In the improbable event that he were elected and certified the winner, while remaining in federal prison, a defeated candidate or any group of ten voters could file an election contest.[100]

4. Alaska Statute 15.25.100(c) allows successive withdrawals so that four candidates run in the general election when possible.

Finally, the plaintiffs argue that even if Mr. Hafner was qualified to run in the primary election, the Division misapplied the withdrawal statute, AS 15.25.100(c), in advancing him to the general election. Alaska Statute 15.25.100(c) provides that if a candidate withdraws, "becomes disqualified,"[101] or is otherwise no longer running 64 or more days before the general election, "the vacancy shall be filled by the director by replacing the withdrawn candidate with the candidate who received the fifth most votes in the primary election." The plaintiffs take this to mean that the fifth-place candidate, and no other candidate, can advance to the general election in the event that someone withdraws. But this cramped reading of the statute is not required by its plain language

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[100] Following such a contest, it appears that only the House itself could actually remove him. U.S. Const. art. I, sec. 5, cl. ("Each House shall be the Judge of the . . . Qualifications of its own Members . . . .").

[101] The plaintiffs argue that Mr. Hafner is disqualified and cannot advance for that reason either. But Mr. Hafner did not "become[]" disqualified under this part of the statute. His qualifications did not change since he filed his declaration of candidacy. This part of the statute would apply to a state candidate who became disqualify by being convicted of a qualifying felony after filing a declaration, for example.

and is contrary to the intent, evident in this statute and others, that four candidates appear on the general election ballot whenever possible.

In interpreting AS 15.25.100(c), the Court should consider the statute's language and purpose, adopting "the rule of law that is most persuasive in light of precedent, reason, and policy."[102] Those considerations support the Division's reading. The language of the statute does not clearly prohibit successive withdrawals; it can easily and logically be read to allow them. And the statutes, especially the withdrawal statute itself, reflect an intention that four candidates should appear on the general election ballot for voters to rank, if at all possible.

Alaska Statute 15.25.100(a) directs the division to "place on the general election ballot only the names of the four candidates receiving the greatest number of votes for an office." And AS 15.25.010 similarly refers to the "the four candidates who receive the greatest number of votes," as does AS 15.58.020(a)(13), which provides the explanation that appears in the election pamphlet. The language of Ballot Measure 2 itself—which the plaintiffs ask the Court to consider[103]—similarly emphasized that the top four candidates will appear on the ballot.[104] These statutes and ballot language indicate an intent that four candidates should advance to the general election.

The withdrawal statute itself is best read to support the goal that voters be given

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102 *Muller v. BP Expl. (Alaska) Inc.*, 923 P.2d 783, 787 (Alaska 1996) (quotation and citation omitted).

103 Mem. at 7.

104 *See* https://www.elections.alaska.gov/election/2020/General/SampleBallots/HD1%20JD4.pdf.

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four choices whenever possible. AS 15.25.100(a) provides the general rule that "only" the top four from the primary election should be included, and AS 15.25.100(c) provides the exception, telling the director to fill vacancies that arise in the top four with the fifth-place finisher. The plaintiffs read this statute to foreclose the possibility of a second replacement if another top four candidate also withdraws. But the statute could also be read to create a new top four and a new fifth place finisher after one withdrawal and replacement. That reading allows for successive withdrawals and advancements between certification of the primary election and the withdrawal deadline.

That is what happened here. Before the Lieutenant Governor withdrew on August 27, Mr. Howe was in fifth place in the unofficial results. When he became the effective fourth-place candidate, Mr. Hafner became the effective fifth-place candidate. When Mr. Salisbury subsequently withdrew on August 30, Mr. Hafner—now the effective fifth-place candidate—became one of the top four candidates. Even if AS 15.25.100(c) allows the advancement of only the candidate in fifth as the plaintiffs suggest, Mr. Hafter *was* in fifth, and he properly advanced.

This result is consistent with increasing, rather than restricting, candidates' access to the ballot and voter choice.[105] The plaintiffs' argument against successive withdrawals under AS 15.25.100(c) fails on the merits.

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105 *See, e.g.*, *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982).

IV. Conclusion

For the foregoing reasons, the Court should deny the plaintiffs' motion for injunctive relief.

DATED September 6, 2024.

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