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Subject: 3AN-20-05901CI - Opposition to Motion to Dismiss and Reply in Support of Motion to Characterize

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

MAY 12 2020

Clerk of the Trial Courts

By _____ Deputy

Case No. 3AN-20-05901CI

OPPOSITION TO MOTION TO DISMISS AND REPLY IN
SUPPORT OF MOTION TO CHARACTERIZE CASE AS NON-ROUTINE

I. INTRODUCTION

Because AS 15.45.130 provides that "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted[.]" Plaintiffs seek invalidation of all petitions for the Fair Share ballot initiative that were supported by false certifications because these subscriptions were

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"not properly certified." Specifically, this case is about whether an initiative should be placed on an upcoming statewide ballot if it is determined that professional circulators falsified their sworn certifications to the lieutenant governor to state they were not paid in excess of the statutory maximum to collect those signatures. Based on Alaska's initiative statutes,¹ prior practice by the State of Alaska of invalidating signatures collected in violation of Alaska's law on the payment of circulators and the Alaska Supreme Court's approval of that practice,² and the weight of persuasive authority from other state supreme courts,³ Plaintiffs seek invalidation of all petition booklets for the 19OGTX initiative that are supported by false circulator affidavits.

State Defendants' motion to dismiss⁴ improperly overlooks all of this authority and instead makes a policy argument that it would be unduly harsh to "disenfranchise" the

¹ See AS 15.45.130. AS 15.45.130 provides that "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted." It then goes on to explain that the circulator certifies the petition by making truthful statements about themselves and their signature-gathering activities, including that the circulator was not unlawfully paid in excess of \$1 per signature, for the collection of signatures. AS 15.45.130(6). AS 15.45.110(e) makes it a "class B misdemeanor" for a circulator to be paid in excess of \$1 per signature, for the collection of signatures.

² See e.g. *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 578 (Alaska 2006) (Alaska Supreme Court approving of the Division's disqualification of otherwise valid subscriptions contained on pages of the petition that did not include the required disclosure of who was paying the circulator).

³ See e.g. *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006); *Brousseau v. Fitzgerald*, 675 P.2d 713, 715 (Ariz. 1984); *Benca v. Martin*, 500 S.W.3d 742, 745-49 (Ark. 2016).

⁴ State Defendants' Response to Plaintiffs' Motion to Characterize Case as Non-Routine and Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6), at 13 (April 30, 2020) (hereinafter "State Defendants' Motion to Dismiss").

Alaska voters who subscribed to petitions being circulated by professional signature gatherers, even if the signature gatherers were induced with unlawful pay to gather the signatures. The State's motion is contrary to the State's position in other ballot initiative cases, ignores the intent of the Alaska Legislature, and has been rejected in numerous modern cases decided by state supreme courts. Most courts hold that invalidating signatures supported by false certifications is not a disenfranchisement of voters but a proper remedy to insure the integrity and continued viability of the initiative process. No voter is disenfranchised by the state or the court upholding Alaska law and the integrity of Alaska's initiative process.

Nor is it true, as State Defendants suggest, that because the Alaska Legislature has made it a crime for a circulator to submit false statements in their certifications of the signatures they have gathered, the proper remedy is to ignore AS 15.45.130, and allow the lieutenant governor to count subscriptions that are not properly certified. As most other state supreme courts have recognized, a legislature's criminalization of false statements in circulator certifications supports the invalidation of the signatures they have gathered. The Alaska Legislature has rightly determined that the circulator's role in the initiative process is crucial and that truthful certifications are critical to the integrity of that process. By the State's own admission, the misconduct by the Fair Share signature gatherers was criminal. Contrary to the State's position, criminal malfeasance should not be condoned or rewarded,

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but instead should be punished by invalidating all signatures gathered by a fraudulent circulator.⁵

In addition to being wrong about the law, State Defendants' position is also an improper basis in which to dismiss a case under Rule 12(b)(6) of the Alaska Rules of Civil Procedure ("Rule 12(b)(6)"). The Alaska Supreme Court has long held that to state a claim upon which relief may be granted, a complaint need only set forth factual allegations that are consistent with some enforceable cause of action: "In determining the sufficiency of the state claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to *some enforceable cause of action*."⁶ Here, Plaintiffs have sought declaratory relief in addition to injunctive relief. Even if State Defendants are correct that invalidation of petitions supported by false circulators is not an available remedy, declaratory relief would still be appropriate to determine the unlawful conduct of the circulators.

⁵ For example the Maine Supreme Court explained in justifying the "invalidation of the petition *in toto*[,] that the "circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many ways hinges on the trustworthiness and veracity of the circulator." *Maine Taxpayers Action*, 795 A.2d at 80. "In fact, the Legislature considers the circulator's swearing of the oath to be a sufficiently grave act that it has specifically criminalized the providing of a false statement in connection with a petition." *Id.* at 81.

⁶ *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986) (quoting *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983)) (emphasis in original). In *Knight*, the Alaska Supreme Court quoted Wright & Miller's authoritative treatise on civil procedure that stated: "The court is under a duty to examine the complaint to determine if the allegations provide for relief *on any possible theory*." See *Knight*, 714 P.2d at 791 (quoting 5 C. Wright & A. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 1357, at 602 (1969)) (original brackets omitted; emphasis in original).

Plaintiffs respectfully request the Court deny State Defendants' Motion to Dismiss, and set expedited discovery and an August 2020 trial date in this matter.

II. FACTUAL BACKGROUND⁷

In early January 2020, the official ballot group for a statewide initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" (hereinafter "19OGTX") hired an out-of-state professional signature-gathering company named Advanced Micro Targeting, Inc. ("Advanced Micro Targeting") to provide circulators to gather subscriptions on petitions supporting 19OGTX's inclusion on this November's general state election ballot.⁸

While Alaska law prohibits the circulators from being paid in excess of \$1 per signature for the collection of signatures and requires each circulator to submit an affidavit swearing they were not unlawfully paid more than this limit, Advanced Micro Targeting's circulators were paid in excess this limit.⁹ These circulators, who were being paid an unlawful amount, collected the vast majority of signatures to get 19OGTX on the ballot.¹⁰ Advanced Micro Targeting circulators submitted 544 petition booklets out of the 786 total submitted to the lieutenant governor.¹¹

⁷ The Alaska Supreme Court, in reviewing a motion to dismiss, does not "consider materials outside the complaint and its attachments." *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 7 (Alaska 2012). Accordingly, the following is taken directly from Plaintiffs' Complaint.

⁸ Plaintiffs' Complaint, ¶ 14 (Apr. 10, 2020).

⁹ *Id.*, ¶¶ 11, 22.

¹⁰ *Id.*, ¶ 17.

¹¹ *Id.*

Advanced Micro Targeting hired circulators by offering to pay them \$3,500 - \$4,000 per month plus bonus, and expecting circulators to collect 80-100 signatures per day, six days per week in return for such compensation.¹² Many of the Advanced Micro Targeting circulators falsely swore in their circulator affidavits that they were not paid in excess of \$1 per signature.¹³

In this lawsuit, Plaintiffs seek a declaration that these circulators' false affidavits violate Alaska statutes on the payment of circulators, AS 15.45.110(c), and to what a circulator must truthfully swear to have the subscriptions he or she collected count toward the requisite number to have the initiative reach the general ballot, AS 15.45.130.¹⁴ Plaintiffs also seek entry of an injunction that the lieutenant governor may not count the subscriptions collected by any circulator who falsely swore that he or she was not paid an unlawful amount to collect subscriptions and for the lieutenant governor to invalidate all petition booklets supported by a false circulator affidavit.¹⁵

III. DISCUSSION

In Alaska, "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."¹⁶ To survive a motion to dismiss, a complaint "need only

¹² *Id.*, ¶ 22.

¹³ *Id.*, ¶ 25.

¹⁴ *Id.*, ¶ 32.

¹⁵ *Id.*, ¶ 36.

¹⁶ *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986).

allege a set of facts consistent with and appropriate to some enforceable cause of action.”¹⁷ The court must “presume all factual allegations of the complaint to be true and [make] all reasonable inferences . . . in favor of the non-moving party.”¹⁸ “If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.”¹⁹ A complaint survives a motion to dismiss even if the plaintiff has not pleaded the correct cause of action or remedy: “In determining the sufficiency of the stated claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to *some enforceable cause of action*.”²⁰ “[T]he court is under a duty to examine the complaint to determine if the allegations provide for relief *on any possible theory*.”²¹

Here, application of these rules confirms this is not the rare case where the Court should grant a motion to dismiss. Plaintiffs have pleaded a viable claim that the Advance Micro Targeting circulators falsified their certifications and that AS 15.45.130 prohibits the lieutenant governor from counting the subscriptions that were certified by those false circulator affidavits. The injunctive remedy Plaintiffs seek—invalidation of petition

¹⁷ *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 6 (Alaska 2012) (quoting *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253-54 (Alaska 2000)); *see also Odom v. Fairbanks Memorial Hospital*, 999 P.2d 123, 128 (Alaska 2000).

¹⁸ *Caudle v. Mendel*, 994 P.2d 372, 374 (Alaska 1999) (brackets in original).

¹⁹ *Id.* at 374.

²⁰ *Knight*, 714 P.2d at 791 (quoting *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983)) (emphasis in *Knight*).

²¹ *Id.* (quoting 5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1357, at 602 (1969)) (emphasis in *Knight*).

booklets supported by false circulator certifications—is clearly an available remedy as the State has invalidated otherwise valid subscriptions because of circulator negligence in the past.²² That remedy should certainly be available in this case, where Plaintiffs are alleging false statements by circulators in their circulator affidavits, not merely circulator negligence in forgetting to include the “paid by” disclosures on each page of a petition booklet. Moreover, Plaintiffs have also requested declaratory relief. Even if the Court ultimately decides against entering the requested injunction, the Court could still enter a declaration that the lieutenant governor may not, under AS 15.45.130, count petitions supported by false circulator affidavits as “properly certified.”

Plaintiffs' Complaint pleads a proper cause of action for at least three reasons, any one of which is grounds to deny the State's motion:

- Plaintiff's position is consistent with the plain meaning of the applicable Alaska statutes;
- the Alaska Supreme Court has previously approved of the State's disqualification of otherwise valid subscriptions to a petition due to failure to abide by statutory requirements; and,
- persuasive decisions from other state supreme courts support Plaintiffs' position.

As further discussed below, this Court should deny the State's motion.

²² See e.g. *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 578 (Alaska 2006) (Alaska Supreme Court approving of the Division's disqualification of otherwise valid subscriptions contained on pages of the petition that did not include the required disclosure of who was paying the circulator).

A. Alaska Law Prohibits the Lieutenant Governor from Counting Petition Subscriptions that are Supported by False Circulator Affidavits.

While State Defendants correctly quote the text of Article XI of the Alaska Constitution and AS 15.45.010 through AS 15.45.245 regarding ballot initiative petitions,²³ they fail to highlight that AS 15.45.130: (1) requires circulators to certify the subscriptions were obtained lawfully by submitting a sworn affidavit along with the petition booklet containing the signatures, and (2) prohibits the lieutenant governor from counting subscriptions that are not properly certified. This statute, when considered in conjunction with AS 15.45.110(c) and (d), precludes this Court from granting the State's motion to dismiss.

Alaska Statute 15.45.110(c) prohibits the payment of circulators in excess of \$1 per signature for the collection of subscriptions on a petition: "A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition."²⁴ A "person or organization that violates [AS 15.45.110(c)] is guilty of a class B misdemeanor."²⁵ Importantly, Alaska law also prohibits the lieutenant governor from counting subscriptions within petitions that are not properly certified at the time of filing:

²³ State Defendants' Motion to Dismiss, at 6-9.

²⁴ AS 15.45.110(c).

²⁵ AS 15.45.110(e). In Alaska, class B misdemeanors are punishable by up to 90 days in jail and a fine of up to \$2,000. See AS 12.55.035 and 12.55.135.

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance . . .

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c).²⁶

Like the state statutory schemes governing the review of petition subscriptions and circulator affidavits in Montana, Ohio, Arizona, Maine and Oklahoma, discussed below, this provision contemplates that the lieutenant governor has the ability to investigate and invalidate petition booklets and all subscriptions contained therein if they are supported by a false circulator affidavit.²⁷

Untruthful statements in a circulator affidavit do not “properly certify” the accompanying petition booklet. AS 15.45.130 prohibits the lieutenant governor from counting signatures within petition booklets if the petition booklet is not “properly certified” when the petition is filed. The statute lists eight requirements that a petition circulator must swear to in his or her affidavit. One of those required certifications is that

²⁶ AS 15.45.130 (emphasis added).

²⁷ See e.g. *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 777 (Mont. 2006) (citing Mont. Code Ann. § 13-27-307 which simply states the secretary of state may “reject any petition that does not meet statutory requirements.”); *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 79-80 (Me. 2002) (“The Secretary is vested with the authority to determine whether any petition filed in support of a citizens initiative is valid. The statute does not provide specific grounds for invalidating a signature, but provides broadly that ‘the Secretary of State shall determine the validity of the petition and issue a written decision stating the reasons for the decision. ...’ Accordingly, we have recognized that the Secretary may disqualify signatures for a failure to follow the requirements of the Constitution or its statutory overlay.”) (internal brackets and citations omitted).

the circulator has not entered into an agreement with a person or organization in violation of the prohibition on paying circulators in excess of \$1 per signature, for the collection of signatures.²⁸ The purpose of the affidavit requirement is to ensure truthful answers, and an untruthful affidavit does not “properly certify” the accompanying petition. Alaska statute *prohibits* the lieutenant governor from counting signatures contained in a petition that is not properly certified.²⁹

State Defendants' argument that the lieutenant governor lacks the authority to invalidate petitions supported by false circulator affidavits is not supported by a single citation to relevant Alaska caselaw or persuasive Outside authority.³⁰ State Defendants' position ignores the plain wording of AS 15.45.130 that the lieutenant governor may not count signatures supported by a false circulator affidavit. Their motion to dismiss must be denied because AS 15.45.110(c) and (d) and AS 15.45.130 permit the remedy Plaintiffs seek in this lawsuit: invalidation of improperly certified subscriptions.

B. The Weight of American Authority Supports Plaintiffs' Position

Contrary to State Defendants' arguments, the greater weight of authority from state supreme courts confirms that invalidation of all subscriptions supported by a false circulator affidavit is the appropriate remedy. These courts reason that their state's criminalization of false statements in circulator affidavits shows that invalidation of all

²⁸ AS 15.45.130(6).

²⁹ AS 15.45.130.

³⁰ State Defendants' Motion to Dismiss, at 11-12 (“[T]he statutes do not authorize, much less require, more than a facial review of circulators' affidavits.”).

signatures supported by the false certification is the appropriate remedy because the legislature found the certification to be a sufficiently grave act to make its violation a crime. Moreover, there is no case supporting State Defendants' argument that because there is no statute specifically detailing how the lieutenant governor or Division of Elections is to conduct an inquiry into the veracity of a circulator affidavit, that the lieutenant governor may not invalidate signatures gathered by a circulator who lies in his circulator affidavit about how he gathered the subscriptions.

A survey of the cases is helpful in illustrating the error in State Defendants' Motion to Dismiss. State Defendants urge this Court to adopt the reasoning of the Missouri Supreme Court's decision over forty years ago in *United Labor Committee of Missouri v. Kirkpatrick*³¹ as persuasive precedent that supports their position in this litigation. But the decision of that divided court is an outlier. It was decided before numerous other state supreme courts looked at this issue and held that petition subscriptions should not be counted if they are supported by a false circulator affidavit.

In *Kirkpatrick*, a sharply divided (4-3) Missouri Supreme Court refused to invalidate all of the signatures contained in petitions which were supported by circulator affidavits that were signed outside the presence of a notary and notarized later and contained signatures collected by someone else other than the circulator.³² Four members of the Missouri Supreme Court were in the majority. These justices declined to invalidate

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³¹ *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449 (Mo. 1978).

³² *Id.* at 450-51.

the signatures based on the incorrect premise that the only interest the circulator affidavit served was to facilitate the accurate determination of whether a "sufficient number of registered voters deem an issue important enough that the issue should be put to a vote before the people."³³ Ignoring that the obvious purpose of the numerous Missouri statutes governing circulator affidavits and notarization of the petition booklets was to set rules on how circulators may gather subscription signatures, the four member majority concluded that Missouri's criminal law for willful violations of the initiative statutes was sufficient to vindicate Missouri's initiative laws.³⁴ Three members of the court, including the Chief Justice, dissented and criticized the majority for ignoring the obvious purpose of the statutory rules was to protect the initiative process and the mandatory nature of these rules.³⁵

A much greater weight of authority from other states supports Plaintiffs' position. In *Brousseau v. Fitzgerald*,³⁶ the Arizona Supreme Court rejected the approach taken six years earlier by the Missouri Supreme Court because that approach would nullify the rules the legislature passed to govern how subscriptions were gathered in the first place.³⁷ The defendant was an Arizona resident seeking to collect enough signatures (632 signatures) to gain access to the Democratic primary election for the office of Mayor of the City of

³³ *Id.* at 453.

³⁴ *Id.* at 456-57.

³⁵ *Id.* at 457 (Morgan, C.J., dissenting).

³⁶ *Brousseau v. Fitzgerald*, 675 P.2d 713 (Ariz. 1984).

³⁷ *Id.* at 715.

Tucson.³⁸ Arizona statutes required circulators to be eligible Arizona voters and to witness each subscriber sign the petition.³⁹

The defendant submitted 1,000 signatures along with an affidavit swearing he had personally collected the signatures.⁴⁰ But the evidence at trial showed that non-residents and minors had actually collected the signatures, not the defendant.⁴¹ Nevertheless, when the City of Tucson checked the gathered signatures, there were more than enough valid subscriptions from proper voters for the defendant to meet the threshold and get his name on the ballot.⁴²

A unanimous Arizona Supreme Court rejected the defendant's argument that so long as the subscriber signatures were valid, then the "substance—allowing the will of the people to be expressed through their actual nominating signatures—is more important than fulfilling technical procedures."⁴³ To the contrary, the *Brousseau* court concluded that a circulator's submission of a false affidavit undermines the careful initiative process crafted by the legislature to obtain ballot access:

Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing some safeguards in the way nomination

³⁸ *Id.* at 714.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 715.

⁴³ *Id.*

signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.⁴⁴

The court held that “petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot.”⁴⁵ Arizona has separate, criminal sanctions for filing a false circulator affidavit,⁴⁶ and continues to apply *Brousseau* to invalidate subscriptions supported by false circulator affidavits.⁴⁷

The Ohio Supreme Court reached the same conclusion as the Arizona Supreme Court. In *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*,⁴⁸ a circulator falsely affirmed in her affidavit that she was a registered Ohio voter to comply with a state statute that permitted only registered Ohio voters to serve as circulators.⁴⁹ The local county board of elections invalidated the 52 signatures collected by this circulator, leaving the candidate seeking ballot access 19 signatures below the threshold.⁵⁰ The candidate

⁴⁴ *Id.* at 715.

⁴⁵ *Id.* at 716.

⁴⁶ See Arizona Revised Statute § 19-118.

⁴⁷ See *Ross v. Bennett*, 265 P.3d 356, 362 (Ariz. 2011) (discussing *Brousseau*'s continued viability and describing its core holding as “Petition sheets bearing false or fraudulent circulator affidavits are void.”); see also *Parker v. City of Tucson*, 314 P.3d 100, 116 (Ariz. App. Ct. 2013) (“The false affidavits rendered the signature sheets void. *Brousseau*, 675 P.2d at 716.”).

⁴⁸ *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801 (Ohio 1982).

⁴⁹ *Id.* at 802-03.

⁵⁰ *Id.* at 801.

appealed the decision to the Ohio state courts, and argued that invalidation of voter signatures collected by an unqualified circulator was unduly harsh and a hyper technical application of Ohio's statute setting circulator requirements.⁵¹ The Ohio Supreme Court noted the criminal penalty in Ohio for a circulator's submission of a false affidavit and rejected the argument that the circulator's misconduct should have no effect on voters' subscriptions on her petition: "[W]e view this error not as a technical defect but as a substantial and fatal omission of a specific statutory requirement."⁵²

The Maine Supreme Court reached the same conclusion in *Maine Taxpayers Action Network v. Secretary of State*.⁵³ There, the court was tasked with reviewing the state's decision to invalidate 3,054 signatures in support of an initiative to limit real and personal property taxes in Maine that were collected by a circulator that stole another's identity, and falsely swore in his circulator affidavit as to his identity and that he was a Maine resident.⁵⁴ Invalidation of all of the signatures collected by the circulator left the initiative 2,812 signatures short of the threshold to reach the ballot.⁵⁵ On appeal, the Maine Supreme Court started by recognizing that direct initiatives are "core political speech" and that the U.S. Supreme Court had taught that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is

⁵¹ *Id.* at 802.

⁵² *Id.* at 803.

⁵³ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75 (Me. 2002).

⁵⁴ *Id.* at 77.

⁵⁵ *Id.*

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to accompany the democratic processes.”⁵⁶ The court also noted that the legislature had “criminalized the providing of a false statement in connection with a petition” by making it a “Class E crime.”⁵⁷ The court ultimately concluded that because of the crucial role circulators play in the initiative process, a false circulator affidavit rendered all signatures collected by that circulator invalid:

[T]he circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many ways hinges on the trustworthiness and veracity of the circulator. In reviewing the signatures gathered by the circulators, the Secretary has the ability to verify through municipal records that a signing voter is actually registered and therefore permitted to vote. In contrast, the Secretary has no way, without engaging in a separate investigation, to verify that a signing voter actually signed the petition. Thus, the circulator's oath is critical to the validation of a petition. Indeed the oath is of such importance that the Constitution requires that it be sworn in the presence of a notary public. ... In addition to obtaining truthful information from the circulator, the oath is intended to assure that the circulator is impressed with the seriousness of his or her obligation to honesty, and to assure that the person taking the oath is clearly identified should questions arise regarding particular signatures. As early as 1917, we held that verification of the signatures and the subsequent oath taken by the circulator is an “indispensable accompaniment of a valid petition,” and, accordingly, that the invalidation of signatures lacking this prerequisite is necessary to preserve the integrity of the initiative and referendum process.⁵⁸

The court therefore invalidated all of the signatures contained in these petition booklets “*in toto*.”⁵⁹

⁵⁶ *Id.* at 78-79 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

⁵⁷ *Id.* at 81.

⁵⁸ *Id.* at 80 (internal citations and brackets omitted).

⁵⁹ *Id.*

The Montana Supreme Court likewise upheld the state attorney general's invalidation of signatures in support of three ballot initiatives that were collected by circulators who falsely swore to the location of their physical addresses in Montana⁶⁰ and that they had personally viewed all subscribers sign the petition.⁶¹ The circulators had also likely employed a "bait and switch" tactic to induce people who knowingly signed one petition to unknowingly sign the other two.⁶² The court upheld invalidation of 64,463 of the 125,609 total signatures collected by these circulators, which resulted in the decertification of all three initiatives from the statewide ballot.⁶³ The court reasoned that this was necessary to protect the careful initiative requirement adopted by the legislature:

We acknowledge that many voters feel strongly that they should have the opportunity to vote on one or more of these initiatives, and that these people will feel disenfranchised by our decision. This is extremely regrettable. The fact remains, however, that if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature.⁶⁴

⁶⁰ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 773-75 (Mont. 2006). Montana Code Annotated § 13-27-302 lists the requirements of circulator affidavits. One of those requirements is that the circulator list the address of the petition signature gatherer. In *Montanans for Justice*, the 43 out-of-state circulators at issue in that case used false or fictitious addresses in Montana in their circulator affidavits. *Id.* at 773. "[S]ome of the provided addresses were hotels, retail stores or shopping centers; some were apartment complexes or personal residences at which the signature gatherer was not listed as a resident, and some addresses simply did not exist." *Id.* at 773.

⁶¹ *Id.* at 770-73.

⁶² *Id.* at 775-76.

⁶³ *Id.* at 771 & n.4.

⁶⁴ *Id.* at 778.

The Montana Supreme Court expressly considered and rejected the holding of the Missouri Supreme Court in *United Labor Committee of Missouri v. Kirkpatrick*—cited by State Defendants in this case—that so long as the state can verify the veracity of the authenticity of subscription signatures, the petition should not be invalidated regardless of the conduct of the circulators.⁶⁵

The Oklahoma Supreme Court has ruled in accord with the cases above. In *In re Initiative Petition No. 379, State Question No. 726*,⁶⁶ that court struck all signatures (57,850 in total) gathered by circulators employed by a Nevada petition company, National Voter Outreach (“NVO”), in support of a citizen taxpayer bill of rights initiative. Those circulators falsely stated in their affidavits that they were “a qualified elector of the State of Oklahoma” when none of them were even Oklahoma residents.⁶⁷ The court reasoned that the Oklahoma legislature’s enactment of criminal sanctions for false circulator affidavits (punishable by up to \$1,000.00 and a year in county jail) made invalidation of all signatures gathered by those circulators the appropriate remedy.⁶⁸ Far from disenfranchising voters, that remedy upholds the integrity of the initiative process enacted in law:

Excluding all petitions associated with the [] initiative does not disenfranchise voters. Rather, it upholds the integrity of the initiative process that has been undermined by criminal wrongdoing and fraud. The

⁶⁵ *Id.* at 770.

⁶⁶ *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32 (Okla. 2006).

⁶⁷ *Id.* at 47-48.

⁶⁸ *Id.* at 41-42.

Legislature has imposed strong sanctions for such wrongdoing. NVO and its out-of-state circulators committed much more than mere technical violations of Oklahoma law—they attempted to destroy the safeguards by which signatures are obtained and verified. Nothing less than the strong sanction of voiding the entire petition will serve to deter similar activity in the future and to protect the precious right of the initiative to Oklahoma voters.⁶⁹

Because the voiding of all petitions supported by false circulator affidavits reduced the number of qualified subscribers below the required threshold, the court ruled “the petition fails for numerical insufficiency.”⁷⁰

In 2016, the Arkansas Supreme Court invalidated 1,040 voter subscriptions and ordered the initiative stay off the election ballot because circulators did not disclose, prior to gathering signatures, that they were getting paid to collect signatures. In *Benca v. Martin*, an Arkansas statute required paid circulators to submit an affidavit to the secretary of state *prior* to gathering subscriptions.⁷¹ The same statute admonished: “[s]ignatures incorrectly obtained or submitted under this section shall not be counted by the Secretary of State.”⁷² Several circulators collected valid signatures but did so before they filed their affidavits with the secretary of state.⁷³ Like the state officials in this case, the Arkansas secretary of state refused to invalidate the otherwise valid signatures of Arkansas voters

⁶⁹ *Id.* at 49-50.

⁷⁰ *Id.* at 50.

⁷¹ *Benca v. Martin*, 500 S.W.3d 742 (Ark. 2016).

⁷² *Id.* at 748-49.

⁷³ *Id.* at 748.

who were in favor of putting the legalization of medical marijuana on the ballot.⁷⁴ Arkansas lawyer Kara Benca sued the Secretary of State to invalidate the petitions.⁷⁵

The Arkansas Supreme Court granted Benca's petition and invalidated enough subscriptions to keep the initiative off the ballot. The court noted that the statutory language was mandatory that the secretary of state "shall not" count subscriptions incorrectly obtained or submitted.⁷⁶ Therefore, the court ruled that the initiative lacked the sufficient number of valid subscriptions, and issued a mandate that the secretary of state keep the medical marijuana initiative off the upcoming ballot.⁷⁷

C. State Defendants' Passing References to the Free-Speech Principles and Distinguishable Caselaw is Unpersuasive.

State Defendants end their motion to dismiss with passing references to free speech principles and Alaska cases involving much different situations than whether subscriptions to a petition supported by false circulator affidavits should be counted by the lieutenant governor. None of these arguments are persuasive or provide a means to ignore the plain language of Alaska statutes.

1. *North West Cruiseship Association v. State* helps, not undermines, Plaintiffs' claims.

North West Cruiseship Association of Alaska, Inc. v. State does not answer the

⁷⁴ *Id.* at 744.

⁷⁵ *Id.*

⁷⁶ *Id.* at 748-49.

⁷⁷ *Id.* at 744, 750.

question at issue in this case. That case involved challenges to subscriber signatures on a petition on four grounds. First, AS 15.45.120 requires each subscriber to be a registered Alaska voter *at the time they sign the petition*, but the petition booklets printed by the Division of Elections lacked a spot for subscribers to date their signatures. During its review of the petitions, the Division only counted signatures of individuals who were registered as of the date the petition booklet was filed. Cruise ship groups challenged all of the subscriptions, arguing the Division had no way of verifying that any subscriber was a registered voter at the time he or she signed the petition.⁷⁸ The Court reasoned that while the Division's method of auditing the signatures "may have been somewhat imprecise, in that a subscriber's voting registration status could only be verified as of the date the petitions were filed, the audit was nevertheless reasonable given that there was no statutory requirement that each signature be dated at the time of the audit."⁷⁹ Importantly, the Court made clear that its "analysis would be different had the legislature affirmatively required the signatures to be individually dated."⁸⁰

Second, the circulator affidavits were self-certified by the circulators instead of by notary publics, and did not include the location of self-certification and included petitions that were circulated in Anchorage where public notaries were typically available.⁸¹ The

⁷⁸ *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 576-77 (Alaska 2006).

⁷⁹ *Id.* at 576-77.

⁸⁰ *Id.* at 577.

⁸¹ *Id.* at 578.

Court reasoned that nothing prohibited a circulator from self-certifying his or her own circulator affidavit in Anchorage or anywhere else in the state, and the failure to include the location of the self-certification was a technicality that did not affect the sworn nature of the affidavit: "Because the failure to provide a place of execution is a technical deficiency that does not impede the purpose of the certification requirement, we conclude the petition booklets should not be rejected on these grounds."⁸²

Third, the cruise ship plaintiffs challenged the Division's failure to reject the subscriptions contained in petition booklets that did not include on each page the "paid by" information required by a now-defunct statute.⁸³ Circulators submitted 254 petition booklets containing subscriptions.⁸⁴ Two of those petition booklets each had one page that did not include the "paid by" information, and all other pages in these two petition booklets contained the proper disclosure.⁸⁵ The Division rejected all signatures contained on the two pages that did not include the "paid by" disclosure, but the plaintiffs sought to invalidate those two booklets in their entirety.⁸⁶ The Court approved of the Division's method, stating that by only excluding the otherwise valid signatures on pages that lacked the disclosure, the Division "struck a careful balance between the people's right to enact legislation by initiative and the regulations requiring that potential petition subscribers be

⁸² *Id.* at 577-78.

⁸³ *Id.* at 578.

⁸⁴ *Id.* at 576.

⁸⁵ *Id.* at 578.

⁸⁶ *Id.*

made aware that the circulators may have a motivation to induce them to sign the petition other than a personal belief in the value of the initiative.”⁸⁷ It is in this context of affirming the Division's rejection of otherwise valid subscriptions on pages of the petition that lacked the required disclosure but counting the subscriptions on the other pages of the petition booklets that included the “paid by” disclosure that the Court quoted its prior directive to the Division to interpret its regulations in a way that “avoids the wholesale disenfranchisement of qualified electors.”⁸⁸ In other words, qualified subscriptions should be disqualified only if they could have been affected by the failure to lawfully disclose who paid the circulator.

Finally, the Court upheld the Division's counting of subscriptions that lacked the subscriber's physical residence address, as required by a Division regulation and not required by statute. The Court reasoned that while these subscribers failed to include their physical address, they all included their mailing address, their voter registration number, or social security number, and this information was sufficient for the Division to confirm they were qualified voters.⁸⁹

None of *North West Cruiseship Association's* holdings undermine Plaintiffs' claim in this case. To the contrary, the Court approved the invalidation of otherwise valid subscriptions because of circulator *negligence*, which should counsel this Court to rule that

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

invalidation of otherwise valid subscriptions is appropriate in the instance of circulator *criminal misconduct*, as is the case here. In *North West Cruiseship Association*, the Division of Elections properly rejected all subscriptions on pages of the petitions that did not include the “paid by” disclosures required by statute despite them otherwise being valid subscriptions, and the Court rejected the plaintiffs’ attempts to turn technical violations into the wholesale invalidation of signature pages that did comply with the statute.⁹⁰ Here, like the Division’s proper rejection of subscriptions on pages affected by circulators’ failures to include information of who was paying him or her to collect the signatures, Plaintiffs seek to invalidate signatures because of criminal misconduct by signature gatherers.

Based on publicly available information of how much circulators hired to collect signatures in favor of 19OGTX were paid, which is described in detail in Plaintiffs’ Complaint, it is likely that the professional out-of-state circulators working for Advanced Micro Targeting were unlawfully paid in excess of \$1 per signature for the collection of signatures,⁹¹ and that they falsified their circulator affidavits supporting their petitions to state they did not receive unlawful pay for the collection of subscriptions.⁹² Plaintiffs’ claim goes to the heart of the signature gathering effort in support of 19OGTX and the proper remedy—as supported by the *North West Cruiseship Association* Court’s approval

⁹⁰ *Id.*

⁹¹ AS 15.45.110(c).

⁹² AS 15.45.130(6).

of the Division's rejection of all subscriptions on pages that lacked the disclosure information—is the invalidation of all signatures affected by the circulator's unlawful conduct. That is, all of the signatures supported by a fraudulent circulator affidavit.

2. Invalidation of all subscriptions supported by a false circulator affidavit promotes the integrity of the initiative process and does not undermine free-speech.

State Defendants are wrong that invalidation of petition subscriptions supported by a false circulator affidavit would “thwart voters' constitutional right to propose and enact initiatives through no fault of their own”⁹³ Several courts have rejected this precise argument. Rather than thwarting voter rights, a court that upholds the requirement that circulators provide truthful affidavits is protecting the integrity of the initiative process itself.

The Montana Supreme Court reasoned that while it was “regrettable” that some voters would feel disenfranchised, the fact remained “that if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature. We can neither excuse nor overlook violations of these laws, for to do so here would confer free reign for others to do so in other matters. We must enforce the law as written and as the Legislature intended.”⁹⁴

The Maine Supreme Court likewise reasoned “the circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many

⁹³ State Defendants' Motion to Dismiss, at 3.

⁹⁴ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006).

ways hinges on the trustworthiness and veracity of the circulator.”⁹⁵ Therefore a false circulator affidavit “justif[ies] the invalidation of the petition *in toto*.”⁹⁶

The Alaska Supreme Court decisions cited by State Defendants⁹⁷ are distinguishable and do not support their position that invalidating initiative subscriptions would be an affront to Alaska election law and disenfranchise voters. *Miller v. Treadwell*⁹⁸ was regarding misspelled write-in votes for Senator Lisa Murkowski in the 2010 general election, and not whether circulators had been unlawfully induced by pay in excess of the statutory maximum to collect signatures to get an initiative on the general ballot. The Court ultimately upheld inclusion of write-in votes that misspelled Senator Murkowski's name based on “voter intent” and its caselaw that has “consistently construed election statutes in favor of voter enfranchisement.”⁹⁹ Here, however, the issue is not voter disenfranchisement, as no vote has taken place, but rather whether the circulators unlawfully procured the required subscriptions to put the issue to a vote of the public. Upholding requirements for ballot access does not disenfranchise any voter; it upholds the integrity of the initiative process so it may endure and be trusted by the public.

⁹⁵ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002).

⁹⁶ *Id.* The Court was bolstered in this conclusion by the fact that the Maine Legislature considered a false statement in a circulator affidavit “to be a sufficiently grave act that it has specifically criminalized the providing of a false statement in connection with a petition.” *Id.* at 81 (citing 21-A M.R.S.A. § 904 (1993)).

⁹⁷ State Defendants' Motion to Dismiss, at 9-10.

⁹⁸ *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

⁹⁹ *Id.* at 870.

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*Willis v. Thomas*¹⁰⁰ involved the Division of Election's inclusion of two voters' ballots in a general-election recount for a state senate seat even though the Division's records reflected they were not registered to vote because both had filled out and submitted the voter registration paperwork but local officials failed to forward these registrations to the Division before the election. The Court reasoned that these individuals should not have their actual votes disqualified because of the negligence of local officials.¹⁰¹ Again, this case involved actual votes and not subscriptions for a petition to reach the ballot collected by a circulator unlawfully induced to gather subscriptions.¹⁰²

The Alaska Supreme Court ballot initiative cases cited by State Defendants are likewise unhelpful to them. In *Yute Air Alaska v. McAlpine*,¹⁰³ the Court was tasked with determining whether the substance of an initiative violated the Alaska Constitution's one-subject rule. The Court refused to overrule its prior precedent on what constituted single-subject legislation and strike the initiative down. Stare decisis counseled in favor of upholding that prior precedent because it was not clear that a different standard would be more workable, the sponsors relied on the Court's caselaw in drafting the initiative, and

¹⁰⁰ *Willis v. Thomas*, 600 P.2d 1079, 1086-87 (Alaska 1979).

¹⁰¹ *Id.* at 1087.

¹⁰² The same is true of *Fischer v. Stout*, 741 P.2d 217 (Alaska 1987). In that case, Victor Fischer was a candidate for a state senate seat and lost the initial ballot count on election day by 15 votes. He demanded a recount. The Court ultimately upheld the election of Fischer's opponent, and in the course of doing so, ordered a handful of absentee votes to be counted that were originally rejected as submitted by a non-registered voter because those individuals had submitted the proper paperwork but the Division had not received it or lost it. *Id.* at 223-24.

¹⁰³ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173 (Alaska 1985).

because the issue involved the initiative process, an act of direct democracy, the Court preferred to keep its liberal standard for finding an initiative conforms to the single-subject rule.¹⁰⁴ Here, there is no stare decisis for this Court to consider, as Plaintiffs and State Defendants agree that the appropriate remedy for false circulator affidavits is a matter of first impression in Alaska.¹⁰⁵ The closest precedent—*North West Cruiseship Association*—confirms that the Division of Elections has invalidated, and the Alaska Supreme Court has approved, otherwise valid voter subscriptions on petition pages where the circulator neglected to include the “paid by” disclosures. Here, Plaintiffs ask for that same remedy for criminal misconduct by signature gatherers in lying about how much they were paid for the collection of signatures. Moreover, here, Plaintiffs have not asked the Court to rule that the substance of 19OGTX is unconstitutional, thereby foreclosing the electorate from ever considering the substance of 19OGTX as a ballot initiative. Rather, Plaintiffs have asked the Court to uphold the integrity of the process proponents are statutorily required to follow to gain access to the ballot. These crucial differences distinguish this case from *Pullen v. Ulmer*,¹⁰⁶ *Planned Parenthood of Alaska v.*

¹⁰⁴ *Id.* at 1180-81.

¹⁰⁵ See Motion to Characterize Action as Non-Routine, at 5; State Defendants' Motion to Dismiss, at 2.

¹⁰⁶ *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996) (noting the rule that when analyzing the substance of an initiative that the court is to “construe voter initiatives broadly so as to preserve them whenever possible.”).

Campbell,¹⁰⁷ and *Boucher v. Engstrom*,¹⁰⁸ which are also cited by State Defendants.

None of these cases by the Alaska Supreme Court support State Defendants' argument that this Court should permit circulators who were unlawfully paid in excess of the statutory maximum to have the signatures they have unlawfully collected count toward ballot access. *North West Cruiseship* supports Plaintiffs' requested remedy.

IV. CONCLUSION

For the foregoing reasons, this Court should deny State Defendants' Motion to Dismiss this lawsuit. Plaintiffs' Complaint meets the low threshold to survive a motion to dismiss because it has alleged "a set of facts consistent with and appropriate to some enforceable cause of action."¹⁰⁹ Specifically, Plaintiffs' Complaint alleges that circulators hired by Advanced Micro Targeting were unlawfully paid in excess of \$1 per signature, for the collection of signatures,¹¹⁰ and lied about their pay in a sworn affidavit that certified the petition(s) submitted to the lieutenant governor. AS 15.45.130 prohibits the lieutenant governor from counting any subscriptions that are not "properly certified" when they are filed. Plaintiffs' Complaint asks the Court, consistent with *North West Cruiseship*

¹⁰⁷ *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 729 (Alaska 2010) (same).

¹⁰⁸ *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (same).

¹⁰⁹ *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 6 (Alaska 2012) (quoting *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253-54 (Alaska 2000)); see also *Odom v. Fairbanks Memorial Hospital*, 999 P.2d 123, 128 (Alaska 2000).

¹¹⁰ AS 15.45.110(c).

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Association, to apply AS 15.45.130 and invalidate all subscriptions contained in petition booklets supported by false circulator affidavits.

DATED at Anchorage, Alaska this 12th day of May, 2020.

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CERTIFICATE OF SERVICE

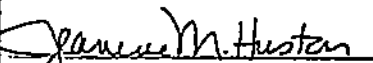
I hereby certify that on the 12th day of May, 2020, a true and correct copy of the foregoing was served by email upon the following:

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OPPOSITION TO MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION
TO CHARACTERIZE CASE AS NON-ROUTINE
RESOURCE DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

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