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Subject: 3AN-20-05901CI - Second Reply in Support of Motion to Characterize Case as Non-Routine and Set

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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; 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

**SECOND REPLY IN SUPPORT OF MOTION TO
CHARACTERIZE CASE AS NON-ROUTINE AND
SET EXPEDITED DISCOVERY AND AUGUST 2020 TRIAL DATE**

I. INTRODUCTION

Defendant Vote Yes For Alaska's Fair Share ("Vote Yes") has offered an angry, accusatory rant, but it provides no new arguments in its Response to Plaintiffs' Motion to Characterize Case as Non-Routine and Set Expedited Discovery and August 2020 Trial

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Date ("Plaintiffs' Motion").¹ Instead it merely repeats the same arguments that State Defendants forwarded in their response to Plaintiffs' Motion.² Vote Yes does not oppose on the merits Plaintiffs' request that this case should be characterized as non-routine and the setting of expedited discovery and an August 2020 trial date. Instead, Vote Yes argues incorrectly that: (1) invalidation of all subscriptions supported by a false circulator affidavit would "disenfranchise" Alaska voters, (2) that the State lacks the authority to invalidate subscriptions in this manner, and (3) that the Alaska Supreme Court's decision in *North West Cruiseship Association v. State*³ demonstrates that the State should keep all signatures affected by the circulator's unlawful conduct. None of these arguments has merit.

II. THE STATE OF ALASKA HAS THE AUTHORITY TO INVALIDATE SUBSCRIPTIONS NOT PROPERLY CERTIFIED AT THE TIME OF THEIR FILING

Vote Yes does not even quote the applicable statutory provision that governs circulator certification of subscriptions. AS 15.45.130 provides that "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing

¹ Defendant Vote Yes for Alaska's Fair Share's Response to Plaintiffs' Motion to Characterize Case as Non-Routine and Set Expedited Discovery and August 2020 Trial Date, Joinder in the State of Alaska's Cross-Motion to Dismiss, Notice of Intention to File a Motion to Dismiss by Friday, May 15, 2020, and Comment on Relevant Authority (May 11, 2020) (hereinafter "Vote Yes For Alaska's Fair Share's Response").

² 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) (Apr. 30, 2020) ("State Defendants' Response").

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

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or corrected before the subscriptions are counted.” The statute goes on to explain that certification is accomplished by a circulator making the sworn statements required by AS 15.45.130. In other words, Alaska's Legislature has spoken on the issue and has directed the lieutenant governor that he may not count subscriptions that are not properly certified with a circulator affidavit. One of the sworn statements that a circulator must make is that he or she has not been unlawfully paid in excess of \$1 per signature, for the collection of signatures.⁴ Plaintiffs ask this Court to apply the plain language of AS 15.45.130 and to disqualify the signatures affected by the unlawful conduct of circulators who were paid in excess of this statutory maximum.

The majority of other state supreme courts that have addressed this issue have held that invalidation of all subscriptions supported by a false circulator affidavit is the proper remedy to protect the integrity of the initiative process. The Arizona Supreme Court so ruled in *Brousseau v. Fitzgerald*, 675 P.2d 713, 715 (Ariz. 1984).⁵ The Ohio Supreme Court so ruled in *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801, 803 (Ohio 1982).⁶ The Maine Supreme Court came to the same conclusion

⁴ AS 15.45.130(6).

⁵ *Brousseau v. Fitzgerald*, 675 P.2d 713, 715 (Ariz. 1984) (rejecting defendant's argument that so long as the petition subscriptions were valid the Court should not invalidate signatures and disqualifying all signatures supported by false circulator affidavit).

⁶ *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801, 803 (Ohio 1982) (rejecting the argument that a circulator's misconduct should have no effect on the viability of otherwise valid subscriptions and holding that “we view this error not as a technical defect but as a substantial and fatal omission of a specific statutory requirement.”).

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in *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002).⁷ So too did the Montana Supreme Court in *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 773-75 (Mont. 2006). Likewise for the Oklahoma Supreme Court in *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32, 49-50 (Okla. 2006), and the Arkansas Supreme Court in *Benca v. Martin*, 500 S.W.3d 742, 744, 750 (Ark. 2016).

These Courts reason that a circulator's central role in the initiative process, as well as their legislatures' decision to criminalize false statements in circulator affidavits, demonstrates that a circulator's false statements undermine the entire process and all signatures supported by the false affidavit must be invalidated. Otherwise, the careful process that each legislature has crafted for allowing a ballot initiative to reach the general ballot is undermined.

Given AS 15.45.130's plain language, this Court should not permit the lieutenant governor to count subscriptions not properly certified at the time the petition is filed. Subscriptions in a petition are not properly certified if the circulator makes false statements in providing the required certifications. The Court should uphold the plain language of the statute and invalidate all subscriptions in support of 19OGTX not properly certified because they are supported by a false circulator affidavit. This conclusion is buttressed by the weight of the majority of modern authority from other state supreme courts.

⁷ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002) (rejecting same argument because "[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.").

The Alaska Supreme Court's decision in *North West Cruiseship Association of Alaska, Inc. v. State* confirms that the State can and does invalidate signatures affected by a circulator's failure to abide by statutory requirements. In that case the Court voiced approval of the State's invalidation of otherwise valid subscriptions from Alaska voters because they were on pages of petitions that did not include the proper disclosures of who was paying the circulator.⁸ The Court reasoned that the circulator's negligence could have caused voters to abstain from signing the petition. Likewise, here, the unlawful payment of circulators affects all signatures collected by the unlawfully paid circulator because that professional circulator was unlawfully induced to collect those signatures. Plaintiffs ask this Court to apply the logic of *North West Cruiseship Association* and invalidate all signatures supported by false circulator affidavits regarding the pay of the circulator. It would be puzzling for the State to invalidate signatures procured despite a circulator's *negligence* but keep signatures procured despite a circulator's *criminal misconduct*, as is the case here.

III. THE STATE'S INVALIDATION OF ALL SIGNATURES SUPPORTED BY FALSE CIRCULATOR AFFIDAVITS DOES NOT "DISENFRANCHISE" A SINGLE VOTER

Several state supreme courts have rejected the argument pushed by State Defendants and Vote Yes that the invalidation of all signatures supported by a false affidavit amounts to the disenfranchisement of voters. These courts correctly reason that it does not

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⁸ *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 576-77 (Alaska 2006).

disenfranchise voters to ensure the statutory process for ballot access is followed. Vote Yes is still free to go out and collect signatures and put an issue to Alaska voters, but they should not be free to violate express statutory requirements with impunity and collect signatures in a manner deemed criminal by the Alaska legislature. This Court should follow the persuasive reasoning of the majority of courts that have considered this question.

The Montana Supreme Court reasoned that it was not disenfranchisement of voters to uphold the Montana statutes for an initiative to reach the ballot:

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.⁹

The Maine Supreme Court likewise rejected this argument, noting the Maine Legislature's criminalization of false statements by circulators as a reason to invalidate all otherwise valid subscriptions supported by that false circulator affidavit:

We turn then to the question of whether the signing of an oath by an imposter may similarly justify the invalidation of the petition *in toto*. 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

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⁹ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006).

prerequisite is necessary to preserve the integrity of the initiative and referendum process.¹⁰

Upholding the statutory requirements for ballot groups to gain access to the general ballot is not disenfranchising voters.

There has been no vote, and this case is not about voting. Vote Yes makes much of a single sentence in *North West Cruiseship Association*, where the Court voiced approval of the Division of Election's disqualification of all otherwise valid subscriptions on pages of petitions where the circulator had failed to include the required "paid by" information but retaining the subscriptions on other pages of the petition that properly included the "paid by" disclosure.¹¹ The Court noted that this balance struck by the Division was "in line with our directive in *Fischer v. Stout* to seek 'a construction which avoids the wholesale disenfranchisement of qualified electors.'"¹² This dicta does not mean the disqualification of subscriptions in conformance with Alaska's initiative statutes is the disenfranchisement of voters. Disenfranchise occurs when someone is deprived the right to vote.¹³ Here, no one has voted on 19OGTX. It is not even on the general election ballot yet. No one will be disenfranchised by this Court's application of Alaska's valid initiative

¹⁰ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002) (internal citations omitted).

¹¹ *North West Cruiseship Ass'n*, 145 P.3d at 578 (original brackets omitted).

¹² *Id.* (original ellipses and brackets omitted).

¹³ BLACK'S LAW DICTIONARY (11th ed. 2019). "To deprive (someone) of a right, esp. the right to vote; to prevent (a person or group of people) from having the right to vote." *Id.*

statute, AS 15.45.130, that prohibits the lieutenant governor from counting subscriptions that are not properly certified.

This case is about upholding the express statutes that protect the integrity of Alaska's ballot initiative process, and only once that process has been followed may the initiative be presented to Alaska voters.

IV. VOTE YES IS ATTEMPTING TO SHIELD FROM DISCOVERY THE DETAILS OF ITS BALLOT CIRCULATORS' CRIMINAL CONDUCT

Not surprisingly, Vote Yes asks the Court to “stay any pre-trial deadlines or discovery” for now. Any delay is helpful to Vote Yes. As State Defendants recognized, “this litigation will have to proceed on an extremely expedited schedule in order for the factual issues to be resolved at a trial before the initiative appears on the ballot in November.”¹⁴ This is so, because the State typically sends the ballots for the November general election to the printers in early September. This means that an August 2020 trial date is necessary to resolve the issues raised by Plaintiffs' Complaint, and to decide whether the proper remedy is invalidation of all subscriptions supported by a false circulator affidavit.

Vote Yes and State Defendants make the inconsistent arguments that: (1) the State cannot investigate a circulator's false affidavit because AS 15.45.130 does not provide an explicit mechanism for the lieutenant governor to make a decision on whether a circulator is lying or not in his or her certification affidavit; and (2) the State's only remedy for a false

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¹⁴ State Defendants Response, at 3.

circulator affidavit is to criminally investigate the circulator as to whether his or her sworn statements are lies. Either the State has the authority to ascertain the truthfulness of circulator affidavits or it does not. The State clearly has that authority, and it is disingenuous for State Defendants and Vote Yes to assert otherwise. Plaintiffs should be granted discovery to determine whether the majority of the circulator affidavits contain false statements about the pay the circulators received to gather signatures.

V. CONCLUSION

This Court should grant Plaintiffs' Motion to Characterize Case as Non-Routine, and Set Expedited Discovery and August 2020 Trial Date. As all parties recognize in their briefing, this case is non-routine. Moreover, because State Defendants and Vote Yes have not shown that Plaintiffs' Complaint fails to state a claim upon which relief may be granted, dismissal is inappropriate. This case should proceed to discovery and an August trial so that the issue can be resolved on the merits.

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

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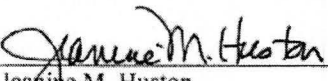
CERTIFICATE OF SERVICE

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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