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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**

APR 30 2020

By Clerk of the Trial Courts
Deputy

Case No. 3AN-20-05901 CI

**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) #3**

The plaintiffs—the Alaska Chamber and a variety of non-profit corporations supporting industry and development in Alaska—have sued the State and the sponsors of a ballot measure, 19OGTX, for injunctive and declaratory relief. The plaintiffs claim that a national professional signature gathering company—Advanced Micro Targeting (“AMT”)—violated Alaska law by paying signature gatherers in excess of \$1 per signature obtained in support of putting 19OGTX on the ballot. The initiative sponsors

hired AMT to collect the voter signatures needed to have the initiative placed on the ballot. [Complaint at ¶ 14] Based on the content of an AMT recruitment, [Complaint at ¶ 22], the plaintiffs allege that the petition circulators working for AMT provided false affidavits in support of the petition booklets. The plaintiffs ask this Court to declare that the alleged false affidavits render the signatures in the booklets invalid and to enjoin the Lieutenant Governor from counting the signatures contained in those booklets.

[Complaint at 8-9]

As the plaintiffs note in their Motion to Characterize Case as Non-Routine, the legal effect of a factual determination that petition circulators filed false certification affidavits is a question of first impression in Alaska. [Mot. at 5-6] Although the plaintiffs have cited a number of out-of-state cases where courts invalidated signatures contained in booklets certified by false affidavits, these cases generally involve other indicia of fraud affecting the genuineness of the signatures themselves,¹ contrary authority also exists, and many of the cases note the strong First Amendment interests of citizens to support

¹ See e.g., *Weisberger v. Cohen*, 22 N.Y.S.2d 1011 (N.Y. Sup. Ct. 1940) (petition sheets invalidated where some signatures were forged showing that authenticating witness had signed false affidavit); *McCaskey v. Kirchoff*, 152 A.2d 140 (N.J. Super.A.D. 1959) (signatures were forgeries showing authenticating affidavits were false); *Sturdy v. Hall*, 143 S.W.2d 547 (Ark. 1940) (allegations included nearly 1200 signatures that "appear to have been written in the same handwriting by persons who had signed other names."); *State ex rel Gongwer v. Graves*, 107 N.E. 1018 (Ohio 1913) (petition contained thousands of forged signatures); *Zaiser v. Jaeger*, 822 N.W.2d 472 (ND 2012) (circulators admitted forging signatures). But see e.g., *Maine Taxpayers Action Network v. Sec. of State*, 795 A.2d 75 (Me. 2002) (invalidating all signatures collected by individual posing as James Powell, because there was no evidence of who he really was).

initiatives and the parallel state constitutional rights at issue.² The strength of those interests, combined with the nature of the statutory scheme and the existence of criminal penalties as a separate incentive to comply with the law suggests that in Alaska, otherwise valid signatures should not be invalidated solely because of petition circulators' violation of the payment limitation in AS 15.45.110(c). Although the Division shares the plaintiffs' concern with the possible violation of Alaska's limitation on the payment of signature gatherers, a remedy that would thwart voters' constitutional right to propose and enact initiatives through no fault of their own is inappropriate.

The plaintiffs correctly note that 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. For this reason, the state defendants now move to dismiss the complaint so that the Court can decide the legal issue as a preliminary matter, thereby avoiding wasting judicial resources.³

² See e.g., *Citizens Comm. For D.C. Video Lottery Terminal Initiative v. D.C. Board of Elections & Ethics*, 860 A.2d 813, 835 (D.C. Ct. App. 2004) (Ruiz, J., concurring) (noting that petition signing is "core political speech" and concluding that "[p]articularly where the signatures collected do not decide an election, but merely determine whether an issue is to be presented to the full electorate for a vote, the First Amendment balance should be struck in favor of speech.").

³ The state defendants further note that they are not in possession of any information or documents not already in the possession of the plaintiffs that would assist this Court in determining whether the factual allegations of the complaint are true. Such information would appear to be available primarily from Advanced Micro Targeting, but the plaintiffs have not named AMT as a defendant in this matter.

I. FACTS

The sponsors of the initiative at issue here—Vote Yes For Alaska’s Fair Share—filed their initiative application, identified as 19OGTX by the Division of Elections, on August 16, 2019.⁴ The initiative bill was titled: “An Act relating to the oil and gas production tax, tax payments, and tax credits.” Lieutenant Governor Kevin Meyer certified the application on October 15, 2019, and the Division of Elections released petition booklets to sponsors for circulation on October 23, 2019. On January 17, 2020, the sponsors filed their petition and the signed booklets with the Division of Elections.

According to the allegations made in the complaint, which for purposes of a motion to dismiss must be accepted as true, the sponsors of 19OGTX hired AMT to gather signatures in support of placing the initiative on the ballot. [Complaint at ¶ 14] The complaint alleges that AMT offered and paid signature gatherers more than \$1 per signature in violation of AS 15.45.110(c). [Complaint at ¶¶ 22, 24] The complaint further alleges that those signature gatherers then falsely swore that they had complied with AS 15.45.110(c) when they certified the petition booklets. [Complaint at ¶ 25]

The sponsors of 19OGTX submitted a total of 786 petition booklets. Of those, 544 booklets were certified by circulators who indicated that they were paid by AMT to collect signatures. The Division reviewed the signatures and determined that of the

⁴ All of the information on filings and notifications relating to the initiative along with links to the documents are publicly available on the Division of Election’s website found at <http://www.elections.alaska.gov/Core/initiativepetitionlist.php#19OGTX> (April 24, 2020). In considering a motion to dismiss, a court may consider public records, such as the information about ballot measures on the Division’s website. *See Nizinski v. Currington*, 517 P.2d 754, 756 (Alaska 1973).

44,881 signatures submitted, 39,174 were qualified voters.⁵ On March 17, 2020, the Lieutenant Governor issued a notice to the sponsors that the petition was properly filed.

On April 10, 2020, the plaintiffs filed this lawsuit naming the Lieutenant Governor, the Director of Elections, the State of Alaska Division of Elections, and Vote Yes For Alaska's Fair Share as defendants. The plaintiffs have not sued AMT or any of the signature gatherers.

II. STANDARD FOR GRANTING A MOTION TO DISMISS

Alaska Civil Rule 12(b)(6) authorizes dismissal of a complaint "for failure to state a claim upon which relief can be granted." A motion filed under this rule tests the legal sufficiency of the claims in the complaint. If a plaintiff fails to allege a set of facts that would establish an enforceable cause of action, the complaint should be dismissed. In considering a motion to dismiss, a court may consider public records.⁶

The complaint here requests a declaration "that the 19OGTX petition booklets that are supported by false circulator affidavits have not been properly certified under AS 15.45.130 and that the signatures in those booklets may not be counted," [Complaint at ¶ 32] and "an order that Lt. Governor Meyer must invalidate those petition booklets and all subscriptions contained within those booklets as not properly certified." [Complaint at ¶ 36] These requests are based on the plaintiffs' theory that, under Alaska law, signatures gathered by petition circulators who falsely swore that they were not paid

⁵ 19OGTX petition summary report available at <http://www.elections.alaska.gov/petitions/19OGTX/19OGTX-PetSumReportFINAL.pdf>.

⁶ *Nizinski*, 517 P.2d at 756.

more than a dollar per signature are invalid and may not be counted. If the plaintiffs are wrong that the remedy for violation of AS 15.45.110(c) is invalidation of signatures, then the complaint against the state defendants should be dismissed for failure to state a claim for which relief may be granted.

III. ARGUMENT

A. The constitutional and statutory provisions governing the collection and review of voter signatures in support of an initiative petition.

This case requires the court to interpret the statutes governing the collection of signatures in support of an initiative petition, AS 15.45.105—.160, and more specifically the statute governing certification of petition signatures, AS 15.45.130. As an initial matter, the Alaska Constitution says nothing about certification. Art. XI, § 3 first directs the Lieutenant Governor to prepare a petition containing a summary of the initiative for circulation by the sponsors; and then provides:

If signed by qualified voters who are equal in number to at least ten percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district, it may be filed with the lieutenant governor.

Thus, the constitution is squarely focused solely on the number of signatures of qualified voters, rather than the signature-gathering process. The process is a creature of statute.

At the heart of this case is AS 15.45.110, which prohibits payment of more than \$1 per signature to petition circulators. The statute provides in relevant part:

AS 15.45.110. Circulation of petition; prohibitions and penalty.

...

(c) 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.

...

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.

Equally important, AS 15.45.130 requires that "each petition shall be certified by an affidavit by the person who personally circulated the petition;" and 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." Alaska Statute 15.45.130 sets forth the elements of the circulator's affidavit, which include the statement that the circulator's pay is consistent with AS 15.45.110(c), quoted above:

The affidavit must state in substance

(1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;

(2) that the person is the only circulator of that petition;

(3) that the signatures were made in the circulator's actual presence;

(4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

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

(7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and

(8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so,

the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

Alaska Statute 15.45.120 provides that “[a]ny qualified voter may subscribe to the petition by printing the voter’s name, a numerical identifier, and an address, by signing the voter’s name, and by dating the signature.” Finally, AS 15.45.160 lays out the “[b]ases for determining the petition was improperly filed, and provides that:

[t]he Lieutenant Governor shall notify the committee that the petition was improperly filed upon determining that (1) there is an insufficient number of qualified subscribers; (2) the subscribers were not resident in at least three-fourths of the house districts of the state; or (3) there is an insufficient number of qualified subscribers from each of the house districts described in (2) of this section.

Notably, the statutory scheme does not provide for any kind of investigation of circulator affidavits by the lieutenant governor⁷ or the Division of Elections nor does it contemplate a hearing to consider evidence of alleged wrongdoing by circulators or sponsors in the collection of signatures.⁸

Thus, in order to determine whether “there is an insufficient number of subscribers” as directed by AS 15.45.160, the Lieutenant Governor is authorized only to review the circulators’ affidavits to ensure that they contain the statements required by AS 14.45.130—i.e. are “properly certified at the time of filing”—and verify that the

⁷ Cf. *Zaiser v. Jaeger*, 822 N.W.2d 472, 477 (N.D. 2012) (describing statutory requirement that Secretary of State investigate random sample of signatures “by use of questionnaires, postcards, telephone calls, personal interviews, or other accepted information-gathering techniques, or any combinations thereof, to determine the validity of the signatures.”).

⁸ Cf. *Citizens Comm. for D.C. Video Lottery Terminal Initiative*, 860 A.2d at 816 (noting that election board rejected petition sheets “after a lengthy evidentiary hearing.”).

subscribers are “qualified voters” by comparing the information in the petition booklets with voter registration records.

B. The Alaska Supreme Court construes the initiative statutes liberally so as to protect the right of the people to propose and enact laws by initiative.

The Alaska Supreme Court has repeatedly held that “[i]n matters of initiative and referendum ... the people are exercising a power reserved to them by the constitution and the laws of the state, and ... the constitutional and statutory provisions under which they proceed should be liberally construed.”⁹ To that end, “all doubts as to all technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.”¹⁰ As the court has said, “[i]n other words, we ‘preserve [initiatives] whenever possible,’”¹¹ and “seek ‘a construction [of statutes and regulations] ... which avoids the wholesale dis[en]franchisement of qualified electors.’”¹²

Although the plaintiffs have cited a number of out of state cases to support their claim that “invalidation of all signatures is the appropriate remedy to ensure compliance”

⁹ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)); see also *Nw. Cruiseship Ass’n of Alaska v. State, Office of Lieutenant Governor, Division of Elections*, 145 P.3d 573, 577 (Alaska 2006); *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 729 (Alaska 2010).

¹⁰ *Yute Air*, 698 P.2d at 1181 (quoting *Boucher*, 528 P.2d at 462).

¹¹ *Planned Parenthood*, 232 P.3d at 729 (citing *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996)).

¹² *Nw. Cruiseship Ass’n*, 145 P.3d at 578 (quoting *Fischer v. Stout*, 741 P.2d 217, 225 (Alaska 1987)).

with the statutory prohibition against paying signature gatherers more than a dollar per signature, [Mot. at 5-6] they ignore contrary authority¹³ and do not grapple with the Alaska cases establishing the Court's strong direction to read the statutory requirements in favor of preserving Alaskans' initiative rights.

C. This Court should construe the statutes so as to avoid "the wholesale disenfranchisement of qualified electors."

The Division of Elections verified 39,174 signatures in support of 19OGTX.¹⁴ The complaint does not allege that the Division's determination that 39,174 qualified voters signed the petition was incorrect, nor does it claim that this "is an insufficient number of qualified subscribers."¹⁵ Notably, the complaint makes no allegations that the signatures are themselves fraudulent, unlike the facts in many of the cases relied upon by the plaintiffs.¹⁶

Instead, they argue that this Court should invalidate the signatures of thousands of qualified voters based on the alleged misconduct of signature gatherers over whom the voters had no control and about which the voters had no way to know. Because this result

¹³ See e.g., *Lefkowitz v. Cohen*, 29 N.Y.S.2d 817, 820-21 (N.Y.A.D. 1 Dept., 1941) (holding that voters "should not lose their right to designate a candidate simply because others over whom they have no control may have perpetrated a wrong."); see also, *Petition of Smith*, 276 A.2d 868, 873 (N.J. Super. A.D. 1971) (distinguishing *McCaskey v. Kirchoff*, 152 A.2d 140 (N.J. Super. A.D. 1959), cited by plaintiffs, [Mot. at 5, n.10], because that case involved wrongdoing by candidates in support of their own election).

¹⁴ See Letter from Lieutenant Governor, Kevin Meyer to Robin Brena, March 17, 2020, available at <http://www.elections.alaska.gov/petitions/19OGTX/19OGTX-LetterToSponsor.pdf>.

¹⁵ AS 15.45.160(1).

¹⁶ See cases cited *supra* n. 1.

is contrary to the Alaska constitution, the statutory scheme and Alaska precedent, and unnecessarily infringes on Alaska voters' constitutional right to propose and enact initiatives, this Court should reject this argument.

First, the statutes do not authorize, much less require, more than a facial review of circulators' affidavits. AS 15.45.130 directs that "[i]n 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 statute also provides what the certifying affidavits must state in substance, as explained above.¹⁷ And although this language is not unambiguous, combined with the lack of investigatory authority of the Division, it appears to contemplate only a review of the face of the affidavits rather than a searching inquiry into the truthfulness of the affiants. In other words, the only way that the Division can determine that a petition is "properly certified *at the time of filing*" is by checking whether the affidavit contains the information laid out in the statute, not by investigating whether that information is actually true. Moreover, the Legislature has provided a criminal penalty for violation of the prohibition on paying signature gatherers more than a dollar a signature, making it a class B misdemeanor.¹⁸ The Legislature did not identify false affidavits as a basis for determining that a petition was improperly filed under AS 15.45.160. To be clear, the Division is not arguing that a failure to comply with AS 15.45.110(c) does not matter. On

¹⁷ AS 15.45.130(1)-(8).

¹⁸ See AS 15.45.110(e).

the contrary, the Division is strongly committed to ensuring the integrity of Alaska's elections. But it can only exercise power given to it by the statutes; and, here, the Legislature has not provided authority for the Division to investigate affidavits.¹⁹

Thus, the statutory scheme provides for a criminal penalty to incentivize compliance with AS 15.45.110, rather than giving the Division of Elections either the authority or the ability to enforce the statute by invalidating signatures gathered by petition circulators paid in excess of the statutory maximum.

Second, invalidation of the signatures of voters who have themselves committed no wrong is also plainly inconsistent with Alaska Supreme Court precedent, notwithstanding the fact that many other state courts have upheld this remedy. The Alaska Supreme Court has "consistently construed election statutes in favor of voter enfranchisement,"²⁰ and declined to invalidate the ballots of voters based on the errors of election officials,²¹ offering little support for the plaintiffs' contention that Alaska law would countenance the mass invalidation of otherwise qualified voter signatures based on the misconduct of signature gatherers.

¹⁹ See *Mich. Civil Rights Initiative v. Board of State Canvassers*, 708 N.W.2d 139, 146 (Mich. Ct.App. 2005) (holding that Board of State Canvassers lacked authority to investigate allegations that signatures procured fraudulently because "the Legislature has only conferred upon the Board the authority to canvass the petition 'to ascertain if the petitions have been signed by the requisite number of qualified and registered electors.'").

²⁰ *Miller v. Treadwell*, 245 P.3d 867, 870 (Alaska 2010).

²¹ See e.g., *Willis v. Thomas*, 600 P.2d 1079, 1087 (Alaska 1979); *Fischer v. Stout*, 741 P.2d 217, 223-24 (Alaska 1987).

Alaska law is more consistent with the view of the Missouri Supreme Court in *United Labor Committee of Missouri v. Kirkpatrick*, which noted that the constitutional right to initiative “by the required number of legal voters should not be lightly cast aside”²² and rejected the argument that false certification definitely invalidated signatures. That court found that validation of signatures as shown through voter registration list checks and testimony of circulators was sufficient to overcome the problem created by false notarization of petitions.²³ The court emphasized that it did “not condone the improper signing by circulators of initiative petitions or of affidavits,” noting that the Missouri Legislature made that a crime “punishable by up to two years in the penitentiary.”²⁴ But the court held that the remedy for “those who swore false oaths” is criminal prosecution, not “nullification of the good faith subscription by the voters to the petitions.”²⁵

Because the plaintiffs have not alleged that the signatures gathered by the sponsors and counted by the Division do not represent the genuine support of informed and qualified Alaska voters, this Court should similarly hold that the remedy for any violation of AS 15.45.110(c) lies in the criminal prosecution provided for in AS 15.45.110(e), and not in the wholesale disenfranchisement of nearly 40,000 Alaska voters.

²² *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 453 (Mo. 1978).

²³ *Id.* at 456.

²⁴ *Id.*

²⁵ *Id.* at 456–57.

IV. CONCLUSION

The complaint in this case does not allege any underlying fraud suggesting that 19OGTX did not attract the support of the requisite number of qualified Alaska voters to earn a place on the ballot. In the absence of any such allegations, and given that AS 15.45.110(e) provides for criminal penalties for violating the circulator payment limits, this Court should hold that otherwise qualified voters' signatures are not invalidated solely because of circulators were paid more than \$1 per signature; and grant the state defendants' motion to dismiss.

DATED April 30, 2020.

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