

EMERGENCY

FILED
STATE OF ALASKA
APPELLATE COURTS

2020 FEB -3 AM 10 55
CLERK APPELLATE COURT

IN THE SUPREME COURT FOR THE STATE OF ALASKA

BY _____
DEPUTY CLERK

STATE OF ALASKA, DIVISION OF
ELECTIONS, GAIL FENUMIAL,
DIRECTOR, STATE OF ALASKA,
DIVISION OF ELECTIONS, and
STAND TALL WITH MIKE, an
independent expenditure group,

Appellants,

v.

RECALL DUNLEAVY, an
unincorporated association,

Appellee.

Case No. S-17706

Superior Court No.: 3AN-19-10903CI

**EMERGENCY MOTION TO EXPEDITE REQUEST FOR SCHEDULING
CONFERENCE AND MOTION TO LIFT STAY**

Appellee Recall Dunleavy ("Recall Dunleavy") files this emergency motion to expedite two simultaneously-filed motions: (1) a request for a scheduling conference to establish an expedited briefing schedule, and (2) a motion to lift the stay granted by the superior court.

The two motions are related. Recall Dunleavy seeks a briefing schedule that allows oral argument to be held **February 19-21, 2020**, and has no objection to the stay remaining in place *if* briefing and oral argument is scheduled for February. However, if this Court sets briefing and argument for later than February, Recall Dunleavy requests expedited review of its motion to lift the stay.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

The parties have agreed to a scheduling conference on **Monday, February 3, 2020**. Recall Dunleavy respectfully requests an order setting an expedited appellate briefing schedule to be entered **no later than Tuesday, February 4, 2020**.

Recall Dunleavy separately requests expedited consideration of its motion to lift stay, such that a decision can be entered no later than **Friday, February 7, 2020**. Recall Dunleavy proposes that any opposition to its motion be due no later than noon, Thursday, February 6, 2020.

The bases for the emergency nature of both motions is provided below. Counsel for Recall Dunleavy conferred with opposing counsel as set forth in the Affidavit of Jahna Lindemuth, filed in support of this motion.

I. PARTIES AND NOTICE TO PARTIES

The telephone numbers and addresses of counsel for Appellants State of Alaska, Division of Elections, and Gail Fenumiai, Director, State of Alaska, Division of Elections (collectively “the State”) are as follows:

Margaret Paton-Walsh and Joanne Grace¹
Attorney General’s Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100
Emails: margaret.paton-walsh@alaska.gov
joanne.grace@alaska.gov

¹ Counsel for Recall Dunleavy understands that Ms. Paton-Walsh is unavailable this week and that Ms. Grace is prepared to respond in her absence.

The telephone numbers and addresses of counsel for Appellant Intervenor Stand

Tall With Mike ("STWM") are as follows:

Craig Richards
Law Office of Craig Richards
810 N Street, Suite 100
Anchorage, AK 99501
Phone: (907) 306-9878
Email: crichards@alaskaprofessionalservices.com

Brewster Jamieson and Michael Baylous
Lane Powell LLC
1600 A Street, Suite 304
Anchorage, AK 99501
Phone: (907) 277-9511
Emails: jamiesonb@lanepowell.com
baylousm@lanepowell.com

The telephone numbers and addresses of counsel for Appellee Recall

Dunleavy are as follows:

Jahna Lindemuth, Scott Kendall, and Samuel Gottstein
Holmes Weddle & Barcott, P.C.
701 W. 8th Avenue, Suite 700
Anchorage, AK 99501
Phone: (907) 274-0666
Emails: JLindemuth@hwb-law.com
SMKendall@hwb-law.com
SGottstein@hwb-law.com

Susan Orlansky
Reeves Amodio LLC
500 L Street, Suite 300
Anchorage, AK 99501
Phone: (907) 222-7100
Email: Susano@reevesamodio.com

Jeffrey Feldman
Summit Law Group
813 D Street, Suite 200
Anchorage, AK 99501
Phone: (907) 299-1620
Email: Jeffff@summitlaw.com

Ms. Lindemuth and Ms. Orlansky will share responsibility for scheduling issues, and it is not necessary for the Court to contact all the other attorneys for Recall Dunleavy.

Opposing counsel have been served via email with copies of this motion and the underlying motions on which Recall Dunleavy seeks expedited action. Additionally, opposing counsel were advised by telephone on Thursday, January 30, of the motions that Recall Dunleavy would be filing today.

Counsel for the State and STWM advised that they are available and willing to participate in a scheduling conference on Monday, February 3. They advised that they do not object to an expedited schedule for briefing and decision of this appeal, but there is no agreement among the parties on what that expedited schedule should be.

Counsel for STWM has advised that STWM opposes expedited consideration of the motion to lift the stay. The State does not oppose expedited consideration of that motion.

II. STATEMENT OF FACTS

This appeal arises out of the application to recall Governor Michael J. Dunleavy. Recall Dunleavy filed its recall application with the Division of Elections on September 5, 2019.² The Division, relying on the opinion of Attorney General Kevin Clarkson, issued a decision on November 4, 2019, refusing to certify the application.³

The next day, Recall Dunleavy filed a lawsuit to have the recall application certified. STWM intervened on November 14, 2019, and an expedited briefing schedule was set, culminating in oral argument on January 10, 2020. The superior court ruled orally following the argument, and issued a written decision on January 14.⁴

The superior court determined that the recall application should have been certified by the Division, except for one factual allegation, which the court struck.⁵ The superior court ordered the Division of Elections to prepare and issue recall petition

² See Order re: Plaintiff's Motion for Summary Judgment, Defendants' Cross-Motion for Summary Judgment, and Intervenor's Cross-Motion for Summary Judgment at 2 (Jan. 14, 2019) [hereinafter S.J. Order] (Appendix A). All referenced appendices are to Recall Dunleavy's Motion to Lift Stay Pending Appeal (Feb. 3, 2020).

³ See *id.* at 3 n.2 (Appendix A to Motion to Lift Stay).

⁴ See generally *id.*

⁵ See *id.* at 18.

booklets to Recall Dunleavy “no later than February 10, 2020, unless that date is stayed by the Alaska Supreme Court.”⁶

The day after the superior court issued its written decision, STWM moved for a stay pending expedited appeal.⁷ Recall Dunleavy responded on an expedited basis and opposed the stay.⁸ The State filed a non-opposition to the stay motion.⁹ After oral argument on January 29, the superior court granted STWM’s requested stay pending expedited appeal.¹⁰ The superior court also ordered the State and STWM to file notices of appeal no later than February 3, 2020.¹¹ The superior court made it clear after oral argument on January 29 that any further decisions regarding a stay pending appeal or a briefing schedule on appeal were to be made by this Court.

All parties agree that expedited resolution of this appeal will give needed clarity to the parties and the citizens of Alaska regarding this litigation and the important

⁶ *Id.*

⁷ STWM’s Motion for Stay Pending Expedited Appeal (Corrected) (Jan. 15, 2020) (Appendix B to Motion to Lift Stay).

⁸ Plaintiff’s Opposition to STWM’s Motion for Stay Pending Appeal (Jan. 21, 2020) (Appendix D to Motion to Lift Stay).

⁹ State’s Non-Opposition to Intervenor’s Motion for Stay (Jan. 22, 2020) (Appendix C to Motion to Lift Stay).

¹⁰ Order Granting Stay Pending Expedited Appeal (Jan. 29, 2019) (Appendix E to Motion to Lift Stay).

¹¹ *Id.* (“This Court orders Defendant[s] and Intervenor to file any appeal with the Alaska Supreme Court by Monday, February 3, 2020.”).

issues it raises. Further, all parties agree that holding a prompt scheduling conference to establish an expedited schedule is the proper first step.

Recall Dunleavy contends that expedited consideration of its motion to lift the stay also is necessary, essentially for the same reasons that it contends the stay should be lifted: The right to petition for recall of an elected official is guaranteed by the Alaska Constitution.¹² The superior court has ruled that the Division of Elections wrongfully refused to certify the recall petition, and thereby denied citizens the opportunity to circulate petitions for the past three months.¹³ The citizens seeking recall are irreparably harmed by every additional day of delay.

Recall Dunleavy proposes that any opposition to its motion to lift the stay be filed by Appellants by noon, Thursday, February 6, and requests that this Court rule on the motion to lift stay by Friday, February 7. The State has asserted that the Division of Elections requires one week's notice to prepare the petition booklets. While the Division was prepared to meet the February 10 deadline that the superior court initially established, apparently production of the booklets has been put on hold because of the superior court's subsequent grant of the stay. Thus, even a ruling by this Court on February 7 will mean that booklets will not be available until February 14.

¹² Alaska Const. art. XI, § 8 ("All elected public officials in the State . . . are subject to recall by the voters of the State or political subdivision from which elected.").

¹³ See S.J. Order at 18 (Appendix A to Motion to Lift Stay).

III. CONCLUSION

Recall Dunleavy respectfully requests this Court enter an expedited briefing and argument schedule no later than Tuesday, February 5, 2020. Recall Dunleavy also requests a decision by this Court on its motion to lift stay pending appeal by no later than February 7, 2020.

DATED this 3 day of February 2020, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, PC

By: 

Jahnna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No. 1511099

SUMMIT LAW GROUP
Jeffrey M. Feldman
Alaska Bar No. 7605029

REEVES AMODIO LLC
Susan Orlansky
Alaska Bar No. 8106042

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 2020, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

Margaret Paton-Walsh
Joanne Grace
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov
joanne.grace@alaska.gov

Craig Richards
Law Office of Craig Richards
810 N Street, Ste 100
Anchorage, AK 99501
crichards@alaskaprofessionalservices.com

Brewster H. Jamieson
Michael B. Baylous
Lane Powell LLC
1600 A Street, Ste 304
Anchorage, AK 99501
jamiesonb@lanepowell.com
baylousm@lanepowell.com


Brian Fontaine

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**AFFIDAVIT OF JAHNA M. LINDEMUTH IN SUPPORT OF EXPEDITED
EMERGENCY MOTIONS**

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Jahna M. Lindemuth, being first duly sworn and deposed, hereby state as follows:

1) I am one of the attorneys for Appellee Recall Dunleavy in the above-captioned appeal.

2) On the afternoon of January 30, 2020, I along with other counsel for Recall Dunleavy participated in a telephonic conference with Margaret Paton Walsh, counsel for the State Appellants, and Brewster Jamieson and Craig Richards, counsel for Intervenor Appellant Stand Tall With Mike ("STWM").

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3) At the telephonic conference, the parties failed to reach agreement on a specific expedited schedule for this appeal. I informed opposing counsel of Recall Dunleavy's intention to seek a February argument and decision, and that if that was not granted, we also would seek to lift the stay imposed by the superior court delaying delivery of the petition booklets until after this Court rules.

4) Counsel for both the State Appellants and Intervenor Appellant agreed this case should be expedited, and they also agreed they were available for a scheduling conference under Alaska Appellate Rule 503.5(e) with the Clerk of Court on Monday, February 3, 2020. Counsel for both the State and Intervenor proposed argument be held no earlier than June 2020.

5) We also discussed expediting the motion to lift stay. Counsel for the State indicated that the State Appellants would not oppose expedited briefing on a motion to lift the stay, but noted that the Division would need one week to comply with any Supreme Court order to lift the stay.

6) Counsel for STWM indicated that they do oppose expedited briefing on Recall Dunleavy's motion to lift stay.

7) Every day of delay causes irreparable harm to Recall Dunleavy's signature-gathering efforts. Every day increases Recall Dunleavy's costs, both in time and money, and critically delays the opportunity for the people to call a recall election.

8) If Recall Dunleavy begins collecting signatures in early February, it is anticipated that the required petition signatures could be submitted to the Division as

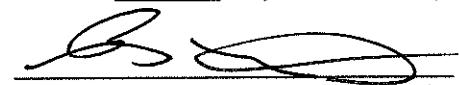
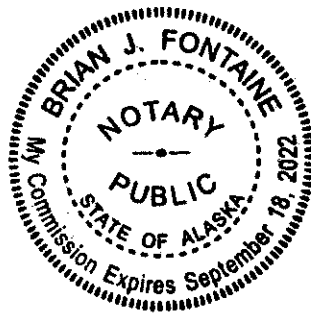
early as the middle or end of March. If the stay is lifted, oral argument is still needed in April, so that a decision is entered before the Division is required to print ballots or voter information guides for the recall election.

FURTHER AFFIANT SAYETH NAUGHT.



Jahna M. Lindemuth

SUBSCRIBED AND SWORN to before me this 3rd day of February 2020.



Notary Public in and for Alaska

My Commission Expires: 9-18-2022


CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 2020, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

Margaret Paton-Walsh
Joanne Grace
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov
joanne.grace@alaska.gov

Craig Richards
Law Office of Craig Richards
810 N Street, Ste 100
Anchorage, AK 99501
crichards@alaskaprofessionalservices.com

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Michael B. Baylous
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1600 A Street, Ste 304
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jamiesonb@lanepowell.com
baylousm@lanepowell.com



Brian Fontaine

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**[PROPOSED] ORDER GRANTING EMERGENCY MOTION TO EXPEDITE
BRIEFING ON MOTION TO LIFT STAY**

Upon full consideration of Appellee Recall Dunleavy's Emergency Motion to Expedite Motion to Lift Stay, and any opposition thereto, it is hereby ORDERED that Recall Dunleavy's Emergency Motion to expedite briefing on Motion to Lift Stay is GRANTED. Any opposition to the Motion to Lift Stay is due by [February 6, 2020 or _____]. This Court will consider the briefed motion expeditiously.

Entered at the direction of an individual justice.

Dated at Anchorage, this ____ day of February, 2020.

Clerk of the Appellate Courts

Meredith Montgomery

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 2020, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

Margaret Paton-Walsh
Joanne Grace
Attorney General's Office
1031 W. 4th Avenue, Suite 200
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Law Office of Craig Richards
810 N Street, Ste 100
Anchorage, AK 99501
crichards@alaskaprofessionalservices.com

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Michael B. Baylous
Lane Powell LLC
1600 A Street, Ste 304
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jamiesonb@lanepowell.com
baylousm@lanepowell.com



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