

EMERGENCY

IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Appellants,

v.

RECALL DUNLEAVY, an unincorporated association,

Appellee.

BY
DEPUTY CLERK

CLERK APPELLATE COURT

2020 FEB -3 AM 10:57

FILED
STATE OF ALASKA
APPELLATE COURTS

Case No. S-17706

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

REQUEST FOR SCHEDULING CONFERENCE UNDER RULE 503.5(e)

AND

**MEMORANDUM CONCERNING RECALL DUNLEAVY'S
PROPOSED SCHEDULE**

Appellee Recall Dunleavy requests a scheduling conference pursuant to Alaska Appellate Rule 503.5(e) to set an expedited schedule for this case. Appellants do not oppose having an immediate scheduling conference under Appellate Rule 503.5(e), and all parties are available **on Monday, February 3, 2020**. All parties agree that this appeal should be expedited, but there is no consensus on the schedule this Court should adopt.

As discussed below, Recall Dunleavy proposes a schedule that would result in oral argument February 19-21, 2020. Appellants are likely to oppose any schedule that calls for argument before June 2020. Recall Dunleavy also has filed an emergency

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motion to lift the stay on signature gathering that was entered by the superior court. As discussed there, Recall Dunleavy will agree to a lengthier briefing schedule—with oral argument in April—if the stay is lifted.

Recall Dunleavy's Scheduling Proposals

Recall Dunleavy proposes two options that would permit the merits of this appeal to be considered by this Court in February. First, this Court could rely on the extensive briefing the parties submitted to the superior court, as has occurred in other election and time-sensitive cases. This case involves only legal issues. The parties filed extensive, well-written and well-researched briefs in the superior court.¹ Relying on these existing briefs would give this Court sufficient time to prepare for oral argument in February. And nothing would prevent this Court from requesting additional limited briefing on discrete issues, if the Court so desired.

Alternatively, Recall Dunleavy respectfully requests the following expedited briefing schedule:

- Appellants' opening briefs: Monday, February 10, 2020.
- Appellee's responsive brief: Friday, February 14, 2020.

¹ The State and Intervenor Stand Tall With Mike submitted a combined 173 pages of briefing in connection with the cross-motions for summary judgment that were filed in the superior court and are the subject of this appeal.

- Appellants' reply briefs: Tuesday February 18, 2020 (Monday is a holiday).
- Oral argument: February 19 to 21, 2020.

Although this timeline is extremely expedited, it is well within the timeline of other proposed or actual timelines in election cases. The State proposed a similar schedule in the Alaskans For Better Elections' initiative case (S-17629).² Although this Court did not grant that request, and instead approved a lengthier, but still expedited briefing schedule, this Court allowed signature-gathering to occur while the appeal was pending.³ In *Miller v. Treadwell*, a case involving Senator Murkowski's write-in campaign, the parties filed briefing and this Court issued a decision just 12 days after the superior court's decision.⁴

² See State's Emergency Notice to Expedite Appeal (Nov. 1, 2019) (suggesting full briefing and oral argument in less than two weeks) (Exhibit 1), in *Kevin Meyer et. al v. Alaskans for Better Elections*, Supreme Court No. S-17629.

³ The State sought a stay of signature gathering from the superior court in that matter, which was denied. See Order Denying Defendants' Motion for Stay Pending Appeal, *Alaskans for Better Elections v. Keven Meyer et. al*, Case No. 3AN-19-09704CI (Alaska Super. Oct. 30, 2019) (Appendix F to Motion to Lift Stay Pending Appeal (Feb. 3, 2020)).

⁴ 245 P.3d 867, 874 (Alaska 2010) (providing an example of an extremely expedited election-related case); see also *Nageak v. Mallott*, 426 P.3d 930, 938-40 (Alaska 2018) (showing this Court issued an order six days after the superior court's written order); *Bess v. Ulmer*, 985 P.2d 979, 982 (Alaska 1999) (explaining how this Court heard argument ten days after the superior court's decision, and issued its own order four days later).

Here, unlike in ordinary elections cases, Recall Dunleavy will sustain ongoing harm by being prevented from gathering signatures because the ability to gather signatures determines when the recall election will be scheduled. A recall election *must* be held within a specific time after the required signatures have been submitted.⁵ Thus, every day of delay in signature gathering unlawfully infringes on Alaskan voters' constitutional right to a recall election on the voters' own timeline.

Because signature gathering has been stayed, Recall Dunleavy requests an expedited briefing schedule with argument in February. Unless this Court lifts the stay pending appeal,⁶ only a very swift decision from this Court will adequately protect Alaskan voters' constitutional right to recall and reduce (if not entirely eliminate) the irreparable harm that every day of delay causes to Recall Dunleavy and voters interested in signing currently-certified recall petition booklets.⁷

Alternatively, if the stay is lifted, Recall Dunleavy requests a briefing schedule that will allow the case to be argued in April. If signature gathering begins promptly,

⁵ AS 15.45.620 (directing the Division of Elections to verify recall petition signatures within thirty days); AS 15.45.650 (requiring an election between sixty and ninety days after a recall petition is determined to have been properly filed).

⁶ See Motion to Lift Stay Pending Appeal (Feb. 3, 2020).

⁷ 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.”).

an April argument would be necessary to ensure a decision by this Court before the State is required to print ballots and voter information guides for the recall election.

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

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EMERGENCY

IN THE SUPREME COURT OF THE STATE OF ALASKA

KEVIN MEYER, LIEUTENANT)
GOVERNOR OF THE STATE OF)
ALASKA and the STATE OF ALASKA,)
DIVISION OF ELECTIONS,)
))
Appellants,)
))
v.)
))
ALASKANS FOR BETTER)
ELECTIONS,)
))
Appellee.)

Supreme Court No. S-_____

Trial Court Case No. 3AN-19-09704 CI

EMERGENCY

MOTION TO EXPEDITE APPEAL

Under Appellate Rule 504, Lieutenant Governor Kevin Meyer and the Alaska Division of Elections (collectively, "the State") move the Court to expedite consideration of this appeal, which is a challenge to a superior court decision ordering certification of an initiative that the State believes is invalid.

The appellee initiative sponsors are now gathering signatures in support of their initiative, so each day that passes will increase their investment in the current version of the measure. But the State's appeal will ask this Court to disapprove their initiative by overturning decades-old unworkable precedents that apply the same broad single-subject rule both to bills enacted by the Legislature and to bills enacted through the initiative process. The State seeks extremely expedited consideration of this appeal so

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that this Court can consider the State's arguments on their merits, rather than feeling constrained by the sponsors' mounting reliance interests, which will increase every day.

A decision on this emergency motion is needed by **close of business on November 1, 2019** because the State requests a schedule that would require appellate briefing and argument preparation to begin immediately.

The State respectfully requests full-court consideration if the assigned justice is inclined to deny this motion. Appellate Rule 503(h)(2)(B) allows the State to receive full-court reconsideration of an individual justice decision, which it intends to do if this motion is denied by an individual justice. Given the State's desire to expedite this case for the reasons detailed below, the State respectfully requests full-court consideration without the delay engendered by this additional step. Appellate Rule 503(g) allows the individual justice considering a motion to refer it to the full court.

The grounds in support of this emergency motion were not submitted to the trial court because this is a motion to expedite an appeal, which the trial court cannot do.

BACKGROUND

In July 2019, Alaskans for Better Elections filed initiative application 19AKBE with the Division of Elections.¹ The bill proposed by the initiative would make three major changes to Alaska law: (1) replacing the party primary system with an open

¹ See Appendix A at 1-3.

nonpartisan primary; (2) establishing ranked-choice voting in the general election; and (3) adding new disclosure and disclaimer requirements to campaign finance law.²

After a careful legal review of 19AKBE, Attorney General Kevin Clarkson recommended that the Lieutenant Governor decline to certify the initiative for signature gathering because the proposed bill contains more than one subject in violation of the single-subject requirement in AS 15.45.080 and Article II, Section 13 of the Alaska Constitution.³ Although the sponsors argued that the three reforms in 19AKBE fall under the single subject of “better elections,” the Attorney General observed that the initiative would make two independent and fundamental changes to Alaska’s system of democratic elections alongside unrelated changes to its campaign finance laws. On August 30, Lieutenant Governor Meyer denied certification.⁴

After the sponsors filed suit, the superior court reversed the Lieutenant Governor’s decision, relying on a series of cases from the 1970s and 1980s that applied an extraordinarily broad interpretation of the single-subject rule that permitted subjects as generalized as “state taxation,”⁵ “land,”⁶ and “criminal law.”⁷ The court ordered the State to distribute petition booklets to the sponsors so that they could begin collecting

² *Id.*

³ State of Alaska, Dep’t of Law, Op. Att’y Gen., 2019 WL 4239852 (August 29, 2019).

⁴ See Appendix A at 1-3.

⁵ *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 546 (Alaska 1978).

⁶ *State v. First National Bank of Anchorage*, 660 P.2d 406, 415 (Alaska 1982).

⁷ *Galbraith v. State*, 693 P.2d 880, 886 (Alaska App. 1985).

signatures in support of 19AKBE.⁸ The State sought a stay, but the superior court denied it,⁹ so the sponsors now have the booklets and can start to collect signatures.

ARGUMENT

In the past, this Court has been reluctant to reconsider its single-subject jurisprudence in the initiative context once sponsors have invested the extensive time and effort necessary to gather the signatures to get their measure on the ballot. For example, in *Yute Air Alaska, Inc. v. McAlpine*, this Court narrowly rejected a single-subject challenge to an initiative—despite explicitly expressing reservations about its precedent—citing as a key reason the fact that “the sponsors of the initiative have relied on our precedents in preparing the present proposition and undertaking the considerable expense and time and effort needed to place it on the ballot.”¹⁰

Here, the sponsors of 19AKBE have not yet gathered the signatures necessary to place it on the ballot, and thus do not yet have the reliance interests of the sponsors in *Yute Air*. But now that the sponsors have the petition booklets and can begin to collect signatures, each day that passes will increase their reliance.

And absent the sort of expedited consideration that the State now requests, initiative sponsors will likely always have incurred the kind of reliance discussed in *Yute Air* by the time this Court considers an initiative appeal. Because the Court’s precedents apply a single-subject standard that is so broad as to be “almost

⁸ Appendix A at 12.

⁹ Appendix B.

¹⁰ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

meaningless,”¹¹ any litigant hoping to restore some teeth to it must come before this Court in the position of an appellant, challenging a ruling that an initiative meets the requirements of the single-subject rule. That means that either the Lieutenant Governor has certified the initiative and it is being challenged by others or, as here, the superior court has overturned a decision denying certification. In both scenarios, the sponsors will be out collecting signatures by the time the case reaches this Court, increasing their reliance with every day that goes by, and effectively preventing the Court from ever reconsidering a jurisprudence that has reduced the single-subject rule to “a farce.”¹²

Because the State believes that the Court’s single-subject jurisprudence is based on a decision that was originally erroneous and that more good than harm will come from overturning the existing precedents, it urges the Court to review this case on an expedited basis so that it can evaluate the State’s arguments on their merits, rather than feeling constrained by what will eventually become the sponsors’ substantial reliance on those precedents if review is delayed.

Extremely expedited review will also benefit the sponsors in the event that this Court ultimately agrees with the State that 19AKBE contains more than one subject. The sooner the Court reaches such a decision, the sooner the sponsors can stop gathering signatures in support of an invalid initiative and instead direct their efforts toward their desired reforms by pursuing multiple separate, single-subject initiatives.

¹¹ *Id.* at 1182 (Justice Moore, dissenting).

¹² *Id.*

CONTACT INFORMATION OF COUNSEL

As required by Appellate Rule 504(c) for emergency motions, the telephone numbers and addresses of counsel are as follows:

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REQUESTED SCHEDULE

The State requests that the Court expedite this appeal and adopt the following schedule for briefing and argument:

- Opening brief: November 6,
- Responsive brief: November 11 (service/filing by email given holiday),
- Reply brief: November 12,
- Oral argument: November 14.

In the alternative, the State requests whatever expedited schedule the Court can provide that will resolve this appeal as quickly as possible.

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CONCLUSION

For these reasons, the State requests that the Court expedite this appeal.

DATED November 1, 2019.

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

**[PROPOSED] ORDER GRANTING UNOPPOSED EMERGENCY MOTION
FOR SCHEDULING CONFERENCE**

Upon full consideration of Appellee Recall Dunleavy's Unopposed Emergency Motion for Scheduling Conference under Alaska Appellate Rule 503.5(e), it is hereby ORDERED that Recall Dunleavy's Unopposed Emergency Motion for Scheduling Conference is GRANTED. The Court will issue an expedited briefing and argument schedule following the conference.

A scheduling conference will be held on this matter on _____

_____ at _____ [AM/PM].

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:

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