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IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA, DIVISION OF ELECTIONS, and STAND TALL WITH MIKE, Appellants. v. RECALL DUNLEAVY, Appellee. Trial Court Case No. **3AN-19-10903 CI**	)	Supreme Court Nos. **S-17706/S-17715**

STATE APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO LIFT THE STAY AND FOR A BRIEFING SCHEDULE

Appellants State of Alaska Division of Elections and Director Gail Fenumiai ("the Division") file this response to the motion of Recall Dunleavy ("the committee") to lift the stay that the superior court ordered on January 29, 2020.[1]

The Division does not oppose leaving the stay ordered by the superior court in place. In addition, it would like to provide some information to avoid misconceptions about the timing of a potential recall election. Specifically, this case is unlike the election cases that the committee cites and need not be subject to the extremely expedited schedules that those cases warranted. There is no emergency presented here that justifies the three-week appeal schedule that the committee proposes. The Division agrees, however, that a somewhat expedited schedule can be instituted—compilation of

[1] *See* Appendix E to the committee's Motion to Lift Stay Pending Appeal ("Motion").

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the trial court record, completion of briefing, argument, and decision by June, 2020 is an expedited appeal. This more reasonable expedited schedule will allow the parties to provide thoughtful briefing, will give the Court time for a considered decision, and would still allow the committee, assuming it can gather the necessary signatures, to have its recall grounds appear on the ballot in one of the already scheduled statewide elections this year.

I. The Division does not oppose leaving the stay in place.

The Division does not oppose the stay. It is true that any harm to the Division of Elections from this Court's order is administrative in nature. However, the Division has an interest in protecting certainty and avoiding voter confusion with respect to any potential election, and in avoiding the high cost of preparing for a separate special election without a court decision on the merits of the recall application. Moreover, the Division agrees with Stand Tall With Mike that there is a strong probability of success for the Division and Intervenors on the merits in this appeal.

Although the Division is not itself asking for a stay, it recognizes that a stay in this case will assure a definitive decision before voters are asked to sign petition booklets.[2] A second round of litigation is possible if the committee gathers signatures prior to this Court's decision, if the Court's subsequent decision allows the recall to go forward and further changes the statement of grounds. If the Court strikes some, but not

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[2] *See* AS 15.45.610 (stating in part that the recall petition booklets must be "signed by qualified voters equal in number to 25 percent of those who voted in the preceding general election in the state… .").

all, of the committee's recall grounds, some voters possibly will have signed the petition booklets based on one or more invalid grounds. The Court would then have to resolve the question of whether the signatures are valid, which will extend the length of the litigation and could add to the uncertainty.

The committee brushes aside any concern about the uncertainty and voter confusion this situation could cause, but it bases its assurances on false pretenses. It argues first that as the recall process proceeds toward election, "substantial campaigning by both sides will occur."[3] That may be true, but the Court cannot assume that this campaigning will focus on informing voters that the grounds in the petition booklets they signed were not accurate, nor can it assume that any campaigning will reach all the voters who signed the booklets. And even if it could, a voter can withdraw a signature only until the booklets are filed with the Division,[4] and neither the Division nor the Court has any control over that timing and how it relates to the Court's decision.

Second, the committee argues that the final, approved statement of grounds will be posted at the polling places.[5] But election day is too late to remedy the problem created by petition booklets with grounds that have been invalidated. The required signatures are intended to prevent the time, money, and distraction of a recall election that is not supported by a sufficient percentage of voters, and the signatures cannot

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3 Motion at 10.

4 *See* AS 15.45.590 (stating in part that "[a] person who has signed the petition may withdraw the person's name only by giving written notice to the director before the date the petition is filed.").

5 Motion at 10.

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serve that function if recall grounds not appearing on these postings were the reason an unknown number of voters signed the petition booklets.

Third, the committee argues that the Court has previously certified an initiative and allowed it to appear on the ballot after making changes to the language found in signature booklets, without requiring new signatures.[6] The committee fails to mention that the Court allows a modified initiative to go forward without the severed provisions only if it meets a three-part test.[7] For a severed initiative to appear on the ballot after signatures have been gathered, the Court must find (1) that "the remainder of the proposed bill can be given legal effect," (2) that "deleting the impermissible portion would not substantially change the spirit of the measure," and (3) that "it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety."[8] This test cannot be applied to save severed recall grounds in this case, because the committee's four grounds are entirely distinct and therefore the Court cannot infer which grounds were important to any voter. The second and third prongs of this test make no sense applied to a statement of grounds for recall that contains four different allegations with no relation to each other. Adding to the difficulty of determining what voters might think of each ground in this case is the fact that the allegations are either so facially vague that, without additional information,

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6 *Id.* at 11 (citing *Mallott v. Stand for Salmon*, 431 P.3d 159 (Alaska 2018)).

7 *Mallott*, 431 P.3d at 173-74.

8 *Id.* (quoting *McAlpine v. University of Alaska*, 762 P.2d 81, 94-95 (Alaska 1988)).

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voters will be unlikely to understand what the Governor has allegedly done or are allegations of actions that caused no harm and thus may not matter to voters.[9]

The committee is also mistaken in claiming that it alone will bear the risk of an adverse decision if it begins collecting signatures now based on recall grounds that are later overturned.[10] The Division is required by statute to verify the 71,000 required signatures within thirty days of their submission, and to begin preparations immediately thereafter for a special election, depending on the timing of the submission.[11] The Division is already working at full capacity to prepare for two statewide elections this year, and if necessary it can and will also prepare for a separate special election. But verifying more than 70,000 signatures and planning a special election would be a particularly burdensome—and expensive—task to undertake this year if it turns out to have been unnecessary or has to be repeated a few months later.

On the question of likelihood of success on the merits, the Division stands by its original certification decision. The Division disagrees with the committee's claim that the superior court correctly analyzed the law in this case, including the total of two decisions that the committee exaggerates to describe as "three decades of recall

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9 *See* Statement of Grounds, Exhibit A (stating, e.g., that "Governor Dunleavy violated separation of powers by improperly using the line-item veto to attack the judiciary and the rule of law").

10 Motion at 10.

11 *See* page 8 and n.18 *infra* (explaining that the committee expects the collection of signatures for the petition to take less than two months).

precedent from this Court" that the superior court "carefully appli[ed]."[12] The Division also does not, as the committee claims, "recognize" that it cannot prevail on appeal unless the Court adopts a more restrictive interpretation of existing precedent.[13] The Division's arguments in this case are solidly grounded in the existing caselaw, Alaska's statutes, and the constitution, and are based on a complete perspective of the recall process. In contrast, the committee's arguments, adopted by the superior court, permit purely political recall because they are grounded in its misguided view that a statement of grounds for recall is sufficient as long as the targeted official should know what the statement means,[14] with additional information provided by the committee if the allegations are otherwise too vague to understand.[15]

In reality, the statement of grounds serves several purposes and must be stated with sufficient particularity to meet all of them. First, the statutory scheme requires the Division Director to determine if the recall committee has stated allegations that meet

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12 Motion at 8. The relevant supreme court cases are *von Stauffenberg v. Committee for Honest and Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995) and *Meiners v. Bering Strait School Dist.*, 687 P.2d 287 (Alaska 1984).

13 *Id.*

14 *See* Superior Court Decision, Appendix A to Motion at 5 (finding that "the particularity standard is effectively a notice pleading standard").

15 *See id.* at 13-15, 16-17 (determining that the grounds are sufficient for a recall election based on facts not found in the statement of grounds).

the statutory grounds for recall.[16] This requires grounds that the Director can understand without additional information. In addition, the allegations must be stated with enough particularity so that the elected official—who can be recalled only for cause and thus has a property interest in the position—has a meaningful opportunity to respond in only 200 words, the rebuttal that Alaska's recall scheme provides.[17] If the targeted official has to both explain the meaning of vaguely worded allegations and respond to them in only 200 words, the official will be deprived of a meaningful opportunity to respond.[18] Finally, the voters must be able to understand the statement of grounds because that 200-word statement, in addition to the targeted official's 200-word response, will be posted at each polling place and may be the only information that voters receive for their decision on how to vote. The Division's position on particularity is entirely consistent with the middle ground for-cause recall that Alaska's constitutional delegates envisioned, the legislature adopted, and this Court recognized in *Meiners v. Bering*

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16 AS 15.45.540 – 550; *see also Citizens for Ethical Government v. State*, 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) (Stowers, J.) at 75 ("'The director shall deny certification upon determining that the application is not substantially in the required form,' . . . and 'in the required form' goes to the question of whether or not under the language in law set out by the Alaska Supreme Court in the *Meiners* case and also in the *von Stauffenberg* case, … there are sufficient facts alleged with particularity pertaining to the recall target's conduct as a legislator that then would make out a *prima facie* case indicating that either a lack of fitness is demonstrated or corruption is demonstrated.").

17 AS 15.45.680 (stating in part that the director shall provide each election board with copies of the statement of grounds and copies of "the statement of not more than 200 words made by the official subject to recall in justification of the official's conduct in office.").

18 *See, e.g., Coghill v. Rollins*, 4FA-92-1728CI (Alaska Super., Sept. 14, 1993) (Savell, J.) at 23 ("These charges do not set forth particular facts . . . which would permit the official to offer a meaningful response justifying his conduct.").

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Strait School District, which contemplates that the grounds will be both factually and legally sufficient within the 200-word statement.[19] The superior court did not even respond to these points.

The Division also takes the position that Alaska's middle-ground recall scheme requires that the statutory grounds for recall be interpreted to provide some meaningful obstacle to no-cause recall that is based solely on policy disagreements with the targeted official. This also is consistent with existing caselaw, but in any event the committee's statement of grounds is insufficient even if the statutory criteria are interpreted broadly.

Because the superior court's decision adopted the committee's arguments, its decision (1) is inconsistent with Alaska precedent; (2) fails to give meaning to the Division's gatekeeper function; (3) deprives a targeted official of the right to meaningfully respond to allegations in 200 words; (4) ignores the role of voters in the process; and (5) fails to appropriately interpret the statutory grounds for recall.

II. Briefing schedule.

The committee proposes an appeal that would be extremely expedited, as though a decision were needed before a late-February election.[20] The committee argues that its February appeal schedule is "well within the timeline of other proposed or actual timelines in election cases."[21] But the committee is not facing the urgency of the situations it cites to support that argument, which include a case that involved a ballot

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19 *Meiners*, 687 P.2d at 294.

20 Request for Scheduling Conference at 1-3.

21 Motion at 3.

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measure (where signatures must be gathered before the legislature convenes in order to avoid a two-and-a-half year wait for a statewide election),[22] and two cases that challenged the results of elections (invoking the strong public interest in the finality and stability of elections, which requires quick resolution of election disputes).[23]

Without that urgency, briefing and oral argument in a three-week timeframe is unwarranted and would not give the parties or the Court enough time to properly handle the important issues in this case. The committee argues that every day of "delay" denies the citizens their constitutional right to recall,[24] but that right is not unconditional. The constitutional right to recall is the right to a process, not the right to an immediate election, and part of that process includes assuring that a recall committee has submitted an application that is "in the required form."[25] The required form includes a statement of grounds, stated in particular, that are legally sufficient for recall under Alaska's statutorily prescribed criteria. Unless the committee raises grounds that fall within the statutory criteria, the fact that the targeted official remains in office does not violate anyone's rights. Here, the committee submitted an application that was not in the required form.

The issues raised in this case are serious and substantial, and the Court has not directly addressed them before, as the two existing supreme court decisions on recall

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22 *See* Motion at 3 (citing *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999)).

23 *See id.* (citing *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010) and *Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018)).

24 Motion at 3.

25 AS 15.45.550(1).

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reviewed local recall—which has a different statutory scheme—and raised different issues.[26]

The Court can set a briefing and argument schedule for this appeal that will be expedited but will not be as extreme as the committee's requested schedule. An expedited schedule that follows Alaska Rule of Appellate Procedure 218 for child protection appeals would be reasonable. Under that schedule, the record will be complete thirty days after the appeal is filed (March 4); the appellant briefs will be due twenty days later (March 24); the appellee brief twenty days later (April 13); and the reply briefs ten days later (April 23). The Court can schedule the oral argument for the next scheduled sitting or can schedule an additional sitting if it believes that to be warranted.

The committee has repeatedly represented in this litigation that it expects to gather the needed voter signatures in less than two months.[27] If the Court does not lift the stay and issues a decision allowing a recall election by early June, the committee, under its own calculations, could submit signatures by early August. If the committee submits them by August 5, the Division will have until September 4 to verify them,[28] and because the general election is scheduled within the 60-90 day period after

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26 *Von Stauffenberg*, 903 P.2d 1055; *Meiners*, 687 P.2d 287.

27 *See* Motion at 7; *see also* Committee's Emergency Motion for Expedited Scheduling Conference to Address Briefing and Decision Schedule at 2, filed on November 5, 2019 in the superior court.

28 *See* AS 15.45.620 ("Within 30 days of the date of filing, the director shall review the petition and shall notify the recall committee and the person subject to recall whether the petition was properly or improperly filed.").

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September 4,[29] the recall vote would appear on the general election ballot. This schedule would provide the committee with the most possible voters, as voter turnout is nearly always highest in a general election that includes a presidential election.[30] Assuming that the recall proceeds to election, this would provide the constitutional right to a recall vote for the highest number of Alaskans.

If the committee did not submit the signatures until after August 5, the Division will have a special election for the recall 60-90 days after it verifies the signatures.[31]

Alternatively, if the Court lifts the stay and the committee gathers signatures within its estimated time period, it would submit them in mid-April and the Division would verify them by mid-May. If the committee submits the petition booklets between April 20 and May 20, the recall question would appear on the primary ballot. If it submits them before April 20 or between May 21 and July 5, the Division will have a separate special election before the primary or between the primary and the general elections, respectively.

However, under this lifting-the-stay briefing scenario, a later stay may be

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29 *See* AS 15.45.650 ("If the director determines the petition is properly filed and if the office is not vacant, the director shall prepare the ballot and shall call a special election to be held on a date not less than 60, nor more than 90, days after the date that notification is given that the petition was properly filed. If a primary or general election is to be held not less than 60, nor more than 90, days after the date that notification is given that the petition was properly filed, the special election shall be held on the date of the primary or general election.").

30 *See* Alaska Division of Elections, Voter Turnout Statistics, General Elections since Statehood, http://www.elections.alaska.gov/statistics/GENRvoterturnout.php (last visited Feb. 5, 2020).

31 *See* AS 15.45.650.

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necessary to settle the issue of whether fewer than all four alternative allegations approved by petition signors can be the basis for a recall vote. Without a stay, the issue could be mooted by an election that otherwise must meet strict statutory scheduling requirements. As discussed above, this would create uncertainty and could create voter confusion.

DATED February 7, 2020.

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Statement of Grounds:

Neglect of Duties, Incompetence, and/or Lack of Fitness, for the following actions:

- Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.

- Governor Dunleavy violated Alaska Law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters.

- Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.

- Governor Dunleavy acted incompetently when he mistakenly vetoed approximately $18 million more than he told the legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over $40 million in additional federal Medicaid funds.

References: AS 22.10.100; Art. IX, sec. 6 of Alaska Constitution; AS 39.52; AS 15.13, including .050, .090, .135, and .145; Legislative Council (31-LS1006); ch.1-2, FSSLA19; OMB Change Record Detail (Appellate Courts, University, AHFC, Medicaid Services).

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FILED
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2020 FEB -7 AM 8:
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CERTIFICATE OF SERVICE

I hereby certify that on this date, true and correct copies of the **State Appellants' Response to Appellee's Motion to Lift the Stay and for a Briefing Schedule** and this **Certificate of Service** were served via U.S. mail and email on the following:

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