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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, an unincorporated association, Plaintiff, v. STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS, Defendants.	Case No. **3AN-19-10903CI**

OPPOSITION TO PLAINTIFF'S MOTION FOR EXPEDITED CONSIDERATION

In this case, the "Recall Dunleavy" committee ("the committee") challenges the Director of the Division of Elections' decision not to certify its application to recall Governor Michael Dunleavy. The committee now asks the Court to expedite this case. The Court should decline to do so because the committee fails to justify the need for hasty resolution. The only date that drives the timing of a decision in this case and the inevitable appeal is the general election in 2022. This deadline leaves ample time to litigate this case under a normal schedule. The Committee provides no reasonable or even logical explanation for why a final appellate decision anytime in 2020 would deny them their desired recall should they prevail in this litigation and then gather sufficient signatures. The Committee's assertion that recall cases are always expedited is wrong—the only statewide recall case in Alaska's history (regarding Lieutenant Governor

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Coghill) involved litigation that proceeded for one year in the superior court alone.[1]

Further, not only is the committee's explanation not a valid reason to expedite, it also demonstrates that the recall is motivated purely by opposition to the governor's political agenda, which is not a legitimate basis for recall under Alaska law. Because no justification exists for the rushed scheduling demanded by the committee, the state defendants ("the State") respectfully request that the motion be denied and the litigation be allowed to proceed under the timelines contemplated by the Alaska Civil Rules.

In its motion, the committee first suggests that election cases are always expedited, pointing in particular to initiative cases. [Mtn at 1-2] But the committee fails to explain why election cases are often expedited, thus avoiding the obvious difference between most election cases and recall cases. Most election cases, including initiative cases, share a common feature that drives the need to expedite consideration and that recall cases lack: an immovable election date. For example, disputes about issues such as candidate qualifications or primary election results must be settled in advance of the general election. Similarly, litigation about general election results must be resolved quickly so that successful candidates can assume their elected positions when their terms start. Initiative cases are also deadline driven and controlled by a different immovable date—the date that the Alaska Legislature will begin its next session.

Unlike recall, in order to get an initiative bill on the ballot, initiative sponsors

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[1] Two complaints were filed in *Coghill v. Rollins, et al.*, one by the State on August 27, 1992, the other by Lieutenant Governor Coghill on September 25, 1992. The superior court's decision is dated September 14, 1993.

must collect voter signatures by a particular date, the day that the legislature convenes. An initiative will appear "on the election ballot of the first statewide general, special, special runoff, or primary election that is held after (1) the petition has been filed; (2) a legislative session has convened and adjourned; and (3) a period of 120 days has expired since the adjournment of the legislative session."[2] Special elections and special runoff elections are rare, so initiative sponsors must look to the primary or general elections held in even-numbered years; and in order to get on either ballot, they must collect the required signatures before the legislature convenes in that year, typically mid-January.[3]

In theory, initiative sponsors should seek certification from the Division with enough time to complete litigation on a normal schedule and collect the necessary signatures before the legislature convenes in an election year, but in practice they rarely do.

Thus, the litigation must be expedited so that if the sponsors prevail, they will have at least two or three months before the first day of the legislative session to try to

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2 AS 15.45.190.

3 The legislature has amended its start date, but it typically has been the second or third week of January. *See* AS 24.05.090 (currently providing that the legislature "shall convene . . . each year on the third Tuesday in January. . . .").

gather the necessary signatures to qualify for that year's ballot.[4] In addition, an appeal of a superior court order in an initiative case also must be expedited so that the supreme court can issue a decision before the Division of Elections' deadline for printing ballots—either for the primary or the general election, depending on when the legislature adjourns.[5]

None of these timing constraints apply to a recall case. The legislature has nothing to do with the recall of an executive branch official and recall voting is not limited to elections scheduled for other reasons, as is initiative voting.[6] Unless a recall petition is filed within a certain window before a scheduled statewide election, the recall will be the subject of a special election.[7] Thus, the immovable election dates that drive expedited consideration in most election cases are not present in a recall case; the

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4 *See*, *e.g*, 19AKBE: The petition application was filed on July 3, 2019; the Lt. Gov. denied certification on August 30, 2019, the superior court in *Alaskans for Better Elections v. Meyer* issued an order on October 28, 2019, and the Director issued booklets on October 31, 2019.

17FSH2: The petition application was filed on July 14, 2017; the Lt. Gov. denied certification on September 12, 2017, and the superior court in *Stand for Salmon v. Mallott,* 3AN-17-9183CI issued an order on October 9, 2017, and the Director issued booklets on October 13, 2017.

07WATR: The petition application was filed on April 25, 2007; the Lt. Gov. denied certification on June 21, 2007, the superior court in *Council of Alaska Producers et al. v. Parnell*, 4FA-07-02696CI issued an order on October 12, 2007, and the Director issued booklets on October 22, 2007.

5 *See* AS 15.45.190 (providing in part that an initiative will appear on the ballot in the next statewide election after a period of 120 days has expired since the adjournment of the legislative session).

6 *See* AS 15.45.190.

7 *See* AS 15.45.650.

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election can be held whenever sufficient signatures have been gathered. As a result, recall cases do not require expedited consideration in the way that initiative and other election litigation does.

Notably, the Division is not aware of any recall case in which a court granted expedited consideration to the sponsors to speed their road to the ballot box. In *Citizens for Ethical Government v. State*, 3AN-05-1233CI, the court expedited briefing on summary judgment, but only because the subject of the recall was a legislator who would otherwise invoke AS 24.40.031, which continues any civil action in which a legislator is a party for the entire legislative session. And even then, the court heard argument on January 4, 2006, three months after the complaint was filed on October 5, 2005.[8] In *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 293 (Alaska 1984), the litigation began after the recall election was scheduled. Similarly, in *von Stauffenberg v. Committee for Honest and Ethical School Bd*, 903 P.2d 1055, 1057 (Alaska 1995), the litigation began only after a recall election was scheduled and then called off when the clerk rescinded her certification of the recall petition. In *Coghill v. Rollins*, 4FA-92-1728CI, it does not appear that expedited consideration was requested. The case was filed in September 1992 and cross-motions for summary judgment were filed in April 1993. And in *Valley Residents v. State*, 3AN-04-6827CI, the plaintiffs challenged the Division's certification of a recall petition against Senator Ogan, but waited three months to file a motion for preliminary injunction, which they did only after the recall

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[8] Exhibit A at 6.

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sponsors had collected sufficient signatures to get the recall petition on the general election ballot. Thus, Alaska's recall cases to date do not support the committee's claim that expedited consideration is appropriate, much less necessary.

The committee's demand for expedited consideration is based on its desire to have a recall election in "early spring," so that "Alaskans could then have a different governor address the legislature's budget and other laws proposed during this upcoming session." [Mot. at 2] But this Court should not rush an extremely important case raising issues of first impression based on such a goal, not least because this Court's decision is only one step in a series of uncertain events that must occur in order for the committee to get its wish. If the committee prevails before this Court, it must also prevail on appeal, and then must collect the necessary signatures to trigger a recall election, and then the governor must lose that election, before it could realize this ambitious goal.

The committee's political agenda does not entitle it to expedited consideration. Indeed, given the constitutional delegates' rejection of the purely political recall model,[9] it would plainly be inappropriate for this Court to expedite the litigation based on this openly political basis. Moreover, the committee's focus on precluding the Governor's participation in budget matters and other proposed laws does not even reflect the bases they have cited for recall, suggesting that the committee's recall efforts are based on policy disagreements that are entirely within the Governor's authority and that as a

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9 *See, e.g.*, *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 294-95 (comparing Alaska to states with no statutory grounds for recall, in which "disagreement with an officeholder's position on questions of policy is sufficient.")

matter of law are not a valid basis for recall.[10]

In effect, the committee asks this Court to expedite the litigation because it prefers a quick decision, not because it needs one. If this were a sufficient basis to expedite litigation, all litigation would be expedited to allow plaintiffs the opportunity to get their desired relief according to their own timeframes.

Finally, although the only real deadline that drives the timing of this case is the general election in 2022, consideration of the committee's claim on a normal schedule need not delay the case for long. Indeed, the civil rules permit the committee to file a summary judgment motion now,[11] something that it could have done if it wished to expedite proceedings. The committee served the defendants on November 6, 2019, so any opposition or cross-motion to a summary judgment motion that the committee files before the end of November will be due December 16, 2019. Thus, even allowing reasonable extensions for the holidays, the case could be ripe for decision by the end of January 2020. Because the only deadline that would thwart the committee's goal of recalling the governor is the date of the general election two-and-a-half years away,[12] a

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[10] *Id.* at 294.

[11] Alaska Civil Rule 77(c)(2)(ii) expressly contemplates that a plaintiff may file a motion for summary judgment even before the defendant answers by providing that in such a case the defendant's opposition will be due "either 15 days from the date of service or, if the plaintiff is the movant, the date the defendant's answer is due under the rules, whichever is later."

[12] Under AS 15.45.630, the Director of Elections will not accept a recall petition if the petition is filed within less than 180 days of the termination of the term of office of the official subject to recall. Governor Dunleavy's term ends on noon on December 5, 2020, *see* Alaska Constitution Art. 3, section 4, and June 8, 2022 is 180 days before this date.

delay of just a few weeks will inflict no harm on the committee and will permit the parties to brief this matter thoroughly and carefully. It will also allow the Court the time to make a thoughtful decision on an important matter of first impression.

Neither precedent nor reason supports the committee's demand for an expedited schedule in this litigation. There is no fast-approaching, immovable date that will thwart the committee's attempt to get its recall petition on the ballot. And no emergency exists that necessitates the rushed briefing and decision that the committee requests. This case presents important questions about the meaning of the State's recall statutes—questions of first impression in Alaska. This Court can and should direct this litigation to proceed under the standard timelines contemplated by the civil rules so that the Court can benefit from the most thorough briefing and argument possible. Therefore, the State respectfully asks this Court to deny the committee's motion.

DATED November 7, 2019.

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By:

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CITIZENS FOR ETHICAL
GOVERNMENT, ET AL.,

Plaintiffs,

vs.

STATE OF ALASKA,
DIVISION OF ELECTIONS,

Defendant.

Case No. 3AN-05-12133 CI

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT

BEFORE THE HONORABLE CRAIG F. STOWERS
Superior Court Judge

Anchorage, Alaska
January 4, 2006

APPEARANCES:

FOR THE PLAINTIFFS: Kenneth Jacobus

FOR THE STATE: Michael Barnhill

FOR INTERVENOR: Michael Spaan
Barat LaPorte

1 P-R-O-C-E-E-D-I-N-G-S
2 -oOo-
3 10:01:15
4 THE CLERK: ...is now in session.
5 THE COURT: Good morning. Please be
6 seated, everybody.
7 Okay. Good morning. We're on record
8 this morning in the matter of Citizens for
9 Ethical Government, William Fulton, Richard
10 Sutton, Michael Bussey versus State of Alaska,
11 Division of Elections, Case No. 3AN-05-12133
12 Civil.
13 This is the time set on for oral argument
14 on the parties' essentially cross motions for
15 summary judgment.
16 We have in the courtroom representing the
17 Citizens for Ethical Government, Mr. Jacobus.
18 Good morning, sir.
19 MR. JACOBUS: Thank you. Good morning,
20 Your Honor.
21 THE COURT: If you would please introduce
22 your client.
23 MR. JACOBUS: This is Ray Metcalfe, Your
24 Honor.
25 THE COURT: Good morning, Mr. Metcalfe.

1 MR. JACOBUS: And I'm not certain if any
2 of the other plaintiffs are in the audience.
3 Are they?
4 MR. METCALFE: They're not.
5 MR. JACOBUS: They're not.
6 THE COURT: All right. For the State of
7 Alaska we have Mr. Barnhill, assistant
8 attorney general on the telephone. Good
9 morning, Mr. Barnhill.
10 MR. BARNHILL: Good morning, Your Honor.
11 THE COURT: I understand that you made
12 several attempts to get out of fogged-in
13 Juneau and didn't make it?
14 MR. BARNHILL: I made two attempts, Your
15 Honor.
16 THE COURT: Have a seat, sir.
17 MR. JACOBUS: Oh, I'm just anticipating
18 since I figured I'd be the first person to
19 argue.
20 THE COURT: All right. Thank you.
21 All right, Mr. Barnhill. Since we're
22 going to be doing this by telephone, I'll just
23 go ahead and review with everybody how I like
24 to manage these kinds of arguments. Obviously
25 each party is going to have an opportunity to

1 both argue your own position and then have one
2 opportunity for rebuttal.
3 Mr. Jacobus will go first. After
4 Mr. Jacobus, it will be Mr. Barnhill, and then
5 Mr. Spaan on behalf of Senator Stevens.
6 We do have an amicus curiae brief that
7 was submitted. The Alaska Legislature
8 legislative council filed a motion to file an
9 amicus curiae brief. According to Black's Law
10 Dictionary, that means literally, a friend of
11 the court. A person with a strong interest in
12 or views on the subject matter of an action
13 may petition the court for permission to file
14 a brief ostensibly on behalf of a party but
15 actually to suggest a rationale consistent
16 with its own views.
17 The court's always happy to have friends
18 of the court. As it turns out, though, amicus
19 attorneys do not argue the case. So today
20 Mr. Fosler will not argue the case, but I
21 thank you for the briefing that you gave me.
22 And then we do have Mr. Spaan
23 representing intervenor, Alaska Senator Ben
24 Stevens in the courtroom, good morning, sir.
25 And Mr. Spaan, who is with you, please?

1 MR. SPAAN: Your Honor, my law partner
2 Barat LaPorte is with me at counsel table, as
3 well as Senator Stevens.
4 THE COURT: Thank you, sir.
5 MR. SPAAN: Thank you.
6 THE COURT: Good morning, Ms. LaPorte.
7 All right. When we had our last hearing
8 we didn't talk about how much time each
9 attorney thought it was going to take to
10 conduct your oral argument, so I would be
11 interested to know what you think, and then
12 we'll come to some consensus here.
13 Mr. Jacobus?
14 MR. JACOBUS: 20 minutes to a half hour
15 total, I would think, for both opening and
16 rebuttal. And I figured that based on the
17 fact that you appear to have set aside an hour
18 for these proceedings.
19 THE COURT: All right. Mr. Barnhill, how
20 much time do you think you'll need?
21 MR. BARNHILL: 15 minutes at most, Your
22 Honor.
23 THE COURT: All right. And Mr. Spaan?
24 MR. SPAAN: Your Honor, probably 10 to 15
25 minutes, but I know Your Honor is always armed

1 with questions, so double that.
2 THE COURT: All right. Ten minutes it is.
3 Okay. I have reviewed the complaint
4 which was filed on October the 5th, and the
5 State of Alaska's answer on November the 14th.
6 The original complaint named Laura Glazier
7 also as a defendant, but then the parties
8 agreed to dismiss her so she is not a named
9 party any longer.
10 I have reviewed, obviously, the motion to
11 intervene filed by Senator Stevens on November
12 the 16th. And then we set on, on a hearing on
13 December the 15th, an expedited briefing
14 schedule and also set today as the argument
15 schedule, in part in order to permit the
16 parties to file everything that they needed to
17 file and to get a decision on record before
18 January the 9th, which is the first day of the
19 next legislative session.
20 There is a statute, Alaska Statute
21 24.40.031, that provides that legislators may
22 exercise the privilege of postponing civil
23 proceedings when the party is a member of the
24 legislature. And the plaintiffs were
25 particularly concerned to try to get this

1 issue resolved before the legislative session
2 started, and so that's the reason that we have
3 set it on today.
4 And then I've also carefully considered
5 the amicus curiae brief filed by the
6 legislative council.
7 I'm going to talk a little bit after the
8 parties have argued about the legal
9 authorities that will guide both the
10 discussion today and also my decision. We're
11 principally looking at Alaska Constitution
12 Article XI, Section 8, that sets forth the
13 provisions for recall.
14 We're looking at various Alaska Statutes
15 pertaining to recall, and most importantly
16 Section 15.45.510, which sets forth the
17 grounds for recall. And also 540, which sets
18 the standard for the Division of Elections to
19 make a determination whether a particular
20 petition is in the proper form.
21 There are a number of provisions that go
22 into the decision whether or not a petition is
23 appropriate, but the only issue in this case
24 is whether or not the director of the Division
25 of Elections properly concluded or not that

1 the petition here filed by the plaintiffs was
2 in the proper form with respect to the two
3 grounds that are alleged.
4 There is also two cases principally on
5 point. And I'm sure counsel will talk about
6 those cases in their oral argument, and I'll
7 certainly discuss them later today. Meiners
8 versus Bering Strait School District, which is
9 678 P.2d 287 Alaska 1994, and Von Stauffenberg
10 versus Committee for an Honest & Ethical
11 School Board, 903 P.2d 1055 Alaska 1995.
12 To lay the groundwork, and then I'll
13 permit counsel to begin your argument. As far
14 as I can determine based on the briefing, all
15 parties agree that there are no genuine issues
16 of material fact and that the dispute today
17 shall be decided as a matter of law pursuant
18 to Alaska Civil Rule 56(c). No party has
19 suggested that there's any genuine issue of
20 material fact.
21 While the parties vigorously dispute how
22 the law should be applied to the undisputed
23 facts, nobody is suggesting that the case
24 can't be and shouldn't be decided. And it's
25 my hope, depending on how oral argument goes,

1 that I'll be able to give you a decision
2 shortly after the oral argument concludes
3 today, in large measure so that if any party
4 that is not on the prevailing side wishes to
5 take an appeal, that you can do so
6 expeditiously.
7 While the legal principles are important
8 and they're interesting, and there have been
9 considerable extra or extraneous materials
10 presented to me, as I understand my task
11 today, that's to ultimately take the language
12 of the petition that was filed by the
13 plaintiffs and evaluate the language for both
14 its factual and legal sufficiency in light of
15 the legal arguments or the legal authorities
16 that are set out both by the Supreme Court and
17 the constitution and the statutes.
18 So with that background in mind, and I'm
19 sure that if any attorney thinks that I'm
20 misreading this, you'll let me know, we'll go
21 ahead and begin.
22 Mr. Jacobus.
23 MR. JACOBUS: Thank you, Your Honor.
24 May it please the Court. I certainly do
25 not disagree at all with the court's