

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.

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.

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:

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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:

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The telephone numbers and addresses of counsel for Appellee Recall

Dunleavy are as follows:

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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

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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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