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

REPLY IN SUPPORT OF MOTION FOR BRIEFING AND DECISION SCHEDULE AND MOTION FOR EXPEDITED SCHEDULING CONFERENCE

Defendants' Opposition to Recall Dunleavy's motions to expedite the briefing and decision in this case[1] discusses at some length other recall and election cases.[2] Notably absent, though, is any explanation of how putting this case on a path for prompt resolution results in any harm or prejudice to the state.

Defendants misapprehend what is at issue and at stake in this case in claiming that "[t]he only date that drives the timing of a decision in this case and the inevitable appeal is the general election in 2022."[3] More than 46,000 qualified Alaskans—almost

1 Recall Dunleavy's proposed briefing schedule is outlined in greater detail in its Motion for Briefing and Decision Schedule (Nov. 6, 2019).

2 *See generally* Defendants' Opposition to Plaintiff's Motion for Expedited Consideration (Nov. 7, 2019) [hereinafter Defendants' Opposition].

3 *Id.* at 1.

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twice as many as required by law—signed the recall application submitted to the state. The substantial interest of Alaskans across the state in pursuing the recall of the Governor is undeniable. If Defendants have wrongly denied certification of the recall application—and the Plaintiff strongly believes that that is exactly what has occurred here—then every day that passes harms Alaskans by depriving them of their legitimate and constitutional right to pursue recall of the Governor. Make no mistake, the Governor's strategy here is to run out the clock. Plaintiff seeks to expedite resolution of this case to avoid that undue strategic, political, and personal benefit.

By statute, once the petition is certified and Recall Dunleavy collects and submits the required signatures, "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."[4] This is not a case where Alaskans have to wait until the next general election to recall the Governor. If Plaintiff's application had not been illegally rejected, signature collection would be underway and a special recall election could be held in early spring. Voters are already being harmed by delay if Defendants' denial was wrong; in contrast, Defendants will suffer no harm from expedited proceedings.

Defendants attempt to distinguish recall petitions from other election-related litigation. Recall Dunleavy agrees that other election-related litigation—like initiatives

4 AS 15.45.670 (emphasis added).

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and election contests—necessitates an expedited schedule.[5] But recall litigation, which is also election-related, has its own need for an expedited decision. Like initiatives, a recall will not make it onto a ballot unless a sufficient number of signatures are submitted along with the petition.[6] Defendants recognize that initiative litigation should be expedited because sponsors will need multiple months to gather signatures if the initiative application is approved.[7] Once petition booklets are in-hand, Recall Dunleavy has a signature requirement that is 2.5 times *greater* than what is needed for an initiative.[8] If anything, this more onerous hurdle for recalls necessitates an even *more* expedited decision than in initiative cases. And, similar to election contests, where courts must move "quickly so that successful candidates can assume their elected positions when their terms start,"[9] so too should Alaskan voters have the right to recall an elected official promptly when grounds exist and signature thresholds have been met.

Defendants cite Alaska's limited, older recall precedent in an attempt to characterize Recall Dunleavy's request as being extraordinary.[10] But looking at each of these cases in turn shows that Defendants' reliance is gravely misplaced. In *Meiners v. Bering Strait School District*, the Division of Elections *certified* the recall petition—a step beyond this case's current procedural posture of having the recall *application*

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5 *See* Defendants' Opposition at 2-4.
6 AS 15.45.610.
7 *See* Defendants' Opposition at 3-4.
8 AS 15.45.610.
9 Defendants' Opposition at 2.
10 *See id.* at 5-6.

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denied—and an appeal was not filed until after a special recall election had been set.[11] In *Von Stauffenberg v. Committee for Honest & Ethical School Board*, the Division of Elections *also* certified the recall petition, and a lawsuit was not filed until after "a sufficient number of signatures" had already been submitted for the recall petition.[12] In *Coghill v. Rollins*, Defendants concede expedited consideration was not requested.[13] Plaintiff is requesting expedited consideration here. In *Citizens for Ethical Government v. State*, Defendants concede that "the court expedited briefing on summary judgment."[14] Finally, in *Valley Residents for a Citizen Legislature v. State*, the case *was* expedited once motions were filed, and the court issued its decision less than 20 days after the first filing.[15]

Defendants argue that recalls based on policy disagreements are not permitted in Alaska.[16] Recall Dunleavy agrees. That is why Recall Dunleavy submitted detailed grounds for recall outlining repeated instances where Governor Michael J. Dunleavy neglected his duty, acted incompetently, and exhibited a lack of fitness for the office he currently holds.[17] And Recall Dunleavy is prepared to promptly provide this court with

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11 687 P.2d 287, 292 (Alaska 1984).
12 903 P.2d 105, 1057 (Alaska 1995).
13 *See* Defendants' Opposition at 5.
14 *Id.* at 5.
15 *Valley Residents for a Citizen Legislature v. State*, Order Regarding Pending Motions, 3AN-04-06827CI, at 3-4, 16 (Alaska Super. Aug. 24, 2004) (Appendix 1).
16 Defendants' Opposition at 2, 6.
17 *See* AS 15.45.510; *see also* Complaint (Nov. 5, 2019).

full briefing that demonstrates why the application stated adequate legal grounds for recall and how Defendants erred in determining otherwise.

Curiously, Defendants make no argument in its opposition *against* expediting this matter. Recall Dunleavy suspects it is because Defendants cannot think of a single proper reason *not* to expedite. After all, Defendants already have a 25-page, single-spaced opinion by Attorney General Kevin Clarkson which can serve as a first draft for a cross-motion for summary judgment.

The Alaska Supreme Court, because of the constitutional right involved, has directed courts to "liberally construe [Alaska's recall statutes] so that 'the people [are] permitted to vote and express their will . . . .' "[18] The over 46,000 qualified Alaskans who signed Recall Dunleavy's recall application deserve a swift decision, and the opportunity to sign recall petition booklets and require the state to hold a recall election. Recall Dunleavy respectfully requests that this court grant its request for an immediate scheduling conference where the court and parties can address an expedited briefing and decision schedule.

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18 *Meiners*, 687 P.2d at 296 (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)).

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 8th day of November 2019.

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CERTIFICATE OF SERVICE
I hereby certify that on this 8th day of November 2019, a true and correct copy of the foregoing was sent to the following via hand delivery and e-mail:

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VALLEY RESIDENTS FOR A CITIZEN LEGISLATURE and TOM BAIRD,

Plaintiffs,

vs.

THE STATE OF ALASKA, Division of Elections and LAURA A. GLAISER, Director Of the Division of Elections,

Defendants,

SENATOR SCOTT OGAN,

Intervenor.

Case No. 3AN-04-06827 CI

ORDER REGARDING PENDING MOTIONS

Plaintiffs and Intervenor Senator Scott Ogan (hereinafter referred to jointly as plaintiffs) challenge the decision of the director of the Division of Elections that certified an application for a petition to recall Senator Ogan. The plaintiffs assert that the recall petition is legally insufficient for several reasons. Before the court is the plaintiffs' motion for injunctive relief, in which the plaintiffs seek an order from this court directing the Division of Elections to withdraw certification of the application for recall and void the recall petition. Both parties also filed motions for partial summary judgment. For the reasons expressed below, this court denies the plaintiffs' motion for injunctive relief and grants the defendants' motion for partial summary judgment.

FACTUAL BACKGROUND

Senator Ogan was elected in District H to the Alaska State Senate in November 2002.

On February 17, 2004, an application for the recall of Senator Ogan was filed with the Division of Elections. In its original form as submitted on that date, the application's stated grounds for recall were as follows:

> Senator Scott Ogan demonstrated corruption in office by actively promoting legislation, directly benefiting business interests of his employer Evergreen Resources, (Evergreen), instead of protecting the private property and due process rights of his constituents.
>
> Ogan's legislative activities enabled Evergreen to acquire coal bed methane (CBM) leases knowing it would deprive his Mat-Su Valley constituents of actual notice of leases and therefore their constitutional right to due process, demonstrating neglect of duty.
>
> Ogan neglected his duties to constituents by promoting Evergreen in legislative committee, misstated important facts (3-28-03), and was even listed as Evergreen's corporate contact in its legislative materials submitted to the House Oil and Gas Committee hearing on HB 69.
>
> Ogan did not abstain from voting on HB 69, which reduced local control over CBM development that directly benefited his employer, Evergreen.
>
> Ogan's persistent and irreconcilable conflict of interest between his duties to his constituents and his activities as an Evergreen and CBM industry promoter demonstrate his inability to recognize his obvious conflict, a failure in ethical judgment that shows lack of fitness to serve in public office, incompetence, and neglect of duty.

[Ex. 3 to Plaintiff's TRO Memo. at 1.]

On April 9, 2004, Laura Glaiser, the director of the Division of Elections, certified the recall petition, but with several deletions to the statement of grounds. She informed

the recall sponsor that she had struck from the application "language that does not meet the particularity requirement or is a legal allegation asserting non-existent laws." [Ex. 4 to Plaintiff's TRO Memo. at 1.] Glasier's deletions were as follows:

> Senator Scott Ogan demonstrated corruption in office by actively promoting legislation, directly benefiting business interests of his employer Evergreen Resources, (Evergreen), ~~instead of protecting the private property and due process rights of his constituents~~.
>
> Ogan's legislative activities enabled Evergreen to acquire coal bed methane (CBM) leases knowing it would deprive his Mat-Su Valley constituents of actual notice of leases ~~and therefore their constitutional right to due process, demonstrating neglect of duty~~.
>
> Ogan neglected his duties to constituents by promoting Evergreen in legislative committee, ~~misstated important facts (3-28-03),~~ and was even listed as Evergreen's corporate contact in its legislative materials submitted to the House Oil and Gas Committee hearing on HB 69.
>
> Ogan did not abstain from voting on HB 69, which reduced local control over CBM development that directly benefited his employer, Evergreen.
>
> Ogan's persistent and irreconcilable conflict of interest between his duties to his constituents and his activities as an Evergreen and CBM industry promoter demonstrate his inability to recognize his obvious conflict, a failure in ethical judgment that shows lack of fitness to serve in public office, ~~incompetence,~~ and neglect of duty.

On April 23, 2004, the Legislative Ethics Committee issued a Draft Advisory Opinion, in which it responded to hypothetical questions that had been posed to the committee by Senator Ogan.

On May 6, 2004, the plaintiffs filed this civil action. However, the plaintiffs did not file any motion in this action so as to bring the issue before the court until August 5, 2004, shortly after the recall sponsors had filed signed petitions with the Division of

Elections in an amount which, if approved, would be sufficient to place the recall petition on the November ballot.

On August 5, 2004, the plaintiffs filed a motion for a temporary restraining order and/or preliminary injunction. The following day, August 6, 2004, the defendants filed a motion seeking partial summary judgment for the defendants on the plaintiffs' claims for injunctive relief. The plaintiffs filed a cross-motion for summary judgment on these same claims on August 16, 2004. Neither party has sought summary judgment on the plaintiffs' due process claim. On August 19, 2004, Senator Ogan moved to intervene in the case, and the defendants filed a non-opposition to his intervention on that same date.

Oral argument on all pending motions was held on August 20, 2004. Senator Ogan's motion to intervene was granted at the outset of oral argument, and he then joined in the plaintiffs' motions.

Standard of Review

Summary judgment shall be granted if the record demonstrates that no material facts are genuinely disputed and a party is entitled to judgment as a matter of law. Civil Rule 56. If summary judgment is appropriate as to any claim, then a final decision on the merits is entered as to such claim and the issue of whether a preliminary injunction should be entered until a final decision is entered becomes moot with respect to that claim.

Neither side has sought summary judgment with respect to the plaintiffs' due process claim. Instead, plaintiffs have sought to enjoin the certification of the recall petition on a temporary basis while the due process issue is determined. Determination

of whether a preliminary injunction should be issued requires consideration of three factors: "(1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues cannot be frivolous or obviously without merit." North Kenai Peninsula Road v. Kenai Peninsula Borough, 850 P.2d 636, 639 (Alaska 1993). "The 'serious and substantial question' standard applies only where the injury which will result from the . . . preliminary injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted." State v. United Cook Inlet Drift Ass'n., 815 P.2d 378 (Alaska 1991)(citations omitted). Otherwise, the plaintiffs must show "probable success on the merits" before a preliminary injunction can be issued. Id. at 379.

Legal Framework

Article XI, Section 8 of the Alaska Constitution provides as follows:

> All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature.

The statutory provisions regarding the recall of legislators are set forth in Title 15 of the Alaska Statutes. In Alaska, state legislators are subject to recall only for specified reasons. AS 15.45.510, enacted in 1960, provides: "The grounds for recall are (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption." A recall petition, or application, is submitted to the director of the Division of Elections for review, where it is either certified or the recall committee is notified of the grounds for the director's refusal to certify the application. AS 15.45.540. AS 15.45.550 sets out the four bases for

denial of certification. Here, the plaintiffs assert that the recall application failed to meet one of these required bases in that statute: "The application is not substantially in the required form." AS 15.45.550(1). Any person aggrieved by a determination made by the director with respect to a recall application may seek judicial review of that determination pursuant to AS 15.45.720.

The Alaska Supreme Court has not directly addressed the statutory recall provisions for legislators set forth in Title 15 that are at issue in this litigation. However, that court has addressed the recall provisions for municipal officials contained in Title 29. Although the statutory grounds for recall are different for municipal officials than for state legislators,[1] the principles enunciated by the Alaska Supreme Court regarding the recall process in general should apply to the recall provisions of Title 15, particularly since the right to recall as to all elected officials emanates from the same constitutional provision. Specifically, the Alaska Supreme Court has held that recall statutes should be "liberally construed so that 'the people are permitted to vote and express their will' . . . The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute." Meiners v. Bering Strait School District, 687 P.2d 287, 296 (Alaska 1984)(citations omitted). Further, the Supreme Court has recognized the "need to avoid wrapping the recall process in such a tight legal straitjacket that a legally sufficient recall petition could be prepared only by an attorney who is a specialist in election law matters." Id. at 301. "We emphasize that it is not [the court's] role, but rather that of the voters, to assess the truth or falsity of the allegations in the petition." Id. at 305, n.18.

[1] Cf. AS 29.26.250 and AS 15.45.510.

In their filings to this court, the plaintiffs assert six separate reasons in support of their motion to enjoin the certification of the recall petition. The plaintiffs' allegations are as follows:

(1) The grounds stated in the recall application are not violations of law, nor do they constitute any of the statutory grounds for recall;

(2) Since Senator Ogan's alleged conduct was in accordance with the Uniform Rules of the Legislature and the Legislative Ethics Code, permitting the recall application to go forward would violate the doctrine of separation of powers between the court and the legislature;

(3) The grounds for recall are not alleged with sufficient particularity as required by statute, AS 15.45.500(2);

(4) The Division of Elections improperly revised the recall application;

(5) The recall supporters improperly used the recall effort in order to gain an advantage; and

(6) The plaintiffs and Senator Ogan are entitled to a due process hearing to show that the factual allegations in the petition are false and misleading.

Each of these arguments is addressed below in turn.

1. Are the Recall Allegations Legally Sufficient?

Legislators in Alaska may only be recalled for one or more of the causes specified in AS 15.45.510: lack of fitness, incompetence, neglect of duties, or corruption. In reviewing the legal sufficiency of allegations in recall petitions, the court is

to "take the allegations as true" and "determine whether such facts constitute a prima facie showing" of the statutory grounds for recall. Von Stauffenberg v. Committee for Honest and Ethical School Bd., 903 P.2d 1055, 1059-60 (Alaska 1995).

Here, the director of the Division of Elections found that three of the four statutory bases had been adequately alleged by the recall applicants: corruption, neglect of duties, and lack of fitness. None of these terms are defined in the recall statutes. However, for purposes of the motions now before the court, the plaintiffs have accepted the defendants' definitions of those terms. [See Plaintiffs' Memo in Opp. to Partial Summary Judgment at 8.]

a. The recall petition is legally sufficient in alleging "corruption."

For purposes of this action, the parties have agreed that "corruption" in the context of recall of a legislator means (1) intentional conduct, (2) motivated by private self-interest, (3) in the performance of work as a legislator, and (4) that violates one or more provisions of the Legislative Ethics Act (AS 24.60.030 *et. seq.*) or other statutes intended to guard against corruption.[2] [Defendants' Opp. to Plaintiffs' Motion for Injunctive Relief at 17].

Here, the recall application alleges that Senator Ogan actively promoted the interests of his employer to the detriment of his constituents in his capacity as a legislator. Defendants assert that this conduct alleges a violation of AS 24.60.100, which provides in relevant part that "a legislator . . . may not represent another person for compensation before an agency, committee, or other entity of the legislative branch."

[2] Cf. AS 24.60.010(6): "no code of conduct, however comprehensive, can anticipate all situations in which violations may occur nor can it prescribe behaviors that are appropriate to a situation; in addition, laws and regulations regarding ethical responsibilities cannot legislate morality, eradicate corruption, or eliminate bad judgment."

This court agrees with the defendants' analysis. Taking the allegations as true, which this court is required to do under the applicable law, the application provides sufficient detail to allege a violation of AS 24.60.100 constituting "corruption."

b. The recall petition is legally sufficient in alleging "neglect of duty."

Defendants have defined "neglect of duty" as the nonperformance of a duty of office established by applicable law. In this regard, the recall application states that Senator Ogan had neglected his duties in three ways: (1) by enabling Evergreen to acquire coal-bed methane leases knowing it would deprive his constituents of notice and their constitutional rights to due process; (2) by promoting Evergreen in legislative committee; and (3) by failing to recognize an obvious conflict of interest between his duties to his constituents and those to his employer. The director of the Division of Elections found that the second and third of these allegations amounted to legally sufficient allegations of neglect of duty. The director deleted the first allegation, finding that this allegation, even if true, would not constitute "neglect of duty."

AS 24.60.010 of the Legislative Ethics Act (LEA) provides, "a fair and open government requires that legislators . . . conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts of interest or even appearances of conflicts of interest." To this end, AS 24.60.030(a)(1) prohibits legislators from accepting "a benefit other than official compensation for the performance of public duties." By allegedly taking action in violation of the statutory standards of conduct set forth in the LEA, Senator Ogan is alleged to have neglected his duties, which in this context overlaps with the ground of "corruption." Irrespective of

the overlap, the petition as approved is legally sufficient in its allegation of "neglect of duty."

c. The recall petition is legally sufficient in alleging "lack of fitness."

The defendants have defined "lack of fitness" as unsuitability for office demonstrated by specific facts related to the recall target's conduct in office. [Defs. Opp. to Inj. Relief at 26.] Here, the recall applicants have asserted that Senator Ogan undertook official conduct for private gain, while failing to recognize the detriment to his constituents of that official conduct. The allegations, which all relate specifically to the alleged conflict between Senator Ogan's loyalty to his employer and to his constituents, are legally sufficient grounds for "lack of fitness" under AS 15.45.510.

2. The doctrine of separation of powers is inapplicable.

Plaintiffs argue that this court should enjoin the Division's actions because the Uniform Rules of the Legislature required Senator Ogan to vote on HB 69. Also, the plaintiffs have asserted that the Advisory Opinion of the Legislative Ethics Committee should be dispositive.

The Advisory Opinion was based on a set of hypotheticals presented to the Committee by Senator Ogan. It is not dispositive of this specific legal dispute. Moreover, the Opinion concluded with the admonition that "you should strictly separate the work that you are otherwise compensated for in your private life from your actions as a public official." It is this alleged failure by Senator Ogan to separate his work for Evergreen from his legislative duties that forms the underlying basis of the recall applicants' claim. [Def. Opp. to Inj. Relief, Ex.2, page 9].

Nor are the Uniform Rules applicable. Those rules preclude a legislator from abstaining on a vote for the final passage of a bill "unless the [legislative body] for special reasons permits a member to abstain." Uniform Rule 34(b). Here, Senator Ogan does not expressly indicate that he requested to abstain from the vote on HB 69 when the bill came before the entire Senate. See Ogan Aff. at 10. Moreover, the Legislative Ethics Act refers to the Uniform Rules' requirement to vote over a legislator's objection in cases where the legislator "has an equity or ownership interest in a business." See AS 24.60.030(g). The recall applicants' petition here is not based on a claim that Senator Ogan had an equity or ownership interest in Evergreen. Rather, it is based on an allegation that Senator Ogan was representing the interests of his employer, Evergreen, in his actions before and within the legislature, rather than representing the interests of his constituents -- conduct which is precluded by AS 24.60.100. Unlike AS 24.60.030, there is no Uniform Rules reference in AS 24.60.100 that could require a legislator to vote after seeking abstention when that legislator was allegedly representing another person for compensation before the agency or committee.

3. The grounds for recall are alleged with sufficient particularity.

The Plaintiffs also assert that the Division erred in approving the recall petition because the grounds for recall were not alleged with sufficient particularity. AS 15.45.500(2) requires that "the grounds for recall [be] described in particular in not more than 200 words."

In von Stauffenberg, 903 P.2d 1055, the Alaska Supreme Court held that allegations in a school board recall petition lack sufficient particularity. There, the

petitioners had alleged that the school board members had violated Alaska law by meeting in an improper, closed-door executive session to discuss retention of a school employee. Since Alaska law expressly permits school boards to meet in executive session while discussing certain personnel issues, the court held that the allegations were legally insufficient. Moreover, with executive sessions for such personnel issues expressly permitted by statute, the court founds that the allegations lacked sufficient particularity when they failed to explain why entering into executive session violated Alaska law.

This court does not read von Stauffenberg to require recall petitioners to state the precise statute(s) that are alleged to have been violated in all instances. To do so would create the type of "artificial technical hurdle" and "tight legal straitjacket" that the Supreme Court proscribed in Meiners. 687 P.2d at 296, 301. Unlike Von Stauffenberg, the alleged conduct of Senator Ogan that formed the basis of the petition is not expressly authorized by statute. The recall petition has sufficient particularity in these circumstances.

4. The recall application is legally sufficient as revised.

Plaintiffs also assert that the recall election should be enjoined because the Division improperly edited the recall petition. "Important considerations of public policy favor an approach that places all legally sufficient charges on the recall ballot to avoid erecting 'artificial technical hurdles' to recall and allow the process to operate in a way that permits the electorate to express its will." Matanuska Elec. Ass'n v. Rewire the Bd., 36 P.3d 685, 693 (Alaska 2001)(*quoting* Meiners, 687 P. 2d at 291).

Here, the Division did not change any of the words in the recall application. However, it did delete several words and phrases it concluded were legally insufficient. As the defendants note, it is primarily the recall sponsors -- not the target of the recall -- who are most affected when the Division deletes language from the application, and it is those sponsors who can either submit a new petition for review, seek judicial review of the Division's deletions, or proceed with the petition as amended. The impact of deletions on the recall target is far less substantial, so long as standing alone, the remainder of the petition can be given legal effect. Since this court has already concluded that the petition as approved by the Division was legally sufficient, the plaintiffs' challenge to the Division's deletions is without merit.

5. The motives of the recall supporters are not a relevant consideration for judicial review of the recall petition.

Plaintiffs also argue that the recall election should be enjoined because "the recall supporters have used the recall as a weapon to coerce illegal legislative conduct." [Plaintiffs' Memo. for Inj. at 21.] But analysis of the motivations of citizens behind a recall petition is outside the scope of judicial review of the petition. Moreover, as defendants correctly note, each of the sponsors and signatories of a recall petition may well have different motivations. Rather, in reviewing allegations in recall petitions, this court is to accept the allegations as true and determine whether such alleged facts constitute a prima facie showing of grounds for recall. See von Stauffenberg, 903 P.2d at 1059.

6. Plaintiffs are not entitled to a preliminary injunction pending a judicial determination as to whether Alaska's constitutional right to due process entitles the plaintiffs to an evidentiary hearing as to the truth or falsity of the allegations in the recall petition.

The plaintiffs and Senator Ogan assert that they are entitled to a due process hearing to show that the factual allegations in the recall petition are false and misleading. The interface between the constitutional right to due process, on the one hand, and the constitutional right to recall elected officials, on the other hand, has not been resolved by the Alaska Supreme Court.[3] Simply stated, to what extent should a judge make a preliminary determination as to the truth or falsity of allegations in a recall petition that is legally sufficient on its face before the petition is submitted to the voters?

The defendants did not seek summary judgment on the plaintiffs' due process claim. Nor did the plaintiffs address the issue directly in their summary judgment pleadings. Accordingly, the court will not grant summary judgment to either party on the due process claim at this time. Instead, the issue will be discussed in the context of the plaintiffs' motion seeking issuance of a preliminary injunction that would halt the recall certification pending determination of the due process claim.

In balancing the hardships, the constitutional right of citizens to seek the recall of their elected officials is of a high magnitude. As the Alaska Supreme Court noted in Meiners, the constitutional provision for recall, together with the rights of initiative and referendum, "give voters a check on the activities of their elected officials above and beyond their power to elect another candidate when the incumbent's term expires." 687 P.2d at 294. "Like the initiative and referendum, the recall process is fundamentally a part of the political process." Id. at 296. Thus, even if Senator Ogan has a protected due process right to a legislative position for a specified term, he acceded to that

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[3] In von Stauffenberg, 903 P.2d at 1061, the Alaska Supreme Court declined to consider this due process issue because it was raised for the first time on appeal, rather than before the trial court. See also Meiners, 687 P.2d at 304, n.7.

legislative position subject to the constitutional right of Alaska's citizens to seek his recall before the end of the specified term. And permitting the recall issue to go before the voters in Senate District H does not necessarily mean that Senator Ogan is faced with irreparable harm. Rather, it will be for the voters of that district to exercise their constitutional right on the recall question, and only after Senator Ogan is accorded his statutory right to provide to the voters his justification for his conduct in office. See AS 15.45.680. Moreover, the recall statutes, with their requirements that the petition specify the grounds for recall with sufficient particularity and their provision for judicial review, accord a measure of procedural protections to the incumbent prior to the electorate's substantive consideration of the recall petition. In considering whether to issue a preliminary injunction, this court finds that the balance of hardships tips decidedly in favor of the constitutional right of the electorate to consider a petition to recall an elected official in a timely manner.

Moreover, given the repeated holdings of the Alaska Supreme Court that in evaluating recall petitions, courts are not to assess the truth or falsity of the allegations, this court finds that the plaintiffs have failed to demonstrate probable success on the merits on this due process claim. "The political nature of the recall makes the legislative process, rather than judicial statutory interpretation, the preferable means of striking the balances necessary to give effect to the Constitutional command that elected officials shall be subject to recall." Meiners, at 296. There is no statutory provision for an evidentiary hearing before a judge to assess the validity of the recall allegations. Therefore, the certification of the recall petition will not be enjoined on the basis of the due process challenge raised by the plaintiffs.

Conclusion

For the foregoing reasons, the court GRANTS the defendants' motion for summary judgment on Counts I through III of the plaintiffs' complaint, and DENIES the plaintiffs' motion for a preliminary injunction with respect to Count IV of the plaintiffs' complaint.

DATED this 24th day of August, 2004.

Sharon Gleason
SHARON L. GLEASON
Judge of the Superior Court

I certify that on 8-24-04
a copy of the above was mailed to each of
the following at their addresses of record: sedor
Administrative Assistant ajs dio