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

Donna Aderhold, David Lewis, and Catriona Reynolds, Plaintiffs, v. **City of Homer,** Defendant.	No. 3AN-17-_____CI **Plaintiffs' Memorandum in Support of Motion for Declaratory and Injunctive Relief**

Pursuant to AS 22.10.020 and Civil Procedure Rule 57(a), Plaintiffs move for a declaratory judgment and to enjoin Defendant from holding a special recall election of Plaintiffs' seats on the Homer City Council.

INTRODUCTION

Plaintiffs, three Homer City Council members, are subject to a recall election based on allegations that they are unfit for office and committed misconduct in office. The bases for these claims by the recall petitions' Sponsors are that Plaintiffs prepared, distributed, and promoted two resolutions, perceived to be politically controversial, which violated Plaintiffs' oaths of office and caused the City of Homer financial loss. Defendant determined that the Sponsors' Statement of

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Recall contains two legally sufficient grounds for recall, and Defendant has scheduled a special recall election for June 13, 2017.

Plaintiffs bring this suit to challenge Defendant's certification of the recall petitions. Plaintiffs, like all legislators, enjoy free speech protections. "Misconduct" that may serve as a ground to recall an elected official cannot include constitutionally protected speech. Because the petitions in this case are based upon the Plaintiffs' constitutionally protected actions, the petitions were certified in error. Plaintiffs therefore seek expedited declaratory and injunctive relief to secure their rights in advance of the June 13 election.

BACKGROUND

I. Plaintiffs' Actions

The following facts are undisputed and are set forth in the Verified Complaint. Plaintiffs are three members of the Homer City Council. In November 2016, Plaintiff David Lewis introduced Resolution 16-121, which expressed support for the Standing Rock Sioux Tribe and opposition to construction of the Dakota Access Pipeline. Council Members Aderhold, Lewis, and Reynolds voted in favor of Resolution 16-121, and it was adopted by the City Council on a 4–3 vote, with the mayor voting to break a 3–3 tie.

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In February 2017, Plaintiffs Aderhold, Lewis, and Reynolds introduced Resolution 17-019, which conveyed disapproval of perceived divisive rhetoric during the 2016 presidential election campaign and called on Homer's citizens to "stand against intolerance and resist expressions of hate," among other similar sentiments. A draft of the resolution—which, unlike the Resolution as introduced, included explicit expressions of disapproval of President Donald J. Trump—had been circulated on social media and had become a topic of discussion among constituents and media commentators. After a draft of the Resolution was sent to the City Clerk to include in the Council packet, Plaintiff Reynolds shared the draft with a constituent, which was later posted to a Facebook group. The Plaintiffs requested changes, which were reflected in the version of Resolution 17-019 as introduced, and the Resolution was defeated in a 5–1 vote.

II. Recall Petitions

One week after the vote on Resolution 17-019, Sponsors submitted to the Homer City Clerk an application for petitions for the recall of City Council Members Aderhold, Lewis, and Reynolds, based upon their actions supporting Resolutions 16-121 and 17-019.[1] After

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[1] Exhibit D to the Verified Complaint.

addressing several technical issues and editing the petition language, but without ruling on the legal sufficiency of the asserted grounds for recall, the Clerk issued three recall petitions, one for each of the Plaintiffs.[2] Sponsors gathered signatures and returned the petitions at the end of March.

III. Certification

State law provides that a municipality may permit recall only for cause, and recognizes three legitimate grounds: "[1] misconduct in office, [2] incompetence, or [3] failure to perform prescribed duties."[3] An application for a recall petition "must contain . . . a statement . . . of the grounds for recall stated with particularity."[4]

After Sponsors returned the petitions containing the appropriate signatures, the Homer City Clerk reviewed the grounds. Noting that all factual allegations in a recall petition must be accepted as true, the

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[2] Memorandum 17-057, the certification of the recall petitions, is attached as Exhibit E to the Verified Complaint.

[3] AS 29.26.250; *see also* Homer City Code 4.60.020 (incorporating AS 29.26.240 – 29.26.360).

[4] AS 29.26.260(a)(3).

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Clerk certified as sufficient two of Sponsors' asserted grounds for recall.[5]

The first certified ground alleges that Plaintiffs are "unfit for public office" because they violated their oaths of office in preparing Resolutions 16-121 and 17-019. The second certified ground, as rephrased by the Clerk, alleges that "Council members at issue engaged in misconduct surrounding draft resolution 17-019 due, in part, to the irreparable economic harm it caused the City." The Clerk's memorandum explaining the reasoning for certifying these two grounds explained that the second ground could constitute misconduct because Sponsors may have meant to allege that when Plaintiffs provided a copy of the draft, which was ultimately shared on social media, they had "impl[ied]their representation of the whole [Council] by the use of their title," a violation of the Code of Ethics in the Homer City Code 1.18.030(h).

The Clerk scheduled a special recall election to take place on June 13, 2017. The election has been noticed on the website of the City of Homer Clerk's Office.[6]

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[5] A third ground for recall alleged that Plaintiffs had violated a prohibition on engaging in "political activity," but because no political activity, as defined in the Homer City Code, had occurred, Defendant rejected this ground. *See* Homer City Code 1.18.020.

DISCUSSION

I. The Grounds For Recall Are Legally Insufficient.

Defendant erred in certifying the petition because the certified grounds for recall do not meet the Alaska standard for the legal sufficiency of a recall petition.

Alaska's recall law endeavors to strike "a middle ground" between favoring officeholders' interests in retaining their seats and favoring constituents' interests in subjecting an officeholder to a recall vote.[7] Disagreement with an officeholder's position on questions of policy is not a sufficient basis for a recall election under Alaska law.[8] Alaska law limits recall elections "for cause."[9]

The Alaska Supreme Court has said that, when analyzing the legal sufficiency of a recall petition, a reviewing body at the certification stage is "in a position similar to a court ruling on a motion to dismiss a complaint for failure to state a claim. For these purposes, [the reviewer]

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[6] Election Information, City of Homer City Clerk's Office, http://www.cityofhomer-ak.gov/cityclerk/election-information (last visited April 21, 2017).

[7] *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 294 (Alaska 1984).

[8] *Id.*

[9] *von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1059 (Alaska 1995).

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must take the allegations as true."[10] When the sufficiency of allegations is challenged in court, the court must treat the facts alleged as true, and then determine whether the facts "constitute a prima facie showing of misconduct in office or [other statutory ground for recall]."[11]

Misconduct, as grounds to support a petition for recall, has been interpreted by the Alaska Supreme Court to include a violation of law. In *von Stauffenberg v. Committee for Honest and Ethical School Board*, the Alaska Supreme Court addressed a petition for recall of four school board members who were alleged to have committed misconduct in office by (1) discussing personnel matters regarding a local elementary school principal in executive session, and (2) disagreeing with the Superintendent and effectively forcing her to resign because she had recommended that the Board not retain the principal, and failing to perform prescribed duties by not proving public communication about the Board's decision to retain the principal.[12] The Court concluded that because misconduct was alleged in two violations of Alaska law and neither allegation actually amounted to a violation of the law, the

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[10] *Meiners*, 687 P.2d at 300 n.18.

[11] *von Stauffenberg*, 903 P.2d at 1059–60.

[12] *Id.* at 1057.

grounds for the recall petition were legally insufficient.[13] Specifically, the Court noted that "elected officials cannot be recalled for legally exercising the discretion granted to them by law."[14] The current case is similar. As discussed further in the sections that follow, neither of the two grounds certified by Defendant involves a violation of Alaska (or municipal) law, and therefore neither sufficiently alleges misconduct.

Defendant observed that "'[m]isconduct in office' is not defined in the recall statutes."[15] But "official misconduct" by a "public servant," is defined in the Alaska Statutes' criminal code.[16] This criminal misdemeanor includes having the intent "to obtain a benefit or to injure or deprive another person of a benefit," and having the *mens rea* of knowingly acting in an unauthorized manner or knowingly refraining from acting as obliged.[17]

For two reasons, this "official misconduct" should anchor the definition of "misconduct in office" that can be a ground for recall. First,

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[13] *Id.* at 1059–60.

[14] *Id.* at 1060.

[15] Memorandum 17-057 at 5, attached as Exhibit E to the Verified Complaint.

[16] AS 11.56.850.

[17] *Id.*

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the legislature has made no effort to clearly distinguish the two; to the extent it meant to give "misconduct in office" a different meaning than "official misconduct," it is not self-evident. Second, this would be consistent what other states have adopted explicitly. In Kansas, misconduct in office that can be ground for recall means, "a violation of law by the officer that impacts the officer's ability to perform the official duties of the office."[18] In Georgia, misconduct in office that can be a recallable offence means "an unlawful act committed willfully by an elected public official or a willful violation of the code of ethics for government service."[19] It is logical to read "misconduct" for the purposes of recall to mean "official misconduct" as defined by and used in the criminal code.

A. First Ground: Unfitness for Office

The first certified ground is based on Sponsors' charge that Plaintiffs are "unfit for public office." The Clerk has prepared the allegation for presentation to voters to read:

> Be here advised that Homer City Council Members Aderhold, Lewis and Reynolds are each proven unfit for public office, as evident by their individual efforts in

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[18] Kan. Stat. Ann. § 25-4302(b) (West).

[19] Ga. Code Ann. § 21-4-3(8) (West).

> preparation of Resolution 16-121 and 17-019, the text of which stands in clear and obvious Violation of Oath of Office. Whereas the use of City Council office as a platform for broadcasting political activism is unlawful, unethical, and outside the bounds of permissible conduct in public service.

Being "unfit for office" is not on its face a ground for recall under article 3 of AS 29.26 for *municipal* elected officials. In contrast, "lack of fitness" *is* a specifically enumerated ground for which the governor, the lieutenant governor, or a member of the state legislature may be recalled from office.[20] Because "fitness" is expressly mentioned in Title 15 for certain state officials but is excluded in Title 29 for municipal lawmakers, this court must presume that the omission is an express exclusion. The principle that *expresio unius est exclusio alterius* applies by "establishing the inference that, where certain things are designated in a statute, all omissions should be understood as exclusions."[21] Given the Legislature's explicit choice not to make fitness a ground for which municipal lawmakers can be recalled, Defendant cannot independently determine that unfitness may constitute a ground for recall.[22]

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[20] AS 15.45.510 ("The grounds for recall are (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption.").

[21] *Central Recycling Servs. v. Municipality of Anchorage*, 389 P.3d 54, 59 (Alaska 2017) (quotation marks omitted).

[22] *See, e.g., State v. Fyfe*, 370 P.3d 1092, 1099 (Alaska 2016).

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Although misconduct is not specifically alleged in the first allegation, if read liberally, this allegation sets forth two possible violations of the law that the Clerk determined could be read as allegations of misconduct: (1) that Plaintiffs violated their oaths of office, and (2) that Plaintiffs "unlawful[ly]" used the City Council office to broadcast political activism. As discussed below, each of these is insufficient to constitute grounds for recall.

The first possible claim of misconduct focuses on Plaintiffs' supposed violation of their oaths of office. The Clerk interpreted this as conceivably contending that Plaintiffs violated their oaths by failing to perform their duties "impartially," as required by the phrase in the oath that requires public officials to swear to carry out their duties "honestly, faithfully, and impartially."[23] Additionally, the conduct by Plaintiffs that Sponsors challenged involved participating in drafting and publicizing the disputed resolutions, both of which are forms of expression.

On the facts of this case, this claim not to have acted "impartially" cannot serve as the basis for a recall election. By not acting impartially, Sponsors meant only that Plaintiffs asserted views on national political

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[23] *See* Homer City Code 4.01.110 (incorporating AS 29.20.600).

issues. Legislators, however, enjoy constitutional guarantees of freedom of expression.[24] Indeed, it is particularly important for elected representatives to be secure in this right so that the people's elected representatives may discuss, debate, and deliberate with freedom.[25] As the U.S. Supreme Court held in 1966, "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."[26] And legislators must use this latitude, for they "have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to

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[24] Alaska Const. art. 1, § 5 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."); *see also Roth v. U.S.*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the heirarchy [*sic*] of First Amendment values and is entitled to special protection." (internal quotation marks omitted)); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (concluding that speech on matters of public concern is "at the heart of the First Amendment's protection").

[25] *See, e.g., Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 202 (Alaska 2007) ("The right of elected officials to speak freely and to communicate with their constituents is firmly grounded in constitutional law.").

[26] *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966); *see also Alaskans for a Common Language, Inc.*, 170 P.3d at 202.

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assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them."[27]

Allowing a recall election based on a determination that Plaintiffs' support for the resolutions could be considered misconduct because their conduct was not "impartial" means that this ground for recall is based directly on the content of Plaintiffs' speech. Content-based restrictions of speech are presumed unconstitutional.[28] As the Alaska Supreme Court has stated, "[I]t is only in the most limited circumstances that speech can be punished."[29] Even if it may be justified, "[t]he state bears the burden of proving that it has a compelling interest to justify infringing on the rights of free speech."[30] No compelling interest was provided in the certification.

Another part of the approved ground for recall is Sponsors' claim that Plaintiffs are alleged to have made public a draft of Resolution 17-

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[27] *Bond*, 385 U.S. at 136–37.

[28] *See, e.g., Rosenberger v. Rector and Visitors of U. of Virginia*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

[29] *Marks v. City of Anchorage*, 500 P.2d 644, 647 (Alaska 1972).

[30] *Green Party of Alaska v. State, Div. of Elections*, 147 P.3d 728, 734 (Alaska 2006).

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019, which opined on the recently completed presidential campaign. Such opining is a well-established component of legislating in Alaska. For example, the Alaska State Legislature Uniform Rules empowers legislative chambers to pass resolutions for various purposes, including "to express the will, wish, view, opinion, sympathy, or request of the house adopting it."[31] Drafting, publicizing, and voting on proposed resolutions—far from being a violation of Alaska or Homer municipal law—is an appropriate exercise of the legislator's discretion.[32]

The Alaska Constitution guarantees the right to speak freely "in a more explicit and direct manner" than the Federal Constitution.[33] The Alaska Supreme Court has noted that, with respect to a matter of public concern, the state constitution is "more protective of [public] employee speech" than the Federal Constitution.[34] Given the particularly robust protection of legislators' free speech, legislators'

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[31] Rule 49(a)(1), http://akleg.gov/docs/pdf/uniform_rules.pdf.

[32] *See von Stauffenberg*, 903 P.2d at 1060 (holding that elected officials cannot be recalled for exercising discretion granted to them by law).

[33] *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1980).

[34] *Alaskans for a Common Language., Inc.*, 170 P.3d at 203; *see also Wickwire v. State*, 725 P.2d 695, 703 (Alaska 1986) ("[W]e believe it appropriate to construe the 'public concern' criteria broadly . . . . there may be instances where we would find that certain speech addressed a matter of public concern and was protected under Alaska's Constitution even though a federal claim might yield a contrary result.").

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taking stands on particular issues cannot possibly be a constitutionally permissible ground for a recall vote.

Because the ground for recall that alleges that Plaintiffs violated their oaths rests on Plaintiffs' alleged failure to remain "impartial"—i.e., that they expressed support for particular positions—this ground for recall must fail. It cannot constitutionally be "misconduct" for an elected official to express an opinion on an issue of national importance.[35]

The Clerk also determined that the recall petition alleged another possible violation of law that could constitute misconduct—specifically, the allegation that Plaintiffs used their office "as a platform for broadcasting political activism." The Clerk struck the allegation as insufficient, concluding that no political activity had occurred. The Clerk rightfully struck this for asserting "a legal duty that does not exist."[36] But the Clerk nevertheless retained in the petition the language clearly intended to support the allegation that Plaintiffs had engaged in impermissible political activity. This language should also

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[35] *See von Stauffenberg*, 903 P.2d at 1060 (interpreting misconduct as a violation of state law).

[36] Memorandum 17-057 at 4, attached as Exhibit E to the Verified Complaint.

have been struck as legally insufficient because, as Defendant reasoned, it cannot apply to elected officials in carrying out their duties as lawmakers. Sharing draft resolutions or proposals to be considered is within the elected official's discretion and cannot be considered misconduct.

B. Misconduct

The second ground for recall that was certified by Defendant provides:

> Misconduct in office is further claimed by the irreparable damage done by draft Resolution 17-019 being made public and widely distributed on social and news media, and publicly promoted as conspicuously drafted by and representing the city of Homer. This action has further caused economic harm and financial loss to the city of Homer.

This allegation fails to state legally sufficient grounds for recall. Specifically, the certification fails to describe how any of the actions mentioned could actually constitute misconduct. That is, the actions allege—making a draft resolution public, distributing a draft resolution widely, and promoting a draft resolution—do not allege any action

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outside Plaintiffs' discretion or any violation of law, even if the activity caused financial loss to the City.[37]

To the extent that Defendant relies on Sponsors' claim that Plaintiffs' actions cost the City money because Plaintiffs' positions were politically controversial, this cannot constitute "misconduct" for the purposes of recall, because Plaintiffs' expressions are constitutionally protected. Defendant's memorandum certifying the petition holds out the possibility that Sponsors might have meant to allege that Plaintiffs violated Homer City Code 1.18.030(h), which prohibits Council Members from "implying their representation of the whole [Council] by the use of their title." Plaintiffs must be free to draft, publicize, and distribute proposed resolutions to the public, however, as part of carrying out their ordinary official duties as local lawmakers. As a result, the certification was issued in error.

II. Certification Violated the Plaintiffs' Free Speech Rights.

In addition to erring by certifying the petition for recall as legally sufficient, certifying the petition on the grounds stated in the petition violated Plaintiffs' constitutional right to speak freely. The

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[37] *See von Stauffenberg*, 903 P.2d at 1059 (interpreting misconduct as violations of applicable state law).

constitutional guarantee of free expression is a cornerstone of political discourse.[38] It is especially vital that elected representatives discuss, debate, and deliberate with freedom. Anything less would constrain the marketplace of ideas at the very threshold where its product can be realized as policy.

In the context of an individual legislator's speech, the U.S. Supreme Court explicitly held in *Bond v. Floyd* that a Georgia state legislator's statements criticizing the policy of the federal government in Vietnam and criticizing selective service laws were protected by the First Amendment and could not be ground to exclude him from office.[39] The Court concluded there was no question that the First Amendment protects expressions in opposition to the national foreign policy and that an oath of office gives the state "no interest" in limiting the

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[38] *Roth*, 354 U.S. at 484 ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *see also Connick*, 461 U.S. at 145 ("[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the heirarchy [*sic*] of First Amendment values and is entitled to special protection." (quotation marks omitted)); *First Nat'l Bank*, 435 U.S. at 776 (holding that speech on matters of public concern is "at the heart of the First Amendment's protection").

[39] *Bond v. Floyd*, 385 U.S. 116 (1966).

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legislator's ability to discuss local or national policy.[40] The Court went on to note that ensuring debate on public issues that is "uninhibited, robust, and wide-open" is the "central commitment" of the First Amendment, and is particularly applicable to legislators because they have "an obligation to take positions on controversial political questions."[41]

The Alaska Supreme Court articulated similar principles in striking down a ballot initiative that would have all government communication conducted in English, the Court made clear that "legislators have an obligation to speak about controversial issues to inform and fully represent their constituents" citing *Bond v. Floyd*.[42] Additionally, in the context of considering the executive immunity of the Governor in *Thoma v. Hickel*, the Alaska Supreme Court held that the right to freedom of expression protected Governor Hickel's right to write and speak to answer criticism levied against him, noting that "[d]ebate is impossible where only one side can speak."[43]

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[40] *Id.* at 136.

[41] *Id.*

[42] *Alaskans for a Common Language., Inc*, 170 P.3d at 202 (citing *Bond v. Floyd*, 385 U.S. 116 (1966)).

[43] *Thoma v. Hickel*, 947 P.2d 816, 821 (Alaska 1997).

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The Alaska Constitution provides for "a more explicit and direct" protection of the right to speak freely than its federal counterpart.[44] As dispositive as the First Amendment protections articulated in *Bond v. Floyd* are to this case, the robust protections of the Alaska Constitution afford Defendant even less conceivable justification for its decision to certify the petition.

Because the grounds alleged in the petitions for recall are based upon actions by Plaintiffs that are constitutionally protected, certifying the petitions amounts to a violation of the Plaintiffs' rights to free expression, and this Court should enjoin the special election.

CONCLUSION

Each allegation that was certified as a ground for a recall election is legally insufficient and, therefore, Defendant erred as a matter of law in certifying any of the grounds and in making plans to hold a special election. Because the grounds alleged in the petitions to support recall were based upon actions by Plaintiffs that are constitutionally protected, certification of the petitions violates the Plaintiffs' rights to free expression. This Court should declare that the grounds alleged for

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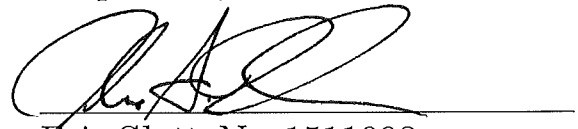
[44] *Messerli*, 626 P.2d at 83.

recall are all legally insufficient and should enjoin Defendant from holding the special recall election now scheduled for June 13, 2017.

Dated: April 24, 2017

Respectfully submitted,



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* Motion to admit *pro hac vice* forthcoming.

Certificate of service

I certify that this Memorandum was served by certified mail and email to:

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