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, and **Heartbeat of Homer,** Intervenor.	No. 3AN-17-06227 CI **Plaintiffs' Reply to Defendant's and Intervenor's Oppositions to Motion for Declaratory Judgment and Injunctive Relief**

INTRODUCTION

Plaintiffs have shown that they are entitled to a declaratory judgment and an injunction preventing Homer from holding a special election that would subject Plaintiffs to possible recall. In defending the decision to hold a recall election, Defendant and Intervenor ask this court to contravene the language and intent of the recall statutes and to permit recall for the exercise of constitutionally protected speech. There are no material facts in dispute; the case is ripe for resolution.

In Alaska, an elected municipal official may be subjected to a recall vote only for cause, when a particularly-stated statutory ground

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is presented in an application for recall petition.[1] Here, the City improperly certified as legally sufficient a recall petition that, even liberally construed, fails to state facts that establish legal grounds for recall. Plaintiffs have been targeted for recall for supporting two City Council resolutions, one of which was adopted. The purpose of each was to express an opinion on an issue of national political controversy.

To deem the grounds and supporting facts alleged here legally sufficient would subject Plaintiffs to recall outside what's provided for by statute, curtailing their constitutional right to speak freely on political issues.

ARGUMENTS

I. The petition does not meet the statutory requirements for recall.

Alaska has chosen to strike a balance in the "middle ground" when evaluating whether to certify a petition for the recall of an elected official.[2] This balance helps preserve the interests not only of elected officials and petition sponsors; it also helps preserve the interests of those who vote elected officials into office, confident their representatives shall serve out their terms free from any threat of

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[1] AS 29.26.250; AS 29.26.260(a)(3).

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

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recall other than for valid grounds.

a. Defendant and Intervenor overstate the extent to which the statutes forgive shortcomings in recall petitions.

While a recall petition's language should be "liberally construed,"[3] Defendant and Intervenor urge the court to exceed the limits on recall established by the legislature.[4] This they justify by invoking Alaskans' constitutional right to subject elected officials to recall, minimizing the constitutional mandate that the legislature prescribe "procedures and grounds" for recall.[5] The right to subject elected officials to recall is not absolute. Emphasizing the recall petition sponsors' interests above all others' violates the statute and defeats the careful balance the legislature struck for the exercise of this right.[6]

The overly liberal standard proposed by Defendant and Intervenor effectively authorizes holding a recall election for any "disagreement with an officeholder's position on questions of policy," a standard *Meiners* makes clear is not the standard in Alaska.[7]

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[3] *Meiners*, 687 P.2d at 296.

[4] AS 29.26.240, *et seq.*

[5] Alaska Const. art. XI, § 8.

[6] AS 29.26.240, *et seq.*

[7] *Meiners*, 687 P.2d at 294.

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b. Defendant cannot cure a deficient recall petition by introducing a ground in its opposition not stated in the original petition.

Defendant's opposition argues that the court should consider that some of the alleged facts might support a possible ground for recall—incompetence—that was not included in the petition application and not contemplated in the City Clerk's memorandum certifying it.[8] To rely on an unstated ground, however, would circumvent both the letter and purpose of the statutory requirement that an "application for a recall petition contain . . . a statement . . . of the grounds for recall stated with particularity."[9]

Both *Meiners* and *von Stauffenberg*[10] illustrate the care with which the Supreme Court ensures that valid grounds are cited in a petition for recall and that supporting facts establish those grounds.[11] Furthermore, granting Defendant's position would be prejudicial to Plaintiffs—who have already submitted rebuttal statements as required by statute—as they cannot have been expected to rebut an

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[8] Compl. Ex. D "Application for Petitions for Recall"; Compl. Ex. E "Memorandum 17-057."

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

[10] *von Stauffenberg v. Committee for an Honest and Ethical School Board*, 903 P.2d 1055 (Alaska 1995).

[11] *Meiners*, 687 P.2d at 298–302; *von Stauffenberg*, 903 P.2d at 1060.

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allegation that was not presented.[12]

c. Accepting the facts alleged as true, they do not constitute a prima facie showing of the cited grounds for recall.

When assessing whether the facts presented support a valid ground for recall, the court should accept the alleged facts as true and then "determine whether such facts constitute a *prima facie* showing of" the cited grounds.[13] Here, the facts presented, taken as true, do not.

Defendant and Intervenor identify four allegations asserting misconduct in office: (1) Plaintiffs violated their oaths to fulfill their duties "impartially"; (2) Plaintiffs violated their oaths to "support and defend" the U.S. Constitution; (3) Plaintiffs used their office "as a platform to broadcast political activism"; and (4) Plaintiffs circulated a draft resolution that was "publicly promoted as conspicuously drafted by and representing the City of Homer." But the petition does not present sufficient facts to establish a showing of misconduct.

First, a duty to fulfill one's duty "impartially" cannot prohibit an elected official from taking a position on a political question, even one that some people consider controversial. As Defendant and Intervenor would have it, it was impermissibly "partial" for Plaintiffs to have

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[12] AS 29.26.330(2).

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

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taken one side of an issue.[14] By this logic, *all* of the City Council members acted "partially" when they voted on the two resolutions at issue, simply by voting for or against.

Second, Intervenor suggests that the contents of a draft resolution—one that merely expresses an opinion and enacts no regulation or law—could conceivably violate the 12th Amendment or the Supremacy Clause of the U.S. Constitution.[15] This implies that any legislative expression at odds with federal policy violates legislators' oaths of office. By this logic, every official in Alaska who has helped implement the people's desire to regulate the sale of marijuana is in violation of his or her oath of office.

Third, Defendant argues that the charge that Plaintiffs engaged in improper "political activism" supports the allegation that Plaintiffs violated their oaths to act "impartially."[16] Accepting this reasoning would nevertheless fail to support a showing of misconduct, because "impartiality" cannot prohibit legislators from staking out a position.

Fourth, the petition includes no fact to support the allegation

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[14] *See* Def's Opp. to Pl's Mot. for Declaratory and Injunctive Relief at 25–27; Intervenor's Opp. to Pl's Mot. for Declaratory and Injunctive Relief at 11.

[15] Intervenor's Opp. at 9–11.

[16] Def's Opp. at 30–31.

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that a Plaintiff held out the draft resolution to represent of the will of the City.[17] The assertion is conclusory. Moreover, circulating a draft among constituents before a resolution is introduced is not only within a legislator's discretion; it is the hallmark of good legislating and, as Defendant concedes, required.[18] If, as *von Stauffenberg* noted, "elected officials cannot be recalled for legally exercising the discretion granted to them by law,"[19] then certainly they cannot be recalled for fulfilling their obligations.

II. Homer violated Plaintiffs' constitutional right to speak freely.

a. Defendant's certification of the recall petition was state action.

Certification of a recall petition and holding an election are state actions. Approving and holding a recall election may include "ministerial" or "mechanical" functional steps along the way, but the desire for the a particular state action—holding a recall election—is what motivated the application for a recall petition in the first place.[20]

Defendant invokes the private citizens behind the petition to

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[17] *See* Def's Opp. at 27–30; Intervenor's Opp. at 11.

[18] Def's Opp. at 29 ("The City agrees that draft resolutions must be circulated prior to Council action.").

[19] *von Stauffenberg*, 903 P.2d at 1060.

[20] Def's Opp. at 9.

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suggest that their initiating a process transforms the state's power and authority into those of private citizens. Defendant cites *Johnson v. Tait* in support, notwithstanding that *Tait* concerned a patron who brought action against a tavern and did not even argue that any state action was present.[21] Instead, the patron argued that no state action was *required* under the Alaska Constitution's free speech clause.[22]

b. Plaintiffs' right and obligation to speak on political matters pose no threat to Alaskans' access to recall provisions.

Defendant and Intervenor conflate Alaskans' right to vote with Alaskans' right to subject elected officials to recall. Unquestionably, voters may cast a ballot for or against a candidate for any reason whatsoever—including the content of a candidate's speech. But the question here is whether sufficient grounds have been presented to warrant holding a recall election. In Alaska, where recall can only be presented to voters for cause, if specific statutory criteria are satisfied, the decision whether to hold an election cannot turn on the content of protected speech.

As the First Circuit observed:

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[21] *Johnson v. Tait*, 774 P.2d 185, 186 n.4 (Alaska 1989) ("Tait does not argue that state action exists.").

[22] *Tait*, 774 P.2d at 186.

> Although we have found no cases directly on point, *probably because it is considered unassailable*, we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment. *This is especially true when the agency members are elected officials. There can be no more definite expression of opinion than by voting on a controversial public issue.*[23]

Similarly, the court should find it uncontroversial and unassailable that Plaintiffs' enjoy free speech protections in the fulfillment of their duties representing their constituents.

III. The court should issue a permanent injunction.

Plaintiffs simultaneously moved for declaratory judgment and injunctive relief. They sought expedited consideration, which this court granted, so that the court could decide the merits and issue a final decision quickly—before the challenged election takes place on June 13. Both Defendant and Intervenor, however, treat Plaintiffs as if they had sought a preliminary injunction.[24] Plaintiffs seek a permanent—not preliminary—injunction; Defendant and Intervenor's arguments that Plaintiffs have not met the standards for a preliminary injunction are inapplicable.

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[23] *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 532 (1st Cir. 1989) (emphasis added).

[24] *See* Def's Opp. at 31–33; Intervenor's Opp. at 6–8.

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CONCLUSION

Defendant erred in certifying the recall petition: under AS 29.26.240 *et seq.*, it was legally insufficient, and certifying it violated Plaintiffs' free speech rights. The court should enjoin the June 13 recall election.

The oppositions fail to establish reasons to deny Plaintiffs' motion. First, they overstate the extent Alaska forgives shortcomings in recall petitions. Even liberally construing the petition, it is legally insufficient. Second, as recall can only be for cause, the decision whether to hold an election cannot turn on protected speech.

The court should grant Plaintiffs' motion.

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Respectfully submitted,

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Certificate of Service

I certify that this reply was hand delivered and emailed to Stacy C. Stone and Eric Sanders on May 22, 2017.

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