

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DONNA ADERHOLD, DAVID)
LEWIS, and CATRIONA REYNOLDS,)
)
Plaintiffs,)
vs.)
)
CITY OF HOMER,)
)
Defendant.)
)
And)
)
HEARTBEAT OF HOMER,)
)
Intervenor.)
_____)

Case No. 3AN-17-06227 CI

**ORDER DENYING MOTION FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF**

Before this Court is the issue of whether the City of Homer Clerk properly certified petitions for the recall of three Homer City Council members.

ESSENTIAL FACTS

Plaintiffs are sitting members of the Homer City Council subject to recall petitions due to their role in the preparation of two resolutions, 16-121 and 17-019. In November 2016, Mr. Lewis introduced Resolution 16-121, which Ms. Aderhold and Ms. Reynolds voted in support of and the City Council eventually adopted. This resolution expressed support of the Standing Rock Sioux Tribe and opposition to the construction of the

Dakota Access Pipeline. In February of 2017, Plaintiffs co-sponsored Resolution 17-019. A draft of this resolution was spread on social media and local news sites. The draft expressed support for undocumented immigrants and other communities in the wake of the inauguration of President Donald Trump. This draft also noted Donald Trump's lack of a "popular mandate" and resolved to "resist any and all efforts to profile undocumented immigrants or any other vulnerable population."¹ The revised draft submitted to the City Council removed explicit references to President Donald Trump and removed the explicit reference to "undocumented immigrants" in the clause noted above. This resolution was not adopted.

Shortly after Resolution 17-019 was presented to the City Council, an application for petitions for the recall of all three plaintiffs was filed. This application made three allegations: first, that their sponsoring of these resolutions violated Homer City Code by engaging in political activity; second, that petitioners are unfit because they violated the oath of office; and third, that they committed misconduct by spreading a draft of Resolution 17-019 and caused irreparable economic harm to the city of Homer. The City of Homer Clerk made technical corrections to the petitions, found that two of the three allegations were legally sufficient (striking the first allegation), and certified the petitions, preparing a separate petition for each of the three Plaintiffs. A special election on these petitions is scheduled for June 13 of 2017. This suit was filed by Plaintiffs against the

¹ Exh. B to Pl.'s Compl.

City of Homer, seeking injunctive relief. Heartbeat of Homer, a group organized to support the recall petitions, intervened as a party.

THE PARTIES' POSITIONS

Plaintiffs contend that the recall petitions were insufficient and should not have been certified. They claim that both assertions relate to their use of speech, do not constitute misconduct under the law, and are protected under the First Amendment to the U.S. Constitution, as well as Article I, section 5 of the Alaska Constitution. Both Defendant and Intervenor argue that the petitions were in fact properly certified. They argue that the recall process is not "state action" that might be barred under the U.S. or Alaska constitutions, because it was initiated through the petition process and not by the City of Homer. Additionally, they claim the recall petitions are legally sufficient even if analyzed as state action.

ANALYSIS

The right to seek recall of public officials is based in Article XI, Section 8 of the Alaska Constitution and AS 29.26.250.² Recall must be "for cause." AS 29.26.250 provides the grounds for recall include misconduct in office, incompetence, or failure to perform prescribed duties. The grounds for recall have to be "stated with particularity" insuring that "the office holder has a fair opportunity to defend his conduct in a rebuttal limited to 200 words."³ The role of the city clerk is to determine whether grounds have

² The City of Homer fully incorporates and adopts the state recall statutes in Homer City Code 4.26.20.

³ *Meiners v. Bering Strait School District*, 687 P2d 287, 302 (Alaska 1984).

been stated with particularity so that the officials subject to recall can defend themselves before the voters.⁴ The voters determine whether or not the grounds for recall have been satisfied or not.

In reviewing the certification of a recall election, the Alaska Supreme Court has held that the statutes relating to recall should be liberally construed so that the people are permitted to vote and express their will. Courts are warned not to create “artificial technical hurdles created by the judiciary.”⁵ The court, in reviewing a recall certification, must accept all allegations as true.

Plaintiffs attack the clerk’s certification of the petitions for recall on a number of grounds. First, they allege the grounds for recall are legally insufficient. They claim the petitions allege disagreements on questions of policy which is not a sufficient basis for recall as it is not for cause. They further argue that misconduct should be equated with a violation of the law.

While it is true that “misconduct in office” is not defined in the statute, to require misconduct in office to be criminal would be to undermine the intent and effectiveness of the recall statutes. The statute provides the electorate with the ability to recall elected officials for cause, requiring “misconduct in office” to be criminal conduct overly limits the statute and would deny the voters’ right to effectively seek recall of their elected officials. It would also not be a “liberal construction” of the statute.

⁴ AS 29.26.290.

⁵ *Meiners* at 302.

The certification of the recall petitions in this case stated with particularity claims of misconduct. The plaintiffs were given an opportunity to respond with particularity and did so by preparing 200 word rebuttals as allowed by the statute. The petitions state the plaintiffs violated their oath of office by failing to perform their duties impartially and the members were unfit for office because they violated their oath. Plaintiffs note that there was no definition of “impartial.” However, the clerk identified the issue and adopted a reasonable definition. It is not the role of the court to second guess the clerk’s reasonable interpretation. The Supreme Court has instructed courts to not review recall petitions in such a strict manner that petitioners would have no practical chance of qualifying for the ballot without the detailed advice of a lawyer. To do so would negate the recall process for citizens of small communities and school districts in rural Alaska.⁶

The petitions also claimed misconduct in office by the plaintiffs’ actions in circulating a draft resolution, Resolution 17-019, and circulating the proposed resolution as if it was drafted by and was representing the City of Homer, in breach of HCC 1.18.03(h). Plaintiffs argue that circulation of draft legislation is appropriate and required by their positions. However, it is not the circulation of the drafts that is the issue, but rather the representations that the proposed legislation was endorsed by the City of Homer.

Plaintiffs also argue the petitions reference “unfitness” and unfitness is not a grounds to recall a municipal official. However, this interpretation ignores the language

⁶ *Id.* at 295.

of the recall as a whole as well as the intent of the petitions. “Unfit” versus “committed misconduct in office” is not decisive here. Misconduct is referenced in the recall petitions. To reject the petitions for this small distinction would be to ignore the Supreme Court’s direction to liberally construe the statute and not to create “artificial pleading barriers.” Here, there was an alleged breach of a legal obligation imposed on an elected official. The petitions sufficiently alleged the breach.

Plaintiffs claim the certification of these recall petitions is an impermissible restriction on their Constitutional guarantees of freedom of expression. Defendant and Intervenor argue that certification of the petitions does not constitute state action for First Amendment purposes. Alternatively, they argue that these protections do not protect Plaintiffs from the regular functioning of the political process.

Ultimately, since the City of Homer is certifying the petitions and holding the election, it may be state action, but that does not automatically mean it is the state suppressing speech. Here the City of Homer Clerk is administratively doing what she was legally required to do by the recall statutes. Even if the clerk’s limited administrative actions were state action, it still doesn’t protect elected officials from the process. The City of Homer is correct in that if a response to a politician’s public speech comes through procedurally proper political action, it does not implicate the First Amendment.

To the extent that the City of Homer engaged in state action by certifying these petitions for legal sufficiency and organizing a special election, the actions were ministerial in nature. The City of Homer Clerk is legally required to certify legally

sufficient petitions.⁷ The Alaska Constitution provides that all publicly elected officials are subject to recall. This right cannot be hampered in cases when a legally sufficient petition for recall is brought, whether explicitly or implicitly, as reprisal against politically unpopular speech by publicly elected officials. The First Amendment does not “succor casualties of the regular functioning of the political process,” and so Plaintiffs may not use freedom of expression claims as a shield against procedurally proper political action.⁸

These are not recall petitions drafted by the City of Homer; they were prepared and filed by private citizens exercising their rights under AS 29.26.250. First Amendment protections against abridgement of speech by the federal or state government do not apply to actions by private citizens.⁹ The City of Homer did nothing to suppress speech.

To conclude that anytime a recall petition is based in part or in whole on what a politician said is protected by the First Amendment would be to eviscerate the recall statute to such an extent that the populace would almost never be able to seek recall of any of their elected officials. It is not what the Alaska Constitution and statutes contemplated and it is an unreasonable interpretation of the law. The recall statutes contemplate a political process initiated by the voters. Elected officials cannot exempt themselves from the process by claiming First Amendment protections.

⁷ AS 29.26.290.

⁸ *Blair v. Bethel School District*, 608 F.3d 540, 545 (9th Cir. 2010).

⁹ *Johnson v. Tait*, 774 P.2d 185, 190 (Alaska 1989).

RULING

The recall petitions at issue are legally sufficient. Accordingly, the Homer City Clerk properly scheduled a special election on June 13, 2017, submitting the question of recall to the voters. Plaintiffs' Motion for Declaratory Judgment and Injunction Relief is denied.

Dated at Anchorage, Alaska this 23 day of May 2017.



Erin B. Marston
Superior Court Judge

I certify that on 5/23/17
a copy of this notice was sent to:

Eric Glatt, Tara Rich/ Eric Sanders/
Stacy Stone



K. DiCarlo, Judicial Assistant