

Brewster H. Jamieson, ABA No. 8411122
Michael B. Baylous, ABA No. 0905022
LANE POWELL LLC
1600 A Street, Suite 304
Anchorage, Alaska 99501
Telephone: 907-264-3325
907-264-3303
jamiesonb@lanepowell.com
baylousm@lanepowell.com

Attorneys for Intervenor Stand Tall With Mike

Craig Richards, ABA No. 0205017
LAW OFFICES OF CRAIG RICHARDS
810 N Street, Suite 100
Anchorage, Alaska 99501
Telephone: 907-306-9878
crichards@alaskaprofessionalservices.com

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 FENUMIAL,
DIRECTOR, STATE OF ALASKA
DIVISION OF ELECTIONS,

Defendants,

STAND TALL WITH MIKE, an
independent expenditure group,

Intervenor.

Case No. 3AN-19-10903 CI

**STWM'S MOTION FOR STAY
PENDING EXPEDITED APPEAL**
(CORRECTED)

COMES NOW, Intervenor Stand Tall With Mike ("STWM"), by and through counsel, and moves this Court to stay its order pending the outcome of STWM's appeal to the Alaska Supreme Court.

I. INTRODUCTION

Alaska's system of recall for cause hangs in the balance in the case. If this Court's order is affirmed, Alaska's recall system is effectively transformed from a "for cause" recall process to a purely political recall process. But affirmance is uncertain or unlikely, and the stakes warrant a stay of this Court's order. A stay would permit the Alaska Supreme

Court to construe—for the first time—the statutes providing for recall of state officers and determine the nature of the recall process in Alaska. That court should have the chance to determine whether Recall Dunleavy’s (“RDC”) recall petition is sufficient under existing law or improperly subjects Governor Dunleavy to recall “for legally exercising the discretion granted to [him] by law.”¹

II. ARGUMENT

A. Standard

“[T]he superior court has discretion to grant a stay concerning a non-monetary judgment.”² The court’s discretion is “guided by ‘the public interest,’”³ and the standard for granting a stay resembles the standard for granting a preliminary injunction.⁴ Where only the party seeking the stay faces irreparable harm, “it will ordinarily be enough that the [party] raised questions goin[g] to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.”⁵ But if the party seeking a stay “does not stand to suffer irreparable harm, or where the party against whom the [stay] is sought will suffer injury if the [stay] is issued,” the party seeking the stay must show “probable success on the merits”⁶ “If the latter part of this standard comes into play, the court is to use a ‘balance of hardships’ approach. . . . weigh[ing] ‘the harm that will be suffered by [one party] if a[] [stay] is not granted, against the harm that will be imposed upon the [other party] if the [stay] is granted.’”⁷

¹ *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995).

² *Keane v. Local Boundary Comm’n*, 893 P.2d 1239, 1249 (Alaska 1995).

³ *Id.*

⁴ *See Id.* (holding that the test presented in *A.J. Industries, Inc. v. Alaska Public Service Commission*, 470 P.2d 537 (Alaska 197), applies).

⁵ *A.J. Indus.*, 470 P.2d at 540 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 260 F.2d 738, 7640 (2d Cir. 1953)).

⁶ *Id.* (footnotes omitted).

⁷ *Keane*, 893 P.2d 1250 n.22.

STWM is the only party likely to suffer irreparable harm and must show only that it raises “a fair ground for litigation.”⁸ But STWM is also likely to succeed on the merits, and even if RDC faces irreparable harm, its harm from delay is less than STWM’s harm from a hasty implementation of the Court’s order.

B. STWM Is the Only Party Likely to Suffer Irreparable Harm.

STWM members will suffer three species of irreparable harm if the Court’s order is not stayed pending appeal.

First, STWM’s members will be called upon to defend the Governor against all twelve charges the Court held legally sufficient.⁹ Because the Governor may not place his rebuttal statement before voters at the petition stage,¹⁰ STWM’s members must spend their time and money communicating with voters about the recall petition’s deficiencies. Their efforts (money and individual volunteer efforts) will be irreparably diluted and rendered futile if they must expend resources contesting charges that the supreme court ultimately holds to be invalid. There is no remedy by which STWM can recover those resources—particularly the time and volunteer efforts.

Second, STWM’s members face irreparable harm if the Governor is distracted from implementing the agenda that drew votes from 145,000 Alaskans (including STWM’s members) during the last general election. STWM’s members campaigned for the Governor’s election because they believed in his platform. If the Governor faces a recall campaign, he will be less able to focus on fulfilling his campaign promises while defending against this recall effort. STWM’s members will not be able to recover the lost chance to put the state on a firmer fiscal footing. This is all the more true if the recall election is called and the Governor removed from office before the supreme court can rule. Alaska law

⁸ *Id.*

⁹ While four of RDC’s “bullet points” remain, the “and/or” clause was maintained, meaning the Governor is forced to defend himself against 12 individual charges in 200 words or less, plus mount an expensive statewide campaign barely a year after taking office.

¹⁰ *See* AS 15.45.680.

favors “electoral repose,”¹¹ and a completed recall election could moot STWM’s important constitutional and statutory arguments.

Third, STWM’s members—along with all Alaskans—face irreparable harm if Alaska’s system of recall for cause is supplanted by recall procedures that permit vague charges aimed at officeholders’ exercise of lawful discretion. RDC’s recall application differs from the applications other courts have considered in alleging grounds that impinge on a governor’s discretion. If an election is held, future governors and other state officials may hesitate to use the power of their offices to rein in spending or take other necessary actions, and voters will regard general elections as contingent decisions subject to the continuous threat of recall whenever the political winds change.

In seeking to avoid this irreparable harm, STWM’s members also vindicate the interests of Alaskan voters in an orderly recall process. As explained below, the supreme court is likely to hold insufficient at least one of the twelve charges this Court approved. If that decision comes during or after the signature gathering effort, voters will be asked to either re-sign the finally-approved version of the recall petition, or RDC will seek to have the already-collected signatures based on a flawed petition counted toward the required number. This will set the table for more legal disputes, create confusion among the signers and the voting public, and erode the credibility and integrity of the recall process. Such a result does not accord with Alaska’s orderly process of recall for cause. It is better for all to measure twice and cut once.

By contrast, RDC faces no irreparable harm from a stay. It need only gather signatures and file its petition before the last 180 days of the Governor’s term.¹² A delay to ensure the recall charges satisfy the law will not make it harder for RDC to gather signatures. Surely, signature-gathering is easier in April or May than in February. If the charges are certified at the direction of the supreme court—and if RDC can gather signatures for the certified charges—the Division of Elections must hold a special election

¹¹ See *von Stauffenberg*, 903 P.2d at 1058 (referring to municipal elections).

¹² See AS 15.45.610; AS 15.45.630(2).

“not less than 60 days, nor more than 90 days,” after determining that the petition was properly filed.¹³ If a general or primary election falls within the statutory time period for holding a special election, the “special election shall be held on the date of the primary or general election.”¹⁴ Presumably, RDC wishes the greatest number of voters to participate in a recall election and seeks to submit its recall to voters at a regularly scheduled election. STWM is prepared to press its appeal on an expedited schedule that will permit RDC to submit any recall effort (assuming it is able to gather signatures for it) during one of the two already-scheduled statewide elections in 2020 (the August primary, or the November general elections).

C. STWM Is Likely to Prevail on the Merits.

STWM need only show that it raises a serious issue on appeal.¹⁵ It does so because it is likely to prevail on the merits of its appeal. As STWM argued to this Court, *Meiners v. Bering Strait School District*¹⁶ does not control this case.¹⁷ *Meiners* addressed a different practical and statutory context. And it was eroded by the Alaska Supreme Court’s decision in *von Stauffenberg v. Committee for an Honest and Ethical School Board*.¹⁸ Accordingly, *Meiners* provides no basis for certifying a political recall application that alleges only vague and conclusory grounds, nearly all of which represent policy differences with the Governor. RDC’s application must meet the statutory criteria in AS 15.45.510, and following *von Stauffenberg*, the recall application must avoid targeting the lawful exercise of the Governor’s discretion.¹⁹ As STWM has explained at length in its briefs, RDC’s application falls short.

¹³ AS 15.45.650.

¹⁴ AS 15.45.650.

¹⁵ *Id.*

¹⁶ 687 P.2d 287 (Alaska 1984).

¹⁷ See STWM Mot. Summ. J. at 15; STWM Reply at 7–8.

¹⁸ 903 P.d 1055 (Alaska 1995); see STWM Mot. Summ. J. at 11–12; STWM Reply at 7–8.

¹⁹ *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995).

The Court found STWM’s arguments unpersuasive. The supreme court has not expressly overruled *Meiners*, and this Court considered itself bound by that ruling. But STWM will likely succeed on appeal. The supreme court has addressed *Meiners* in a recall case only once in the thirty-five years since it was decided, and in doing so, failed to restate *Meiners*’s permissive standard. This case presents an opportunity for the supreme court to clarify that *von Stauffenberg*’s protections for officeholders’ lawful discretion control over *Meiner*’s solicitude for under-resourced voters attempting to recall a town official. In light of the differences between Title 15 and Title 29, the practical differences between this recall effort and the recall effort in *Meiners*, the supreme court’s tepid treatment of *Meiners* in *von Stauffenberg*, and the vagueness of RDC’s stated grounds, the supreme court will hold insufficient one or all of RDC’s grounds for recall.

III. CONCLUSION

STWM will suffer irreparable harm if RDC’s recall application is certified while this case is pending on appeal. Because STWM raises a serious issue on appeal—and is likely to prevail—the Court should stay its order pending resolution of this weighty case in the Alaska Supreme Court.

DATED this 15th day of January, 2020.

I certify that on January 15, 2020, a copy of the foregoing was served by email, per court order, on:

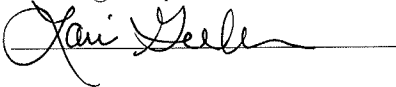
S. Orlansky, Reeves Amodio LLC
susano@reevesamodio.com

J. Lindemuth, S. Kendall, S. Gottstein
Holmes Weddle & Barcott, PC
jlindemuth@hwb-law.com; smkendall@hwb-law.com;
sgottstein@hwb-law.com

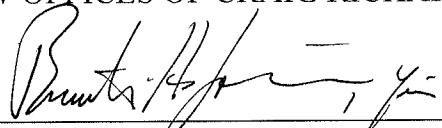
J. Feldman, Summit Law Group
jefff@summitlaw.com

M. Paton-Walsh, Office of the Attorney General
Margaret.Paton-Walsh@alaska.gov

C. Richards, Law Offices of Craig Richards
crichards@alaskaprofessionalservices.com

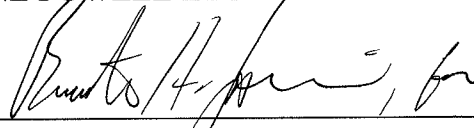


LAW OFFICES OF CRAIG RICHARDS

By 
Craig Richards, ABA No. 0205017

and

LANE POWELL LLC

By 
Brewster H. Jamieson, ABA No. 8411122
Michael B. Baylous, ABA No. 0905022

Attorneys for Intervenor Stand Tall With Mike