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Subject: 3AN-19-08349CI Plaintiffs' Notice Regarding Supreme Court Order on Amici Curiae Brief  
Date: 4/16/2020 12:12:11 PM

AMERICAN TRIAL COURTS  
STATE OF ALASKA, THIRD DISTRICT

APR 16 2020

Clerk of the Trial Courts

Deputy

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

**American Civil Liberties Union of  
Alaska, Bonnie L. Jack, and  
John D. Kauffman,**

Plaintiffs,

v.

**Michael J. Dunleavy, in his official  
capacity as Governor of Alaska;  
and the State of Alaska,**

Defendants.

No. 3AN-19-08349CI

**Plaintiffs' Notice Regarding  
Supreme Court Order on  
Amici Curiae Brief**

Plaintiffs give notice to the Court that the Alaska Supreme Court denied their motion for leave to file an amici curiae brief in *State of Alaska, Division of Elections and Director Gail Fenumiai v. Recall Dunleavy*, S-17706. The Supreme Court's order is relevant to the

timing of this Court's decision on the parties' pending summary judgment motions. Because the Supreme Court has denied Plaintiffs' motion, it is unlikely to rule in a way that impacts this Court's decision, and Plaintiffs urge this Court to issue an order on summary judgment as soon as practicable.

On April 10, Defendants noticed the Court that the Alaska Supreme Court was prepared to decide questions that "go to the very

D/S

heart of issues” that are before this Court. Defendants asked the Court to postpone a decision until after the Supreme Court ruled in *Recall Dunleavy*, because the “Supreme Court’s decision would be controlling” in this case. Plaintiffs pointed out, however, that the State had contemporaneously taken the opposite position before the Supreme Court, arguing that the “distinct legal issues” in this case “are not before” the Supreme Court in the *Recall Dunleavy* appeal at all. State’s Opposition to Motion for Leave to File Amicus Brief, *Recall Dunleavy*, at 2 (filed April 14, 2020), attached as Exhibit 1.

In direct contradiction to its representations to this Court, the State strongly urged the Supreme Court to deny Plaintiffs’ participation as amici in *Recall Dunleavy*, arguing that the question of whether the governor’s veto violates the separation of powers is “outside the scope of this appeal and currently the subject of a different lawsuit.” *Id.* at 1. ~~The State made clear in its opposition that it believed~~ that “the relief requested by the [Recall Dunleavy] committee is the certification of its recall application, not the declaration requested by the ACLU that the governor’s veto objections constitute a violation of the separation of powers.” *Id.* at 2. The State argued to the Supreme Court that Plaintiffs “have filed a separate lawsuit” and could appeal to the Supreme Court “once the superior court has issued a ruling.” *Id.*

On April 15, the Supreme Court denied Plaintiffs' request to participate in *Recall Dunleavy* as amici curiae. Order, Motion for Leave to File an Amicus Curiae Brief, *Recall Dunleavy*, (filed April 15, 2020), attached as Exhibit 2. The Supreme Court's order indicates that it agrees with the State's position that whether Governor Dunleavy's appellate courts' line-item veto violated the separation of powers will not be decided in the *Recall Dunleavy* appeal. The Supreme Court did not explicitly set forth the reasons for the order, but explained that it was based on its consideration of the State's opposition, while noting that appellee Recall Dunleavy did not oppose the motion. *Id.*

Accordingly, this Court should reject Defendants' request to postpone its decision. Defendants' request is completely contrary to the position it has taken in *Recall Dunleavy*, a position with which the Alaska Supreme Court agrees. Plaintiffs' concerns about the timeliness of this Court's decision remain, and respectfully request that the Court issue a summary judgment order as soon as practicable.

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Dated April 16, 2020

/s/ Stephen Koteff

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*Counsel for Plaintiffs ACLU of Alaska,  
Bonnie L. Jack, and John D.  
Kauffman*

## CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, the foregoing was served on the following via electronic mail:

Jessica Leeah ([jessica.leeah@alaska.gov](mailto:jessica.leeah@alaska.gov))  
Lael Harrison ([lael.harrison@alaska.gov](mailto:lael.harrison@alaska.gov))

/s/ Stephen Koteff

Stephen Koteff

**IN THE SUPREME COURT OF THE STATE OF ALASKA**

State of Alaska, Division of Elections, )  
and Director Gail Fenumiai, )

Appellants, )

v. )

Recall Dunleavy and Stand Tall With )  
Mike, )

Appellees. )

Supreme Court No. **S-17706**

Trial Court Case No. 3AN-19-10903 CI

**STATE’S OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS BRIEF**

Appellants State of Alaska Division of Elections and Director Gail Fenumiai (“the Division”) oppose the request of the American Civil Liberties Union of Alaska, Bonnie L Jack, and John D. Kauffman (“ACLU”) to file an amicus brief at the supplemental briefing stage of this appeal. The motion was filed without notice to the Division, one week before reply briefs must be filed, and the brief addresses a legal question that is outside the scope of this appeal and currently the subject of a different lawsuit. Because this appeal is not an appropriate forum for the ACLU to litigate its case, the Division asks the Court to deny the motion.

This Court’s April 2, 2020 order asked the parties to address a series of general questions regarding the governor’s line item veto power, whether a governor’s objections explaining a veto could be a basis for a recall, and whether a line item veto could violate the separation of powers doctrine. As the Division explained in its opening supplemental brief, the Court need not—indeed, should not—address the substance of

the governor's veto message—i.e. his objections—because the recall committee's statement of grounds makes no reference to the veto message, but instead refers only to the line-item veto itself.

Despite this, the ACLU seeks leave to file a brief arguing distinct legal issues raised in a separate lawsuit currently before the Superior Court—issues that are not before this Court in this appeal. In doing so, the ACLU ignores a key limitation for amicus briefing, ironically one established in a case in which the ACLU was a party: “an amicus party may not seek relief beyond the scope of relief sought by the parties of record.”<sup>1</sup> And in this case, the relief requested by the committee is the certification of its recall application, not the declaration requested by the ACLU that the governor's veto objections constitute a violation of the separation of powers.

An appeal of the Division's certification decision, which by law was based only on the language of the recall committee's statement of grounds, is not the proper forum for amici's arguments. They have filed a separate lawsuit; and they will have an opportunity to appeal to this Court if they wish, once the superior court has issued a ruling. The ALCU's attempt to leapfrog the superior court is a transparent subversion of the legal process and should not be permitted by this Court.

However, should this Court decide to accept this brief, the Division respectfully requests an additional week to file its reply brief so as to address amici's arguments in full.

<sup>1</sup> *State v. Alaska Civil Liberties Union*, 159 P.3d 513, 514 (Alaska 2006).

DATED April 14, 2020.

KEVIN G. CLARKSON  
ATTORNEY GENERAL

By: /s/ Margaret Paton Walsh  
Margaret Paton-Walsh  
Assistant Attorney General  
Alaska Bar No. 0411074

# In the Supreme Court of the State of Alaska

State of Alaska, Division of Elections  
and Director Gail Fenumiai,  
Appellants,

v.

Recall Dunleavy,  
Appellee.

Trial Court Case No. 3AN-19-10903CI

Supreme Court No. S-17706

## Order

Motion for Leave to File an Amicus  
Curiae Brief

Date of Order: 4/15/2020

On consideration of the Motion for Leave to File an Amici Curiae Brief filed by the American Civil Liberties Union of Alaska on 4/13/2020, the Opposition filed by the State of Alaska, Division of Elections and Director Gail Fenumiai on 4/14/2020, and Recall Dunleavy not opposing,

**IT IS ORDERED:**

The Motion is **DENIED**.

Entered at the direction of an individual justice.

Clerk of the Appellate Courts

/s/ R. Montgomery-Sythe

Ryan Montgomery-Sythe, Chief Deputy Clerk

Distribution:

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**Attachments:** image001.gif, image002.jpg, image003.png, Plaintiffs' Notice Regarding Supreme Court Order on

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Attached for filing and service in 3AN-19-08349C is 1 document totaling 8 pages:

Plaintiffs' Notice Regarding Supreme Court Order on Amici Brief.

Stephen Koteff  
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