Memorandum

To: Interested Parties

Date: July 26, 2019

Re: Governor Dunleavey Recall Application – Pending

I. INTRODUCTION & BACKGROUND

We have been asked to briefly evaluate four groups of allegations stated in a draft application to recall Governor Michael J. Dunleavy. Those allegations are, in substance, as follows. Each asserts that the Governor should be recalled based on three statutory grounds for recall: neglect of duties, incompetence, and lack of fitness. In coming to these conclusions we have consulted, in part, with numerous election law experts as well as former Attorney Generals and former members of the judiciary:

1. Governor Dunleavy **violated Alaska law (AS 22.10.100)** by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.

2. Governor Dunleavy separately **violated the Executive Branch Ethics Act (AS 39.52)**; **violated Alaska Campaign Disclosure Statutes (AS 15.13);** and **misused state funds in violation of AS 15.13.145(b)** by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about his political opponents and supporters.

3. Governor Dunleavy **violated separation-of-powers** by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.

4. Governor Dunleavy **acted incompetently** when he **mistakenly vetoed** $18 million more than he told the legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over $40 million in federal Medicaid funds.

II. ANALYSIS

A. Legal Review of Lack of Fitness, Incompetence, and Neglect of Duties.

In the past decade, there have been just two attempted recalls of elected state officials, both representatives: Kyle Johansen (2011) and Lindsey Holmes (2013).[1] The Attorney General's Office recommended that the Director of the Division of Elections deny certification of both applications, and the Lindsey Holmes denial was litigated in superior court. The State's denial was upheld as proper and was not appealed.

The Lindsey Holmes Attorney General Opinion provides the State's most recent (and lengthy) analysis of the somewhat complicated and infrequently litigated recall law. I will not repeat all of that here, but rather focus on the portions that matter most for purposes of the current application. I note that because each of the allegations in this application cites three separate and independent legal grounds for recall, this effectively gives the reviewing attorney—and ultimately a court—up to 18 separate and independent legal grounds to evaluate as the basis for a recall, any one of which—if sustained—would serve to certify the application.

In evaluating legal sufficiency, courts first look to the grounds of recall upon which an application relies. As with the attempted Lindsey Holmes recall, the focus here is not factual, to the extent there are any disputed facts. The analysis is strictly legal, because the Division Director—who is tasked with certifying or denying the recall application—***must*** assume all factual allegations in a recall summary are true.[2] Review of legal sufficiency in a recall application focuses on whether the alleged facts state a claim under a ground for recall.[3] It is for the voters to decide whether those facts are a true basis for the claim.

1. Lack of Fitness

Courts have defined "lack of fitness" as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office"[4] or engaging in unlawful conduct. In enunciating this latter standard, superior court judge Craig Stowers, now a justice on the Alaska Supreme Court, stated in *Citizens for an Ethical Government v State of Alaska*[5]:

> if there is a statement in the form of "X is illegal" . . . those are statements of law, and that's appropriate for the court . . . to **evaluate those and to determine whether or not those are true and accurate statements of law.** If they are not, I think, under the *von*

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1 2011 Op. Alaska Att'y Gen. (Oct. 3); 2013 Op. Alaska Att'y Gen. (Dec. 3).

2 *Meiners v. Bering Strait School District*, 687 P.2d 287, 300 n. 18. (Alaska 1984).

3 2005 Inf. Op. Att'y Gen. at 11 (Sept. 7; 663-06-0036).

4 *Valley Residents for a Citizen Legislature v. State of Alaska*, No. 3AN-04-6827 CI at 10 (Alaska Super. Aug. 24, 2004) (order granting summary judgment).

5 No. 3AN-05-12133 CI (Alaska Super. Jan. 4, 2006) (order granting summary judgment).

Stauffenberg case and under the *Meiners* case, it's my duty to conclude that those do not in and of themselves assert valid legal grounds and at the least those should be stricken.[6]

Because it was not illegal for legislators to serve as paid consultants to politically-involved corporations (the basis for the lack of fitness allegation in the above-cited case), the application did not state a legally sufficient allegation for lack of fitness.[7] Accordingly, as to lack of fitness, a reviewing attorney would make a recommendation of legal validity or lack thereof to the Division Director, whose decision would be appealable to a court which would in turn determine whether the statements were "true and accurate statements of law."

2. Incompetence

Only once has an Alaska court reviewed the legal sufficiency of an allegation of "incompetence" in the context of an attempt to recall a state official. In *Coghill v. Rollins*,[8] Superior Court Judge Savell concluded that the appropriate definition of "incompetence" in this context (the attempted recall of the Lieutenant Governor) was a "lack of ability to perform the official's required duties."[9] It is worth noting that in enacting the original recall statutes, the legislature intentionally excluded grounds such as "favoritism," "carelessness," "extravagance," "inability," "selfishness," and "no benefit to public," from the four statutory grounds for recall ultimately chosen— implying that only true and manifest malfeasance should subject a legislator to recall.[10]

3. Neglect of Duties

"Neglect of duty" has been interpreted to mean "the nonperformance of a duty of office established by applicable law."[11] The *Valley Residents* case is one of the only times, if not the only time, a court has interpreted this provision.

B. The Foregoing Legal Standards Applied to the Application to Recall Governor Dunleavy

Applying these legal standards to the present application, the strongest grounds for recall are probably the failure to appoint a superior court judge within the statutorily-mandated timeframe, the violation of APOC statutes, and the "mistaken" vetoing of Medicaid funds. But the other allegations—violations of the Executive Branch Ethics Act and improper use of the

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6 (Emphasis added).

7 *Id*.

8 No. 4FA-92-1728 CI (Alaska Super., Nov. 1, 1993) (order granting summary judgment in part).

9 *Id*.

10 *See* Legislative Council, *Suggested "Alaska Election Code"* at 66-67 (Jan. 20, 1960); 2005 Inf. Op. Att'y Gen. at 4-5 (Sept. 7; 663-06-0036).

11 *Valley Residents for a Citizen Legislature v. State of Alaska*, No. 3AN-04-6827 CI at 9 (Alaska Super. Aug. 24, 2004) (order granting summary judgment).

line-item veto—also state very strong claims for the legal violations a court would need to find in order to uphold certification of a recall.

1. Failure to Appoint a Superior Court Judge Within the Mandated Statutory Timeframe.

Article IV, section 5 of the Alaska Constitution provides that the "governor *shall* fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council."[12]

Alaska Statute 22.10.100(a) provides that the "governor *shall* fill a vacancy or appoint a successor to fill an impending vacancy in the office of superior court judge *within 45 days* after receiving nominations from the judicial council, by appointing one of two or more persons nominated by the council for each actual or impending vacancy."[13]

According to publicly available records, on February 4, 2019, the judicial council forwarded nominations to the Palmer Superior Court to the governor for consideration in filling two pending vacancies there. On March 21, 2019, the Governor failed to fill one of these vacancies, instead writing a letter through his Chief of Staff complaining about the process and quality of the nominees.

The law is clear that the governor must fill judicial vacancies within 45 days of receiving nominations, and the facts are clear that he did not do that. This is a "nonperformance of a duty of office established by applicable law" sufficient to establish neglect duty under current case law. His failure to appoint a judge was also clearly unlawful, thereby establishing lack of fitness.

2. Violations of the Executive Branch Ethics Act & Alaska Public Offices Commission (APOC) Statutes Based on Paid Electronic Advertisements and mass mailings.

The Executive Branch Ethics Act at AS 39.52.120(b)(6) provides that a public officer may not "use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes; . . . in this paragraph, "for partisan political purposes" (A) means having the intent to differentially benefit or harm a (i) candidate or potential candidate for elective office; or (ii) political party or group; (B) but does not include having the intent to benefit the public interest at large through the normal performance of official duties."

Thus, the deciding legal factor on this claim is whether the ads in question were for "partisan political purposes" or, instead or additionally, whether they had "the intent to benefit the public interest at large through the normal performance of official duties." A reviewing attorney or court would need to look at the specific electronic advertisements as well as the

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12 (Emphasis added).

13 (Emphasis added).

mailers, and would reasonably conclude that they were published for "partisan political purposes" as opposed to intending to "benefit the public interest at large through the normal performance of official duties." It is important to note here that the use of ads such as these has no precedent in the actions of any prior governor or administration.

Based on the above analysis, this could constitute lack of fitness and neglect of duties if a court or reviewing attorney found that the ads actually violated the Ethics Act. There is no evidence of a lack of ability to perform duties here sufficient to sustain an allegation of incompetence.

Alaska's campaign finance statutes contain numerous disclosure requirements designed to ensure a level of transparency in political advertisements:

- Alaska Statute 15.13.090 requires that "all communications shall be clearly identified by the words 'paid for by' followed by the name and address of the person paying for the communication."

- Alaska Statute 15.13.135(b)(2) requires that "[a] person who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, or any other communication that supports or opposes a candidate for election to public office shall place" a specific notice to voters "that it is readily and easily discernible," indicating that the communication is "not authorized, paid for, or approved by the candidate."

- Alaska Statute 15.13.050 requires that "[b]efore making an expenditure in support of or opposition to a candidate . . . each person other than an individual shall register" with the Alaska Public Offices Commission (APOC) on forms provided by APOC.

- Finally, AS 15.13.145, with limited exceptions not applicable here, prohibits the state from using state money to "influence the outcome of the election of a candidate to state or municipal office."

Alaska campaign finance law is very straightforward about what is required of political advertisements. The Governor failed to comply with any or all of these requirements in the electronic advertisements and mass mailings. He therefore violated the law. If a reviewing attorney or court agrees with this conclusion, this would be sufficient legal grounds for lack of fitness and neglect of duties.

3. Unconstitutional Use of the Line-Item Veto

The Governor publicly stated, in writing, that he was vetoing court system funding because of the Alaska Supreme Court's prior decisions regarding public funding of abortions, in

the amount of those procedures' cost to the State: "The Legislative and Executive Branch are opposed to State funded elective abortions; the only branch of government that insists on State funded elected abortions is the Supreme Court. The annual cost of elective abortions is reflected by this reduction."

Shortly thereafter, the American Civil Liberties Union of Alaska (ACLU) filed a lawsuit challenging the constitutionality of these actions,[14] and the two counts in that complaint offer a good legal framework for a recall analysis.

The ACLU complaint alleges that the Governor violated the judicial doctrine of separation of powers because the "court system veto was made in direct retaliation for the Alaska Supreme Court's decision in *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska 2019)" and thus "violates the Alaska Constitution and the separation of powers because it retaliates against and seeks to punish the court system for exercising its judicial powers and seeks to undermine the independence of the judiciary."

That complaint also alleges that this action violates Article II, sec. 15 of the Alaska Constitution's limits on gubernatorial veto power, because "the authority to strike or reduce items does not include the authority to reallocate appropriations by the Legislature," and the "Governor is without authority to take any veto action not specifically granted to him in the Constitution." Accordingly, the court system veto "violates Article II, sec. 15 of the Alaska Constitution because it is an impermissible reallocation of an appropriation."

These are substantive claims that are extremely well-grounded in the constitution and case law, and a court is far more likely than not to agree that the Governor violated the Constitution in making this veto. Accordingly, and for the same reasons stated above, this action states a legal ground for recall under the "neglect of duties" and "lack of fitness" analysis.

4. Mistaken Veto of Medicaid Funds

The application alleges that Governor Dunleavy acted incompetently when he mistakenly vetoed $18 million more than he told the legislature in official communications that he intended to strike. Uncorrected, the error would cause the state to lose over $40 million in matching federal Medicaid funds. Upon information and belief, there exists official communications in which the Governor's Office admits that this was an "error." A "mistake" of this magnitude and impact would certainly imply a "lack of ability to perform the official's required duties" sufficient for a reviewing attorney or court to find incompetence.

[14] *ACLU v. Dunleavy*, 3AN-19-08349 CI (Alaska Super. Jul. 17, 2019) (Complaint for Declaratory and Injunctive Relief).

III. CONCLUSION

There is no guarantee what a reviewing attorney or a court would do or what conclusions they would reach. However, it is our collective opinion that the allegations in this application accurately state at least one—and likely multiple—legally sufficient grounds to certify a recall of the governor. On the basis of the proposed grounds, we strongly believe that a court will ultimately certify a valid basis to appear on the ballot.