THE STATE
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CIVIL DIVISION

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December 6, 2013

Gail Fenumiai
Director, Division of Elections
P.O. Box 110017
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Dear Ms. Fenumiai:

Re: Lindsey Holmes Recall Application
AGO File No.: JU2013200362

Dear Ms. Fenumiai:

You have asked for our opinion regarding the application for recall of House Representative Lindsey Holmes. Alaska Statute 15.45.540 requires the director of the Division of Elections to review the application and either certify it or notify the recall committee of the grounds of refusal.

The application's statement of grounds for recall does not satisfy the legal standard for recall required by AS 15.45.510, in that the alleged facts, taken as true, are insufficient to state a claim for lack of fitness—the sole statutory ground for recall stated in the summary. Therefore, the application is not substantially in the form required by AS 15.45.550(1). We recommend the application be denied because Representative Holmes's conduct in changing political parties is lawful and constitutionally protected.

I. Background.

On November 6, 2013, a recall committee filed a petition for the recall of Representative Lindsey Holmes, last elected from State House District 19 in 2012. The application provided the following summary of the grounds for recall, repeated here verbatim:

> Representative Holmes has demonstrated unsuitable conduct, is unfit for office, and should be recalled. She has: Sworn on her Declaration of Candidacy that she was a Democrat. Membership in a political partly [*sic*] implies a certain political belief system and is an important factor by which voters evaluate a candidate. Made

> representations to district residents and her supporters that she would serve in the legislature as a Democrat. Solicited campaign contributions, making representations that she would serve in the legislature as a member of a Democratic caucus. Deceived voters by misrepresenting her intended political party. She formally changed her party affiliation from Democrat to Republican immediately before being sworn in. In doing so, she adopted the political and legislative philosophy voters elected her to oppose. Said, "I think in a lot of ways it has been something I've been moving toward for the entire six years I've been in the legislature." As a representative, she joined the Republican caucus and voted for a Republican speaker and a Republican-led organization of the House. Misrepresented herself to voters and Division of Elections, thereby qualifying as deception, unfit conduct, and subject to recall vote.

We review this application under applicable Alaska law.

II. Applicable law.

The law of recall in Alaska consists of the Alaska Constitution, the statutes implementing recall, and court decisions from both the supreme and superior courts. In addition, several Attorney General Opinions offer guidance.

A. The Alaska Constitution.

Article XI, section 8 of the Alaska Constitution provides: "All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature."

B. The recall statutes.

The statutory provisions governing the recall of legislators are set out in Title 15 of the Alaska Statutes. A valid application for recall of a state official under AS 15.45 must comply with the following provisions:

a. It must seek the recall of the governor, lieutenant governor, or a member of the state legislature.[1]

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[1] AS 15.45.470.

b. It must be accompanied by a $100 deposit.[2]

c. It must be filed after the first 120 days of the term and at least 180 days before the termination of the term of office of any official subject to recall.[3]

d. It must meet numerous technical requirements.

e. It must articulate at least one of the four grounds for recall: lack of fitness; incompetence; neglect of duties; or corruption.[4]

As Director of the Division, you must review the application and either certify it or notify the recall committee of the grounds of refusal to certify.[5] There are four grounds to deny certification: (1) the application is not substantially in the required form; (2) the application was filed during the first 120 days of the term of office of the official subject to recall or within less than 180 days of the termination of the term of office of any official subject to recall; (3) the person named in the application is not subject to recall; or (4) there is an insufficient number of qualified subscribers.[6]

The statute does not specify a required time frame for this review process.

C. Summary of Alaska recall cases.

1. Alaska Supreme Court cases.

a. Meiners v. Bering Strait School District

The leading Alaska case addressing recall petitions is *Meiners v. Bering Strait School District*,[7] which involved the attempted recall of an entire Regional Education

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2 AS 15.45.480.

3 AS 15.45.490; AS 15.45.550(2).

4 AS 15.45.510.

5 AS 15.45.540.

6 AS 15.45.550.

7 687 P.2d 287 (Alaska 1984).

Attendance Area ("REAA") school board.[8] The *Meiners* court reviewed the spectrum of perspectives on recall, ranging from a legalistic recall process that construes recall grounds and procedures narrowly in favor of the office holder to a political recall process in which there are no grounds required for recall and all doubts are resolved in favor of placing the recall question before the voters. The *Meiners* court suggested that, historically, Alaska "appears" to have fallen in the middle of this spectrum.[9]

In the context of the recall of a local official, the court was mindful of the possibility that recalls could be initiated in remote parts of the state by voters with limited access to legal resources. Accordingly, the court was reluctant to interpret the recall statutes too strictly. Thus, the court held that recall statutes, like initiative and referendum statutes, "should be liberally construed so that 'the people [are] permitted to vote and express their will.'"[10] The court held that "the recall process is fundamentally a part of the political process. The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute."[11]

Because the applicable statute required the grounds for recall to be stated with particularity, the *Meiners* court reviewed two of the asserted grounds for sufficiency. The court found that the appropriate standard of review was to assume the alleged facts are true, and rule upon them similar to a court ruling on a motion to dismiss for failure to state a claim.[12] The court reviewed the asserted grounds to determine whether they sufficiently stated a claim for "failure to perform prescribed duties," one of the specified grounds in the recall statute.

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8 As such, the case involved a different set of recall statutes related to the recall of local officials. *See* AS 14.08.081; AS 29.28.130-.250 (1984). The current statutes governing local recall are set out in AS 29.26.240-.360. The local recall statutes have a slightly different list of grounds for recall: misconduct in office, incompetence, or failure to perform prescribed duties. *See* AS 29.26.250.

9 687 P.2d at 294.

10 *Id.* at 296 (citations omitted).

11 *Id.*

12 *Id.* at 300 n.18.

Ultimately, the court found that the recall committee stated a claim for failure to perform prescribed duties when the board, which by statute "employed" the district superintendent, allegedly failed to control the superintendent's expenditures on non-district purposes and violated various provisions of law related to open meetings.[13] The court additionally held that inaccurate legal statements or lack of legal citation would not invalidate the application. The court wanted to avoid "wrapping the recall process in such a tight legal straitjacket that a legally sufficient recall petition could be prepared only by an attorney who is a specialist in election law matters."[14]

The court then considered whether any of the grounds should be deleted. The court held that the Division of Elections could not rewrite the allegations of the petition, but concluded that insufficient grounds should be deleted to avoid "abuse" and "the drafting of recall petitions with little regard for the statutory grounds of recall."[15] The court authorized the division to "delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute."[16]

b. von Stauffenberg v. Committee for an Honest and Ethical School Board

In *von Stauffenberg v. Committee for an Honest and Ethical School Board*,[17] the recall committee alleged that local school board members committed misconduct and failed to perform prescribed duties by going into executive session to consider the continued retention of an elementary school principal. The court concluded that since the Alaska Open Meetings Act permitted consideration in executive session of "subjects that tend to prejudice the reputation and character" of a person, the targeted board members were properly exercising the discretion granted to them by law when they went into executive session.[18] The recall petition, therefore, failed to contain sufficient statements of grounds for recall. Moreover, because the allegations failed to state why going into

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13 *Id.* at 300-01.

14 *Id.* at 301.

15 *Id.* at 302.

16 *Id.* at 303.

17 903 P.2d 1055 (Alaska 1995).

18 *Id.* at 1060 (citing AS 44.62.310(c)(2)).

executive session violated Alaska law, the court held that the allegations also were not sufficiently particular.[19]

2. Alaska superior court cases.

There are three superior court decisions on recall applications targeting state officials under AS 15.45.

a. Coghill v. Rollins

Coghill v. Rollins[20] involved a recall application targeting Lieutenant Governor Coghill. Judge Savell applied the *Meiners* standard for reviewing the two alleged grounds for recall: incompetence and lack of fitness. The recall committee alleged that Lieutenant Governor Coghill should be recalled on the ground of "incompetence" because he had not read the election laws and had made contradictory statements regarding the recall process.[21] In reviewing this allegation for sufficiency, Judge Savell found that "incompetence"—under a liberal construction and commonsense meaning of the term—"must relate to a lack of ability to perform the official's required duties."[22] He found that knowledge of election laws is directly related to the statutory duties of the lieutenant governor.[23] As such, Judge Savell concluded that the allegation regarding failure to read the election laws was legally sufficient. With respect to the allegation regarding contradictory statements, however, Judge Savell concluded that the allegation was insufficient standing alone, but could remain because it supported the allegation regarding failure to read the election laws.[24] Thus, Judge Savell sustained the entire accusation of incompetence.[25]

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19 *Id.*

20 No. 4FA-92-1728 CI (Alaska Super. Sept. 14, 1993) (memorandum decision granting summary judgment in part). The recall attempt ultimately was not completed.

21 *Id.* at 18.

22 *Id.* at 20-21.

23 *Id.* at 22.

24 *Id.*

25 *Id.* at 22-23.

In the second ground, the recall committee alleged that Lieutenant Governor Coghill was unfit for office because he made unfounded public accusations of criminal activity of recall staff and had used his office to intimidate individuals who had challenged his nomination and election.[26] Judge Savell concluded that this allegation was both factually and legally insufficient because it contained no details about the accusations and did not describe how the lieutenant governor had used his office to intimidate others.[27]

b. Valley Residents for a Citizen Legislature v. State of Alaska

Valley Residents for a Citizen Legislature v. State of Alaska[28] involved an application to recall Senator Scott Ogan. One of the grounds alleged by the recall committee was that Senator Ogan demonstrated a lack of fitness by promoting his employer in legislative committee and through his voting and by failing to recognize an obvious conflict between his respective duties to his employer and to his constituents.[29] Judge Gleason found that the recall petition stated a violation of the Legislative Ethics Act.[30] She defined "lack of fitness" as "unsuitability for office demonstrated by specific facts related to the target's conduct in office."[31] Judge Gleason concluded that the recall committee's specific allegations related to the alleged conflict between Senator Ogan's loyalty to his employer and to his constituents stated a legally sufficient allegation of lack of fitness.[32]

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26 *Id.* at 23-24.

27 *Id.*

28 No. 3AN-04-6827 CI (Alaska Super. Aug. 24, 2004) (order granting summary judgment).

29 *Id.* at 3.

30 *Id.* at 9.

31 *Id.* at 10.

32 *Id.*

c. Citizens for an Ethical Government v. State of Alaska

In *Citizens for an Ethical Government v. State of Alaska*,[33] the superior court found that the division correctly refused to certify the application for recall of Senator Ben Stevens.[34] The petition alleged that Senator Stevens demonstrated corruption and lack of fitness by accepting money from a politically involved entity. Ruling from the bench, Judge Stowers held, in relevant part, that the petition failed to allege with sufficient particularity facts regarding Senator Stevens' conduct in office. Judge Stowers used the definition of lack of fitness from the *Valley Residents* case. Judge Stowers found that the application must allege "specific facts related to the recall target's conduct in office," not the official's conduct generally. Judge Stowers elaborated on this principle, stating:

> In essence, as you analyze statements in a [recall] petition, if you have a statement that says something to the effect of "A did B," or "A did B for C reason," those are statements of fact . . . [that] go to the voters to determine whether those are true or not and whether the voters want to rely on those allegations to recall a particular office holder. On the other hand . . . 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 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. To the extent that there are mixed questions of fact and law: "A did B, which is illegal," then the validity of that statement in part turns on whether the statement of law is valid or not, and if it's not, it is stricken. And it also depends in part on whether the facts as alleged are specific enough or particular enough to create a statement that is sufficient to go to the voters. It's not my role as the court to, with a hyper-critical analysis, determine whether or not particular statements of fact are sufficient or not. But on the other hand, if the statutes that I have previously referred to and if the supreme court in *Meiners* and *von Stauffenberg* mean anything . . . a court is required to make at

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

34 *See* 2005 Inf. Op. Att'y Gen. (Sept. 7; 663-06-0036).

> least a threshold determination as to whether what has been alleged is factually specific enough.[35]

Ultimately, Judge Stowers found that no sufficient factual allegations or unlawful activity regarding Senator Stevens' conduct in office had been alleged.[36] The court noted that it was not illegal for legislators to serve as paid consultants to politically involved corporations.[37] Therefore, the court held that the petition was not substantially in its proper form and the division had correctly refused to certify the application. The recall committee appealed to the Alaska Supreme Court, but declined to pursue the appeal to completion.[38]

D. Attorney General Opinions on recall.

This office has issued many opinions on recalls.[39] These opinions have often recommended that the division reject allegations that fail to allege particular grounds and provide a level of detail that gives the recall target a meaningful opportunity to respond and the voters something more than a vague idea of the reasons for the recall. Further, this office also has recommended that the division reject allegations that merely allege proper or lawful conduct. Such allegations fail to state a claim for recall and are legally insufficient.

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35 No. 3AN-05-12133 CI, Media No. 3-AN3106-2 11:27:28 to 11:50:38 (Alaska Super. Jan. 4, 2006) (oral ruling granting summary judgment).

36 *Id.*

37 *Id.*

38 Supreme Court No. S-12208. On May 30, 2006, the recall committee moved to dismiss its appeal on mootness grounds because Senator Stevens' term was soon to expire.

39 But only two such opinions address the recall of a state official under Title 15. *See* 2005 Inf. Op. Att'y Gen. (Sept. 7; 663-06-0036); 2011 Op. Att'y Gen. (Oct. 3). In addition, the Department of Law retained independent counsel to advise the Division in the Ogan and Hickel/Coghill recalls. *See* Letter from Sedor to Glaiser (April 8, 2004; 663-04-0126); Letter from Brown to Thickstun (Aug. 24, 1992.).

The following are examples of allegations that we advised were factually and legally sufficient. The examples in bold pertain to the recall of a state official under Title 15:

- Holding closed and unnoticed school board meetings (misconduct).[40]
- Prohibiting a motion by shouting "shut up" at a meeting (incompetence).[41]
- Forcing a board member to vote against his wishes (incompetence).[42]
- Contracting to pay for a decertified superintendent (misconduct and failure to perform prescribed duties).[43]
- Becoming involved in personnel matters related to a family member(misconduct).[44]
- Threats against employees and school board members related to family members (misconduct).[45]
- Refusing to take oath of office (failure to perform prescribed duties).[46]
- **Actively promoting employer in legislative office (corruption, neglect of duties, and lack of fitness).**[47]
- Hiring unqualified personnel, violating Open Meetings Act, failing to supervise superintendent, and violating a statute requiring implementation of a teacher and administrator evaluation system (misconduct, incompetence, failure to perform prescribed duties).[48]

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40 1987 Inf. Op. Att'y Gen. (May 28; 663-87-0504).

41 1988 Inf. Op. Att'y Gen. (May 2; 663-88-0496).

42 *Id.*

43 *Id.*

44 1989 Inf. Op. Att'y Gen. (Sept. 25; 663-90-0009).

45 *Id.*

46 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393).

47 Letter from Sedor to Glaiser (April 8, 2004; 663-04-0126).

48 2007 Op. Alaska Att'y Gen. (July 19).

The following are examples of allegations that we advised were not sufficient:

- Not intending to vote as the public preferred (not unlawful).[49]
- Defending a superintendent in an investigation (not unlawful).[50]
- Unspecified abuse to audience members (not particular).[51]
- Unwillingness to work with district employees and administration and unspecified shortfall re: ethics code and board policy (not particular).[52]
- Unspecified use of position for personal gain (not particular).[53]
- Involvement in negotiations without regard for the board's position (not unlawful).[54]
- Calling a board meeting while certain administrators were out of town (not unlawful).[55]
- School board members entering a district office and reviewing district financial records without authorization from superintendent (not unlawful).[56]
- Changing the wording of a letter in an effort to be misleading (not particular).[57]
- Making false and damaging statements about an administrator (not particular).[58]
- Failure to have full and open communication (not particular).[59]

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49 1987 Inf. Op. Att'y Gen. (May 28; 663-87-0504).

50 1988 Inf. Op. Att'y Gen. (April 22; 663-88-0462).

51 1988 Inf. Op. Att'y Gen. (May 2; 663-88-0496).

52 1989 Inf. Op. Att'y Gen. (Sept. 25; 663-90-0009).

53 *Id.*

54 *Id.*

55 1989 Inf. Op. Att'y Gen. (Sept. 26; 663-90-0102).

56 *Id.*

57 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393).

58 *Id.*

- Unspecified harassment, lack of judgment, abuse of travel privileges (not particular).[60]
- **Payment from private company for advice and loyalty while serving as a senator even where company was one potentially affected by the actions of the legislature (alleged corruption and lack of fitness) (not unlawful).**[61]
- Conflict of interest in school board member also being shooters club coach (not unlawful).[62]
- Improper voting in violation of procedural rules and conflict of interest (not unlawful).[63]
- No statutory grounds for recall referenced (not unlawful).[64]
- **Leaving caucus meeting, not returning to district to hold public meetings, and sacrificing leadership position in legislature (alleged incompetence and neglect of duties) (not unlawful).**[65]

With the foregoing law and principles in mind, we now turn to the application for the recall of Representative Holmes.

III. Analysis.

AS 15.45.550 sets forth four bases for denying certification of an application:

1. the application is not substantially in the required form;

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59 1993 Inf. Op. Att'y Gen. (July 26; 663-93-0419).

60 *Id.*

61 2005 Inf. Op. Att'y Gen. (Sept. 7; 663-06-0036).

62 2005 Inf. Op. Att'y Gen. (Nov. 22; 663-06-0075).

63 2006 Inf. Op. Att'y Gen. (Jan. 17; 663-06-0096).

64 2010 Op. Att'y Gen. (June 7).

65 2011 Op. Att'y Gen. (Oct. 3).

2. the application was filed during the first 120 days of the term of office or within less than 180 days of the end of the term of office of the official subject to recall;

3. the person named is not subject to recall; and

4. there are not enough qualified subscribers.

At the outset, we note that the application was timely filed, Representative Holmes is subject to recall, and the division has determined that there is a sufficient number of qualified subscribers.[66] Thus, we discuss below only whether the application is substantially in the required form.

Whether an application is substantially in the required form involves a three-step inquiry. First, the division must determine whether the application is technically sufficient, that is, whether the recall committee has complied with all of the ministerial requirements of a recall application. Next, the division must determine whether the summary of grounds for recall is factually sufficient, that is, whether the factual statements are sufficiently particular or detailed. Finally, the division must determine whether the summary of grounds is legally sufficient, that is, assuming the alleged facts to be true, whether they state a claim for one of the specified grounds for recall.

A. Technical sufficiency.

Alaska Statutes 15.45.480 - .500 set out several technical requirements that must be satisfied with respect to a recall application. This application satisfies all of those requirements.

The application was accompanied by a $100 deposit as required by AS 15.45.480. The application sets forth the name and office of the person to be recalled as required by

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66 Representative Holmes, a state legislator, is a person subject to recall under AS 15.45.470. The application was filed on November 6, 2013. Representative Holmes's term of office began on January 15, 2013, and will end on January 20, 2015. The 120th day of her term was May 15, 2013. Thus, the application was filed more than 120 days after the beginning of her term and not within 180 days of the end of her term of office. Accordingly, the application was timely filed. You have informed our Office that the application contains a sufficient number of qualified subscribers as required under AS 15.45.500(3).

AS 15.45.500(1). The application contains a summary of grounds for recall that is not more than 200 words as required by AS 15.45.500(2).[67] The application designates a recall committee consisting of three qualified voters who subscribed to the application, and includes the name, mailing address, and signature of each committee member as required by AS 15.45.500(4). The application also includes the printed name, signature, address, and a numerical identifier of qualified voters equal in number to 10 percent of those who voted in the preceding general election in House District 19, and more than 100 voters subscribed to the application as sponsors as required by AS 15.45.500(3). The signature pages also contain a statement that the qualified voters signed the application with the name and office of the person to be recalled and the statement of grounds for recall attached, as required by AS 15.45.500(3).

B. Factual sufficiency.

Our conclusion in this case turns on the legal sufficiency of the petition. Thus, we assume solely for purposes of this analysis that the recall petition states particular or specific facts related to Representative Holmes's conduct in office.[68]

C. Legal sufficiency: lack of fitness.

As discussed immediately below, the summary is legally insufficient to demonstrate a lack of fitness. Representative Holmes's switch of political parties upon being sworn into office and failure to make good on campaign promises do not reflect a derogation of legislative duties sufficient to constitute a "lack of fitness" for office under the recall statutes. Further, affiliating with a political party is a First Amendment right, not lost to a public official simply by virtue of her election to office.

Review of legal sufficiency focuses on whether the particular alleged facts state a claim under a ground for recall.[69] In evaluating legal sufficiency, courts first look to the

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[67] Whether that summary of grounds is factually or legally sufficient is discussed in the next subsections.

[68] The division does not determine factual accuracy of allegations in a recall summary, but must assume they are true. *Meiners*, 687 P.2d at 300 n.18. The factual sufficiency analysis centers on whether an allegation in a recall petition states particular or specific facts related to the recall target's conduct in office. *See, e.g., Citizens for an Ethical Gov't v. State*, No. 3AN-05-12133 CI (Alaska Super. Jan. 4, 2006) (oral ruling granting summary judgment).

[69] 2005 Inf. Op. Att'y Gen. at 11 (Sept. 7; 663-06-0036).

grounds of recall upon which the application relies. The present recall application is based on one statutory ground: lack of fitness.

Alaska courts have reviewed the legal sufficiency of an allegation of "lack of fitness" in the context of an attempt to recall a state official three times. In *Coghill v. Rollins*,[70] the recall committee alleged that Lieutenant Governor Coghill was unfit for office because he made unfounded public accusations of criminal activity of recall staff and had used his office to intimidate individuals who had challenged his nomination and election. Judge Savell concluded that this allegation was both factually and legally insufficient because it contained no details about the accusations and did not describe how the lieutenant governor had used his office to intimidate others.[71]

In *Valley Residents for a Citizen Legislature v. State of Alaska*[72] Judge Gleason defined lack of fitness as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office."[73] She determined that specific allegations describing an alleged conflict between Senator Ogan's loyalty to his employer and his constituents were legally sufficient.[74] In *Citizens for an Ethical Government v. State of Alaska*[75] Judge Stowers, employing the same definition of lack of fitness, determined that allegations that Senator Ben Stevens had received money from a politically active corporation did not state a grounds for recall because that activity was lawful.

Here, the allegation of lack of fitness centers on Representative Holmes's public representations that she was a Democrat and subsequent change in political affiliation to the Republican Party after her reelection. But this conduct does not constitute a "lack of fitness" sufficient to certify a recall petition because her conduct was lawful and constitutionally protected.

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70 No. 4FA-92-1728 CI (Alaska Super. Sept. 14, 1993).

71 *Id.* at 23-24.

72 No. 3AN-04-6827 CI at 10 (Alaska Super. Aug. 24, 2004).

73 *Id.*

74 *Id.*

75 No. 3AN-05-12133 (Alaska Super. Jan. 4, 2006) (oral ruling).

First, switching party affiliation and voting with that party in a manner inconsistent with campaign promises does not exhibit "unsuitability for office" on the part of Representative Holmes. To suggest otherwise would be to conclude that Representative Holmes somehow became unfit for office simply by virtue of adopting the views and beliefs of an opposing political party. It also suggests that changing one's mind or failure to make good on campaign promises reflects a lack of fitness, in contravention of Alaska Supreme Court precedent holding that the recall process cannot be invoked based on "disagreement with an officeholder's position on questions of policy."[76] An elected official's switch of party affiliation is not unprecedented,[77] and this Office can find no authority recalling an elected official solely on the basis of such action. Indeed, our Office has specifically advised that failure to vote for or support a particular candidate is not a legal ground for recall.[78]

Second, Representative Holmes's actions represented an exercise of her constitutional right to associate with a political party of her choice. That association is a fundamental right protected by the First and Fourteenth Amendments to the United States Constitution and Article I, section 5 of the Alaska Constitution,[79] and is not lost to a legislator simply by virtue of her election to office.[80]

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76 *Meiners,* 687 P.3d at 294.

77 *See* Cissna, Francis L., *Switching Sides: Is Party Affiliation a Tie that Binds?*, 28 Ariz. St. L.J. 735, 772 (Fall 1996).

78 1987 Inf. Op. Att'y Gen. (May 28; 663-87-0504) (opining that a school board member "supporting the wrong candidate for superintendent . . . is not unlawful behavior" subjecting board member to recall).

79 *See, e.g., Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."); Alaska Const. art. I, sec. 5.

80 *See Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska 2007) ("'[T]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.'" (quoting *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966)); *Thoma v. Hickel*, 947 P.2d 816, 821 (Alaska 1997) (recognizing First Amendment rights of government officials); *Kusper*, 414 U.S. at 57 ("The right to associate with the political party of one's choice is an integral part of [the] basic constitutional freedom [of association]").This is not to suggest that conduct otherwise protected by the First Amendment could never

It is also 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.[81] Allowing the switching of political party to be a statutory basis for recall is a legislative decision—the conduct does not fall within the current statutory bases.

In sum, Representative Holmes's campaign promises and representations and subsequent switch of political parties do not constitute a "lack of fitness" sufficient to recall her.

IV. Conclusion.

We recommend that you deny certification of the application for recall of Representative Holmes because the application fails to allege a legally sufficient ground for recall. Accordingly, the application is not substantially in the form required by AS 15.45.550(1).

If you decline to certify this application, you should advise the recall committee that it has the right to seek judicial review under AS 15.45.720 within 30 days of the date of the notice of your determination.

Please contact us if you would like further advice on this matter.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:
Elizabeth M. Bakalar
Assistant Attorney General

EMB/tjd

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present a legally sufficient ground for recall, but the conduct alleged here does not present that circumstance.

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