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**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ERIC AARSETH, JUDGE

BRIEF OF APPELLANTS STATE OF ALASKA, DIVISION OF ELECTIONS AND DIRECTOR GAIL FENUMIAI

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CONSTITUTIONAL PROVISIONS

Article XI, section 8. Recall

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.

ALASKA STATUTES

§ 15.45.470. Provision and scope for use of recall

The governor, the lieutenant governor, and members of the state legislature are subject to recall by the voters of the state or the political subdivision from which elected.

§ 15.45.480. Filing application

The recall of the governor, lieutenant governor, or a member of the state legislature is proposed by filing an application with the director. A deposit of $100 must accompany the application. This deposit shall be retained if a petition is not properly filed. If a petition is properly filed the deposit shall be refunded.

§ 15.45.490. Time of filing application

An application may not be filed during the first 120 days of the term of office of any state public official subject to recall.

§ 15.45.500. Form of application

The application must include

(1) the name and office of the person to be recalled;

(2) the grounds for recall described in particular in not more than 200 words;

(3) the printed name, the signature, the address, and a numerical identifier of qualified voters equal in number to 10 percent of those who voted in the preceding general election in the state or in the senate or house district of the official sought to be recalled, 100 of whom will serve as sponsors; each signature page must include 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; and

(4) the designation of a recall committee consisting of three of the qualified voters who subscribed to the application and shall represent all sponsors and subscribers in

matters relating to the recall; the designation must include the name, mailing address, and signature of each committee member.

§ 15.45.510. Grounds for recall

The grounds for recall are (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption.

§ 15.45.515. Designation of sponsors

The qualified voters who subscribe to the application in support of the recall are designated as sponsors. The recall committee may designate additional sponsors by giving notice to the lieutenant governor of the names, addresses, and numerical identifiers of those so designated.

§ 15.45.520. Manner of notice

Notice on all matters pertaining to the application and petition may be served on any member of the recall committee in person or by mail addressed to a committee member as indicated on the application.

§ 15.45.530. Notice of the number of voters

The director, upon request, shall notify the recall committee of the official number of persons who voted in the preceding general election in the state or in the senate or house district of the official to be recalled.

§ 15.45.540. Review of application for certification

The director shall review the application and shall either certify it or notify the recall committee of the grounds of refusal.

§ 15.45.550. Bases of denial of certification

The director shall deny certification upon determining that

(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.

§ 15.45.560. Preparation of petition

(a) The director shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state or throughout the senate or house district of the official sought to be recalled. Each petition must contain

(1) the name and office of the person to be recalled;

(2) the statement of the grounds for recall included in the application;

(3) a statement of minimum costs to the state associated with certification of the recall application, review of the recall petition, and conduct of a special election, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition;

(4) an estimate of the cost to the state of recalling the official;

(5) the statement of warning required in AS 15.45.570;

(6) sufficient space for the printed name, a numerical identifier, the signature, the date of signature, and the address of each person signing the petition; and

(7) other specifications prescribed by the director to ensure proper handling and control.

(b) Upon request of the recall committee, the lieutenant governor shall report to the committee the number of persons who voted in the preceding general election in the state or in the district of the official sought to be recalled by the recall committee.

§ 15.45.610. Filing of petition

A petition may not be filed within less than 180 days of the termination of the term of office of a state public official subject to recall. The sponsor may file the petition only if signed by qualified voters equal in number to 25 percent of those who voted in the preceding general election in the state or in the senate or house district of the official sought to be recalled.

§ 15.45.620. Review of petition

Within 30 days of the date of filing, the director shall review the petition and shall notify the recall committee and the person subject to recall whether the petition was properly or improperly filed.

§ 15.45.650. Calling special election

If the director determines the petition is properly filed and if the office is not vacant, the

director shall prepare the ballot and shall call a special election to be held on a date not less than 60, nor more than 90, days after the date that notification is given that the petition was properly filed. If a primary or general election is to be held not less than 60, nor more than 90, days after the date that notification is given that the petition was properly filed, the special election shall be held on the date of the primary or general election.

§ 15.45.660. Preparation of ballot

The ballot shall be designed with the question of whether the public official shall be recalled, placed on the ballot in the following manner: "Shall (name of official) be recalled from the office of .....?" Provision shall be made for marking the question "Yes" or "No."

§ 15.45.680. Statement of official subject to recall; display of grounds for and against recall

The director shall provide each election board in the state or in the senate or house district of the person subject to recall with at least five copies of the statement of the grounds for recall included in the application and at least five copies of the statement of not more than 200 words made by the official subject to recall in justification of the official's conduct in office. The person subject to recall may provide the director with the statement within 10 days after the date the director gave notification that the petition was properly filed. The election board shall post at least one copy of the statements for and against recall in a conspicuous place in the polling place.

PARTIES

The State of Alaska, Division of Elections, and its director, Gail Fenumiai are the appellants. Recall Dunleavy, an unincorporated association, and Stand Tall With Mike, an independent expenditure group, are the appellees.

JURISDICTION

This is an appeal from an order of the superior court, the Honorable Eric A. Aarseth, granting partial summary judgment to Recall Dunleavy. The superior court issued final judgment on January 29, 2020. This Court has authority to consider this appeal under AS 22.05.010 and Appellate Rule 202(a).

ISSUES PRESENTED

1. Recall applications must include a statement of "the grounds for recall described in particular in not more than 200 words." Must this statement of grounds contain sufficient detail to inform the reader—whether the targeted official, director of elections, or voter—of the conduct alleged to constitute one of the statutory grounds for recall?

2. The statutory grounds for recall are (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption. Alaska has a for-cause recall system. To give meaning to the idea of for-cause recall, must the Division and the Court require that the recall allegations meet some minimum threshold of seriousness before certifying a recall application?

3. The Division of Elections declined to certify Recall Dunleavy's application because its allegations lacked sufficient particularity to establish grounds for a recall

election. Recall Dunleavy defended its statement primarily by relying on extraneous information and explanations. Was it error for the superior court to reverse the Division's decision?

INTRODUCTION

Alaska has a for-cause recall system. Its constitutional convention delegates rejected the idea of a purely political recall and directed the legislature to establish procedures and grounds for recall. The legislature decided that a public official may be recalled only for (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption,[1] and gave the Director of the Division of Elections ("the Division") the task of determining whether a recall application is "substantially in the required form,"[2] including "the grounds for recall described 'in particular' in not more than 200 words."[3]

Despite this Court's recognition that Alaska law requires cause to recall an official, the Recall Dunleavy committee ("the committee") and the superior court have interpreted the requirement of recall grounds described in particular as an empty formality, which, according to the court, should not "restrict the voters' right to affirmatively take action to admonish or disapprove of an elected official's conduct in office …" [Exc. 290] Under this view, the statement of grounds is sufficiently particular as long as it meets a "notice pleading" standard and the official should understand what it is about—even if others cannot. And as long as any omission, mistake, or misconduct is

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1 AS 15.45.510.

2 AS 15.45.550(1).

3 AS 15.45.500(2).

alleged, the voters can decide whether the statutory grounds have been established.

But if it is up to the voters to decide whether the allegations constitute one of the grounds for recall, then the Division's review serves no purpose and Alaska would have a purely political recall scheme. And that cannot be the case. The statutes contemplate a recall process that poses three questions to two distinct audiences. First, the Division decides whether the allegations, if true, establish that the official is unfit, is incompetent, has neglected his or her duties, or is corrupt. Second, the voters decide if the allegations are true, and third, if so, whether they warrant removing the official from office.

In this case, the superior court erred by conflating these questions and giving voters the responsibility that the statute assigns to the Division. The court thus effectively created a de facto no-cause political recall system, erasing the purpose of the statutory grounds and accepting a scheme expressly rejected by the constitutional delegates, that is, one based on "disagreement with an officeholder's position on questions of policy."[4]

This case is not about what the governor has or has not done; both the Division and the Court must assume that the statement's allegations are true. Instead, this case asks whether the 200-word statement of grounds adequately establishes a *prima facie* case of at least one statutory ground for recall. Because this Court has not interpreted the recall statutes in Title 15, its answer will govern the recall process for all future state officials.

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4 *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 294 (Alaska 1984).

STATEMENT OF THE CASE

I. The constitutional and statutory framework for the recall of elected officials requires an application with a statement of grounds containing allegations that meet at least one of the four statutory criteria.

Article XI, section 8 of the Alaska Constitution declares: "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. Procedure and grounds for recall shall be prescribed by the legislature." The legislature has created a multi-stage process, which begins with recall sponsors gathering signatures on an application attached to a statement of grounds.[5] Once the sponsors have signatures from qualified voters "equal in number to 10 percent of those who voted in the preceding general election" in the state or the district of the targeted official, they submit the application to the Division.[6]

The director then reviews the application to determine whether to certify it.[7] The director must deny certification upon determining that:

> (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
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> (4) there is an insufficient number of qualified subscribers.[8]

If the director certifies an application, the Division prepares petition booklets with

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5 AS 15.45.500(3) ("[E]ach signature page must include 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.").

6 *See* AS 15.45.480 and AS 15.45.500.

7 AS 15.45.540.

8 AS 15.45.550.

the name and office of the targeted official and "the statement of the grounds" included in the application.[9] To trigger an election, the sponsors must then collect signatures from qualified voters equal to "25 percent of those who voted in the preceding general election" and file them no later than 180 days before the end of the official's term.[10]

In the event of a recall election, the director must provide to each election board "copies of the statement of the grounds for recall included in the application and ... the statement of not more than 200 words made by the official subject to recall in justification of the official's conduct in office."[11] Each election board must post the statements for and against recall "in a conspicuous place in the polling place."[12]

The permissible grounds for recall are: "(1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption."[13] The recall statutes do not define these terms.

II. Recall Dunleavy filed an application to recall the governor; the Division of Elections declined to certify the application.

Governor Michael J. Dunleavy was elected on November 6, 2018. On September 5, 2019, a recall committee ("the committee") filed an application to recall him. The application provides the following allegations as grounds for recall:

> Neglect of Duties, Incompetence, and/or Lack of Fitness, for the following actions:
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> 1. Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.

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9 AS 15.45.560.

10 AS 15.45.610; AS 15.45.630.

11 AS 15.45.680.

12 *Id.*

13 AS 15.45.510.

2. Governor Dunleavy violated Alaska Law and the Constitution, and misused state funds 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 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 approximately $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 additional federal Medicaid funds.

References: AS 22.10.100; Art. IX, sec. 6 of Alaska Constitution; AS 39.52; AS 15.13, including .050, .090, .135, and .145; Legislative Council (31-LS1006); ch.1–2, FSSLA19; OMB Change Record Detail (Appellate Courts, University, AHFC, Medicaid Services). [Exc. 1]

On November 4, 2019, the director declined to certify the recall application because it was "not substantially in the required form." [R. 42] The director explained that although the technical requirements of the recall statutes were met, the statement of grounds for recall was not factually and legally sufficient for certification. [R. 42]

III. Proceedings in the superior court.

On November 5, 2019, the committee filed a complaint asking the superior court to review the director's determination. [Exc. 2-7] The parties filed cross-motions for summary judgment. [Exc. 12-184] The State also filed a motion to strike exhibits and citations that the committee included in its motion for summary judgment, arguing that the superior court's review should be limited to the four corners of the application. [Exc. 185-89] The court granted this motion in part, agreeing not to consider these extraneous

materials, but leaving them in the record in anticipation of an appeal. [Exc. 284-85]

IV. The superior court reversed the director's determination except for the allegation in Paragraph 3(b).

The superior court issued an oral ruling from the bench, striking allegation 3(b) as legally insufficient, but otherwise holding that the statement of grounds was sufficiently particular. A written order followed. [Exc. 286-303] The Division filed this appeal.

STANDARDS OF REVIEW

This Court reviews a summary judgment decision de novo,[14] and applies its independent judgment when interpreting constitutional provisions or statutes.[15] The Court adopts the "rule of law that is most persuasive in light of precedent, reason, and policy."[16]

ARGUMENT

I. Recall in Alaska.

As the Court has recognized, Alaska does not have political recall that allows voters to remove an elected official from office based merely on policy disagreements.[17] Instead, voters can recall elected officials only for cause—that is, for specific reasons set out in statute.[18] At the same time, Alaska's recall scheme does not provide extensive procedural protections for officials, as some states' laws do, such as court hearings to establish probable cause of the truth of factual allegations[19] or the requirement that recall

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14 *State v. Schmidt*, 323 P.3d 647, 654 (Alaska 2014).

15 *Id.* at 655.

16 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016) (citation omitted).

17 *Meiners*, 687 P.2d at 294.

18 *See* AS 15.45.510.

19 *See, e.g.*, Ga. Code Ann. § 21-4-6.

proponents cite the particular statutes underlying the alleged misconduct.[20] On a spectrum that runs from no-cause, political recall at one end, to recall that is very protective of elected officials at the other end, Alaska's recall scheme falls in the middle.[21]

But in this case, the superior court interpreted Alaska's recall scheme as though it were far from the middle, skewed nearly to the no-cause, political recall end of the spectrum. In doing so, the court strayed from the analyses of every Alaskan court that has reviewed statements of grounds for recall, which includes two supreme court cases[22] and three superior court cases.[23] Contrary to the superior court's claim, the Division has not "invited" expansion of this caselaw; [Exc. 290] rather, its position is solidly grounded in these cases and the statutes, and consistent with the intent of the convention delegates.

It is the superior court that has strayed from the caselaw, by basing its analysis on a standard advocated by the committee in this case: that a statement of grounds is sufficient as long as the targeted official should know what conduct it refers to. [Exc. 290-91] This "notice pleading standard" ignores the Division's pre-certification determination of whether the statement meets the statutory for-cause grounds, and it violates the official's due process right to a meaningful opportunity to respond. The standard also fails to consider whether voters can understand the grounds, so that their

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20 *Meiners*, 687 P.2d at 301.

21 *Id.* at 294.

22 *von Stauffenberg v. Committee for Honest and Ethical School Bd.*, 903 P.2d 1055 (Alaska 1995); *Meiners*, 687 P.2d 287.

23 *Citizens for Ethical Government v. State*, 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) (Stowers, J.); *Valley Residents for a Citizen Legislature v. State*, 3AN-04-06827CI (Alaska Super., August 24, 2004) (Gleason, J.); *Coghill v. Rollins*, 4FA-92-1728CI (Alaska Super., Sept. 14, 1993) (Savell, J.).

votes will not simply become a referendum on the official's policy choices. The superior court's approach fundamentally undermines Alaska's for-cause recall scheme.

A. Alaska has a for-cause, middle-ground recall scheme.

Alaska's constitutional convention delegates envisioned a meaningful bar to no-cause recall and Alaska's statutes provide for this. The delegates wanted the state's elected officials to be free to focus on the business of governing for a full term, absent serious acts or omissions that call into question the official's ability or suitability to continue in office. They did not want officials to be recalled based on disagreement with their legitimate policy decisions. They therefore rejected both a "no-cause" and a "low-bar" recall for Alaska, the two major questions they debated on the subject of recall.

In comprehensive discussions, the delegates voted down two amendments that proposed recall without specified grounds. They did not want public officials to be subject to the "nuisance"[24] of "recall for whatever grounds the people feel are justified."[25]

Some delegates advocated for this, but they were outvoted. Delegate McCutcheon favored recall for any ground or no grounds. In his view, "[i]t doesn't make any difference whether there are grounds or not, if there is a change in the public sympathy with respect to [officials'] politics or their attitude in office or anything else, they should be subject to recall."[26] Delegate Fischer agreed: "[E]very public official should be liable to recall for whatever grounds the people feel are justified . . . . Let's leave it to the

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24 2 Proceedings of the Alaska Constitutional Convention (PACC) 1238 (January 5, 1956).

25 *Id.* at 1214-15.

26 *Id.* at 1209.

people. If they feel a man should be kicked out of his job, let the people do it."[27] But other delegates disagreed; delegate Taylor rejected the idea of "[p]ublic punishment for hypocrisy," for example.[28] Delegate Fischer proposed an amendment to allow "recall by the voters for any reason that the voters may see fit" but the amendment failed.[29]

Delegate White then proposed a similar amendment, which would allow voters to determine their own grounds in each petition, "leav[ing] it to the people to establish the grounds . . . be it as frivolous as it may, and let the case stand or fall on its merits."[30] Delegate Hurley opposed this amendment because it would "create a nuisance value to which public officials should not be subjected," preferring instead grounds that were "sincere."[31] Mr. White's amendment also failed.[32]

The delegates also rejected a "low-bar" recall that would allow a technical but harmless act or omission to serve as grounds for recall.[33] This is indicated by their discussion of one of the grounds initially proposed by the Committee on Direct Legislation. The initial committee proposal included four grounds—malfeasance, misfeasance, nonfeasance, or conviction of a crime involving moral turpitude.[34] The first

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27 *Id.* at 1214-15.

28 *Id.* at 1211.

29 *Id.* at 1221, 1237.

30 *Id.* at 1238.

31 *Id.*

32 *Id.* at 1239.

33 *Id.* at 1207-1212.

34 Alaska Constitutional Convention, Committee on Direct Legislation, Committee Proposal No. 3 (Dec. 19, 1965) (Alaska State Archives 320.3).

three came straight from territorial law,[35] and the new fourth ground was the subject of extensive debate by the delegates. Specifically, the delegates considered whether to remove the requirement that the alleged crime involve "moral turpitude." Delegate Hellenthal moved to delete that modifier and make conviction of *any* crime a ground for recall, arguing that a public official should be "beyond reproach" and subject to recall "irrespective of the nature of the crime."[36]

Delegate V. Rivers wondered if this would mean that a public official could be recalled for going through a red light or parking overtime.[37] Mr. Hellenthal answered yes, "[a]ny crime should be the grounds for recall and then leave it to the good judgment of the people to determine whether the crime was severe enough for them to warrant signing the petition."[38] Delegate R. Rivers did not believe that violation of a law that involved no moral wrong should be grounds for recall, because then "every public official [would be] subject to recall for the most minor misdemeanor."[39] Delegate Johnson agreed, stating that he opposed the amendment because "there ought to be some protection for public officials."[40] This latter position prevailed and the proposed amendment failed.[41]

Ultimately, the delegates decided to have the legislature determine the grounds for

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35 *See Meiners*, 687 P.2d at 294 (citing § 16-1-61, ACLA 1949).

36 2 PACC 1207 (January 5, 1956).

37 *Id.*

38 *Id.* at 1208.

39 *Id.* at 1210.

40 *Id.* at 1211.

41 *Id.* at 1212.

recall, and they added that duty to the constitution.[42] In the words of delegate Hurley, "the legislature [should] prescribe the grounds under which a recall petition should be circulated so as to prevent circulation of recall petitions for petty grounds."[43]

Thus, the delegates intended that recall be based on meaningful grounds of a sufficient magnitude to prevent recall campaigns for "petty grounds" or the "most minor misdemeanor." Their view that recall should be reserved for consequential matters should inform the Court in determining whether an allegation meets the statutory recall criteria.

Consistent with the delegates' clear direction that the legislature should impose meaningful grounds, the relevant statute sets forth four criteria. All four criteria state serious grounds that are intended and should be interpreted to create a genuine obstacle to petty or political recall: lack of fitness, incompetence, neglect of duties, or corruption.[44] These categories could be interpreted broadly to include almost anything, and that is how the superior court applied them. But this approach renders the statutory grounds superfluous. And an all-encompassing interpretation makes the delegates' intent that recall in Alaska be used only for significant reasons largely illusory and will open the flood gates for the political recall that the delegates rejected. And it would allow a recall committee to cite grounds that have little impact on an official's job performance as a pretense to recall the official for political or policy differences. For this reason, the statutory criteria should be interpreted to serve as a meaningful obstacle to a political

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42 *Id.* at 1240. Article 11, section 8 states that "Procedures and grounds for recall shall be prescribed by the legislature."

43 *Id.* at 1239.

44 AS 15.45.510.

recall, consistent with a middle-ground recall scheme.

The superior court interpreted nearly every aspect of Alaska's recall scheme with the same looseness. In doing so, the court pushed Alaska's law from the middle of the spectrum to the no-cause end. Neither this Court nor any other superior court has applied the laws so liberally as to effectively eliminate the threshold determination that a recall committee's stated allegations must meet the statutory criteria.

B. Alaska's recall scheme requires a statement of grounds of no more than 200 words, made with particularity, that will stand on its own without additional information.

The superior court fundamentally misunderstood Alaska's recall scheme in accepting the main premise of the recall committee in this case. This premise is that the statement of grounds has the sole purpose of giving the targeted official notice of the basis for recall and that it is acceptable as long as the committee—through extensive additional information—establishes that the official should understand the grounds.

By focusing on what the governor should know, the trial court and the committee have ignored the critical importance of the process of Alaska's recall scheme. Without adherence to the process, recall in Alaska loses its integrity and becomes a free-for-all—essentially a purely political recall rather than the middle-ground, for-cause recall scheme that the delegates chose and the legislature constructed. To avoid this, the Division must be able to rely on the words in the statement of grounds. Even if an official has engaged in the most egregious corrupt activity and was completely aware that a recall statement referred to this activity, the Division would have to deny certification if the statement did not describe the act with enough particularly so that someone *unfamiliar* with the conduct

could understand the factual allegation and why, if true, it would constitute corruption.

Aside from the trial court here, all other Alaskan courts that have reviewed recall applications have understood the importance of the process and have recognized that Alaska's scheme requires (1) a statement of grounds that can stand on its own (2) stated with sufficient particularity that (3) the Division of Elections can determine whether the allegations invoke one of the statutory criteria, (4) the targeted official can meaningfully respond in 200 words, and (5) voters reading the statement and the official's rebuttal have sufficient information to understand the charge and to make a recall decision.

1. The statement of grounds must stand on its own.

The superior court relied on information outside the four corners of the statement of grounds in determining its sufficiency. Although the court asserted that it considered only the words of the statement, this claim was belied by its analysis of the grounds, which incorporated and relied on additional information supplied by the committee. [Exc. 296-300, 302] This was error. The statement must stand on its own and be stated with sufficient particularity that the Division can determine whether the statement, assuming it is true, falls within the statutory criteria, the elected official can meaningfully respond in 200 words, and the voters can understand what they are basing their recall votes on.

The requirement that the statement of grounds be free-standing and comprehensive is inherent in Alaska's statutory scheme, which requires the Division to determine whether "the application" is "substantially in the required form."[45] The "required form" is set out in AS 15.45.500, which provides in part that "[t]he application must include …

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45 AS 15.45.550(1) (emphasis added).

the grounds for recall described in particular in not more than 200 words." The target of any recall also is limited to 200 words of rebuttal,[46] and the voters will have the benefit of only the application and the rebuttal at the polls.[47] Therefore, the application must stand on its own in making the case for recall. In determining the sufficiency of the statement of grounds, the Division cannot assume knowledge of facts not included in its 200 words.

This principle is demonstrated in all of the Alaska cases, which focus solely on the application's language and do not consider other facts or allegations in evaluating the sufficiency of the grounds.[48] In *Citizens for Ethical Government v. State*, then-Superior Court Judge Craig Stowers stated that he understood his task to be to disregard the "considerable extra or extraneous materials presented to me," and "ultimately [to] take the language of the petition . . . and evaluate the language for both its factual and legal sufficiency in light of" the law.[49] When, during argument, the recall committee's attorney referred to facts not stated in the petition, the court redirected him: "But again, my focus is on the language of the petition."[50] In presenting his decision, Judge Stowers stated that he had "not reached [his] decision with reference to any of the extraneous information

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46 AS 15.45.680.

47 *Id.*

48 *See Meiners*, 687 P.2d at 298-302 (analyzing facts alleged in specific paragraphs of petition); *von Stauffenberg*, 903 P.2d at 1059-1060 ("[W]e take the facts alleged in the first and fourth paragraphs as true and determine whether such facts constitute a prima facie showing of misconduct . . . or failure to perform prescribed duties."); *Coghill* at 18-24 (analyzing only specific factual allegations in application); *Valley Residents* at 8-12 (relying on facts alleged in application); *Citizens* at 24 ("But again, my focus is on the language of the petition.") and 72-73.

49 *Citizens* at 9.

50 *Id.* at 24.

that's been provided."[51] And he quoted AS 15.45.500's requirement that "the grounds for recall [be] described in particular in not more than 200 words," noting that "if this statute has any meaning at all, the phrase 'described in particular' is something that the court is required to consider *as it reviews the 200 words or less in any given petition.*"[52]

The Division cannot rely on outside information when reviewing an application to determine whether the allegations are sufficient to meet Alaska's for-cause criteria for recall. The application is in proper form and therefore certifiable if it both describes the grounds for recall with sufficient particularity and if the alleged facts make a *prima facie* case for the cited ground for recall—all in the 200 words of the statement of grounds.[53]

The Division cannot neutrally infer facts that are not found in the application, however widely known extraneous information might seem to be. The Division will accept the committee's factual claims as true, but those facts must be contained in the 200-word statement because the Division is not charged with tracking the acts and omissions of elected officials. Its job is to run elections.[54] If an application relies on facts not stated within, the Division would have to conduct some sort of investigation, thereby prolonging the process and undermining its own impartiality. The statutory scheme does

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51 *Id.* at 72.

52 *Id.* at 73. (Emphasis added).

53 *von Stauffenberg*, 903 P.2d at 1059-60; *see also Citizens* at 75 ("'The director shall deny certification upon determining that the application is not substantially in the required form,' . . . and 'in the required form' goes to the question of whether or not under the language in law set out by the Alaska Supreme Court in the *Meiners* case and also in the *von Stauffenberg* case, … there are sufficient facts alleged with particularity pertaining to the recall target's conduct as a legislator that then would make out a *prima facie* case indicating that either a lack of fitness … or corruption is demonstrated.").

54 AS 15.10.105(a).

not provide for this, nor does it provide for the court to consider extraneous evidence. Nor would extraneous evidence make sense, as the Division's role is only to review the application and the court's role is only to review the Division's certification decision.

In addition, the Division focuses on the 200-word statement because its mission of supervising elections includes facilitating fairness, simplicity, and clarity in voting procedures.[55] As described more fully below, the voters must be able to rely solely on this statement of grounds, which appears both in the petition booklets[56] and at the polling place,[57] and the Division's role includes assuring that the statement sufficiently informs the voters. This is analogous to the Division's duty to assure that the summary of a ballot measure is "complete enough to convey an intelligible idea of the scope and import of the proposed law,"[58] as generally "the people have a right to a fair and accurate summary of issues on which they are being asked to express their will."[59] The duty to assure fairness and accuracy for voters falls upon the Division.[60]

Despite this, the committee's arguments below almost completely ignored the language of its application, offering instead a lengthy discussion of factual allegations

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55 *See, e.g.,* AS 15.15.030 ("The director shall prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections.").

56 AS 15.45.560(a)(2).

57 AS 15.45.680.

58 *Burgess v. Alaska Lt. Gov. Terry Miller*, 654 P.2d 273, 275 (Alaska 1982).

59 *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1120 (Alaska 1993).

60 *See, e.g.,* AS 15.45.180(a) (providing that the ballot shall contain "a true and impartial summary of [an initiative.]"); AS 15.45.410(a) (providing that a ballot shall contain "a true and impartial summary of [a referendum]"); AS 15.50.020 (providing that a proposed constitutional amendment shall "give a true and impartial summary of the amendment proposed.").

and legal claims not included in the statement. [Exc. 27-64] The Division argued these additional facts should be disregarded and the superior court agreed, stating: "the court will not consider extraneous materials as evidence in its decision-making." [Exc. 285]

Nevertheless, the court did consider outside facts in upholding the committee's recall grounds. It claimed to be considering the "additional fact allegations . . . only to understand the Plaintiff's theory of the allegation[s]," [Exc. 296-97 nn.37-38, 42)] and indeed, that is the only way it could have understood some of the grounds, because they are otherwise "mere conclusory statements or arguments."[61] But a reviewing court cannot rely on additional facts to understand allegations, because the Division cannot rely on them to determine the statement's sufficiency; the official will be denied a meaningful opportunity to respond; and voters will not have these facts at the polls.

In addition to background information supplied by the committee's brief, the superior court also considered the contents of documents that the committee merely referenced in the final paragraph of the statement of grounds. [Exc. 297, n. 39, 299-300]

In the committee's view, because the governor "was explicitly provided these references, [the superior] court cannot ignore them." [Exc. 202] The committee relied heavily on the contents of the referenced documents in its defense of the factual sufficiency of Paragraph 3 of the statement, [Exc. 223][62] as did the court in its opinion. [Exc. 298-300] But the committee's argument—and the superior court's acceptance of

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61 *Citizens* at 82.

62 ("[T]ogether the text of Paragraph 3 and the references point to one specific line-item veto. They leave no reasonable doubt for the Governor precisely what conduct is at issue.").

it—misconstrues the purpose of the statement of grounds. The question is not what the targeted official reasonably understands, but whether the statement describes the alleged "grounds for recall with particularity in not more than 200 words."[63] And although the reference paragraph is part of the 200 words of the application, the materials referenced—i.e. the text of the statutes, the legal memo, and the OMB Change Record Detail—are not. Of course, the committee was not required to identify the specific statutes that it claims the governor has violated,[64] so its omission of the text of the statutes does not affect the analysis. But mere citation of the other, factual materials does not somehow encompass their contents within the 200 words of the application. Including the referenced materials expands the word count to well over 1500 words.[65]

The committee cannot evade the statutory word limit for the statement of grounds simply by citing documents with additional information. If that were permitted, the word limit would be meaningless. The Court should not sanction such a transparent end-run around the plain requirements of the statute, both because it improperly tips the balance created by the recall statutes toward the committee[66]—likely depriving the elected official of a meaningful opportunity to respond in only 200 words[67]—and because it thwarts evaluation of the adequacy of the grounds by the Division and the courts.

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63 AS 15.45.500(2).

64 *Meiners*, 687 P.2d at 301.

65 Given the nature of the budget documents, a precise word count is difficult.

66 *See Meiners*, 687 P.2d at 298 n.7 (noting the "balance properly made in the recall statutes..."); *see also*, AS 15.45.680 (providing for display of 200-word statement of grounds and 200-word rebuttal in polling places on election day).

67 *See* Section I.B.2.c *infra* pages 25-29.

2. The statement of grounds must be made with particularity.

Not only must the committee limit its stated grounds to 200 words, it must state those grounds "in particular."[68] The particularity requirement serves three important functions. First, sufficient particularity is necessary for the Division and a reviewing court to determine whether the statement is "substantially in the required form"—that is, whether the factual allegations state a claim under the statutory recall criteria.[69] Second, the allegations must be sufficiently particular to allow the official a meaningful opportunity to respond. And third, the particularity requirement ensures that voters have the information they need to vote.

Ignoring these functions, the superior court erroneously adopted the committee's position that "the particularity requirement is effectively a notice-pleading standard with the specific 'purpose of … giv[ing] the officeholder a fair opportunity to defend his conduct …'"[70] The court stated that the standard for particularity is whether a particular allegation "'is not [so] impermissibly vague' that the official cannot respond." [Exc. 291] But not only is a notice-pleading standard plainly inappropriate in the recall context, it fails to require the statement of grounds to fulfill any of its three functions properly.

a. "Notice pleading" is inappropriate in the recall process.

The committee based its "notice pleading" argument on a partial quote from *Meiners*, repeated by the superior court, that "[t]he purpose of the requirement of

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68 AS 15.45.500(2).

69 AS 15.45.550(1).

70 Exc. 290-91 (quoting *Meiners*, 687 P.2d at 302).

particularity is to give the officeholder a fair opportunity to defend his conduct . . . ." [Exc. 200, 291] This cropped quote might suggest that particularity is meant only to give the targeted official notice of the grounds. But both the committee and the court omitted the rest of the *Meiners*' quote: "The purpose of the requirement of particularity is to give the officeholder a fair opportunity to defend his conduct *in a rebuttal limited to 200 words.*"[71] From the perspective of the targeted official, a fair opportunity to defend the allegations in only 200 words is quite different than simply getting notice of the nature of the action alleged.[72]

von Stauffenberg v. Committee for Honest and Ethical School Board also does not support the argument that particularity requires allegations only to meet a notice pleading standard. In *von Stauffenberg*, the court found that the allegations were insufficient because they lacked enough particularity for the Court to determine whether they violated one of the statutory criteria.[73] The allegations were that a school board acted improperly when it entered into executive session to discuss the retention of a school principal.[74] The Court found that these allegations "fail to state why entering into the executive session was violative of Alaska law," as Alaska's Open Meetings Act has an exception for discussion of subjects that tend to prejudice the reputation and character of a person.[75]

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71 *Meiners*, 687 P.2d at 302.

72 *See Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009) (stating that the notice pleading standard is satisfied by a brief statement that "give[s] the defendant fair notice of the claim and the grounds upon which it rests.")

73 *von Stauffenberg*, 903 P.2d at 1060.

74 *Id.* at 1057.

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

The Court found that these allegations were insufficiently particular to state a violation of the statutory criteria for recall. Thus, the *von Stauffenberg* court applied the particularity requirement not only to determine whether the grounds were particular enough to provide notice to the targeted official, but also to determine whether they were particular enough to state a claim for one of the statutory bases for recall. In *von Stauffenberg*, the Court did this in reviewing the determination of the borough clerk.[76] In a statewide recall effort under Title 15, it is the Division of Elections that initially makes this determination as part of its certification function.[77] Therefore *von Stauffenberg* demonstrates that the particularity requirement is meant in part to allow a borough clerk or the Division—as well as the reviewing courts—to make this determination.

This Court has never mentioned a notice pleading standard in a recall analysis, where it is clearly inappropriate. "Notice pleading" is a "lenient" standard that is satisfied by a brief statement that 'give[s] the defendant fair notice of the claim and the grounds upon which it rests.'"[78] This makes sense in a litigation context, where a complaint may be liberally construed in favor of the plaintiff because the defendant can explore the precise nature of the plaintiff's claims and evidence in the course of discovery, motion

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76 *Id.* at 1057.

77 AS 15.45.550; *see also Citizens* at 75 ("'The director shall deny certification upon determining that the application is not substantially in the required form,' . . . and 'in the required form' goes to the question of whether or not under the language in law set out by the Alaska Supreme Court in the *Meiners* case and also in the *von Stauffenberg* case, ... there are sufficient facts alleged with particularity pertaining to the recall target's conduct as a legislator that then would make out a *prima facie* case indicating that either a lack of fitness is demonstrated or corruption is demonstrated.").

78 *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009).

practice, and trial. In other words, a claimant need not include details about the evidence in the complaint because that evidence will later be offered to establish the claim.

But the recall process has no discovery, motion practice, or trial. If the statement of grounds does not identify the salient facts demonstrating that the targeted official's conduct meets a ground for recall, not only is the official hamstrung in his ability to defend his conduct, but the Division and a reviewing court cannot determine if the statement makes a *prima facie* case for recall and voters will lack the facts they need to make an informed decision.

b. The Division cannot make the certification determination unless the statement is made with particularity.

Because the right to recall officials in Alaska is "limited to recall for cause,"[79] the Division and reviewing courts must review the legal sufficiency of recall allegations.[80] The application must describe the allegations with sufficient particularity to identify the conduct that purportedly creates an issue, and the alleged facts must support legally sufficient grounds for recall.[81] As then-Judge Stowers stated in *Citizens for Ethical Government*, "it is for the court . . . to at least make a preliminary or threshold determination whether the factual allegations are alleged with sufficient particularity or specificity so that you can even get the allegations to the voters."[82] If the stated facts fail, on their face, to meet one of the statutory recall grounds, the allegation cannot go to the

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79 *von Stauffenberg*, 903 P.2d at 1059.

80 *Id.* at 1059-60.

81 AS 15.45.550(1).

82 *Citizens* at 28; *see also id.* at 80 ("[A] court is required to make at least a threshold determination as to whether what has been alleged is factually specific enough.").

voters.[83]

The particularity of the factual allegations and the sufficiency of the legal grounds are interrelated and are examined together. In some situations, the facts might be stated with particularity but will fail to state a claim based on the statutory criteria. In a Florida case, for example, the state supreme court found that the allegation that a city commissioner gave orders and made requests of city employees without the consent of the city commission did not constitute malfeasance—defined as illegal action—because even if the allegations were true, the conduct was permitted by law.[84]

Alternatively, allegations may state facts that *could* state a claim under one of the statutory grounds, but the facts alleged are not specific enough to determine this for certain—as in *von Stauffenberg*.[85] Similarly, in *Citizens for Ethical Government*, the court examined an allegation that a state senator had engaged in corruption by accepting a consulting contract with a company in conflict with his duties as a senator. The court found that contracting to advocate the position of two clients on matters of mutually shared but conflicting interest does not necessarily constitute corruption, and to the extent

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83 *Meiners*, 687 P.2d at 303 ("[T]he certifying officer may delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute.").

84 *Bent v. Ballantyne*, 368 So.2d 351, 352-53 (Fla. 1979); *see also In re Ventura*, 600 N.W.2d 714, 717-79 (Minn. 1999) (finding that the allegations in the recall petition concerned conduct that was not within the performance of the governor's official duties or was not unlawful and thus did not meet the definition of "malfeasance."); *Moutrie v. Davis*, 498 So.2d 993, 996-97 (Fla. 1986) (finding that a councilman's request that the police chief be fired and his failure to investigate alleged blackmail did not constitute malfeasance or misfeasance and therefore could not support recall.).

85 *von Stauffenberg*, 903 P.2d at 1060.

that this conduct might sometimes constitute corruption, the petition failed to state specific facts indicating this.[86]

Another possibility is an allegation that is too factually vague to meet the particularity requirement. In *Coghill v. Rollins*, the court reviewed an allegation against Lieutenant Governor Coghill that stated that "[h]is unfitness is demonstrated by this unethical and unprofessional conduct as indicated by his totally unfounded public accusations of criminal activity of recall staff."[87] The court found that "[s]tripped of conclusory labels" such as "unethical" and "unprofessional," the allegation accused Coghill of "making unspecified public accusations against the recall proponents" without "indication of when, to whom, and about whom the accusations were made" or what criminal activity was involved.[88] The court held that these charges did not "set forth particular facts upon which voters can conclude that Coghill is unfit for office or which would permit [him] to offer a meaningful response justifying his conduct."[89] Thus, one key function of the particularity requirement is to allow the Division to determine if a committee's allegations meet the statutory criteria.

c. The targeted official could be deprived of a meaningful opportunity to be heard if the statement lacks particularity.

Both the federal[90] and state[91] constitutions prohibit state action that deprives

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86 *Citizens* at 81-82.

87 *Coghill* at 23.

88 *Id.*

89 *Id.*

90 U.S. Const. amend. XIV, § 1.

91 Alaska Const. art. I, § 7.

individuals of property without due process of law. In Alaska, public employees subject to termination only for just cause have a property interest in continued employment.[92] The extent of due process required for recall of elected officials depends on the government's recall laws, because officials take office subject to the terms and conditions of the political system in which they operate. Thus, an official in a state that requires no grounds for recall may have a diminished right to notice and an opportunity to be heard.[93] The offices in those jurisdictions are purely at-will positions.

In contrast, officials in jurisdictions with for-cause recall, like Alaska, are entitled to more process.[94] Because those officials have an expectation of remaining in office for a full term absent specified grounds, they are entitled to a process that provides notice of the grounds alleged and a meaningful opportunity to respond. A "fundamental requirement of due process" is "[n]otice reasonably calculated to afford the parties an opportunity to present objections to a proceeding."[95] In Alaska, the recall statutes provide for notice of the grounds through the application, which must include "the grounds for recall described in particular in not more than 200 words."[96]

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92 *City of North Pole v. Zabek*, 934 P.2d 1292, 1297 (Alaska 1997).

93 *Sproat v. Arnau,* 213 So.2d 692 (Fla.1968) (upholding as constitutionally sufficient recall petition alleging loss of confidence in elected officials, where city charter provided that charge that a majority of the electors had lost confidence in officials sought to be recalled would be sufficient): *Bonner v. Belsterling*, 136 S.W. 571 (Texas 1911) (rejecting due process claim because official took office under law that provided at-will recall, and "the proceeding is just what he contracted for when he accepted the office.").

94 *Meiners*, 687 P.2d at 296 n.7 ("Recall, of course, differs from initiative and referendum in that a particular person's continuance in office is at stake, and not just the fortunes of a policy or issue.").

95 *Kerr v. Kerr*, 779 P.2d 341, 342 (Alaska 1989).

96 AS 15.45.500(2).

The second prong of due process—the opportunity to be heard—is provided in Alaska's recall scheme by the official's rebuttal to the application.[97] The targeted official may provide the director with justification of the official's conduct in a statement of 200 or fewer words, which the director provides to each election board to post "in a conspicuous place in the polling place."[98]

The ability to identify the conduct underlying the recall effort is critical to due process. In *Meiners*, this Court noted that "[t]he purpose of the requirement of particularity is to give the officeholder a fair opportunity to defend his conduct in a rebuttal limited to 200 words"[99] and allegations that do not specifically explain what conduct the committee believes is worthy of recall make the official's rebuttal much more complicated and difficult.

Despite this, the committee argued and the superior court held that the stated allegations need to identify the grounds only to the targeted official—the "notice pleading" standard. [Exc. 199-200, 290-91] But even if a targeted official might guess what a vague or conclusory allegation means, the official must respond to it in only 200 words. If the official has to speculate about the possible meanings, and then both explain these possibilities and fully respond to them in a 200-word rebuttal to voters, the official will be deprived of both notice and the opportunity to be heard. In addition, the voters will have an insufficient statement of the grounds and an insufficient response, adding up

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97 AS 15.45.680.

98 *Id.*

99 *Meiners,* 687 P.2d at 302.

to insufficient information on which to deprive the official of a full term in office. Because a fair process for the targeted official and essential information for voters both require allegations that are stated with specificity, the particularity requirement is critical to the integrity of the election, and thus to Alaska's recall election scheme.

This Court has expressly endorsed this view of the particularity requirement.[100] When considering whether invalid grounds should be stricken from petition booklets if other alleged grounds are sufficient, the Court determined in *Meiners* that the insufficient allegations should not appear because that "might force the target official to expend most of his 200 words of rebuttal fending off charges, which although legally insufficient for recall, he fears might garner the voters' attention."[101] The dangers of this "are apparent," the Court said: "[it] invites abuse."[102] Similarly, accepting a statement of grounds that does not clearly indicate what the official is alleged to have done and how it meets the statutory recall criteria will unfairly hinder the official's ability to respond and will invite the kind of nonspecific insinuations of some of the committee's allegations here.

In addition to this Court, the superior court in *Coghill* also found that—regardless of due process—the statement of grounds must be particular enough to give the targeted official a meaningful chance to respond.[103] Whether based on due process or on the fair process required by the statute, recall grounds must be stated with particularity within the

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100 *Id.*

101 *Id.*

102 *Id.*

103 *Coghill* at 23 ("These charges do not set forth particular facts . . . which would permit the official to offer a meaningful response justifying his conduct.").

four corners of the statement so that the targeted official can meaningfully respond.

d. Voters need to understand both the 200-word statement and the official's response.

Although due process generally requires notice only to the deprived party, in a for-cause recall jurisdiction, it requires sufficient notice to others as well, most notably to the voters. Ultimately, "it is the responsibility of the voters to make their decision in light of the charges and rebuttals."[104] The official's opportunity to be heard is the opportunity to be heard by *voters*. Voters need to understand the allegations sufficiently to determine, in light of the subject's rebuttal statement, how to vote.[105] Notice to the official and notice to voters cannot be separated for due process purposes because the voters are the decision-makers. Unlike a government agency terminating an employee or reducing public benefits, the voters lack full background information about the reason for the proposed deprivation. They must rely on the bare allegations of the application and the official's 200-word rebuttal in order to make an informed decision when casting a vote. While some voters may independently inform themselves more fully about the underlying issues if that opportunity is available, the statement of grounds that explains the reason for the recall effort—along with the official's rebuttal—may be all that the voters see.

In the trial court, the committee denied that the particularity requirement is meant to provide voters with an understanding of the grounds for recall, asserting that the

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104 *Meiners*, 687 P.2d at 301.

105 *See Davis v. Shavers*, 439 S.E.2d 650, 652 (Ga. 1994) ("[I]t is imperative that the application state with clarity and specificity the facts supporting the grounds for recall such that both the public and the official sought to be recalled are properly notified of the violation alleged to have been committed.").

Division had "simply [made] it up from whole cloth." [Exc. 194] The superior court completely ignored the point, also failing to recognize any necessity for voters to understand the grounds. This position disrespects and disregards the role of the voters, indicates a lack of understanding of Alaska's recall process, and suggests, contrary to the constitutional history and statutory scheme, that Alaska has no-cause recall.

By statute, the Division determines whether the statement of grounds is legally sufficient to go to the voters.[106] Voters do not decide whether the facts meet the alleged criteria; they never see the statement if it does not state a claim.[107] If the Division determines that the statement meets a statutory criterion, it prints the statement of grounds in petition booklets for voters to sign if they agree that recall should appear on the ballot.[108] If, as the committee suggests, voters do not need to understand these grounds in isolation, within the four corners of the 200-word statement, then Alaska's law would not mandate that the grounds be printed in the booklets.

If a sufficient number of voters sign the booklets, then the recall grounds—in isolation, within the four corners of the 200-word statement—are posted at each polling place "in a conspicuous place" for the voters to see when they come to vote.[109] If voters do not need to understand what the allegations are and why they amount to neglect, corruption, lack of fitness, or incompetence, then Alaska's law would not require them to

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106 AS 15.45.540.

107 *See* AS 15.45.540 ("The director shall review the application and shall either certify it or notify the recall committee of the grounds of refusal.").

108 AS 15.45.560(a)(2).

109 AS 15.45.680.

be posted at all polling places.

But, of course, the statement is not meant only to provide notice to the official. In the booklets and at the polling place, the statement provides voters with the information they need to cast their votes. It is like the summaries of initiatives, referenda, and proposed constitutional amendments that appear on Alaska's ballot; they are all intended to inform voters in a clear, concise manner of the important issues they must decide.

As with initiatives, referenda, and constitutional amendments, the recall process does not assume that voters will be exposed to information about the issues in other ways. The statement may be all that the voters see, so it must stand on its own. The Division cannot assume that every recall will have explanatory campaigns or that any campaign will reach every voter. The statement of grounds provides a minimum amount of information that each voter can easily access when deciding whether to sign a booklet or how to vote at the polls, where they decide two things: (1) are the allegations true, and if so (2) should the official be recalled?

This important function requires allegations that are particular enough for voters to understand what the official has allegedly done. The superior court recognized this function in *Coghill* when it rejected one allegation in the statement of grounds because it did not "set forth particular facts upon which voters can conclude that Coghill is unfit for office,"[110] and another because it provided "insufficient facts to . . . permit the voters to determine the truth of the charge."[111] Without this particularity, voters by necessity would

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110 *Coghill* at 23.

111 *Id.* at 24.

decide a recall election based on something other than the facts and the statutory criteria, essentially defaulting to a no-cause, purely political recall system.

II. The grounds for recall must be defined so as to bar purely political recall.

The for-cause nature of Alaska's recall process puts the burden of establishing grounds for recall squarely on the recall committee. For a duly-elected official in a for-cause recall jurisdiction, removal from office is an extraordinary proceeding and should not be treated lightly. The recall committee's burden to establish cause includes stating allegations that clearly identify the acts at issue and explaining why they are worthy of recall. Anything less compromises the official's due process rights, as explained above.

A. The Division's statutory role as a gatekeeper means that interpretation of the grounds cannot be left to the voters.

As described above, the Division makes the legal determination of whether a committee's recall grounds are sufficient for certification based on the facts alleged in the four corners of the statement and on the statutory criteria. The Division and reviewing courts must review the legal sufficiency of recall allegations to determine whether, assuming the stated facts to be true, the allegations constitute a *prima facie* showing of the identified statutory criteria.[112] The Division has fulfilled this responsibility many times since statehood.[113]

But, contrary to this clearly defined statutory role, both the committee and the superior court suggest that any uncertainty or insufficiency of the grounds can be left to

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112 *von Stauffenberg*, 903 P.2d at 1059-60.

113 http://www.elections.alaska.gov/doc/forms/H54.pdf (last viewed Feb. 16, 2020).

the voters to sort out. For example, the superior court adopted the committee's assertion that "it is up to the voters to decide whether a particular failure to act constitutes neglect of duty sufficient to warrant removal from office." [Exc. 295] The superior court similarly held that any mistake was sufficient to establish "incompetence" and that "[v]oters have the right to weigh the seriousness and circumstances of the alleged mistake." [Exc. 302] This is not the law, and the constitutional delegates expressly rejected this concept, voting down delegate Hellenthal's view that "[a]ny crime should be the grounds for recall and then leave it to the good judgment of the people to determine whether the crime was severe enough for them to warrant signing the petition."[114]

If the statutory grounds are to do any meaningful work in creating a barrier to political recall—i.e. if they establish *cause* for recall—then the Division's review must perform a gatekeeping function. Thus, it must be possible that it could find a statement of grounds to be insufficient before it goes to the voters. That means that the grounds cannot be so broadly interpreted that any mistake equals incompetence, any omission is neglect of duty, and any mistake, act, or omission can establish "lack of fitness" if it is unpopular.

Thus, it is essential to Alaska's for-cause recall system that the Division's review involve meaningful threshold standards as part of the definition for each ground. It cannot be the perfunctory process proposed by the recall committee and accepted by the superior court. And, contrary to the suggestion of the committee, such threshold standards will not "wrap the recall process in such a tight legal straitjacket" that no elected officials will be subject to recall. [Exc. 24] Rather, as consideration of past recall statements of grounds

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114 2 PACC 1208 (January 5, 1956).

demonstrates, recall sponsors—even in small communities off the road system—are quite capable of explaining the grounds for recall clearly and concisely.[115]

B. The superior court erred in interpreting the grounds for recall.

The superior court held that the Alaska Legislature's failure to amend the state recall statutes in the wake of three superior court decisions in which the courts adopted the definitions of the grounds agreed upon by all parties indicated "the Legislature's acceptance and approval of the definitions." [Exc. 291] This is incorrect as a matter of law. This Court has expressly rejected the argument that "the legislature's silence indicates approval" of a controlling Supreme Court decision, noting that "[l]egislative inaction frequently indicates unawareness, preoccupation or paralysis," and "declin[ing] to attribute significance to the legislature's mere inaction."[116] The legislature's failure to overturn superior court decisions, which are not controlling on future courts, is even less compelling evidence of its approval of those decisions. Thus, the superior court erred in abdicating its responsibility to interpret the statutory grounds actively contested by the parties by instead deferring to decisions that simply accepted uncontested definitions.

Even more importantly, the superior court erred by failing to apply the definitions it actually adopted in any meaningful way. Rather, it adopted the broadest possible definitions of the grounds and then simply asserted that the allegations met those definitions. This approach effectively erased the gatekeeping function of the statutory grounds, creating a system in which almost any allegation can constitute cause for recall.

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115 *See* SOA Appendix.

116 *Providence Washington Ins. Co. v. Grant*, 693 P.2d 872, 878 (Alaska 1985).

1. Lack of fitness.

The Division proposed that lack of fitness should be interpreted to mean lack of physical or mental capacity to perform the official's functions. [Exc. 153-54] Both the committee and the superior court rejected this definition, relying in part on the claim that Article III, section 12 of the Alaska Constitution provides an alternative process for removing a governor who is physically or mentally unfit. [Exc. 209, 293] But this reliance is clearly misplaced. This position ignores the fact that the recall statutes apply to all state elected officials, not just to the governor, and it ignores the second sentence of Article III, section 12, which provides that the "procedure for determining absence and disability shall be prescribed by law." In fact, the only procedure the legislature has provided for determining absence and disability and subsequent removal is recall.

Instead of interpreting "lack of fitness" to encompass mental or physical fitness, the superior court chose "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office," also declaring that it considered "an official's ethical and moral fitness to fall within the term 'suitability.'" [Exc. 18-19, 208, 292-93]

Below, the Division pointed out that the notion of unsuitability for office was peculiarly unhelpful as a definition of "lack of fitness" because it is just as vague and amorphous as the phrase it purportedly defines. [Exc. 154] In effect, this definition permits the kind of purely political, no-cause-required recall that the constitutional delegates expressly rejected. This is fully apparent from the conclusory assertions of the recall committee's briefing below stating, for example, that "ignoring [a] deadline based on a ... need for information ... shows an utter 'lack of fitness.'" [Exc. 33] The superior

court's decision similarly demonstrates that this definition of lack of fitness does no work at all to circumscribe the situations or conduct that can subject an official to recall. The superior court suggested, for example, that voters could find that the governor "lacks fitness" solely "because he did not obey the law," without requiring any allegation of the seriousness or consequences of the violation. [Exc. 296] This result was expressly rejected by the constitutional delegates, who rejected proposals to subject public officials to recall for any legal violation however minor or inconsequential.[117] Further, if under the superior court's interpretation, lack of fitness includes the simple failure to follow the law, then this definition subsumes "neglect of duties," which the court defined as "the nonperformance of a duty of office established by applicable law." [Exc. 294] The court's broad definition of lack of fitness thus renders another criterion superfluous.

Even if this Court believes that "lack of fitness" should be interpreted broadly to cover more than simply mental or physical fitness, it should still employ sufficient rigor in applying that definition to prevent a back-door de facto political recall by requiring the statement of grounds to explain how or why alleged conduct makes the official unfit for office. Contrary to the committee's view, this is by no means self-evident in many cases.

2. Incompetence.

The Division argued below that incompetence should mean "lack [of] sufficient knowledge, skill or professional judgment." [Exc. 156] This definition is consistent with that of Judge Savell in *Coghill v. Rollins*—"a lack of ability to perform the official's

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117 *See* section I.A *supra* pages 9-12.

duties,"[118] as demonstrated by Coghill's alleged unfamiliarity with the election code—and with the committee's definitions—"not [being] legally qualified," "unsuitable for a particular purpose," "lacking the qualities needed for effective action' or 'unable to function properly.'" [Exc. 20-21] Although the committee complained that the Division's formulation "adds an unwarranted gloss" to the definition, [Exc. 22] it failed to explain the substantive difference between its definition and the Division's.

That difference is apparent, however, in the way that the parties applied these definitions to the allegations. For the committee, any allegation of a mistake or misunderstanding—regardless of its significance or consequences—establishes a *prima facie* showing of incompetence. [Exc. 62-63, 229] Further, the committee also argued that so long as one could infer a mistake or lack of understanding from alleged conduct, that too constitutes a *prima facie* showing of incompetence. [Exc. 32, 42, 50, 221, 225-56]

The superior court effectively accepted the committee's approach, adopting the definition from *Coghill* and holding that "[i]f an official is alleged to have failed to perform a duty or has done so poorly, the nature of the failure or the quality of the work is up to the voters to weigh." [Exc. 294] But this approach both ignores the purpose of requiring grounds for recall in the first place and robs the word *incompetence* of meaning. The grounds are meant to limit the allegations presented to voters. And people make mistakes all the time. That does not make them incompetent under any meaningful understanding of the word. If it did, then "incompetence" as a recall ground would not at all limit the public officials who could be subjected to recall. The trial court's definition

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118 *Coghill* at 21.

would permit the recall of all elected officials—none of whom is perfect—giving Alaska a de facto political recall system. This Court should not permit this stark departure from the intent of the delegates and the legislature in creating a for-cause recall system.

Instead, this Court can apply the common core of the parties' definitions and the *Coghill* court's approach by defining incompetence as "a lack of ability to perform the official's required duties."[119] The lack of ability could be established in two ways. First, by an allegation that an official does not have basic knowledge or qualifications for the duties of the position—e.g., that the lieutenant governor is unfamiliar with the election laws. Or, second, by alleging conduct demonstrating an official's functional inability to do the job. This second approach must both allege mistakes made by the official *and* explain why the mistakes show that the official cannot perform the required duties.

Consider the analogy of a surgeon: a person with no surgical training likely is incompetent as a surgeon, lacking the basic qualifications for the job. In this case, no additional information is necessary to show that the person is incompetent. But even a trained surgeon can be incompetent—if she lacks a steady hand or the nerves to manage the stress of surgery. But to make a *prima facie* showing that a trained surgeon is incompetent requires more than just an allegation that the surgeon made a mistake during surgery. It would require allegation of a mistake that affected the procedure's outcome such that the surgeon cannot be trusted to perform surgery. Mistakes that do not affect a person's ability to perform a job do not even suggest, much less establish, incompetence.

This Court's treatment of judicial error reinforces this point, recognizing the

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119 *Coghill* at 21.

principle that harmless error—i.e. mistakes with no real impact—do not warrant reversal of a court decision.[120] A similar requirement in the recall context both honors the common meaning of "incompetence" and prevents a de facto political recall system.

3. Neglect of duties.

The Division interpreted "neglect of duties" to mean "substantial noncompliance with one or more substantive duties of office." [Exc. 157] This definition gives meaning to the difference between the language in AS 15.45.510 and the closest ground for recall in the municipal statutes: "failure to perform prescribed duties."[121] "[P]rinciples of statutory construction mandate that we assume the legislature meant to differentiate between two concepts when it used two different terms."[122] Thus, the legislature presumably intended to establish a different standard for recalling state and municipal officials by adopting different terminology. This definition also gives some substance to the ground so that it prevents recall of an official for trivial or ministerial omissions.

By contrast, the committee proposed not only that "neglect of duty" includes any failure to comply with a statutory directive—regardless of its nature or significance—but also that because "the Governor is also required to undertake many 'obligatory tasks, conduct, service, or functions' that are not spelled out" in the constitution or statutes, it should include the failure to do things not required by law. [Exc. 23] According to the committee, "[i]t is up to the voters to decide whether a particular failure to act constitutes

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120 *Barton v. North Slope Bor. Sch. Dist.*, 268 P.3d 346, 353 (Alaska 2012).

121 *See* AS 29.26.250.

122 *Alaska Spine Center, LLC v. Mat-Su Valley Medical Center, LLC,* 440 P.3d 176, 182 (Alaska 2019).

a neglect of duty sufficient to warrant removal from office." [Exc. 23]

The superior court declined to inject any meaningful threshold requirements into the definition of "neglect of duty" that the court applied in *Valley Residents*—"the nonperformance of a duty of office established by applicable law"—on the erroneous theory that the legislature "has accepted" this definition. [Exc. 294-95] And it parroted the committee's contention that whether a particular omission "constitutes neglect of duty sufficient to warrant removal from office" could be left to the voters. [Exc. 295]

Thus, in the superior court's view, "neglect of duties" is established by any allegation that an official failed to do something required by law, regardless of the nature of the requirement or the impact of the omission. But this standard imposes almost no barrier to recall, potentially permitting recall for even minor administrative omissions and effectively creating a no-cause recall scheme in Alaska. This flies in the face of the clear intent of the delegates and this Court's prior rulings that Alaska has for-cause recall.

In sum, as with the other grounds, to avoid de facto political recall and remain consistent with this Court's previous statements about recall in Alaska, "neglect of duties" must be interpreted as requiring something more than the most trivial omissions—either an allegation of the significance of the duty or an allegation that the omission had a tangible consequence to justify subjecting the official to a recall election.

III. Recall Dunleavy's recall application is facially invalid.

A. A statement of grounds must explain how the alleged conduct meets one or more grounds for recall.

Rather than allege clearly which statutory ground is triggered by each allegation in the first three paragraphs of the statement, the committee has bundled three grounds

together in a prefatory sentence and applied all three to all the allegations. As its arguments show, the committee intended this device to offer multiple theories of wrongdoing that are not even hinted at in the application's language. This does not comply with basic principles of due process or the plain requirements of the statutes.

Below, the committee argued multiple theories of wrongdoing in the alternative—all dependent on explanations it did not include in its statement of grounds—and the court adopted the same approach. [Exc. 42, 50, 221, 296, 298, 300] But this tactic runs afoul of the particularity requirement. As this Court noted in *Meiners*, "[t]he purpose of the particularity requirement is to give the officeholder a *fair opportunity* to defend his conduct *in a rebuttal limited to 200 words*."[123] This requires both specific facts and an explicit connection to one or more of the grounds.

It cannot be enough for a committee to list multiple grounds and then provide unconnected factual allegations, leaving the reader to connect the dots by imagining possible theories that would meet the recall grounds. If it were, the official would not have a "fair opportunity" to respond, because in his 200 words he would have to defend against multiple versions of his alleged misconduct not spelled out in the allegation itself.

For example, the committee offered the following theories below as to why its allegations about the use of state funds to pay for electronic advertisements and mailers established the grounds for recall:

> (1) "Multiple violations of specific laws show neglect of the Governor's duty to abide by the laws that govern his official conduct." [Exc. 221]

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123 *Meiners*, 687 P.2d at 301.

(2) "The Governor's willingness to disregard the law demonstrates a lack of fitness for his position." [Exc. 221]

(3) "Not knowing the requirements of the law evidences incompetence." [Exc. 221]

None of these theories is explained in the allegation itself, but the committee contended—and the superior court accepted—that the substance of these 45 additional words should be inferred from the allegation. But the governor cannot defend himself against these theories of wrongdoing without explaining them and thus, because of the lack of particularity, he must both speculate as to the committee's theories and then expend his limited words explaining the factual allegations before he can offer a defense.

In effect, the committee's vagueness buys it three allegations in one, creating a fundamental imbalance in what is meant to be a fair system that provides each side the same limited space to explain its case. Because the committee's stratagem undermines the system's balance and imperils the official's due process rights, this Court should invalidate this either/or approach and strike the first three paragraphs of the statement of grounds for failing even to identify which grounds are implicated by the conduct, much less explain why or how the allegations meet one of the grounds for recall.

B. The allegation that the governor refused to appoint a superior court judge within the 45-day statutory deadline does not establish lack of fitness, incompetence, or neglect of duty.

The committee's first allegation is that "Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations." The superior court's entire analysis of this allegation consists of these three sentences:

> Governor Dunleavy had a legal duty to select a candidate within the time prescribed by the Legislature. If the allegations are true, his failure to select a candidate by the prescribed date could demonstrate to a voter that: he "lacks fitness" because he did not obey the law; that he is "incompetent" because he did not understand his duty to conduct his due diligence on the candidates or process before the expiration of the statutory deadlines; and/or that he "neglected his duty" because he failed to appoint a new judge within the time given by statute. This allegation is legally sufficient. [Exc. 296]

This analysis demonstrates several problems with the looseness of the court's interpretation of the recall requirements. First, the committee did not allege that the governor did not understand his duty to appoint by the deadline; the court itself added this fact. Without that fact, the court could not conclude that the allegation meets the "incompetence" criterion because the allegation does not make a *prima facie* case for it.

Second, the court's definitions of the other two cited criteria are so broad that one subsumes the other. If the governor's failure to appoint a judge "within the time given by statute" means that he has neglected his duty, and his "failure to select a candidate by the prescribed date" means that he "lacks fitness," then under the superior court's interpretation, presumably all neglect of duty demonstrates a lack of fitness. The superior court's interpretations of these criteria makes "neglect of duty" completely redundant. But whether the allegation is that the governor neglected his duty or lacks fitness makes no real difference because the allegation does not indicate, nor is it self-evident, why a technical deviation from the statutory timeframe caused any harm.

This raises the third problem with the court's loose interpretation of the recall requirements: it interpreted the criteria so broadly that they pose no meaningful obstacle to no-cause recall. The criteria should not allow a technical but harmless violation to be a

basis for recall, because it then can serve as a pretense for recall for policy differences.

That is why this ground is insufficient. The delegates unequivocally rejected the concept of subjecting elected officials to recall for mere technical violations of the law. As discussed above, the delegates rejected a "low-bar" recall, as indicated by their refusal to allow recall for "conviction of a crime," rather than "conviction of a crime of moral turpitude."[124] They did not want to include conviction of a crime that involved no moral wrong, because then "every public official [would be] subject to recall for the most minor misdemeanor,"[125] wanting "some protection for public officials."[126] They ultimately left to the legislature the job of "prescribe[ing] the grounds under which a recall petition should be circulated so as to prevent circulation of recall petitions for petty grounds."[127]

The reason that the delegates rejected violations of laws that do not affect the public or government's functions is clear. If a harmless act with no lasting impact were a sufficient basis for recall, then Alaska would be a "for-cause" recall state in name only; in reality it would have a no-cause political recall. Under a for-cause scheme, the criteria must at least require an allegation with a minimal threshold of impact, either explicitly or implicitly. And the mere failure to meet an appointment deadline does not carry self-evident consequences that constitute a meaningful neglect of duties.

If this ground were enough to invoke a recall election, a committee could as easily cite a governor's failure to issue a proclamation to commemorate Women Veterans

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124 *See* section I.A *supra* pages 9-12.

125 2 PACC 1210 (January 5, 1956).

126 *Id.* at 1211.

127 *Id.* at 1239.

Day,[128] Dutch Harbor Remembrance Day,[129] or Alaska Territorial Guard Day[130] as a neglect of duty. But interpreting these omissions as neglect of duty would undermine the delegates' intent not to permit "low-bar" recall and create a very different recall scheme.

In the trial court, the committee rejected the idea that a harmless act or omission does not meet statutory criteria. Quoting *Meiners*, it argued that the requirement that the allegation be more than a technical violation is "found nowhere in recall law" and would "'wrap the recall process in such a tight legal straitjacket' . . . that virtually no elected official could ever face recall for neglect of duties." [Exc. 24] The former argument is belied by the convention delegates' clear intent that the constitution's recall "grounds" not include insignificant violations. The latter argument is simply hyperbole; identifying some level of harm is not difficult. An allegation of an act that shows harm would be, for example, that the governor failed to timely appoint a judge, that the late appointment left the seat vacant, and that the vacancy resulted in excessive workloads for other judges.

Allegations that Alaska courts have found to be sufficient have either stated the harm or involved acts where the sufficiency of the allegation was self-explanatory. In *Meiners*, in alleging that school board members failed to perform prescribed duties, the committee stated facts that identified the resulting harm. Citing the school board's failure to control the superintendent's administrative practices, the committee identified his "large appropriation of district funds . . . for non-district, non-students, and non-

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128 AS 44.12.078.

129 AS 44.12.085.

130 AS 44.12.083.

educational programs," and provided examples of particular acts including a $230,000 appropriation to the adventure-based education program of another school district.[131] In *Coghill*, the allegations included incompetence based on both the lieutenant governor's public acknowledgment that he had not even read the election laws and his contradictory public statements about his involvement in and knowledge of the recall process.[132] Although the petition did not spell out why this was more than a technical flaw, the reason is clear. One of the primary duties of the lieutenant governor in Alaska is to "control and supervise the division of elections."[133] The top election official running the elections must have familiarity with the relevant laws and processes in order to meet this responsibility. As the court stated, "Knowledge of the election laws is directly related to Coghill's duties as lieutenant governor, analogous to a building inspector's ignorance of the building code, a chemist's lack of knowledge of the periodic table, or a litigator's ignorance of the rules of civil procedure."[134]

The committee argued below that the late appointment has an "implication of harm" that is "clear": abuse of power and an effort to inject political considerations into the judicial appointment process. [Exc. 218] But these "implications of harm" are not self-evident from a late judicial appointment and are not even actual harms. "Abuse of power" is simply a legal characterization, not a concrete consequence. And the charge that the governor was trying to inject political considerations into the judicial

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131 *Meiners*, 687 P.2d at 291.

132 *Coghill* at 20.

133 AS 15.10.105.

134 *Coghill* at 22.

appointment process is a factual allegation that is not included in the committee's statement of grounds, not a self-evident consequence of the late appointment.

Without either a stated or self-evident connection to one of the criteria, the committee's first allegation does not state a claim under any of them.

C. The application's allegations regarding electronic advertisements and direct mailers lacks sufficient factual particularity.

The recall committee submitted as its second allegation that:

> Governor Dunleavy violated Alaska Law and the Constitution, and misused state funds 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 political opponents and supporters. [Exc. 1]

This paragraph lacks the necessary factual particularity to support a recall. Without any information about either the statements or the individuals, neither the voters nor the Division nor this Court can conceivably evaluate whether the alleged advertisements and mailers violated either the Executive Branch Ethics Act[135] or any part of Alaska's campaign finance laws,[136] both of which are cited in the list of references. It therefore does not state a claim that implicates any of the statutory recall criteria.

Ignoring this problem, the superior court relied on the committee's arguments and exhibits that were not included in the statement of grounds, to fill in additional details alleging that the governor "intended 'to differentially benefit or harm' specific candidates, potential candidates, or political groups, instead of intending to 'benefit the

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135 AS 39.52.

136 AS 15.13.

public interest at large.'" [Exc. 297] The Court then held that

> if the allegations are true, Governor Dunleavy's conduct could constitute a violation of the law which would constitute neglect of duty. If he understood the laws and chose to ignore the laws, the act could establish a lack of fitness. On the other hand, if he did not intend to violate the law or did not understand the law, the allegations, if true, could establish his incompetence. [Exc. 298]

But this analysis demonstrates both the inadequacy of the allegations and the flaws in the superior court's approach. First, the court apparently recognized that even if the allegations were true, it lacked sufficient information to *know* from them that the governor had violated the law, finding only that it "*could* constitute a violation." [Exc. 297, emphasis added] This alone, under *von Stauffenberg*, establishes that the allegation lacks factual and legal particularity. In that case, the Court reviewed two allegations that school board members had violated Alaska law by meeting in "an improper, closed-door executive session, in violation of Alaska Law," to discuss retention of a school employee.[137] Alaska law expressly permits school boards to meet in executive session in certain circumstances—specifically, while discussing certain personnel issues—so the Court found that the allegation was legally insufficient.[138] And because this conduct was permitted in certain circumstances, the Court also found that the allegations lacked sufficient particularity in failing to explain why the executive session violated Alaska law.[139] It was not enough for the recall committee to characterize the meeting as "improper" and "in violation of Alaska Law." The Court analyzed whether the *facts*

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137 *von Stauffenberg*, 903 P.2d at 1057.

138 *Id.* at 1060.

139 *Id.*

alleged "constitute[d] a *prima facie* showing of [the statutory criteria]."[140]

Second, the superior court's theories as to how the electronic advertisements and mailers could demonstrate either lack of fitness or incompetence rely on allegations not found in the statement of grounds—i.e. that the governor "understood the laws and chose to ignore the laws," and that "he did not intend to violate the law or did not understand the law." [Exc. 298] But the court cannot insert extra allegations to help the statement make sense. The statement is either sufficiently particular or it is not.

And it is not: the committee's allegation lacks essential detail and explanation. The lack of factual particularity is fatal to the allegation because the prohibitions in both the Executive Branch Ethics Act and campaign finance laws involve fact-specific inquiries. For example, the claim that the governor "misused state funds" by "using state funds for partisan purposes" appears to be an allegation that he violated AS 39.52.120(b)(6), but the facts are insufficient to establish this. The statute provides in relevant part:

> 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 . . . [I]n 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;
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> (B) but does not include having the intent to benefit the public interest at large through the normal performance of official duties.

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140 *Id.* at 1059-60.

Any analysis of an alleged violation of this statute requires some allegations about exactly what was said and about whom. But the only facts are that state funds were used "to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters." That does not indicate if the communications at issue were intended "to differentially benefit or harm a candidate or potential candidate" or party—in fact, it mentions only "political opponents and supporters" not candidates or parties—and it does not say whether the ads were "intended to benefit the public interest at large." Thus, the factual deficiency also creates a legal deficiency.

The same problem also exists here with the committee's allegation that funds were spent "without proper disclosure," because without an explanation of what the advertisements and mailers said about whom, it is impossible to evaluate whether they violate any of the statutes in AS 15.13. And, absent any *prima facie* showing that the advertisements and mailers violated the law, this allegation fails to establish any of the grounds for recall. Authorizing advertisements and mailers by itself is not neglect of duty, incompetence, or lack of fitness under any conceivable definition of these grounds.

In contrast, in *Meiners* the recall petition included specific instances of the school superintendent's misuse of district funds and specific occasions when the board allegedly violated "state public records and public meeting laws."[141] And in *Valley Residents*, the application identified specific legislative acts and votes that were alleged to be corrupt.[142]

But the allegations here include no information about these advertisements or

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141 *Meiners*, 687 P.2d at 291-92, 300-01.

142 *Valley Residents* at 2.

mailers other than the conclusory claim that they included "partisan statements about political opponents and supporters" and were intended for "partisan purposes." The opponents and supporters are not identified and the partisan statements are not even paraphrased. Without this detail, the governor does not have "a fair opportunity to defend [his] conduct in a rebuttal."[143] And the voters have no way to evaluate whether the allegations are true and, if true, whether they warrant removal.

No doubt recognizing that the allegations fail to make out a *prima facie* case under any statutory ground, the committee did not even argue this point below, claiming only that the governor "is on notice" about "which political communications violated the law, and why," [Exc. 34] and providing nearly eight pages of additional alleged facts and explanation of why this additional information meets the statutory criteria. [Exc. 35-42]

But the purpose of the allegations in a recall application is not only to give notice to the targeted official, but also to allow the Division and the courts to evaluate the adequacy of the grounds and to inform the voters. Thus, it is inappropriate for the committee to rely on its own self-serving assertions about what the governor does or does not know in order to justify its own failure to provide any specific factual allegations.

Nor may the committee justify its failure to provide *any* specific facts related to this ground by claiming that "[i]t would have been impossible to provide this detail within the 200-word limit of the recall application." [Exc. 35] Both recall sponsors and recall targets are limited to a 200-word statement. If it were actually impossible to provide sufficient facts within the 200-word limit, then perhaps the committee should

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143 *Meiners*, 687 P.2d at 302.

have challenged the constitutionality of the recall statutes, but it did not. In any event, if the committee's complaint is correct, it is hard to see how the governor could have a meaningful opportunity to defend his conduct within that same limit.

Without factual allegations that support a legal conclusion that the governor violated the law, this allegation cannot make out a case of any ground for recall.

D. The allegation that the governor "violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law" lacks sufficient factual particularity.

The committee's third allegation is so devoid of specific factual allegations that it is plainly inadequate. "Stripped of conclusory labels"[144]—e.g., "violated separation of powers," and "attack the judiciary and the rule of law"—the only fact in the allegation is that the governor used his line-item veto, and that is a power expressly given to him by the Alaska Constitution.[145] Moreover, even including the committee's characterizations, this allegation fails to inform anyone unfamiliar with the issue of what the governor did.

This allegation's inadequacy is demonstrated by the inability of either the committee or the superior court to explain how the governor's use of his constitutional line-item veto power could constitute any of the grounds for recall without recourse to facts not included in the statement of grounds. [Exc. 43-50, 219, 298-300] Whatever this Court may think about those additional allegations, the statement contains no hint of those facts and no authority allows the Division or this Court to look beyond the

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144 *Coghill* at 23.

145 Alaska Const. art II, § 15 provides: "The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin."

allegations in the application. And relying on additional allegations to approve this paragraph would fatally undermine Alaska's recall process by effectively eliminating the requirement that the reasons for recall be set out in a statement of grounds, in clear contravention of the plain language of the statute and every existing Alaskan precedent.

E. An allegation of a mistaken—but implicitly corrected—veto is insufficient to establish any of the grounds for recall.

The recall committee submitted as its fourth allegation that:

> Governor Dunleavy acted incompetently when he mistakenly vetoed approximately $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 additional federal Medicaid funds.

The committee alleges that the governor's mistaken veto of Medicaid funds is sufficient for recall. In briefing below, it added new sensationalized facts, claiming that "[a]n executive who makes such dramatic funding choices, without consulting impacted agencies—and without considering the impact to tens of thousands of Alaskans—acts inappropriately and is incompetent and unfit for office." [Exc. 63-64] Of course, these additional "facts" are not in the statement, so they cannot be considered to support it. But the trial court *did* consider other facts, basing its decision both on other facts supplied by the committee and on an OMB document referenced but not included in the statement of grounds. [Exc. 302] The only fact found in the allegation is that the governor mistakenly vetoed money. By stating that "[u]ncorrected, the error would cause the state to lose" additional funds, the allegation indicates that the mistake was corrected without harm.

This allegation does not state a claim for incompetence, the ground the court invoked. The court defined "incompetence" as the "lack of the ability to perform the

official's required duties." [Exc. 293] Although an official's single omission *could* indicate an inability to perform official duties, the mere occurrence of a mistake is not enough to establish this. As explained above, a person's lack of training as a surgeon indicates incompetence to perform surgery, but a mistake by a trained surgeon does not alone establish incompetency to perform surgery. The same is true here. Making a single, later corrected, mistake does not make a *prima facie* showing that the governor is unable to perform his duties.[146] The allegation must connect the error to a lack of ability.

Like *von Stauffenberg*, the facts alleged here are insufficient to make a *prima facie* case. In *von Stauffenberg*, this Court held that an allegation that a school board had a closed-door session to be legally insufficient because the law permits a school board to go into executive session for some employment decisions.[147] The Court also found that the allegation lacked particularity because it did not explain why the executive session violated Alaska law.[148] Here too, the allegation here does not include the facts needed to establish that the veto constitutes incompetence.

The committee argued below that voters should decide if a mistake is "sufficient to warrant removal from office." [Exc. 23] The court agreed, finding that if true, the governor's "alleged mistake … could be interpreted as 'incompetence,'" permitting voters "to weigh the seriousness and circumstances of the alleged mistake." [Exc. 302]

But this analysis misapplies the law and if accepted, would eliminate the

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146 *See von Stauffenberg*, 903 P.2d at 1059-60.

147 *Id.* at 1060.

148 *Id.*

Division's role to determine if the alleged facts state a claim under the law. The voters should not determine this—nor could they for this allegation, without more facts—and the Court should not assume that voters can weigh circumstances that are not included in the statement of grounds. Determining whether the facts alleged state a claim under the statutory grounds is a function for the Division and the court, not the voters.[149]

CONCLUSION

For these reasons, the Court should reverse the decision of the superior court and find that the committee's application was not in the required form.

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149 *See Meiners*, 687 P.2d at 300; *von Stauffenberg*, 903 P.2d at 1060.

Meiners v. Bering Strait School District
687 P.2d 287 (1984)

Statement of Grounds

We the undersigned, as registered voters in the Bering Strait School District, petition the commision [sic] of elections to hold a recall election for the eleven members of the Bering Strait School Board. The present members are: Chuck Degnan, Francis Degnan, R.R. Blodgett, Don Jackson, Howard Lincoln, Clifford Weyiounna, Joseph Noongwook, John Cheemuk, Roger Nassuk, Jonah Tokeinna, Herbert Appassingok. We cite the failure of the present board to perform the prescribed duties of their office.

1. We cite the failure to control the administrative practices of superintendent Ron Hohman. The superintendent has made large appropriation of district funds on his own judgement for non-district, non-student, and non-educational programs. An example is a $230,000 appropriation to the adventure based education program of another school district. A trip by Bethel students to London, a play by the Bethel theater group and other monies spent around the state benefited *no* students from the Bering Strait School District. The State of Alaska Department of Education has ruled that this money was spent in a totally inappropriate manner. Our board has failed to hold the superintendent responsible for these monies. We also cite alledged [sic] coercive and illegal means used by the superintendent to prompt his staff to perform activities of a non-educational manner including circulation of a statement of support among teachers, and use of district staff to promote his own election bid for a national position.

2. We cite the failure of the school board to provide full and open communication between themselves and the voters of the district. The board has failed under state statutes to provide its constituents adequate notice of school board meetings and functions. The board has failed under the common rules of order to set time and date of the next meeting while in regular session. The board has also failed to provide adequate public disclosure of minutes. The board has only met in regular session four times from June 1982 through the 1st of April 1983 a period of eleven months, yet the board publicly claims that policy calls for monthly meetings. The board has also failed to provide the public access to the board agenda. At the last regular meeting held on April 7, 1983 a petition containing over three hundred names as well as resolutions passed by a majority of the A.E.C./P.A.C. members in our district calling for the removal of Ron Hohman from his position was denied the right to be added to the agenda by Chairman Chuck Degnan.

3. The board has failed to deal with allegations of conflict of interest and unethical behavior among its members and board. According to common law public officials must not give the appearance of personal gain from holding a position on a

board. Yet Chairman Chuck Degnan publicly claims to be “paid” twenty thousand plus dollars per year for his position. R.R. Blodgett's business concerns conduct massive amounts of business with the school district. Also R.R. Blodgett made an abusive and derogatory phone call to a concerned parent in February of 1982 and the board was asked to conduct a complete investigation into the matter and this order of business has never been officially addressed by the board.

This petition begins its circulation on April 11, 1983 and all signatures will be secured within the sixty days prescribed by law.

Coghill v. Rollins, et al.
Case No. 4FA-92-1728 CI

Statement of Grounds

1.) John "Jack" Coghill is incompetent. His incompetence is demonstrated by his public acknowledgement that he has not even read the Election Laws, as well as contradictory public statements regarding his involvement and knowledge of the recall process.

2.) John "Jack" Coghill is unfit for office. His unfitness is demonstrated by his unethical and unprofessional conduct as indicated by his totally unfounded public accusations of criminal activity of recall staff; and, he has used the Office of Lieutenant Governor in an attempt to intimidate individuals who challenged the legitimacy of his nomination and election.

Von Stauffenberg v. the Committee for an Honest and Ethical School Board
903 P.2d 1055 (1995)

Statement of Grounds

[M]isconduct in office and failure to perform prescribed duties by these members, specifically:

> (1) Misconduct on April 6, 1993 when the members entered into an improper, closed door executive session, in violation of Alaska Law, and discussed the superintendent's decision on the retention of Mary Asper; and
>
> (2) Misconduct on April 6, 1993 when the members refused to support the superintendent's decision on the retention of Mary Asper, which had the effect of forcing the superintendent to resign and a course of action that was not in the best interests of the students of the Haines Borough School District; and
>
> (3) Failure to perform prescribed duties by failing to provide full and open communication between themselves and the voters of the district on then [sic] subject of the retention of Mary Asper; and
>
> (4) Failure to perform prescribed duties by attending an improper, closed door executive session, in violation of Alaska law, [c]oncerning the superintendent's decision on the retention of Mary Asper.

Valley Residents v. State
Case No. 3AN-04-6827 CI

Statement of Grounds

Senator Scott Ogan demonstrated corruption in office by actively promoting legislation, directly benefitting business interests of his employer Evergreen Resources, (Evergreen), instead of protecting the private property and due process rights of his constituents.

Ogan's legislative activities enabled Evergreen to acquire coal bed methane (CBM) leases knowing it would deprive his Mat-Su Valley constituents of actual notice of leases and therefore their constitutional right to due process, demonstrating neglect of duty.

Ogan neglected his duties to constituents by promoting Evergreen in legislative committee, misstated important facts (3-28-03), and was even listed as Evergreen's corporate contact in its legislative materials submitted to the House Oil and Gas Committee hearing on HB 69.

Ogan did not abstain from voting on HB 69, which reduced local control over CBM development that directly benefited his employer, Evergreen.

Ogan's persistent and irreconcilable conflict of interest between his duties to his constituents and his activities as an Evergreen and CBM industry promoter demonstrate his inability to recognize his obvious conflict, a failure in ethical judgment that shows lack of fitness to serve in public office, incompetence, and neglect of duty.

Citizens for Ethical Government v. State, Division of Elections
File No. 663-06-0036

Statement of Grounds

In 1999, VECO supported a $350,000 campaign seeking voter permission to redirect Permanent Fund Dividends to capital projects. The vote was 83% "NO."

Since the 1999 vote, VECO has paid $400,000 to six lobbyists and $195,000 to Ben Stevens, seeking ways to fund government from Permanent Fund earnings, thereby reducing public pressure to demand world market value for Alaska's oil.

Ben Stevens signed an oath, (a contract with Alaska), promising to uphold Alaska's constitution. Alaska's constitution requires Stevens to seek the highest possible payment for Alaska's resources. Stevens then contracted his advice and loyalty to a company seeking to extract Alaska's resources for as little as possible.

Contracting to advocate the position of two clients on matters of each client's mutually shared but conflicting interest is generally considered fraudulent and corrupt. Due to the conflicting goals of such contracts, it is not possible for a single consultant to loyally advocate the goals of both clients. By necessity, one of any two such contracts was signed in bad faith.

Stevens either doesn't understand his ethical boundaries and is therefore "unfit to serve" or he willingly engaged in "corruption" by contracting in conflict with his duties as Senator. Either scenario justifies recall.