IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, DIVISION OF ELECTIONS, and DIRECTOR GAIL FENUMIAI, Appellants, v. RECALL DUNLEAVY, Appellee.	Supreme Court No. S-17706 Superior Court No. 3AN-19-10903CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE JUDGE ERIC A. AARSETH, PRESIDING

BRIEF OF APPELLEE

Jahna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No. 1511099
HOLMES WEDDLE & BARCOTT, PC
701 West 8th Avenue, Suite 700
Anchorage, Alaska 99501
Phone: (907) 274-0666

Susan Orlansky
Alaska Bar No. 8106042
REEVES AMODIO LLC
500 L Street, Suite 300
Anchorage, AK 99501
Phone: (907) 222-7117

Jeffrey M. Feldman
Alaska Bar No. 7605029
SUMMIT LAW GROUP
813 D Street, Suite 200
Anchorage, AK 99501
Phone: (907) 229-1620

Filed in the Supreme Court
for the State of Alaska on
this 9th of March 2020.

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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

AS 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.

AS 15.45.510. Grounds for recall

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

AS 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.

INTRODUCTION

Recall is a constitutional right reserved to the people that is "fundamentally a part of the political process."[1] Consequently, this Court has held that recall statutes, like the statutes governing initiatives and referenda, must be "liberally construed so that the people [are] permitted to vote and express their will[.]"[2] "The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute."[3]

Recall Dunleavy submitted an application alleging three legal grounds for recall authorized under AS 15.45.510—lack of fitness, incompetence, and neglect of duties—based on five separate acts of Governor Michael J. Dunleavy. The Division of Elections, relying on the opinion of Attorney General Kevin Clarkson, rejected the application. The superior court properly held that four of the five allegations should have been certified under Alaska's constitution and statutes.[4]

In seeking to block the recall effort, the Division argues in this appeal, as it did below, that this Court should depart from its settled law and adopt new interpretations of the grounds for recall set out in Alaska statutes. The theme throughout the Division's brief is that certification of Recall Dunleavy's application would convert Alaska to "a de facto

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1 *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 296 (Alaska 1984).

2 *Id.* (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)) (internal quotation marks omitted).

3 *Id.*

4 The superior court struck one of the five allegations as legally insufficient, and that decision is not the subject of appeal.

no-cause political recall system," where an official may be recalled simply "based on disagreement with an officeholder's position on questions of policy." [At. Br. 3]

This is untrue, both as a matter of fact and law. Recall Dunleavy's application does not allege mere policy disagreements as the bases for recall. Three of the four paragraphs allege with particularity serious violations of law, including violations of the Alaska Constitution, and the fourth alleges a serious mistake that is not authorized by law. Alaska's recall statutes, as applied by the courts over the past thirty-five years and by the superior court in this case, require meaningful cause to be alleged with particularity, as well as a review for legal sufficiency. This review ensures that "elected officials cannot be recalled for legally exercising the discretion granted to them by law."[5] The existing case law provides a meaningful bar to recall based on policy decisions alone, and this Court should decline the Division's invitation to reject the consistently-applied common definitions of the statutory grounds in favor of new and more restrictive standards. This Court should affirm the judgment of the superior court.

ISSUE PRESENTED

Does the application for a petition to recall Governor Dunleavy state valid grounds for recall as required by the Alaska Constitution and the legislature?

STATEMENT OF FACTS

Recall Dunleavy is an unincorporated association headed by a recall committee comprised of Joe Usibelli, Sr., Arliss Sturgulewski, and Victor Fischer. [Exc. 3, 8] In the

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

summer of 2019, Recall Dunleavy drafted and began circulating an application to recall the governor. Using just under the 200 words allowed by AS 15.45.500(2), the recall application lists five acts by Governor Dunleavy and alleges that each act meets three of the grounds for recall authorized by AS 15.45.510. [Exc. 1] On September 5, 2019, Recall Dunleavy filed its application with the Division of Elections, supported by tens of thousands of signatures from across the state. [Exc. 4, 9]

On November 4, the Division issued a letter to Recall Dunleavy stating that it had verified 46,405 valid signatures, far more than the 28,501 signatures that were required. [Exc. 332] It determined that other statutory requirements for a proper recall application also were met. [Exc. 331-32] But, in reliance on an opinion letter from Attorney General Kevin Clarkson, the Division determined that "the application is not substantially in the form as required by AS 15.45.550(1)," because, in Clarkson's view, the application fails to state any legitimate ground for recalling the governor. [Exc. 331, 306-30]

Recall Dunleavy filed a complaint in superior court, seeking a declaration that the recall application alleges with particularity actions by the governor that establish authorized grounds for recall. [Exc. 2-7] Recall Dunleavy requested an injunction directing the Division to provide the recall committee with petition booklets. [Exc. 6] Recall Dunleavy sought an expedited schedule for addressing and resolving its claims.[6]

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[6] Stand Tall With Mike (STWM), an independent expenditure group supporting the governor, intervened without objection and agreed to submit its briefs at the same time as the Division. [R. 110-15, 117-19] STWM participated fully in the case throughout the superior court proceedings. After the adverse ruling below, STWM filed a notice of appeal to this Court, which it subsequently dismissed. *See Stand Tall With Mike v. Recall Dunleavy*, No. S-17715, Order on Motion to Dismiss Appeal (Feb. 19, 2020). STWM is

[R. 173-74, 181-83] The parties agreed there are no disputed material facts, and submitted cross-motions for summary judgment as directed.[7]

The superior court heard oral argument on the cross-motions for summary judgment on January 10, 2020. [R. 919-26] Judge Aarseth ruled from the bench at the end of the arguments, and followed the oral ruling with a more detailed written decision on January 14. [R. 924-26; Exc. 286-303] Judge Aarseth determined that the recall application properly alleges four acts that state authorized grounds for recall. [Exc. 295-302] He struck one allegation,[8] and directed that petition booklets with the remaining four bases for recall be made available to Recall Dunleavy no later than February 10.[9] [Exc. 300-01, 303] He signed the final judgment on January 29, 2020. [Exc. 304-05]

STANDARD OF REVIEW

This appeal presents only questions of law to which this Court applies its independent judgment.[10]

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not participating in this appeal. Its actions and arguments in the superior court are not discussed in this brief.

[7] Recall Dunleavy's opening memorandum is at Exc. 12-66. The Division's opposition and cross-motion is at Exc. 128-84. Recall Dunleavy's opposition and reply is at Exc. 190-230. The Division's reply is at Exc. 241-76.

[8] Judge Aarseth struck the allegation that "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to . . . preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities." [Exc. 1, 301] He reasoned that a governor cannot, with his line-item vetoes, prevent the legislature from fulfilling its constitutional duties. [Exc. 301]

[9] Judge Aarseth later stayed that order [R. 959-60], and this Court lifted the stay. *See* Order on Motion to Lift Stay Pending Appeal (Feb. 14, 2020). The second round of signature gathering began on February 21.

[10] *See von Stauffenberg*, 903 P.2d at 1059 n.9.

ARGUMENT

I. WELL-ESTABLISHED PRECEDENT DIRECTS HOW THE RECALL STATUTES SHOULD BE INTERPRETED.

A. Statutes Governing Recall Must Be Construed Liberally In Favor Of Permitting People To Vote.

The Alaska Constitution guarantees the people the right to recall an elected official. Article XI, section 8 provides:

> All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature.

The minutes from the constitutional convention show that delegates differed widely in their views of the legitimate grounds for recall, and in the end they agreed only that some ground should be required; the delegates allowed the legislature to define the grounds.[11] The Constitution thus directs the legislature to prescribe the procedures and grounds for recall, which it has done in AS 15.45 for elected state officials and in AS 29.26 for local officials. The legislature also has provided that substantial compliance with the recall statutes is sufficient.[12]

In *Meiners v. Bering Strait School District*, the first case on recall to reach this Court, this Court reviewed the minutes of the constitutional convention and the local-official recall statute and concluded that, compared to other states, Alaska has opted "to

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[11] *See* 2 Proceedings of the Alaska Constitutional Convention (PACC) at 1207-16 (Jan. 4, 1956); 2 PACC at 1221-40 (Jan. 5, 1956).

[12] *See* AS 15.45.550 ("The director shall deny certification upon determining that (1) the application is not substantially in the required form[.]").

follow a middle ground."[13] This means that the statutes governing recall require cause to compel a recall election; mere disagreements with an officeholder's lawful positions on questions of policy are insufficient.[14] On the other hand, the possible grounds for recall are stated broadly, without express definitions. In the 35 years since *Meiners*, despite judicial observations that the statutory grounds are undefined,[15] the legislature has chosen not to add more detailed definitions.

To effectuate the intent of the constitutional drafters and the legislature, this Court held in *Meiners* "that statutes relating to the recall, like those relating to the initiative and referendum, 'should be liberally construed so that the people [are] permitted to vote and express their will[.]' . . . The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute."[16]

The legislature's failure to adopt more specific definitions for either the state or local-official recall statute, while repeatedly modifying other portions of the recall

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13 687 P.2d at 294. Alaska is one of seven states that require cause to initiate a recall election; another twelve states do not require cause. *See* Zachary J. Siegel, Comment, *Recall Me Maybe?: The Corrosive Effect of Recall Elections on State Legislative Politics*, 86 U. COLO. L. REV. 307, 315 (2015). Each jurisdiction has its own statutory structure for recall. The state with the recall structure most similar to Alaska's is Kansas, where the legislature appears to have modeled its statutes on Alaska's. *See Unger v. Horn*, 732 P.2d 1275, 1280 (Kan. 1987); *see also* Kan. Stat. Ann. §§ 25–4301 to 25–4331.

14 *See Meiners*, 687 P.2d at 294.

15 *See id.* at 296; *Coghill v. Rollins*, 4FA-92-1728CI, Memorandum Decision (Alaska Super. Sept. 14, 1993) (hereinafter *Coghill*) at Exc. 118.

16 *Meiners*, 687 P.2d at 296 (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (internal quotation marks omitted).

statutes,[17] suggests an acceptance of the judiciary's approach to interpreting the recall statutes.[18] This Court has made clear it would defer to the legislature if the legislature acted to clarify the statutes, but this Court did not deem it proper for the courts to do that editing: "The political nature of the recall makes the legislative process, rather than judicial statutory interpretation, the preferable means of striking the balances necessary to give effect to the Constitutional command that elected officers shall be subject to recall."[19]

Meiners' analysis of the constitutional convention minutes is accurate.[20] The Division's interpretation of the drafters' intent is not. [At. Br. 9-12] The minutes of the convention reflect no consensus among the delegates about how demanding the grounds for recall should be. Some delegates favored having no grounds at all; that suggestion was

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17 For amendments to AS 15.45.470-.720 after *Meiners*, see ch. 13, § 53, SLA 2019; ch. 38, §§ 5-6, SLA 2006; ch. 2, §§ 46-54, FSSLA 2005; ch. 82, §§ 69-70, SLA 2000; ch. 21, §§ 59-64, SLA 2000. For amendments to AS 29.26.240-.360 after *Meiners*, see ch. 80, §§ 14-19, SLA 1989; ch. 74, § 9, SLA 1985.

18 The Division asserts that the superior court erred in giving weight to the legislature's failure to modify the grounds for recall after various courts articulated definitions. [At. Br. 34] The superior court did not err. Although legislative inaction is never dispositive on a question of legislative intent, this Court repeatedly has stated that the legislature is presumed to be aware of pertinent court decisions when it amends a statute, and this Court previously has interpreted legislative inaction as tacit approval of judicial decisions construing the unamended provisions. *See Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1123 & n.41 (Alaska 2017) (citing *Joseph v. State*, 293 P.3d 488, 492 (Alaska App. 2012)); *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 913 (Alaska 2016) (citing *Young v. Embley*, 143 P.3d 936, 945 (Alaska 2006)). The Department of Law has recognized and asked this Court to apply this rule of construction in other cases. *E.g.*, *Williams v. State*, Nos. S-17483/17474, Brief of State as Cross-Petitioner at 28 (filed Sept. 25, 2019).

19 *Meiners*, 687 P.2d at 296.

20 *Id.* at 294-95.

voted down.[21] But so was the suggestion to include in the constitution that the "[g]rounds for recall are malfeasance, misfeasance, nonfeasance, or conviction of a crime involving moral turpitude."[22] The Division highlights comments from a few delegates who expressed the view that recall should be allowed only for serious misconduct.[23] [At. Br. 9-12] But, when the debate concluded, the majority did not adopt that view. The majority did *not* vote that the grounds for recall should set a "high-bar," not a "low-bar" [At. Br. 9-10], or that "recall should be reserved for consequential matters." [At. Br. 12] The majority agreed only that grounds should be defined, rather than allowing recall for any reason that dissatisfied citizens selected, and that the legislature, rather than the drafters, should define both the grounds and the procedures for recall.[24]

Subsequent to *Meiners*, three superior court judges have addressed recall of state officials,[25] and the Department of Law, giving advice to the Division of Elections, wrote

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21 2 PACC at 1232-37 (Jan. 5, 1956) (amendment proposed by Delegate V. Fischer); *see Meiners*, 687 P.2d at 295.

22 *See* 2 PACC at 1221-22 (Jan. 5, 1956); Alaska Constitutional Convention, Comm. on Direct Legislation, Committee Proposal No. 3 (Dec. 19, 1955) (Alaska State Archives 320.3); *see also Meiners*, 687 P.2d at 295.

23 *See Meiners*, 687 P.2d at 295.

24 2 PACC at 1222, 1240 (Jan. 5, 1956) (amendment by Delegate R. Rivers); *see Meiners*, 687 P.2d at 295.

25 For ease of reference, copies of these decisions were provided to the superior court and are reprinted in the excerpt:

Citizens for Ethical Gov't v. State, Div. of Elections, No. 3AN-05-12133CI, Transcript of Proceedings (Jan. 4, 2006) (hereinafter *Citizens for Ethical Gov't*) (Superior Court Judge Craig Stowers), at Exc. 83-102, *appeal dismissed as moot*, Supreme Court No. S-12208 (Alaska June 20, 2006).

opinions in a series of cases.[26] Prior to this case, those opinions were consistent with the published and unpublished judicial opinions in this state. In drafting its recall application, Recall Dunleavy relied on the decisions of this Court, decisions of the superior courts which applied this Court's cases, and opinions of the Department of Law. None of those analyses interpreted the statutes as the Division now urges in this case.

The Division's opening brief never acknowledges the rule of liberal construction this Court adopted for recall statutes.[27] The Division's efforts to push a less liberal

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Valley Residents for a Citizen Legislature v. State, Div. of Elections, No. 3AN-04-06827CI, Order Regarding Pending Motions (Aug. 24, 2004) (hereinafter *Valley Residents*) (Superior Court Judge Sharon Gleason) at Exc. 67-82.

Coghill (Superior Court Judge Richard Savell) at Exc. 103-27, *appeal dismissed as moot, Coghill v. Rollins*, Supreme Court No. S-6108 (Alaska Apr. 12, 1995) (unpublished) (hereinafter *Coghill MO&J*) at Exc. 366-71.

[26] Attorney General opinions addressing applications to recall a state official include:

Letter from Michael Geraghty, Att'y Gen., to Gail Fenumiai, Dir., Div. of Elections, *Re: Lindsey Holmes Recall Application*, 2013 WL 6593253 (Dec. 6, 2013) (hereinafter *Holmes Recall Op.*).

Letter from John Burns, Att'y Gen., to Gail Fenumiai, Dir., Div. of Elections, *Re: Review of Application for Recall of House Representative Kyle Johansen*, 2011 WL 5848617 (Oct. 3, 2011) (hereinafter *Johansen Recall Op.*).

Letter from Michael Barnhill, Assistant Att'y Gen., to Laura Glaiser, Dir., Div. of Elections, *Re: Review of Application for Recall of Senator Ben Stevens*, 2005 WL 2300397 (Sept. 7, 2005) (hereinafter *Stevens Recall Op.*), *appealed to superior court as Citizens for Ethical Gov't.*

Letter from John Sedor, independent counsel retained to advise the Div. of Elections, to Laura Glaiser, Dir., Div. of Elections, *Legal Review of Recall Application Re: Senator Ogan* (April 8, 2004) (hereinafter *Ogan Recall Op.*) at Exc. 338-65, *appealed to superior court as Valley Residents*.

[27] In the superior court, the Division conceded the rule of liberal construction in its reply memorandum [Exc. 257], as did the Attorney General in his opinion to the Division [Exc. 312], but neither then applied it.

approach and to impose new requirements are inconsistent with this Court's cases requiring liberal construction and with the legislature's direction that substantial compliance is sufficient. The suggested new requirements have no support in any prior case or the legislative history of the recall statute, and it would be fundamentally unfair to change the rules *after* a recall application has been drafted and circulated in reliance on previously announced definitions and standards.[28]

B. All Facts Alleged Must Be Accepted As True When Reviewing A Recall Application.

Alaska Statute 15.45.550(1) directs the Director of the Division of Elections to deny a recall application only if "the application is not *substantially* in the required form."[29] In evaluating the legal sufficiency of an application, this Court looks solely to the allegations on which the application relies.[30] This analysis is strictly legal because the Division—

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[28] *See Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (explaining, in an initiative case, that one reason for not departing from precedent is that "the sponsors . . . have relied on our precedents in preparing the present proposition and undertaking the considerable expense and time and effort needed to place it on the ballot").

[29] AS 15.45.550(1) (emphasis added). Although the local-official recall statutes have no comparable provision, the *Meiners* Court rejected interpreting those statutes without "substantial compliance." *See* 687 P.2d at 294 (a middle-ground approach allows substantial compliance and does not treat recall as "special, extraordinary, and unusual," in contrast to an approach that requires strict construction where doubts are resolved in favor of the officeholder (quoting *State ex rel. Palmer v. Hart*, 655 P.2d 965, 967 (Mont. 1982))).

[30] Although the 200-word statement of grounds alone should be considered when reviewing legal sufficiency, with its superior court briefing, Recall Dunleavy submitted additional information to provide context in understanding what the governor reasonably was aware of and understood when he committed the acts at issue in the recall petition. [Exc. 13, 192, 232] This Court previously has considered information beyond a 200-word statement of grounds to provide context. *See von Stauffenberg*, 903 P.2d at 1056-58, 1060 & nn.2, 4; *see also Phillips v. Hawthorne*, 494 S.E.2d 656, 659 (Ga. 1998) ("The quantum

which is tasked with certifying or denying the recall application—must assume all factual allegations in a recall summary are true.[31] If the Division's decision is appealed, "this [C]ourt is 'in a position similar to a court ruling on a motion to dismiss a complaint for failure to state a claim . . . [and this Court] must [therefore] take the allegations as true[.]' "[32] "If [an allegation of fact] is not true, the [officials] may say so in their rebuttals."[33] It is for the voters to decide whether those facts are accurate and whether they support recalling the official.[34]

C. Particularity Requires Both Factual And Legal Sufficiency.

Alaska Statute 15.45.500(2) requires that "the grounds for recall [be] described in particular in not more than 200 words." Although this Court has not reviewed the particularity requirement in the context of recalling a state official, two decisions interpret and apply the

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and specificity of facts, i.e., the 'reasonable particularity' . . . that will be needed to provide this 'proper notification' must necessarily vary in each case with the nature of the controversy and the community in which it arose." (citation omitted)). The superior court confirmed it considered additional materials only for context, and not to assess the legal sufficiency of the petition grounds, as was Recall Dunleavy's intent. [Exc. 284-85, 289, 296-97]

31 *Meiners*, 687 P.2d at 300-01 n.18.

32 *von Stauffenberg*, 903 P.2d at 1059 (second and fourth alterations in original) (quoting *Meiners*, 687 P.2d at 300-01 n.18).

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

34 *Id.* at 300-01 n.18 ("We emphasize that it is not our role, but rather that of the voters, to assess the truth or falsity of the allegations in the petition."); *see also Unger v. Horn*, 732 P.2d 1275, 1277 (Kan. 1987) ("The electors are as qualified to determine the capability and efficiency of their elected officials, after giving those officials an opportunity to perform the duties of their offices, as they were when they first selected the officials to fill the positions.").

particularity requirement in the local-official recall context.[35] In reviewing for particularity, this Court looks to ensure that the factual allegations are sufficiently particular to provide reasonable notice to the officeholder, and that the grounds are legally sufficient and do not allege an act within the officeholder's discretion.[36]

1. Factual sufficiency

This Court confirmed in both *Meiners* and *von Stauffenberg* that the particularity requirement is effectively a notice-pleading standard with "[t]he purpose of . . . giv[ing] the officeholder a fair opportunity to defend his conduct in a rebuttal limited to 200 words."[37] Assuming all alleged facts to be true, and applying the Alaska Civil Rule 12 legal sufficiency standard of review, this Court considers whether a particular alleged act "is not [so] impermissibly vague" that the official cannot respond.[38] The Kansas Supreme Court, applying an identical statutory particularity requirement, explained the purpose in the same way: "The grounds stated in a recall petition must be specific enough to allow the official an opportunity to prepare a statement in justification of his or her conduct in office."[39]

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35 *See von Stauffenberg*, 903 P.2d at 1060; *Meiners*, 687 P.2d at 300-02. As the superior court noted, the particularity requirements for recall of state and local officials are now the same. [Exc. 289-90] *Compare* AS 15.45.500(2) ("the grounds for recall described in particular in not more than 200 words"), *with* AS 29.26.260(a)(3) ("a statement in 200 words or less of the grounds for recall stated with particularity").

36 *See von Stauffenberg*, 903 P.2d at 1060; *Meiners*, 687 P.2d at 300-302.

37 *von Stauffenberg*, 903 P.2d at 1060 (quoting *Meiners*, 687 P.2d at 302).

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

39 *Unger*, 732 P.2d at 1281 (applying Kan. Stat. Ann. § 25–4320(a)(2) ("the grounds for recall described in particular in not more than 200 words")).

In *Meiners*—when local-official recall proponents were not limited to 200 words and specific instances had to be alleged[40]—the Court concluded that two of the three allegations satisfied this requirement, including the allegations that "the board members failed to perform their prescribed duty to 'employ' a superintendent" and that other conduct violated "state public records and public meetings laws."[41]

The Division spends much time arguing that the notice-pleading standard argued by Recall Dunleavy is something less than or different from sufficient notice that gives the officeholder a fair opportunity to defend his conduct as discussed in *Meiners*. [At. Br. 20-23, 25-29] But the crux of determining whether an allegation is too "impermissibly vague" is whether the officeholder has enough information to respond; that is a notice-pleading standard.[42] Not every fact need be alleged, just sufficient facts so that the officeholder can respond.

To buttress its argument for a heightened particularity standard, the Division argues the governor has a due process right to holding office. [At. Br. 25-29] *Meiners* rejected this claim and held that "a particular person's continuance in office" is "not a reason for [the Court] to frustrate the recall process by construing statutes more narrowly than we do statutes

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40 *See* former AS 29.28.150(a)(3) (1984) (requiring "a statement of the grounds of the recall stated with particularity as to specific instances" without any word limit) [Exc. 374]; *see also Meiners*, 687 P.2d at 291-92 (restating the statement of grounds, which contains over 500 words).

41 *Meiners*, 687 P.2d at 300-02.

42 *Id.* at 302; *see also von Stauffenberg*, 903 P.2d at 1059.

relating to initiative and referendum."[43] No recall cases from other jurisdictions support the Division's due process argument, either.[44] All elected officials in Alaska serve subject to the voters' constitutional right to recall. The legislature remains free to change the procedures and grounds for recall, and can do so without fear of offending due process because the people's right to recall contained in the Alaska Constitution expressly is subject to the procedures and grounds set by the legislature. Elected officials are entitled to the notice prescribed by statute, no more and no less.

The Division also argues that every relevant fact and an explanation of why the conduct is sufficient to support recall must be included in the petition. This argument is incorrect and ignores the governing standard. The Division and this Court must assume that the facts alleged in the application are true for purposes of reviewing for both factual and legal sufficiency.[45] If the facts describe a violation of law or another act outside the elected official's discretion,[46] and those facts are assumed to be true, then an explanation of *why* the

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43 *Meiners*, 687 P.2d at 296 n.7.

44 *See, e.g.*, *Sproat v. Arnau*, 213 So.2d 692, 692-93 (Fla. 1968) (rejecting a constitutional challenge to the recall statutes on due process grounds and upholding a recall petition that reflected full compliance with the legislative charter requirements); *Brown v. Wetherington*, 300 S.E.2d 680, 682-83 (Ga. 1983) (recall statute satisfies due process by providing notice and an opportunity to be heard); *Bonner v. Belsterling*, 137 S.W. 1154, 1157 (Tex. Civ. App. 1911) ("The office of member of the board of education . . . is not 'property' within the meaning of that word as used in the state and federal Constitutions. Offices are created for the public good, at the will of the legislative power, with such privileges and emoluments attached as are believed to be necessary to make them accomplish the purposes designed.").

45 *Meiners*, 687 P.2d at 300-01 n.18.

46 *See infra* Section I.C.2 for a discussion on legal sufficiency.

facts amount to a violation of law is not required. For example, as discussed more fully below, Recall Dunleavy did not simply allege a missed deadline in the appointment of a judge; the application alleges an *intentional refusal* to appoint by the statutory deadline. [Exc. 1] And in the allegation regarding the use of state funds on campaign mailers, the application alleges "use of state funds *for partisan purposes*." [Exc. 1 (emphasis added)] The Division calls these allegations "conclusory," but, with a notice-pleading standard where all facts must be assumed true, such allegations are factually sufficient.

The Division further argues that, beside informing the target official of the allegations against him, the 200-word statement must give complete notice to the Division of Elections and the voters. [At. Br. 23-25, 29-32] Unquestionably, the application must frame the issue for the Division, so it can review the sufficiency of the allegations—i.e., whether an allegation fails to state a ground or is so impermissibly vague that the official cannot respond. Attorney General Clarkson's lengthy opinion makes clear that Recall Dunleavy's application provided more than enough information for the Division and its attorneys to conduct their legal analysis. [Exc. 306-30]

The Division is wrong that the application alone, in 200 words, must give complete notice to the voters. The statute provides that, if the governor does not agree with the recall proponents' characterization of his actions in their petition, his remedy is to use his own 200 words to explain, excuse, or defend his conduct.[47] A close reading of the Division's argument

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[47] *See Meiners*, 687 P.2d at 301 ("Where the petition merely characterizes the law in a way different than the official (or his or her attorney) would prefer, he or she has an opportunity to put his or her rebuttal before the voters, alongside the charges contained in

concedes this point: "Voters need to understand the allegations sufficiently to determine, *in light of the subject's rebuttal statement*, how to vote." [At. Br. 29 (emphasis added)] But in the next breath, the Division contradicts this concession and asserts that "The statement may be all that the voters see, so it must stand on its own." [At. Br. 31] As the presence of independent expenditure group Stand Tall With Mike in this lawsuit shows, there will be campaigns on both sides educating voters prior to the special election. [R. 117-19] Recall Dunleavy's 200-word statement frames the issues for voters, and gives Governor Dunleavy notice of the grounds more than sufficient to craft his rebuttal statement and campaign against his recall.

In sum, the Division appears to want a different statutory scheme for recall than the one Alaska has. Other states, like Washington, have statutes that require far more specificity in the recall application.[48] But other states' statutory schemes are fundamentally different in other ways, including not having a 200-word limit or requiring 10 percent of the voters to sign the application.[49] As this Court stated in *Meiners*, Alaska's courts should not impose restrictions on recall not found in Alaska's statutes.[50]

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the petition."); *see also id.* ("[I]t is the responsibility of the voters to make their decision in light of the charges and rebuttals.").

[48] Wash. Rev. Code § 29A.56.110 ("The [recall application] shall state the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complained of, . . . and be verified under oath. . . .").

[49] Washington, for example, has no word limit and allows one person to file a recall application. Wash. Rev. Code §§ 29A.56.110, .130.

[50] *See Meiners*, 687 P.2d at 296. If this administration desires to change recall law, it can seek a legislative change.

2. Legal sufficiency

As noted by the Division, the particularity requirement requires both factual and legal sufficiency. [At. Br. 23-25] In addition to requiring facts sufficient to give the elected official notice, the Division (and then the judiciary) reviews a statement of grounds for legal sufficiency to ensure that the application does not allege a violation of "non-existent laws"[51] so that "elected officials cannot be recalled for legally exercising the discretion granted to them by law."[52]

Virtually all of the decisions rejecting allegations for lack of particularity do so because the applications alleged only behavior that was legal. For example, in *von Stauffenberg*, this Court determined that the petition "allege[d] violation of totally non-existent laws."[53] Because school board members were entitled to go into executive session, and doing so did not violate the Open Meetings Act, the recall application failed to allege a ground with particularity that could go to the voters.[54] In *Citizens for Ethical Government*, the allegations also failed because the alleged conduct—working as a paid consultant—was not illegal.[55] Likewise, in *Coghill*, Judge Savell found an allegation lacked particularity because it stated only that Lieutenant Governor Coghill had engaged in "unfounded public accusations of criminal activity of recall staff," which was, at most, "a conclusory allegation that Coghill has

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51 *Id.* at 301.

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

53 *Id.* at 1060 & n.13 (citing *Meiners*, 687 P.2d at 301).

54 *Id.* at 1059-60.

55 *Citizens for Ethical Gov't* at Exc. 91-93 (concluding there were no legal grounds for recall because it is "perfectly legal conduct" for a sitting legislator to be a paid consultant).

made statements against people with whom he disagrees. This is not an unusual event in the world of politics."[56]

In contrast, in *Valley Residents*, Judge Gleason found that the allegation that Senator Ogan took legislative action in favor of his employer in violation of the Legislative Ethics Act stated valid grounds of corruption, neglect of duties, and lack of fitness. [Exc. 75-78] "Unlike *Von Stauffenberg*, the alleged conduct of Senator Ogan that formed the basis of the petition is not expressly authorized by statute. The recall petition has sufficient particularity in these circumstances." [Exc. 78 (emphasis omitted)]

To summarize, under Alaska law as consistently applied by the courts and attorneys general, an official cannot be recalled for acts that are consistent with law and therefore within the elected official's discretion. Policy disagreements alone are not enough. Although the Division spends most of its brief arguing for heightened standards to ensure recall is only for meaningful grounds in Alaska, this Court's legal sufficiency review serves that purpose.

D. Statutory Grounds For Recall Should Be Interpreted In A Commonsense Manner, Consistent With Past Judicial Decisions And Opinions By The Department Of Law.

In AS 15.45.510, the legislature established four authorized grounds for recalling an elected state official. This case involves three of them: lack of fitness, incompetence, and neglect of duties. This Court has never interpreted the words of AS 15.45.510, but it

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[56] *Coghill* at Exc. 125-26; *see also Holmes Recall Op.*, 2013 WL 6593253, at *8-10 (recommending rejection of recall application because the assertion that the representative switched parties did not allege any illegal conduct); *Johansen Recall Op.*, 2011 WL 5848617, at *11-12 (recommending rejection of recall application because the assertion that the representative forfeited his leadership position did not allege any illegal conduct).

has twice addressed grounds governing recall of local officials.[57] In *Meiners*, this Court examined allegations of "failure to perform prescribed duties," which is similar to the "neglect of duties" ground at issue in this case.[58] In *von Stauffenberg*, the petition alleged "misconduct in office," which is not a ground directly comparable to any of the three grounds asserted in this case.[59]

The superior courts and the Department of Law (prior to this suit) consistently have treated the principles established in *Meiners* and *von Stauffenberg* as applicable when evaluating recall petitions under AS 15.45.510.[60] This is proper. Both the state and local-official recall statutes were adopted by the legislature to fulfill the obligation delegated to it by the Alaska Constitution. Both are subject to the same philosophy and intent expressed by the drafters. And neither the constitutional convention minutes nor the legislative history for either AS 15.45.510 or AS 29.26.250 reflects any intent to make the standards for recall different, notwithstanding the legislature's choice of slightly different words to describe the authorized grounds for recall.[61]

When statutory terms are not given express definitions by the legislature, this Court

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57 *See von Stauffenberg*, 903 P.2d at 1057-60; *Meiners*, 687 P.2d at 298-302.

58 *See Meiners*, 687 P.2d at 298-302.

59 *See von Stauffenberg*, 903 P.2d at 1057-60.

60 *See Citizens for Ethical Gov't* at Exc. 86, 89, 91, 93-94, 96-97; *Valley Residents* at Exc. 72, 77-80; *Coghill* at Exc. 113-20, 122; *Holmes Recall Op.*, 2013 WL 6593253, at *2-3; *Johansen Recall Op.*, 2011 WL 5848617, at *3-4, *9; *Stevens Recall Op.*, 2005 WL 2300397, at *4-6, *10-11, *13; *Ogan Recall Op.* at Exc. 342-53, 356.

61 *See* 2 PACC at 1207-16 (Jan. 4, 1956); 2 PACC 1221-22, 1234-40 (Jan. 5, 1956); *see also Meiners,* 687 P.2d at 295 (observing the absence of any legislative history concerning the legislature's choice of grounds for recall in Title 29).

repeatedly has held that the courts should "construe statutory terms according to their common meaning."[62] The courts' goal is always to "give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[63] Dictionaries can "provide a useful starting point."[64]

As discussed below, the definitions of the statutory grounds adopted by the superior court in this case are based on the common understandings of the terms. Beyond that, they are consistent with *Meiners* and solidly supported both by decisions of other superior court judges and the Department of Law's analyses applying the same language in other recall cases. The Division minimizes the significance of the earlier superior court decisions, because the parties in those cases agreed on the definitions that the courts should use. [At. Br. 34] The Division ignores that it was one of the parties in all those cases; its prior support of the definitions indicates that the Division once believed each definition has sufficient "teeth" to ensure that recall elections are allowed only when applications allege cause as required by AS 15.45.510.[65] Applying the definitions it now challenges, the

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62 *Alaska Pub. Defender Agency v. Superior Court*, 450 P.3d 246, 253 (Alaska 2019) (quoting *Alaska Ass'n of Naturopathic Physicians v. State, Dep't of Commerce, Cmty. & Econ. Dev.*, 414 P.3d 630, 635 (Alaska 2018)); *see also Alaska Spine Ctr., LLC v. Mat-Su Valley Med. Ctr., LLC*, 440 P.3d 176, 181 (Alaska 2019).

63 *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019) (quoting *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1234 (Alaska 2003)).

64 *Alaska Pub. Defender Agency*, 450 P.3d at 253 (quoting *Alaska Ass'n of Naturopathic Physicians*, 414 P.3d at 635).

65 *See Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014) ("[This Court] give[s] more deference to agency interpretations that are longstanding and continuous." (internal quotation marks omitted)).

Division in the past has both approved[66] and rejected[67] recall applications.

One theme runs through many of the Division's arguments on defining the grounds for recall, so it can be addressed here, before turning to the specific grounds. The Division contends repeatedly that the application must show, not just misconduct, but also harm resulting from the target's actions. [At. Br. 36, 38-40, 43-47] But the Division does not show how the requirement of alleging harm is supported by the statute, the constitution, or precedent. It argues principally that a showing of harm is necessary to ensure that recall is based on cause. This is a new position for the Division, not previously taken in other cases. The Division approved the application that led to the *Valley Residents* case, even though it did not allege any serious consequence as a result of a senator's failure to recognize and avoid a conflict of interest. [Exc. 359-64; At. Br. Appx. 5] The Division successfully defended this view in court; Judge Gleason upheld the determination that the allegations of neglect of duties and unfitness for office were sufficient. [Exc. 68, 75-76] Similarly, Judge Savell found an allegation of incompetence legally sufficient when the recall application asserted that the lieutenant governor had admitted his unfamiliarity with the election laws he was charged with administering, even though there was no allegation that his ignorance caused harm in any election. [Exc. 121-25]

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66 *See Valley Residents* at Exc. 67-82; *see also Holmes Recall Op.*, 2013 WL 6593253, at *6 & nn.40-48 (listing other cases where the Division found an application satisfied one or more of the similar grounds for recall of a local official).

67 *See Citizens for Ethical Gov't* at Exc. 83-102; *Coghill* at Exc. 103-27 (upholding and reversing in part the Division's decision rejecting application); *Holmes Recall Op.*, 2013 WL 6593253, at *8-10; *Johansen Recall Op.*, 2011 WL 5848617, at *11-12; *Stevens Recall Op.*, 2005 WL 2300397, at *13-14.

The Alaska legislature has not seen fit to add a requirement of harm to the recall statutes, as other states have done.[68] And, as this Court has recognized, the courts should not legislate by judicial decision.[69]

The following sections show that, without adding a requirement of alleging specific harms, the definitions used by the superior court are all appropriate definitions for this Court to use.

1. Lack of fitness

The superior court used the definition of lack of fitness developed by Judge Gleason: Lack of fitness means "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office." [Exc. 292 (quoting *Valley Residents* at Exc. 76)] This definition was suggested by the Division. [Exc. 76; *see also* Exc. 357-58, 364] Then-Judge Stowers used the same definition in analyzing an application to recall a state senator [Exc. 87-88], and Judge Savell used a similar definition in *Coghill*.[70] [Exc. 125] The Attorney General's Office used Judge Gleason's definition in its analysis of the recall

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[68] *See* Va. Code 24.2-233(1) ("Upon petition, a circuit court may remove from office any elected officer . . . [f]or neglect of duty, misuse of office, or incompetence in the performance of his duties when that neglect of duty, misuse of office, or incompetence in the performance of duties *has a material adverse effect upon the conduct of the office*[.]" (emphasis added)).

[69] *See Meiners*, 687 P.2d at 296.

[70] Judge Savell did not find that the recall application stated facts that established unfitness. [Exc. 125-26] But he did conclude that the application stated a ground for recall based on incompetence, and Coghill appealed that ruling. *See infra* at 25. This Court dismissed the appeal as moot, but, in that context, commented that it could add little to the common definition of "unfitness" that Judge Savell used. [Exc. 370]

application involving Senator Stevens in 2005,[71] and yet again in its 2013 analysis of the recall application involving Representative Holmes, the Department's most recent state recall opinion preceding this case.[72]

Ignoring precedent and its own previous positions, the Division now contends that "lack of fitness" should be interpreted to mean "lack of physical or mental capacity to perform the official's functions." [At. Br. 35] Besides being an unwarranted departure from the definition the Division has endorsed repeatedly in the past, the proposed narrow interpretation is inconsistent with common usage of the term "unfit," it is inconsistent with the principle of liberal construction, and it is unsupported by legislative history. Had the legislature intended that lack of fitness mean only "physically or mentally unfit," it easily could have drafted the first ground in AS 15.45.510 in exactly those terms—but the legislature did not do that. It left "lack of fitness" broader and undefined.

Another reason to reject the Division's definition is that, for the governor's position at least, a different section of the constitution deals explicitly with physical and mental disability, and provides a faster, simpler, and more certain way than recall to remove a disabled governor.[73] The drafters of the constitution plainly did not envision recall as the way to deal with a governor's physical or mental disability.

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71 *See Stevens Recall Op.*, 2005 WL 2300397, at *13-14.

72 *See Holmes Recall Op.*, 2013 WL 6593253, at *8-9.

73 Alaska Const. art. III, § 12. For other state officeholders, article II, section 12 of the Alaska Constitution gives each body in the legislature the express ability to "expel a member with the concurrence of two-thirds of its members." If a state legislator were to become physically or mentally unfit and did not voluntarily resign, this is the easier and more likely path of removal.

Counsel advising the Division in the *Valley Residents* matter rejected the claim that a broad definition of unfitness allows a purely "political model of recall." [Exc. 357] He reasoned that the way to ensure that recall remains for cause is to require a particular allegation of unfitness manifested by actions in the official's conduct of his office. [Exc. 357-58] This entirely sensible analysis refutes the Division's claim that more is needed to prevent recall elections from being held without cause.

A change to the definition also is not needed because the legal sufficiency review by the Division (and potentially the courts) ensures that "elected officials cannot be recalled for legally exercising the discretion granted to them by law."[74] Every court applying the definition of unfitness that Judge Aarseth adopted carefully scrutinized the recall application, and, if the application did not allege a violation of law or other clearly improper conduct in office, the court rejected the application under this ground.[75] This history belies the Division's claim that defining lack of fitness as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office" transforms the statute into one permitting no-cause recall. [At. Br. 35-36]

The definition of unfitness that has been accepted in the past by the Division and other courts is the appropriate definition for this Court to apply.

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74 *von Stauffenberg*, 903 P.2d at 1060; *see also supra* Section I.C.2 (discussing legal sufficiency).

75 *See Citizens for Ethical Gov't* at Exc. 94-100; *Valley Residents* at Exc. 76; *Coghill* at Exc. 125-26.

2. Incompetence

The superior court accepted the definition of incompetence first adopted by Judge Savell in *Coghill*: incompetence "must relate to a lack of ability to perform the official's required duties." [Exc. 123; *see* Exc. 293-94] For this commonsense definition, Judge Savell drew on the definition of "incompetency" in Black's Law Dictionary. [Exc. 122-23]

In *Coghill*, the recall proponents asserted that the lieutenant governor's admitted unfamiliarity with the election laws stated a ground for recall based on incompetence. [Exc. 120] Judge Savell agreed. [Exc. 124-25] Coghill appealed that ruling to this Court, but the appeal was mooted when the recall proponents suspended their efforts to gather signatures. [Exc. 366-71] This Court issued an unpublished decision dismissing the appeal without addressing the merits; in that context, this Court observed that there was little it could add to the common definition of incompetence that the superior court had used that could assist recall campaigners or the Division in future cases. [Exc. 370-71]

The superior courts' definition of incompetence reflects common usage.[76] As such, it was accepted by independent counsel advising the Division in 2004,[77] and by the

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[76] *See Coghill* at Exc. 122 (quoting *Incompetency*, BLACK'S LAW DICTIONARY (6th ed. 1990)); *see also Ogan Recall Op.* at Exc. 356 (quoting *Incompetent*, NEW OXFORD AMERICAN DICTIONARY (2001) ("[N]ot having or showing the necessary skills to do something successfully[.]"); *Incompetent,* MERRIAM-WEBSTER.COM, www.merriam-webster.com/ (last visited Mar. 3, 2020) ("[L]acking the qualities needed for effective action[.]").

[77] *See Ogan Recall Op.* at Exc. 356-57.

Department of Law in a 2011 analysis of a recall application.[78] Before this case, it does not appear that the Department has argued for rejecting the definition used in *Coghill*.

In this appeal, however, the Division prefers the definition that Attorney General Clarkson proposed—that incompetence means "lack [of] sufficient knowledge, skill or professional judgment" [At. Br. 36; *see also* Exc. 319]—though the Division acknowledges that this definition is consistent with the definition used by Judge Savell and Judge Aarseth. [At. Br. 36-37]

The Division also asks this Court to add to any definition a requirement that the application either explicitly allege that the official lacks the basic knowledge or qualifications for his position or explicitly allege why a mistake by the official demonstrates his inability to perform official duties. [At. Br. 38] These proposed drafting requirements are not found in the statutes, and the legislature's adoption of a 200-word limit for any recall application should make the courts leery of adding requirements for explicit explanations that are not mandated by statute.

The Division asserts that, absent such explicit explanations, "incompetence" becomes a ground for recall that could be established by alleging any mistake, no matter how trivial or inconsequential. [At. Br. 33, 37] This is not accurate. The requirement to review for legal sufficiency ensures that "elected officials cannot be recalled for legally exercising the discretion granted to them by law."[79] In other words, an elected official may

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78 *See Johansen Recall Op.*, 2011 WL 5848617, at *11.

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

have discretion to make trivial and inconsequential mistakes—no one can be expected to be perfect—but no official has discretion to make serious mistakes. The allegations approved here are neither trivial nor inconsequential. The recall application lists four *serious* errors by the governor in performing his official duties, each of which (taken as true) evidences that Governor Dunleavy lacks the ability to perform his required duties (using Judge Savell's definition) or lacks sufficient knowledge, skill, or professional judgment to fulfill his duties (using the Division's definition).

There also is no basis for adopting a "harmless error" rule, as the Division urges. [At. Br. 38-39] As discussed above, a requirement of alleging specific harm has never been grafted onto the statutory grounds before and has no basis in case law or legislative history.[80]

The commonsense definition of incompetence that the superior court used, which other courts and the Department of Law have used in other cases, does not permit "no-cause recall," and is an appropriate definition for this Court to use.

3. Neglect of duties

The superior court used the commonsense definition of neglect of duty previously used by Judge Gleason, at the suggestion of the Division in *Valley Residents*: Neglect of duty means "the nonperformance of a duty of office established by applicable law." [81]

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[80] Even if some of the errors alleged later were corrected, that would not diminish the incompetence manifested in making the mistake. To use the Division's analogy, to allow a later correction to undermine an allegation of incompetence would be like saying a surgeon who made a serious mistake is not incompetent because the patient recovered.

[81] *See also Ogan Recall Op.* at Exc. 356.

[Exc. 294-95 (quoting *Valley Residents* at Exc. 75)] The Department of Law, in advising the Division, used this definition in at least one other case as well.[82]

Meiners addressed the very similar ground for recall of a local official stated in former AS 29.28.140 (now renumbered as AS 29.26.250), which authorizes recall for "failure to perform prescribed duties."[83] This Court did not see a need to develop a specific definition beyond the statutory language. It interpreted the statutory phrase broadly and rejected arguments that the phrase should apply only to alleged failures to perform a duty specifically described by another statute; instead, this Court determined, "legal principles of general application . . . are the measure of the 'prescribed duties' which a recall petition must allege a failure to perform."[84]

The Division argues that "neglect of duties" in AS 15.45.510 is a more demanding standard than "failure to perform prescribed duties" in AS 29.26.250. [At. Br. 39] However, neither case law nor legislative history supports the claim that the legislature intended the third ground in AS 15.45.510 to be harder to establish than the third ground in AS 29.26.250. In *Meiners*, this Court remarked on the lack of legislative history concerning the choice of grounds for recall stated in Title 29.[85] Nothing explains the

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82 *See Johansen Recall Op.*, 2011 WL 5848617, at *12 (quoting *Valley Residents* at Exc. 75).

83 *See Meiners*, 687 P.2d at 298-302.

84 *Id.* at 301; *see also id.* at 300 ("[An elected official's] exercise of [his] power in an unlawful manner could constitute a failure to perform a prescribed duty, one prescribed by the statute of general application.").

85 *See id.* at 295.

legislature's reason for departing from the terminology in Title 15. Given the lack of legislative explanation for the choice of grounds in AS 29.26.250, this Court stated, "it would be a mistake to read too much into the statute's history."[86] The counsel who advised the Division in the *Valley Residents* matter, and who represented the Division when it proposed the definition that Judge Gleason and later Judge Aarseth used, concluded expressly that "the terms in the two recall statutes are sufficiently similar that it is appropriate to follow the *Meiners* approach in evaluating the sufficiency of allegations of neglect of duty." [Exc. 356]

Notwithstanding its own prior use of the definition that the superior court used here, the Division maintains that this definition allows no-cause recall. [At. Br. 40] It asserts that, to avoid this possibility, the application, within the 200-word limit, should have to allege "either . . . the significance of the duty [neglected] or . . . that the omission had a tangible consequence." [*Id.*] This new drafting requirement is not found in the statutes and goes beyond the common usage of neglect, which does not always entail a failure to perform an important duty or that the failure results in serious consequences.[87]

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86 *Id.*

87 *See, e.g., Neglect,* DICTIONARY.COM, www.dictionary.com (last visited Mar. 3, 2020) (definitions of "neglect," which include "to omit, through indifference or carelessness; . . . to fail to carry out or perform (orders, duties, etc.)"); *Neglect*, THESAURUS.COM, www.thesaurus.com (last visited Mar. 3, 2020) (noting that "neglect," as a verb, means "fail to do; forget"; synonyms include "bypass," "disregard," and "overlook"); *Neglect*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/ (last visited Mar. 3, 2020) ("NEGLECT implies giving insufficient attention to something that merits one's attention"; synonyms include "bypass," "disregard," and "forget").

The Division does not explain why it did not previously believe these extra pleading requirements were necessary, and they are not necessary to ensure that recall is allowed only for cause. Here, if the facts alleged in the application are accepted as true (as they must be), they do not allege "the most trivial omissions." [At. Br. 40] For each allegation, the duty neglected is plainly significant.

The superior court's definition of "neglect of duty" is an appropriate one, grounded in precedent and commonsense. This Court should adhere to the definition endorsed by other courts and the Department of Law in other cases, which Recall Dunleavy properly relied on in preparing its recall application.

4. It is not necessary that the statutory grounds have mutually exclusive definitions.

The Division criticizes the definitions that the superior court used because they overlap, or one ostensibly subsumes another. [At. Br. 36, 43] Reading the superior court's definitions shows that no one definition entirely subsumes another. [Exc. 291-95] Unquestionably, there is overlap, but that is not a problem. In common usage, the same act can evidence incompetence, neglect of duty, and unfitness for office. Judge Gleason recognized that the definitions she used overlapped to a degree, but she did not see that as a problem, nor did the Division which proposed the definitions to her.[88] [Exc. 75-76]

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[88] *See Ogan Recall Op.* at Exc. 359 ("[G]iven the lack of statutory guidance in Title 15, recall sponsors ought not to be penalized for either mischaracterizing one paragraph as one ground of recall or alleging that a particular fact alleged constitutes all or more than one ground for recall.").

Unless and until the legislature develops clear and distinct definitions, it is reasonable and consistent with liberal construction for courts to use broad definitions of the grounds that include some overlap.

E. The Application Is Not Facially Invalid For Alleging Multiple Grounds.

The Division asserts that, because Recall Dunleavy's 200-word recall application "has bundled three grounds together in a prefatory sentence and applied all three to all the allegations," the first three grounds must be invalidated because Governor Dunleavy would not have "a fair opportunity to defend his conduct in a rebuttal limited to 200 words."[89] [At. Br. 40-42] Recall Dunleavy fully intended to allege that each of the original five allegations constitutes three separate grounds for recall, which is exactly what anyone reasonably would understand in reading the application. [Exc. 1] There is no reason the governor cannot rebut the charges in 200 words; indeed rebutting charges is often easier than making an allegation.

The Division is wrong in arguing that an application may not assert that one alleged act violates more than one ground for recall. [At. Br. 40-42] No statute prohibits this.[90] It is easy to imagine how a substantial violation of law implicates multiple grounds.[91] Moreover, although the briefing to the superior court assumed that the application must contain both allegations of fact and the specific ground of recall established by that

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

90 *See* AS 15.45.500(2); AS 15.45.510.

91 For example, Judge Gleason in *Valley Residents* held that the same allegations were legally sufficient to meet three different grounds: corruption, neglect of duty, and lack of fitness. [Exc. 74-76]

allegation, this is by no means obvious under AS 15.45.500(2). Stating the grounds for recall "in particular" is established by stating specific facts.[92] Whether the facts alleged in particular satisfy one or more of the statutory grounds for recall is ultimately a legal determination for the Division or the courts. This is why attorneys advising the Division in other cases have not always found it necessary to determine which ground for recall is stated and have advised that naming the wrong ground is not material,[93] if the facts satisfy another ground.[94]

In any event, as *Meiners* made clear, a petition does not rise or fall as a whole, and a court "may delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute."[95] Once this Court's review is done,

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92 Similarly, a complaint can be legally sufficient when it alleges facts that state a cause of action, even without giving the cause of action a name. *See McCormick v. City of Dillingham*, 16 P.3d 735, 743 (Alaska 2001) ("[I]f a party has notice of the conduct for which the opposing party is seeking relief, the opposing party may recover under any theory supported by the evidence."); *see also Schaible v. Fairbanks Med. & Surgical Clinic, Inc.*, 531 P.2d 1252, 1255-57 (Alaska 1975); *Brayton v. City of Anchorage*, 386 P.2d 832, 833 (Alaska 1963).

93 *See* Letter from Talis Colberg, Att'y Gen., to Whitney Brewster, Dir., Div. of Elections, *Re: Review of Application for Recall of Irene Paul, Shelly Wilson, and Edward Gamble, Sr.*, 2007 WL 2333369, at *4-7 (July 19, 2007) (recommending certification of recall application for school board members, which listed all three statutory grounds, followed by a list of acts, without specifying which act violated which ground or grounds).

94 *See Ogan Recall Op.* at Exc. 359. The *Meiners* Court expressly left open the issue of what a court should do if the application fails on the ground alleged, but satisfies another ground not alleged. *Meiners*, 687 P.2d at 299 n.14 ("Hence we do not decide whether a petition which refers to only one of the three statutory grounds for recall may be held sufficient on the basis of a judgment by the municipal clerk or a court that in fact, it properly alleges conduct satisfying a different one of the three statutory grounds.").

95 *Meiners*, 687 P.2d at 303.

there are a variety of options if this Court were to conclude that each allegation needs to be tied to specific grounds and less than all allegations are legally sufficient as to all three grounds. Indeed, Recall Dunleavy's application gives this Court maximum flexibility if it reaches that issue. In the end, if only one allegation is legally sufficient on one ground, the recall application must be certified.

II. THE RECALL APPLICATION STATES FOUR VALID BASES FOR RECALLING THE GOVERNOR.

A. Introduction

The superior court thoughtfully analyzed each allegation in the recall application for both factual particularity and legal sufficiency. [Exc. 295-302] He upheld four of the five allegations. [Exc. 303] The Division attacks his conclusion as to each approved basis for recall. [At. Br. 42-55]

The superior court's decision dispels the Division's claim that the court abdicated its responsibility to determine whether each allegation states legally sufficient grounds for recall and simply left any uncertainty about sufficiency to be resolved by the voters. [At. Br. 32-33] Judge Aarseth did not leave interpreting the statutory grounds to the voters; as addressed above, he adopted and then applied a definition for each of the three statutory grounds at issue. [Exc. 291-302] Then, exercising the gate-keeping function that a judge should exercise, he struck one of the original allegations as legally insufficient. [Exc. 300-01] What he left to the voters was exactly what the Alaska Constitution authorizes voters to decide: whether allegations that are legally sufficient to state a ground for recall are true, and whether the governor should be removed from office. [Exc. 295, 298, 300, 302]

The four sections below are headed with the verbatim language of each allegation now at issue. The analysis that follows demonstrates that each allegation gives the governor clear notice of what he is alleged to have done and how each allegation (taken as true) satisfies all three grounds for recall asserted in the application.

B. Specific Bases For Recall

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

The Alaska Constitution requires the governor to fill any vacancy in the superior court by appointing one of the two or more persons nominated by the Alaska Judicial Council.[96] The Alaska legislature codified this requirement and established a time frame: "The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of superior court judge within 45 days after receiving nominations from the judicial council[.]"[97] Thus, in stating that Governor Dunleavy refused to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations, the recall application expressly alleges that the governor intentionally violated one of his specific legal duties in a clearly identified particular act.

The superior court properly found that this allegation states a valid basis for recall under all three grounds listed in the recall application:

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96 Alaska Const. art. IV, § 5.

97 AS 22.10.100(a).

- The governor is incompetent because he did not understand his obligation to become familiar with the nominees and the appointment process sufficiently in advance of the deadline so that he could make his decision within the mandated time.
- The governor lacks fitness because he did not obey the law.
- The governor neglected a specific statutory duty because he failed to make an appointment within the time prescribed by law.[98]

[Exc. 296] Here, the same particular fact satisfies each statutory ground alleged. It was not necessary, as the Division maintains, for the application to spell out, in fewer than 200 words, why and how the failure to appoint on time satisfies each ground.

The Division does not deny that the first allegation in the recall application is factually particular. [At. Br. 42-47] Nor does the Division dispute that, on its face, the allegation states an act by the governor that was noncompliant with the statute that requires him to make an appointment within 45 days of receiving nominations. [*Id.*] Instead, the Division reiterates the position of Attorney General Clarkson: essentially, that a "technical" but "harmless" violation of the law does not meet any of the grounds for recall. [At. Br. 44; Exc. 323-24]

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[98] The historical record does not show that any previous governor failed to make a judicial appointment within 45 days. *See* Walter L. Carpeneti & Brett Frazer, *Merit Selection of Judges in Alaska: The Judicial Council, the Independence of the Judiciary, and the Popular Will*, 35 ALASKA L. REV. 205, 220-21 & n.113 (2018); Alaska Judicial Council, Historical Selection Log, https://www.ajc.state.ak.us/selection/histlog.html (last visited Mar. 3, 2020).

The Division is wrong that a governor *intentionally* violating the law—"refusing to appoint a judge . . . within 45 days of receiving nominations"—is a purely technical or harmless violation. [Exc. 1] The explicit allegation in the application that Governor Dunleavy "refus[ed]" to appoint a judge within the time limit takes this ground for recall outside a hypothetical situation where a governor miscounted days, or unexpected events consumed his time and made it impossible for him to make a timely appointment.

As discussed earlier, nothing in any of the statutory grounds for recall expresses or implies a requirement that the application explain how an official's deliberate flouting of the law caused a specific harm. Plainly, any intentional disregard of legal duties by an elected official harms a system of government that depends on the rule of law. This is especially true for the governor, who constitutionally is charged with faithfully executing the law.[99] A governor's deliberate refusal to appoint one of the Judicial Council's nominees—even temporarily—also harms the state by politicizing the merit system of judicial selection established by the constitution.[100] Because the application pleads a deliberate and non-trivial violation of law, it is legally and factually sufficient, and the question whether this breach of law supports removal from office is a political decision entrusted by the Alaska Constitution and statutes to the voters.

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[99] Alaska Const. art. III, § 16 ("The governor shall be responsible for the faithful execution of the laws.").

[100] *See* Alaska Const. art. IV, §§ 5, 8; Carpeneti & Frazer, *supra* n.98, at 207 ("An enduring concern of the majority of the delegates was injecting politics into the selection of judges." (citing 1 PACC at 584, 589, 593-94 (Dec. 9, 1955))); *see also id.* at 209-20 (summarizing constitutional convention minutes).

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.

In addition to the above allegation, the application also contains detailed references to the laws that were violated: "Art. IX, sec. 6 of the Alaska Constitution; AS 39.52; AS 15.13, including .050, .090, .135, and .145," and a reference to "Legislative Council (31-LS1006)," a memorandum written by attorneys for the legislature. [Exc. 1] Based just on the face of the application, the application states prima facie grounds of neglect of duties, lack of fitness, and incompetence that should go to the voters.

The Division argues that this allegation lacks sufficient factual particularity and is legally insufficient because the facts alleged do not conclusively establish a violation of law. [At. Br. 47-52] This is incorrect. More detail about "what was said and about whom" is not needed to establish that a violation of law occurred. That the governor used state funds "for partisan purposes" is a factual allegation that must be assumed to be true. "[F]or partisan purposes" is not vague, imprecise, or conclusory. "[P]artisan political purposes" is defined in statute, and "means having the intent to differentially benefit or harm a (i) candidate or potential candidate for elective office; or (ii) political party or group," and it expressly "does *not* include having the intent to benefit the public interest at large through the normal performance of official duties."[101] Thus, the use of state funds "for partisan

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[101] AS 39.52.120(b)(6) (emphasis added); *see also* Alaska Const. art. IX, § 6 ("No . . . appropriation of public money [shall be] made, . . . except for a public purpose.");

purposes," as alleged, is a violation of the Ethics Act, which Governor Dunleavy must follow.[102] Use of state funds "to influence the outcome of the election of a candidate to a state or municipal office" is also a violation of Alaska's campaign finance laws.[103] No additional details are needed because, contrary to the Division's arguments, it is always illegal for a state official to use state funds for partisan politicking.

The Division, like this Court, must accept the recall application's factual assertions at face value.[104] "Partisan" here is a factual description of the governor's advertisements and mailers. A governor who uses state funds to create and distribute partisan advertisements and mailers acts illegally. The recall application was not required to cite the law (although it did), let alone explain the law to the governor or the voters.[105] The assertion that the governor used state funds to purchase partisan advertisements and mailers alleges illegal acts, and is therefore a legally sufficient basis to support the three grounds for recall.

AS 39.52.010-.965 (Executive Branch Ethics Act); 9 AAC 52.010-.990 (Executive Branch Code of Ethics).

102 AS 39.52.910; *see also* AS 39.52.120(b)(6) (prohibiting "the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes").

103 AS 15.13.145(a).

104 *See von Stauffenberg*, 903 P.2d at 1059-60 (citing *Meiners*, 687 P.2d at 300-01 n.18); *see also Holmes Recall Op.*, 2013 WL 6593253, at *8 n.68; *Johansen Recall Op.*, 2011 WL 5848617, at *7.

105 The Division agrees legal citations are not needed. [At. Br. 19] *See also Meiners*, 687 P.2d at 301.

The application also alleges that Governor Dunleavy failed to make disclosures required by law. The campaign finance statutes, referenced in the application, require: (1) a "clear[]" identification of who "paid for" a communication;[106] (2) specific language distancing an independent group from a particular candidate;[107] and (3) prior registration with APOC.[108] The factual allegation that state funds were spent on partisan political advertisements "without proper disclosure" is a specific factual allegation that must be assumed to be true; thus another violation of law is alleged.

The nature of the allegations here differ from the allegations found insufficiently particular in prior decisions. In *von Stauffenberg*, *Citizens for Ethical Government*, and *Coghill*, allegations failed because the alleged conduct was not necessarily illegal.[109] This allegation is different because spending state money on partisan advertising and mailers is always illegal, and the application provides adequate detail for the Governor to prepare a

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106 AS 15.13.090(a) ("All communications *shall* be clearly identified by the words 'paid for by' followed by the name and address of the person paying for the communication." (emphasis added)).

107 AS 15.13.135(b) ("A person who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, or any other communication that supports or opposes a candidate for election to public office . . . shall place the following statement in the mailing, literature, advertisement, or other communication so that it is readily and easily discernable: This NOTICE TO VOTERS is required by Alaska law. (I/we) certify that this (mailing/literature/advertisement) is not authorized, paid for, or approved by the candidate.").

108 AS 15.13.050(a) ("Before making an expenditure in support of or in opposition to a candidate . . . , each person other than an individual shall register [with APOC.]").

109 *See von Stauffenberg*, 903 P.2d at 1060; *Citizens for Ethical Gov't* at Exc. 97; *Coghill* at Exc. 125-26.

rebuttal. This makes the current case more like *Valley Residents* and *Meiners*, where the factual allegations were deemed sufficiently particular.[110] The factual allegations in *Meiners* that this Court found adequately particular were somewhat more detailed than Recall Dunleavy's allegations,[111] but recall applicants then were not subject to *any* word limit, *and* were required to state grounds with specificity.[112]

One of the Governor's most obvious duties is to follow the law. Repeated violations of the law therefore constitute neglect of that important duty and, as a result, this allegation in the recall application states a valid basis for recall.[113]

Fitness for office likewise requires respect for and obedience to the law.[114] As the superior court held, understanding the laws and intentionally violating them establishes lack of fitness. [Exc. 298] Equally, not understanding the laws, especially the specific ethics laws that apply to one's official position, establishes lack of fitness. Thus, the application does not need to allege whether the governor acted in ignorance or with deliberate disregard of the law.

Finally, not understanding the laws establishes incompetence. The governor has access to a broad range of legal advisors. APOC provides training and informal guidance. Because

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110 *See Meiners*, 687 P.2d at 298-302; *Valley Residents* at Exc. 75 (addressing legal sufficiency), 77-78 (addressing factual particularity and finding sufficient particularity in the allegation that the recall target promoted the interests of his employer in legislative committee and failed to recognize the conflict of interest, since the alleged conduct is always illegal).

111 *Meiners*, 687 P.2d at 298-302.

112 *See id.* at 291-92 (reprinting the recall application, which contained over 500 words); former AS 29.28.150(a)(3) (1984) [Exc. 372-75].

113 *See supra* at 27-30 (defining "neglect of duties").

114 *See supra* at 22-24 (defining "lack of fitness").

Governor Dunleavy failed to obtain and act on advice on how to comply with the law in areas that are carefully regulated to prevent abuse of power, he demonstrated his incompetence—i.e., a "lack of ability to perform [his] required duties."[115]

3. Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law.

For this allegation, the Division challenges only factual sufficiency, and does not contest the legal sufficiency of this allegation or defend the governor's ability to veto court system funding in retribution for a court decision.[116] [At. Br. 52-53]

In addition to alleging an illegal use of the governor's veto powers, this statement specifically alleges an "attack [on] the judiciary and the rule of law." Although the Division characterizes this allegation as "conclusory" and not specific enough, the governor's veto of court system funding was widely reported to the public, and there is no question the governor knew exactly which veto this allegation refers to. The Attorney General's opinion to the Division conceded this point.[117] A well-publicized suit

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115 *See supra* at 25-27 (defining "incompetence").

116 The Attorney General took the position in his opinion to the Division that there is essentially no limit on the Governor's line-item veto power. [Exc. 327-28] This is wrong. Although the Governor's veto power is broad, it cannot be exercised for an unconstitutional reason. *See Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (discussing the improper exercise of the line-item veto power as a violation of separation of powers); *see also Cole v. Webster*, 692 P.2d 799, 802 (Wash. 1984) (holding that recall can be based on a discretionary act, if "the discretion was exercised in a manner which was manifestly unreasonable or exercised on untenable grounds or for untenable reasons"); *CAPS v. Bd. Members*, 832 P.2d 790, 791 (N.M. 1992) (holding that malfeasance ground for recall can include discretionary acts if "done with an improper or corrupt motive").

117 *See* Exc. 328 ("One could assume that the allegation about attacking the judiciary refers to the widely reported veto message on the reduction to the Alaska Court System of

challenging the court system veto was filed against the governor before the recall application was circulated.[118] And the references in the recall application specifically include "OMB Change Record Detail (Appellate Courts . . .)."[119] [Exc. 1] As reflected in the OMB Change Record Detail,[120] the governor provided the following budget message explaining his line-item veto: "The Legislative and Executive Branch are opposed to State funded elective abortions; the only branch of government that insists on State funded elective abortions is the Supreme Court. The annual cost of elective abortions is reflected by this reduction."[121] Considering the language in the text and the reference, the allegation

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$334,700, the stated purpose of which was to reduce the appropriation by the amount of the cost of state-funded elective abortions.").

118 *See ACLU of Alaska v. Dunleavy*, Complaint for Declaratory and Injunctive Relief, 3AN-19-08349CI (July 17, 2019) (challenging the constitutionality of Governor Dunleavy's court system line-item veto); *see also* Tegan Hanlon, *ACLU sues Dunleavy for veto to Alaska court system over abortion rulings*, ANCHORAGE DAILY NEWS, July 17, 2019, https://www.adn.com/politics/2019/07/17/aclu-sues-dunleavy-for-veto-to-alaska-court-system-over-abortion-rulings/; Zachariah Hughes, *ACLU sues Dunleavy over "punitive" cuts to court system*, ALASKA PUBLIC MEDIA, July 17, 2019, https://www.alaskapublic.org/2019/07/17/aclu-sues-dunleavy-over-punitive-cuts-to-court-system/.

119 Because of the superior court's order, the statement of grounds on this point now reads: "OMB Change Record Detail (Appellate Courts)." *See* Exc. 303.

120 STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO CHANGE RECORD DETAILS, at 122 (June 28, 2019) (hereinafter JUNE VETO CHANGE RECORD DETAILS), https://omb.alaska.gov/ombfiles/20_budget/FY20Enacted_cr_detail_6-28-19.pdf.

121 As the OMB Change Record Detail also shows, the only other veto of court system funding was to a 3% increase in court system salaries. *Id.* The Governor could not have been confused which veto was at issue because this veto cannot be characterized as "an attack [on] the judiciary" that "violated separation-of-powers," as alleged in the recall application. [Exc. 1]

about the improper line-item veto is not so impermissibly vague that the governor cannot respond.

This is especially true given the legislative history of the appropriation bill at issue, a sequence of events well known to the governor. The governor proposed an FY 2020 operating budget,[122] and the legislature passed its version, which included $7,106,400 that the governor had requested for the appellate courts.[123] But in the months between the governor's proposal to fund the appellate courts and the legislature's approval of the amount the governor requested, this Court issued its decision in *State v. Planned Parenthood of the Great Northwest*.[124]

Governor Dunleavy obviously did not like or agree with this Court's decision, nor did he understand it. On June 28, 2019, when he issued his line-item vetoes to the appropriation bill passed by the legislature, he reduced the funding to the appellate courts to provide $334,700 *less* than he originally had proposed and that the legislature had approved.[125] His veto message made clear that the *sole* reason for this reduction in the

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122 STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, COMPONENT DETAIL (1077), JUDICIARY, at 1 (Dec. 14, 2018), https://omb.alaska.gov/ombfiles/20_budget/ACS/Proposed/20compdetail_acs.pdf (proposing flat funding for the judiciary in FY2020).

123 *See* ch. 1, § 1, at 38, 1SSLA 2019 (as amended).

124 436 P.3d 984 (Alaska 2019).

125 *See* ch. 1, § 1, at 38, 1SSLA 2019 (as amended); *see also* JUNE VETO CHANGE RECORD DETAILS, at 122.

appellate courts' budget was his disagreement with this Court's decision in *State v. Planned Parenthood*.[126]

The superior court correctly held that the allegation about the line-item veto states a prima facie claim for neglect of duties, lack of fitness, and incompetence:

> If the allegations are true, Governor Dunleavy breached his oath of office to defend the Constitution by attempting to infringe upon the powers reserved to the Judicial branch, thus constituting a neglect of duties. If true that Governor Dunleavy attempted to influence or undermine the independence of the judiciary, his actions could constitute a lack of fitness. Last, if Governor Dunleavy was unaware of his duty to not encroach upon the powers of another branch, that could constitute "incompetence." This allegation is legally sufficient.

[Exc. 300] These analyses are sound.

The governor's veto message reflects incompetence, lack of fitness, and neglect of duties in another way as well. His veto message rests on a flatly wrong characterization of the *Planned Parenthood* decision.[127] This Court explicitly did *not* require funding for any "elective abortions"; the decision unequivocally addresses funding only for medically necessary abortions.[128] The governor's mis-description of this Court's decision thus demonstrates neglect of duties and lack of fitness, because, to fulfill his constitutionally-assigned role of enforcing the law, the governor must understand the law. The mis-description demonstrates incompetence as well, because it shows he could not perform his duty of understanding the law.

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126 JUNE VETO CHANGE RECORD DETAILS, at 122.

127 The veto message also erroneously characterized the Alaska Supreme Court as a branch of government.

128 *See Planned Parenthood*, 436 P.3d at 1001-05.

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.

On its face, this ground for recall alleges that a specific, identified act by Governor Dunleavy constituted a serious mistake. Further, it states that the governor acknowledged that he vetoed millions of dollars more from the state budget than he intended to veto. [Exc. 1] And the recall application states that the effect of the mistake could be devastating; the state would lose over $40 million more in federal Medicaid funds if the error were not corrected. [Exc. 1; *see also* Exc. 60-62] Under the state's budget process, Governor Dunleavy by himself could not remedy his error.[129] Only the legislature could restore the erroneously vetoed funds by either overriding the veto or passing a new appropriations bill.[130] The recall application refers to the possible loss if the error went uncorrected, because the application was drafted and signature-gathering began before the legislature met in special session and corrected the governor's mistake.[131]

The superior court determined that this allegation satisfies at least the statutory ground of incompetence: "A mistake can be a measure of competence." [Exc. 302] This is plainly correct.

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[129] *See Wielechowski v. State*, 403 P.3d 1141, 1153 (Alaska 2017) ("[T]he governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature." (quoting *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) (emphasis omitted))).

[130] *See* Alaska Const. art. II, §§ 15-16; *Simpson v. Murkowski*, 129 P.3d 435, 446-47 (Alaska 2006) (describing an appropriation, a veto, and a failure to override).

[131] *See* ch. 2, § 1, at 5, 2SSLA 2019 (signed Aug. 19, 2019).

The allegation also validly states a ground for recall under the two other statutory grounds asserted in the application:

Neglect of duties: The governor is given extraordinary power with his line-item veto authority.[132] This explicit grant of power includes an implicit duty to understand the power the governor is granted, so that the governor can exercise his power to achieve the results he intends. The erroneous veto shows that Governor Dunleavy failed to understand the budgeting process sufficiently to accomplish his goals by vetoing only the funds that he intended to strike from the budget, and not vetoing dollars that he believed a program needs. His failure to understand the process establishes a neglect of his duty to learn enough about his role as the executive in the budgeting process, so that he will not make errors that harm citizens who depend on state programs and federal matching grants.

Lack of Fitness: Governor Dunleavy's failure to exercise his line-item veto authority so as to achieve the results he intended also establishes his unfitness for office. He lacks either the intelligence to understand the laws he is charged with administering, or he lacks the patience or requisite carefulness to exercise his line-item vetoes to strike only what he intends to delete from the state budget. Any of these reflects unsuitability for the office demonstrated by specific facts related to his conduct in office.

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132 *See* Alaska Const. art. II, § 15; *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (characterizing the constitutional grant of line-item veto authority over appropriations as "a 'strong control on the purse strings' of the state" (quoting 3 PACC at 1740 (Jan. 11, 1956)).

The Division does not contest that this allegation is factually particular, nor does it claim that the governor did not make a mistake. [At. Br. 53-55] On appeal, the Division argues only that the allegation of a mistake—without an allegation of actual harm—is legally insufficient. [*Id.*] However, as discussed above, neither the recall statute nor legal precedent supports the Division's claim that a recall application must explain actual harm caused by the recall target's admitted mistake.[133] Neither does the statute provide a safe harbor to an official who commits a serious mistake, if someone else later corrects it.[134] The recall statutes and this Court's precedents allow voters—not the courts or the Division—to determine whether a clear mistake by the governor on a multi-million dollar budgeting issue is a reason to remove the governor from office.

This case is not like *von Stauffenberg*, as the Division contends. [At. Br. 54] There, the application asserted misconduct in office and failure to perform prescribed duties, based on the target officials' meeting in closed-door sessions to discuss employment matters.[135] This Court determined that the allegations were not legally sufficient because school boards legally may discuss employment matters in executive session.[136] In that situation, additional facts might have established legal sufficiency by showing why certain closed meetings were not within the officials' discretion and therefore were improper.[137] Here,

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133 *See supra* at 21-22.

134 *See supra* at n.80.

135 *See von Stauffenberg*, 903 P.2d at 1057.

136 *Id.* at 1059-60.

137 *See id.* at 1060.

by contrast, the admitted multi-million dollar mistake plainly was not within the discretion granted to the governor by law.[138]

Because the allegation is factually particular and legally sufficient, the superior court correctly determined that the fourth allegation should be presented to voters so the voters can decide whether a governor who committed this error should remain in office.

CONCLUSION

Ignoring precedent and this Court's direction to liberally construe recall statutes, the Division argues that Recall Dunleavy's application should not be certified by narrowing the meanings of the grounds and ratcheting up the particularity requirement. If this administration sees fit to change recall law, it can seek a legislative change. The recall application in this case, as edited by the superior court, satisfies all statutory requirements. This Court should uphold the judgment of the superior court, which reversed the Division of Elections' decision not to approve the recall application, and allow the recall process to proceed.

Respectfully submitted, this 9th day of March 2020.

Jahna M. Lindemuth [9711068]
Scott M. Kendall [0405019]
Samuel G. Gottstein [1511099]
Jeffrey M. Feldman [7605029]
Susan Orlansky [8106042]

138 *See id.*