IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Division of Elections, and Director Gail Fenumiai, Appellants, v. Recall Dunleavy and Stand Tall With Mike, Appellees.	)	Supreme Court No. **S-17706**

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

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

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

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CONSTITUTIONAL PROVISIONS

Article XI, section 8. Recall

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

ALASKA STATUTES

§ 15.45.470. Provision and scope for use of recall

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

§ 15.45.480. Filing application

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

§ 15.45.490. Time of filing application

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

§ 15.45.500. Form of application

The application must include

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

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

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

(4) the designation of a recall committee consisting of three of the qualified voters

who subscribed to the application and shall represent all sponsors and subscribers in matters relating to the recall; the designation must include the name, mailing address, and signature of each committee member.

§ 15.45.510. Grounds for recall

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

§ 15.45.515. Designation of sponsors

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

§ 15.45.520. Manner of notice

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

§ 15.45.530. Notice of the number of voters

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

§ 15.45.540. Review of application for certification

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

§ 15.45.550. Bases of denial of certification

The director shall deny certification upon determining that

(1) the application is not substantially in the required form;

(2) the application was filed during the first 120 days of the term of office of the official subject to recall or within less than 180 days of the termination of the term of office of any official subject to recall;

(3) the person named in the application is not subject to recall; or

(4) there is an insufficient number of qualified subscribers.

§ 15.45.560. Preparation of petition

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

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

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

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

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

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

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

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

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

§ 15.45.610. Filing of petition

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

§ 15.45.620. Review of petition

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

§ 15.45.650. Calling special election

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

§ 15.45.660. Preparation of ballot

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

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

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

INTRODUCTION

The Court's decision in this case will determine not only whether or how this particular recall campaign will proceed; it will lay the groundwork for all future recall attempts. The interpretations the Court develops and the rules it applies must be reasonable and fair not just to the parties here, but also to future recall campaigns and targeted officials. To get it right, the Court must focus on the committee's statement of grounds and determine whether it alleges with particularity facts that, if true, establish a *prima facie* case of one or more of the grounds for recall.

Consistent with this Court's precedents holding that Alaska has a for-cause recall system, the Division asserts that recall grounds must make a meaningful showing that an official should be removed based on specific facts connected to at least one statutory ground for recall. The committee accuses the Division of "want[ing] a different statutory scheme for recall than the one Alaska has," [Ae. Br. 16] but in fact, it is the committee that wants to abandon Alaska's recall scheme. In its view, a statement of grounds should not have to explain the reasons for a recall. As long as the official can figure out what the statement means, campaigns can fill in the gaps for voters, and the Division should simply accept a committee's legal conclusions. But this is not the recall system contemplated by the constitutional delegates, the legislature, or this Court's precedents.

ARGUMENT

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

The Division argued in its opening brief that, based on the recall scheme created by Alaska's Constitution and statutes, a recall application must contain a statement of

grounds with allegations sufficiently particular to make a *prima facie* showing they meet at least one statutory criterion for recall. It argued that Alaska has a for-cause, middle-ground recall scheme, and that each ground must be stated with particularity so that it is understandable on its own without additional information. These requirements are based in law and are necessary to (1) permit the Division to determine if the grounds are sufficient, (2) give the targeted official a fair opportunity to respond in 200 words, and (3) provide voters the information they need to decide how to vote.

After vigorously attempting to justify the sufficiency of its statement with supplemental information in the trial court, the committee now appears to have largely abandoned that tactic. Nevertheless, the committee's arguments contradict most of the framework described above and the committee continues to disagree with it.

The committee argues that the particularity requirement is met if a stated ground meets a notice pleading standard, i.e., if the official should know what it means. [Ae. Br. 12] The committee also disputes the Division's point that a vaguely stated ground could deprive the official of a meaningful opportunity to be heard because the official would have to both explain the committee's statement and rebut it in only 200 words. [Ae. Br. 13-14] In fact, the committee denies that an official has any due process right at all.

Both of these arguments are incorrect. Notice pleading requires only general notice; by definition notice pleading does not require particularity and therefore this argument ignores the statutory language itself, not to mention the essential elements of Alaska's recall scheme that require more than general notice. The committee's argument that an official has no due process right is contrary to the law. In Alaska an employee has

a property interest in a job unless the employee can be terminated at will,[1] and elected officials can be removed only for cause. The committee argues that no due process right exists because the legislature remains free to change the procedures and grounds for recall, [Ae. Br. 14] but that makes no difference; the legislature can always change the protected status of any public employee who has it, which obviously will change the property interest attached to those jobs. The fact remains that under the current law, elected officials are not at-will employees. It is also untrue that no other jurisdiction recognizes a due-process right for targeted officials facing recall. Most other jurisdictions have no-cause recall[2] and their officials thus have no due process rights, and jurisdictions with for-cause recall do recognize the right.[3] In Alaska, an official's rebuttal should satisfy the due process right to be heard, but a 200-word rebuttal will not provide a meaningful opportunity if the official is forced to explain the allegations in order to rebut them.

Contrary to the committee's claim, the Division has not argued that a petition must include "every relevant fact." [Ae. Br. 13] It argues only that an allegation must be clear enough to identify specifically what the official has done or not done so that the Division

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

2 *See* https://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx#Grounds (last viewed 3-16-20) ("in most of the 19 recall states specific grounds for recall are not required …").

3 *See, e.g., Gilbert v. Morrow*, 277 So.2d 812, 813-14 (Fla. App. 1973) ("An officeholder has a property right in his office and this right may not be unlawfully taken away or illegally infringed upon").

and courts can determine whether it meets the statutory criteria, the official can meaningfully respond in 200 words, and voters can understand the basis of the recall.

The committee's reliance on the independent groups formed to campaign against its recall effort to provide information to voters is similarly misplaced. [Ae. Br. 16] Even if the campaigns for and against the Governor's recall somehow reached every Alaskan voter and fully informed each about the facts behind the committee's allegations, the Division cannot assume that this will happen for every recall. Most recall efforts do not involve statewide officials and do not feature large, well-funded campaigns. The statutory process is meant to provide voters with the information they need absent campaigns, by requiring the Division to post the statement of grounds and the rebuttal in each polling place.[4] Regardless of what additional campaigning might occur, when a committee submits an application to the Division to review, it must at that point be sufficient to stand on its own, which means that the grounds must be stated "in particular."

Finally, the committee treats legal sufficiency as an entirely separate inquiry from factual sufficiency, arguing that a statement of grounds is factually sufficient so long as the official knows what it is talking about, and legally sufficient so long as it "does not allege a violation of 'non-existent laws' so that 'elected officials cannot be recalled for legally exercising the discretion granted to them by law.'" [Ae. Br. 17] But this view is contradicted both by the statutes and by *Meiners*[5] and *von Stauffenberg*[6]. The Division

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4 AS 15.45.680.

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

6 *von Stauffenberg v. Committee for Honest & Ethical School Bd.*, 903 P.2d 1055, 1059-60 (Alaska 1995).

reviews the statement to determine whether, taking the allegations as true, it makes out a *prima facie* case *of one or more grounds for recall*, not a *prima facie* case that a law has been violated.[7] In fact, a violation of the law is neither necessarily sufficient to establish a ground for recall, nor necessarily required—legal acts or omissions could, for example, demonstrate an official's incompetence or neglect of duties.

II. Liberal construction must be applied thoughtfully to Alaska's recall statutes to avoid undermining their objectives.

Contrary to the committee's claims, the Division is not asking the Court to apply a more restrictive construction of the recall statutes than it has before, nor is it making any argument that "departs from [the Court's] settled law." [Ae Br 1, 9-10, 13-14]

The committee complains that the Division did not discuss "liberal construction" in its opening brief. This is because the liberal construction canon is irrelevant to the Division's position that the committee's vague allegations undermine Alaska's for-cause recall scheme. Liberal construction is not applied to frustrate the purpose of statutory language. In the context of liberally construing the court rule on intervention, this Court cited the view that liberal construction should be applied with "thoughtful consideration of the objectives it is intended to serve," and not understood to construe the applicable law "out of all recognition to its laudable purpose."[8]

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7 *von Stauffenberg*, 903 P.2d at 1055, 1059-60.

8 *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 912 n.16 (Alaska 2007) (citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1904, at 238 (1986)).

Here, the committee seeks a liberal construction to rehabilitate its failure to comply with the requirement that the statement of grounds be stated "in particular."[9] [AE Br. 13-14] In initiative cases, the Court liberally construes statutes to allow the people to vote and express their will,[10] but it does not apply that canon universally or thoughtlessly. For example, despite construing initiative provisions liberally, the Court does not apply subject matter *exceptions* narrowly, but rather considers them in light of their objectives.[11]

The Court should also interpret AS 15.45.500's particularity requirement in light of its objectives. The legislature did not randomly include the particularity requirement; it is meant to insure enough specificity to determine whether the statement of grounds meets the statutory recall criteria and to allow voters to understand how an official has purportedly violated them. Allowing non-particular grounds through liberal construction would defeat both of these underlying purposes. Without a meaningful application of the particularity requirement, the Division may be unable to understand an allegation sufficiently to determine if it meets the criteria and voters will not know how to vote.

This Court has interpreted the recall statutes to respect the need to show that the alleged grounds fall within the statute. For example, in *von Stauffenberg*, the Court reversed a decision in which the superior court had found—based on the directive that "the recall statutes are to be 'liberally construed'"—that two of the four recall grounds

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9 AS 15.45.500(b).

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

11 *Lt. Gov. of Alaska v. AFCA*, 363 P.3d 105, 108 (Alaska 2015).

were sufficiently stated.[12] But this Court found them insufficiently stated without ever mentioning a need to liberally construe the statement of grounds or anything else.[13]

And despite applying the liberal construction canon for initiatives, the Court has declined to interpret unclear language liberally so as to render it valid. In *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage*,[14] the Court noted that a confusing initiative petition defeats the purpose of the signature-gathering requirement, as petition signers may not understand what they are signing.[15] The Court declined to save the initiative by applying the principle that procedural and technical requirements should be relaxed for initiatives because they are drafted by non-lawyers,[16] as "confusing or misleading petitions frustrate the ability of voters to express their will."[17]

Similarly here, if voters cannot understand the act or omission alleged, they cannot specifically know what they are deciding, other than an impermissible thumbs-up or thumbs-down vote on whether to keep the official in office based on policy preferences. That is political recall, not for-cause recall. And if the statement is not specific enough to inform the Division of the precise act or omission, the Division cannot determine if it meets the statutory grounds. Thus, the consequence of construing the particularity clause as liberally as the committee advocates is that Alaska's elected officials would be subject

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12 *von Stauffenberg*, 903 P.2d at 1058.

13 *Id.* at 1059-61.

14 129 P.3d 898 (Alaska 2006).

15 *Id.* at 901-902.

16 *Id.* at 902 (quoting *Boucher v. Engstrom*, 528 P.2d 456 (Alaska 1974)).

17 *Id.*

to no-cause, political recall.

The Court will still apply recall statutes liberally to allow voters to express their will when doing so would not contravene the statute's objectives, that is, when the interpretations further, rather than undermine, the objectives of Alaska's recall scheme.[18]

The committee's argument that the Court should uphold its statement of grounds because it relied on precedent in drafting the statement lacks merit for several reasons. [Ae.Br. 10] First, this Court has addressed the purpose of the statement of grounds in two cases only, and has never interpreted the grounds for recall in Title 15.[19] Thus, this is not a well-defined body of jurisprudence. Second, the Court has not addressed most of the issues in this case. Third, the issues that the Court has decided—e.g., that the statement must make a *prima facie* showing that the allegations meet the statutory criteria[20] and must be sufficiently particular to allow the official to respond in 200 words[21]—are the bases of, not contrary to, the Division's positions in this case. The committee's position is not anchored in precedent and ignores key elements of Alaska's recall scheme.

III. Interpreting the grounds.

The committee suggests that the Division's position that some showing of harm or

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18 *See, e.g., Meiners*, 687 P2d at 298 n.12 (liberally construing statute to allow recall signatures to be supplemented 10 days from a court determination that the number was insufficient, rather than 10 days from the clerk's review); *id.* at 298 (liberally construing statute to interpret the number of required signatures to relate to a percentage of voters in the last municipal, not statewide "general election"); *id.* at 301 (liberally construing statute to decline to require a recall committee to cite particular statutes in its statement).

19 *See, e.g., Meiners*, 687 P2d at 298-302; *von Stauffenberg*, 903 P.3d at 1059-60.

20 *von Stauffenberg*, 903 P.3d at 1059-60.

21 *Meiners*, 687 P2d at 302.

consequence is necessary to establish grounds for recall is inconsistent with the statute and precedent, particularly the Division's own opinions in prior recall cases. [Ae. Br. 20-21] Not so. On the contrary, the Division argues that the statutory terms themselves require harm or consequences. For example, an allegation of facts demonstrating incompetence—defined as "a lack of ability to perform the official's required duties"[22]—must *by definition* include facts establishing that the official has made a mistake or mistakes with sufficient negative consequences to establish "a lack of ability to perform the official's required duties."[23] In essence, the Division is simply asking the Court to apply the plain meaning of the statutory grounds.

And although the committee strongly contests the Division's proposed definitions, it ignores the fact that the Division's primary argument is not about the specific language used to define the grounds, but rather that the definitions cannot be applied so loosely as to thwart the reason for having grounds in the first place and create de facto political recall. [At. Br. 36-38, 40] In other words, even if the Court accepts the committee's preferred definitions, its four grounds are still inadequate. They can be sufficient only if the Court ignores the import of the statutory terms and construes them so liberally as to erase their meaning and render Alaska's recall system as pure politics based on policy differences.

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22 Although the committee continues to argue that this definition is somehow meaningfully different from the language in the Attorney General's opinion, the Division does not agree and therefore will use the committee's preferred language.

23 An alternative way to establish incompetence would be to allege that the official is categorically unqualified—like a Lieutenant Governor who has never read the election code—but the committee's statement has no such allegation against the Governor.

A. Lack of Fitness.

The committee rejects the Division's observation that its preferred definition of lack of fitness—"unsuitability for office demonstrated by specific facts related to the recall target's conduct in office"—is so amorphous that it permits a purely political recall, relying on outside counsel's advice to the Division in *Valley Residents* that the vagueness of the word "unsuitability" could be offset by requiring "a particular allegation of unfitness manifested by actions in the official's conduct of his office." [Ae. Br. 24] But the committee has overlooked the point that counsel was making: he explained that "We interpret 'lack of fitness' under Title 15 as referring to conduct in office showing the office holder to be unsuitable through factual detail sufficient to enable the public to understand the charge and the recall target to respond meaningfully." [Exc. 358] In other words, the danger of permitting political recall through use of an overly general term like "unsuitability" could be offset by applying a rigorous requirement of factual particularity—one that at a minimum would allow the voters to understand the charges. But because the committee also insists that it should have to comply only with a "notice-pleading" standard for its factual allegations, its definition of "lack of fitness" is so devoid of substance as to create a de facto political recall.

B. Incompetence.

The committee attempts to create a material dispute over the language used to define incompetence where none exists. The Division's proposed language—"lack of sufficient knowledge, skill or professional judgment"—does not lead to a different analysis from the committee's language—"lack of ability to perform the official's

required duties." [Ae. Br. 25] The only difference is in the seriousness with which the parties take the requirement that an official show a "lack of ability to perform [their] required duties." For the committee, any mistake is apparently sufficient; and any requirement of harm or consequence as a result of a mistake would have to be "grafted onto the statutory grounds" without "basis in case law or legislative history." [Ae. Br. 27]

But the Division's point is that incompetence means something more than simply making a mistake or, in other words, that not every mistake demonstrates that an official "lacks [the] ability to perform [their] required duties." And, indeed, the committee effectively conceded this below, arguing that "[i]ncompetence is a state of being … [that] can be manifested in different ways." [Exc. 212] The Division has argued that those ways include both a fundamental lack of knowledge essential to perform a job—like the unqualified surgeon or a Lieutenant Governor who has never even read the election laws he is responsible for enforcing—or committing mistakes that are sufficiently serious to demonstrate an inability to perform the duties of office. [At. Br. 38] But the committee resists the notion that it should have to explain why a mistake shows that an official cannot perform their duties, characterizing this as a "proposed drafting requirement" "not found in the statutes." [Ae. Br. 26] This would be true if one of the grounds for recall was "making a mistake," but it is not—the ground is "incompetence" and if, as the committee argues, incompetence means "lack of ability to perform the required duties," a statement of grounds that fails to show why an alleged mistake establishes that the official lacks the ability to perform their duties, simply has not made out a case of incompetence.

Nor does the committee's cramped notion of the "requirement to review for legal

sufficiency" solve this problem. [Ae. Br. 26] Indeed, in the context of the ground of incompetence, it makes no sense at all. The committee notes that "elected officials cannot be recalled for legally exercising the discretion granted to them by law," [Ae. Br. 26] and suggests that officials may have "discretion to make trivial and inconsequential mistakes … but [that] no official has discretion to make serious mistakes." [Ae. Br. 27] It is far from clear what the committee means by this, but there seems to be no basis in law or history for the assertion that elected officials cannot within the legal exercise of their discretion make "serious mistakes."

Moreover, the committee's suggestion that legal review of an incompetence charge would be governed by the limitation that an official cannot be recalled for legally exercising the discretion granted to them precludes the fourth allegation of its own statement, involving the veto of Medicaid funds. Because it was clearly within the Governor's constitutional authority and discretion to veto any amount of Medicaid funds, under the committee's argument, he cannot be recalled for any alleged mistake he made because he was "legally exercising his discretion."

C. Neglect of duties.

The Division argued, consistent with well-established principles of statutory construction, that the ground "neglect of duties"—found in Title 15 and applicable to state elected officials—should be interpreted to require more than just the "failure to perform prescribed duties"—found in Title 29 and applicable to municipal office—in order to give substance to the Legislature's use of different language to describe these grounds. [At. Br. 39] In response, the committee argues that because the legislative

history does not explain the use of different terms, this Court should simply ignore it, quoting *Meiners* for the proposition that "it would be a mistake to read too much into the statute's history."[24] [Ae. Br. 29] But the Division has not asked the Court to read anything into the statute's history, only to interpret the statute's *language*. And the Division knows of no precedent supporting the argument that in the absence of helpful legislative history a court should ignore differences in the language of statutes.

The committee cites a variety of definitions of neglect to show that the common understanding of the word "does not always entail a failure to perform an important duty or that the failure results in serious consequences." [Ae. Br. 29] But it ignores the fact that those alternative definitions *do* entail something else—an element of "indifference" or "carelessness" [Ae. Br. 29, n.87] absent from any of the theories proffered by the committee or the superior court for how the Governor's conduct allegedly constitutes neglect of duty. Because the committee has not alleged that the Governor was indifferent or careless in his conduct, in order to establish that a failure to act constitutes "neglect"—under common understanding—it must allege some harm or consequence.

IV. Recall Dunleavy's statement of grounds is facially inadequate.

In its opening brief, the Division argued that by bundling three of the four statutory grounds together in a prefatory sentence allegedly applying to all four of the following paragraphs, the committee has denied the Governor a meaningful opportunity to respond in only 200 words. The committee has no real answer to this. It simply sees no

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24 *Meiners*, 687 P.2d at 295.

problem with leaving the reader to speculate about how its factual statements constitute each of the three grounds it lists up front. No doubt this is because it has never taken seriously the official's right to a fair opportunity to rebut the charges. And now it simply asserts without any explanation, analysis, or authority that "there is no reason the governor cannot rebut the charges in 200 words;" because apparently "rebutting charges is often easier than making an allegation." [Ae. Br. 31]

But this is not some self-evident truth that suffices to dispatch the Division's concern about the lack of factual particularity and explanation in the allegations. It is nothing more than a self-serving assertion that is belied by the committee's own inability to explain the grounds without reference to additional facts and use of many additional words. That fact alone gives the lie to the claim that the Governor can easily respond to all the implicit allegations that the committee argues are included in its statement.

Contrary to the committee's claim, the Division did not argue that an application may not assert that one allegation violates multiple criteria for recall. [At. Br. 40-42] It argued that an application must *explain* how the factual allegations implicate the grounds. If more than one criterion applies, the statement should explain how the alleged facts constitute each criterion. Only with that information is the statement particular enough to give the targeted official a fair opportunity to respond in an equivalent number of words.

A. The late judicial appointment allegation does not establish lack of fitness, incompetence, or neglect of duty.

In its opening brief, the Division argued that the superior court erred in finding that the first allegation—that the Governor appointed a judge after the statutory deadline—shows incompetence, a lack of fitness, and neglect. [At. Br. 42-47] The

Division pointed out that the superior court relied on facts not in the statement in finding incompetence, and used definitions of the latter two criteria that are so broad as to essentially eliminate the requirement that recall be based on cause. [At. Br. 42-47]

In response, the committee continues to base its arguments on facts not found in the allegation: that the Governor "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." [Ae. Br. 35] By definition, an allegation cannot make a *prima facie* showing of meeting a statutory criteria based on facts not stated in the allegation. The committee also repeats its claim that the allegation shows harm because a "refusal to appoint" a nominee "harms the state by politicizing the merit system." [Ae. Br. 36] But the committee made no allegation that the late appointment was meant to "politicize" the merit system, so that argument serves only as an example of an allegation that would state harm, had it been made.

The committee also argues that this allegation is not purely technical or harmless because it states that the Governor "refused" to appoint a judge, and his intentional failure to appoint could not be a mistake or beyond his control. [Ae. Br. 36] That is true, but irrelevant. The Division's position does not rely on intent; it asserts that missing a deadline even intentionally does not, without more, show harm. For example, court rules set many deadlines. If an attorney misses a deadline, even intentionally—for example filing a brief a day or two late in order to double-check with a client that the arguments are acceptable—courts will still accept the brief if the late filing creates no prejudice. An allegation that missing the deadline was intentional does not show that it caused harm.

The committee's allegation might have been sufficient had it claimed that the Governor had a bad motive for missing it, but it does not even state this. The Division cannot infer facts not found in a statement unless they necessarily follow from the facts included.

As the Division has argued throughout this case, the statutory criteria are intended to limit the reasons for recall and therefore require an allegation with some threshold of impact, either explicit or implicit. The mere failure to meet a deadline, intentional or not, does not on its face demonstrate incompetence, lack of fitness, or neglect.

B. The committee cannot rely on legal conclusions in place of specific facts.

The Division argued that the second ground lacks sufficient factual particularity to establish a violation of either the Executive Branch Ethics Act or campaign finance laws. In response, the committee claims that the allegation that "the governor used state funds 'for partisan purposes' is factual [and] must be assumed to be true." [Ae. Br. 37] In essence, it claims that its characterization of the advertisements and the Governor's intent as being "for partisan purposes" incorporates all the underlying factual elements of the legal definition of "for partisan purposes" found in AS 39.52.120(b)(6). [Ae. Br. 37] Therefore, it argues, by definition this allegation is sufficient to establish a violation of the Executive Branch Ethics Act. [Ae. Br. 37] But this approach renders the Division's (and the Court's) review a nullity, and represents a dramatic expansion of the rule that the factual allegations in the statement are assumed to be true.

As the Division explained in its opening brief, AS 39.52.120(b)(6) prohibits a public official from using state funds for partisan political purposes and defines partisan political purposes as "having the intent to differentially benefit or harm a (i) candidate or

potential candidate for elective office; or (ii) political party or group," but "does not include having the intent to benefit the public interest at large through the normal performance of official duties." The Division also noted that whether a particular electronic advertisement or mailer violates this prohibition would depend on its content and purpose. [At. Br. 50] That determination requires a legal analysis of the facts about the advertisement or mailer. In essence, then, whether a mailer was distributed "for partisan political purposes" is a mixed question of law and fact.

If the committee had described the advertisements or mailers with particularity, the Division or the Court could apply those facts to the legal standard for evaluating whether something was done "for partisan purposes" and determine whether the advertisements or mailers violated the law. But here, the committee demands not only that its factual allegations be accepted as true, but also that its legal analysis and legal conclusions be accepted as true—indeed, it argues that it need not even provide the key facts and instead can simply offer its legal conclusions and have them treated as true factual statements. But that is not the law.[25] Indeed, if a committee's legal conclusions must be accepted as true, *von Stauffenberg* would have come out the other way: the application in that case alleged that the school board's executive session was "improper" and "in violation of Alaska law," [SOA App. at 4] and under the committee's approach

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[25] *See e.g., Citizens for Ethical Government v. State,* 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) (Stowers, J.) ("To the extent that there are mixed questions of fact and law, A did B, which is illegal, then the validity of that statement in part turns on whether the statement of law is valid or not. And if it's not, it gets stricken. And it also depend in part on whether the facts as alleged are specific enough or particular enough to create a statement that's sufficient to go to the voters.") [Exc. 93]

these assertions would have been taken as factual statements and assumed to be true.

The committee further claims that the allegation that the Governor spent state funds on partisan political ads "without proper disclosure," if assumed to be true, shows a violation of campaign finance law. But this is incorrect even if the Court treats the claim that the mailers were created "for partisan purposes" as a factual statement rather than as the legal conclusion that it is. Campaign finance laws apply only to election campaigns, but the allegation does not state that the political opponents or supporters were elected officials, much less actual candidates in any upcoming election, and the statutory definition of "for partisan purposes" is not confined to election contexts. Thus even if the Court accepts that the mailers were distributed for partisan purposes as a factual matter, that does not also mean that they were related to an election. This allegation thus lacks sufficient factual particularity to establish a violation of campaign finance laws.

C. The committee's allegation about the Governor's use of veto power lacks sufficient factual particularity.

In its opening brief, the Division pointed out that the committee's third allegation lacks sufficient factual particularity, because no reader who does not already know exactly what it refers to could possibly deduce the substance of the allegation from the words in the statement. Ignoring the gravamen of this problem, the committee asserts that the Division "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." [Ae. Br. 41] But the Division could not contest the legal sufficiency of an allegation so vague that it communicates nothing of substance, nor did it have any reason to address the Governor's "ability to veto court system funding in retribution for a court decision,"

because the statement of grounds does not allege that he did that.

Nor does the committee really dispute that this allegation lacks factual particularity. [Ae. Br. 41-44] Instead, it asserts that "the governor's veto of court system funding was widely reported to the public," and contends that a lawsuit challenging the veto was "well-publicized," [Ae. Br. 41] as if this somehow excuses its failure to state the substance of the claim in the statement of grounds. Nor does the fact that the reference paragraph at the bottom of the statement includes the phrase "OMB Change Record Detail (Appellate Courts…)" do more than indicate that the Governor's veto cut funding to the appellate courts—something that, by itself, is fully within his discretion and is an exercise of his constitutional authority. Indeed, elsewhere in its brief the committee concedes that "an official cannot be recalled for acts that are consistent with law and therefore within the elected official's discretion." [Ae. Br. 18]

Everything else the committee says about its third ground relies on facts and characterizations not found in the application, reinforcing the ground's facial deficiency.

D. An allegation of a mistaken veto is insufficient to establish any of the grounds for recall.

The Division argued in its opening brief that the superior court erred in finding that the Governor's mistaken but corrected veto of Medicaid funds made a *prima facie* showing of "incompetence," because a mistake alone does not indicate incompetence. [At Br. 53-55] The Division analogized to a trained, experienced surgeon who makes a mistake; the mistake alone does not establish that the surgeon is incompetent, even if it causes harm. In response, the committee quotes the trial court's statement that "[a] mistake can be a measure of competence," which the committee deems "plainly correct."

[Ae Br 45] That statement *is* plainly correct, but it is also plainly correct that a mistake does not necessarily demonstrate incompetence. More information is needed to show this.

The committee also argues that the veto shows a neglect of duties, but its argument adds supplemental facts not found in its statement of grounds. It asserts that the Governor "failed to understand the budgeting process." [Ae Br 46] That allegation is nowhere in the committee's fourth stated ground. The committee argues further that the veto shows a lack of fitness because the Governor "either lacks 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." [Ae. Br. 46] Again, the committee wants to demonstrate that its allegation was sufficiently particular by adding facts not included in its stated ground.

The committee also claims that the lack of harm from the veto was due to the legislature's remediation, presumably suggesting that therefore the allegation should be analyzed as though the mistake were uncorrected. [Ae. Br. 47] But its explanation of how the mistake was fixed is irrelevant because it is not stated in the allegation. As written—to say that "uncorrected, the mistake *would* cause the state" to lose money—the allegation indicates that the mistake was fixed without harm. If the mistake had not been—or was not about to be—fixed, the allegation would have said that "uncorrected, the mistake *will* cause the state" to lose money.

CONCLUSION

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