



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law

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November 4, 2019

Gail Fenumiai
Director of Elections
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P.O. Box 110017
Juneau, Alaska 99811-0017

Re: *Review of Application for Recall of Governor Michael J. Dunleavy*
AGO No. 2019200686

Dear Director Fenumiai:

You have asked for the Department of Law's opinion regarding the application for recall of Governor Dunleavy that was received by your office on September 5, 2019. Alaska Statute 15.45.540 requires the director of the Division of Elections (Division) to review the application and either certify it or notify the recall committee of the grounds of refusal.

I. Summary of Opinion

The application complies with the technical requirements of the recall statutes.¹ The timely filed application names an elected official subject to recall and is accompanied by the required payment. But, because the statement of grounds for recall fails to satisfy the legal standards required for a recall, we recommend that certification of the application be denied.

¹ Alaska's recall process at the state level contains two stages: (1) the application process under AS 15.45.480–.550, and (2) the petition process under AS 15.45.560–.630. The recall process is generally referred to in terms of a “petition” for recall. Any references to “petition” in this opinion are the same as “application” for the purposes of reviewing the application and the statement of grounds.

II. Background

Governor Michael J. Dunleavy (“the Governor”) was elected on November 6, 2018. On September 5, 2019, sponsors filed an application to recall the Governor. The application provides the following 158-word alleged grounds for recall:²

Neglect of Duties, Incompetence, and/or Lack of Fitness, for the following actions:

1. Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.
2. Governor Dunleavy violated Alaska Law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters.
3. Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.
4. Governor Dunleavy acted incompetently when he mistakenly vetoed approximately \$18 million more than he told the legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over \$40 million in additional federal Medicaid funds.

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

The application was accompanied by: (1) a \$100 deposit; (2) a statement that the sponsors are qualified voters; (3) a designation of a recall committee of three sponsors

² This is an approximate count, not including subsection letters such as (a) or (b), and with statutory citations treated as one word (i.e., “AS #”). If this references section is included in the word count, the statement of grounds would total 189 words. Either way, it is under 200 words.

who shall represent all persons who signed the application; (4) signatures of at least 100 qualified voters who subscribed to the application as sponsors; and (5) signatures and addresses of allegedly qualified voters equal to more than 10 percent of those who voted in the last general election.³ The statement of grounds for recall also references approximately 149 pages of additional material, including an Office of Management and Budget (“OMB”) Change Record Detail consisting of 144 pages and a Legislative Division of Legal and Research Services Memorandum consisting of five pages. As discussed further below, because this material takes the statement of grounds far beyond the 200-word limit, it should not be considered for purposes of determining whether the grounds are factually and legally sufficient.

III. Applicable law

The law of recall in Alaska is found in (1) the Alaska Constitution, (2) Alaska statutes implementing recall and establishing the procedures and grounds for recall, and (3) court decisions from the Alaska Supreme Court. Decisions from the Alaska Superior Court are persuasive but not controlling authority.⁴ Additionally, prior opinions from the Department of Law and court decisions from other states can be helpful in interpreting Alaska’s recall statutes.

A. The Alaska Constitution

Article XI, section 8 of the Alaska Constitution permits recall of all elected public officials in Alaska except judicial officers. The constitution does not set forth the procedures or grounds for recall, but instead empowers the legislature to establish them.

B. Alaska statutes

By statute, an application for recall must meet the following requirements:

- It must name a public official subject to recall: governor, lieutenant governor or state legislator. AS 15.45.470.

³ The Division of Elections reviewed the signatures and found that 46,405 of the signatures submitted were legible signatures that met the requirements of AS 15.45.500(3). The Department of Law has no role in the signature review process.

⁴ Among the three superior court decisions on state recall applications, we have given greater weight to the most recent case, Judge Stowers’ decision in *Citizens for an Ethical Government v. State*, No. 3AN-05-12133CI (Alaska Super., Jan. 4, 2006) (Stowers, J.) (oral ruling on summary judgment), because Justice Stowers is now a member of the Alaska Supreme Court. For your convenience, a copy of the official transcript of Judge Stowers’ decision is attached to this Opinion letter.

- It must be accompanied by a deposit of \$100. AS 15.45.480.
- It must be filed after the first 120 days in office and no later than 180 days before the last day in office of the official subject to recall. AS 15.45.490; AS 15.45.550(2).
- It must be in the proper form, which requires:
 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. a statement that the sponsors are qualified voters who signed the application with the statement of grounds for recall attached;
 4. the designation of a recall committee of three sponsors who represent all the sponsors and subscribers;
 5. the signatures of at least 100 qualified voters who subscribe to the application as sponsors for purposes of circulation; and
 6. the signatures and addresses of qualified voters equal in number to 10 percent of those who voted in the preceding general election.

AS 15.45.500.

- It must adequately articulate at least one of the four legal grounds for recall:
 1. lack of fitness;
 2. incompetence;
 3. neglect of duties; or
 4. corruption.

AS 15.45.510.

As the Director of the Division, you are tasked with reviewing the application and you must either certify it, if it meets the technical and substantive requirements, or notify the

recall committee of the grounds for refusal to certify.⁵ Although the statutes do not specify a timeframe for completing your review, you requested our legal review be completed within sixty days, which falls on November 4, 2019.

IV. Standard of review

No decision of the Alaska Supreme Court has addressed the statutes governing recall of a state level official. The Supreme Court has, however, twice addressed the recall statutes for local officials found in AS 29.26, which differ from the grounds for recall of a state elected official.⁶ Superior court judges have, nonetheless, treated the Alaska Supreme Court's recall decisions regarding local officials to be controlling for recall applications of statewide officials.⁷

Some general rules of review are noteworthy at the outset. The reviewer⁸ of a recall application is to “avoid wrapping the recall process in such a tight straightjacket that a legally sufficient recall petition could be prepared only by an attorney who is a specialist in election law matters.”⁹ The statement of grounds contained within the application must “give the officeholder a fair opportunity to defend his conduct in a rebuttal limited to 200 words.”¹⁰ And the application must stand or fall based upon the words written by its sponsors—the reviewer cannot “rewrite the allegations of the petition in different language.”¹¹ The reviewer is to “delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute.”¹² This latter point is important because “[t]he right to recall . . . officials in

⁵ AS 15.45.540.

⁶ See *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287 (Alaska 1984); *von Stauffenberg v. The Committee for an Honest and Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995).

⁷ See *Coghill v. Rollins*, No. 4FA-92-1728CI (Alaska Super., 14, 1993) (Savell, J.); *Valley Residents for a Citizen Legislature v. State*, No. 3AN-04-6827CI (Alaska Super., Aug. 24, 2004) (Gleason, J.); *Citizens*, No. 3AN-05-12133CI (Stowers, J.).

⁸ We intend the word “reviewer” to refer to both you as the Director of the Division of Elections and the Department of Law as your legal advisor.

⁹ *Meiners*, 687 P.2d at 301.

¹⁰ *Id.* at 302.

¹¹ *Id.*

¹² *Id.* at 303.

Alaska is . . . limited to recall for cause”—*i.e.*, absent “cause” (legal grounds for recall), there can be no recall.¹³

The grounds for recall in the application must be both factually and legally sufficient.¹⁴ The reviewer is to ensure that only factually and legally sufficient charges go to the voters.¹⁵ The reviewer should examine a recall application similar to how a court reviews a motion to dismiss a complaint for failure to state a claim.¹⁶ Applying this standard, the reviewer should take the factual allegations as true.¹⁷ The question for the reviewer is whether the facts, taken as true, constitute a *prima facie* showing of the grounds for recall. We discuss the standards for factual and legal sufficiency in more detail in the following sections.

A. Factual sufficiency

The factual allegations of an application must describe the conduct that constitutes the grounds for recall “in particular.”¹⁸ The reviewer of an application is “required to make at least a threshold determination as to whether what has been alleged is factually specific enough.”¹⁹ The purpose of the particularity requirement is to protect both the elected official and voters.²⁰ Factual allegations must fairly inform the electorate of the charges and allow the targeted official a reasonable opportunity to rebut the charges.²¹ As the Alaska Supreme Court explained in *von Stauffenberg* and *Meiners*, “[t]he purpose of the requirement of particularity is to give the officeholder a fair opportunity to defend his

¹³ *von Stauffenberg*, 903 P.2d at 1059; *accord Meiners*, 687 P.2d at 295; *In re Recall of Reed*, 124 P.3d 279, 281 (Wash. 2005) (“public officials are protected from petitions based on frivolous charges.”); *In re Recall of Call*, 749 P.2d 674, 676 (Wash. 1988) (“[t]he right to recall elected officials is limited to recall for cause so as to free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations.”).

¹⁴ *See von Stauffenberg*, 903 P.2d at 1059–60; *see also Reed*, 124 P.3d at 281; *In re Recall of Lee*, 859 P.2d 1244, 1247 (Wash. 1993).

¹⁵ *Reed*, 124 P.3d at 281.

¹⁶ *von Stauffenberg*, 903 P.2d at 1059.

¹⁷ *Id.*

¹⁸ AS 15.45.500(2); *see also, e.g., von Stauffenberg*, 903 P.2d at 1060; *Citizens*, No. 3AN-05-12133CI at 4–5.

¹⁹ *Citizens*, No. 3AN-05-12133CI at 12.

²⁰ *Meiners*, 687 P.2d at 302.

²¹ *von Stauffenberg*, 903 P.2d at 1060; *see also* 2004 Op. Att’y Gen. (Apr. 8, 2004) at 9 and n. 43.

conduct in a rebuttal limited to 200 words.”²² Allegations stated in overly general terms would leave the elected official incapable of defending himself and would lead some electors to sign a recall petition “with no idea of what words or acts of the official might have precipitated the recall effort.”²³ The factual allegations of a recall application must also specify some detail as to how the office holder personally committed or was personally responsible for the alleged conduct that constitutes the ground for recall.²⁴ “[T]here is ‘no authority for the proposition that a public official may be recalled for the act of a subordinate done without the official’s knowledge or direction.’”²⁵

We acknowledge that recall statutes are to be broadly construed such that substantial compliance by the sponsors with the established procedures is sufficient to meet the requirements. But if the statutes and the rulings of “the Supreme Court in *Meiners* and *von Stauffenberg* mean anything . . . a court is required to make at least a threshold determination as to whether what has been alleged is factually specific enough.”²⁶ In the superior court case of *Citizens for an Ethical Government v. State*, Judge Stowers warned that “[r]ecall advocates must allege more than mere conclusory statements or arguments, otherwise our recall process drifts to the end of the spectrum where simple disagreement with an officeholder’s position on questions of policy becomes sufficient ground in and of themselves.”²⁷ Disagreement with an elected official’s policies is not a valid basis for recall.²⁸

The reviewer may consider only the 200 or fewer words in the statement of grounds when considering a recall application. The sponsors of an application are not permitted to skirt the statutory 200-word limit by referencing or attaching additional

²² 903 P.2d at 1060 (quoting *Meiners*, 687 P.2d at 302).

²³ *Steadman v. Halland*, 641 P.2d 448, 453 (Mont. 1982).

²⁴ *See, e.g., Coghill*, No. 4FA-92-1728CI at 23–24 (Judge Savell found that an allegation to the effect that Lieutenant Governor Coghill had made unfounded public accusations of criminal activity of recall staff and had used his office to intimidate individuals who had challenged his nomination and election, was both factually and legally insufficient because it contained no details about the accusations and did not describe how the Lieutenant Governor had used his office to intimidate others).

²⁵ *Reed*, 124 P.3d at 281–82 (quoting *In re Recall of Morrisette*, 756 P.2d 1318, 1320 (Wash. 1988)).

²⁶ *Citizens*, No. 3AN-05-12133CI at 12.

²⁷ *Citizens*, No. 3AN-05-12133CI at 14; *see also Meiners*, 687 P.2d at 294; *Cole v. Webster*, 692 P.2d 799, 803 (Wash. 1984).

²⁸ *Meiners*, 687 P.2d at 294; *Citizens*, No. 3AN-05-12133CI at 14; *Cole*, 692 P.2d at 803.

documents and materials to the application.²⁹ Judge Stowers declined to review additional materials that were submitted to him and specifically limited his review to the precise words of the statement of grounds for recall contained within the recall application.³⁰ The 200-word limit for the statement of grounds must be strictly enforced because, in the event of a recall election, the elected official is limited to only 200 words in the rebuttal statement that is posted in polling places.³¹

B. Legal sufficiency

Unlike the deference given to the truth of factual allegations, the reviewer of a recall application must review legal allegations or legal conclusions *de novo* for their consistency with law. No deference is given to the sponsors' legal conclusions.³² This applies to (1) allegations that some action—the facts of which the reviewer assumes to be true—constitutes one of the statutory grounds for recall; and (2) allegations that some action that is foundational to the sponsor's claim is unlawful or has specific legal consequence.³³ Allegations that present mixed questions of law and fact are to be reviewed *de novo* for the truth or correctness of the legal assertions of the allegation. As Judge Stowers stated, “[t]o 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.”³⁴ In order to define the grounds for recall, we must first review the history of the constitutional and statutory recall provisions.

The passage of Alaska's first recall statute followed close on the heels of the Alaska Constitutional Convention and was informed by the delegates' discussion of recall. In 1959, the newly created Alaska Legislature directed the Alaska Legislative

²⁹ *Citizens*, No. 3AN-05-12133CI at 4–5.

³⁰ *Id.* at 4–5; *see also Steadman*, 641 P.2d at 453 (explaining that the Montana Supreme Court would not consider a “Reasons for Recall” document that was attached to the petition).

³¹ AS 15.45.680.

³² *See von Stauffenberg*, 903 P.2d at 1059-60 and n.12 (stating that the Court's role is to “determine whether doing [an alleged action] was a violation of Alaska law”); *Meiners*, 687 P.2d at 301 (“If the petition alleges violation of totally non-existent laws, then it would not allege failure to perform prescribed duties.”); *Citizens*, No. 3AN-05-12133CI at 10–11 (finding that allegations to the effect that a state senator had engaged in corruption and had demonstrated lack of fitness by accepting money from a politically involved entity were legally insufficient because it is not illegal to serve as a paid consultant to politically involved corporations).

³³ *See Meiners*, 687 P.2d at 301, 303.

³⁴ *Citizens*, No. 3AN-05-12133CI at 11.

Council to prepare an election code along with a report for introduction in the 1960 legislative session.³⁵ As requested, Legislative Council prepared a comprehensive election code, and included sections implementing the constitutional provision on recall.³⁶ Those initial legislative actions indicate that the legislature intended the grounds for recall to be considered serious substantive actions of malfeasance and nonfeasance rather than technical or procedural matters. This statutory approach implemented the intent of the Constitutional Convention delegates.

The first draft of the constitutional recall provision that the delegates evaluated read as follows:

Every elected public official in the State, except judicial officers, is subject to recall by the voters of the State or subdivision from which elected. Grounds for recall are malfeasance, misfeasance, nonfeasance, or conviction of a crime involving moral turpitude. The legislature shall prescribe the recall procedures.³⁷

Amendments to this proposal were taken up by the convention beginning on January 4, 1956. Delegate Hellenthal offered the first amendment to the section, seeking to strike the words “involving moral turpitude.”³⁸ He contended that any crime should be sufficient grounds for recall.³⁹ During the debate on this amendment, Delegate McCutcheon contended that the amendment had not gone far enough and that no grounds should be specified for a recall.⁴⁰

As the debate proceeded, however, it was clear that the majority of the delegates did not agree with the views of Delegates Hellenthal and McCutcheon. Delegate Rivers did not want to make lesser crimes grounds for recall.⁴¹ Delegate Johnson thought “there ought to be some protection for public officials.”⁴² Delegate Hellenthal’s amendment to delete the words “involving moral turpitude” failed.⁴³

³⁵ See Legislative Council, *Suggested Alaska Election Code* (Jan. 20, 1960) at 1.

³⁶ See 1st Legis., 2nd Sess., HB 252.

³⁷ Constitutional Convention Committee Proposal No. 3, Report of the Committee on Direct Legislation, Amendment and Revision (December 9, 1955) at 3.

³⁸ 2 Proceedings of the Alaska Constitutional Convention at 1207.

³⁹ *Id.* at 1207–08.

⁴⁰ *Id.*

⁴¹ *Id.* at 1210–1212.

⁴² *Id.* at 1211.

⁴³ *Id.* at 1212.

The next amendment, offered by Delegate Fischer, sought to strike the specified grounds from the recall provision.⁴⁴ The question was then raised whether constitutional silence on the grounds for recall would permit the legislature to prescribe grounds. Delegate Rivers insisted that grounds be prescribed either in the constitution or in statute.⁴⁵ The convention approved the amendment striking the specified grounds from the Constitution’s text.⁴⁶

The debate then turned back to the issue of whether the legislature should have the power to specify grounds for recall. Delegate White offered an amendment providing that “[g]rounds for recall shall be set forth in a recall petition.”⁴⁷ Delegate White explained that this would remove the legislature’s power to prescribe specific grounds for recall.⁴⁸ In response, Delegate Rivers reiterated his view that the legislature should prescribe the grounds for recall.⁴⁹ Delegate Hurley joined Delegate Rivers and expressed his concern that if no grounds for recall were specified,

[I]t does create a nuisance value to which public officials should not be subjected. I recognize that they should be subject to recall, but I think that the grounds should be sincere and they should be. I think it is fair to leave it to the legislature to prescribe the grounds under which a recall petition should be circulated so as to prevent circulation of recall petitions for petty grounds in local jurisdictions by some recalcitrant officer who was not elected, which I have seen happen in my own community.⁵⁰

Delegate White’s amendment—to simply have the grounds for recall stated in a recall petition—failed.⁵¹ The convention then took up an amendment from Delegate Rivers that required the legislature to specify grounds for recall. Without further debate, the convention approved the amendment, with a vote of 39 to 11.⁵²

In summary, the convention had serious concerns with the pure “political” recall model that permits the recall of an elected official for any reason or no reason.

⁴⁴ *Id.* at 1213–14.

⁴⁵ *Id.* at 1215.

⁴⁶ *Id.* at 1222.

⁴⁷ *Id.* at 1237.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1238.

⁵⁰ *Id.* at 1238–39.

⁵¹ *Id.* at 1239.

⁵² *Id.* at 1240.

Consequently, the convention soundly rejected this model in favor of requiring the legislature to specify the grounds for recall, creating a threshold that must be met to justify allowing a recall petition to move forward. The delegates supported the idea that grounds for recall should be substantive, not just technical or procedural.⁵³ And the legislature implemented the delegates' intent by enacting substantive grounds for recall.

The specific grounds that the legislature ultimately enacted were selected from a list of grounds set forth in a Library of Congress reference book on state government.⁵⁴ The reference book provided a lengthy list of bases for recall that had been used to that date: "Among the charges noted are unfitness, favoritism, carelessness, extravagance, incompetence, inability, no benefit to public, selfishness, neglect of duties, and corruption."⁵⁵ Notably, the legislative council drafters did not select the entire list. Instead, they picked only four of the grounds mentioned: lack of fitness, incompetence, neglect of duty, and corruption. The drafters' decision to not include lesser or more subjective grounds such as "no benefit to the public," "carelessness," and "selfishness" is consistent with the Constitutional Convention delegates' desire to provide at least "some protection for public officials" from recall on "nuisance" and "petty grounds."⁵⁶

With this background, we consider the three grounds alleged here—neglect of duty, incompetence, and lack of fitness—and provide the standard for evaluating whether the facts, if taken as true, make a prima facie showing of the grounds alleged.

1. Neglect of duty means substantial noncompliance with one or more substantive duties of office.

The term "neglect of duty" is not defined in the Alaska recall statutes, and the Alaska Supreme Court has never defined this term in a recall context. Both *Meiners* and *von Stauffenberg* addressed the local government basis for recall—which is "failure to perform duties"—and found that discretionary uses of power are not mandatory duties

⁵³ 2 Proceedings at 1238–39.

⁵⁴ Legislative Council, *Suggested Alaska Election Code* (Jan. 20, 1960) at 67 (citing W. Brooke Graves, *American State Government* 151 (ed. Heath 1953)).

⁵⁵ Graves, *American State Government* 151.

⁵⁶ 2 Proceedings at 1211, 1238–39. *See also Meiners*, 687 P.2d at 295; *von Stauffenberg*, 903 P.2d at 1059 & n. 11 (limiting recall to Alaska to recall for cause, "so as to free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations").

and therefore not grounds for recall.⁵⁷ As stated above, mere policy disagreements are also expressly rejected as grounds for recall.⁵⁸ Although local official recall cases are helpful in understanding the court’s approach, the legislature chose “failure to perform duties” as a ground for local recall and “neglect of duty” as a ground for state recall. The legislature’s use of different terms suggests that the grounds have different meanings.⁵⁹ “Neglect of duty” requires a higher threshold burden than mere “failure to perform duties”; the former requires a showing of neglect while the latter requires a showing that a duty was affirmatively and intentionally not performed.

Neglect of duty appears to be similar to the concept of “nonfeasance” and encompasses serious and repeated failures to perform substantive essential duties. For example, nonfeasance is defined by Minnesota as “the intentional, repeated failure of a state officer . . . to perform specific acts that are required duties of the officer.”⁶⁰ Washington defines the related concept of “violation of the oath of office” as “the willful neglect or failure by an elective public officer to perform faithfully a duty imposed by law.”⁶¹ Under Virginia’s law, the conduct must have “a material adverse effect upon the conduct of the office” to amount to a neglect of duty.⁶² Virginia’s case law suggests that neglect of duty requires an intentional act, and that an honest mistake about which law applies and delay in evaluating the law cannot substantiate a claim for neglect of duty.⁶³

In Alaska, courts apply a substantial compliance analysis to post-election challenges, an approach that provides guidance on how to apply the neglect of duty standard in the recall context. The substantial compliance standard is “necessary to

⁵⁷ *von Stauffenberg*, 903 P.2d at 1060; *see also Meiners*, 687 P.2d at 300 (finding that the board’s duty to employ and also control a superintendent was not discretionary but a requisite duty of the board, so that facts alleging a failure to control him were sufficient to demonstrate the board’s failure to perform the prescribed duty to employ a superintendent).

⁵⁸ *Meiners*, 687 P.2d at 294; *Citizens*, No. 3AN-05-12133CI at 14; *Cole*, 692 P.2d at 803.

⁵⁹ *See Alaska Spine Ctr., LLC v. Mat-Su Valley Med. Ctr., LLC*, 440 P.3d 176, 182 (Alaska 2019) (assuming if legislature meant the same type of restriction in both subsections then it would have used the same language).

⁶⁰ MN ST § 211C.01(2); *In re Proposed Petition to Recall Hatch*, 628 N.W.2d 125, 128 (Minn. 2001).

⁶¹ *Chandler v. Otto*, 693 P.2d 71, 73–74 (Wash. 1984).

⁶² VA. Code 24.2-233. Virginia has a removal process like recall that similarly begins with a petition, but removal is decided in a court proceeding.

⁶³ *See Warren v. Commonwealth*, 118 S.E.2d 125, 126 (Va. 1923).

distinguish trivial from non-trivial errors and omissions.”⁶⁴ The Alaska Supreme Court holds that “rigidly applying a forfeiture [of election] standard for inconsequential violations is inconsistent with the presumptive validity of election results.”⁶⁵ A consistent theme for election contests is that petitioners have a dual burden, to show malconduct—defined in *Hammond v. Hickel* as a significant deviation from statutory or constitutional norms—that could have affected the election outcome.⁶⁶ First, conduct is not malconduct where the alleged offenders have complied with the purpose of a statute.⁶⁷ Second, the cases also distinguish between duties established in mandatory versus directory statutes. Mandatory statutes go to the essence of why the election law was created.⁶⁸ Directory statutes provide procedural guidance.⁶⁹ For conduct to amount to a violation, it must violate the purpose of a mandatory statute to a degree significant enough to have affected the outcome of an election.⁷⁰

The Alaska Supreme Court’s approach in these election cases is reminiscent of the discussion on recall amongst the Constitutional Convention delegates, which provided the foundation for the statute passed by the Alaska Legislature just a few years later. The delegates were concerned that recall could be used by an opposing political faction to harass an elected official with an application for recall based on technical or procedural grounds—or as one delegate referred to them, “petty grounds.”⁷¹ Neglect of duty was meant to be more than just an unintentional error or failure to comply with a directory, rather than mandatory, duty. Therefore, the duty alleged to have been neglected needs to be substantive, and the facts need to show that the official affirmatively and intentionally failed to substantially comply with that substantive duty in order to meet the recall ground of neglect of duty.

⁶⁴ *Grimm v. Wagoner*, 77 P.3d 423, 429 (Alaska 2003).

⁶⁵ *Id.* at 432. Substantial compliance analysis appears appropriate in a recall context because, just as in the context of an election challenge, a recall is an attempt to undo the result of an election.

⁶⁶ *Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978).

⁶⁷ *Dansereau v. Ulmer*, 903 P.2d 555, 567–68 (Alaska 1995) (“the apparent purpose of AS 15.56.010—to promote an informed electorate and to allow voters to evaluate the solicitations they receive—was substantially met.”); *Hammond*, 588 P.2d at 266, 269 (Alaska 1978).

⁶⁸ *Finkelstein v. Stout*, 774 P.2d 786, 791 (Alaska 1989), overturned on other grounds by *Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018).

⁶⁹ *Id.* at 788.

⁷⁰ *Hammond*, 588 P.2d at 264.

⁷¹ 2 Proceedings at 1238–39.

2. Incompetence means a substantial lack of sufficient knowledge, skills, or professional judgment required to perform substantive duties of the office.

Incompetence has likewise not been defined by the legislature or interpreted by the Alaska Supreme Court. In a superior court case, Judge Savell determined that the definition of incompetence “must relate to a lack of ability to perform the official’s required duties.”⁷² Black’s Law Dictionary provides a broad definition: “the quality, state, or condition of being unable or unqualified to do something.”⁷³

Alaska’s Business and Professions Code offers definitions of professional incompetence that could be helpful in defining incompetence for purposes of recall.⁷⁴ For example, professional incompetence of a medical licensee is defined by regulation as “lacking sufficient knowledge, skills, or professional judgment . . . to a degree likely to endanger the health of his or her patients.”⁷⁵ Likewise, a nurse’s license may be suspended up to two years for conduct found to be “professionally incompetent, if the incompetence results in the public health, safety, or welfare being placed at risk.”⁷⁶ Whereas incompetence of a doctor or a nurse must relate to endangering patients or the health of the public, incompetence of an elected official must relate to performing the substantive duties of the office. Considering the discussion of the constitutional delegates and these other statutory definitions of professional “incompetence,” an elected official will meet the ground for incompetence only if the alleged facts show he lacks sufficient knowledge, skill or professional judgment required to perform substantive duties of the office. It is clear that the term “incompetence” cannot be defined in such a way that it can be used as a proxy for mere policy disagreements—this would permit a result that the Constitutional Convention delegates, the legislature, the Alaska Supreme Court and other state courts have rejected.⁷⁷

⁷² *Coghill*, 4FA-92-1728CI at 21.

⁷³ Black’s Law Dictionary (11th ed. 2019).

⁷⁴ *See, e.g.* AS 08.68.850; AS 08.64.302; 12 AAC 36.330 (as interpreted by *Halter v. State, Dep’t of Commerce & Economic Dev., Med. Bd.*, 990 P.2d 1035, 1037 (Alaska 1999) (where the Supreme Court upheld the definition as not unconstitutionally vague as applied in sanctioning a medical professional.)); AS 08.64.326; AS 08.64.130; 12 AAC 44.720; AS 14.20.170. *See also* *Lee Houston & Assocs., Ltd. v. Racine*, 806 P.2d 848, 853 (Alaska 1991); *Bibo v. Jeffrey’s Restaurant*, 770 P.2d 290 (Alaska 1989); *Van Horn Lodge, Inc. v. White*, 627 P.2d 641, 643 (Alaska 1981).

⁷⁵ 12 AAC 40.970.

⁷⁶ 12 AAC 44.720(b)(3).

⁷⁷ 2 Proceedings at 1207-40; *Meiners*, 687 P.2d at 294; *Citizens*, No. 3AN-05-12133 CI at 14; *Cole*, 692 P.2d at 803.

3. Lack of fitness means substantial physical or mental inability to perform substantive duties of the office.

Prior decisions by the superior court applied vague definitions for lack of fitness that allow sponsors wide latitude in defining it, which is inconsistent with the history of the Constitutional Convention and the recall statutes.⁷⁸ Because these prior decisions are not binding and the definitions are unworkable for purposes of having a substantive threshold, we suggest looking to other statutory definitions when defining “lack of fitness.”

In Alaska’s Business & Professions Code, “fitness” is determined by mental or physical ability.⁷⁹ For example, pilots may be subjected to mental or physical exams to determine their fitness to perform the duties of a pilot,⁸⁰ nurses to determine their fitness to perform the professional duties of a nurse,⁸¹ and pharmacists to determine their fitness.⁸² Social workers must be considered “fit to practice social work as determined by the board” to obtain a certificate of fitness for their licensure.⁸³ Also, pawnbrokers must provide proof they are fit to engage in business as pawnbrokers in order to obtain their requisite licensure.⁸⁴ Physical or mental disability establishes unfitness as a ground for disciplinary action against a medical licensee.⁸⁵ The code also requires a certificate of

⁷⁸ In *Coghill*, Judge Savell used the Black’s Law dictionary definition of “unfitness” available at the time, which reads: “unsuitable; incompetent; not adapted or qualified for a particular use or service; having no fitness.” *Coghill*, No. 4FA-92-1728CI at 23. In *Valley Residents*, Judge Gleason adopted the Division of Election’s definition of lack of fitness: “unsuitability for office demonstrated by specific facts related to the recall target’s conduct in office.” *Valley Residents*, No.3AN-04-6827CI at 10.

⁷⁹ There are also determinations of fitness based on written exams, such as exams required for legal or medical professionals, but these would not apply to determination of the fitness of an elected official.

⁸⁰ AS 08.62.040.

⁸¹ 12 AAC 44.760.

⁸² 12 AAC 52.940.

⁸³ AS 08.95.110(a)(4) (fitness is assessed along with professional standing, but separately from academic degree(s), experience, and moral character, which are addressed in separate subsections).

⁸⁴ AS 08.76.110 (the other qualifications are good character, requisite experience, filing the appropriate application, and paying the required fee).

⁸⁵ AS 08.64.326(8)(C) (“has demonstrated . . . unfitness because of physical or mental disability”).

fitness that certifies only physical fitness for explosives handlers (in construction and excavation)⁸⁶ and for marine pilots.⁸⁷

Considering these statutory approaches to determining fitness as well as the discussion of the constitutional delegates, “lack of fitness” on the part of an elected official should relate to the substantive duties that need to be carried out and a showing of a substantial lack of physical or mental ability to perform those duties. In other words, lack of fitness means a substantial physical or mental inability to perform the substantive duties of the office. Any lesser definition of this phrase would subject elected officials to recall for mere policy choices, a result that was rejected by the constitutional delegates.⁸⁸

V. Analysis

A. The application meets the technical requirements.

The application was accompanied by a \$100 deposit as required by AS 15.45.480. The application sets forth the name and office of the person to be recalled as required by AS 15.45.500(1). The application contains a statement of grounds for recall that, on its face, is not more than 200 words as required by AS 15.45.500(2).

Although the statement of grounds contains a reference section, we do not consider the referenced materials because they would expand the statement to over 149 pages and substantially beyond 200 words. Like Judge Stowers in *Citizens*, we limit our review to the four corners of the application.⁸⁹ This is also the approach the Alaska Supreme Court endorsed in *von Stauffenberg*, where it mentioned external information in its recitation of the case facts and proceedings, but limited its findings to information alleged within the statement of grounds.⁹⁰

The application designated a recall committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the recall as required by AS 15.45.500(4). The application contained signatures of at least 100 qualified voters who subscribe to the application as sponsors for purposes of circulation as required by AS 15.45.500(3).

⁸⁶ AS 08.52.020.

⁸⁷ 12 AAC 56.080.

⁸⁸ *Meiners*, 687 P.2d at 294 (citing to 2 Proceedings at 1237–39); *Citizens*, No. 3AN-05-12133CI at 14; *Cole*, 692 P.2d at 803 (Wash. 1984).

⁸⁹ *Citizens*, No. 3AN-05-12133CI at 17.

⁹⁰ *von Stauffenberg*, at 1056–57.

The application contains the signatures and addresses of qualified voters equal in number to 10 percent of those who voted in the preceding general election for governor as required by AS 15.45.500(3). The valid signature pages contained a statement that the sponsors are qualified voters who signed the application, and the statement of grounds for recall is attached as required by AS 15.45.500(3). The statement of grounds for recall was also printed on the back of all the qualified signature sheets.⁹¹

B. The statement of grounds for recall is factually and legally deficient.

The reviewer must determine whether the statement of grounds for recall is factually sufficient, that is, whether the factual statements are sufficiently particular. Next, the reviewer must determine whether the statement of grounds is legally sufficient, that is, assuming the alleged facts to be true, whether it states a valid legal claim for one of the specified grounds for recall. For the reasons discussed below, we conclude that three of the four allegations listed in the statement fail to sufficiently allege the facts and that all four allegations fail to meet any of the listed grounds for recall—neglect of duty, incompetence, or lack of fitness.

1. The allegation that Governor Dunleavy refused to appoint a judge to the Palmer Superior Court within forty-five days merely alleges a procedural violation and fails to show a violation of any substantive duty.

The first allegation appears to be factually sufficient as there is no dispute that Governor Dunleavy did not appoint a judge to the Palmer Superior Court within forty-five days as provided by Alaska statute. But this does not make a prima facie showing of any of the grounds for recall.

The Alaska Constitution directs the governor to “fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the Judicial Council.”⁹² The constitution does not impose a time deadline on the governor. Instead, it refers only to “filling any vacancy.” The only fact included in the statement of grounds is that the governor refused to appoint within the statutory timeline of forty-five days after receiving the nominations. The statement does not include any facts indicating the governor never appointed a judge, i.e., failed to fill a

⁹¹ There were twenty-three signature pages that failed to include the statement of grounds on the back of the signature page. The Division of Elections did not accept the signatures on these pages for failure to attach the statement of grounds as required by AS 15.45.500(3). The remainder of the qualified signature pages contained enough signatures of qualified voters to surpass the minimum required qualified voter signatures, according to the Division of Elections’ review.

⁹² Alaska Const. art. IV, § 5.

vacancy. And, there is no dispute that the governor did appoint a judge shortly after the forty-five day period and before any vacancy occurred.

The facts also fail to allege that the judicial position was vacant, or that the failure to appoint within the forty-five day window created an unfilled vacancy, strained court resources or created an inability to timely process cases. It was widely reported that the judicial position was not yet vacant at the time of the governor's appointment.⁹³ The governor's substantive duty under the Alaska Constitution is to fill a vacancy, not to make an appointment within a specific timeframe. Absent any other supportive facts, merely missing a statutory timeline that is not included in the substantive constitutional duty to appoint a judge does not amount to substantial noncompliance with the constitutional duty or any other legal ground for recall.

Legislative history and practice also indicate that the statutory timeframe alone does not amount to a substantive duty.⁹⁴ The judicial nomination and appointment statute has been amended twice to permit the Alaska Judicial Council (AJC) more time to nominate candidates. The AJC now has ninety days (as opposed to its original thirty days) after a seat is vacated to send at least two nominees to the governor so that he has a

⁹³ Judge Vanessa White's seat on the Palmer Superior Court was not scheduled to become vacant until late April 2019. In February 2019, the Governor attempted more than once to obtain additional information from the Alaska Judicial Council to ensure the nominating process had properly included the qualified candidates according to the merit-based selection process the constitution requires. The appointments were due on March 21, 2019, but the Governor and Chief Justice were finally able to meet on March 26, 2019 for a productive discussion regarding the judicial selection process. Following that meeting, the Governor interviewed the AJC's two nominees as soon as was practicable and then appointed Kristen Stohler to the Palmer seat on April 17, 2019, before it ever became vacant. The five-day delay, associated with the Governor's meeting with the Chief Justice, resulted in a more fully-informed decision by the Governor, brought about no harm to the public or judiciary, and substantially complied with the prescribed timeframe.

⁹⁴ There are numerous other areas in statute where timelines or actions are considered more of a guideline than a mandate. For example, the legislature is required by AS 24.05.150 to complete its session in ninety days but regularly fails to meet that timeline, instead relying on the constitutional 120-day timeline. Alaska Const. art. II, § 8 (the legislature must adjourn "no later than one hundred twenty consecutive calendar days from the date it convenes"). Legislators cannot be subject to a recall application for the mere failure to adjourn in ninety days, just as the governor cannot be subject to a recall application for the failure to meet the forty-five day timeline for appointment of a judge, especially where no judicial seat was left vacant.

choice of whom to appoint.⁹⁵ This illustrates that the timelines are not set in stone and allowing more time does not amount to a constitutional violation. In fact, during Governor Walker's administration, the AJC intentionally delayed submitting its nominations to the governor rather than submitting them immediately following the AJC's candidate interviews. Because of that delay, all five of Governor Walker's appointments on February 9, 2017 were made more than forty-five days after the AJC interviews were completed.⁹⁶

Because the forty-five day timeframe is merely procedural rather than substantive, the mere failure to comply with it does not amount to neglect of duty. Instead, the Governor fully complied with the substantive constitutional requirement to appoint a judge to fill a vacancy. This allegation, as a matter of law, does not fit the definitions of incompetence or lack of fitness that we explain above.

⁹⁵ AS 22.10.100 (and the ninety-day time period can be extended with the concurrence of the Supreme Court).

⁹⁶ One appointment was made approximately fifty-two days following the AJC interview. Four others were made more than sixty days following their respective AJC interviews. Judge Pat Douglas of Dillingham Superior Court had retired in the fall of 2016, and Judge Reigh was appointed to the Dillingham seat February 9, 2017, approximately sixty-five days after interviews were completed for Dillingham Superior Court. See <http://www.ajc.state.ak.us/selection/histlog.html#a2015>; <https://www.kdlg.org/post/tina-reigh-formally-installed-dillingham-superior-court-judge#stream/0>. Although the AJC delayed in order to accommodate Governor Walker's cancer treatment, the fact that the AJC delayed indicates that the timeframe is not substantively mandatory. If the timeframe were substantive and mandatory then the AJC would not have delayed and would have nominated regardless of Governor Walker's circumstances.

2. The allegation that Governor Dunleavy misused state funds without proper disclosure and for partisan purposes fails to allege sufficient facts to support recall.⁹⁷

The second allegation, stripped of its legal conclusions, reads: “Governor Dunleavy...authoriz[ed] and allow[ed] the use of state funds...to purchase electronic advertisements and direct mailers making...statements about political opponents and supporters.” The facts alleged in this allegation do not meet the factual sufficiency requirement. Instead, the allegation contains the assertion that electronic advertisements and direct mailers were sent using state funds, and that these materials made statements. This does not show a violation of a substantive duty since state funds can be spent on mailers and electronic advertisements.

The allegation does not indicate what the statements said, except that they were about “political opponents and supporters.” Without any further specific facts of what occurred, it is hard to discern exactly what the wrongful conduct was. Does political opponents and supporters mean candidates who had already filed declarations of candidacy? Does that mean the Republican or Democratic Party? And were these made when there was an ongoing campaign? Also, did the governor have a direct hand in purchasing and creating these electronic advertisements? The allegation provides no specific facts to establish that these were unlawful partisan statements made for partisan purposes. Additionally, to say “authorized and allowed” does not show specific personal involvement in, or knowledge of, the creation and approval of content. The allegation states no specific facts regarding how the governor was aware of, or personally authorized, the allegedly partisan statements. This is important because “there is no authority for the proposition that a public official may be recalled for the act of a

⁹⁷ As noted above, the referenced supplemental material is not considered because its inclusion would not substantially comply with the 200-word limit. We cannot look outside the four corners of the statement of grounds. AS 15.45.680; *see also von Stauffenberg*, at 1060; *Meiners*, 687 P.2d at 302–303; *Citizens*, 3AN-05-12133CI at 14; *Steadman*, 641 P.2d at 453. But even if this referenced material was taken into account, the sole electronic advertisement attached to the legal opinion from Legislative Legal Services does not demonstrate a partisan political purpose. The advertisement is not directed at a specific candidate or political group and was not issued during the course of an election. The subject matter of the advertisement is the PFD, which benefits resident Alaskans. The message of the advertisement encourages Alaskans to get involved with the legislative process by communicating with their legislators. This does not amount to a partisan political purpose, but rather normal outreach by the Office of the Governor on matters of public interest, and mere encouragement of citizens to petition their elected representatives. Both permanent fund dividends and citizens engaging to petition their elected representatives benefit the public interest.

subordinate done without the official’s knowledge or direction.”⁹⁸ As written, the second allegation states legal conclusions without facts to support them. The application does not put the governor or electorate on notice of what specific actions on his part personally amount to neglect of duty, incompetence, or lack of fitness.

The lack of particular facts also leads to legal insufficiency. Without more facts, it is impossible to determine whether the advertisements or mailers were intended for partisan purposes and whether the language was partisan, which is required in order to find a potential violation of the Executive Branch Ethics Act. Partisan political purposes is defined in AS 39.52.120(b)(6):

A public officer may not . . .
use or authorize the use of state funds, facilities, equipment,
services, or another government asset or resource for partisan
political purposes . . . in this paragraph, “for partisan political
purposes”

(A) means having the intent to differentially benefit or harm a
(i) candidate or potential candidate for elective office; or
(ii) political party or group;

(B) but does not include having the intent to benefit the public
interest at large through the normal performance of official duties.

Whether public funds are used for partisan political purposes is a “heavily fact-dependent” legal question, and in this context especially “the principle laid down in *von Stauffenberg*, that there be specific facts alleged, needs to be followed.”⁹⁹ It is lawful to use public funds when the use “include[s] having the intent to benefit the public interest at large through the normal performance of official duties.”¹⁰⁰ The facts do not specify whether the alleged use of funds included such an intent, and without any indication of the language or targets of the ads and mailers, we cannot objectively infer the intent. This makes it impossible to determine whether the use of public funds was lawful or unlawful.¹⁰¹ Because the included facts do not support the legal conclusions, the allegation is legally insufficient as to neglect of duty, incompetence, and lack of fitness. And the allegations do not as a matter of law fit the definitions of incompetence or lack of fitness.

⁹⁸ *Reed*, 124 P.3d at 281–82 (quoting *Morrisette*, 756 P.2d at 1320).

⁹⁹ *Citizens*, No. 3AN-05-12133CI at 13–14.

¹⁰⁰ AS 39.52.120(b)(6).

¹⁰¹ *Citizens*, No. 3AN-05-12133CI at 13–14.

3. The allegation that Governor Dunleavy violated separation of powers is based on the Governor’s lawful exercise of his constitutionally granted discretionary line-item veto authority and cannot be grounds for recall.

Alaska Constitution article 2, section 15 expressly authorizes the governor to line-item veto sums of money in any appropriation bill at his discretion, including appropriations to the judiciary. The constitution does not except the judiciary from the governor’s line-item veto power. The legislature then has the opportunity to override each veto with a three-quarters vote under article 2, section 16. In the third allegation, the sponsors allege that Governor Dunleavy used the line-item veto to “attack the judiciary and the rule of law” and “preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.” These are conclusory statements with no detail on what and how much the Governor vetoed or how the vetoes precluded the legislature from upholding its duties. The allegation regarding Health, Education, and Welfare responsibilities is particularly vague, and it would be difficult for the targeted official to respond in 200 words, let alone for the public to understand what actions of the Governor are at issue aside from his constitutionally granted discretionary authority to strike or reduce appropriations generally or general policy disagreements over his vetoes. For these reasons, the third allegation is factually insufficient. But even if it is found to be factually sufficient, the governor’s use of the constitutionally granted line-item veto authority is absolutely legal, purely discretionary, and disputes over policy cannot be grounds for recall.¹⁰²

The budgeting process is a “joint responsibility” of the legislature and the governor “to determine the State’s spending priorities on an annual basis.”¹⁰³ Here, staying within the confines of the statement of grounds for recall, the Governor exercised his constitutionally granted line-item veto authority to reduce certain appropriations to the judiciary along with many other parts of government, in particular relating to health,

¹⁰² *von Stauffenberg*, 903 P.2d at 1060. General policy disagreements with the governor, whether regarding budget vetoes or other matters, is not, as a matter of law, a valid basis for recall. *See* 2 Proceedings at 1207–40; *Meiners*, 687 P.2d at 294; *Citizens*, No. 3AN-05-12133CI at 14; *Cole*, 692 P.2d at 803.

¹⁰³ *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006).

education, and welfare.¹⁰⁴ The next step under the Alaska Constitution is for the legislature to have an opportunity to override the veto. The allegations do not indicate that the Governor tried to bypass the legislative power or institute his line-item vetoes after they had been overridden—likely because the legislative history available on the legislature’s website shows as a matter of public record that the legislature never exercised its authority to override any of the vetoes.

This is exactly how the budgeting process is meant to work, and the Governor exercising his constitutionally granted discretionary line-item veto authority does not amount to substantial noncompliance with a substantive duty or any showing that he acted incompetently or was unfit when he made these discretionary decisions. Both the legislature and the Governor carried out their constitutional duties as set forth in the constitution. If the Governor’s actions in exercising his constitutionally granted line-item veto power constituted a ground for recall, then the legislature’s failure to override must also constitute a ground for recall. But this would be an absurd result and does not comport with the intent of the recall statutes.

4. The allegation that Governor Dunleavy mistakenly vetoed more money than he told the legislature he intended to reduce merely asserts a scrivener’s error that does not rise to the level of incompetence, lack of fitness, or neglect of duty.

The only facts in the fourth allegation state the governor “mistakenly vetoed \$18 million more than he told the legislature in official communications he intended to strike.” The fourth allegation goes on to reach a legal conclusion that “the error would cause the state to lose over \$40 million in federal Medicaid funds.” This allegation is actually attempting to interpret the appropriations bill, which is uncodified law.¹⁰⁵ Uncodified law is no different than codified law, except for its temporary nature. Any legal conclusion about the result of the error or how the law would be interpreted is to be reviewed *de novo* by the reviewer of the recall application.

¹⁰⁴ 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 \$334,700, the stated purpose of which was to reduce the appropriation by the amount of the cost of state-funded elective abortions. Although this factual detail is not within the confines of the statement of grounds for recall and should not be considered, the analysis would not change, even if it were taken into account. Significantly, the \$334,700 veto amounted to less than 1% of the appropriation to the Alaska Court System. The Governor’s veto came nowhere near defunding the judicial branch or hindering it from carrying out its constitutional duties, which arguably could be considered an abuse of discretion that would amount to a neglect of duty.

¹⁰⁵ HB 39 (Ch. 1 FSSLA 2019).

House Bill 39, after the governor's line-item vetoes, shows that the governor intended to veto, and struck in the allocation section, \$27,004,500 to eliminate the Adult Preventive Dental program.¹⁰⁶ This amount, which represents approximately \$18 (closer to \$19) million in federal funds and \$9 (closer to \$8) million in state funds, was incorrectly transcribed in the appropriation line for the Medicaid Services budget, resulting in the entire \$27 million being shown as a reduction from state funds and not a combination of state and federal.¹⁰⁷ This is clearly a scrivener's error and is evident as such on the face of the enacted line-item vetoes.

One scrivener's error does not amount to a showing of lack of knowledge, skills, or professional judgment required to perform the discretionary duty of line-item vetoes on an appropriations bill.¹⁰⁸ If this amounts to incompetence, then every governor and legislator could be recalled for any technical error made on an official document or letter. For incompetence to be met, the facts must show that skill or judgment is lacking to such a degree that it is interfering with the ability of the governor to perform his substantive duties. The governor performed his duty to strike or reduce items, and no facts alleged show that he lacks the skill or judgment to carry out this duty.¹⁰⁹

Additionally, as a matter of law the legal result of this error would not have been to lose over \$40 million in federal Medicaid funds. Following the enactment of the line-item vetoes, the Department of Law was asked to interpret the enacted law. The department advised the Office of Management and Budget that HB 39 should be interpreted to accomplish its intent, which was to eliminate funding for the program. In order to implement that intent, the reduction in the state general fund appropriation would not be \$27 million but instead would be \$8,273,600 with the remainder reduced from federal funding because the program is funded by a mix of state and federal funds. This conclusion was based on the clear intent of the legislation as disclosed on the face of the

¹⁰⁶ Ch. 1 FSSLA 2019, page 21, lines 16–17.

¹⁰⁷ *Id.* at page 20, line 27.

¹⁰⁸ “An allegation akin to mere ‘administrative incompetence’ does not support recall.” (1992 Op. Att’y Gen. (Aug. 24; 16918-0004).)

¹⁰⁹ As a matter of normal routine and practice, the governor does not personally draw lines over appropriation items. Documents are prepared for him by staff at his direction on what he wants to veto. He then initials the items. The allegations state no facts to claim that the Governor personally committed the scrivener error. To take this type of typographical error that clearly involves multiple staff in the creation of the document and find that it amounts to a showing of incompetence, lack of fitness, or neglect of duty on the part of the Governor personally would turn the whole point of requiring grounds for recall on its head. And once again, an elected official cannot be recalled based upon the acts of another of which they are unaware and did not approve. *Reed*, 124 P. 3d at 281–82 (quoting *Morrisette*, 756 P.2d at 1320).

bill, which was to veto funding for the program, and as disclosed in the veto message, which provided that the veto would result in a reduction in spending of state and federal funds (not just state funds) of \$18,730,900 in federal receipts and \$8,273,600 in general funds.¹¹⁰

Moreover, the reasons for rejecting the third allegation also apply here. A governor's use of the constitutionally granted line-item veto power is discretionary and cannot constitute a basis for recall for neglect of duty.¹¹¹ Even if the enacted appropriation was interpreted to be a reduction of \$18 million in state general funds, there is no showing that the governor failed to substantially comply with his constitutional duty in exercising his line-item veto authority. The governor could have intentionally chosen to reduce the Medicaid Services budget by an additional \$18 million in state funds, and that action would have been completely within the governor's constitutional discretion. Disagreement with the governor's intentional veto of this \$18 million could not, as a matter of law, be a valid ground for recall.¹¹²

For these reasons, the fourth allegation fails both factually and legally to make a prima facie showing of neglect of duty, lack of fitness, or incompetence.

VI. Conclusion

My recommendation is that you decline to certify the application for recall of Governor Dunleavy because the statement of grounds is neither factually nor legally sufficient and therefore not substantially in the form required by AS 15.45.550(1). If you decline to certify this application, you should advise the recall committee that it has the right to seek judicial review under AS 15.45.720 within thirty days of the date of the notice of your determination.

Sincerely

Kevin G. Clarkson
Attorney General

¹¹⁰ The Department of Law's legal interpretation of HB 39 was included in the veto message attached to HB 2001 (Ch. 2 FSSLA 2019), which can be found on the Office of Management and Budget's website at https://omb.alaska.gov/ombfiles/20_budget/PDFs/FY20_HB2001_Post_Veto_CR_Detail_8-19-19.pdf, page 27.

¹¹¹ *von Stauffenberg*, 903 P.2d at 1060.

¹¹² *See* 2 Proceedings at 1207-40; *Meiners*, 687 P.2d at 294; *Citizens*, No. 3-AN-05-12133 CI at 14; *Cole*, 692 P.2d at 803.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CITIZENS FOR ETHICAL
GOVERNMENT, ET AL.,

Plaintiffs,

vs.

STATE OF ALASKA,
DIVISION OF ELECTIONS,

Defendant.

Case No. 3AN-05-12133 CI

TRANSCRIPT OF PROCEEDINGS
ORAL ARGUMENT

BEFORE THE HONORABLE CRAIG F. STOWERS
Superior Court Judge

Anchorage, Alaska
January 4, 2006

APPEARANCES:

FOR THE PLAINTIFFS: Kenneth Jacobus
FOR THE STATE: Michael Barnhill
FOR INTERVENOR: Michael Spaan
Barat LaPorte

1 gentlemen.

2 Please give me about seven minutes to ten
3 minutes or so to review these notes, excuse
4 myself. I'll be back in the courtroom, let's
5 make it right at 11:30, and hopefully I'll be
6 able to give you my thoughts at that point.
7 So we'll be off record.

8 (Off record)

9 (Off-record comments)

10 THE COURT: All right. We're back on
11 record, and everyone that should be here is
12 here.

13 Mr. Barnhill, you're still here?

14 MR. BARNHILL: Yes, Your Honor.

15 THE COURT: All right. Thank you.

16 First of all, I want to thank the
17 parties, and especially counsel, for your
18 excellent briefing on this issue. And I've
19 got to say to anyone in the audience that's
20 interested. If you want to get a real
21 experience of seeing how excellent lawyers
22 will brief issues that are very interesting
23 and have a lot to say about how in Alaska
24 matters of elections and recalls are dealt
25 with and thought about, I really commend to

1 you that you might take a look at the briefs
2 and the argument that the counsel has put
3 together. A-plus gentlemen, and ma'am.

4 And also, I want to thank counsel for
5 taking time right immediately before the
6 Christmas holiday, and again between Christmas
7 and New Year's, for putting these briefs
8 together on an expedited basis. I know that
9 this worked a hardship in your personal lives
10 and probably in your professional lives. And
11 under the circumstances, again, you did an
12 excellent job and I appreciate that and I
13 thank you.

14 MR. JACOBUS: Thank you, Your Honor.

15 THE COURT: All right. The court finds
16 that the proposed petition as a whole fails to
17 allege sufficient facts with particularity
18 regarding Senator Stevens' alleged conduct in
19 office, conduct as a legislator that violates
20 any law, much less the Legislative Ethics Act
21 or other anti-corruption statutes, Alaska law,
22 or the Alaska Constitution, such as to make
23 out a prima facie case of corruption in office
24 or lack of fitness.

25 The only issue that the court is asked to

1 review today is the question "is the petition
2 substantially in proper form." That is, does
3 it describe grounds for recall with sufficient
4 particularity; and if so, do the alleged facts
5 make a prima facie case for lack of fitness or
6 corruption. And as I've just indicated, my
7 answer to that question is no.

8 Not at issue are the other technical
9 requirements for persons in the plaintiff's
10 position seeking to get a petition for recall
11 on the ballot. In other words, the issues of
12 the name and office of the recall target, the
13 required information regarding qualified
14 voters, the required information regarding the
15 recall committee; none of those things are in
16 issue.

17 My decision is guided strictly by the
18 statutes that are pertinent here, the Alaska
19 Constitution itself, and the two cases that
20 we've all referred to. I have not reached my
21 decision with reference to any of the
22 extraneous information that's been provided by
23 any of the parties. There's been no motion to
24 strike any of that material, and obviously I'm
25 not going to strike it; it can remain as part

1 of the record for appellate review.

2 The principle statutes are as follows:
3 Section 15.45.500 of the Alaska Statutes
4 pertains to the form of the application for
5 recall petition. And it says in pertinent
6 part, "The application must include the
7 grounds for recall described in particular in
8 not more than 200 words." And if this statute
9 has any meaning at all, the phrase "described
10 in particular" is something that the court is
11 required to consider as it reviews the 200
12 words or less in any given petition.

13 Section 15.45.510, grounds for recall,
14 state: "The grounds for recall are (1) lack
15 of fitness, (2) incompetence, (3), neglect of
16 duties, or (4) corruption." The statutes do
17 not define these particular grounds. There
18 are no regulations that define these grounds,
19 so the court looks to definitions that are
20 proposed by or used by the parties, and that's
21 certainly what I have done today.

22 The grounds in this case, or the
23 definitions, I should say, were taken from a
24 prior case, the Valley Citizens case
25 previously referred to, or Valley Residents, I

1 should say. In there, the parties defined
2 lack of fitness to be "unsuitability for
3 office demonstrated by specific facts related
4 to the recall target's conduct in office."

5 And again, as I look at this, I'm mindful
6 that specific facts need to be alleged that
7 relate to the recall target's conduct in
8 office, not his conduct generally, not
9 necessarily his conduct in other contexts, but
10 his conduct in office.

11 Corruption was defined in Valley
12 Residents and by the parties in this case.
13 "Corruption, in the context of recall of a
14 legislator means, 1, intentional conduct; 2,
15 motivated by private self-interest; 3, in the
16 performance of work as a legislator; and 4,
17 that violates one or more provisions of the
18 Legislative Ethics Act, or other statutes
19 intended to guard against corruption."

20 And again, I am drawn to the phrase
21 "intentional conduct in the performance of
22 work as a legislator."

23 And then finally, Alaska Statute
24 15.45.550 refers to the basis of denial of
25 certification by the director of the Division

1 of Elections. And this says, in part, "The
2 director shall deny certification upon
3 determining that the application is not
4 substantially in the required form."

5 And "in the required form" goes to the
6 question of whether or not under the language
7 in law set out by the Alaska Supreme Court in
8 the Meiners case and also in the Von
9 Stauffenberg case, whether or not there are
10 sufficient facts alleged with particularity
11 pertaining to the recall target's conduct as a
12 legislator that then would make out a prima
13 facie case indicating that either a lack of
14 fitness is demonstrated or corruption is
15 demonstrated. And the court does not, and I
16 have not and I will not make any finding or
17 offer any thought whatever on whether the
18 allegations contained in the petition are true
19 or not, because as Mr. Jacobus has very
20 correctly argued, that's a matter ultimately
21 for the voters.

22 The following principles I think are true
23 and are important in my decision. First, the
24 Alaska legislature is a citizen legislature.
25 And for an interesting review of argument on

1 that, I would commend to anyone who is
2 interested, the amicus curiae's brief on that
3 point, and also the resources or sources of
4 information that were cited in that brief.

5 Second, legislators are expected and
6 permitted to work and earn their living, and
7 of necessity most of them are going to work
8 for private employers, whether it's themselves
9 or someone else.

10 Third, it is not presently unlawful for a
11 legislator to work as a consultant.

12 Fourth, it's not presently unlawful for a
13 legislator to work as a consultant even for a
14 politically involved entity, such as VECO is
15 alleged to be.

16 Now I would say by way of comment with
17 respect to these last two principles, these
18 are public policy issues that are expressly
19 delegated by the Alaska Constitution to the
20 legislature. In other words, the constitution
21 expressly states that the legislature is the
22 body that's going to ultimately be responsible
23 for determining what is and is not unlawful or
24 what is or is not proper for an individual
25 legislator to do, in terms of what an

1 appropriate grounds of recall is going to be.

2 That was debated extensively by the
3 constitutional convention. The argument went
4 back and forth. Some members of the
5 convention argue that there should be no
6 grounds whatever and it should be left up
7 specifically to the citizens just to say, you
8 know, we don't like this person, for whatever
9 reason, and we would like to have this person
10 submit to a recall. Other members of the
11 convention wanted to have very specific and
12 very legalistic and limiting terms. And
13 ultimately, as the Supreme Court recited in
14 the Meiners case, Alaska has taken a
15 middle-of-the-road approach here rejecting
16 both ends of those spectrum.

17 These issues are also political issues
18 which Alaska citizens through either voting,
19 through the nomination process, through the
20 primary process, were ultimately, potentially
21 through the initiative process, may have some
22 voice in. But again, it's not for the courts
23 here under strict separation of powers
24 analysis to sit here and make determinations
25 whether it's unlawful or not for legislators

1 to work for consultants -- as consultants for
2 politically involved companies. As we sit
3 here today, that's a perfectly legal conduct.

4 The Alaska Constitution does not require
5 legislators to seek highest possible payment
6 for Alaska resources. To the extent that that
7 particular sentence in the petition is
8 pertinent to my decision, that's a statement
9 of law, and I would conclude that that's not
10 appropriate to send on to voters. That's
11 something that the court is required to pass
12 on.

13 In essence, as you analyze statements in
14 a petition, if you have a statement that says
15 something to the effect of A did B, or A did B
16 for C reasons, those are statements of fact.
17 And you get things like that, the court
18 doesn't pass on that. Those statements of
19 fact as a general principle go to the voters
20 to determine whether those are true or not,
21 whether the voters want to rely on those
22 allegations to recall a particular
23 officeholder.

24 On the other hand, in a petition if
25 there's a statement in the form of X is

1 illegal where the constitution or some state
2 law prohibits Y, those are statements of law,
3 and that's appropriate for the court, and
4 indeed it's my duty, to evaluate those and to
5 determine whether or not those are true and
6 accurate statements of law.

7 If they are not, I think under the
8 Von Stauffenberg case and under the Meiners
9 case, it's my duty to conclude that those do
10 not in and of themselves assert valid legal
11 grounds and at the least those should be
12 stricken.

13 To the extent that there are mixed
14 questions of fact and law, A did B, which is
15 illegal, then the validity of that statement
16 in part turns on whether the statement of law
17 is valid or not. And if it's not, it gets
18 stricken. And it also depends in part on
19 whether the facts as alleged are specific
20 enough or particular enough to create a
21 statement that's sufficient to go to the
22 voters.

23 It's not my role as the court to, with a
24 hypercritical analysis, determine whether or
25 not particular statements of fact are

1 sufficient or not. But on the other hand, if
2 the statutes that I have previously referred
3 to and if the Supreme Court in Meiners and
4 Von Stauffenberg mean anything, these things
5 mean that a court is required to make at least
6 a threshold determination as to whether what
7 has been alleged is factually specific enough.

8 And as I have indicated in this petition,
9 reading each one of these sentences and each
10 one of these paragraphs individually and
11 reading them all as a whole, I find that they
12 are not.

13 In essence, this petition alleges that
14 Senator Stevens, to the extent that the
15 petition actually refers to conduct by Senator
16 Stevens, and much of the petition does not, it
17 refers to conduct by VECO and conduct by
18 voters. But in any event, to the extent that
19 it refers to conduct by Senator Stevens, it
20 does not allege conduct which is legally
21 sufficient to make a prima facie case for lack
22 of fitness or for corruption.

23 I would also note that another principle
24 is the Alaska Constitution does not prohibit
25 the legislature from using Permanent Fund

1 earnings per se to fund government. To the
2 extent that there is a factual allegation that
3 Senator Stevens on behalf of VECO advocated
4 that particular position, that if true in and
5 of itself does not amount to illegal or
6 corrupt or unfit activity.

7 It is not unlawful for a legislator to
8 consult for a company which seeks to extract
9 Alaska resources for as little as possible,
10 assuming arguendo that this allegation is
11 true.

12 As a matter of law, it is not necessarily
13 true that, quote, contracting to advocate the
14 position of two clients on matters of each
15 client's mutually shared but conflicting
16 interest is generally considered fraudulent
17 and corrupt, closed quote.

18 I would take this particular statement as
19 being a mixed question of law and fact. And
20 to the extent that it might be legally
21 accurate, factually accurate, that just
22 highlights the need for particularity and for
23 specificity and facts. This is a legal
24 proposition which is heavily fact dependent.

25 In some circumstances the court can think

1 of cases where it might be true that
2 contracting to advocate the position of two
3 clients on matters of each client's mutually
4 shared but conflicting interest may be
5 considered to be fraudulent and corrupt. On
6 the other hand, I can think of circumstances
7 where it wouldn't be. And in fairness to the
8 voters, and in fairness to the recall target,
9 I think it's important that the principle laid
10 down in Von Stauffenberg, that there be
11 specific facts alleged, needs to be followed.

12 Mr. Spaan, would you approach the bench,
13 please.

14 MR. SPAAN: Yes, sir.

15 THE COURT: I am not a doctor and I give
16 you no warranties, but these things work.

17 MR. SPAAN: Thank you.

18 THE COURT: You're welcome.

19 All right. Recall advocates must allege
20 more than mere conclusory statements or
21 arguments, otherwise our recall process drifts
22 to the end of the spectrum where simple
23 disagreement with an officeholder's position
24 on questions of policy becomes sufficient
25 ground in and of themselves. And Meiners at

1 page 294 supports that proposition.

2 The bottom line standard, looking at both
3 Von Stauffenberg at pages 1059 and 1060, and
4 also the Meiners case, the court takes the
5 facts as alleged as true, but then determines
6 whether such facts constitute a prima facie
7 case of lack of fitness or corruption.

8 If the petition alleges violation of
9 nonexistent Alaska law, whether it's statutory
10 law or common law, then it is legally
11 insufficient. And I have concluded that that
12 in part is the case with this petition.

13 If the petition alleges -- if the
14 petition's allegations fail to state why the
15 alleged conduct violates Alaska law, the
16 petition lacks sufficient factual
17 particularity. And that is the specific
18 holding in Von Stauffenberg as well. If
19 either of these shortcomings exist, then the
20 director of the Division of Elections was
21 correct in concluding the petition was not in
22 its proper form.

23 And I would note in passing that there is
24 no allegation in the petition, nor do I think
25 that there's any fair basis or reasonable

1 basis to infer from what is in the petition,
2 that Senator Stevens in his conduct as a
3 legislator introduced any particular
4 legislation that would demonstrate grounds of
5 unfitness or corruption, nor did he -- nor is
6 it alleged that he voted for any particular
7 legislation, nor is there an allegation
8 showing specific conduct by Senator Stevens as
9 a legislator which in fact created the
10 conflict of interest.

11 And in this regard, I would say and adopt
12 by reference that I am persuaded by
13 Mr. Barnhill's and the State of Alaska's
14 argument distinguishing the difference between
15 a potential conflict of interest which often,
16 if not always, is present, and crossing the
17 line into an actual conflict of interest,
18 which is what the Legislative Ethics Act and
19 other pieces of legislation and principles of
20 legislative ethics are designed to protect
21 against and punish if there's transgression.

22 In the plaintiff's response to the brief
23 of the amicus curiae, they suggest that the
24 petition alleges that Senator Stevens violated
25 Alaska Statute 24.60.100, which provides in a

1 nutshell that a legislator who represents
2 another person for compensation before an
3 agency of the State shall disclose the name of
4 the person represented subject matter,
5 et cetera.

6 There is nothing that the court can see
7 in looking at the four corners of the petition
8 or even making good faith efforts to try to
9 parse out some reasonable inference that this
10 particular allegation is part and parcel of
11 that petition. I do not see it.

12 And indeed, you know, Mr. Spaan made the
13 point that he could craft a more specific and
14 acceptable petition, except that he's not
15 going to. Neither is the court. But, you
16 know, the fact that this language is, you
17 know, fairly clearly brought forward in the
18 petitioner -- or in the plaintiff's response,
19 demonstrates how easy it would be to make
20 these kinds of allegations.

21 The plaintiffs also allege a violation of
22 24.60.070, which requires a disclosure of
23 close economic associations involving a
24 substantial financial matter. And again, I
25 see nothing in the petition that touches on

1 that. And I think that Mr. Jacobus properly
2 and candidly and commendably agreed that those
3 particular allegations involving the
4 disclosure issues are not part and parcel of
5 the petition that's before the court in this
6 case.

7 For all of these reasons, the plaintiff's
8 motion for declaratory and injunctive relief
9 is denied. Or in the alternative, I think as
10 Mr. Jacobus correctly also indicated, you
11 know, treating his motion as a motion for
12 summary judgment, that's denied. The State of
13 Alaska's cross-motion for summary judgment is
14 granted. And the intervenor's motion for
15 summary judgment is granted.

16 I'm not sure it's necessary for me to do
17 this, but in the event that it is, if any
18 party thinks it's necessary, I will orally and
19 immediately issue an Alaska Civil Rule 54(b)
20 final judgment at this point, so that any
21 party who wishes may begin the process to
22 start an immediate appeal to the Alaska
23 Supreme Court.

24 Again, I want to thank counsel and the
25 parties for your participation and your

1 excellent argument and your patience as we go
2 through this today.

3 It would not be my intent, unless I'm
4 persuaded otherwise, to prepare extended
5 written findings of facts and conclusions of
6 law. I think I've given you a general outline
7 of what my thinking is sufficient to bring
8 this to the Alaska Supreme Court if you need
9 to or wish to. However, if any party wants me
10 to consider and sign written findings and
11 conclusions, I'm not going to prohibit any
12 party from submitting them to me. And of
13 course, other parties can have an opportunity
14 to review those in advance and object to them
15 if they wish.

16 All right.

17 MR. JACOBUS: Your Honor? I'm sorry.

18 THE COURT: Yes, Mr. Jacobus.

19 MR. JACOBUS: We would not propose
20 submitting any additional documents because
21 what this court has said on the record here is
22 sufficient, but we would ask for a 54(b)
23 judgment in order not to delay proceedings.

24 THE COURT: All right.

25 MR. JACOBUS: Thank you, Your Honor.

1 THE COURT: If you fax me one today, I'll
2 sign it.

3 MR. JACOBUS: Yes, Your Honor.

4 THE COURT: All right. Thank you,
5 Mr. Jacobus.

6 Mr. Barnhill, is there anything else that
7 we need to attend to today?

8 MR. BARNHILL: No, Your Honor. Thank
9 you.

10 THE COURT: You're welcome.

11 Mr. Spaan?

12 MR. SPAAN: No, Your Honor. Thank you
13 very much.

14 THE COURT: All right. You're very
15 welcome everybody.

16 We'll be off record.

17 THE CLERK: Please rise. Court is in
18 recess.

19 11:50:34

20 (End of recording)

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