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April 8, 2004

Laura A. Glaiser
Director, Division of Elections
c/o Attorney General Gregg Renkes
State of Alaska, Department of Law
Office of the Attorney General
P.O. Box 110300
Juneau, Alaska 99811-0300

via electronic transmission
original (with exhibits) to follow

Re: *Legal Review of Recall Application Re: Senator Ogan*
State Department of Law File No. 663-04-0126
Contract No. 04-215-171
Our File No.: S3476-02

Dear Ms. Glaiser:

We have been retained as independent counsel to review and provide you with a legal opinion concerning whether you should certify the application for the recall of Alaska State Senator Scott Ogan that was filed with the Division of Elections on February 17, 2004. *See* letter of retention attached as **Exhibit 1**.[1]

I. Introductory Remarks

The statutes governing recall of state public officials are threadbare in critical places. Like those at issue in *Meiners v. Bering Strait School District*, the statutory scheme has many "ambiguities."[2] The Alaska Supreme Court has yet to

[1] We have not been asked and we have not reached any conclusion as to whether "recall targets have a due process right to notice and a hearing under the due process clause of the Alaska Constitution prior to the holding of a recall election to determine the truth or falsity of recall allegations," which is an issue the Alaska Supreme Court has specifically not resolved. *Von Stauffenberg v. Committee for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1061 (Alaska 1995); *see also Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 294 n.7 (Alaska 1984) (due process claim not raised).

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

interpret the recall statutes under Title 15 that are at issue here. This required us to undertake an exercise in extrapolating standards and rules from common yet undeveloped principles. We have attempted to do this in as transparent a manner as possible. Given the lack of statutory specificity and case law guidance, we are keenly aware that reasonable minds could come to differing conclusions. We believe the conclusions we have reached reflect the current state of the law and the policies underlying recall in Alaska.

II. **Background Facts**

Senator Scott Ogan was elected in 2002 to represent Senate District H. On February 17, 2004, an application for recall of Senator Ogan was filed with the State of Alaska Division of Elections.[3] The stated grounds for recall are:

> Senator Scott Ogan demonstrated corruption in office by actively promoting legislation, directly benefiting business interests of his employer Evergreen Resources, (Evergreen), instead of protecting the private property and due process rights of his constituents.
>
> Ogan's legislative activities enabled Evergreen to acquire coal bed methane (CBM) leases knowing it would deprive his Mat-Su Valley constituents of actual notice of leases and therefore their constitutional right to due process, demonstrating neglect of duty.
>
> Ogan neglected his duties to constituents by promoting Evergreen in legislative committee, misstated important facts (3-28-03), and was even listed as Evergreen's corporate contact in its legislative materials submitted to the House Oil and Gas Committee hearing on HB 69.
>
> Ogan did not abstain from voting for HB 69, which reduced local control over CBM development that directly benefited his employer, Evergreen.
>
> Ogan's persistent and irreconcilable conflict of interest between his duties to his constituents and his activities as an Evergreen and CBM industry promoter demonstrate his inability to recognize his obvious conflict, a failure in ethical judgment that shows lack of fitness to serve in public office, incompetence, and neglect of duty.

[3] Pages from the Application for Recall are attached as **Exhibit 2**.

For these reasons, Senator Ogan cannot adequately serve as Senator and should be recalled.

III. **Statutory Framework**

Alaska Statutes Title 15, Chapter 45, Article 3 sets forth the grounds and procedures for recall of the governor, the lieutenant governor, and state legislators.

Relevant to our role, a recall application must be filed with the Director of Elections ("Director"). 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) 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 shall represent all sponsors and subscribers in matters relating to the recall;

(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 in the state or in the senate or house district of the official sought to be recalled.[4]

The Director must review the application and "either certify it or notify the recall committee of the grounds for refusal."[5] The applicable statutes do not provide a timeline within which the Director must respond.[6] Alaska Statute 15.45.550 sets out four grounds for denying certification of a recall application:

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

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[4] AS 15.45.500.
[5] AS 15.45.540.
[6] *Compare* AS 15.45.620, which provides 30 days for the Director to review a recall petition.

> (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.

We are aware of no basis to deny the recall application under numbers (2) through (4) above. The application was timely filed and Senator Ogan is subject to recall. Our letter of retention states that the Division of Elections has verified that the requisite number of voters has subscribed to the application as sponsors.[7]

The remaining question is whether the Director should deny certification on grounds that the application is not substantially in the required form pursuant to AS 15.45.550(1). The application identifies Senator Scott Ogan representing Alaska Senate District H as the official sought to be recalled, satisfying AS 15.45.500(1). The pages listing sponsors for circulation of the recall petition indicate that the sponsors are qualified voters and the list of sponsors includes the signatures of the sponsors on the same sheet as the statement of grounds for recall, satisfying AS 15.45.500(3). The page designating a recall committee names three members to represent all sponsors and subscribers in matters relating to the recall of Senator Ogan, satisfying AS 15.45.500(4). Our letter of retention states that the Division of Elections has verified that the requisite number of qualified voters has subscribed to the application as sponsors, satisfying AS 15.45.500(5), and that the application contains signatures and addresses of the requisite percentage of the number of voters who voted in the preceding general election in Senator Ogan's district, satisfying AS 15.45.500(6).[8]

That leaves the question whether the application includes "the grounds for recall described in particular in not more than 200 words" as required by AS 15.45.500(2). The stated grounds in the recall application contain 197 words, which is within the 200 word limit.

The remainder of this letter will focus on whether the application states grounds for a recall and satisfies the particularity requirement of AS 15.45.500(2). We begin by setting forth our general approach to interpreting

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[7] **Exhibit 1**.
[8] **Exhibit 1**.

the recall processes set out in Title 15, then discuss the statutory grounds for recall set out in AS 15.45.510, and then, finally, describe how we recommend applying those standards to the application at issue here.

IV. Recall Under Title 15 Occupies the "Middle Ground" Between a Pure Political Process and a Technical Legal Process

Like referenda and the initiative process, recall, in general, provides voters "a check on the activities of their elected officials above and beyond their power to elect another candidate when the incumbent's term expires."[9] The right of Alaskan voters to recall elected officials emanates from Article XI, Section 8 of the Constitution of Alaska, which provides:

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

The Legislature has established recall procedures and grounds in two separate places. In Title 29, the recall process for elected and appointed municipal office holders is provided.[10] Title 15 contains the recall process for the governor, the lieutenant governor, and state legislators. The process under Title 15 is the one relevant to the Senator Ogan recall application. While the two statutory recall processes (under Title 15 and under Title 29) are similar, the grounds for recall are not identical. Under Title 15, the grounds for recall are "(1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption."[11] Under Title 29, the grounds for recall are now "misconduct in office, incompetency, or failure to perform prescribed duties."[12]

Unlike the Title 15 recall procedures, which have never been addressed by the Alaska Supreme Court, the Title 29 recall procedures have been the subject of three reported Alaska Supreme Court cases.[13] In *Meiners v. Bering*

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[9] 687 P.2d at 294.
[10] AS 29.26.240-.360.
[11] AS 15.45.500.
[12] AS 29.26.250.
[13] *Von Stauffenberg v. Committee for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995); *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287 (Alaska 1984); *McCormick v. Smith*, 793 P.2d 1042 (Alaska 1990), vacated on unrelated grounds, 799 P.2d 287). McCormick addressed the ability of recall sponsors to intervene in an action between the target of the recall and the municipal clerk, whether the waiting period is mandatory when the application is rejected as insufficient, and the validity of certain signatures. None of these issues are relevant to our inquiry.

Strait School District, the Alaska Supreme Court considered the recall process in Alaska.[14] The *Meiners* court analyzed relevant comments from the Alaska Constitutional Convention as well as recall processes from across the country and discussed recall in terms of a spectrum.[15]

At one end of the spectrum is recall as a legal process. Under this view, recall is an extraordinary process producing the harsh result of removing elected officials before expiration of their terms of office.[16] Grounds for recall, therefore, are narrowly construed. Procedural requirements are strictly construed. All doubts are resolved against conduct of a recall election and there is no doctrine of substantial compliance.[17] For example, in Florida, recall is viewed as an extraordinary proceeding with a heavy burden on those seeking recall to conform to the statutes governing recall.[18] While Washington courts previously took a more political view of recall,[19] significant statutory changes now make recall available only for specific narrowly defined grounds that must be set out in a detailed charge including the date, location, and nature of each act upon which recall would be based.[20] Washington requires a recall petitioner to verify under oath that she or he has knowledge of the facts underlying the asserted grounds for recall[21] and the recall charges are submitted to the court for a sufficiency review. [22]

At the other end of the spectrum discussed by *Meiners* is recall as a political process. Under this view, there is little judicial or administrative oversight in the recall process and all doubts are "resolved in favor of placing the recall questions before voters."[23] In states taking this view, there are no statutory grounds for recall. So long as a sufficient number of signatures are obtained, any disagreement with an office holder's conduct is sufficient to force a recall election.[24] In New Jersey, for example, any elected official can be removed from office after serving for at least one year based on any statement of cause

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[14] 687 P.2d at 295.
[15] 687 P.2d at 294.
[16] 687 P.2d at 294 (describing the approach taken in states such as Montana as illustrated in *State ex rel. Palmer v. Hart*, 655 P.2d 965 (Mont. 1982)).
[17] 687 P.2d at 294.
[18] *Garvin v. Jerome*, 767 So.2d 1190, 1193 (Fla. 2000).
[19] *Chandler v. Otto*, 693 P.2d 71, 73 (Wash. 1984)(*en banc*).
[20] Wash. Rev. Code §29.82.010.
[21] Wash. Rev. Code §29.82.010; *Chandler*, 693 P.2d at 73.
[22] Wash. Rev. Code §29.82.021(2).
[23] 687 P.2d at 294.
[24] 687 P.2d at 294 & n.5 (citing cases from Colorado, Michigan, Nebraska and New Jersey); *see also Abbey v. Green*, 235 P.2d 150 (Ariz. 1925); *Bernzen v. City of Boulder*, 525 P.2d 416 (Colo. 1974) (*en banc*); *In re: Bower*, 242 N.E. 2d 252, 255 (Ill. 1968); *Batchelor v. Eighth Judicial Dist. Ct.*, 408 P.2d 239, 241 (Nev. 1965).

connected with his office, without any requirement that the statement of cause allege malfeasance or nonfeasance or provide particulars so long as at least 25% of registered voters sign the recall petition.[25] In Oregon, there are no constitutional or statutory grounds for recall and there is no statutory authorization for judicial review of a recall petition.[26] California requires recall petitions to state grounds for recall, but the statement is purely to inform voters and the sufficiency of the stated grounds is not reviewable.[27]

Meiners concluded that recall in Alaska occupies a "middle ground" between recall as a legal process and recall as a political process.[28] The Alaska Constitution requires the legislature to prescribe procedures and grounds for recall,[29] but these statutes (governing recall) are to be "liberally construed" to permit voters to express their will without being stymied by artificial technical hurdles.[30] While Alaska does not permit political or no-cause recalls, neither has the Alaska Supreme Court emphasized the legal character of recall to the exclusion of the political aspects of the process.[31]

This "middle ground" approach does not eliminate the need to comply substantially with the statutory framework provided.[32] In other words,

> [t]o liberally construe the statutes governing the exercise of the power to recall is not to ignore entirely the requirements of those statutes.[33]

Whatever the "middle ground" may mean in its application, it appears that the "middle ground" approach also applies to recall under Title 15. The *Meiners* court's discussion of the nature of recall did not draw its strength from Title 29

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[25] *Westpy v. Burnett*, 197 A.2d 400, 406 (N.J. Super. App. Div. 1964) *judgment affirmed by Westpy v. Burnett*, 197 A.2d 857 (N.J. 1964).
[26] Or. Const. Art. II §18; Or. Stat. 249.86 *et seq.; see also, Gordon v. Leatherman*, 450 F.2d 562, 564 (5th Cir. 1971) (holding no due process rights attach where there "is no requirement that a recall petition contain any allegation or statement as to the reasons for the recall sought").
[27] Cal. Const. Art. II §14.
[28] 687 P.2d at 294.
[29] Alaska Const. Art. XI § 8.
[30] 687 P.2d at 296 *quoting Boucher v. Engstom*, 528 P.2d 456, 462 (Alaska 1974)(stating that initiatives – AS 29.26.100 *et seq.* – are to be construed to avoid "technical deficiencies").
[31] 687 P.2d at 294.
[32] *See, e.g., Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1219 n.8 (Alaska 1993) (notwithstanding liberal construction of initiative laws, the people have a constitutional right to "a fair and accurate summary of issues on which they are being asked to express their will" and that this right extends to "petitions in all elections").
[33] *Hazelwood v. Saul*, 619 P.2d 499, 501 (Colo. 1980).

but, instead, on the constitutional foundations of recall in Alaska.[34] The underlying reasoning of *Meiners* and the constitutional grounding of the right to recall in Alaska strongly suggest that the "middle ground" applies with equal force to questions of construction and interpretation of the recall provisions under Title 15. Similarities between the statutory schemes for recall bolster this conclusion.[35]

V. **What Does the "Middle Ground" Mean?**

In the "middle ground" that recall occupies in Alaska, a balance must be struck between the rights of citizens to access the recall process without overly burdensome technical hurdles and the rights of elected office holders to be subject to recall only for the statutory grounds stated with particularity. Some guidelines have been developed as to how this balance is to be struck.

A. Factual Allegations Are To Be Taken As True

In *Meiners,* the court addressed the statutory requirement that a petition for recall under Title 29 contain a "statement . . . of the grounds of the recall stated with particularity as to specific instances."[36] This requirement is similar to the particularity requirement in Title 15.[37] In *Meiners*, the court stated that "it is not the role of the municipal clerk or Director of Elections" to determine whether statements of fact are true or false.[38] Instead, the determination as to the truth or falsity of the stated grounds for recall is left to the voters.[39] Thus, the Director is to take the factual statements in the application as true and determine whether the application states grounds for recall.[40] This "means that, accepting the

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[34] 687 P.2d at 294-96.
[35] *Compare* AS 15.45.470-.720 *with* AS 29.26.240-.360.
[36] 687 P.2d at 291, 299-302 (discussing former AS 29.28.150(a)(3)).
[37] AS 15.45.500 requires the recall application to include "the grounds for recall described *in particular* in not more than 200 words[.]" (emphasis added).
[38] 687 P.2d at 301.
[39] 687 P.2d at 300 n.18.
[40] This requirement that factual statements be accepted as true, even when there is strong evidence to the contrary, can create nonsensical results causing significant costs to the government in the form of costs of election and disruption to public business which invariably attend a recall election. For instance, in a recall petition submitted by the Division of Elections for review to the State Attorney General's Office, one of the grounds for recall alleged that the school board member had refused to swear to uphold the Constitution of the United States. 1991 Alaska Att'y Gen. Op. (Inf.) 71. Even though the school district had "gratuitously" provided the Division of Elections with a signed and notarized written oath of office, the holding in *Meiners* that the voters should determine the truth or falsity of the allegations prevented the Division from striking the patently untrue allegation from the recall petition. *Id.* at n.3.

allegations as true, the charge on its face supports the conclusion that the official committed" a recallable offense.[41]

B. Factual Allegations Must Fairly Inform the Electorate of the Charges and Allow the Targeted Official a Reasonable Opportunity to Rebut the Charges

Meiners identified the purpose of the particularity requirement in the Title 29 recall procedures as being "to give the office holder the opportunity to defend his conduct in a rebuttal limited to 200 words."[42] Other states have recognized the necessity of having articulated grounds for recall to provide both the public and the recall target notice of why the officer holder is sought to be removed.[43] Even in Washington, which is now at the legalistic end of the spectrum, a recall petition is not rejected for "a mere technical violation" of the particularity requirements so long as "the electorate has sufficient information to evaluate the charge and the elected official has sufficient notice to respond to the charge."[44] Unlike Washington law, the Title 15 recall provisions of Alaska law do not expressly require a statement of the date and location of each alleged act supporting recall.

The Director should not erect artificial technical hurdles by requiring an application for recall to contain detail beyond that necessary to inform the public of the charges and provide the recall target a fair opportunity to

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[41] *Matter of Recall of Wade*, 799 P.2d 1179, 1181 (Wash. 1990) (citations omitted).
[42] 687 P.2d at 302.
[43] In *Unger v. Horn*, the Supreme Court of Kansas concluded that a petition seeking recall of a school board member on grounds that he violated open meeting laws by participating in unannounced private meetings failed to satisfy Kansas' particularity requirement because the general allegation that he had violated open meetings laws without details provided the board members no opportunity to refute the charge. 732 P.2d 1275, 1277, 1280-81 (Kan. 1987). In *State ex. rel City Council of the City of Gladstone v. Yeaman*, the Missouri Court of Appeals ruled that a recall petition that merely repeated the three statutory grounds for recall, misconduct in office, failure to perform duties prescribed by law, or incompetence, in guiding city affairs was insufficient. 768 S.W.2d 103, 107 (Mo. App. 1988). Although Missouri has no statutory requirement for specificity, the court ruled that mere repetition of the statutory grounds for recall did not afford potential petition signers adequate reason to affix their signature or give the recall target a fair opportunity to respond. 768 S.W.2d at 107. Michigan requires the asserted basis for recall to be stated with "sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall." *Dimas v. Macomb County Election Comm'n.*, 639 N.W.2d 850, 852 (Mich. App. 2002) *appeal denied by Dimas v. Macomb County Election Comm'n.*, 646 N.W. 2d 470 (Mich. 2002).
[44] *In re Recall of Kast*, 31 P.3d 677, 681 (Wash. 2001) (*en banc*).

respond. In this regard, we are mindful that only so much particularity can be reasonably expected in 200 words.[45]

C. The Recall Application Must Be Considered Under the Doctrine of Substantial Compliance

Alaska Statute 15.45.550 provides that "[t]he director shall deny certification upon determining that the application is not *substantially* in the required form."[46] In light of that language, we believe that the doctrine of substantial compliance should be applied during the review of the application for a petition to recall Senator Ogan. This requires that conduct, here the application, "which falls short of strict compliance with the statutory . . . requirements but which affords the public the same protection that strict compliance would offer" be found sufficient.[47]

In determining whether the substantial compliance doctrine should be applied, we consider whether the obligation or conduct at issue is "mandatory or merely directory." If the rule, here a statute, is mandatory, then strict compliance is required.[48] On the other hand, "if it is directory, substantial compliance is sufficient absent significant prejudice to the other party."[49]

The application of the doctrine of substantial compliance is consistent with *Meiners* and *von Stauffenberg*. In fact, it may be that substantial compliance is the mechanism by which the "middle ground" is achieved. One goal of the recall process is to not create "artificial technical hurdles" and provide access to the recall process to a broad spectrum of Alaskans.[50] At the same time, providing voters a fair summary of the recall allegations[51] and giving "the office holder the opportunity to defend his conduct in a rebuttal limited to 200 words" are equally important goals.[52] The focus of the Director's

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[45] AS 15.45.500(2).
[46] AS 15.45.550(1) (emphasis added)
[47] *Nenana City Sch. Dist. v. Coghill*, 898 P.2d 929, 933 (Alaska 1995)(*quoting Jones v. Short*, 696 P.2d 665, 667 (Alaska 1985).
[48] *Copper River Sch. Dist. v. State*, 702 P.2d 625, 627 (Alaska 1985).
[49] 702 P.2d at 627.
[50] *Meiners*, 687 P.2d at 296 (*quoting Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)); *see also von Stauffenberg*, 903 P.2d at 1058.
[51] *See, e.g., Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1219 n.8 (Alaska 1993) (Notwithstanding liberal construction of initiative laws, the people have a constitutional right to "a fair and accurate summary of issues on which they are being asked to express their will" and that this right extends to "petitions and elections").
[52] 687 P.2d at 302.

review, in this regard, should be whether these somewhat competing goals are met as opposed to a focus of a more technical or legalistic nature.

D. Allegations of Violation of Nonexistent Laws are Insufficient

In *Von Stauffenberg v. Committee for an Honest & Ethical School Board,*[53] the Alaska Supreme Court considered a recall application against school board members that identified the grounds for recall as being "misconduct" and "failure to perform prescribed duties."[54] The recall proponents alleged that the board members had entered executive session in violation of Alaska law to consider whether to retain an elementary school principal.[55] To determine whether the application was sufficient, the court accepted as true the factual allegations regarding the board meeting and evaluated whether, as a matter of law, the alleged acts constituted a violation of the Open Meetings Act. *Von Stauffenberg* held that an allegation of violation of a nonexistent law is insufficient.[56] Thus, "elected officials cannot be recalled for legally exercising discretion granted to them by law."[57] Applying that same reasoning to Title 15, when a recall application alleges conduct that violates a "law" but no law prohibits the conduct, the allegation is legally insufficient. [58]

E. While the Recall Application Cannot Be Rewritten by the Director, Insufficient Severable Allegations Must Be Deleted

The Director may not permit insufficient allegations to be included in a recall petition.[59] The Alaska Supreme Court has noted the importance of the governmental screening function when it stated that failure to delete insufficient allegations "invites abuse" and "invites the drafting of recall petitions with little regard for the statutory grounds of recall."[60] *Meiners* interpreted former AS 29.26.210(1) "as prohibiting the director of elections from re-writing the

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[53] 903 P.2d 1055 (Alaska 1995).
[54] 903 P.2d at 1057.
[55] 903 P.2d at 1057.
[56] 903 P.2d at 1060 n.13 *citing Meiners*, 687 P.2d at 301.
[57] 903 P.2d at 1060 n.14 *citing Chandler v. Otto*, 693 P.2d 71, 74 (Wash. 1984) (*en banc).*.
[58] 903 P.2d at 1059-60 n.13. "Given the relevant exception to the Open Meetings Act, the grounds for recall allege a violation of totally nonexistent law. That is, there is no law which precludes public officials from discussing sensitive personnel matters in closed door executive sessions."
[59] *Meiners*, 687 P.2d at 301.
[60] *Meiners*, 687 P.2d at 302; s*ee also Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1221 (Alaska 1993) (stating that "all matters . . . should be presented *clearly* and *honestly* to the people of Alaska . . . 'to guard against inadvertence by petition-signers and voters and to discourage stealth by initiative drafters and promoters . . .'") (citations omitted)(emphasis added).

allegations in a recall petition in different language."[61] *Meiners* also rejected the proposition that if any allegation supporting recall is sufficient the entire petition must go forward as a whole.[62] These conclusions protect a recall target from having to use the limited rebuttal opportunity to respond to legally insufficient charges that may attract voters' attention.[63]

Meiners also declined to adopt the position that an entire recall petition be rejected if any of the stated grounds are insufficient.[64] *Meiners* recognized that such a construction would frustrate the purposes of recall because recall proponents may be forced to bear the significant burden of gathering signatures a second time if any aspect of the grounds was found deficient.[65] Having identified those outcomes to be avoided, *Meiners* ruled that a certifying officer may "delete severable individual charges that do not come within the grounds specified by statute."[66] *Meiners* ruled, however, that "those charges which are sufficient to meet the statute must be set forth on the ballot in full, as contained in the petition, without revision."[67] *Meiners* observed that that approach would avoid the hazards of other approaches and would be fair to proponents of recall, the targeted officials, and voters.[68]

The Alaska Supreme Court has employed similar reasoning to address presentation to the voters of a ballot initiative, portions of which were unconstitutional. In *McAlpine v. University of Alaska*, the Alaska Supreme Court discussed whether Alaska courts have the power to sever from an initiative not yet put to popular vote a "discrete constitutionally-impermissible

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[61] 687 P.2d at 302.
[62] 687 P.2d at 302.
[63] 687 P.2d at 302.
[64] 687 P.2d at 302.
[65] 687 P.2d at 302-303.
[66] 687 P.2d at 303. Other states take a similar approach. *See, e.g., Hamlett v. Hubbard*, 416 S.E.2d 732, 733-34 (Ga. 1992) (directing that insufficient allegations in a recall petition be expunged or obliterated from the petition before it is submitted to the people); *Reynolds v. Figge*, 19 P.3d 193, 202 (Kan. App. 2001) (indicating that "it would serve little purpose for an official subject to recall to obtain a determination that one or more of the grounds for recall is sufficient, but yet allow those legally insufficient grounds to be posted at the polling places" and ruling "that the statement for recall posted at the polling places must contain only the legally sufficient grounds for recall"). *But see Garvin v. Jerome*, 757 So.2d 1190, 1192-94 (Fla. 2000) (describing recall as an "extraordinary proceeding with the burden on those seeking to overturn the regular elective process to base the petition on lawful grounds or face the invalidation of the proceedings" and holding that a recall petition in which four of the five included grounds "were legally insufficient could not properly form the basis for a recall election").
[67] 687 P.2d at 303.
[68] 687 P.2d at 303.

portion of a proposed bill and order the remainder to appear on the next ballot without the sponsors reinstituting the certification and signature-gathering processes."[69] *McAlpine* observed that courts with "power to alter initiatives may frustrate the constitutionally-guaranteed right of the people to sponsor, subscribe to, vote on, and enact laws by initiative."[70] But *McAlpine* concluded that "circumspect judicial exercise of the power to sever impermissible portions of initiatives will promote, rather than frustrate, the important right of the people to enact laws by initiative."[71] The court noted that invalidating an entire initiative "on grounds that one sentence of secondary importance is constitutionally invalid would be strong medicine" as it would force those supporting the initiative "to choose between abandoning their efforts altogether and submitting a new application and expending, for the second time, the significant time and effort required to generate public enthusiasm and gather the requisite number of signatures."[72]

McAlpine discussed *Meiners* and emphasized *Meiners'* conclusion that "striking the entire petition rather than excising the invalid portion would place an unwarranted constriction on the rights of the people to express their will."[73] *McAlpine* concluded that a court's duty when conducting pre-election review of an initiative was similar to its duty when reviewing an already enacted law, such that a reviewing court should sever an impermissible portion of the proposed bill when:

> (1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety.[74]

The protective considerations identified in *McAlpine* apply with equal measure to the certification of a recall application under Title 15. In fact, the third factor noted above becomes self effectuating in the context of a recall application. Recall sponsors can determine for themselves whether to

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[69] 762 P.2d 81, 92 (Alaska 1988).
[70] 762 P.2d at 92.
[71] 762 P.2d at 93.
[72] 762 P.2d at 93.
[73] 762 P.2d at 94.
[74] 762 P.2d at 94-95 (footnotes omitted).

undertake the effort of circulating recall petitions if allegations in the application have been severed as insufficient.

That severable individual charges may be deleted from a recall petition does not mean that each element of a recall petition must be evaluated in isolation. Requiring that each factual allegation or paragraph of an application be evaluated in isolation would run counter to the principle that recall statutes are to be reviewed liberally to enable a broad spectrum of Alaskans to use the recall process without being tripped up by unnecessary legal technicalities or artificial hurdles.[75] It would be inappropriate to evaluate a recall application in such a manner that the certification of the application depended upon fortuities of phrasing, paragraph and structure of the statement of the grounds. In that regard, it is important to remember that the Title 15 recall statutes are skeletal and do not provide clear guidance regarding the methods by which sufficiency of the asserted grounds will be judged.

VI. **How Should the Grounds for Recall Under Title 15 be Interpreted?**

A. Lack of Definition and General Guidelines

The four statutory grounds for recall of state office holders are "lack of fitness," "incompetence," "neglect of duties," and "corruption."[76] The legislature, which is charged by the constitution to establish the grounds for recall, has not defined these four terms. Thus, Title 15 has the same "ambiguities" that exist in Title 29.[77]

The paucity of information in the statutes establishing the grounds for recall leaves recall applicants and targeted officials guessing as to what interpretive mechanisms might be employed to define the grounds after the application has been filed. Others have used a variety of interpretive methods to grapple with the problem of fairly interpreting undefined terms in the context of the "middle ground" where recall is both for cause as well as a political tool[78]

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[75] 687 P.2d at 296.
[76] AS 15.45.510.
[77] *Cf. Meiners*, 687 P.2d at 296.
[78] *See* Letter from attorney Harold Brown to Charlotte Thickstun, Director, Division of Elections (August 24, 1992) (hereinafter "Brown letter") attached as **Exhibit 3**; *Coghill v Rollins, et al.*, No. 4FA-92-178 CI (Alaska Super., Sept. 14. 1993) (Memorandum decision) (hereinafter "Savell decision"), attached as **Exhibit 4**.

We interpret the grounds of recall in light of the following guidelines:

1. The grounds for recall should not be defined too restrictively. While grounds for recall must be specified, the *Meiners* court, in discussing the Title 29 grounds, contrasted Delegate White's comments at the Alaska Constitutional convention (urging that the people retain the right to determine the reasons for recall) with Delegate Hurley's comments (urging that the Legislature prescribe the grounds to avoid recalls for "petty grounds") and noted that the original statutory listing of grounds by the Legislature was quite broad – effectively tracking Delegate White's philosophy.[79] The court went on to note with approval that subsequent amendment of the statute, while appearing to be a limitation of grounds for recall, may have, instead, been a summary of existing grounds.[80] The court counseled that "it would be a mistake to read too much into the statute's history."[81]

2. The Alaska Supreme Court has said that "[i]n interpreting a statute or an ordinance, [the court's] goal is to give effect to the intent of the law making body 'with due regard for the meaning that the language in the provision conveys to others.'"[82] A related principle is that "[i]n assessing statutory language, 'unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage.'"[83]

3. One could try to define the four statutory grounds for recall through reference to unrelated statutes. While this might be helpful, it is a problematic interpretive method because it involves relatively elaborate legal research.[84] Interpretation of the grounds

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[79] *Meiners*, 687 P.2d at 295.
[80] 687 P.2d at 295.
[81] 687 P.2d at 295.
[82] *Marlow v. Municipality of Anchorage*, 889 P.2d 599, 602 (Alaska 1995) *quoting Foreman v. Anchorage Equal Rights Comm'n.*, 779 P.2d 1199, 1201 (Alaska 1989)(citing *State v. Alex*, 646 P.2d 203, 208-09 n.4 (Alaska 1982)).
[83] *Muller v. BP Exploration (Alaska), Inc.*, 923 P.2d 783, 787 (Alaska 1996) *quoting Tesoro Alaska Petroleum Co. v. State*, 746 P.2d 896, 905 (Alaska 1987).
[84] Dozens of Alaska statutes use the terms "fitness" and "incompetence." Six Alaska statutes, other than AS 15.45.510, use "corruption": AS 09.43.120(a)(2) ("corruption in any of the arbitrators" is grounds for vacating an arbitration award); AS 15.20.540 ("corruption on the part of an election official sufficient to change the result of the election" is grounds for contesting an election result); AS 5.30.160 (listing findings supporting the Congressional Ballot

for recall based on such research might require detailed legal advice and thereby render recall inaccessible to a broad spectrum of Alaskans, a result to be avoided.[85] Interpretation through comparison to other statutes is also impossible for some of the listed grounds for recall. Each Alaska statute using the word "corruption," for instance, involves concerns about corruption or the appearance of corruption among public office holders, including legislators, but none defines corruption.

4. *Meiners* defined "failure to perform prescribed duties" by reference to the office holder's statutory duties broadly interpreted to include implicit related obligations.[86] In *Meiners*, the recall proponents alleged that the school board members had failed to adequately supervise and control the conduct of the superintendent.[87] *Meiners* analyzed the sufficiency of the allegations by referring to the statute establishing the duties of a regional school board, which included the obligation to "employ a chief school administrator,"[88] and the statute establishing the powers of a regional school board, which included the power to "appoint, compensate and otherwise control all school employees."[89] *Meiners* rejected the argument that "controlling" school employees, including the superintendent, was merely a discretionary function that the board may choose not to perform.[90] Thus, at least where statutory duties are involved, implicit related obligations must also be considered.

Access Limitation Act, including that close alignment of federal office holders with special interest groups providing campaign contributions creates corruption or the appearance of corruption, which reduces voter participation); AS 15.30.170(1) (listing purposes of the Congressional Ballot Access Limitation Act including to "promote, protect, and defend the compelling interest of the citizens of this state in preventing corruption and the appearance of corruption among the federal legislative representatives of this state by limiting the number of terms in which any Senator or Representative may hold office[.]"); AS 24.50.010(6) (legislative findings for legislative ethics statutes include that "No code of conduct, however comprehensive, can anticipate all situations in which violations may occur nor can it prescribe behaviors that are appropriate to every situation; in addition, laws and regulations regarding ethical responsibilities cannot legislate morality, eradicate *corruption*, or eliminate bad judgment[.]")(emphasis added); AS 39.52.010(6) (recognizing the same in legislative findings regarding the executive branch ethics act).

[85] *Meiners*, 687 P.2d at 295-96.

[86] 687 P.2d at 299.

[87] 687 P.2d at 291-92.

[88] 687 P.2d at 299 & n.15 (quoting AS 14.08.111).

[89] 687 P.2d at 299 & n.16 (quoting AS 14.08.101).

[90] 687 P.2d at 300.

B. Interpreting the Statutory Grounds for Recall in Title 15

1. Corruption

No Alaska Statute defines corruption. No Alaska Supreme Court case defines "corruption." In a 1992 legal opinion, Harold Brown concluded that "corruption implies an intentional evil or wrongful act."[91] Brown's definition is broader than the definitions of corruption in legal and nonlegal dictionaries. Black's Law Dictionary defines corruption as follow:

> An act done with intent to give some advantage inconsistent with official duty and the rights of others. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.[92]

The definition of corruption in Black's Law Dictionary includes a cross-reference to the term "bribe," which it defines as,

> Any money, goods, a right in action, property, thing of value, or any preferment, advantage, privilege, or emolument, or any promise or undertaking to give any, asked, given, or accepted, with the corrupt intent to induce or influence action, vote, or opinion of a person in any public or official capacity.[93]

Nonlegal dictionaries have similar definitions. For example, The New Oxford American Dictionary defines corruption as "dishonest or fraudulent conduct by those in power, typically involving bribery."[94] The definitions of corruption in Merriam-Webster's Collegiate Dictionary include "impairment of integrity, virtue, or moral principle," or an "inducement to wrong by improper or unlawful means (as bribery)."[95]

The problem of elected officials being perceived as being influenced in the execution of their duties by conflicts of interest has been recognized by the

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91 *See* Brown Letter, **Exhibit 3** at 9-10.
92 Black's Law Dictionary 345 (6th ed. 1990).
93 Black's Law Dictionary 191 (6th ed. 1990).
94 The New Oxford American Dictionary 386 (2001).
95 Merriam-Webster's Collegiate Dictionary 408 (Deluxe ed. 1998).

Alaska legislature and is addressed in the Legislative Ethics Act ("LEA"),[96] which establishes standards of conduct for legislators. As an introduction to those standards, the legislature found that "A fair and open government requires of legislators . . . conduct the public's business in a manner that preserves the integrity of a legislative process and avoids conflicts of interest or even the appearance of conflicts of interest" and that "A part time citizen legislature implies that legislators are expected and permitted to earn outside income, and that the rules governing legislators' conduct during and after leaving public service, must be clear, fair, and as complete as possible."[97]

The statutory standards of conduct for legislators "specifically supersede the provisions of the common law relating to legislative conflict of interest that may apply to a member of the legislature."[98] These provisions, however, do "not exempt a person from applicable provisions of another law unless the law is expressly superceded or incompatibly inconsistent with the specific provisions of the LEA."[99] Because the statutory term "corruption," at its very essence, reflects a particular type of conflict of interest, "corruption" in Title 15 should not be interpreted in a way that is inconsistent with the LEA.

Based on the above, we interpret "corruption" in the context of recall of a legislator as (1) intentional conduct, (2) motivated by private self-interest, (3) in the performance of work as a legislator, (4) that violates one or more provisions of the LEA or other statutes intended to guard against corruption.[100]

2. Neglect of Duties

Neglect of duties as a statutory ground for recall of a state public official has not been expressly construed in any Alaska case with precedential value in Alaska.[101] Harold Brown interpreted "neglect of duties" as meaning refusal or unwillingness without sufficient excuse to perform one's duties.[102] Brown did not discuss how an office holder's duties should be defined.

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[96] Alaska Statutes Title 24, Chapter 60.
[97] AS 24.60.010(2) and (4).
[98] AS 24.60.020(b).
[99] AS 24.60.020(b).
[100] *See, e.g.*, AS 11.41.520 (establishing the crime of extortion); AS 11.41.530 (establishing the crime of coercion).
[101] Judge Savell limited his analysis to allegations of incompetence and unfitness and did not define neglect of duties. *See* Savell decision, **Exhibit 4**.
[102] *See* Brown letter, **Exhibit 3** at 9.

Meiners addressed the sufficiency of allegations of "failure to perform prescribed duties,"[103] which is a statutory ground for recall under Title 29 that may be similar to "neglect of duties." The difference in wording of the two recall statutes may suggest that those terms should be interpreted as having distinct meanings. We believe the terms in the two recall statutes are sufficiently similar that it is appropriate to follow the *Meiners* approach in evaluating the sufficiency of allegations of neglect of duty. As demonstrated by the discussion of the alleged failure to adequately supervise a school administrator, *Meiners* defines duties for the purposes of recall as encompassing the express statutory obligations associated with the office and related obligations implicitly included as corollaries to the office holder's express duties.[104]

We, therefore, interpret "neglect of duties" under Title 15 as the nonperformance of a duty of office established by applicable law. An "applicable law" includes implicit related obligations. While "neglect of duties" may overlap with "corruption" to the extent that an allegation describes conduct violative of the LEA, neglect of duties also encompasses duties outside of and in addition to the LEA.

3. Incompetence

In 1992, Harold Brown concluded that "incompetence" means a lack of physical or mental capacity to perform the duties of the office.[105] In 1993, when ruling on the sufficiency of an application for a petition to recall Lieutenant Governor Coghill, Superior Court Judge Richard Savell ruled that "incompetence for the purposes of recall must relate to a lack of ability to perform the official's required duties" without including any requirement that the lack of ability stem from mental or physical disability.[106] The definitions of incompetence in nonlegal dictionaries vary in their levels of generality and detail, but do not include the limitation that the inability of an incompetent person to perform stems from a physical or mental disability.[107]

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[103] *Cf. Meiners*, 687 P.2d at 299 n.14 (discussing failure to perform prescribed duties).
[104] 687 P.2d at 300.
[105] Brown letter, **Exhibit** 3 at 9 *citing Cole v. Webster*, 692 P.2d 799, 804 (Wash. 1984) *and* 1981 Op. Kansas Atty. Gen. (Jan. 20, No. 1 82-11).
[106] Savell decision, **Exhibit 4** at 21.
[107] The New Oxford American Dictionary defines "incompetent" as "not having or showing the necessary skills to do something successfully," and notes that in the field of law "incompetent" means "not qualified to act in a particular capacity." The New Oxford American Dictionary 860 (2001). Merriam-Webster's Collegiate Dictionary defines "incompetent" as "not legally qualified[;] inadequate or unsuitable for a particular purpose[; and] lacking the qualities need for effective action [,] unable to function properly." Merriam-Webster's Collegiate Dictionary 928 (Deluxe ed. 1998).

We find Judge Savell's less restrictive definition to be closer to a common understanding of incompetence. We interpret "incompetence" for the purposes of recall under Title 15 as the inability to perform the duties of office regardless of the cause.

In keeping with the principle that an office holder cannot be recalled for discretionary decisions, we bound our definition of "incompetence" to exclude claims that a lawmaker is incompetent by reason of being insufficiently informed about the subjects and policies before the legislature. We would not find sufficient allegations that a policy maker was incompetent because he or she declined to read briefing or a position paper on a given subject. We also would not require lawmakers or executive officials with broad responsibilities, such as the Governor, to have personally read each title and chapter of the Alaska Statutes.[108]

4. Lack of Fitness

The statutes governing recall under Title 15 do not define "lack of fitness." Brown concluded that a "lack of fitness" implied conduct that was unsuitable, inappropriate or improper.[109] Brown deemed insufficient the allegation that Governor Hickel's "unfitness was demonstrated by lapses of memory and publicly admitted mistakes which far exceed the normal bounds of sound judgment" because the allegation did not describe improper conduct and lacked necessary detail.[110] We find Brown's working definition of fitness to be consistent with the common understanding of lack of fitness as unsuitability.[111] Standing alone, the common understanding of lack of fitness as unsuitability might bring Alaska too close to a political model of recall. That result can be avoided, however, by the requirement of particularity and the limitation that the asserted grounds for recall must relate to the recall target's conduct in office.[112] Those limiting considerations prevent lack of fitness from being used as a catch-all allowing a minority of the electorate to produce political instability by attempting recall without identifiable cause.

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[108] *Cf.* Savell decision, **Exhibit 4**.
[109] Brown letter, **Exhibit** 3 at 9 *citing CAPS v. Alvarado*, 832 P.2d 790 (N.M. 1992).
[110] **Exhibit 3** at 10-11.
[111] *Cf.* The New Oxford American Dictionary 640 (2001) (defining "fitness" as "the quality of being suitable to fill a particular role or task").
[112] Even states taking a more political view of recall require that the asserted cause for recall be connected with the recall target's conduct in office. *See, e.g.*, *Westpy v. Burnette*, 197 A.2d 400, 403-04 (N.J. Super. App. Div. 1964) *judgment aff'd by Westpy v. Burnette*, 197 A.2d 857 (N.J. 1964).

In our view, allegations need not demonstrate a violation of the LEA to sufficiently state "lack of fitness" as a ground for recall under Title 15. Among the findings in the introduction to the LEA are:

> (1) high moral and ethical standards among public servants in the legislative branch of government are essential to assure the trust, respect, and confidence of the people of this state;
> (2) a fair and open government requires that legislators and legislative employees conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts of interest or even appearances of conflicts of interest;
> . . . .
> (6) no code of conduct, however comprehensive, can anticipate all situations in which violations may occur nor can it prescribe behaviors that are appropriate to every situation; in addition, laws and regulations regarding ethical responsibilities cannot legislate morality, eradicate corruption, or eliminate bad judgment[.][113]

As noted above, the provisions of the LEA supersede provisions of the common law related to conflict of interest, but do not exempt legislators from applicable provisions of another law unless that law is expressly superseded or incompatibly inconsistent with the LEA.[114] An interpretation of "lack of fitness" that treats the standards of conduct of the LEA as behavioral floors, is not "incompatibly inconsistent" with the LEA and is, in fact, wholly consistent with the legislative findings that the LEA does not anticipate all possible violations and cannot draw statutory lines prohibiting all conduct which is not acceptable.

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.

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[113] AS 24.60.010.
[114] AS 24.60.020(b).

VII. **Analysis of the Ogan Recall Application**

A. Factual Particularity

With regard to the application for a petition to recall Senator Ogan, we find that the alleged grounds for recall relate to one alleged event: Senator Ogan's alleged promotion of Evergreen Resources' interests through HB 69. We conclude that individual factual allegations that are related to a single claim should be read together.[115] In other words, the application to recall Senator Ogan should be read as a whole.

An argument could be made that to evaluate a recall application, the stated grounds should be parsed so each factual assertion is compared in isolation to the statutory grounds for recall under Title 15. We advise against taking that approach for somewhat interrelated reasons. First, in discussing Title 29 recalls, the Alaska Supreme Court has indicated that the recall processes and statutes are to be reviewed liberally so individual Alaskans can use the recall process without being tripped up by unnecessary legal technicalities or artificial hurdles.[116] In general, considering each allegation or paragraph of an application in isolation would be counter to that principal because certification of an application would depend upon fortuities of phrasing, paragraphing and structure of the statement of the grounds.

In addition, given the lack of statutory guidance in Title 15, recall sponsors ought not be penalized for either mischaracterizing one paragraph as one ground of recall or alleging that a particular fact alleged constitutes all or more than one ground for recall. To conclude otherwise would, through the ambiguities of the statutes, put the recall process into a legalistic straight jacket. Finally, the allegations in the specific application for recall of Senator Ogan all relate to Senator Ogan's alleged promotion of Evergreen Resources and HB 69. Because the application states facts related to a single event, separating those facts for consideration in isolation would be inappropriate.

We find, reading the application as a whole, that the application for a petition to recall Senator Ogan is sufficiently particular to enable those who may sign a recall petition to understand the nature of the alleged wrongdoing and to permit Senator Ogan to meaningfully respond in a rebuttal limited to

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[115] *Cf*. Savell decision, **Exhibit 4** at 22-23 (concluding that the allegation that Coghill had made contradictory public statements regarding his involvement and knowledge of the recall process should be read together with the claim that Coghill was incompetent because he did not know the State's election laws).

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

200 words. The application, therefore, meets the goals of the statute as discussed *supra* in Section IV above. Stripped of argument, nonparticularized facts, and legal conclusions, the application for the recall of Senator Scott Ogan contains the following factual allegations:

1. Ogan was employed by Evergreen Resources.[117]

2. Ogan was active as an Evergreen and coal bed methane industry promoter.[118]

3. Ogan actively promoted legislation directly benefiting business interests of Evergreen Resources.[119]

4. Ogan promoted Evergreen in legislative committee.[120]

5. Ogan was listed as Evergreen's corporate contact in legislative material submitted to the House Oil and Gas Committee hearings on HB 69.[121]

6. HB 69 reduced local control over coal bed methane development, which directly benefited Ogan's employer Evergreen.[122]

7. Ogan did not abstain from voting for HB 69.[123]

8. Ogan's legislative activities enabled Evergreen to acquire coal bed methane leases.[124]

9. Ogan knew that his constituents would be deprived of actual notice of the leases.[125]

10. Ogan did not protect the private property and due process rights of his constituents.[126]

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[117] **Exhibit 2** at ¶ 1.
[118] **Exhibit 2** at ¶ 5.
[119] **Exhibit 2** at ¶ 1.
[120] **Exhibit 2** at ¶ 3.
[121] **Exhibit 2** at ¶ 3.
[122] **Exhibit 2** at ¶ 4.
[123] **Exhibit 2** at ¶ 4.
[124] **Exhibit 2** at ¶ 2.
[125] **Exhibit 2** at ¶ 2.
[126] **Exhibit 2** at ¶ 1.

Taking all the above factual allegations as true and reading them together, the application describes a course of conduct whereby an elected official took active steps to promote legislation benefiting his employer, including promoting the employer in legislative committee proceedings and voting in favor of that legislation knowing that it would benefit his employer at the expense of his constituents. The application as a whole alleges conduct in sufficient detail to enable voters and petition signatories to understand the nature of the alleged wrongdoing and to permit a meaningful response from Senator Ogan. We therefore conclude the particularity requirement of AS 15.45.500 is satisfied.

We did not include in the above list of facts the allegation that Senator Ogan misstated important facts on March 28, 2003.[127] The application does not indicate what facts Senator Ogan is alleged to have misstated on March 28, 2003, why the facts were important, or how the alleged misstatements relate to the alleged conflict of interest. The absence of such particulars deprives Senator Ogan of the opportunity to meaningfully respond to the allegation that he misstated important facts. Because the allegation that Senator Ogan misstated facts lacks detail necessary to satisfy the purposes of the particularity requirement, it should be stricken.

B. Legal Sufficiency

Having concluded that the allegations are stated with sufficient particularity, we considered whether the facts alleged in the application for a petition to recall Senator Ogan amount to a prima facie showing of any of the four statutory grounds for recall under Title 15, each of which has been asserted by the applicants. A related question is what significance, if any, derives from the fact that the applicants have asserted that the same course of conduct demonstrates all four of the statutory grounds for recall under Title 15. Given the lack of definition of each of the four asserted grounds for recall, their potential overlap, and the fact that recall applicants may obtain clarification on that point only after composing an application and gathering the preliminary signatures necessary for the initial filing, less weight should be given to the precise phrasing of the application and characterization of the facts as applying to each of the four grounds for recall. In order to avoid erecting artificial technical hurdles, we recommend comparing the particular factual allegations as a group to each of the four statutory grounds for recall.

[127] **Exhibit 2** at ¶ 3.

1. Neglect of Duties

The application alleges facts that constitute "neglect of duties" as a ground for recall. We have interpreted "neglect of duties" as meaning nonperformance of a duty of office established by applicable law. The precise duties of a legislator are not as clearly defined as the duties for executive branch officials such as the Lieutenant Governor, but even broadly defined, the duties of legislators do not include any obligation to refrain from supporting legislation that alters the notice procedures for matters such as mineral leasing. In the absence of information about a conflict of interest, the assertion that a legislator violated his duties by supporting legislation that enabled such leases to be obtained, is little more than criticism of a policy decision. The duties of an individual legislator such as Ogan do not differ from those of any other legislator, and the legislative body is not prohibited from passing such legislation merely because it may be susceptible to constitutional challenge. To the extent that the application alleges that Senator Ogan neglected his duties by working to pass legislation changing the lease notice standards, the allegation is insufficient. The assertions that "neglect of duties" include the allegations that Senator Ogan promoted legislation "instead of protecting the private property and due process rights of his constituents" and that Senator Ogan's constituents were deprived of their constitutional right of due process should be stricken because, as noted above, neglect of duty cannot be interpreted to include support for legislation that may be subject to constitutional challenge.[128]

The application also asserts that Senator Ogan neglected his duties by failing to recognize an obvious conflict of interest. With respect to conflicts of interest, a legislator's legal obligation is to refrain from taking action in violation of the statutory standards of conduct set forth in the LEA. Whether the allegations suggest a violation of those standards of conduct is discussed below under the rubric of corruption. In this respect, the statutory ground "neglect of duties" overlaps with the ground "corruption."

2. Corruption

The application asserts that Senator Ogan should be recalled due to corruption. We have interpreted "corruption" as a ground for recall under Title 15 as intentional conduct in the performance of work as a legislator motivated by private interests that violates the LEA. Among the provisions in

[128] The grounds for recall with redline changes recommended in this opinion are attached as **Exhibit 5**.

the LEA is a prohibition on using public funds for a nonlegislative purpose, or for the private benefit of the legislator or another person.[129] The statutory standard of conduct for legislators also provide that

> Unless required by the Uniform Rules of the Alaska State Legislature, a legislator may not vote on a question if the legislator has an *equity* or ownership interest in a business, investment, real property, lease, or other enterprise if the enterprise is substantial and the effect on that interest of the action to be voted on is greater than the effect on a substantial class of persons to which the legislator belongs as a member of a profession, occupation, industry or region.[130]

Under AS 24.60.100, a legislator "may not represent another person for compensation before an agency, committee, or other entity at the legislative branch."

Read together, the allegations in the application for a petition to recall Senator Ogan allege that Senator Ogan as an employee of Evergreen Resources, promoted Evergreen before at least one legislative committee, supported HB 69 to benefit his employer to the detriment of his constituents and later voted for HB 69. The activity described in the application does not demonstrate a violation of the prohibition on voting set forth in AS 24.60.030 insofar as Senator Ogan is not alleged to have any equity or ownership interest in Evergreen. The LEA does not expressly prohibit voting on legislation that would benefit one's employer. Nor do the allegations indicate that Senator Ogan used any public funds for the private benefit of himself or Evergreen or any other person.

The factual allegations in the application for a petition to recall Senator Ogan do, however, describe a violation of AS 24.60.100, which prohibits legislators from representing another person for compensation before a committee of the legislative branch. The application includes the allegation that Senator Ogan promoted his employer Evergreen in legislative committee and was listed as Evergreen's corporate contact in legislative materials submitted to the House Oil and Gas Committee hearing on HB 69. The application does not expressly assert that Senator Ogan intended a violation of the legislative standards of conduct, or that he engaged in that representation of Evergreen

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[129] AS 24.60.030(2).
[130] AS 24.60.030(g) (emphasis added).

for the purpose of benefiting himself, but it provides sufficient detail to allege a violation of AS 24.60.100 which, per our interpretation, amounts to "corruption." This allegation also constitutes an allegation of "neglect of duty" insofar as the two grounds overlap on violations of the LEA.

3. Lack of Fitness

The application states that Senator Ogan's conflict of interest between his legislative duties and his activities as a promoter for Evergreen and the coal bed methane industry demonstrate an inability to recognize an obvious conflict showing Senator Ogan's lack of fitness for his office. Like Brown, we have interpreted "lack of fitness" as meaning unsuitability demonstrated by specific facts related to a recall target's conduct in office. Read together, the factual allegations in the application for a petition to recall Senator Ogan sufficiently state lack of fitness as a ground for his recall from office. The asserted grounds, taken as true, describe a specific alleged conflict of interest and explain what basis there is for believing that Senator Ogan's performance of his functions as a legislator have been colored by concern for the private interests of his alleged employer, Evergreen, at the expense of his broader policy making obligations. By providing a specific example of alleged conduct whereby Senator Ogan's performance of his legislative duties is said to have been compromised, the application adequately states grounds by which the electorate could conclude that Senator Ogan is unsuitable for his position as a legislator. In essence, and in this application, "lack of fitness" encompasses the claim that Senator Ogan's conduct created an "appearance[s] of conflict[s] of interest"[131] which, while not specifically violating the LEA, has made him unfit for office.

4. Incompetence

The application for a petition to recall Senator Ogan also asserts that Senator Ogan's alleged conflict of interest demonstrates a failure in ethical judgment that shows incompetence. However, the specific factual allegations contained in the application do not demonstrate that Senator Ogan is unable to perform the duties of his office. The application therefore does not state incompetence as a proper ground for recall.

VIII. **Conclusion**

For the reasons stated above, we recommend that you certify the application for a petition to recall Senator Ogan. The application was timely

[131] AS 24.60.010(2).

filed, names a person subject to recall, and is supported by a sufficient number of qualified subscribers. The application is substantially in the required form, but its grounds include one factual allegation that is insufficient to meet the purposes of the particularity requirement of AS 15.45.500(2). The application also includes unsupported legal assertions and conclusions that should be stricken. Attached as **Exhibit 5** is a statement of the grounds showing which portions have been deleted. We recommend that you use the grounds as set forth in **Exhibit 5**, rather than as submitted by the applicants, to prepare a recall petition in accordance with AS 15.45.560.

If you have any questions, please contact me.

Sincerely,

BANKSTON, GRONNING, O'HARA,
SEDOR, MILLS, GIVENS & HEAPHEY, P.C.

John M. Sedor

JMS/LEF/sll
Enclosure
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