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

RECALL DUNLEAVY, an unincorporated association Plaintiff, vs. STATE OF ALASKA, DIVISION OF ELECTIONS, AND GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS Defendants.	
STAND TALL WITH MIKE, an independent expenditure group Intervenor.	3AN-19-10903 CI

Order Re:

I. Plaintiff's Motion for Summary Judgment
II. Defendant's Cross-Motion for Summary Judgment
III. Intervenor's Cross-Motion for Summary Judgment

Plaintiff moves for summary judgment on the grounds that its recall application states proper grounds. Defendants State of Alaska, Division of Elections and Gail Fenumiai, Director, State of Alaska Division of Elections (Defendant) and Intervenor Stand Tall with Mike (Intervenor) each filed cross-motions for summary judgment on the grounds that the 200-word statement of the grounds for recall is not factually and legally sufficient. All parties agree that a motion for summary judgment is the proper procedural vehicle for the court to render a judgment on the issues presented. There is no dispute about which words in the application the Director of Elections rendered an opinion; there only remains a legal analysis of whether the grounds as stated in the application meet the

legal sufficiency required in AS 15.45.470-15.45.710.

The Court does not decide whether the allegations are true or not – that is the job of the voters. Neither does the Court weigh the allegations to determine whether an allegation, even if true, is a reason why the voters should or should not recall an elected official.

Background

On September 5, 2019, a recall committee filed an application to recall Governor Michael J. Dunleavy. The application provides the following allegations as grounds for recall:

> 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).[1]

The Defendant denied certification of the recall application because "the statement of grounds for recall are not factually and legally sufficient for purposes of certification," but the Director found that the application met all other requirements of the statutes.[2] Plaintiff brought this case to challenge the decision.[3]

Standard of Review

Summary judgment is appropriate when there are no genuine issues of material fact, and the case can be decided as a matter of law.[4] When reviewing the legal sufficiency of allegations in recall petitions, the court's approach is that of a motion to dismiss for failure to state a claim, and the court must construe the application liberally and accept the allegations as true.[5] Courts apply an "independent judgment" standard to issues of law and do not defer to the Director of Elections' decision.[6]

The Court will decide whether each allegation, if taken as true, supports one or more of the grounds provided by the Legislature.[7] The Court will review whether the law

---

[1] "These references include: (1) the judicial appointment statute which Governor Dunleavy refused to follow; (2) a constitutional provision and statutes relating to Governor Dunleavy's unlawful partisan mailers and electronic advertisements, along with a specific related legislative legal opinion; (3) Governor Dunleavy's own explanation of his appellate court line-item veto; (4) Governor Dunleavy's June 28, 2019 vetoes, along with specific examples of their impacts on the health, education, and welfare of Alaskans; and (5) Governor Dunleavy's mistaken veto of Medicaid funds, and an explanation of his intended veto that shows his error." Pl.'s Reply in Supp. of Mot. for Summ. J. and Opp'n to Defs.'s and Interv.'s Cross-Mot. for Summ. J.s.

[2] Gail Fenumiai letter to Joe Usibelli Sr. on November 4, 2019 (denying certification for recall).

[3] The DOE denied certification of the recall application on November 4, 2019 "solely because the statement of grounds did not comply with the statutory requirements." Opp'n to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. n 15.

[4] See Christensen v. Alaska Sales & Serv., Inc., 335 P.3d 514, 516-21 (Alaska 2014).

[5] See von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd., 903 P.2d 1055, 1059 (Alaska 1995) (taking "the facts alleged in the first and fourth paragraphs as true and determine whether such facts constitute a prima facie showing of misconduct in office or failure to perform prescribed duties") (internal citations omitted).

[6] See Wielechowski v. State, 403 P.3d 1141, 1146 (Alaska 2017).

[7] See AS 15.45.570.

actually prohibits the alleged conduct.[8] To determine particularity and notice, the Court limited its review to the 200 words in the Plaintiff's application. The Court considered and discussed the Plaintiff's factual theories for each allegation only to provide context to the reader.

It is the Legislature's role, not the judiciary's, "to prescribe both the procedures and the grounds for recall. The political nature of the recall makes the legislative process, rather than judicial statutory interpretation, the preferable means of striking the balances necessary to give effect to the Constitutional command that elected officers shall be subject to recall."[9] Voters are the trier of fact, and "make their decision in light of the charges and rebuttals."[10]

Discussion

I. Applying the Particularity Requirement

Article XI of Section 8 of the Alaska Constitution states,

> All elected 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 Alaska Legislature enacted AS 15.45.470-.700 and AS 29.26. 28-.360 to prescribe the specific processes to recall state and municipal elected officials respectively. Though the specific grounds for recall are different for state versus municipal officers, the

---

[8] See von Stauffenberg, 903 P.2d at 1060.
[9] Meiners v. Bering Strait Sch. Dist., 687 P.2d 287, 296 (Alaska 1984) ("Like the initiative and referendum, the recall process is fundamentally a part of the political process. The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute").
[10] Id. at 301.

requirement for particularity within 200 words is the same.[11] The Alaska Supreme Court in Meiners and von Stauffenberg held that when reviewing a recall application, the statutes should be construed liberally and the allegations accepted as true, so as to protect the right of the people to vote and express their will.[12]

The Alaska Supreme Court decided Meiners and von Stauffenberg in 1984 and 1995 respectively. The Legislature re-visited the Title 15 recall statutes in 2000,[13] 2005,[14] and 2006,[15] but has neither rejected, explicitly or implicitly, the Alaska Supreme Court's interpretation of the recall statutes.

This Court is obligated to faithfully interpret and apply the Alaska Constitution and the laws of this state as created by the Legislature. This Court declines the invitation of the Attorney General and the Intervenors to expand the holding of Meiners and von Stauffenberg contrary to the Legislature's implicit adoption of those holdings. Further, this Court declines to restrict the voters' right to affirmatively take action to admonish or disapprove of an elected official's conduct in office as voters have a right to do so through the initiation, referendum, and recall process.

AS §15.45.550 provides bases of denial of certification. AS 15.45.500(2) requires that "the grounds for recall [be] described *in particular* in not more than 200 words" (emphasis added). The Alaska Supreme Court confirmed in both Meiners and von Stauffenberg that the particularity requirement is effectively a notice pleading standard

---

[11] Compare AS 15.45.500(2) ("described in particular"), with AS 29.26.260(a)(3) ("stated with particularity").
[12] See von Stauffenberg, 903 P.2d at 1057; Meiners, 687 P.2d at 291.
[13] See SLA 2000, ch. 21, § 59.
[14] See 1st Sp. Sess. 2005, ch. 2, § 46.
[15] See ch. 38, § 5, eff. May 19, 2006.

with "[t]he purpose of . . . giv[ing] the officeholder a fair opportunity to defend his conduct."[16] The standard for particularity is "whether a particular alleged act 'is not [so] impermissibly vague' that the official cannot respond."[17]

II. Interpreting the relevant grounds for recall

There have been several Alaska Superior Court decisions that have defined the grounds for recall for state elected officials. AS 15.45.510 establishes four grounds for recall: (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption. Alaska Superior Court judges have consistently treated the Alaska Supreme Court's recall decisions regarding local officials to be controlling for recall applications of statewide officials.[18]

In Coghill, decided in 1993, the Court defined the term "incompetence." In Valley Resident, decided in 2004, the Court defined "lack of fitness" and "neglect of duties." In Citizens, decided in 2006, the Court defined "lack of fitness" in alignment with Valley Resident.

As discussed previously, the Alaska Legislature affirmatively reviewed and made amendments within the Title 15 recall statutes, but did not make any changes to or define the recall grounds as stated in AS 15.45.510. This Court interprets the Legislature's silence post-decision in Coghill, Valley Residents, and Citizens as the Legislature's acceptance and approval of the definitions used by the courts.

---

[16] Meiners, 687 P.2d at 302.
[17] Id.
[18] See Coghill v. Rollins, Memorandum Decision, No. 4FA-92-1728CI (Alaska Super., 14, 1993) (Savell, J.); Valley Residents for a Citizen Legislature v. State, Order Regarding Pending Motions, No. 3AN-04-6827CI (Alaska Super., Aug. 24, 2004) (Gleason, J.) (Appendix B); Citizens for Ethical Government v. State, Transcript of Record, 3AN-05-12133CI, at 5-6 (Stowers, J.).

1. Lack of fitness

In Valley Residents, the court defined the statutory recall ground, "lack of fitness" as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office."[19] The target for recall, Senator Ogan allegedly promoted his employer in legislative committee through his voting, and failed to recognize an obvious conflict between his respective duties to his employer and to his constituents. The Court found that the stated ground for recall was legally sufficient because it alleged a violation of the Legislative Ethics Act.

The definition applied by the Court in Valley Residents is logical and would give an elected official reasonable notice. This court finds that "suitability for office" can describe the person's ethical and moral fitness for the office. Including ethical and moral fitness is consistent with the oath of office every public officer must take – to faithfully discharge his duties.[20]

Defendant and Intervenor argue that "unsuitability for office" "is so vague and subjective that it would amount to the kind of purely political, no-cause-required recall that the constitutional delegates expressly rejected."[21] While "unsuitability" is a broad term, when connected to specific conduct as alleged, it is sufficient to place the elected official on notice to defend against the allegations.

Defendant's suggestion to define "lack of fitness" in terms of mental or physical

---

[19] Valley Residents, Order Regarding Pending Motions, at *10; see also Citizens, Transcript of Record at 5-6, 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) (defining lack of fitness as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office") (Appendix C); Coghill, Memorandum Decision, No. 4FA-92-1728 CI (Alaska Super. Sept. 14, 1993).

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

[21] See Opp'n. to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. 28.

ability, as in Alaska's Business and Professions Code is problematic.[22] "Recall applications are intended to be easy for laypeople to prepare without lawyer assistance."[23] Furthermore, there are other processes in place to remove a governor from office based on mental or physical ability.[24] Last, the Legislature has declined to adopt the Business and Professions Code definition and this Court declines to further restrict the meaning of a definition that the Legislature has implicitly approved.

This Court will apply the "lack of fitness" definition applied in the Valley Residents decision and accepted by the Legislature. The Court considers an official's ethical and moral fitness to fall within the term "suitability."

2. Incompetence

In Coghill v Rollins, the Court defined "incompetence" in Title 15 as "lack of [the] ability to perform the official's required duties."[25] Lieutenant Governor Coghill was alleged to be unfamiliar with Alaska's election code despite overseeing elections, and therefore the Court concluded that the allegation of incompetence was legally sufficient.[26] On a moot appeal, the Alaska Supreme Court declined to address the definition of "incompetence."

Defendant and Intervenor suggested additional requirements of harm or multiple acts. That type of information, while relevant, goes to the weight of the evidence rather

---

[22] See Att'y Gen. Clarkson Op. at 15-16 (Exhibit 2).
[23] See Meiners, 687 P.2d at 301.
[24] See, e.g., Alaska Constitution Art. III, sec. 12 ("Whenever for a period of six months, a governor has been . . . unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant").
[25] Coghill, Memorandum Decision, 4FA-92-01728CI, at 21 (Alaska Super. Sept. 14, 1993) (Appendix D).
[26] Id. at 22.

than to clarify whether the official, as measured by his/her act or inaction, lacked the ability required. If an official is alleged to have failed to perform a duty or has done so poorly, the nature of the failure or the quality of the work is up to the voters to weigh. Additionally, in Coghill, the mere allegation that Lieutenant Governor was unfamiliar with the law he was charged with administering was adequate to establish a ground for recall due to incompetence.[27] In other words, harm was not required to show incompetence.

The Court declines to expand or restrict the definition of "incompetence" when the Legislature has declined to do so. The Court will apply the same definition as used in the Coghill decision.

3. Neglect of duty

In Valley Residents, the Court defined "neglect of duty" as "the nonperformance of a duty of office established by applicable law."[28]

In this case, Defendant compared "neglect of duty" to the concept of "nonfeasance," which Minnesota, Virginia, and Washington have defined to require an intentional act.[29] Defendant compared neglect of duty to violating one's oath of office.[30] Additionally, Defendant distinguished between trivial and non-trivial errors and omissions.[31] While these arguments are reasonable, this Court does not have the

---

[27] Id. at 24-25.
[28] Valley Residents, Order Regarding Pending Motions, at 9.
[29] See, e.g., No. AGO No. 2019200686, 2019 WL 5866609, at *7 (Alaska A.G. Nov. 4, 2019) (citing MN ST § 211C.01(2); In re Proposed Petition to Recall Hatch, 628 N.W.2d 125, 128 (Minn. 2001); Chandler v. Otto, 693 P.2d 71, 73-74 (Wash. 1984); Warren v. Commonwealth, 118 S.E.2d 125, 126 (Va. 1923)).
[30] See id.
[31] See id.

discretion to create a more stringent definition than has already been used by the courts, and the Legislature has accepted. As Plaintiff suggests, "it is up to the voters to decide whether a particular failure to act constitutes neglect of duty sufficient to warrant removal from office."[32]

This Court will use the definition of "neglect of duties" as applied in the Valley Residents decision and not rejected by the Legislature.

III. Which, if any, of the five allegations are sufficient to go to a vote?

Plaintiff argues three grounds for recall: (1) lack of fitness, (2) incompetence, and (3) neglect of duties.[33] The grounds for recall that are sufficient "must be set forth on the ballot in full, as contained in the petition, without revision."[34]

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

The Constitution states: "The governor shall fill any vacancy in an office of . . . superior court judge by appointing one of two or more persons nominated by the judicial council."[35] AS 22.10.100 codifies this duty and provides: "The governor shall . . . appoint a successor to fill an impending vacancy in the office of superior court judge within 45 days after receiving nominations from the judicial council."[36] The Governor has discretion over whom, but not whether to appoint a new judge, nor does the Governor

---

[32] Pl.'s Mot. for Summ. J. 12.
[33] The Supreme Court of Alaska has not yet defined these grounds.
[34] Meiners, 687 P.2d at 303.
[35] Alaska Const. art. IV, § 5.
[36] AS 22.10.100(a).

have the discretion to exceed the 45 day deadline.

Plaintiff alleges that Governor Dunleavy failed to fill a judiciary seat in Palmer Superior Court within the 45 days prescribed by law.[37]

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

2. **Allegation:** "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."

Plaintiff alleges that Governor Dunleavy allowed the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers.[38]

---

[37] The Plaintiff provided additional information within their briefing. The Alaska Judicial Council processed and vetted 13 applications for the positions and nominated three candidates. Those candidates' names were transmitted to Governor Dunleavy on February 4, 2019, thus giving the Governor until March 21, 2019 to select two of the three candidates. Governor Dunleavy allegedly appointed the final nominee to the position on April 17, 2019, 72 days after the Council forwarded its list of nominees. The Court does not rely on that information to determine particularity but does review that information to understand the Plaintiff's theory of their allegation.

[38] The Plaintiff provided additional information within their briefing. Plaintiff alleges that Governor Dunleavy has spent $18,902, $8,173, and $3,312, of public funds on partisan advertising through three Facebook pages entitled "Restore the PFD," "Repeal SB91," and "Cap Government Spending," respectively. These pages allegedly include advertisements that attack politicians who disagreed with Governor Dunleavy, support politicians that have favored

Plaintiff argues that Governor Dunleavy's conduct violated the Executive Branch Ethics Act, Alaska's campaign finance laws, and article IX, section 6 of the Alaska Constitution. AS 39.52.120(b) ("The Executive Branch Ethics Act") provides, in relevant part:

> A public officer may not . . .
> use or authorize the use of state funds . . . for partisan political purposes. . .
> [I]n this paragraph, "for partisan political purposes"
> (A) means having the intent to differentially benefit or harm a
> (i) candidate or potential candidate for elective office; or
> (ii) political party or group;
> (B) but does not include having the intent to benefit the public interest at large through the normal performance of official duties.

Plaintiff argues that Governor Dunleavy's actions constitute a violation of the Ethics Act because they were intended "to differentially benefit or harm" specific candidates, potential candidates, or political groups, instead of intending to "benefit the public interest at large."[39]

Alaska's campaign finance laws require: (1) a clear indication of who paid for a communication;[40] (2) specific language distancing an independent group from a particular candidate;[41] and (3) prior registration with APOC.[42]

---

these campaigns, and promote Governor Dunleavy personally. Additionally, Governor Dunleavy's office has allegedly admitted to spending approximately $3,500 of public funds to print and distribute "campaign-style literature" supporting particular politicians who voted for positions that Governor Dunleavy favors, without disclosing who paid for them. The Court does not rely on that information to determine particularity but does review that information to understand the Plaintiff's theory of their allegation.

[39] See AS 39.52.120(b)(6); see also Memorandum from Daniel C. Wayne, Legislative Counsel, Legislative Affairs Agency, Div. of Legal & Research Servs., to Rep. Zack Fields, at 4 (May 20, 2019) ("[T]he use of public funds for a partisan political purpose is unconstitutional, and therefore not a normal performance of official duties") (Exhibit 13).

[40] AS 15.13.090(a).

[41] AS 15.13.135(b).

[42] AS 15.13.050(a). The Plaintiff provided additional fact allegetaions, considered by the Court only to understand the Plaintiff's theory of the allegation. Plaintiff argues that Governor Dunleavy's conduct violate Alaska's campaign finance laws because neither the mailers nor the Facebook ads clearly identified who paid for the

If the allegations are true, Governor Dunleavy's conduct could constitute a violation of the law, which would constitute neglect of duty. If he understood the laws, and chose to ignore the laws, the act could establish a lack of fitness. On the other hand, if he did not intend to violate the law or did not understand the law, the allegations, if true, could establish his incompetence. The facts and conclusions, therefore, are left to the voters to decide. This allegation is legally sufficient.

3. **Allegations:** "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to . . ."

    i. "(a) attack the judiciary and the rule of law."

The Constitution for the State of Alaska is divided into separate Articles for the Legislature, Executive and Judicial branches. Implicitly, this State recognizes the separation of powers doctrine.[43] The Alaska Supreme Court has relied upon the existence of that doctrine in making a number of holdings, which have resulted in protecting the authorities reserved for the Executive or Legislative branches.[44] The Constitution grants the Judicial Branch all judicial powers, which necessarily includes interpreting the Alaska Constitution.[45]

---

communications or stated that Governor Dunleavy was not acting on behalf of the candidate's campaign. Additionally, Governor Dunleavy allegedly did not register with APOC in advance of distributing these communications.

[43] See, e.g., Bradner v. Hammond, 553 P.2d 1, 5 n.8 (Alaska 1976) (citing Myers v. United States, 272 U.S. 52 (1926)) (prohibiting one branch "from encroaching upon and exercising the powers of another branch").

[44] See, e.g., Pub. Def. Agency v. Superior Court, Third Judicial Dist., 534 P.2d 947, 951 (Alaska 1975) ("When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers"); Rust v. State, 582 P.2d 134, 138 (Alaska 1978), on reh'g, 584 P.2d 38, n.11 (Alaska 1978) ("Since Article III concerns the executive branch, it can fairly be implied that this state does recognize the separation of powers doctrine").

[45] Alaska Const. art. IV, § 1 ("The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature"); see also ACLU v. Dunleavy, Order Denying Motion to Dismiss, 3AN-19-

Article XII, Section 5 requires each public officer to take an oath of office. That oath requires the officer to support and defend the Constitution of the State of Alaska and to faithfully discharge their duties.

Plaintiff alleges that after Governor Dunleavy prepared a proposed budget for FY 2020, which he submitted to the Legislature, the Alaska Supreme Court issued its decision in State v. Planned Parenthood of the Great Northwest,[46] which held unconstitutional a regulation and statute that limited the availability of Medicaid funding for medically necessary abortions. When Governor Dunleavy issued his line-item vetoes to the appropriations bill passed by the Legislature, he allegedly reduced the funding to the appellate courts to provide $334,700 less than he had originally proposed and that the Legislature had approved. If the allegation stopped here, the veto was within the Governor's discretion and, therefore, not a violation of his duties. As such, it could not be a grounds for recall.[47]

However, Plaintiff further alleges that Governor Dunleavy explained his veto as reflecting his "oppos[ition] to State funded elective abortions. . . The annual cost of elective abortions is reflected by this reduction."[48] Plaintiff alleges that the veto message demonstrates an attempt by Governor Dunleavy to influence and undermine the judicial branch's independence.

08349CI, at 8-10 (Alaska Super. Dec. 12, 2019) (ruling that courts may review executive vetoes for constitutional compliance and not necessarily dismiss on political question grounds").

[46] 436 P.3d 984 (Alaska 2019).

[47] See von Stauffenberg, 903 P.2d at 1060 ("elected officials cannot be recalled for legally exercising the discretion granted to them by law").

[48] STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO CHANGE RECORD DETAILS at 122 (June 28, 2019) (Exhibit 14).

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

ii. "(b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities."

Plaintiff alleges that after the Legislature completed its annual budget process for FY 2020, Governor Dunleavy line-item vetoed approximately $440 million, on top of $270 million in cuts already included in the appropriations bill, for a total of 182 specific programs vetoed spanning health, education, and welfare. After failing to override Governor Dunleavy's vetoes in a 37-1 vote, the Legislature passed a new appropriations bill to restore most of the vetoed funds. Governor Dunleavy line-item vetoed the second appropriations bill by $220 million.

The Alaska Constitution, unlike the United States Constitution, provides affirmative rights to its citizens in the areas of health,[49] education,[50] and welfare.[51] The Alaska Supreme Court has not defined these rights, but has recognized that "the Legislatures do not have to fund or fully fund any program (except, possibly,

[49] Alaska Const. art. VII, § 4 ("The legislature shall provide for the promotion and protection of public health").
[50] Alaska Const. art. VII, § 1 ("The legislature shall by general law establish and maintain a system of public schools open to all children of the State").
[51] Alaska Const. art. VII, § 5 ("The legislature shall provide for public welfare").

constitutionally mandated programs)".[52]

Plaintiff argues that because the Legislature has a constitutional duty to provide for the health, education, and welfare of Alaska's citizens, the Governor cannot wield his veto power to preclude the Legislature from fulfilling that duty. Plaintiff argues that Governor Dunleavy went beyond the legitimate exercise of his veto power and breached his duty to respect the Legislature's role to fund core government services. Plaintiff argues that voters should decide the level of harm due to the incompetently reduced budgets.

Governor Dunleavy has the Constitutional authority to veto bills passed by the Legislature.[53] The Governor has broad discretion when exercising his line-item veto authority, but the Legislature always maintains the ability to override a Governor's veto.[54] As such, a Governor can never prevent the Legislature from fulfilling its Constitutional duties with his/her veto power.[55] This allegation, even if true, cannot establish grounds for recall based on a lack of fitness, incompetence, or neglect of duty.

4. **Allegation:** "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."

Plaintiff alleges that Governor Dunleavy vetoed significantly more Medicaid

---

[52] Simpson v. Murkowski, 129 P.3d 435, 447 (Alaska 2006).
[53] Alaska Const. Art. II, §15 ("The Governor may veto bills passed by the Legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin").
[54] See Alaska Const. Art. II, §16.
[55] Opp'n. to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. 51.

funds than he intended. He allegedly intended to veto $27,004,500 of funding for adult dental benefits, but miscalculated due to his misunderstanding of the federal matching rate.[56] He explained that he kept "$18,730,900 in [state] general funds that . . . [he] never intended to be vetoed" in June 2019.[57] It is alleged that this mistake would have equated to roughly a $40 million loss of federal funds.

A mistake can be a measure of competence.[58] Governor Dunleavy's alleged mistake, if true, could be interpreted as "incompetence." Voters have the right to weigh the seriousness and circumstances of the alleged mistake.

Conclusion

This decision best preserves the right of the voters. The Alaska Constitution gives the voters great power to act independently of their elected officials. Initiative and referendum powers allow the public to legislate and veto laws regardless of what the Legislature and Governor may say or want. Similarly, the recall process allows the voters to step in and replace an elected official before the end of their elected term.

Defendant's and Intervenor's arguments have a basis in law and logic, but would significantly limit the recall power of the public as granted by the Legislature. This Court declines to usurp the authority vested in the Legislative branch by our Constitution to prescribe the recall process. If the Legislature determines that this Court's decision places too great of a burden on an elected official to defend their exercise of discretion as

---

[56] Calculations explained at Motion for Summary Judgment 50.
[57] STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, HB 2001 FY20 Post-Veto Change Record Detail at 27 (Aug. 19, 2019) (Exhibit 18).
[58] See also Meiners, 687 P.2d at 294 ("[T]here is no doctrine that 'substantial compliance' with the procedures is sufficient and that technical errors will be overlooked after-the-fact").

granted them by their office, it is the Legislature that has the authority to create more protective rules for elected officials, not the Court.

This Court reverses the Director of Elections' decision to reject the recall application, except for allegation 3(b), which shall be struck. The third allegation in the recall petition shall be changed to: "(3) Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law."[59] Each of the remaining allegations is legally sufficient and is stated with particularity such that the elected official can adequately respond to the allegations.

The Director of Elections shall certify the remaining recall application pursuant to AS 15.45.540 and shall prepare the petitions as required by AS 15.45.560. The petitions shall be prepared and issued to the applicants no later than February 10, 2020, unless that date is stayed by the Alaska Supreme Court.

Plaintiff's motion for summary judgment is granted in part and denied in part. Defendant's and Intervenor's cross-motions for summary judgment are denied in part and granted in part.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 14th day of January, 2020.

I certify that on 1/14/2020 a copy of the following was mailed/emailed to each of the following at their addresses of record.
S. Ortansky; J Feldman; S Gottstein; S. Kendall; J Leidemuth; M Paton-Walsh; C Richards; M Bayless; B. Jamieson
Administrative Assistant

ERIC A. AARSETH
Superior Court Judge

[59] The deletion of the "(a)" and replacing the semi-colon with a period do not change the meaning of the allegation.