IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DONNA ADERHOLD, DAVID LEWIS, and CATRIONA REYNOLDS,

Plaintiffs,

vs.

CITY OF HOMER,

Defendant.

and

HEARTBEAT OF HOMER,

Intervenor.

Case No. 3AN-17-06227 CI

DEFENDANT'S OPPOSITION TO MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Defendant, the City of Homer ("City"), hereby opposes the Motion for Declaratory Judgment and Injunctive Relief filed by Plaintiffs, Donna Aderhold, David Lewis, and Catriona Reynolds (hereafter referred to as "Plaintiffs"). In their motion, the Plaintiffs ask this Court to enjoin the City from holding a special election during which voters can cast their votes to recall or retain Plaintiffs from their current seats on the Homer City Council. The Plaintiffs assert that the City Clerk erred in certifying the recall

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petitions and thus the election is unwarranted. Specifically, they argue that the grounds on which the recall petitions were based were insufficient and violated the Plaintiffs' right to free speech.

Contrary to the allegations contained in the motion, state law required the City Clerk to certify the petitions and mandates the recall election be held. Further, the state statutes governing the right to recall in the state of Alaska, both on their face and as applied by the City Clerk to the petitions at issue, in no way violated the Plaintiffs' First Amendment rights. Finally, their request for injunctive relief cannot stand as a matter of law and equity.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 6, 2017, a group of Homer residents, hereafter referred to as the Sponsors or Petitioners, filed an application requesting petitions for the recall of the Plaintiffs (the "Application").

The Application stated:

> Sec. 29.26.250 Grounds for recall are misconduct in office which has adversely affected the public, conduct which has violated the oath of office, and failure to perform duties prescribed by law.

It went on to include a "Statement of Recall" that stated, in substantial part:

> Be here advised that Homer City Council Members Aderhold, Lewis and Reynolds are each proven unfit for public office, as evident by their individual efforts in preparation of Resolution 16-121 and 17-09, the text of which stands I clear and obvious Violation of Homer City Code, Title 1:…[Homer City Code and statutory citations and quotes omitted]

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> Whereas the use of City Council office as a platform for broadcasting political activism is unlawful, unethical, and outside the bounds of permissible conduct in public service.
>
> Misconduct in office is further claimed by the irreparable damage done by draft Resolution 17-019 being made public and widely distributed on social and news media, and publically promoted as conspicuously drafted by and representing the City of Homer. This action has further caused economic harm and financial loss to the city of Homer. Verified Complaint, Exhibit D. ("Recall Statement" or "State of Recall")

In addition to the Recall Statement, the Application included signatures, addresses, and the printed name of voters allegedly qualified to vote in Homer.

The resolutions referenced in the Recall Statement included Resolution 16-121, "A Resolution of the City of Homer Supporting the Standing Rock Lakota Tribe and Opposing the Dakota Access Pipeline," and Resolution 17-019, "A Resolution of the City Council of Homer, Alaska, Stating That the City of Homer Adheres to the Principle of Inclusion and Herein Committing This City to Resisting Efforts to Divide This Community With Regard to Race, Religion, Ethnicity, Gender, National Origin, Physical Capabilities, or Sexual Orientation Regardless of the Origin of Those Efforts, Including From Local, State or Federal Agencies." Resolution 16-121 was sponsored by Council Member Lewis and adopted by the Council. Resolution 17-019 was sponsored by the Plaintiffs but did not pass.

In addition to these resolutions, the Recall Statement criticized the alleged circulation of an earlier, more politically-charged, draft of Resolution 17-019 ("Draft

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Resolution"). The Draft Resolution had been circulated on social media prior to its presentation to the Council and contained language subsequently omitted from the proposed resolution, including statements that President Trump disregarded constitutionally protected freedoms and made statements "offensive and harmful" to individuals in specified protected classes. *See* Draft Resolution language quoted in "Homer City Council Goes into Full 'Resist Trump' Mode with Resolution," http://www.mustreadalaska.com, attached as Exhibit 1 (public comments omitted from exhibit). In response to its release, the City Clerk and the City Council were inundated with public comments criticizing the Plaintiffs for considering and circulating a controversial resolution that, according to those comments, jeopardized the City's tourism revenue and community spirit. It was reported in local media that some tourists chose or would choose not to visit Homer because of the resolutions.[1]

Upon receipt of the Application, the City Clerk applied Homer City Code 4.26.020, which fully incorporates and adopts wholesale the recall procedures required by AS 29.26. The Clerk ultimately determined that the Application complied with the

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[1] *See* "Council Reject Inclusivity Resolution" by Michael Armstrong, Homer News, March 2, 2017, at http://homernews.com/local-news-news/2017-03-02/council-rejects-inclusivity-resolution, *and* "Homer City Council votes down 'inclusivity' Resolution" by Shahla Farzan, AK Public Media February 28, 2017, at http://www.alaskapublic.org/2017/02/28/homer-city-council-votes-down-inclusivity-resolution/. (Last visited March 15, 2017.)

preliminary criteria required in AS 29.26.260 and issued the recall petitions on April 5, 2017. *See* Memo 17-057, Exhibit E to Plaintiffs' Verified Complaint ("Complaint").

On March 31, 2017, eleven days before any of them were due, the Sponsors timely filed three petitions, each of which contained over 430 sufficient signatures, or approximately 29% of the number of voters who voted at the last regular election.[2] On April 5, 2017, the Clerk issued a public memorandum finding that sufficient signatures had been submitted for each petition and that two of the three grounds for recall in the Recall Statement were sufficient. Accordingly, the Clerk certified the petitions on April 5, 2017. *See* Exhibit E attached to Complaint. Prior to preparing the Recall Statement for the ballot, the Clerk struck the portion of the grounds for recall that she found insufficient, but did not add or in any way reorganize the text of the Recall Statement.

A special election was scheduled for June 13, 2017, with the amended grounds for recall stated in a public memorandum identifying the date of the special election and the ballot language. *Id.* On April 6, 2017, the Plaintiffs were reminded to submit a 200 word or less statement rebutting the allegations in the Recall Statement to the Clerk no later than April 28, 2017. Each Plaintiff timely submitted a rebuttal statement and these statements were approved for inclusion on the ballot. *See* Draft Ballot attached hereto as

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[2] Pursuant AS 29.26.280(b), the petitions had to be "signed by a number of voters equal to 25 percent of the number of votes cast for that office at the last regular election held before the date written notice is given to the contact person that the petition is available."

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Exhibit 2 (includes rebuttal statements as submitted by Plaintiffs). On April 24, 2017, over two weeks after the Clerk issued her certification memorandum, Plaintiffs filed this action. As the Court is aware, the parties agreed to an expedited schedule in order to have these issues resolved prior to the statutorily mandated election on June 13, 2017.

II. ARGUMENT

Plaintiffs' attempt to usurp the role of the electorate in the recall process directly violates State constitutional and statutory law. Article IX, § 8 of the Alaska Constitution, and AS 29.26.250 provide voters a constitutional and statutory right to recall elected officials. The right to recall a local official is limited by statutory requirements. AS 29.26.280; AS 29.26.250. In this case, the City Clerk properly determined that the petitions exceeded the requisite number of signatures and that the Recall Statement sufficiently alleged statutory grounds for recall, namely, "misconduct in office, incompetence in office or failure to perform prescribed duties." AS 29.26.280. Based upon this determination, the City Clerk was mandated by the Alaska Constitution and Alaska Statutes to certify the petitions.

Plaintiffs' motion and supporting memorandum consistently demonstrate their fundamental misconceptions regarding Alaska's constitutionally guaranteed right to recall and the role a city clerk plays in that process. A city clerk's authority in reviewing a recall petition is bound by precise statutory guidelines. While the voters are tasked with determining whether or not the grounds for recall have been satisfied, a city clerk

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determines only if the grounds have been stated with sufficient particularity so that the officials subject to recall can defend themselves before the voters. The Homer City Clerk complied with the law, carefully reviewing the Application, the Recall Statement, and the recall petitions ultimately filed. While the City certainly shares Plaintiffs' frustration stemming from the statutory ambiguity surrounding the grounds for recall, it is the Alaska legislature, and not a city clerk, which is authorized to address those concerns.

A. Certifying the Recall Petitions Did Not Violate Plaintiffs' Rights to Free Expression under Either the United States or the State of Alaska Constitutions

Plaintiffs' argument that their constitutional rights to free speech protect them from being recalled based upon their speech is both procedurally and substantively flawed. It misconstrues the relationship between elected officials and the people whom they serve and ignores the federal and state laws preserving that relationship. The Plaintiffs are certainly free to speak openly, but the electorate must be permitted to react to political speech using the political processes afforded them. In Alaska, that includes the constitutional right to recall elected officials.

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Similarly, art. 1, § 5 of the Alaska Constitution provides that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

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While the City recognizes these constitutional protections, they are not implicated in the case at hand. First and foremost, the voter-initiated recall process is not "state action" that is subject to the limitations of the First Amendment or Alaska's guarantee of freedom of speech. Second, the guarantee of freedom of expression does not protect legislators from the proper functioning of the democratic process.

(1) The recall process is not state action and therefore Plaintiffs cannot claim that they are protected from it by the First Amendment or art. I, § 5 of the Alaska Constitution.

The Plaintiffs' contention that their rights of free speech have been violated cannot succeed because they require "state action" to invoke constitutional protections, and the recall process ultimately involves action by the voters and Petitioners, not by the City administration. The Petitioners took action to seek recall and the voters, not the Clerk, will ultimately decide if the grounds for recall have merit.

In order to claim the protections of the First Amendment, as it is applied to the states through the Fourteenth Amendment, a plaintiff must show that there is state action. *Johnson v. Tait*, 774 P.2d 185, 188 (Alaska 1989), *citing Hudgens v. National Labor Relations Board*, 424 U.S. 507, 518 (1976) ("The first amendment does not guarantee freedom of speech against private infringement; it only protects against abridgement by the federal or state government"). Similarly, the prohibition on suppressing speech in art. I, § 5 of the Alaska Constitution does not apply to actions by private citizens. *Johnson v. Tait*, 774 P.2d 185, 190 (Alaska 1989). To state the obvious, the private

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citizens who filed the recall petition are not state actors. Therefore, Plaintiffs' argument, that they are protected by the Alaska or United States Constitutions from the private citizens seeking to recall them, lacks merit.

Similarly, Plaintiffs cannot assert that it is the City that is stifling their expression and not the voters of Homer. Although the Clerk has certified the petitions, her role is ministerial in that she is required to certify the petitions once the statutory requirements are met. AS 29.26.310 states that "[i]f a recall petition is sufficient, the clerk *shall* submit it to the governing body at the next regular meeting or at a special meeting held before the next regular meeting." (Emphasis added.) And at the next regular meeting, "[i]f a regular election occurs within 75 days but not sooner than 45 days after submission of the petition to the governing body, the governing body *shall* submit the recall at that election." AS 29.26.320(a). Consequently, the Clerk's actions and the City Council's actions in this case are not state action. Instead, they are purely a mechanical function of the voter-initiated political process from which Plaintiffs cannot exempt themselves. By way of analogy, a city issuing a permit for a political group to stage a protest rally does not turn that rally into state speech. The action taken by the City merely allows the voters to weigh in on whether the Plaintiffs should be removed from office for the reasons stated in the respective recall petitions.

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(2) The guarantees of freedom of speech in the United States and State of Alaska Constitutions do not protect elected officials from the proper functioning of the political process.

Even if the Clerk's limited role in the recall process constitutes state action, Plaintiffs' claims that they cannot be recalled by the voters based upon the content of their speech misinterprets the protections under both the United States and Alaska constitutions. It is well established under both federal and state court decisions that neither the First Amendment nor its Alaska counterpart "succor casualties of the regular functioning of the political process." *Id.* at 545; *see also Zilich v. Longo*, 34 F.3d 359, 363 (6th Cir. 1994) and *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1248 (10th Cir. 2000). Put simply, elected officials' free speech rights do not shield them from the political process. In a democracy, elected officials must be free to speak their minds; their constituents must be allowed to hold them accountable for those opinions.

The Court's dedication to preserving the integrity of the political process and the right of the voters is aptly articulated in *Blair v. Bethel School District*, 608 F.3d 540 (9th Cir. 2010). In that case, the United States Court of Appeals for the Ninth Circuit explicitly stated that it would not be a violation of the First Amendment or even "controversial in the least" for an elected official's constituents to refuse to vote for him on account of his statements about issues. 608 F.3d at 545. The Court of Appeals upheld the Bethel Washington School Board's vote to remove Blair from his role as vice

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president in response to his criticism of the district's superintendent. In that decision, the Court found the board's action did not violate the First Amendment because just as "Blair certainly had a First Amendment right to criticize" the superintendent, "his fellow Board members had the corresponding right to replace Blair with someone who, in their view, represented the majority view of the Board." *Id.* at 545–46. The Court surmised there was "little difference between what the Board's internal vote against Blair accomplished and what voters in a general public election might do if they too were disaffected by Blair's advocacy." *Id.*

Just as Blair could be removed from his leadership position on the Bethel School Board through a "procedurally legitimate vote" because of his speech, so too can Plaintiffs be removed by the voters in a properly-scheduled recall election. *Blair* at 544. To allow an elected official to claim that he or she could not suffer a negative consequence through the political process because of free speech protections would itself violate the rights of other legislators and the voting public to respond. *Id.* at 545-546.

Plaintiffs fail to recognize that recall is purely political and not punitive. They also fail to acknowledge that recall is a right vested in the voters, not the clerk. These flaws resonate throughout their motion and the cases upon which they base their constitutional claims. Substantially all of the cases cited in the Plaintiffs' memorandum involve prosecution of an official for violation of a law or the constitutional ramifications where a legislative body attempts to unilaterally remove an official *despite* his or

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her approval by the voters. *See e.g. Thoma v. Hickel,* 947 P.2d 816 (Alaska 1997); *Bond v. Floyd*, 385 U.S. 116, 126 (1966). Recall is not a punishment, it is a process, and thus cases protecting officials from punishment by state actors cannot be relied upon to support protections from the political process. Indeed, most of the cases relied upon by Plaintiffs support the validity of the Clerk's actions and emphasize the importance of protecting the *voter's* right to free expression and the fundamental protections afforded the electoral process.

By way of example, Plaintiffs rely heavily on *Bond v. Floyd*, a United States Supreme Court decision from 1966 in which the Court held that the First Amendment protects legislators' right to express their views on issues of policy. 385 U.S. 116 (1966). At issue in that case was the Georgia House of Representatives' refusal to seat Bond because of statements he made against the war in Vietnam. As part of holding that Bond must be seated, the Supreme Court emphasized that "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office." 385 U.S. at 136. Indeed, the guarantee of free expression to elected officials stated in *Bond* exists in large part to protect the rights and intent of the voters, not the officials representing them.

As recognized in *Blair*, the refusal to seat Bond had the effect of nullifying the multiple popular votes that had led to his election. 608 F.3d at 545 n. 4. The Ninth Circuit distinguished improper retaliation that frustrates the democratic process from the

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proper functioning of that process. *Id.* For instance, just as the Georgia legislature could not stop Bond from taking his seat, thereby frustrating the will of the voters in Bond's district, so too the board could not stop Blair from continuing in his position. *Id.* ("This would be a different case had Blair's peers somehow managed to vote him off the Board or deprive him of authority he enjoyed by virtue of his popular election - but they didn't.") But where the response to the elected official's speech came through procedurally proper political action, that action did not implicate the First Amendment. *Id.* at 543-44.

Plaintiffs have been afforded the opportunity to speak their minds on "controversial political questions" and now the people of Homer get to decide whether to keep them in office through the constitutionally guaranteed recall process. The action that Plaintiffs seek to enjoin does not suppress the results of a popular election; rather, the complained of action is the democratic process itself. Plaintiffs' citation to *Bond* evinces their misunderstanding of the recall process. The recall is not punitive. It is instead the appropriate functioning of the political process.

B. The Clerk Correctly Certified the Petitions for Recall Election As a Matter of Law and Equity

Despite the Plaintiffs' misguided reliance on the First Amendment to avoid the recall process, the Plaintiffs' complaint and declaratory judgment motion are ultimately

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grounded in statutory provisions governing recall, and these provisions were properly applied by the City Clerk as a matter of law and equity.

It is well established under Alaska law that petitions for recall must be afforded every benefit of the doubt when assessing their sufficiency. The Court has explicitly stated that "statutes relating to the recall, like those relating to the initiative and referendum, should be liberally construed so that the people [are] permitted to vote and express their will...." *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 296 (Alaska 1984) (internal citations and quotations omitted); *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 94 (Alaska 1988), *citing Meiners*, 687 P.2d at 295; Alaska Const. art. XI, §§ 1, 8; AS 15.45.010–.240; AS 29.26.240–.360). The Court has been especially wary of judicially-created "artificial hurdle[s] to the people's right to vote and express their will." *McCormick v. Smith*, 793 P.2d 1042, 1046 (Alaska 1990).

The legislature and the Court have repeatedly emphasized that the voter's, and not the clerk, serve as the trier of fact when recall is at issue. The Alaska Supreme Court has expressly confirmed that "[i]t is not the role of the municipal clerk or Director of Elections to take the matter out of the voters' hands." *Meiners* at 301. Accordingly, when a city clerk is deciding whether a petition states a sufficient basis for recall, the clerk must assume that the allegations contained in the Recall Statement are true. *Meiners* at 300 n.18.

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Under Alaska law, an elected official may be recalled for one of three reasons: (1) misconduct in office; (2) incompetence; or (3) failure to perform prescribed duties. AS 29.26.250; *Von Stauffenberg v. Committee for Honest and Ethical School Bd.,* 903 P.2d 1055, 1059 (Alaska 1995). Although the legislature has provided little guidance as to what types of conduct fall within the grounds for recall, it did require such grounds to be "stated with particularity" in the recall petition. AS 29.26.260(a)(3). When considering the "particularity" of recall grounds, the Alaska Supreme Court has cautioned against "wrapping the recall process in such a tight legal straitjacket that a legally sufficient recall petition could be prepared only by an attorney who is a specialist in election law matters." *Meiners*, 687 P.2d at 301. Instead, the Court interprets the purpose of particularity requirement as ensuring that "the officeholder [has] a fair opportunity to defend his conduct in a rebuttal limited to 200 words." *Id.* at 302.

The Court has recognized that petitions are often drafted by citizen groups without the help of legal counsel and that municipal clerks are also not trained attorneys with experience in election law. Hence, the standard of particularity required of a petitioner is lower than the standard a legal practitioner might face. *Id.* at 301. The Court has also opined that these statutes are ambiguous and has called for their clarification by the legislature. *Meiners* at 296, 305. Therefore, "caution is indicated before adopting interpretations of the statutes which would require municipal clerks to make significant discretionary decisions of a legal nature." *Id.* at 296.

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The City Clerk repeatedly acknowledged the legislature's and the Court's liberal interpretation of the statutes governing the right to recall and she diligently complied with these laws. The certification memorandum released by the Clerk provides ample examples of the Clerk's careful attention to the ambiguities under the applicable law and her awareness that such ambiguities must, under existing law, be interpreted in favor of the electorate, rather than the elected.

(1) The City Clerk's decision to certify two allegations in the petitions, as more fully explained in Memorandum 17-057, was required by State law and Alaska Supreme Court precedent.

In light of both the statutory requirements and the Alaska Supreme Court's interpretation of those requirements, the City Clerk was required to certify the recall petitions and she properly scheduled the election to place the question of recall before the voters. The Clerk's release of a detailed and comprehensive memorandum explaining the bases for her decision, and the legal mandates underpinning it, reflect the objectivity and precision with which the Clerk performed her duties, and her inability to decide otherwise in light of existing law.

The City Clerk determined that the Recall Statement included three separate allegations, which she reviewed separately for sufficiency. These allegations were:

1. Council members at issue are unfit because they violated HCC 1.18 in sponsoring Resolutions 16-121 and 17-019 ("Allegation 1");

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2. Council members are unfit because they violated their oaths of office in sponsoring Resolutions 16-121 and 17-019 ("Allegation 2"); and

3. Council members at issue engaged in misconduct surrounding draft resolution 17-019 due, in part, to the irreparable economic harm it caused the City ("Allegation 3").

The Clerk found Allegation 2 and Allegation 3 were sufficient, but refused to certify Allegation 1, finding that it failed to state grounds for recall with particularity. The Clerk's determinations regarding each allegation are discussed in turn below. While Allegation 1 was found insufficient and is not at issue in this case, the Clerk's reasoning regarding that allegation demonstrates the breadth of her reasoning and is therefore included.

Allegation 1

Because the Clerk determined that Allegation 1 accused Plaintiffs of violating a legal duty that does not exist, she found it insufficient. She reasoned that Allegation 1 asserted that the Plaintiffs were unfit for office because they violated HCC 1.18, which prohibits "political activity," and the oath requirements under the Alaska Constitution. Homer City Code 1.18 states that:

> A City official may not take an active part in a political campaign or other *political activity* when on duty. Nothing herein shall be construed as preventing such officials from exercising their voting franchise, contributing to a campaign or candidate of their choice, or expressing their

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> political views when not on duty or otherwise conspicuously representing the City. (Emphasis added).

The Clerk presumed that Petitioners were alleging the Plaintiffs engaged in prohibited "political activity." However, the activity alleged did not fall within the definition of "political activity" under Homer City Code 1.18.020, which limits such activity to:

> [A]ny act for the purpose of influencing the *nomination or election of any person to public office, or for the purpose of influencing the outcome of any ballot proposition or question*. Informing the public about a ballot proposition or question without attempting to influence the outcome of the ballot proposition or question is not political activity. (Emphasis added).

The Clerk explained that the resolutions at issue were drafted and presented after the certification of the national election and were not directed at any candidate or pending ballot proposition. She noted that the Homer City Code does not prohibit speech on federal policies, elected politicians, politics, or any other type of policy-based or political commentary outside the election/campaign realm. Accordingly, there was no violation of HCC 1.18.[3]

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[3] It is worth noting that to the extent a First Amendment challenge had any merit with regards to the recall petitions, it would necessarily involve Allegation 1, which would have required the City Clerk to interpret a Homer City Code provision to expressly prohibit local officials from engaging in any political speech, at any time. The Clerk's rejection of this ground effectively eliminated any potential First Amendment claim against the City with any viability.

Allegation 2

In considering Allegation 2, the Clerk noted that the Statement of Recall claimed the Plaintiffs were unfit because they violated the oath of office by drafting Resolutions 16-121 and 17-019. The oaths of office mandated under the Homer City Code and Alaska Statutes requires officials to "honestly, faithfully, and impartially" perform their duties.[4] The Clerk concluded that based upon the allegations in the Statement of Recall, it appeared Petitioners were accusing Plaintiffs of acting partially, rather than impartially, in supporting the resolutions.

The Clerk struggled with Allegation 2 because there is no legal definition for "impartial" that would clarify the scope of the Plaintiffs' oath and provide the Clerk a black letter law definition to apply in her review. Ultimately, based upon the plain meaning of the word "impartially" and the City Attorney's confirmation that there was ambiguity regarding the definition of "impartially" as it applied, the Clerk found Allegation 2 sufficient.

Allegation 3

Much like Allegation 2, Allegation 3 required the Clerk to examine the relevant laws and balance her authority and proscribed duties in the recall process with the ambiguity within the governing statutes. In Allegation 3, the Petitioners asserted the Plaintiffs committed "misconduct in office" through the "irreparable damage done by

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[4] HCC 4.01.110; AS 29.20.600.

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draft Resolution 17-019 being made public and widely distributed on social and news media, and publicly promoted as conspicuously drafted by and representing the City of Homer." The Petitioners further alleged in their Recall Statement that such action caused economic harm and financial loss to the City.

The Clerk reported in her certification memorandum that while "misconduct in office" was not defined in the recall statutes, Black's Law Dictionary defines "misconduct" as "[a] dereliction of duty; unlawful or improper behavior;" and "official misconduct" as "[a] public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance." The term "embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act." *See* 1988 Inf. Op. Att'y Gen. at 3 (Apr. 22; 663-88-0462) (quoting Black's Law Dictionary (5th ed. 1979)) (recall of Copper River School District Board Chairman).

Homer City Code 1.18.030(h) prohibits Council Members from "implying their representation of the whole [Council] by the use of their title." Accordingly, the Clerk determined that if the Council Members publically implied the Draft Resolution represented the City's official position, as alleged in the Recall Statement, Plaintiffs may have violated HCC 1.08.030(h) and, as a result, engaged in unlawful or improper behavior constituting "misconduct".

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While the Plaintiffs may disagree with the Clerk's interpretation of the definitions of "impartially" and/or "misconduct," the Clerk meticulously followed the recall statutes and, to the extent there was ambiguity in such statutes, interpreted them in favor of certifying the petitions as required by law.

(2) *The Clerk correctly determined that the Recall Statement petition sufficiently stated a claim that the Plaintiffs engaged in misconduct by violating their Oath of Office.*

a. The meaning of "misconduct in office," as that term is used in the grounds for recall, should be read broadly to encompass violations of laws or obligations imposed on elected officials and not limited to the criminal standard of official misconduct.

Plaintiffs have sought in their pleadings to unduly limit what would qualify as grounds for recall in two ways. First, they have argued that this Court should interpret the term "misconduct in office" as it is used in AS 29.26.250 to be synonymous with the crime of official misconduct set out in AS 11.56.850. Second, the Plaintiffs have argued that "unfitness" is not a proper ground to recall municipal officials. These arguments ignore previous rulings by the Alaska Supreme Court, would unduly restrict the public's ability to recall elected officials, and would violate the Court's direction that recall statutes be construed broadly.

Restricting the definition of "misconduct in office" to a criminal standard of wrongdoing is not supported by the Alaska Supreme Court's analysis in *Von Stauffenberg*, where recall proponents had alleged that the officials engaged in

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