misconduct by violating the Open Meetings Act. 903 P.2d at 1057. In that case, the Court found that the facts alleged did not expressly state a law that was being violated, but that the conduct did allege conduct that could constitute a violation of the Open Meetings Act, and thereby qualify as "misconduct" as that term is used in the recall statutes. *Id.* at 1060. Hence, the Alaska Supreme Court implicitly recognized that "misconduct" included not only criminal acts subject to prosecution under AS 11.56.850, but civil violations as well. Accordingly, under established precedent, "misconduct in office" must be broader than the limited scope of the crime of official misconduct.

Furthermore, such a restriction would improperly narrow the grounds for recall. In general, criminal statutes are to be narrowly construed. *State v. ABC Towing*, 954 P.2d 575, 579 (Alaska App. 1998). In contrast, recall statutes "should be liberally construed so that the people [are] permitted to vote and express their will...." *Meiners*, 687 P.2d at 296. Plaintiffs cannot rewrite the recall statute to read "official misconduct" in place of "misconduct in office" and thereby narrow the grounds for which they can be recalled.

Second, the Plaintiffs have argued that "unfitness," a term used in the recall petitions in this case, is not a ground to recall municipal officials. But this argument ignores the language of the Recall Statement as read as a whole, as well as the clear intent of the Petitioners. The Statement of Recall clearly asserted that the conduct allegedly "unfit" was also a "clear violation" of law, and the language in the Recall Statement as

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originally submitted makes clear that Petitioners considered all conduct at issue "misconduct." The relevant portion of the Statement of Recall states:

> Be here advised that [the Council Members]… 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 *in clear and obvious Violation of Homer City Code, Title 1*:…(Homer City Code and statutory citations and quotes omitted; Emphasis added.)
>
> 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….
>
> * * *

The Plaintiffs' argument is essentially that Petitioners should have said "misconduct" instead of "outside the bounds of permissible conduct." This argument would require the Clerk, and this Court, to ignore the intent of the legislature and the reasoning of the Alaska Supreme Court.

Plaintiffs claim that the use of "unfit" somehow invalidates the Statement and makes the petitions insufficient also ignores direction offered by the Alaska Supreme Court. The Plaintiffs submit that the inclusion of "unfitness" as a grounds for recalling state but not municipal officials, demonstrates the legislature's "explicit choice not to make fitness a ground for which municipal lawmakers can be recalled." This argument fails for two reasons. First, the Alaska Supreme Court has already declined to read any

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meaning into the difference between the grounds for recall of state and municipal officials. *Meiners* at 295 ("'Misconduct in office' and 'failure to perform prescribed duties' might easily be taken to be summaries of, not subtractions from, the complicated bundle of offenses they replaced [in the state grounds for recall]. Thus, we think it would be a mistake to read too much into the statute's history"). Second, the substance of the petitions' allegations is not the specific word "unfit," but rather the factual assertions that underlie the overall view that the Plaintiffs engaged in misconduct and should be recalled. To reject the petitions simply because the people who drafted it wrote "unfit" instead of "committed misconduct in office," especially in light of the Petitioners' express reference to "misconduct" and violations of law throughout the Recall Statement, would erect the type of artificial pleading barrier that the Alaska Supreme Court warned against in *Meiners*.

In the end, whether the petitions state "misconduct in office," "unfitness" or "failure to perform a prescribed duty," they ultimately allege the same conduct: Breach of a legal obligation imposed on the elected official. That was the standard employed in both *Meiners* and *Von Stauffenberg*. *Meiners* at 301; *Von Stauffenberg* at 1060, n.13. Plaintiffs themselves recognize in their motion that "misconduct in office" can include a violation of law. *See von Stauffenberg*, 903 P.2d 1059-60. The Court should therefore look to whether the petitions sufficiently alleges such a breach.

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b. The Clerk correctly determined that, assuming all facts in the statement to be true, the petitions sufficiently alleged that the Plaintiffs had committed misconduct in office by failing to honor their oath to be impartial.

Plaintiffs' failure to understand the limited scope of the Clerk's role in the recall process is again exemplified by their argument that she erred in certifying the petitions because an interpretation of the oath requiring council members to act "impartially" does not make sense. It is well established under Alaska law, that the Clerk is not required, or permitted, to morph into a legal practitioner for the sole purpose of interpreting and applying the recall statutes. The oath of office requires municipal officials to "impartially" exercise their oath. The Clerk is tasked with determining, within reason, what "impartially" means for purposes of the oath. She did so by (1) searching for a definition that would apply to the specific statute at issue; (2) searching for a definition in similar provisions of Alaska Statutes and in the Homer City Code; and finally (3) searching for a common plain meaning direction on the meaning of "impartially." When faced with no legal guidance on how that term is used in the statute at issue, the Clerk applied the plain meaning of the word. Ultimately, the Plaintiffs do not approve of the Clerk's characterization of the law. But while a "petition which alleges violation of totally non-existent laws is legally insufficient, while a petition which merely characterizes the law in a way different than the targeted official would prefer is legally sufficient." *von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd.*, 903 P.2d 1055,

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1060 (Alaska 1995), citing *Meiners* at 301. Here, the petitions specifically alleged a violation of the council members' oaths of office. That oath required them to be "impartial." While the Plaintiffs may prefer to characterize their oaths in a way that would shield them from this recall, the petition has stated that they violated their oath -- an oath that is required by law. Assuming the facts alleged to be true, the grounds for recall have therefore stated a sufficient basis for recall.

Both the Homer City Code and Alaska state law require municipal officials to affirm in writing that they will fulfill their duties "honestly, faithfully and impartially…." HCC 4.01.110; AS 29.20.600. Reading the recall statutes broadly, an allegation that the Plaintiffs had failed to act in accordance with HCC 4.01.110 and AS 29.20.600 by making statements that were partial would state a sufficient basis for recall.

In assessing whether the Recall Statement sufficiently alleged a violation of the Plaintiffs' oaths, all the facts alleged in the petition must be assumed to be true. *Meiners*, 687 P.2d at 300, n.18. As long as the petition alleges that the Plaintiffs acted in a way that would constitute misconduct in office, the question of whether the Plaintiffs were in fact impartial goes to the voters. Further, the Plaintiffs are free to take issue with the definition of "impartially" in their rebuttal statements, which are considered alongside the Recall Statement on the ballot. Here, as discussed more thoroughly above, the petitions stated that preparing the resolutions at issue and the associated political activism violated the oaths of office. Assuming as true that Plaintiffs used their "City Council office as a

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platform for broadcasting political activism," that would qualify as acting in a partial manner. That would in turn violate the Plaintiffs' oaths to act impartially. It was not the Clerk's role to determine whether those actions were, in fact, impartial.

The Plaintiffs' remaining argument against certification on this allegation can essentially be boiled down to the contention that they cannot have been "impartial" because recalling them for doing so would violate their right to free speech. This argument fails for the reasons more fully explained above: Political officials cannot use the First Amendment to shield themselves from the political process. Plaintiffs therefore failed to meet their burden to show that the petitions fail to state a sufficient basis for recall.

*(3) The Clerk correctly determined the Recall Statement petitions sufficiently stated a claim that Plaintiffs committed misconduct in office by being incompetent as well as violating HCC 1.18.030(h)'s requirement that they not speak on behalf of the City of Homer when they are not authorized to do so.*

The Recall Statement sufficiently alleged that the Plaintiffs had been incompetent, as well as committed misconduct by circulating a draft that unlawfully purported to speak for the City.

Under AS 29.26.250, a municipal official may be recalled for incompetence. The recall petition states that the Plaintiffs caused "irreparable damage" when the Draft Resolution was posted on social media leading to "economic harm and financial loss to the City of Homer." Incompetence can be defined as "[t]he quality, state, or condition of

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being unable or unqualified to do something." Black's Law Dictionary (10th ed. 2014). If Plaintiffs' alleged actions led to the purported financial losses to the City and its business community, that could be characterized as incompetence in that Plaintiffs failed to effectively represent the City. Assuming the facts alleged in the recall petitions are true, this section alleges incompetence on the part of Plaintiffs, which is a sufficient basis for recall.

Furthermore, HCC 1.18.030(h) prohibits City officials from inappropriately using their office title or authority:

> No City official or the City Manager shall use the implied authority of office or position for the purposes of unduly influencing the decisions of others, or promoting a personal interest within the community. City officials and the City Manager will refrain from using their title except when duly representing the City in an authorized capacity. Unless duly appointed by the Mayor or Council to represent the interests of the full Council, Council members shall refrain from implying their representation of the whole by the use of their title.

As noted above, the recall petitions allege that Plaintiffs committed misconduct in office by circulating the Draft Resolution on social and news media where it was "publicly promoted as conspicuously drafted by and representing the City of Homer." Assuming that these factual allegations are true, this allegation would state a violation of HCC 1.18.030(h). Under the standard of review announced in *Meiners* and *Von Stauffenberg*, the Clerk correctly determined that this allegation stated a violation of the Homer City Code and a sufficient basis for recall.

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Plaintiffs argue first that the Recall Statement did not state a violation of law. Asserting that a violation of law is the only sufficient basis for recall ignores the plain language of the statute; under AS 29.26.250, allegations of incompetence are equally sufficient. As noted above, the second allegation certified by the Clerk sufficiently states that Plaintiffs incompetently caused economic harm to the City and its business community.

In response to the allegation that they violated HCC 1.18.030(h), Plaintiffs also argue that they must be free to publicize, draft and distribute proposed resolutions to the public as part of their official duties. The City agrees that draft resolutions must be circulated prior to Council action. But this argument misstates the violation alleged in the recall petitions. However, as discussed above, the allegation does not merely state that the Draft Resolution was circulated, but that it was "publicly promoted as conspicuously drafted by and representing the city of Homer." *See* City Clerk's Memorandum 17-057 at 3 attached to Plaintiffs' Complaint as Exhibit E. That is the alleged action which violates the Homer City Code and makes this allegation a sufficient basis for recall. Thus, assuming it to be true that the draft was circulated as representing the views of Homer, the alleged basis sufficiently states a violation of HCC 1.18.030(h).

In sum, assuming all facts alleged in the second allegation to be true, that portion of the Recall Statement sufficiently alleges that Plaintiffs incompetently caused economic

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harm to the City. Independently, under the same standard, the second allegation states a violation of HCC 1.18.030(h). The Clerk therefore correctly certified the petitions.

*(4) The Clerk correctly deleted the appropriate sections of the Recall Statement*

When certifying the grounds for recall, the City Clerk decided that a section of the Statement related to "political activity" should be struck because it did not state a sufficient basis for recall. *Meiners*, 687 P.2d at 303 ("[T]he certifying officer may delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute"). Plaintiffs argue that the Clerk should have struck additional language that they contend relates to the stricken "political activity" allegation. Below is the original Recall Statement with the language removed by the Clerk struck through:

> *Statement for Recall: 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 17-019, the text of which stands in clear and obvious Violation of ~~Homer City Code, Title 1: 1.18.030 Standards and prohibited acts. n. Political Activities; §5.~~ Oath of Office. 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 publicly 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.*

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It appears that Plaintiffs are arguing that the language "[w]hereas 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" should have been struck. The Court in *Meiners* cautioned that the Clerk should not rewrite the petition when a portion is struck. *Id.* at 302. Pursuant to this guidance, the safest course was to leave in all portions of the Recall Statement that could fairly relate to the sufficient allegations. While that language may have originally applied to the "political activity" allegation, it just as fairly relates to the allegation that Plaintiffs engaged in partisan activity in violation of their oath to be impartial. The Clerk therefore properly left the language in the petitions.

C. The Request for an Injunction Should Be Denied Because the Plaintiffs Cannot Meet Their Burden to Show Probable Success On the Merits and Granting The Injunction Would be An Impermissible Prior Restraint on Speech.

In the memorandum in support of the Plaintiffs' motion, they haphazardly argue that an injunction is generally warranted in this case, presuming that a decision is not issued prior to the election. This claim for an injunction is, first and foremost, unnecessary as the court has granted the Plaintiffs' unopposed motion for expedited consideration and the court has adopted a schedule to ensure a final decision prior to the recall election. Additionally, an injunction is legally unwarranted as the Plaintiffs cannot show that they will probably succeed on the merits of their claim. Furthermore, granting

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the injunction would be an impermissible prior restraint on the voters' freedom of expression.

Under Alaska law, "[a] plaintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard." *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014). However, the balance of hardships test "applies only where the injury which will result from the temporary restraining order or the preliminary injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted." *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378–79 (Alaska 1991) (citations omitted) (citing A.J. Indus., 470 P.2d at 540; *Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 554 (Alaska 1975)).

Here, if the injunction is granted, the injury to the Intervenors and the City is truly irreparable; Council Members Reynolds and Lewis cannot be recalled if the election is not held on June 13. Under AS 29.26.290(a), "A petition may not be filed within 180 days before the end of the term of office of the official sought to be recalled." Both council members' terms expire on October 9, 2017. As it is, the current petitions were certified just outside that deadline on April 5, 2017. Any further delay would render Lewis and Reynolds immune from recall. On the other hand, "[w]here the injury which will result from the temporary restraining order or the preliminary injunction is not inconsiderable and may not be adequately indemnified by a bond, a showing of probable

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