STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

DEBORAH MCISAAC,

Plaintiff,

v.

CITY OF BALTIC,

Defendant.

49CIV23-001333

BRIEF IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT THAT PETITION TO RECALL MAYOR DEBORAH MCISAAC IS INVALID

* *

The Petition to Recall Mayor Deborah McIsaac (attached as Exhibit A to the Complaint and referred to herein as the "Petition") fails to comply with South Dakota law requiring a "specific statement" of the grounds for recall. It should, accordingly, be declared by this Court to be invalid.

I. THE PETITION & PROCEDURAL BACKGROUND

Mayor McIsaac is the Mayor of Baltic, South Dakota. (Petition at 1). On May 12, 2023, a Petition to recall her from serving in such office was filed with the City of Baltic. (*Id.*). The Petition stated as follows:

> The citizens of Baltic, per the authority listed in SDCL 9-13-30, seek the recall of Mayor McIsaac on grounds of misconduct in office, gross incompetence, and gross partiality due to the following actions, which are sourced from sworn testimony and official documents:
>
> 1. Harassing and/or threatening City employees both before the election and after the election,
>
> 2. Improper use of City property/funds during a personal "press conference" by utilization of City resources during a campaign event and through participation by City employees and appointed officers, upon request,

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

3. Failure to present public information in a true and correct manner to members of the public related to development projects within the City and ongoing litigation,

4. Utilizing her office to advance her own political interests and the financial interests of others while failing to disclose a potential conflict of interest,

5. Harassing and intimidating conduct towards members of the public that would constitute gross incompetence by failing to maintain decorum.

(*Id.*).

Mayor McIsaac timely filed a Complaint seeking a declaratory judgment "that the Petition is legally insufficient under SDCL 9-13-30 for failure to contain a specific statement of the grounds on which removal is sought" and requested an expedited hearing on the matter pursuant to SDCL 9-13-30. (Complaint). Mayor McIsaac also filed an Unopposed Motion to Enjoin or Stay Recall Election Until the Court Rules on the Legal Sufficiency of the Recall Petition, which this Court granted. (Order to Stay a Recall Election). This Court then issued a scheduling order in this matter, setting forth that the parties shall brief the sole issue of whether the face of the Petition sufficiently sets forth grounds for removal and that a hearing shall be held on the same. (Scheduling Order).

II. THE SCOPE OF THE COURT'S REVIEW

The sole issue before this Court is the legal sufficiency of the Petition, *i.e.*, whether each ground asserted in the Petition meets SDCL 9-13-30's requirement to be a "specific statement".

In review of a petition for removal, no extraneous evidence can be considered by the Court. *See* SDCL 9-13-30 (providing a petition for recall may be challenged only for the "filing of the recall petition *or the sufficiency of the specific statement of the grounds of the recall petition*" (emphasis added)). This restriction exists because it is the role of the electorate, not the courts, to determine the truth or falsity of the claims in a recall petition. *See Unger v. Horn*, 732 P.2d 1275, 1278 (Kan. 1987) ("A majority of those states which have considered the sufficiency of allegations

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

in recall petitions have held that the truth or falsity of such grounds must be determined by the electors, not the courts."); *von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995) ("[I]t is not [the court's] role, but rather that of the voters, to assess the truth or falsity of the allegations in [a] petition" for recall.); *Gilbert v. Morrow*, 277 So. 2d 812, 814 (Fla. Dist. Ct. App. 1973) ("While the trial court may not pass upon the truth or falsity of the grounds stated for removal from office, inasmuch as this is the province of the electors, still the charges must allege sufficient facts to identify to the electors the acts or failure to act without justification which are urged as misconduct in office.").

Moreover, the decision as to whether a petition is valid must be based on a review of each ground asserted and the petition deemed <u>invalid</u> if any one ground is not sufficiently stated. Otherwise, recall petitions may be subject to gamesmanship, improper crafting, and the integrity of the electoral system may be compromised. *See Garvin v. Jerome*, 767 So. 2d 1190, 1192-93 (Fla. 2000). In *Garvin v. Jerome*, the Florida Supreme Court stated a petition that contained a legally sufficient grounds for removal was nonetheless invalid because the petition also contained legally insufficient grounds for removal (*i.e.* impermissible vague grounds for removal). *Id.* In doing so, the Florida Supreme Court set forth substantial reasoning. *Id.* First, it determined that if there is at least one legally <u>insufficient</u> grounds for removal in a petition, it then becomes difficult if not impossible to determine whether the electorate signed the petition for a legally sufficient reason for recall or a legally insufficient reason. *See Id.* As a consequence, there is "little doubt that the presence of the invalid grounds would taint any recall election based thereon. . . . [P]ublic officials should not face removal from the office they were lawfully and properly elected to on a ballot that contains illegal grounds for recall in express violation of the statute." *Id.* at 1193. Furthermore, the court reasoned that permitting a petition containing a legally insufficient grounds

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

for removal to be enforced would "almost certainly lead to abuse" and gamesmanship, which would undermine the electoral process. *Id.* The court reasoned:

> For example, to garner support for a recall petition, an astute draftsman could couple legally insufficient (but politically charged) allegations with legally sufficient (but less politically compelling) grounds. While the valid grounds might not generate support for the recall petition, the invalid grounds might. Unless, upon judicial review, a defective petition endorsed by voters is invalidated, the legitimate purposes served by the recall statute would be severely undermined.

Id. Accordingly, even if some grounds set forth in the petition meet the required standard of specificity, the entire petition must be declared invalid if any ground fails to meet the standard.

III. THE LEGAL STANDARD FOR A RECALL PETITION

The current version of SDCL 9-13-30 provides that a petition "shall contain a specific statement of the grounds on which removal is sought."[1] SDCL 9-13-30. Further, the statute provides a remedy to challenge any petition that fails to meet this standard. An "interested person" may "challeng[e] the filing of the recall petition ***or the sufficiency of the specific statement of the grounds of the recall petition***." SDCL 9-13-30 (emphasis added).

---

[1] Notably, SDCL 9-13-30 was amended to require a "specific statement on the grounds for which removal is sought," whereas the prior version instead simply required a "general statement" to be set forth. *See State v. Leyse*, 60 SD 384, 244 N.W. 529, 530 (1932) (quoting the predecessor statute to SDCL 9-13-30, which read, "such petition shall contain *a general statement of the grounds* on which removal is sought" (emphasis added)). Further, the predecessor statute to SDCL 9-13-30 did not allow a petition to be challenged for insufficiency of the grounds for removal in a circuit court. Instead, the predecessor statute provided that a petition could be rejected by a city auditor if the petition lacked the requisite number of qualified signers, without prejudice to refiling after the insufficiency was corrected:

> *[T]he city auditor shall examine the [petition] and ascertain whether or not it is signed by the requisite number of qualified electors*, and shall attach to such petition his certificate showing the result of such examination. If by the auditor's certificate the petition is shown to be insufficient, an amended petition may be filed within ten days from the date of such certificate. Within ten days after the filing of such amended petition the *city auditor shall make like examination thereof and if his certificate shall show the same to be insufficient it shall be returned to the persons filing the same, without prejudice to the filing of a new petition to the same effect*.

State v. Leyse, 60 SD 384, 244 N.W. 529, 530 (1932) (emphasis added) (quoting the predecessor statute to SDCL 9-13-30). These changes are significant and demonstrate that the Legislature intended that recall petitions contain specific grounds for removal rather general, vague statements or allegations.

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

"The rules of statutory interpretation are well-established." *Edgemont Sch. Dist. 23-1 v. S. Dakota Dep't of Revenue*, 1999 SD 48, ¶ 8, 593 N.W.2d 36, 38. A court must look to the plain and ordinary meaning of the words in a statute to determine their effect. *See Argus Leader v. Hagen*, 2007 SD 96, ¶ 12, 739 N.W.2d 475, 480 ("Interpreting statutes according to their plain language is a primary rule of statutory construction."); *Zoss v. Schaefers*, 1999 SD 105, ¶ 6, 598 N.W.2d 550, 552 ("One of the primary rules of statutory construction is to give words and phrases their plain meaning and effect."); *see also Abata v. Pennington Cnty. Bd. Of Commissioners*, 2019 SD 39, ¶ 18, 931 N.W.2d 714, 721 ("There are two primary rules of statutory construction. The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction.").

Accordingly, for a recall election to be held, each ground of the Petition must be deemed to be a specific statement. In the matter *sub judice,* the Petition fails to meet this standard and should be declared invalid.

IV. ARGUMENT

Here, the Petition fails to comply with SDCL 9-13-30's requirement of specificity. The term "specific" means "restricted to a particular individual, situation, relation, or effect" or "free from ambiguity." *Specific*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/specific (last accessed May 26, 2023). Under this plain meaning, the grounds for removal should be clear and unambiguous, and these stated reasons for removal should refer to specific actions or omissions of Mayor McIsaac that justify her removal from office. Although the South Dakota Supreme Court has not yet opined on what constitutes a "specific statement of the grounds on which removal is sought" under SDCL 9-13-30, South Dakota

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

Attorney General Mark Meierhenry provided a written opinion as to a New Underwood mayor recall petition, which is consistent with this plain meaning of "specific" set forth above. *See* S.D. Op. Att'y Gen. 16 (1983), 1983 WL 180589 (hereinafter "*In re New Underwood"*).

In re New Underwood also involved a recall petition brought under SDCL 9-13-30. *Id.* The filed petition therein stated that the mayor had "negative 'personality characteristics' without identifying what they are" and further that the mayor "harassed and intimidated residents . . . contrary to the best interests of these residents and of the community." *Id*. Attorney General Meierhenry opined these allegations ***did not provide*** "specific" grounds for removal under SDCL 9-13-30. *Id*. The Opinion explained the petition failed because it did not explain "how" or "when" the alleged harassment and intimidation occurred. *Id.* Likewise, the allegation that the mayor had "negative personality characteristics" was general, not specific. *Id.* As such, the "naked assertions [in the petition] simply d[id] not satisfy the statutory requirement" for a "specific statement" under SDCL 9-13-30. *Id.*

Other states have similar recall statutes to SDCL 9-13-30, where the state legislatures have also required recall petitions to state grounds for removal with ***specificity or particularity*** to be valid. Courts, in interpreting these "specificity" requirements, have held a petition must identify ***the acts or omissions*** of the named official that form the basis of the alleged misconduct. *See, e.g*., *Unger v. Horn,* 732 P.2d 1275, 1280-81 (Kan. 1987) (stating "[i]t is obvious that the legislature intended, by adopting [a bill requiring] that the grounds for recall be described in particular, that the petition for recall contain more than a general statement of the grounds for removal" and further holding a petition that contained a "general allegation" an official violated a statute but that did not provide "**a *clear statement of the alleged act or acts constituting the grounds for recall***" was insufficient under said state law (emphasis added)); *Beckstrom v. Kornsi*, 217 N.W.2d 283, 288

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

(Wis. 1974) (holding that, where state law requires "reasons for recall [to] be stated clearly [in a petition,] . . . the reason or reasons assigned [in the petition] must be based on ***some act or failure to act*** which in the absence of justification would warrant the recall" and state the same in the petition (emphasis added)); *Chandler v. Otto*, 693 P.2d 71, 74 (Wash. 1984) (stating that, to be "factually sufficient" under Washington law, a recall petition, while it "may contain some conclusions," must "state sufficient facts to identify to the electors and to the official being recalled ***acts or failure to act which without justification would constitute a prima facie showing of misfeasance***, malfeasance, or a violation of the oath of office" (emphasis added)); *Reynolds v. Figge*, 19 P.3d 193, 200 (Kan.App. 2001) (holding that grounds for removal in a recall petition raising an "allegation that [officers] failed to enforce the terms of [a] superintendent's employment contract lacked specificity" as required by state law when that petition "neglected to state what parts of the contract were not enforced").

The requirement that recall petitions state grounds for removal with "specificity" serves several important roles. First, such statutes ensure that officials subject to recall have notice of the allegations against them and are able to defend themselves. "The grounds stated in a recall petition must be specific enough to allow the official an opportunity to prepare a statement in justification of his or her conduct in office." *Figge*, 19 P.3d at 199; *see also Unger*, 732 P.2d at 1280-81 (holding that a petition that fails to describe the acts or omissions providing grounds for recall does not give the named official an opportunity to refute the allegations against them and is therefore invalid).

Second, statutes requiring that petitions state the grounds for removal with "specificity" ensure that the electorate will have notice of the basis of the petition and the political issues at an upcoming recall election. *See Beckstrom*, 217 N.W.2d at 288 (explaining that statutes requiring

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

"specificity" of the grounds for removal in a recall petition are intended in part to "furnish information to the electors" about "political . . . issue[s that] may be raised at the election").

Third, recall statutes requiring a specific statement of the grounds for removal help ensure that elected officials are able execute their office without unwarranted interference from frivolous recall petitions. *See In re Recall of Certain Offs. of City of Delafield*, 217 N.W.2d 277, 283 (Wis. 1974) (holding that the Wisconsin legislature, in imposing a statute setting recall election procedures, deliberately "established safeguards so that such officials will not be [needlessly] vexed with recall petitions").

Finally, as previously discussed, courts are to limit their review to the face of the petition in examining a petition for "specificity" or "particularity." "A majority of those states which have considered the sufficiency of allegations in recall petitions have held that the truth or falsity of such grounds must be determined by the electors, not the courts." *Unger*, 732 P.2d at 1278. "The trial court may not pass upon the truth or falsity of the grounds stated for removal from office, inasmuch as this is the province of the electors." *Id.; see also In re Recall of Certain Offs. of City of Delafield*, 217 N.W.2d at 283 ("The power granted to an electorate to remove certain elected officials through recall procedure is political in nature and it is for the people and not the courts to decide the merits of the reasons stated in the petition."). As such, a trial court cannot consider the veracity of the grounds for removal as alleged in a petition. *Unger*, 732 P.2d at 1278. However, a court must still determine that the charges alleged in the Petition state "sufficient facts to identify to the electors ***the act or failure to act*** without justification which is urged as misconduct in office." *Id. (emphasis added); see also Chandler*, 693 P.2d at 74 (holding that statutes requiring recall petitions to state the grounds for removal with "factually sufficien[cy] . . . ensure[] that both the

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

public electorate and the challenged elective official will make informed decisions in the recall process").

Here, the Petition at issue wholly fails to comply with South Dakota's requirement of specificity. It asserts that Mayor McIsaac should be recalled on "grounds of misconduct in office, gross incompetence, and gross partiality due to the following actions, which are sourced from sworn testimony and official documents." The Petition then lists five "grounds" that it purports are grounds for recall. None of these five actions provides a "specific statement of the grounds on which removal is sought." SDCL 9-13-30.

> *Grounds for Removal #1: Harassing and/or threatening City employees both before the election and after the election.*

The allegation that Mayor McIsaac "harassed" or "threatened" City employees is general and vague. The allegation does not state the ***acts or omissions*** constituting the alleged harassment, the threatening behavior, or even describe the general nature of such behavior. Neither does the allegation specifically identify the recipient of such behavior or the time the behavior occurred. Moreover, in *In re New Underwood,* Attorney General Meierhenry opined that a general allegation that a mayor "harassed and intimidated residents" failed to provide "specific grounds for removal" as required by South Dakota law. For these reasons, a general allegation of threatening or harassing behavior, without any reference to the *acts or omissions* forming the basis of such an allegation, does not provide a "specific statement" of the grounds for removal as required by SDCL 9-13-30.

> *Grounds for Removal #2: Improper use of City property/funds during a personal "press conference" by utilization of City resources during a campaign event and through participation by City employees and appointed officers, upon request.*

This allegation purports to provide specificity on the grounds for removal while providing none. The allegation, although in convoluted language, appears to state that Mayor McIsaac had a

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

campaign event/press conference and had City officers and employees attend at her request. The allegation then purports that such a public event was an improper use of City resources.

This allegation does not describe what kind of public event was held with any particularity but rather characterizes the event hazily as some sort of "personal press conference" or "campaign event." The allegation also does not state the time or place of the alleged public event. But most importantly, the allegation fails to describe the ***acts or omissions*** at such a "press conference/campaign event" that were improper. Neither does the allegation provide any information on how "City funds/property" were misappropriated for such an event. In sum, the allegation provides no information on the time, place, and parties involved at the "press conference/campaign event", or ***state the alleged improper acts or omissions*** that allegedly occurred at such an event. Therefore, the allegation does not provide a "specific statement" of the grounds for removal under SDCL 9-13-30.

> *Grounds for Removal #3: Failure to present public information in a true and correct manner to members of the public related to development of projects within the City and ongoing litigation.*

Worded differently, the allegation purports that Mayor McIsaac failed to disclose information related to City projects and ongoing litigation. Like Grounds for Removal #2, this allegation purports to provide specificity on the grounds for removal while providing none. Again, a "specific statement" under SDCL 9-13-30 requires identification of the acts or omissions giving rise to the alleged misconduct. Here, again, there is only a general allegation of failure to disclose information. Further, this general allegation does not even provide notice of the time or forum of the alleged failure to disclosure. The allegation only provides that the alleged failure to disclosure concerned information related to City projects and litigation. The Petition cannot seek to avoid the "specificity" requirement of SDCL 9-13-30 but merely describing the "category" of information

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

allegedly withheld, without stating the ***acts or omissions*** gave rise to the failure to disclose, *what* specific information was withheld, or *how* such withholding was improper.

> *Grounds for Removal #4: Utilizing her office to advance her own political interests and the financial interests of others while failing to disclose a potential conflict of interest.*

Grounds for Removal #4 states that Mayor McIsaac failed to disclose a conflict of interest and used her office to improperly advance her own political and financial interest. Again, the Petition describes the general category of alleged misconduct—conflict of interest and misuse of office—while failing to identify the acts or omissions forming the basis of the allegation. SDCL 9-13-30 requires a specific statement of the underlying ***acts or omissions*** providing grounds for removal. But Grounds for Removal #4 identifies no such acts or omissions that created a conflict of interest or amounted to inappropriate use of office. As such, Grounds for Removal #4 fails to provide a "specific statement" as required by SDCL 9-13-30.

> *Grounds for Removal #5: Harassing and intimidating conduct towards members of the public that would constitute gross incompetence by failing to maintain decorum.*

Grounds for Removal #5 is virtually equivalent to the Grounds for Removal #1, except that Grounds for Removal #5 states that Mayor McIsaac "harassed and intimidated the public," while Grounds for Removal #1 alleged that Mayor McIsaac "harassed and intimidated City employees."

For the same reasons as expressed above, Grounds for Removal #5 fails to provide a "specific statement" and is therefore insufficient under SDCL 9-13-30. A general allegation of "harassment" or "threatening" behavior, without identifying ***the act or omissions*** constituting such harassment or threatening behavior, does not provide a "specific statement of the grounds on which removal is sought" SDCL 9-13-30. *See Specific*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/specific (last accessed May 26, 2023) (defining specific as "restricted to a particular individual, situation, relation, or effect" or "free from ambiguity"); *In re New*

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

Underwood, supra (stating that an allegation a mayor "harassed and intimidated residents" did not provide "specific statements of the grounds on which removal is sought" because such a "naked assertion[]" did not identify *how* and *when* such misconduct "was accomplished"). Like the other four grounds, this fifth grounds fails to meet the specificity requirement of SDCL 9-13-30.

V. CONCLUSION

The burden imposed by SDCL 9-13-30 is not unduly burdensome. A petition need not prove that the grounds for removal listed therein are true. Under a plain interpretation of SDCL 9-13-30, and case law from other states interpreting virtually identical "specificity" requirements, a petition need only identify the ***acts or omissions*** that form the basis of the alleged misconduct. Identification of the specific ***acts or omissions*** that form the basis of the allegations raised in a petition helps ensure that (1) the official subject to recall has notice of the specific grounds of the allegations against them and is able to mount a defense; (2) the electorate has notice of the grounds for recall and the political issues at stake in the recall election; and (3) officials are able to perform their duties without needless vexation from meritless recall petitions.

Here, the Petition contained only general allegations and failed to identify any of the ***acts or omissions*** forming the basis of each ground for removal. As such, the Petition does not comply with SDCL 9-13-30. Additionally, the Petition does not provide Mayor McIsaac with notice of the conduct underlying the charges against her and, therefore, prevents her from preparing a defense. Likewise, the Petition fails to notify the electorate of the grounds for recall and the political issues at stake during a recall election. To allow a recall election to move forward based only on general allegations in the Petition would contravene the clear legislative directive of SDCL 9-13-30 and nullify the statute's provision that a petition for recall must include a "specific statement of the grounds of the recall petition." SDCL 9-13-30.

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333

For the reasons set forth herein, Mayor McIsaac respectfully requests a declaratory judgment that the Petition is invalid for failure to provide a specific statement of the grounds for removal.

Dated this 2nd day of June, 2023.

/s/ *Lisa Hansen Marso*

Lisa Hansen Marso
Kristin N. Derenge
BOYCE LAW FIRM, L.L.P.
300 South Main Avenue
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424
lkmarso@boycelaw.com
knderenge@boycelaw.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Lisa Hansen Marso, hereby certify that I am a member of the Boyce Law Firm, L.L.P., and that on the 2nd day of June, 2023, the foregoing Brief in Support of Motion for Declaratory Judgment that Petition to Recall Mayor Deborah McIsaac is Invalid was electronically filed and served through Odyssey File and Serve System to:

Sara Frankenstein
sfrankenstein@gpna.com

Aidan F. Goetzinger
agoetzinger@gpna.com

Drew Duncan
dcduncan@ddlawsd.com

/s/ *Lisa Hansen Marso*
Lisa Hansen Marso

Filed: 6/2/2023 4:45 PM CST Minnehaha County, South Dakota 49CIV23-001333