No. 98897-8

(King County No. 78443-9-I)

SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE RECALL CHARGES AGAINST CITY OF SEATTLE MAYOR, JENNY DURKAN

BRIEF OF APPELLANT

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I. INTRODUCTION

This Court has repeatedly recognized that policy disagreements cannot be the basis for a recall petition. Rather, a recall petitioner must show that a public official intentionally committed specific acts of misconduct that violate particular legal duties. Washington's long-established factual and legal sufficiency requirements prevent recall filings from undermining the democratic process and deterring public officials from carrying out the duties they were elected to perform. Representative democracy requires elected officials to make difficult (and sometimes unpopular) decisions. Allowing a recall petition to proceed to the voters based on lawful discretionary decisions, particularly those made in the midst of a civil emergency, would chill the discretionary authority of public officials across the political spectrum.

Here, Petitioners disagree with City of Seattle Mayor Jenny Durkan's policies and discretionary decisions. Yet they fail to identify any factually and legally sufficient basis for recall. Following the most widespread civil unrest Seattle has seen in decades, Petitioners submitted, and the trial court approved, a charge that Mayor Durkan "failed to institute new policies and safety measures for the Seattle Police Department" with regard to the use of chemical crowd control measures. Remarkably, neither Petitioners nor the trial court identified the particular "policies and safety measures" Mayor Durkan had a duty to implement, but failed to enact. In other words, Petitioners fail to identify the action Mayor Durkan should have taken to preclude recall.

The trial court erred in holding that Petitioners' charge was factually and legally sufficient. Factually, Petitioners fail to (1) identify any act Mayor Durkan took that can be grounds for recall and (2) demonstrate that Mayor Durkan violated any law, standard, or rule, let alone that she intended to do so. As for legal sufficiency, there is no evidence that any discretionary decision Mayor Durkan made in the midst of multiple ongoing civil emergencies was manifestly unreasonable. Moreover, Mayor Durkan reasonably believed, and Judge James Robart subsequently confirmed, that any unilateral change to the Seattle Police Department's use of force and crowd management policies without federal court approval would risk violating the ongoing consent decree between the City of Seattle and the Department of Justice.

Mayor Durkan respectfully requests that this Court reverse the trial court and dismiss the Petition in its entirety.

II. ASSIGNMENTS OF ERROR

- The trial court erred in holding that Charge B of Petitioners' recall petition, as modified by the trial court, was sufficient to proceed to the voters. CP 303-04.
- The trial court erred in denying Mayor Durkan's Motion for Reconsideration. CP 793.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- Did the trial court err in holding that Charge B was factually sufficient where (1) Petitioners have not specified the policies or safety measures Mayor Durkan purportedly failed to

implement, and (2) there is no evidence that Mayor Durkan violated a law, standard, or rule, let alone that she intended to do so?

- Did the trial court err in holding that Charge B was legally sufficient where (1) Mayor Durkan's discretionary decision not to usurp the authority of Seattle's experienced and highly qualified Chief of Police was not manifestly unreasonable; and (2) unilateral changes to Seattle Police Department policies without federal court approval would have risked violating the consent decree between the City of Seattle and the Department of Justice?

III. STATEMENT OF THE CASE

A. Case Background

Following the tragic murder of George Floyd in Minnesota, protests began in Seattle on May 29, 2020. CP 176. These events escalated significantly and quickly.

1. May 30

Peaceful demonstrations turned to "chaos," including "significant property damage, multiple arson events, theft, and injuries to community members and law enforcement." *Id.* Mayor Durkan issued an emergency proclamation describing the perilous situation, including assaults on officers, Seattle Police Department ("SPD") cars set on fire, an SPD rifle stolen from a police vehicle and fired, and Molotov cocktails thrown at SPD headquarters. CP 146. SPD records note 55 arrests on May 30 alone, including for assault on an officer, assault, and burglary. CP 430. SPD

records further describe an individual being stabbed in the abdomen, multiple recovered weapons, and rampant vandalism and/or looting. CP 430-36. The National Guard was activated to assist in restoring safety.

2. May 31

The focus of the demonstrations shifted to SPD's East Precinct. Multiple officers were injured after being hit with rocks, bottles, pepper spray, fireworks, and other projectiles. CP 176. There were 21 arrests on charges including burglary, assault, robbery, and assault/unlawful possession of a firearm. CP 416. Due to the depletion of less-lethal tools available to officers "as they managed the significant violence, property damage, and injuries to police and other civilians during the events," SPD Chief Carmen Best, pursuant to her lawful authority under the Seattle City Charter, authorized SPD patrol to use CS gas "in the necessary event of crowd disbursement otherwise consistent with SPD policy." CP 176.[1]

3. June 1

Individuals in the protest crowd near SPD's East Precinct deployed several explosions towards officers. CP 176. SPD records also describe individuals "pushing hard" through a barricade, the arrest of an individual who had an AR-15 assault rifle in the crowd, and a "violent aggressive crowd that refused to follow orders and pushed officers." CP 411-13.

[1] As the Seattle Office of the Inspector General noted in its Informational Summary of Less Lethal Weapon Usage in Protests, under "normal circumstances," SWAT is authorized to use CS gas in crowd management situations. CP 479.

There were at least three reports of officer injuries. CP 409-14. After issuing several dispersal orders, incident command authorized CS gas and OC spray.[2] CP 411.

4. June 2

After viewing the events of the previous evening, Mayor Durkan requested "immediate recommendations" and "systemic review" of SPD's crowd management policy from the two oversight bodies charged with assessing individual and systemic problems at SPD, respectively: the Office of Police Accountability ("OPA") and the Inspector General ("OIG"). CP 444. In a press conference, Mayor Durkan publicly announced the review:

> I want people to be able to peacefully gather to be able to demand change, express grief, experience community with one another, but we need them to do it peacefully.
>
> We will do all we can to protect the cherished right to assemble and express First Amendment rights, but we will also make sure we maintain public safety, protect people, and protect the public safety of every community.
>
> Chief Best and I have had so many conversations over the years, and we know and agree and reaffirm that every encounter of police they use and try to determine how to de-escalate as a first step. The use of any force—whether it be the use of hands-on force or pepper spray or tear gas should only be done as circumstances require.

CP 462. Mayor Durkan reaffirmed her commitment to investigating police misconduct, stating, "there could never be a more important moment that [OPA and OIG] have the resources and confidence of the

[2] CS gas is commonly known as tear gas. OC spray is commonly known as pepper spray. CS gas was deployed in approximately 100 U.S. cities during protests in June. CP 447-58.

public . . . we will make sure that in the budget[,] OPA and OIG have the resources they need to do the job they need to do to give the public the confidence that the oversight is there." CP 465.

Unfortunately, violence continued from some in the protest crowds, with officers hit by bottles, rocks, and other projectiles. CP 177. At least four officers were injured, including one who required hospitalization. CP 391. SPD incident command authorized OC spray and CS gas near midnight after prior dispersal efforts failed. CP 403.

5. June 3

To de-escalate the situation, SPD created additional barrier space between officers and the crowd. CP 177. Officers still incurred injuries from projectiles thrown from the crowd. *Id*. Regardless, SPD did not deploy chemical irritants. *See generally* CP 173-80, 384-91.

6. June 5

Mayor Durkan and Chief Best took several critical steps:

- Proactively following up on her earlier request and mindful of the complexities of the situation, Mayor Durkan sought professional input on SPD's crowd management policies by sending a letter to the OPA, OIG, SPD's court-appointed Federal Monitor, the Community Police Commission, and the Department of Justice. CP 444. In the letter, Mayor Durkan requested review of "SPD's crowd management policy, including the use of all crowd management tools

and strategies, in the next 30 days." *Id*. She further requested that they work with Public Health Seattle & King County to "determine what innovative techniques . . . can provide a greater ability to de-escalate situations that occur with mass protests, so that the use of force can be greatly minimized and avoided." *Id.*

- The OIG, CPC, and OPA released a memorandum regarding the use of CS gas, noting the Mayor and Chief's requests that they "thoroughly review the [SPD] protest response." CP 469. They recommended that SPD "cease the use of CS gas in response to First Amendment activity, until such time as any appropriate use can be vetted by oversight entities and incorporated into a written SPD policy." *Id*.
- Just hours later, Chief Best announced that SPD would suspend the use of CS gas for at least 30 days pending the oversight work. Any use of CS gas could only be used by SWAT in "life safety circumstances and consistent with training." CP 177; *see also* CP 325.[3] Chief Best's directive further specified, "until further notice, any deployment must be approved by the Chief or the Chief's designee." CP 177.

[3] Chief Best's remarks begin at 12:04 of the press conference, following Mayor Durkan's remarks.

- Mayor Durkan noted her support for Chief Best's order, stating that "SPD officers do not need to be using tear gas at protests as a crowd management tool." CP 325.

7. June 6

Demonstrators near the East Precinct began trying to push the line of officers back by 15-20 feet. CP 177. When officers tried to reestablish the line, individuals in the crowd began to throw items at officers and attempt to take fencing from SPD. CP 177-78. Throughout the night, officers were hit with glass bottles and fireworks. CP 178. Due to these dangers, OC spray was deployed; CS gas was not. *Id*.

8. June 7

During evening hours, the situation deteriorated. SPD installed new barriers, hoping to minimize direct confrontations. CP 336-37. Nonetheless, officers on the ground observed individuals break and weaponize the protective fencing, as well as another group of approximately 20 people with shields, helmets, and gas masks attempting to create a disturbance. CP 178. As the crowd slowly advanced towards police, officers observed a potential IED nearby and received a radio report of an individual with a gun in the crowd. *Id.* Despite multiple instructions to cease advancing, the situation escalated, as demonstrators threw items at officers, including a water bottle filled with chemical irritants. *Id.* As individuals brought wooden shields with nails to the front

of the line, the crowd surrounded officers and began to block the area that was designated as the safe entry/exit point for SPD. CP 179.

Based on the life-safety circumstances presented, Chief Best authorized CS gas shortly after midnight. In a press conference, Chief Best described her decision in the midst of this extremely difficult situation:

> I was keeping abreast of what was happening in the precinct. We had a shooting earlier in the day. At some point, it got unruly, [and] there was a man with a gun in the crowd. The officers felt like it was a life-safety situation based on what was occurring, and I concurred. And I own that decision. I made that decision, and I will own any decision that I think is in the best interests of everyone's public safety.

CP 325. There have been no further deployments of CS gas.

9. Subsequent Review

Pursuant to Mayor Durkan's request, on June 12, 2020, the Office of Inspector General issued its Informational Summary of Less Lethal Weapons Usage in Protests. CP 185. In its report, the OIG stated that "[i]n its preliminary research, OIG did not find credible external sources advocating a blanket ban on the use of less lethal tools either in general patrol operations or crowd control." CP 187. Rather, in the absence of such tools, "officers may rely on greater use of lethal force to respond to threats to their or others' safety." *Id.*[4]

[4] SPD's operations manual notes that "less-lethal tools are used to interrupt a subject's threatening behavior so that officers may take physical control of the subject with less risk of injury to the subject or officer than posed by greater force applications." CP 187.

On June 15, 2020, the Seattle City Council passed Ordinance 126102 (the "Ordinance"), banning all "crowd control weapons," including chemical irritants, effective at the end of July. CP 472.[5] On June 29, 2020, Mayor Durkan returned the Ordinance unsigned, noting that while she shared concerns regarding crowd management tools, the Ordinance, among other issues, contained no exemption for life-safety situations and possibly violated the City's obligations under its federal court overseen consent decree with the DOJ. CP 512.

B. Related Cases

During the pendency of trial court proceedings, two related matters were heard in the United States District Court for the Western District of Washington.

1. Black Lives Matter Seattle-King County v. City of Seattle

Plaintiffs sought a temporary restraining order relating to the ongoing demonstrations. On June 12, 2020, Judge Richard A. Jones issued an order granting plaintiffs' motion in part, but declining to ban the use of chemical irritants outright. Judge Jones recognized that "people have a right to demonstrate and protest government officials, police officers being no exception." *Black Lives Matter Seattle-King County v. City of Seattle*, 2020 WL 3128299, at *2 (W.D. Wash. June 12, 2020). Judge Jones noted, however, that "to protect person and property, police

[5] The Ordinance does not purport to apply retroactively. *See* CP 472-77.

officers must make split-second decisions, often while in harm's way."[6] *Id*.

Thus, Judge Jones stated that his order "does not preclude individual officers from taking necessary, reasonable, proportional, and targeted action to protect against a specific threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property." *Id*. at *5. Moreover, Judge Jones permitted use of CS gas where (a) efforts to subdue a threat by using alternative measures, including pepper spray, have been exhausted and ineffective, and (b) the Chief has determined that use of CS gas is the only reasonable alternative. *Id*.

On June 17, 2020, the court entered a Stipulated Order Entering a Preliminary Injunction that extended the above terms until September 30, 2020.[7]

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[6] As the City noted in its briefing on the TRO, "[SPD] will generate after-action reports[,] and [] dedicated Force Review Boards will examine each crowd management event and every use of force, whether ordered by the incident commander or used by an individual officer. There are hundreds of hours of body worn cameras to review. Additionally, the [OPA] will be independently reviewing complaints, which . . . number in the thousands. Finally, the [OIG] will be systematically reviewing the policies and procedures of [SPD] in this context." CP 229.

[7] On August 10, 2020, Judge Jones entered an Order Granting Stipulated Clarification of the Preliminary Injunction. The stipulated order likewise did not ban use of CS gas or other chemical irritants. *See generally* Order Granting Stipulated Clarification of Preliminary Injunction, *Black Lives Matter Seattle-King County v. City of Seattle*, No. 2:20-cv-00887-RAJ (W.D. Wash. filed Aug. 10, 2020).

2. United States of America v. City of Seattle

Following a 2011 investigation, the federal government issued findings of fact that SPD engaged in a pattern or practice of unconstitutional policing and excessive force. Rather than pursue litigation to contest the filing, the City entered into a consent decree agreement with the federal government (the "Consent Decree") that is overseen by Judge James Robart. CP 522. Among other things, the Consent Decree requires that the City submit policies related to the use of force, including the use of crowd management tools, to the court-appointed monitor, the court, and the federal government for approval prior to implementation. CP 572.

Following enactment of the Seattle City Council Ordinance banning all crowd control tools, Judge Robart granted the United States of America's Motion for a Temporary Restraining Order enjoining implementation of a directive to SPD officers implementing the ban. CP 650; *see also* Order, *United States of America v. City of Seattl*e, No. 2:12-cv-01282-JLR, Dkt. 630, at *6-8 (W.D. Wash. July 25, 2020). Specifically, Judge Robart held that (1) the Consent Decree requires that policies relating to the use of crowd control tools be submitted to the Monitor, the DOJ, and the Court for approval prior to implementation, and (2) removing all forms of less lethal crowd control tools "will not increase public safety due to remaining measures being more likely to cause injury and insufficient time for police to train in alternative de-escalation

techniques." *Id*. In other words, a federal court order precluded Mayor Durkan from unilaterally implementing changes to SPD's court-approved use of force and crowd management policies.

C. Trial Court Proceedings

On or around June 15, 2020, Petitioners filed the above-referenced recall petition (the "Petition") with the King County Department of Elections. CP 7. Petitioners brought seven recall charges, broadly alleging that all of the acts referenced in the Petition "were performed wrongfully, and knowingly and constitute malfeasance, misfeasance, and/or a violation of [Mayor Durkan's] oath of office." CP 9. Charge B of the Petition specifically alleged:

> Mayor Durkan endangered the peace and safety of the community and violated her duties under RCW 35.18.200, Seattle Charter Art. V, Sec. 2, SMC 10.020.010A, and her oath to uphold US Const., Amends. 1 and 4, Washington Constitution, Art. 1, Sec. 3-5 when she failed to institute new policies and safety measures for the Seattle Police Department when using crowd control measures during a public health emergency.

CP 12. On June 25, 2020, the King County Prosecuting Attorney's Office filed its Petition to Determine Sufficiency of Recall Charges and Adequacy of Ballot Synopsis with the trial court. CP 1. Mayor Durkan submitted an opposition to the Petition; Petitioners submitted additional briefing in support. CP 122, 110.

Following oral argument on July 2, 2020, the trial court issued its Order on [the] Petition to Determine Sufficiency of Recall Charges and Adequacy of Ballot Synopsis on July 10, 2020. CP 297. The trial court

dismissed six of the Petition's seven charges. CP 303. With regard to Charge B, the trial court held:

> Charge B alleges that Mayor Durkan failed to institute new policies and safety measures for SPD to prohibit the use of tear gas and other chemical crowd control agents by SPD when such use would be particularly detrimental to public health during the COVID-19 pandemic. The [Petitioners] further allege that Mayor Durkan knowingly allowed SPD officers to continue to use chemical crowd control agents over many days without concern for the health and well-being of the community, constituting misfeasance, malfeasance, and violation of oath of office. Any alleged failure of Mayor Durkan to prohibit the use of chemical crowd control agents by SPD based on the early conduct before she can be said to have been aware, are legally and factually insufficient. To the extent the allegations pertain to failure to step in to stop the use of chemical crowd control agents after Mayor Durkan is alleged to have become aware of and opposed to their alleged use on peaceful protestors as a means of crowd control, such allegations are legally and factually sufficient to go forward.

CP 300-01. The trial court accordingly re-formulated Charge B to read:

> Mayor Durkan endangered the peace and safety of the community and violated her duties under state and local laws and her oath to uphold the federal and state constitutions when she failed to institute new policies and safety measures for the Seattle Police Department after learning of the use of chemical agents on peaceful protestors as a means of crowd control during a public health emergency.

CP 303-04.

On July 14, 2020, Mayor Durkan filed a Motion for Reconsideration. CP 306. At the trial court's request, Petitioners filed a Response, and Mayor Durkan filed a Reply. CP 596, 640. In their Response to Mayor Durkan's Motion for Reconsideration, Petitioners

admitted that Mayor Durkan was not subject to recall for not implementing an outright ban on CS gas and claimed they never maintained otherwise. CP 603.

On July 29, 2020, the trial court denied Mayor Durkan's Motion for Reconsideration, stating that "[t]he gravamen of the court's ruling as summarized above is more broadly the alleged failure to protect the health and well-being of the community." Nonetheless, the trial court noted that it did not "opine on whether Mayor Durkan should replace Chief Best, or under what circumstances the use of CS gas and the like may reasonably and legally be justified." CP 793.

Mayor Durkan timely filed her Notice of Appeal on August 12, 2020. CP 795.

IV. ARGUMENT

A. Legal Standard

This Court reviews de novo the trial court's initial determination of the sufficiency of recall charges. *In re Recall of Boldt*, 187 Wn.2d 542, 549, 386 P.3d 1104 (2017). The charges as a whole must give the elected official meaningful notice of the particular conduct challenged and why it is grounds for recall. *Id.*

Washington requires that a recall be justified "for cause": it is the only state, among those that provide a process for recall, to impose such a requirement. *Estey v. Dempsey*, 104 Wn.2d 597, 600, 707 P.2d 1338 (1985). By requiring cause, Washington prohibits purely political recall elections. *Cole v. Webster*, 103 Wn.2d 280, 285-86, 692 P.2d 799 (1984).

Instead, Washington limits recall, "to allow recall for cause yet free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations." *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984). The requirement of a judicial finding of sufficiency reflects "the framers' intent to prevent recall elections from reflecting on the popularity of the political decisions made by elected officers." *In re Recall of Telford*, 166 Wn.2d 148, 152, 206 P.3d 1248 (2009).

A voter who seeks to recall an elected official must charge that the official "committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has violated the oath of office." *Matter of Levine*, 194 Wn.2d 99, 102, 448 P.3d 764 (2019) (quoting RCW 29A.56.110). The recall statute defines these terms:

> (1) "Misfeasance" or "malfeasance" in office means any wrongful conduct that affects, interrupts, or interferes with the performance of an official duty;
>
> a. Additionally, "misfeasance" in office means the performance of a duty in an improper manner; and
>
> b. Additionally, "malfeasance" in office means the commission of an unlawful act;
>
> (2) "Violation of the oath of office" means the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

RCW 29A.56.110.

The proponent of the recall petition bears the burden of establishing that the charges alleged in the recall petition are both factually and legally sufficient. *In Re Recall of Kelley*, 185 Wn.2d 158, 163, 369 P.3d 494 (2019). As modified by the trial court, Charge B states:

> Mayor Durkan endangered the peace and safety of the community and violated her duties under state and local laws and her oath to uphold the federal and state constitutions when she failed to institute new policies and safety measures for the Seattle Police Department after learning of the use of chemical agents on peaceful protestors as a means of crowd control during a public health emergency.

Petitioners fail to meet their burden as to both factual and legal sufficiency.

B. Charge B is factually insufficient.

1. Petitioners fail to allege any specific act that would justify recall.

To be factually sufficient, a recall charge must "give a detailed description including the approximate date, location, and nature of each act complained of." RCW 29A.56.110. "[C]harges are factually sufficient only if they enable the voters and the challenged official to make informed decisions." *Recall of Kelley*, 185 Wn.2d at 164. For example, in *In re Recall of Bolt*, 177 Wn.2d 168, 176, 298 P.3d 710 (2013), petitioner alleged that a city councilmember "bullied and harassed" a town employee, while the mayor allowed the behavior. This Court held that the allegation was factually insufficient for both officials, as it did not "identify the conduct or behavior with any specificity." *Id.* at 177. Rather, the charge simply made general allegations of "bullying" and "harassment." *Id.*

Likewise, in *Kelley*, 185 Wn.2d at 168, petitioner stated that the former state auditor had "failed to identify both ballot-title fraud on all residents of the junior taxing district . . ., and also a further fraud to evade

an $800 million ceiling on long-term debt . . . ." This Court held that the petition was factually insufficient, as it did not "state any specific facts regarding how Kelley deficiently performed his duties by failing to discover Sound Transit's alleged fraud." *Id.* at 169; *see also Levine*, 194 Wn.2d at 107 (holding petition insufficient where petitioner's theory of an alleged violation of the Open Public Meetings Act was "unclear").

In their response to Mayor Durkan's Motion for Reconsideration, Petitioners conceded that Mayor Durkan is not subject to recall for not implementing an outright ban on CS gas and claim they never maintained otherwise. CP 603 ("[A] request to outlaw CS gas was not present in the charges, nor was it the intent."). Petitioners nonetheless maintain that Mayor Durkan should be subject to recall based on a purported failure to take unspecified steps or issue unidentified "orders" to SPD. In addition, Petitioners fail to describe how their preferred policies would have differed from SPD's existing use of force and crowd management policies that were approved under the Consent Decree, as well as Chief Best's June 5 order prohibiting CS gas except at her direction in life-safety circumstances. Without this basic information, Petitioners cannot satisfy RCW 29A.56.110's requirement that a recall petition identify the alleged act or acts justifying recall.

2. <u>There is no evidence that Mayor Durkan violated any law, standard, or rule, let alone that she intended to do so.</u>

As discussed in detail with regard to legal sufficiency below, there is no evidence that Mayor Durkan violated any law, standard, or rule. Yet

even if the Court accepts the claim that Mayor Durkan somehow violated the law, Petitioners nonetheless fail to establish any facts that could support a finding that she intended to do so.

Factual sufficiency requires that a petition demonstrate not only that the official intended to commit an unlawful act, but that she intended to act unlawfully. *Matter of Recall of Inslee*, 194 Wn.2d 563, 567-68, 451 P.3d 305 (2019). While some inferences are permissible in a recall petition, on the whole, the facts must indicate both a violation of the law and an intent to violate the law. *Id.* at 572. *see also Boldt*, 187 Wn.2d at 550-51 ("Where a recall petition alleges that an official committed an unlawful act, factual sufficiency also requires that the petition contain a factual basis for both the proposition that the official intended to commit the act *and* that the official intended to act unlawfully.") (Emphasis in original).

For example, in *Levine*, 194 Wn.2d at 110, the petitioner claimed that a public official illegally filed a "false and misleading police report," which alleged that the public official was blocked from leaving city hall and attacked in the city hall parking lot. Petitioners claimed that witnesses disputed this report and submitted a declaration from a witness stating that she "personally saw councilmembers leaving the meeting at issue and did not observe anyone blocking them or preventing them from leaving the building." *Id.* This Court held that such evidence "falls far short of

establishing the knowledge and intent necessary to sustain an allegation of unlawful conduct." *Id.*

Likewise, in *In re Recall of Carkeek*, 156 Wn.2d 469, 128 P.3d 1231 (2006), the petitioner claimed that a commissioner violated the Open Public Meetings Act when he sought an anti-harassment order against two of his neighbors to exclude them from public meetings. Even though the anti-harassment order was denied, the petition was insufficient to show intent to violate the law. *Id.* at 474. Noting the absence of any "concrete facts" showing an "impermissible motive," this Court held that the commissioner's "sincere, if ultimately nonprevailing, fear for his personal safety" was not indicative of the requisite intent." *Id.*

Here, the trial court held that at some point, Mayor Durkan should have "step[ped] in" and done something more regarding the use of chemical irritants, rejecting Mayor Durkan's argument that holding as such without evidence of intent would inappropriately apply a broad tort liability standard to a recall petition. In recent cases, however, this Court has not lightly inferred a public official's intent to violate the law. Indeed, in one of the few cases where this Court inferred intent to violate the law, *Matter of Recall of Riddle*, 189 Wn.2d 565, 575, 403 P.3d 849 (2017), a county clerk had a statutory duty to enter child support and temporary restraining orders within five days. The clerk, blaming implementation of a new case management program, failed to enter such orders for up to eight months. *Id.* Despite being repeatedly made aware of the problem,

the clerk continued to fail to enter the orders, even though the pre-existing method of filing the orders remained available. *Id.*

In light of the official's "refusal to accept suggestions or assistance over this extended period of time," this Court held, "a voter might . . . rationally infer that Riddle acted willfully and with unreasonable indifference to the consequences of her failure to [perform her statutorily mandated duty]." *Id.*

In sharp contrast, Mayor Durkan violated no law and consistently demonstrated her intent to protect the legal rights of all involved with the protests. She was forced to make difficult decisions in a rapidly evolving, chaotic environment that posed safety risks to the general public, protestors, bystanders, surrounding businesses, and police officers.[8] As discussed above, Petitioners fail to specify any act justifying recall that Mayor Durkan purportedly took. Yet even if they had specified any such act, not only is there no evidence to support an allegation that Mayor Durkan intended for any individual's constitutional rights to be violated, there is ample evidence that she sought to protect the rights of lawful protestors. Mayor Durkan:

[8] Nor are the facts even similar to *In re Recall of Burnham*, 194 Wn.2d 68, 448 P.3d 747 (2019), where city councilmembers purchased contaminated property for significantly more than its appraised value against the advice of counsel. As the dissenting justices stated, the public officials acknowledged their motivation to make a gift of public funds by ensuring the seller of the property recouped what she previously spent on the property. *Id.* at 84-85. Here, there is no evidence that Mayor Durkan intended to violate any law, rule, or standard; in fact, all evidence is to the contrary.

- Consistently voiced her support for the First Amendment rights of protestors;
- Actively requested OPA, CPC, DOJ, Federal Monitor, and OIG review of crowd management policies just days after the onset of the protests;
- Promised budgetary support, despite the economic crisis, for accountability and review of recent events; and
- Publicly stated her support of Chief Best's decision to prohibit the use of CS gas pending review of SPD crowd management policies.

Mayor Durkan's statements and actions throughout the process indicate her sole intent to enforce and comply with the law, not violate it. *See Inslee*, 194 Wn.2d at 570 (governor's request to Secretary of State to act in his stead in instance of unavailability demonstrated intent to comply with the law, not violate it). There is no factual basis for Petitioners' allegation that after a decades-long career actively pursuing police reform efforts, Mayor Durkan intended for SPD officers to violate citizens' rights. SPD has existing court-approved policies relating to use of force and crowd management. If individual officers' actions violated those policies,

Petitioners fail to set forth any evidence that Mayor Durkan or Chief Best intended this result.[9]

C. Charge B is legally insufficient.

Legal sufficiency requires that a charge define "substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office." *Telford*, 166 Wn.2d at 154. A petition states legally sufficient charges only if it identifies the "standard, law, or rule that would make the officer's conduct wrongful, improper, or unlawful." *In re Recall of Ackerson*, 143 Wn.2d 366, 377, 20 P.3d 930 (2001).

1. Petitioners' disagreement with Mayor Durkan's discretionary decisions is not a basis for recall.

"Lawful, discretionary acts are not a basis for recall." *Telford*, 166 Wn.2d at 154. Rather, the exercise of discretionary authority cannot be grounds for recall unless the exercise is manifestly unreasonable. *Bolt*, 177 Wn.2d at 174. This Court has repeatedly rejected recall petitions founded in policy disagreements, rather than manifestly unreasonable exercises of discretion. *See, e.g.*, *In re Recall of Robinson*, 156 Wn.2d 704, 709, 132 P.3d 124 (2006) ("[T]he mayor's reasonable exercise of discretion in negotiating contracts is not a legally sufficient reason for recall."); *In re Recall of Piper*, 184 Wn.2d 780, 791, 364 P.3d 113 (2015)

[9] An official cannot be recalled for an act of a subordinate where the official did not direct or have knowledge of the act. *In re Matter of Recall of Morrisette*, 110 Wn.2d 933, 936, 756 P.2d 1318 (1988); *see also In re Heiberg*, 171 Wn.2d 771, 780, 257 P.3d 565 (2011) (holding that for recall purposes, mayor was not responsible for the clerk's destruction of a document simply by virtue of the mayor's supervisory capacity over the clerk). Mayor Durkan is not subject to recall for any act taken by any subordinate without her knowledge or direction.

(rejecting recall charges "motivated by a desire to politically reshape [a] PUD board"); *In re Recall of Sandhaus*, 134 Wn.2d 662, 670, 953 P.2d 82 (1998) (whether an elected official "is doing a satisfactory job of managing his office is a quintessential political issue"); *In re Recall of DeBruyn*, 112 Wn.2d 924, 930, 774 P.2d 1196 (1989) (political disagreement does not provide a basis for recall); *Cole*, 103 Wn.2d at 286 (Washington does not allow recall based solely on political disagreement).

Similar to the Petitioners here, in *Inslee*, 194 Wn.2d at 573, the petitioner sought to recall Governor Inslee for his purported failure to declare a state of emergency regarding homelessness. This Court held that the charge was legally insufficient. Although it was "apparent" that Washington was facing a homelessness crisis, the choice not to execute this discretionary act was not manifestly unreasonable. *Id.*; *see also*, *Burnham*, 194 Wn.2d at 79 (city council's purchase of property for $68,000 was not manifestly unreasonable where the property was contaminated and had previously been appraised at $40,000, even though legal counsel advised against the purchase); *In re Zufelt*, 112 Wn.2d 906, 913-14, 774 P.2d 1223 (1989) (mayor's discretionary decision to disband the reserve police force was not legally sufficient basis for recall).

In contrast, in *In re Recall of Cy Sun*, 177 Wn.2d 251, 260, 299 P.3d 651 (2013), this Court held that there was a manifestly unreasonable exercise of discretion where a mayor retaliated against a whistleblower against the advice of the city attorney, unilaterally mistreated employees,

refused to follow required procedures, and violated union contracts. *See also, Riddle*, 189 Wn.2d at 576-577 (holding that clerk's knowing failure to perform statutorily mandated duties for eight months could not be appropriate exercise of discretion).

Here, Petitioners broadly and generically cite to constitutional provisions, state law, and local laws. None of their purported bases reflect a legal duty that Mayor Durkan violated.

a. Petitioners fail to show any violations of the state and federal constitutions.

Petitioners claim that Mayor Durkan violated her "oath to uphold US Const., Amends. 1 and 4, Washington Constitution, Art. 1, Sec. 3-5." Petitioners fail to specify how Mayor Durkan purportedly violated any of the five constitutional provisions they rely on. Without any specificity in their allegations or analysis, Mayor Durkan cannot meaningfully respond to their claim.

This Court has recognized that recall petitioners may not vaguely rely on constitutional provisions to establish violation of a legal duty. In *Matter of McNeil*, 113 Wn.2d 302, 305, 778 P.2d 524 (1989), petitioners alleged that public officials "violated constitutional guaranties of due process and the requirements of the Spokane City Charter" by failing to provide an opportunity for public comment with regard to a contract. This Court held that the charge was legally insufficient, as petitioners failed to (1) "explain[] how due process guarantees enter into this case" and (2) show that the public officials had taken any action that would invoke the

city charter's notice requirements. *Id.* at 305-06. *See also*, *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) ("Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.").

Petitioners fail to establish any violation of a legal duty based on the identified constitutional provisions.

b. Petitioners fail to show any violation of RCW 35.18.200.

Petitioners claim that Mayor Durkan violated her duties under RCW 35.18.200. RCW 35.18.200 provides:

> The mayor shall preside at meetings of the council, and be recognized as the head of the city or town for all ceremonial purposes and by the governor for purposes of military law.
>
> He or she shall have no regular administrative duties, but in time of public danger or emergency, if so authorized by the council, shall take command of the police, maintain law, and enforce order.

There is no evidence in the record that the Seattle City Council authorized Mayor Durkan to "take command of the police." Petitioners' claim accordingly fails.

c. Petitioners fail to show any violation of SMC 10.020.010A, which only underscores the discretionary nature of Mayor Durkan's authority.

Petitioners allege that Mayor Durkan violated her duty under SMC 10.02.010A. SMC 10.02.010A provides:

> Whenever riot, unlawful assembly, insurrection, other disturbance, the imminent threat thereof, or any fire, flood, storm, earthquake, or other catastrophe or disaster occurs in the City and results in or threatens to result in the death or injury of persons or the destruction of property or the disruption of local government to

> such extent as to require, **in the judgment of the Mayor**, extraordinary measures to prevent the death or injury of persons and to protect the public peace, safety, and welfare, and alleviate damage, loss, hardship, or suffering, the Mayor shall forthwith proclaim in writing the existence of a civil emergency. (Emphasis added).

The Petition itself acknowledges that Mayor Durkan issued a series of civil emergency orders in response to the protests and associated civil unrest. CP 13-14. SMC 10.02.010A does not identify any other statutorily mandated legal duty for the Mayor; Petitioners accordingly cannot establish any violation of a legal duty.

d. Petitioners fail to show any violation of Seattle City Charter, Article V, Section 2, which further underscores the discretionary nature of Mayor Durkan's authority.

Petitioners allege that Mayor Durkan violated her duties under Seattle City Charter, Article V, Section 2, which states:

> The Mayor shall see that the laws in the City are enforced, and shall direct and control all subordinate officers of the City, except in so far as such enforcement, direction and control is by this Charter reposed in some other officer or board, and shall maintain peace and order in the City. **He or she may, in any emergency, of which the Mayor shall be the judge, assume command of the whole or any part of the police force of the City**; but before assuming such control he or she shall issue his or her proclamation to that effect, and it shall be the duty of the Chief of Police to execute orders promulgated by the Mayor during such emergency. The Mayor shall perform such other duties and exercise such authority as may be prescribed by law. (Emphasis added).

Article VI, Section 4 of the Seattle City Charter further provides that the "Chief of Police shall manage the Police Department, and shall prescribe rules and regulations, consistent with law, for its government and control; provided, that the Chief of Police shall be responsible to the Mayor for the administration of the Police Department and the

enforcement of law." Moreover, Article VI, Section 5 states that the Chief of Police shall be the "chief peace officer of the City" and "shall maintain the peace and quiet of the City."

Read together, these provisions vest the Chief of Police with maintaining peace and managing SPD, though the Mayor may assume command of SPD where she, in her lawful discretion, determines that an emergency exists. Courts have long recognized the importance of deference to an executive's discretionary authority. *See Marbury v. Madison*, 5 U.S. 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

Petitioners' claim that it was manifestly unreasonable for Mayor Durkan not to "remove Chief Best" and "take control of the Seattle Police Department and give it orders" (CP 295, 600) is meritless. First, as previously discussed, Petitioners do not specify the "orders" Mayor Durkan should have given or how they would have differed from the measures taken by Chief Best. As stated above, policy disagreements cannot be a basis for recall. Indeed, elections matter, and if an elected official could be subject to recall for political or policy differences, every elected official statewide would be subject to perpetual recall. Similarly, if recall could be based on arguments that an elected official exercises discretion in a way other than the manner the petitioner prefers, every

official entrusted with discretionary authority would always be subject to recall.

Second, Chief Best is a nationally recognized law enforcement leader who is committed to constitutional policing, police reform, and community safety. Petitioners cannot credibly claim that Mayor Durkan (who has never served as a police officer) performed her duties in a manifestly unreasonable manner by not usurping Chief Best's legal authority granted by state law and the City Charter, and taking control of SPD. Petitioners fail to demonstrate any manifestly unreasonable exercise of Mayor Durkan's discretionary authority.

2. Mayor Durkan has no legal duty to unilaterally implement new SPD policies and procedures, and was precluded from doing so by federal court order.

As discussed above, Petitioners fail to identify any act that justifies recall or any manifestly unreasonable discretionary decision. The trial court nonetheless held that Mayor Durkan's failure to "step in and stop" the use of chemical crowd control measures was a sufficient basis for recall. The use of chemical measures is still subject to litigation and legislation, and Mayor Durkan had no legal duty to take any such specific actions. In fact, the Consent Decree would have prevented her from doing so.

This Court has recognized that officers of a municipality, including the mayor, have only such powers and duties as are conferred upon them, expressly or by necessary implication, by applicable statutes. *State v. O'Connell*, 83 Wn.2d 797, 824, 523 P.2d 872 (1974). A recall charge

cannot be legally sufficient where it does not allege violation of an official's legal duties. For example, in *In re Recall of Lindquist*, 172 Wn.2d 120, 133, 258 P.3d 9 (2011), petitioners sought recall for a prosecutor's alleged failure to investigate. The prosecutor argued that the charge was legally insufficient, as "the prosecuting attorney does not perform investigations." *Id.* This Court agreed, holding that the charge was factually and legally insufficient because the prosecutor "had no duty to investigate." *Id.* at 134. *See also, Matter of Recall Charges Against Seattle School District Board of Directors*, 162 Wn.2d 501, 511, 173 P.3d 265 (a charge was legally insufficient where directors had no legal duty to hold the hearing petitioners claimed they failed to timely hold).

Initially, Petitioners fail to show that Mayor Durkan had a legal duty to ban chemical irritants. Indeed, neither Judge Jones nor any other federal court nationwide has ordered an outright ban on chemical irritants relating to the recent demonstration. *See, e.g.*, *Black Lives Matter Seattle-King County*, 2020 WL 3128299, at *5 (declining to ban chemical irritants and permitting Chief Best to authorize CS gas in life-safety situations); *Don't Shoot Portland v. City of Portland*, 2020 WL 3078329, at *4 (D. Or., June 9, 2020) (permitting CS gas where the lives or safety of the public or police are at risk); *Abay v. City of Denver*, 2020 WL 3034161, at *5 (D. Colo., June 5, 2020) (permitting chemical agents "after an order to disperse was issued" and after adequate time is given for the intended audience to comply); *Anti Police-Terror Project, et. al. v. City of Oakland*,

No. 20-cv-03866-JCS, at *2 (N.D. Cal., June 18, 2020) (permitting CS gas where necessary to protect "lives, serious bodily injury, or specific property"); *Williams v. City of Dallas*, 3:20-CV-01526-L, at *1-2 (N.D. Tex., June 11, 2020) (permitting less lethal weapons in situations presenting immediate threat of serious harm).

Moreover, Mayor Durkan's lack of legal duty here is further compounded by the Consent Decree, which, as Judge Robart recently held, requires that policies relating to the use of crowd control tools be submitted to the Monitor, the DOJ, and the federal court for approval prior to implementation. Order, *United States of America v. City of Seattle*, at *8. Mayor Durkan cannot have a legal duty to unilaterally implement a policy in violation of a federal court order. Indeed, given her knowledge of the Consent Decree, had Mayor Durkan unilaterally implemented an outright ban on chemical irritants, such a decision would have presented a closer question for recall purposes than the facts presented here.

V. CONCLUSION

For the foregoing reasons, Mayor Durkan respectfully requests that this Court reverse the trial court and dismiss the Petition.

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DATED this 31st day of August, 2020.

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CERTIFICATE OF SERVICE

I, Suzanne Petersen, declare under penalty of perjury of the laws of the State of Washington that on this 31st day of August, 2020, I caused the foregoing document to be filed with the Clerk of the Supreme Court and served on petitioners/respondents, via email and U.S. Mail, First Class postage prepaid, addressed as follows:

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