

No. 98897-8

(King County No. 20-2-10455-8 SEA)

SUPREME COURT OF THE STATE OF WASHINGTON

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

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RESPONSE TO MOTION TO SUPPLEMENT THE RECORD WITH  
NEW EVIDENCE

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## I. INTRODUCTION

Petitioners now seek to supplement the record with over 200 pages of declarations and additional information not presented to the trial court.<sup>1</sup> This Court should deny Petitioners' Motion to Supplement the Record with New Evidence (the "Motion"). First, the sufficiency of the petition is determined at the time of the Superior Court proceedings, which this Court reviews *de novo*. The proposed declarations were not before the trial court and often describe events that had not occurred when the matter was before Judge Roberts. Second, the supplemental materials add little, if anything, to the issues of legal or factual sufficiency of the charges against the Mayor.

Particularly in light of the accelerated briefing schedule in this matter, the parties should make their arguments based on the existing factual record. Mayor Durkan respectfully requests that the Court deny the Motion.

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<sup>1</sup> All but three of the declarations Petitioners seek to add to the record were executed more than a week prior to the filing of Petitioners' Emergency Motion to Set a Briefing Schedule. Notably, Petitioners did not indicate in their request for an expedited briefing schedule that they believed expanding the record would be necessary.

## II. STATEMENT OF FACTS

On July 10, 2020, the trial court held that one of Petitioners' seven recall charges, as modified by the trial court, was sufficient to hold a recall election. *See* Mayor Durkan's Notice of Appeal, Ex. A. The trial court dismissed the remaining charges. *Id.* On July 29, 2020, the trial court denied Mayor Durkan's Motion for Reconsideration. *Id.* at Ex. B.

The Petitioners moved for a significantly accelerated briefing schedule in this matter. *See* Harvey's Emergency Motion to Set a Briefing Schedule. In their motion, they argued the trial court record was limited. Nowhere did Petitioners mention their plan to try to supplement the record with over 200 pages of declarations and photos.

However, in this Motion, Petitioners seek to supplement the record with "new evidence," consisting primarily of a set of declarations and exhibits thereto (the "Declarations"). While many of those declarations address events that happened the weekend before July 29, 2020, the date Judge Roberts denied Mayor Durkan's motion for reconsideration, none were signed before August 2, 2020. In fact three declarations were signed August 13, 14, and 19, 2020 and relate to events that occurred in mid-August 2020. All but those three mid-August declarations were submitted in *Black Lives Matter Seattle-King County v. City of Seattle, Seattle Police Department*, currently pending in the United States District Court for the

Western District of Washington before Judge Richard Jones. The federal court declarations were submitted in support of Black Lives Matter Seattle-King County's motion for contempt of a preliminary injunction. *See generally* Motion at 13-192; *Black Lives Matter Seattle-King County*, No. 2:20-cv-00887-RAJ, Dkt. 110 (W.D. Wash., Aug. 10, 2020). The court dismissed without prejudice the motion for contempt following the entry of a stipulated order clarifying the preliminary injunction. *Black Lives Matter Seattle-King County*, Dkt. 110 at 6.<sup>2</sup>

None of the Declarations address Mayor Durkan's alleged specific involvement with the claims at issue; indeed, not a single declaration mentions her by name.

### III. ARGUMENT

#### A. **The supplemental materials were not considered by the trial court and should not be part of this record.**

The Supreme Court applies a *de novo* standard of review on recall petitions. The Court determines factual and legal sufficiency of the petition before the trial court. *In re Recall of West*, 155 Wn.2d 659, 663, 121 P.3d 1190 (2005) ("A superior court makes the initial determination of whether the charges are sufficient, which we review *de novo*").

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<sup>2</sup> The remaining three declarations are newly filed in this Court; one of the three is anonymous and unsigned. Motion at 203. Petitioners also include a statement from the National Lawyer's Guild that, like the other materials, makes no mention of Mayor Durkan. *Id.* at 204.

The few cases involving supplementing the Supreme Court record in recall cases have denied the supplement with minimal analysis. In *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 72 P.3d 741 (2003), the court required the movant demonstrate that they met all six of the RAP 9.11 conditions. *In re Recall of West*, 155 Wn.2d at 668, n.4, the court denied supplementation because the materials were “not helpful” and a motion to supplement was not timely. *In re Recall of Pepper*, 189 Wn.2d 546, n.6, 403 P.3d 839 (2017), the court denied the motion without comment. It appears none of those cases proposed supplementation with later events. If the court’s gatekeeper function is whether the petition is factually and legally sufficient, it would appear to be an unprecedented expansion of recall law to allow the Supreme Court to consider subsequent events.

**B. RAP 9.11 Criteria**

RAP 9.11(a) states:

The appellate court may only on its own initiative direct that additional evidence be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily

expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.<sup>3</sup>

Courts may also waive or alter the provisions of this (or any rule) in order to serve the ends of justice, including the requirements of RAP 9.11(a). *See* RAP 1.2(c).

Petitioners filed their recall action on June 15, 2020. Presumably, they believed their allegations were factually and legally sufficient. Further, the additional declarations do not reference the Mayor's role as opposed to the City's liability in other proceedings. The declarations are "not helpful" in the words of the *In re West*, 155 Wn. 2d, at 668, n.4. As such, the Petitioners do not meet criteria (1), (2) or (6) of the RAP.

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<sup>3</sup> Courts may also waive or alter the provisions of this (or any rule) in order to serve the ends of justice. *See* RAP 1.2(c)

#### IV. CONCLUSION

For the foregoing reasons, Mayor Durkan respectfully requests that this Court deny the Motion.

DATED this 25th day of August, 2020.

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## CERTIFICATE OF SERVICE

I, Sabrina Mitchell, declare under penalty of perjury of the laws of the State of Washington that on this 25th 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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DATED this 25th day of August, 2020.

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