

NO. 98897-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE MATTER OF RECALL CHARGES AGAINST

CITY OF SEATTLE

MAYOR JENNY DURKAN

*Appellant.*

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary E. Roberts

RESPONSE BRIEF AND

OPENING BRIEF OF CROSS-APPELLANT

PETITIONER ELLIOTT GRACE HARVEY

**TABLE OF CONTENTS**

- I. INTRODUCTION.....1**
- II. ASSIGNMENTS OF ERROR & ISSUES PRESENTED.....2**
- III. STATEMENT OF THE CASE.....4**
  - A. Procedural Facts.....4**
  - B. Substantive Facts.....4**
    - 1. General Facts.....4
    - 2. Information specific to chemical weapons — tear gas and pepper spray.....11
    - 3. Additional information about bystanders in the surrounding Capitol Hill neighborhood.....13
    - 4. Attacks on the press and medics and failure to de-escalate.....16
- IV. LEGAL ARGUMENT**
  - A. The Mayor’s Statement of Facts is misleading and at any rate, may be largely disregarded in this case.....17**
  - B. Petitioners briefly review the overall standards for recall cases in this section.....18**
  - C. The Superior Court correctly found Charge B to be both factually and legally sufficient.....19**
    - 1. The facts as presented in Charge B would not be confusing to either the Mayor or to Seattle voters, and these allegations are factually well-supported.....19
    - 2. The failure to act to prevent violence, in spite of her duty to enforce the laws and keep the peace — after weeks, and then months — constitutes at minimum misfeasance and violation of the Mayor’s oath of office and thereby is legally sufficient to go to the voters.....29
    - 3. “Intent” is not required if a violation of the law is not alleged, but insofar as this Court believes Mayor Durkan

	<u>committed misfeasance, her intent can be inferred from the facts</u> .....	36
4.	<u>If there is such a thing as “abuse of discretion,” this must necessarily be it</u> .....	37
D.	<b>The Superior Court erred when it struck Charge E or, in the alternative, when it did not expand Charge B to recognize the peril the actions of the SPD caused for bystanders, for example residents in the neighborhoods where chemical weapons were deployed</b> .....	39
E.	<b>The Superior Court erred when it failed to sustain Charge C, because it was well-supported that SPD: 1) attacked and harassed both press and volunteer medics onscene; 2) failed to provide care to protesters SPD injured; and 3) failed to use de-escalation techniques, and Mayor Durkan had notice of these illegal acts, as she did of the inappropriate use of chemical weapons</b> .....	40
1.	<u>SPD attacked, harassed, and arrested members of the press, in clear violation of SMC 12.A.12.020, and this became well known</u> .....	41
2.	<u>The Seattle Police Department disregarded SCM 14.090-POL-10(b) regulations regarding the provision of medical care in a crowd management setting, and violated international norms of conduct when they targeted volunteer medics, blocked medical care, and destroyed aid stations and medical supplies</u> .....	45
3.	<u>The Seattle Police Department disregarded SPM 8.100-POL-1 regulations regarding the use of de-escalation techniques</u> .....	49
V.	<b>CONCLUSION</b> .....	50

## TABLE OF AUTHORITIES

### *Constitutional Provisions*

United States Constitution, Amend. 1.....	33
United States Constitution, Amend. 4.....	33
United States Constitution, Amend. 14.....	33
Washington Constitution, art. 1, §§ 3-5.....	33
Washington Constitution, art. 1, § 7.....	33
Washington Constitution, art. I, § 33.....	18
Washington Constitution, art. I, § 34.....	18

### *Cases*

<u>Chandler v. Otto</u> , 103 Wn.2d 268, 693 P.2d 71 (1984).....	18, 19, 30, 37
<u>Erection Co. v. Dept. of Labor &amp; Indus.</u> , 121 Wn.2d 513, 852 P.2d 288 (1993).....	30-31
<u>Greco v. Parsons</u> , 105 Wn.2d 669, 717 P.2d 1368 (1986).....	30
<u>In re Recall Charges Against Davis</u> , 164 Wn.2d 361, 193 P.3d 98 (2008).....	36-37
<u>In re Recall of Boldt</u> , 187 Wn.2d 542, 386 P.3d 1104 (2017).....	18-19
<u>In re Recall of Bolt</u> , 177 Wn.2d 168, 298 P.3d 710 (2013).....	24
<u>In re Recall of Kast</u> , 144 Wn.2d 807, 31 P.3d 677 (2001).....	17, 30, 34
<u>In re Recall of Kelley</u> , 185 Wn.2d 158, 369 P.3d 494 (2019).....	20-21
<u>In re Recall of Morrisette</u> , 110 Wn.2d 933, 756 P.2d 1318 (1988).....	40-41

<u>In re Recall of Pearsall-Stipek</u> , 141 Wn.2d 756, 10 P.3d 1034 (2000).....	30, 36, 37
<u>In re Recall of Pepper</u> , 189 Wn.2d 546, 403 P.3d 839 (2017).....	35
<u>In re Recall of Reed</u> , 156 Wn.2d 53, 124 P.3d 279 (2005).....	40
<u>In re Recall of Riddle</u> , 189 Wn.2d 565, 403 P.3d 849 (2017).....	18, 19-20
<u>In re Recall of Sandhaus</u> , 134 Wn.2d 662, 953 P.2d 82 (1998).....	37
<u>In re Recall of Shipman</u> , 125 Wn.2d 683, 886 P.2d 1127 (1995).....	38
<u>In re Recall of Wade</u> , 115 Wn.2d 544, 799 P.2d 1179 (1990).....	19, 36
<u>In re Recall of Wasson</u> , 149 Wn.2d 787, 72 P.3d 170 (2003).....	19
<u>In re Recall of West</u> , 155 Wn.2d 659, 121 P.3d 1190 (2005)....	18, 30, 36
<u>Pederson v. Moser</u> , 99 Wn.2d 456, 662 P.2d 866 (1983).....	30
<u>State v. Johnson</u> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	33
 <b><i>Statutes</i></b>	
RCW 29A.56.110-.270.....	18
RCW 29A.56.110.....	19, 30
RCW 29A.56.140.....	17
SMC 12A.12.020.....	41
 <b><i>Other Authorities</i></b>	
Seattle Council ordinance 126102, passed June 15, 2020.....	24
Seattle City Charter, Art. V, §2.....	21, 30, 34
Seattle City Charter, Art. VI, §2.....	21, 34
Seattle City Charter, Art. VI, §4.....	22
Seattle Police Manual (SPM) 14.090-POL-10(b).....	45

Seattle Police Manual (SPM) 8.100-POL-1.....48-49

## I. INTRODUCTION

This case presents a compelling question. Though military and quasi-military forces in the United States are putatively overseen by civilians, Mayor Durkan’s argument suggests a world where ordinary citizens have no legal recourse when the police forces of a city become violent and dangerously out of control. No way to make the violence stop, no way to protect themselves, their families or friends, or even their homes, from people armed by our government, other than by resorting to force themselves.

We hope this Court finds another path, a more reasonable one. Though Washington restricts recall to cases where there is “cause,” it is also one of the states that enshrines the right of recall as a constitutional right.

Surely this constitutional right of the citizenry, meant specifically to protect them against either failures by elected officials to do their jobs and/or lawlessness in the supposed execution of those roles, must be applied in cases where an official simply refuses to act. Where, under the facts alleged, the lawlessness and outright violence — as well as the mayor’s failure to protect Seattle citizens from it — are manifest. The voters of Seattle will understand immediately what the issue before them would be in this case. By the end of this briefing, if not before, this Court will, too.

The Seattle Police Department (“SPD”) has been wildly out of control for months, since the first day of teargas deployment, when a nine-year-old child was pepper-sprayed in the face, continuing all the way up through the present day. The facts herein are appalling.

Protesters are gassed in the street. Citizens are gassed in their homes. Reporters and medics are attacked or arrested, when law and public policy demands they be immune. Many individuals and broader entities – including the City Council, neighborhood groups, and even members of her own staff – have implored the Mayor to act. And indeed, in these circumstances, she is the sole elected official who has the capacity to take effective action to stop these assaults by the SPD, the sole elected official who has the power to protect her electorate.

Despite having a duty to enforce the laws and keep the peace under the Seattle City Charter, the Mayor has neglected her duty and chosen not to do so. This recall petition must therefore proceed.

## **II. ASSIGNMENTS OF ERROR & ISSUES PRESENTED**

1. Charge E was not duplicative of Charge B, because residents who were affected by chemical weapons in their homes should be afforded protection from this violence the same as protesters in the streets.
2. Charge C should have been sustained, as the attacks on the press and medics and the failure by SPD to deescalate the conflicts were highly publicized and continued over weeks, the Superior Court erred in finding such activities were ones taken “without the Mayor’s

knowledge, not at her direction.” Instead, the Mayor had a more than sufficient level of information about these assaults of protected peoples as she did the chemical weapon attacks.

*Issues Presented:*

*Should people who are recklessly exposed to chemical weapons in their own homes by police releasing them in massive quantities on residential streets be as protected and as important to recognize as victims of such unlawful conduct, as those who are protesting in the same streets? (Assignment of Error #1)*

*When attacks on the medics and press plainly violate both regulations and worldwide ethical norms, when such attacks began by June 1 and have continued through the present day, and when such attacks have been discussed extensively in social media and also in the regular media, can the mayor be assumed to be ignorant of such attacks? (Assignment of Error #2)*

*When a police department has specific instructions in its manual requiring de-escalation to be tried by police, but officers have ignored such instruction and instead attacked peaceful protesters repeatedly, can the person responsible for the leadership of that department decide not to respond to those violations over weeks, and then months? (Assignment of Error #2)*

*Can a city's elected executive avoid the possibility of a recall vote by simply ignoring her citizens who beg for her action to protect them,*

*while the police department that answers to the executive oppresses the people of the city with violent, lawless, and outrageous behavior? (Issue from State's Assignments of Error, Appellant Opening Brief ("AOB") at 2)*

## **I. STATEMENT OF THE CASE**

### **A. Procedural Facts.**

This petition for recall was filed with King County Elections on June 15, 2020. CP 7-28. The King County Prosecutor's Office drafted a ballot synopsis and filed it on June 26, and the recall was set for a hearing in King County Superior Court on July 2. CP 1-4, 93.

The Honorable Mary E. Roberts ruled on the petition on July 10, 2020, dismissing five of the counts as insufficiently supported and one (Charge E) as duplicative. CP 300-02. She sustained one charge, Charge B, and limited its scope slightly. CP 300-01, 302.

The Mayor moved for reconsideration. CP 306-23. The Superior Court denied reconsideration on July 29, 2020, and the Mayor appealed on August 12, 2020. CP 790-96.

### **B. Substantive Facts.**

1. General Facts. Prior to late May, the city of Seattle - like the rest of the country - was concerned and consumed by COVID-19. On March 3, 2020, Mayor Durkan issued a Mayoral Proclamation of Civil Emergency in response to the rapid increase in COVID-19 cases in Seattle. CP 45-48.<sup>1</sup> In May, claiming a need to focus on coronavirus,

---

<sup>1</sup> *Mayoral Proclamation of Civil Emergency, City of Seattle, (May 3, 2020).*

Mayor Durkan asked the U.S. district attorney to free the city of Seattle's police department from federal oversight imposed in the 2012 consent decree with the Department of Justice.<sup>2</sup>

On May 25, 2020, George Floyd was murdered by Officer Derek Chauvin in Minneapolis. Demonstrations in Seattle against police brutality and systemic racism began on May 29. On the first day of Seattle protests, there were 7,949 confirmed cases of COVID-19 in King County<sup>3</sup> and Mayor Durkan's COVID-19 emergency order was still in effect. CP 49-52 (extension of order).

The following day, May 30, tensions reached a fever pitch when the Seattle Police Department ("SPD") began deploying crowd control weapons, including flash bang grenades, gas grenades, and pepper spray, on largely peaceful protesters in the downtown core of Seattle, including a well-publicized incident involving a 9 year-old child being pepper sprayed in the face.<sup>4</sup> Protesters described seeing multiple city street intersections filled by gas by SPD. CP 56-57.

---

<sup>2</sup> *In move to limit federal oversight of police, Seattle cites its hard work, need to focus on coronavirus*, Seattle Times, May 25, 2020, [seattletimes.com/seattle-news/in-move-to-limit-federal-oversight-of-police-seattle-cites-its-hard-work-need-to-focus-on-the-coronavirus/](https://seattletimes.com/seattle-news/in-move-to-limit-federal-oversight-of-police-seattle-cites-its-hard-work-need-to-focus-on-the-coronavirus/); The United States Department of Justice, *Investigation of the Seattle Police Department*, Aug 6, 2015, [justice.gov/crt/investigation-documents](https://justice.gov/crt/investigation-documents). See also Seattle Police Department, *Settlement Agreement History*, [seattle.gov/police/about-us/professional-standards-bureau/settlement-agreement-history](https://seattle.gov/police/about-us/professional-standards-bureau/settlement-agreement-history).

<sup>3</sup> *Coronavirus daily news updates, May 29: What to know today about COVID-19 in the Seattle area, Washington state, and the world*, Seattle Times, May 29, 2020, [seattletimes.com/seattle-news/health/coronavirus-daily-news-updates-may-29-what-to-know-today-about-covid-19-in-the-seattle-area-washington-state-and-the-world/](https://seattletimes.com/seattle-news/health/coronavirus-daily-news-updates-may-29-what-to-know-today-about-covid-19-in-the-seattle-area-washington-state-and-the-world/).

<sup>4</sup><https://www.kuow.org/stories/a-child-pepper-sprayed-a-womans-eye-nearly-lost-denounce-seattle-police-tactics>;

But when protesters denounced police violence, they were met with police violence:

[May 30, 2020] At 4:49 PM, many additional explosive devices were thrown into a crowd of nonviolent demonstrators who were chanting "arms up, don't shoot" in unison with arms raised. I did not witness any verbal demands of dispersal on behalf of the Seattle Police Department, nor did I witness any actions against the police to warrant any such response. CP 56 (Doe declaration).

I was the recipient of pepper spray myself and experienced burning in my eyes, nose and throat which made it very difficult for me to run in the opposite direction, which seemed to be the instruction. We never got answers as to why we weren't allowed to march. I found out by a police officer yelling in my face at 5:05 that there was a curfew just handed down by the mayor for 5pm. CP 58 (Solomon declaration).

Notably, when the SPD requested permission on May 31, 2020, to use CS gas and 40 mm launchers, the reason given was not that a situation had developed causing the use of CS gas to be appropriate and necessary, but because other supplies had run out:

Consistent with department policies that govern the use of force during crowd management events, SPD officers attempted to disperse the crowd using less-lethal munitions on hand, including blast balls and OC spray. As a result of the magnitude of last night's event, both Patrol and SWAT are both now largely depleted of these less-lethal munitions.

(Emphasis added.) CP 69 (Memo from SPD requesting to use CS and 40mm launchers).

On June 1, 2020, a group of protesters informed the SPD at 5:40pm they might march towards the SPD's East Precinct. CP 66 (SPD Blotter of timelines of police responses). By the time the marchers arrived at the precinct at 7:11pm that day, SPD had created a police line across the

projected path of the marchers, blocking access for demonstrators to continue their march past the precinct. CP 67. At 9:10pm, the police line deployed pepper spray, blast balls, and CS gas on a group of peaceful protesters CP 68, 69.<sup>5</sup>

[V]ideos of the officers spraying the crowd and deploying flash bangs quickly spread on social media Monday night; many of those who shared them said the footage showed the police were responsible for escalating the confrontation. A police officer at the front of the crowd can be seen grabbing a protester's umbrella just before other officers deploy pepper spray into the crowd.<sup>6</sup>

Over the next several days, the SPD - under Mayor Durkan's oversight - continued to barricade their precinct and attack protesters demonstrating against police violence. As the Mayor's team admits in her opening brief, police deployed tear gas,<sup>7</sup> at minimum, on May 31, June 1, June 2, June 6, and June 7.<sup>8</sup> AOB at 4, 5, 6, 8, 9.

On June 5, 2020, Mayor Durkan addressed the use of tear gas: "In conversations with the Chief, I know she agrees that SPD officers do not

---

<sup>5</sup> See also, *Seattle-area protests: Police declare a riot as demonstrators gather for fourth day to call for police accountability*, Seattle Times, Jun 1, 2020, [seattletimes.com/seattle-news/george-floyd-protests-continue-in-seattle-area-demonstrators-expected-to-gather-for-fourth-day-to-call-for-racial-justice/](https://www.seattletimes.com/seattle-news/george-floyd-protests-continue-in-seattle-area-demonstrators-expected-to-gather-for-fourth-day-to-call-for-racial-justice/).

<sup>6</sup> Quote from *Seattle police use blast balls, pepper spray to try to disperse Saturday protesters*, Seattle Times, Jun 6, 2020, [seattletimes.com/seattle-news/seattle-area-protests-demonstrators-prepare-for-ninth-day-of-action-after-george-floyds-killing/](https://www.seattletimes.com/seattle-news/seattle-area-protests-demonstrators-prepare-for-ninth-day-of-action-after-george-floyds-killing/). See also video of initiation of attack on protesters at [https://www.youtube.com/watch?v=D5sQt\\_bQS4A](https://www.youtube.com/watch?v=D5sQt_bQS4A) (Converge Media video by Omari Salisbury); <https://www.youtube.com/watch?v=0NpXH7p-ELo>.

<sup>7</sup> The Mayor emphasises the use of tear gas here, to nearly the complete exclusion of pepper spray/OC gas. But all the orders and recommendations in the record applied equally to both kinds of gas. If you include OC, you'd add May 30 and June 6 to just this list, not to mention many more dates after these.

<sup>8</sup> The Mayor claims no further CS gas has been deployed since June 7, AOB at 7, but protesters have been gassed repeatedly since that date. Possibly this has been with pepper spray, which is less inherently physically damaging than tear gas. But pepper spray presents almost the same danger profile with regard to the pandemic, as we'll describe further below.

need to be using tear gas at protests as a crowd management tool[.]”<sup>9</sup> Both Mayor Durkan and Chief Best acknowledged the lack of de-escalation, and “apologized for instances in which they said officers may have failed to deescalate tense moments, used disproportionate force against demonstrators and deployed less-than-lethal weapons too quickly.”<sup>10</sup> The Mayor and Chief announced a 30-day ban on tear gas, and Chief Best also rescinded the May 31 authorization for CS canisters and 40 mm launchers on June 5, although SPD claimed a different reason for the use of these more dangerous weapons than the “depletion of supplies” cited on May 31<sup>st</sup>, stating instead:

[A] concern that should there be indication of events similarly escalating in rapid and violent manner, SPD would not be sufficiently equipped to prevent further large scale property destruction such as that seen in the downtown core.

CP 71 (SPD Memo rescinding CS approval on June 5).

One day after the “30-day ban” of tear gas, police sprayed clouds of OC gas on protesters outside the East Precinct. Only two days into the supposed “30-day ban” of CS gas, the SPD deployed CS gas again against protesters at the same location, shortly after having deployed OC gas.<sup>11</sup>

For reasons that remain unclear, the SPD abandoned the East Precinct on June 8,<sup>12</sup> and the “Capitol Hill Autonomous Zone” (the

---

<sup>9</sup> *How ambiguity and a loophole undermined Seattle’s ban on tear gas during George Floyd demonstrations*, Seattle Times, Jun 9, 2020, [seattletimes.com/seattle-news/how-ambiguity-and-a-loophole-undermined-seattles-ban-on-tear-gas-during-george-floyd-demonstrations/](https://www.seattletimes.com/seattle-news/how-ambiguity-and-a-loophole-undermined-seattles-ban-on-tear-gas-during-george-floyd-demonstrations/).

<sup>10</sup> *Man shot on Capitol Hill in Seattle after gunman drives car into George Floyd protest*, Seattle Times, Jun 7, 2020, [seattletimes.com/seattle-news/crime/man-shot-after-gunman-drives-car-into-capitol-hill-protesters/](https://www.seattletimes.com/seattle-news/crime/man-shot-after-gunman-drives-car-into-capitol-hill-protesters/).

<sup>11</sup> See Note 10, above.

“CHAZ”) was created by the protesters. Later renamed the “Capitol Hill Occupied Protest” (the “CHOP”), many protesters occupied the area for weeks.<sup>13</sup>

The CHOP was dismantled by Seattle Police on July 1 on Mayor Durkan’s 2am order, a day before the Superior Court hearing on this case.<sup>14</sup> Protests about police brutality and systemic racism in Seattle have persisted at least nightly until the present day, and violence still breaks out regularly between SPD and Seattle citizens.

One of the worst days of police violence after the CHOP was dismantled was Saturday, July 25, 2020. Black Lives Matter Seattle-King County, the ACLU, law firm Perkins Coie, and the Korematsu Center had already collaborated on a case brought in federal court in the Western

---

<sup>12</sup> Shortly after the abandoning, Chief Best told SPD officers on a department-wide video call that it was “not her decision” to give up the East Precinct, and that she was “angry” about it. Michael Ruiz, *Seattle police chief: 'Leaving the precinct was not my decision'*, Fox News, June 11, 2020, <https://www.foxnews.com/us/seattle-police-chief-leaving-precinct> On the other hand, Mayor Durkan has stated that while she made the decision to remove the street barriers around the precinct, but “she did not directly order officers to leave the precinct herself, and that the decision was made by “SPD Frontline Commanders on site.” *Mayor Durkan clarifies role in clearing of East Precinct*, MyNorthwest.com, June 12, 2020, <https://mynorthwest.com/1941548/mayor-durkan-east-precinct-decision/>? No one has identified the person who gave the order -- or even if an order was given. David Kroman, *Confusion, anger in Seattle Police Dept. after East Precinct exit*, Crosscut, June 19, 2020, <https://crosscut.com/2020/06/confusion-anger-seattle-police-dept-after-east-precinct-exit>

<sup>13</sup> See e.g., Bridget Read, *What’s Going on in CHOP, the Seattle Occupied Protest Zone?*, The Cut, updated July 1, 2020, <https://www.thecut.com/2020/07/whats-going-on-in-chaz-the-seattle-autonomous-zone.html> (general history of CHOP), Becca Savransky, *How CHAZ became CHOP: Seattle’s police-free zone explained*, Seattle Post-Intelligencer, June 22, 2020, <https://www.seattlepi.com/seattlenews/article/What-is-CHOP-the-zone-in-Seattle-formed-by-15341281.php> (same).

<sup>14</sup> Eddy Rodriguez, *Seattle Police Dismantle CHOP Over 'Ongoing Violence' After Mayor Declares Autonomous Zone Over*, Newsweek, July 1, 2020, <https://www.newsweek.com/seattle-police-dismantle-chop-over-ongoing-violence-after-mayor-declares-autonomous-zone-over-1514680>

District of Washington, *Black Lives Matter Seattle-King County, et al, v. City of Seattle*.<sup>15</sup> That case had led to federal Judge Richard Jones issuing a TRO restricting SPD from using “chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations.” CP 82 (full order CP 72-83). The only time SPD would be allowed to use such weapons would be if life safety was at risk, and even then, officers had to:

...not deplo[y them] indiscriminately into a crowd and to the extent reasonably possible, they should be targeted at the specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property.

CP 82. This TRO was extended by agreement of the parties until September 30, 2020. CP 219-21.

On Tuesday, July 28, 2020, after the police riots of that Saturday, the Perkins legal team for BLM, et. al, filed twenty-two declarations from eyewitnesses to the police violence. CP 657-789. Over and over, these declarants were unambiguous that police attacked without motivation, provocation, or warning. CP 658, 662, 663, 665, 668, 669, 677-78, 683-84, 686, 693-94, 707, 710, 711, 722, 731, 736, 739-40, 752, 755, 760, 763, 772.

---

<sup>15</sup> Elizabeth Turnbull, *ACLU Washington files emergency lawsuit against SPD and City of Seattle to stop use of chemical agents and projectiles*, South Seattle Emerald, June 9, 2020, <https://southseattleemerald.com/2020/06/09/aclu-washington-files-emergency-lawsuit-against-spd-and-city-of-seattle-to-stop-use-of-chemical-agents-and-projectiles/>

Many protesters reported being sprayed directly in the face with pepper spray from inches away, even though they were attempting to comply with police orders, or they described projectiles being fired, seemingly at random, into packed crowds. CP 662, 665, 668, 678, 679, 684, 686, 707, 710, 711, 712, 716, 717, 718, 722, 723, 731, 736, 739. Some of the protesters took pictures of their injuries, such as chemical burns, deep bruising and swelling, and lacerations. CP 675, 690, 692, 697, 699, 701, 703, 705, 725, 727, 729, 734, 745, 747, 752, 766, 768, 770, 777, 779, 781, 785, 787, 789. Many also described symptoms of emotional trauma, PTSD, and disillusionment that the police had brutalized them when they were being peaceful. CP 660, 672-73, 679-80, 720, 757, 761.

A few declarants reported that police specifically targeted people identified as press, CP 735-37, 750-53, and a nurse acting as a medic explained how she was assaulted and threatened with assault while trying to help patients. CP 223-247. Far from “life safety” justifying the police use of “crowd control” weapons on that date, the police attacks led to mass chaos, serious injuries, and terror.

2. Information specific to chemical weapons — tear gas and pepper spray. Tear gas — also called CS gas — has been often criticized as dangerous and chaotic in terms of application. In their charging letter, Petitioners quoted a 2018 article by Dr. Rohini Haar of Physicians for Human Rights:

Tear gas, by nature, is indiscriminate, and affects everyone within its reach – from those who may initiate a protest, to peaceful

bystanders, to children caught up in the chaos, to law enforcement officers themselves. Young children, or those with asthma or respiratory disorders, and those who may not be able to run away quickly, are particularly at risk of serious injury.

CP15.<sup>16</sup> The dangers of tear gas, and its usually-less-lethal cousin, pepper spray, are compounded when combined with a respiratory pandemic.

On June 5, 2020, in an open letter signed by nearly 1,300 doctors and medical professionals, law enforcement was urged to enact a list of guidelines for protecting the public from the virus. CP 54-55.<sup>17</sup> The letter makes the following recommendation regarding tear gas or “other respiratory irritants”, such as pepper spray:

Oppose any use of tear gas, smoke, or other respiratory irritants, which could increase risk for COVID-19 by making the respiratory tract more susceptible to infection, exacerbating existing inflammation, and inducing coughing.

(Emphasis added.) CP 55. In addition to the deleterious effects of the gasses themselves, medical experts warned: “those rushing to help people sprayed by tear gas could come into close contact with someone already infected with the virus who is coughing infectious particles [because of the gas.]”<sup>18</sup>

Also on June 5, the three agencies that provide oversight for SPD - Seattle’s Office of the Inspector General (“OIG”), Community Police

---

<sup>16</sup> Citing Haar, Rohini J., MD MPH, *The Very Real Health Impacts of Tear Gas*, Physicians for Human Rights, Dec 11, 2018, [phr.org/our-work/resources/the-very-real-health-impacts-of-tear-gas/](http://phr.org/our-work/resources/the-very-real-health-impacts-of-tear-gas/).

<sup>17</sup> Citing Bender Ignacio, Rachel, MD MPH, *Open letter advocating for an anti-racist public health response to demonstrations against systemic injustice occurring during the COVID-19 pandemic*, Jun 1, 2020 attached as Exhibit 9 to the charging letter.

<sup>18</sup> *Can Tear Gas and Pepper Spray Increase Virus Spread?* New York Times, June 8, 2020, [nytimes.com/aponline/2020/06/08/health/ap-us-med-america-protests-tear-gas-virus.html](https://www.nytimes.com/aponline/2020/06/08/health/ap-us-med-america-protests-tear-gas-virus.html).

Commission (“CPC”), and Office of Police Accountability (“OPA”) - issued a joint recommendation that SPD stop using tear gas and other respiratory irritants, in part because:

The Seattle and King County Department of Public Health and other public health officials around the country oppose the use of tear gas and other respiratory irritants because of its potential to increase spread and vulnerability to COVID-19.

CP 470. The same report noted that the SPD had no training on tear gas and that tear gas had not been approved by the federal court under the SPD consent decree. CP 469-70. On June 12, the OIG moreover further found, in its longer review of “less lethal” weapons and the SPD that:

The use of CCWs which are indiscriminate in their nature, such as stun grenades and tear gas, should not be used for dispersion or generally in the context of protests.

(Emphases added.) CP 201 (full report CP 185-217).

Finally, the long-term effect of CS gas on those exposed, including people simply being home when tear gas is deployed in their neighborhood, is significant: “The chemical agent also seeps into homes, contaminates food, furniture, skin and surfaces, and can cause long-term lung damage.”<sup>19</sup>

3. Additional information about bystanders in the surrounding Capitol Hill neighborhood. On June 1, 2020, the city-wide curfew started at 6pm. CP 37, 39. As noted previously, at 9:10pm that same day, the

---

<sup>19</sup> *Tear Gas Is Way More Dangerous Than Police Let On — Especially During the Coronavirus Pandemic*, ProPublica, June 4, 2020, [propublica.org/article/tear-gas-is-way-more-dangerous-than-police-let-on-especially-during-the-coronavirus-pandemic](https://www.propublica.org/article/tear-gas-is-way-more-dangerous-than-police-let-on-especially-during-the-coronavirus-pandemic).

Seattle Police Department deployed blast balls and CS (tear) gas canisters near the SPD East Precinct at 11th Ave and E Pine St. CP 68. CS gas and pepper spray both drifted throughout the neighborhood surrounding the East Precinct and seeped into the homes of residents presumably observing the curfew.

The zone immediately surrounding the precinct has an estimated several thousand residents. CP 85.<sup>20</sup> A nearby resident that was impacted shared his story at a Seattle City Council subcommittee hearing:

[T]here was a protest and once the flashbangs and tear gas went off, it seeped into my apartment. And my three-month-old son, Nadav, who was sleeping, was awoken from his sleep, coughing, crying, spitting up mucus, mucus bubbling out of his nose, he was bright red. And we were forced to leave through our homes. We ran to our car. We didn't have time to even put him in the car seat because it was so bad. My wife had to pour breast milk on his eyes and we had to go and leave our home.

CP 86.<sup>21</sup> The next day, June 2, the city-wide curfew began at 9pm. CP 41, 43. At 11:36, the Seattle Police Department deployed OC<sup>22</sup> and blast balls and 100 seconds later, CS gas. CP 68. Chemical agents again impacted residents in their homes in the area surrounding the East Precinct. A collective statement from the residents of a building overlooking the scenes describes how they were impacted:

The SPD's use of tear gas on the evenings of June 1 and 2 blanketed the intersection of 11th and Pine Street and sprawled

---

<sup>20</sup> *Pike/Pine Conservation Study*, Lund Consulting for the City of Seattle, 2008, relevant population information.

<sup>21</sup> Azoulai, Daniel, Public comment, City of Seattle Public Safety and Human Services Committee Meeting, Jun 3, 2020.

<sup>22</sup> "OC" (oleoresin capsicum) can mean pepper spray or OC canisters ("pepper bombs"). Both were used by the SDP between May 29 and June 8, 2020, it's unclear what was used when.

throughout the neighborhood. If those of us in nearby buildings felt the harmful side effects of the tear gas we can only imagine how the protesters on the ground felt.<sup>23</sup>

On June 6, 2020, no curfew was in place.<sup>24</sup> At 7:36 pm it was well before sunset when OC and blast balls were deployed at 11th Ave and E Pine St. CP 64. Although the previous day, Mayor Durkan said during her press conference, “SPD officers do not need to be using tear gas at protests as a crowd management tool[,]”<sup>25</sup> the SPD merely replaced CS gas with OC canisters instead,<sup>26</sup> allowing clouds of pepper spray to drift around the neighborhood at a time when residents were likely to be out doing grocery shopping.<sup>27</sup>

On June 7, 2020, no curfew was in place. In the early hours of June 8, at 12:04 am, SPD officers again deployed OC and blast balls near the East Precinct. CP 60. Ten minutes later at 12:14 am, CS gas was again deployed. *Id.* This was only two days following an announcement from Mayor Durkan and Chief Best “suspending the use of CS gas for at least

---

<sup>23</sup> *A Call to Action for Businesses and Residents Subjected to SPD Tear Gas During the Capitol Hill Protests*, Capitol Hill Seattle Blog, Jun 5, 2020, [capitolhillseattle.com/2020/06/capitol-hill-community-post-a-call-to-action-for-businesses-and-residents-subjected-to-spd-tear-gas-during-the-capitol-hill-protests/](https://capitolhillseattle.com/2020/06/capitol-hill-community-post-a-call-to-action-for-businesses-and-residents-subjected-to-spd-tear-gas-during-the-capitol-hill-protests/).

<sup>24</sup> *Mayor Durkan Will Be Terminating Citywide Curfew Effective Immediately*, Office of the Mayor, Jun 3, 2020, [durkan.seattle.gov/2020/06/mayor-durkan-will-be-terminating-citywide-curfew-effective-immediately/](https://durkan.seattle.gov/2020/06/mayor-durkan-will-be-terminating-citywide-curfew-effective-immediately/).

<sup>25</sup> *How ambiguity and a loophole undermined Seattle’s ban on tear gas during George Floyd demonstrations*, Seattle Times, Jun 9, 2020, [seattletimes.com/seattle-news/how-ambiguity-and-a-loophole-undermined-seattles-ban-on-tear-gas-during-george-floyd-demonstrations/](https://seattletimes.com/seattle-news/how-ambiguity-and-a-loophole-undermined-seattles-ban-on-tear-gas-during-george-floyd-demonstrations/).

<sup>26</sup> *SPD Disperses Crowd with Blast Balls, “Chemical Agents,” on Eighth Day of Protests Against Police Brutality*, The Stranger, June 7, 2020, [thestranger.com/slog/2020/06/06/43857405/spd-disperses-crowd-with-blast-balls-chemical-agents-pepper-spray-on-eight-day-of-protests-against-police-brutality](https://thestranger.com/slog/2020/06/06/43857405/spd-disperses-crowd-with-blast-balls-chemical-agents-pepper-spray-on-eight-day-of-protests-against-police-brutality).

<sup>27</sup> Keimig, Jasmyne, Jun 7, 2020, [twitter.com/jasmynekeimig/status/1269535478581100544](https://twitter.com/jasmynekeimig/status/1269535478581100544).

thirty (30) days[.]”<sup>28</sup> This assault continued for some time. A resident within one block of the police assault described the scene on this date:

The onslaught of explosions was relentless, it seemed like they should stop right away, but they didn’t. I went to my door to see if anyone needed refuge from the smoke, people were still there watching the police deploy these explosive weapons. A live band was playing while in the midst of clouds of smoke and gas. The sounds of the music punctuated by detonations was devastating.

CP 88-89 (Harvey declaration)

4. Attacks on the press and medics and failure to de-escalate. In the early days of the protests, when reporters announced their presence to the police, they were often specifically targeted for violence, or removed from the scene.<sup>29</sup> This has continued through the present day, although the last evidence admitted at the Superior Court level involved: 1) the detention of one reporter on the front step of his office on the day the CHOP was cleared; CP 634; 2) the arrest of a UK reporter on the same day;<sup>30</sup> and 3) At least two assaults on press on Saturday, July 25, which were detailed in affidavits filed a day before the Superior Court ruled on July 29. CP 735-37, 750-53.<sup>31</sup>

---

<sup>28</sup> Durkan, Jenny A. *Evaluation of Crowd Management Tactics and Use of Less-Lethal Tools*, Jun 5, 2020, attached as Exhibit 18 to the charging letter.

<sup>29</sup> Picket, Jordan, Jun 8, 2020,

[twitter.com/jordanpicket/status/1269929380987334658?s=21%5D](https://twitter.com/jordanpicket/status/1269929380987334658?s=21%5D). Sowersby, Shauna, Jun 6, 2020, [twitter.com/shauna\\_sowersby/status/1269463849725390849?s=21](https://twitter.com/shauna_sowersby/status/1269463849725390849?s=21)

<sup>30</sup> The night before this case was argued in Superior Court, the CHOP was cleared by order of the Mayor. Some of the events of that morning were detailed in a pleading filed by Elliot Grace Harvey on July 1. CP 291-96.

<sup>31</sup> See also Charles Woodman, *Seattle Considers Resolution To Protect Media, Medics At Protests*, Patch.com, Aug. 16, 2020,

<https://patch.com/washington/seattle/seattle-considers-resolution-protect-media-medics-protests>

People providing medical assistance were also specifically targeted, and the police neither provided medical aid to the injured nor attempted to deescalate before initiating violent confrontations, counter to the requirements of the Seattle Police Manual (“SPM”) These will be discussed further in the relevant argument sections. See infra, Section II.E.

## II. LEGAL ARGUMENT

### A. The Mayor’s Statement of Facts is misleading and at any rate, may be largely disregarded in this case.

Respondents/Cross-Appellants (herein referred to as “Petitioners,”) could expend tremendous time, energy, and paper refuting details asserted in the Mayor’s “Statement of the Case.” But this is neither necessary nor helpful. Under the standard of review, Petitioners’ facts must be taken as true when examining a petition for recall, as Seattle voters, not any Court, “will ultimately act as the factfinders.” RCW 29A.56.140; In re Recall of Kast, 144 Wn.2d 807, 813, 31 P.3d 677 (2001).

The facts in this case are highly disputed, and the Mayor’s Statement of the Case is disingenuous at best, in large part because it claims protesters were typically the aggressors. In fact, SPD attacked protesters time and time again, often with no warning, making otherwise peaceful protests chaotic and dangerous for protesters, police, and anyone in the vicinity.

In the end, neither the Mayor nor this Court will determine the facts – instead, Seattle voters will determine what they believe is true when

signing the petition and/or voting the Mayor out of office. Petitioners will not waste this Court's time and attention in disputing individual facts.

**B. Petitioners briefly review the overall standards for recall cases in this section.**

Washington voters have a constitutional right to recall any nonjudicial elected official who “has committed some act or acts of malfeasance or misfeasance while in office, or who has violated [her] oath of office.” In re Recall of Riddle, 189 Wn.2d 565, 403 P.3d 849, 853<sup>32</sup> (2017) (citing Const. art. I, § 33). The statutes governing recall proceedings are RCW 29A.56.110-.270. Id. (citing Const. art. I, § 34).

The courts act solely as gatekeepers in the recall process. The Courts' role is to ensure the recall process is not used to “harass public officials by subjecting them to frivolous or unsubstantiated charges.” In re Recall of West, 155 Wn.2d 659, 662, 121 P.3d 1190 (2005); See also Chandler v. Otto, 103 Wn.2d 268, 274, 693 P.2d 71 (1984) (Washington courts protect public officials from recalls based on “frivolous charges or mere insinuations”). It is up to the voters to determine whether the charges are true and, if so, whether they actually justify recalling the official. Riddle, 403 P.3d at 853. Courts therefore take all factual allegations from the Petitioners as true. In re Recall of Boldt, 187 Wn.2d 542, 549, 386 P.3d 1104 (2017). At the Supreme Court, “[t]he sufficiency

---

<sup>32</sup> Petitioners apologize for not having pin cites to the Washington Reporter for Riddle. The law library is currently closed, and Petitioners are unaware of a site that shows page numbers for recent cases.

of a recall petition is reviewed de novo.” Id. (quoting In re Recall of Wasson, 149 Wn.2d 787, 791, 72 P.3d 170 (2003)).

**C. The Superior Court correctly found Charge B to be both factually and legally sufficient.**

1. The facts as presented in Charge B would not be confusing to either the Mayor or to Seattle voters, and these allegations are factually well-supported. A recall charge is factually sufficient where the alleged facts, taken as a whole, “ ‘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.) Riddle, 403 P.3d at 853 (citing Boldt, 187 Wn.2d at 548, and Chandler, 103 Wn.2d at 274) (further discussion of misfeasance, malfeasance, and violation of the oath of office are in sections 2 and 3, immediately below). Part of this test is whether the petitioners have “knowledge of identifiable facts” which support the charges. RCW 29A.56.110; In re Recall of Wade, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990).<sup>33</sup>

The Petitioners here provided ample evidence of the facts below, and in fact continued to supplement the record while the case was still active in Superior Court. CP 291-96, 596-639, 655-789. And indeed, the Mayor’s team does not assert that the Petitioners’ lacked sufficient facts to support their allegations. See generally, AOB at 17-20 (arguing factual

---

<sup>33</sup> An additional consideration is that, in those cases where an official is charged with violating the law, the petitioners must have knowledge of facts indicating the official intended to commit an unlawful act. Wade, 115 Wn.2d at 549. This will be discussed specifically in Section 3, below.

sufficiency).<sup>34</sup>

The Mayor does claim that the charges are still factually insufficient, because they do not sufficiently inform the Mayor or the voters of what is alleged so that they can make informed decisions. AOB at 17. The Mayor cites to two cases for this proposition, one of which is In re Recall of Kelley, 185 Wn.2d 158, 369 P.3d 494 (2019). AOB at 17-18.

The Mayor claims that Petitioners must explain what the Mayor should have done as a part of their petition. The Mayor bases this argument on Kelley, claiming that petition failed because it did not include “any specific facts regarding how [State Auditor] Kelley deficiently performed his duties by failing to discover Sound Transit’s [financial] fraud.” AOB at 18, citing 185 Wn.2d at 169.

The Kelley Court does mention briefly that even if petitioners there had succeeded at showing Kelley had a duty to uncover the Sound Transit fraud, they had not shown any facts that noted he had performed deficiently. 185 Wn.2d at 169. This is not relevant here, because Petitioners have shown grave harm to protesters and residents of Seattle, due to the Mayor’s inaction in the face of her assigned duties under the City Charter. This is a manifestly deficient performance.

Even more importantly, in Kelley, this Court largely found the petition insufficient because the State Auditor has no authority to

---

<sup>34</sup> In addition to the specificity argument, the Mayor also argues that Petitioners have not identified a statute or standard that was violated by the Mayor. AOB at 18-23. This is not the case, but is more appropriately a discussion of legal sufficiency, and is therefore addressed in sections 2 and 3, infra.

investigate or supervise the financials of a non-state entity — and Sound Transit is a local entity, not a state entity at all. 368 P.3d 498.<sup>35</sup> To claim that Kelley actually stands for the premise that a Petitioner must explain exactly how an official should have solved a given problem is misleading at best. Unlike the respondent in Kelley, the Mayor does indubitably have the relevant authority over SPD, especially in a state of emergency, such as that the Mayor had proclaimed, twice over before this petition was filed.

The Mayor could lawfully — as she even agrees — have taken charge of the police department because of the emergency that she herself declared. Seattle City Charter, Art. V, §2. Or she could have lawfully dismissed the Chief of Police and, with the help of the City Council, replaced her with someone more respectful of the constitutional rights and the health of protesters. Seattle City Charter, Art. VI, §2. Or she could have issued unambiguous orders to the Chief to ensure that when police used these weapons, they complied with the federal TRO, and only used them in positions involving “life safety,” because the SPD has manifestly not been using them in that manner.<sup>36</sup> CP Seattle City Charter, Art. VI, §2. In just one example, people protesting on July 25 frequently and independently described police shooting projectiles and gas at retreating and/or complying protesters; that behavior does not protect lives - if

---

<sup>35</sup> Pin cites are to the Pacific Reporter, because page numbers are not available for the Washington reporter online.

<sup>36</sup> Tammy Mutasa, *'It's pretty traumatizing': Protester hit by SPD flash bang says she nearly died*, Komo News, Jun. 9, 2020  
[komonews.com/news/local/protester-injured-by-exploding-flash-bang-shares-her-story](https://www.komonews.com/news/local/protester-injured-by-exploding-flash-bang-shares-her-story)

anything, quite the reverse. CP 658, 659, 669, 677-78, 684, 716-17, 722, 736, 751, 756-57, 760.

Or Mayor Durkan might have taken yet another, different, lawful action that still protected the protesters and citizens of Seattle from unlawful, violent conduct by the SPD - perhaps mediation between the parties or something entirely unimagined herein. In any event, even the section of the City Charter the Mayor cites frequently makes it clear the Chief of Police must answer to the Mayor as regards law enforcement: “the Chief of Police shall be responsible to the Mayor for the administration of the Police Department and the enforcement of law.” Seattle City Charter, Art. VI, §4. This means that the Mayor’s use of Kelley in her argument is not just missing the point, but is a counter-example to the situation wherein the Mayor found herself. Unlike Kelley, she had both a duty, and the authority, and still she declined to do anything of substance.

The Mayor had ample power and authority to stop the violence. What she did was worse than nothing. She talked about protecting the rights of protesters, but based on the actions of SPD, which continues to gas and/or abuse protesters at most nightly protests to the present day, she did nothing at all to keep the peace or enforce the law.

She has, on the other hand, claimed incorrectly that she had no right to control the police over Chief Best. She has vetoed the budget cut to SPD by the City Council, which body sought to defund the SPD in

response to their open acts of violence (the power of the purse being the only one the Council can legally wield).<sup>37</sup> She has told the protesters that she will not outlaw gas.<sup>38</sup> She has, through the City Attorney's office, lobbied the federal court to conclude that the City Council had no ability to legislate away the ability of the SPD to use chemical weapons and other dangerous crowd control measures without going first through review via the consent decree,<sup>39</sup> although at least the first time, Judge Robard found against her and the SPD:

The court also notes that other restrictions on SPD's use of crowd control weapons have been recently imposed without eliciting the same reaction from the City or the Government concerning any conflict with the Consent Decree. For example, on June 12, 2020, the Honorable Richard A. Jones issued a TRO limiting SPD's use of chemical irritants and projectiles....Further, on June 5, 2020, Seattle Police Chief Carmen Best issued her own suspension of SPD's use of CS gas for at least 30 days..., neither of these other actions provoked the City or the Government to notify the court of any potential inconsistency with the Consent Decree or the need to impose injunctive relief. Accordingly, the court concludes that neither SPD nor the Mayor have established either a likelihood of success on the merits or even serious

---

<sup>37</sup> Evan Bush, *Mayor Durkan vetoes council's 2020 budget revision that would have cut up to 100 Seattle police officers*, Seattle Times, Aug. 21, 2020, <https://www.seattletimes.com/seattle-news/mayor-durkan-vetoes-councils-2020-budget-revision-that-would-have-cut-up-100-police-officers/>; Alfred Charles, *Seattle Mayor Jenny Durkan issues veto of City Council budget plan that cut police funding*, KOMO News, Aug. 21, 2020,

<https://komonews.com/news/local/seattle-mayor-jenny-durkan-to-veto-city-council-budget-plan-that-cut-police-funding>

<sup>38</sup> <https://twitter.com/UrbanistOrg/status/1267976301823967232>  
<https://www.facebook.com/stuart.t.apy/videos/10223924720052535/> (last exchange about gas begins at 1:46:39)

<sup>39</sup> The Notice the federal court received was from the City Attorney's office, on behalf of SPD, but because Mayor Durkan explicitly joined SPD in making the request to enjoy enforcement of the City Council ordinance, the Judge Robard addresses her in his order. <https://www.documentcloud.org/documents/6997513-Notification-of-New-Ordinance.html> (p. 6 of document)

questions going to the merits of the claim. (Emphasis added.)<sup>40</sup>

See also CP 472-77 (Council ordinance 126102, passed June 15, 2020).<sup>41</sup>

In short, the Mayor has — rather than trying to protect the protesters — actively advocated against any effective controls on the SPD. She has taken the letter of the consent decree and used it to violate its spirit. The consent decree was intended to protect the people of Seattle from the unconstitutional acts of the SPD, and yet she has used it to protect the police from the consequences of their own behavior, when they have grossly misused the weaponry with which the city provided them.

The Mayor also cites to In re Recall of Bolt, and claims that the allegations of inaction against her are the equivalent of the allegations in that case, which were that a city councilmember “bullied and harassed” a town employee, with no specific allegation of what form such “bullying and harassment” took, or when, or where. AOB at 17, citing 177 Wn.2d 168, 177, 298 P.3d 710 (2013).

Bolt is not on point. Petitioners have taken pains to explain how many times Mayor Durkan was asked to take action, and how the rights of the protesters continued to be violated, and still the Mayor did not take any action that could have conceivably stopped or at least limited the insupportable violence committed by SPD.

---

<sup>40</sup> <https://assets.documentcloud.org/documents/7000648/Robart-Order.pdf>, p. 6.

<sup>41</sup> Judge Robard did sign a TRO two days later, at the request of the Department of Justice, until reports from OIG, CPC, and OPA could be reviewed.

The fact that in Mayor Durkan’s case, Petitioners assert inaction does not mean they have not explained the facts sufficiently. Attached again, as it was during the Petitioner’s response to the Mayor’s Motion for Reconsideration, is a matrix showing some of the times the mayor was asked to take action.<sup>42</sup> This only contains 16 of the 56 rows in the original matrix, which either show requests by relevant parties to Mayor Durkan to stop the violence, or the circumstances that created such requests:

Date	Event	Source
June 2	Police claim that a “riot” broke out by the East Precinct and deploy CS gas, pepper spray, and flash-bang grenades by the precinct. The incident starts with a police officer snatching the pink umbrella of a protester. Footage shows chaos after the blocks filled with gas	43
June 2	Protesters chant “no gas, no gas” at a meeting with Mayor Durkan prior to her press conference. She responds, “ <i>I’m not going to stand up and make a promise.</i> ”	44
June 5	Issuing a memorandum to Mayor Durkan, Chief Best, and the City Attorney, all three of Seattle’s police oversight agencies — the CPC, OPA, and OIG — jointly recommend the SPD stop using CS gas, noting: <i>SPD has no department-wide policies on the use of tear gas. Police officers <u>should not be</u></i>	CP 185 - 217

<sup>42</sup> The full matrix is at CP 610-20.

<sup>43</sup> <https://mynorthwest.com/1906245/live-updates-seattle-bellevue-protests;>  
[https://twitter.com/HannaKIROFM/status/1267674896009584640?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1267674896009584640%7Ctwgr%5E&ref\\_url=https%3A%2F%2Fmef\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1267674896009584640%7Ctwgr%5E&ref\\_url=https%3A%2F%2Fmynorthwest.com%2F1906245%2Flive-updates-seattle-bellevue-protests%2F%3F](https://twitter.com/HannaKIROFM/status/1267674896009584640?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1267674896009584640%7Ctwgr%5E&ref_url=https%3A%2F%2Fmef_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1267674896009584640%7Ctwgr%5E&ref_url=https%3A%2F%2Fmynorthwest.com%2F1906245%2Flive-updates-seattle-bellevue-protests%2F%3F)

<sup>44</sup> <https://twitter.com/UrbanistOrg/status/1267976301823967232>  
<https://www.facebook.com/stuart.t.apy/videos/10223924720052535/> (last exchange about gas begins at 1:46:39)

	<i>deploying use of force tools for which they do not have policies and training. That is not how our system of police accountability works, nor should it.</i> (Emphasis added.) The same article also condemns other respiratory irritants and blast balls.	
June 5	The head of the Seattle Office for Civil Rights, a Durkan appointee, writes an open letter to her staff after attending the protests and being terrified by police behavior. She urges the city to “ <i>immediately halt</i> ” using tear gas, flash-bang devices and rubber bullets during demonstrations. <i>“What I experienced in person and have seen in video footage has been terrifying. I have heard from other city leadership and employees that they fear for their personal safety, not because of other protesters but because of the police.”</i>	45
June 5	43rd District Democrats call on the mayor to resign because she failed to protect protesters: <i>“Multiple reports, photos, and videos show the Seattle Police Department targeting peaceful protesters, children, and members of the media with tear gas, pepper spray, flash bangs, and rubber bullets, while frequently covering their names and badge numbers with tape....”</i>	46
June 6	Fearing imminent violence, local journalist Omari Salisbury calls on elected officials to come to the barricades. Councilmembers Mosqueda, Herbold, Strauss, Morales, Representative Macri, and King County Councilmember Zahilay all come to the scene.	47

<sup>45</sup>[http://www.chronline.com/northwest\\_regional\\_news/seattle-mayor-police-chief-agree-to-ban-use-of-tear-gas-on-protesters-amid-ongoing/article\\_3c510f22-a834-11ea-864d-3fd5fa5654de.html](http://www.chronline.com/northwest_regional_news/seattle-mayor-police-chief-agree-to-ban-use-of-tear-gas-on-protesters-amid-ongoing/article_3c510f22-a834-11ea-864d-3fd5fa5654de.html)

<sup>46</sup><https://thecisforcrank.com/2020/06/05/another-day-of-protests-small-concessions-from-the-city-and-calls-for-systemic-change-in-seattle/>  
<https://docs.google.com/document/d/1Eyndzr3YyrqqqBgLw7haREiT9b3t2HIx2UtBD7IFta4/edit>

<sup>47</sup><https://thecisforcrank.com/2020/06/05/another-day-of-protests-small-concessions-from-the-city-and-calls-for-systemic-change-in-seattle/>  
<https://docs.google.com/document/d/1Eyndzr3YyrqqqBgLw7haREiT9b3t2HIx2UtBD7IFta4/edit>

	Councilmember Morales tweets en route that she has called both Mayor Durkan and Chief Best.	
June 7	A letter to Mayor Durkan from 26 elected officials is released publicly, with the signers asking “ <i>We firmly request that you direct SPD to change their tactics....</i> ” The letter is signed by 4 members of the City Council, 3 members of the County Council, 6 state senators, and 13 state representatives.	[26]
June 7	<p>Police use pepper spray and flash-bang grenades on protesters, despite the agreement the previous day to not use CS gas, Councilmember Sawant is hit by tear gas at the protests.</p> <p>A young protester is nearly killed after being struck in the chest by a flash-bang grenade shot by police. Her heart stops beating three times enroute to the hospital</p> <p>The video of the assault on the protester is especially relevant. She stands, a few paces from other protesters, unmoving, with her hands partially raised, perhaps 30 feet from the police line. A shot rings out, and she turns and drops to the ground. Volunteer medics rush in to help her, and the police line continues to fire projectile and gas at the protesters who are dragging her away.</p>	48, 49
June 8	Councilmembers Tammy Morales and Teresa Mosqueda join in Councilmember Kshama Sawant’s call for the mayor to resign: Mosqueda further says, “ <i>How many people need to write in about being gassed? How many people have to be sprayed in the street every night? The mayor should ask herself if she is the right leader, and resign.</i> ”	50

<sup>48</sup><https://abcnews.go.com/US/wireStory/latest-statue-gen-wickham-toppled-richmond-71117416>; <https://mobile.twitter.com/cmshama/status/1269897621218312192?lang=en>

<sup>49</sup><https://komonews.com/news/local/protester-injured-by-exploding-flash-bang-shares-her-story>; <https://youtu.be/qjkbPbEPfPc> (video of attack where protester shot by SPD projectile); <https://www.youtube.com/watch?v=yQUsbmAzLrs> (also video of protester being shot by SPD projectile, different view, relevant portion of video starts at 1:48)

<sup>50</sup><https://www.kuow.org/stories/3-seattle-council-members-say-mayor-durkan-should-resign-after-police-response-to-protests>

June 9	The Citywide Race and Social Justice Initiative (RSJI) Change Team Co-Leads, representing 28 different city agencies tasked with undoing systemic racism, call directly on Mayor Durkan to protect the protesters, enforce de-escalation requirements, and end the use of chemical weapons during COVID-19.	51
Jun 10	10 elected officials of color send an open letter to Mayor Jenny Durkan and Chief Best, calling upon them first and foremost to: <i>“sto[p] the use of all forms of chemical substances for crowd control; en[d] the use of rubber bullets and flash-bangs; and demilitariz[e] police on the streets who interact with protesters.”</i>	52
Jun 11	<p>The Pride Foundation issues an open letter to Mayor Durkan that is signed by 16 leaders from 13 different LGBTQ organizations, in part stating:</p> <p><i>Your response has been to stand by SPD, even as they escalate violence day after day. Your response has been to ignore community voices asking that the SPD budget needs to be cut. Your response has been to use your sexual orientation as a way to insinuate deeper empathy for these calls for action than your actual actions suggest.</i></p> <p>....</p> <p><i>We know what that means: you are not listening.</i></p>	53
Jun 18	A new business coalition of tech leaders for racial justice calls on the mayor, demanding she implement the CPC police reforms.	54

<sup>51</sup><https://theisforcrank.com/2020/07/06/fbi-says-there-was-specific-threat-against-east-pr ecinct-durkan-letter-dodges-protesters-three-demands/> (link to letter itself is midway down, in the paragraph) “A month after the heads of the city’s Race and Social Justice Initiative “change teams” sent a letter to Mayor Jenny Durkan asking her to substantively address the demands of protesters, Durkan has responded, with a letter outlining many of the same actions the mayor has highlighted in her press appearances since George Floyd’s murder sparked protests against police violence in late May.”

<sup>52</sup><http://seattlemedium.com/10-elected-officials-of-color-send-letter-to-mayor-durkan-and -chief-best/>

<sup>53</sup><https://pridefoundation.org/2020/06/a-joint-open-letter-from-seattle-lgbtq-organizational -leaders/>

<sup>54</sup><https://www.geekwire.com/2020/seattle-tech-business-leaders-form-racial-justice-coaliti on-demand-police-reforms/>

Jul 9	The ACLU, the Fred T. Korematsu Center for Law and Equality, and Perkins Coie send a letter to the City Attorney’s office, asserting that the SPD has violated Judge Jones’ TRO multiple times, as well as the new Council ordinance that prohibits the use of blast balls, tear gas, and pepper spray. The letter demands that the city “ <i>immediately direct the officers to not to deploy</i> ” such weapons.	55
July 10	Councilmember Lisa Herbold issues another open letter to Mayor Durkan, this one about the constituted violations of rights and the arrest/detention of reporters: <i>“It is our job as elected officials to ensure the press remains free and is able to carry out its work, in accordance with the Constitution and City law. The Constitution and Municipal Code protections for the press, and observers, do not exist for the convenience of government, to be cast aside whenever they happen to be inconvenient to government.”</i>	56

Neither the Mayor nor Seattle voters are or will be confused by the allegations of the petition. Some voters may agree with the Mayor’s version of the facts, other voters will not. But ample facts are before this court that Charge B is sufficiently explained and factually supported to go to the citizenry.

2. The failure to act to prevent violence, in spite of her duty to enforce the laws and keep the peace — after weeks, and then months — constitutes at minimum misfeasance and violation of the Mayor’s oath of office and thereby is legally sufficient to go to the voters. Besides “factual

<sup>55</sup> <https://twitter.com/KorematsuCtr/status/1281377739849609218>

<sup>56</sup><https://herbold.seattle.gov/west-seattle-bridge-update-2020-budget-rebalancing-deliberations-new-homeless-service-provider-funding-directors-rule-for-exceptional-and-significant-trees-jump-start-investments-seattle/>

sufficiency,” the other threshold question in a recall petition is whether the charges are “legally sufficient.” Greco v. Parsons, 105 Wn.2d 669, 717 P.2d 1368 (1986). To be legally sufficient, the charges must describe conduct that would be a prima facie case of misfeasance, malfeasance, or a violation of the oath of office. Chandler v. Otto, 103 Wn.2d at 274. “Misfeasance,” “malfeasance” and “violation of the oath of office” are statutorily defined:

- (1) “Misfeasance” or “malfeasance” in office means any wrongful conduct that affects, interrupts, or interferes with the performance of 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. These definitions, as well as the rest of the recall statute, are to be construed in favor of the voter, not the elected official. In re Pearsall-Stipek, 141 Wn.2d 756, 765, 10 P.3d 1034 (2000), citing Pederson v. Moser, 99 Wn.2d 456, 462, 662 P.2d 866 (1983). Once again, the facts as averred by the Petitioners are assumed to be true for this analysis. West, 155 Wn.2d at 662, citing Kast, 155 Wn.2d at 813.

It is fundamentally the duty of the Seattle mayor to “see that the laws in the City are enforced” and to “maintain peace and order.” Seattle City Charter, Art. V, §2. These mayoral duties are mandatory under the Charter. Id. See, e.g., Erection Co. v. Dept. of Labor & Indus., 121 Wn.2d

513, 518, 852 P.2d 288 (1993) (“It is well settled that the word ‘shall’ in a statute is presumptively imperative and operates to create a duty....”).

If, as here, the behavior of the SPD violates the law and the rights of Seattle citizens, it is incumbent upon the mayor to stop such violations. Indeed, the Mayor has the duty to do so under the City Charter, and is the only elected official in a position to do so, given her express authority under the same document.

Here, because no one else has been able to stop the SPD’s violent behavior, and Mayor Durkan has declined to do so, unknown numbers of protesters have been injured. Unknown numbers of protesters have been cowed from the streets, deprived of their right to protest peacefully. Unknown numbers of residents of downtown Seattle and Capitol Hill have suffered invasions of their homes by chemical weapons forbidden in wartime, but not forbidden when used by SPD in a global pandemic.<sup>57</sup> We know the names of only a few of these people, via the media, social media, and affidavits filed in this case and related cases.

But there are so many others. As this Response Brief is being drafted on Monday, September 7, this writer is also watching Nikkita Oliver’s current livestream, in front of SPD’s West Precinct. There Ms. Oliver is narrating as SPD officers wash blood off the sidewalk, because

---

<sup>57</sup> It is notable that tear gas was banned in wartime by the 1925 Geneva Protocol, in the aftermath of an influenza pandemic where World War I had accelerated the spread of a respiratory disease. Activist Shaun Scott wrote recently about this and noted “On several occasions in recent weeks, Seattle police — seemingly unconcerned with COVID-19 — used the chemical agent on protestors, covering the city’s most densely populated residential neighborhood with it on June 7.”

<https://crosscut.com/2020/07/durkan-seattle-police-and-undermining-civil-liberties>

earlier in the evening, a Black protester identified as “TK” was tackled to the ground by SPD in the course of an arrest for obstruction, striking their head on the curb. “TK,” is still being filmed by Ms. Oliver, looking dazed, with blood all over their face, as they sit in police custody, surrounded by officers far larger than them. As this writer continues to watch, upon Ms. Oliver’s cajoling, “TK” is being loaded into an ambulance to be taken to Harborview Medical Center.<sup>58</sup>

This is happening right now, tonight. A completely separate Twitter video, also taken tonight at a different location, shows SPD bicycle officers rolling into a peaceful protest outside the Seattle Police Officer’s Guild and immediately starting to arrest people and fire pepper spray with no visible motivation and no order to disperse.

<https://twitter.com/CrabSabbath/status/1303215078531936256> . The same account explains:

Nobody was prepared for that level of blatant assault. The pepper spray didn't help matters. And yes, no warning or dispersal order was ever given. This was their arrival. We've seen so many people assaulted by SPD since May 30th

<https://twitter.com/CrabSabbath/status/1303215078531936256>

Another protester wrote tonight of the same event:

SPD sent 15 vehicles and bearcat, deployed blast balls and tear gas immediately on the crowd, and THEN declared an unlawful assembly. SPD are the agitators.

<https://twitter.com/Alyfacee/status/1303150953831395329>

---

<sup>58</sup>[https://www.facebook.com/nikkitaroliver/videos/10100934830070270/?notif\\_id=1599540729570428&notif\\_t=live\\_video&ref=notif](https://www.facebook.com/nikkitaroliver/videos/10100934830070270/?notif_id=1599540729570428&notif_t=live_video&ref=notif)

If this is just what this writer sees, tuning into social media on this random night in September, as this draft inches toward done, how many others have there been, who have been unseen?

These many assaults implicate the welfare of Seattle residents, as well as their constitutional rights under the federal and state constitutions - their right to freedom of assembly and redress of grievances; their right to freedom of speech, their right to be secure in their own houses; and given their bodily injuries and their frequent arrests, their right to due process. US Const., Amend. 1, 4, 14. Washington Const., Art. 1, §§ 3-5, 7.

These are most certainly not, as the state baselessly claims, “naked castings into the constitutional sea.” AOB at 26, citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). This dismissive attitude to the bodily injuries and emotional trauma of uncounted Seattle residents is to basically argue that protesters do not have a right to either bodily autonomy or to peacefully protest and express themselves. It is moreover to argue that Seattle residents of downtown and Capitol Hill have no right to be safe in their own homes from chemical weapons - weapons that are illegal in wartime, no less.

Mayor Jenny Durkan is the only elected official with power over the SPD. She is thus the only person answerable to Seattle voters when the SPD violates citizens’ rights. She is, moreover, a person tasked with maintaining peace and order in the city, and enforcing its laws, a task she has refused to shoulder.

As we know, the SPD could be controlled by the Mayor in any declared emergency. Seattle City Charter, Art. V, §2 (control during emergencies). Currently Seattle is still under the Mayor’s emergency proclamation due to COVID-19, although she terminated the emergency proclamation regarding the George Floyd protests on June 17. CP 49-52 (COVID-19 order still in place). And the Mayor has at all times the power to fire a Police Chief and to largely hire another. Art. VI, §2 (Mayor may remove Police Chief).<sup>59</sup> For Mayor Durkan to allow these offenses to occur over and over, and to take no action to intervene when she is responsible for the execution of the laws and the peace of the city, is at minimum malfeasance and violation of her oath of office.

In In re Recall of Kast, the Respondent argued that because there was no punishment for violating the open bidding law, his conduct could not possibly be malfeasance. 144 Wn.2d at 815. This Court disagreed:

Nevertheless, his conduct would still be considered malfeasance under section (1) because his violation of the law was “wrongful conduct” and because his conduct “[i]nterfered with the performance of official duty” by failing to promote the best interests of the fire district. As a result of his conduct, the fire district could not be sure that it had received the best value or price for the culvert ditch project.

---

<sup>59</sup> In fact, Interim Chief Diaz was appointed solely by Mayor Durkan when Chief Best recently announced her intent to resign. <https://mynorthwest.com/2085146/spd-interim-chief-search-for-replacement-2020/> Because he is “Interim Chief,” Mayor Durkan need not have the City Council’s agreement to his taking control, and she has already announced that she will not seek a permanent replacement in 2020. Id. This means the City Council will continue to have no input into the control of the SPD for an indefinite period. See Seattle City Charter, Art. VI, §2 (appointment of [permanent] police chief subject to confirmation by City Council).

(Internal cites omitted.) 144 Wn.2d at 815-16. Here, not unlike Kast, the Superior Court found that “the gravamen of the [Superior C]ourt’s ruling as summarized above is more broadly the [Mayor’s] alleged failure to protect the health and well-being of the community,” given her duties as Mayor. (Emphasis added.) CP 792. See also, In re Recall of Pepper, 189 Wn.2d 546, 559, 403 P.3d 839 (2017) (allegations against respondent were not that her actions was criminal or illegal, but that they “violated her duty as a council member”).

As she took office, Mayor Durkan swore in relevant part to:

...support the constitution of the United States, the constitution of the State of Washington, and the charter and ordinances of the City of Seattle, and that I will faithfully conduct myself as mayor for the City of Seattle.

By not protecting her electorate, by not enforcing the laws and maintaining the peace and order of the City as charged to her, Mayor Durkan has not “faithfully conducted herself” as mayor. In addition, she has supported neither the state and federal constitution — rather, she turned a blind eye to the concerns of both.

The facts thus show that Mayor Durkan has at minimum committed malfeasance and violation of her oath of office. Even without more, this means that Charge B meets the requirements of legal sufficiency.

3. “Intent” is not required if a violation of the law is not alleged, but insofar as this Court believes Mayor Durkan committed misfeasance, her intent can be inferred from the facts. If a recall petitioner

charges an elected official with the commission of an unlawful act — in misfeasance, for example — “the petitioner must show facts indicating the official had knowledge of and intent to commit an unlawful act.” Id. See also Wade, 115 Wn.2d at 549. This is because recall via misfeasance is not intended for those situations where a respondent made a “simple mistake.” Pearsall-Stipek, 141 Wn.2d at 779.

Petitioners need not show an intent to break the law if the recall is based on misfeasance or violation of the oath of office — this requirement only applies to recall charges that are based on violation of a statute. Because Mayor Durkan’s inaction constituted both misfeasance and violation of her oath of office, “intent” is simply not at issue in this case. Even so, intent can be inferred here.

In proving knowledge of the unlawful act and an intent to commit it, voters may draw reasonable inferences from the facts alleged. In re Recall Charges Against Davis, 164 Wn.2d 361, 370-71, 193 P.3d 98 (2008), citing West, 155 Wn.2d at 666-67. In Davis, this Court did not need Port Commissioner Davis to admit she had unlawful intent when she signed an agreement to pay benefits to the retiring CEO of the Port of Seattle, because:

We can infer from the record that Comm. Davis understood her duties as port commissioner and the legal necessity of voting in public session before potentially obligating the Port in any monetary agreement, and, for purposes of recall, intentionally acted outside the scope of these duties by signing an agreement with Dinsmore. We find the charge Comm. Davis signed an agreement with intent to

commit malfeasance and without authority factually sufficient.

(Emphasis added.) See also Pearsall-Stipek, 141 Wn.2d at 779 (intent could be inferred from the fact that alleged falsehoods occurred shortly after County Auditor had been put under oath, which would have reminded her of “her legal obligation to tell the truth”); In re Recall of Sandhaus, 134 Wn.2d 662, 671, 953 P.2d 82 (1998) (intent could be inferred when prosecutor continued spending after being warned to stop by the Board and an auditor).

Here, Mayor Durkan was requested on many occasions by many independent parties to intervene in the unlawful conduct of the police. The debate about her inaction was exceedingly public. In addition, Mayor Durkan is herself a lawyer and former US attorney, and she doubtless knows what is legal police behavior and what is not. Given that here, the Mayor made an informed choice to let the police continue in their crimes unabated, this choice was indubitably “intentional” within the meaning of the recall rules.

4. If there is such a thing as “abuse of discretion,” this must necessarily be it. An elected official cannot be recalled for appropriately exercising the discretion granted him or her by law. Chandler, 103 Wn.2d at 274. An official may be recalled for execution of discretionary acts only if the “official exercised discretion in a manifestly unreasonable manner.” In re Recall of Shipman, 125 Wn.2d 683, 685, 886 P.2d 1127 (1995).

Mayor Durkan did not intervene on May 30, June 1st, June 2nd; perhaps these failures were within her discretion, given that it might take time for her to see that the pattern of police violence wasn't changing, or for her to hear from experts that using a lung irritant during a global pandemic was reckless and dangerous. But after more information was released about the special dangers of respiratory irritants in a respiratory pandemic, and after those dangers were reiterated by multiple sources including the City Council and the CPC, OIG, and OPA, the Mayor was informed to a degree that fully equipped her to act.

Here, she continues to not intervene in a situation where citizens risk injury nearly every night and the SPD violates their rights to freedom of assembly, freedom of speech, and insofar as the protesters are injured or arrested, their due process rights, and it does so over and over in order to maintain its grip on power.

This is not a reasonable exercise of discretion. It is an abuse of power. The direct abuse of citizens is by the SPD, but the SPD could not accomplish it without the willing inaction of the Mayor.

**D. The Superior Court erred when it struck Charge E or, in the alternative, when it did not expand Charge B to recognize the peril the actions of the SPD caused for bystanders, for example residents in the neighborhoods where chemical weapons were deployed.**

The Superior Court struck Charge E, finding it duplicative of Charge B. CP 301. But while Charge E also focused on the use of chemical weapons during the same timeframe, the Superior Court appears

to have overlooked that Charge E was describing an entirely different class of victims of SPD: the persons who might not be protesting at all, but who were nonetheless exposed to chemical weapons while in the putative safety of their own homes.

The East Precinct is in the middle of Capitol Hill, a mixed-use, residential neighborhood of Seattle. The precinct is surrounded by not just restaurants and retail, but also a number of apartment buildings, and it is less than a block from single family homes beginning and continuing up the hill.

The Statement of the Case herein reviewed several statements by local residents about how they were affected by the gas released and the nightly explosions, including that of Petitioner Elliott Grace Harvey. See infra Section III(B)(3) at 13-16. It is undisputed that these local residents bore a significant burden in terms of the protests and the police response.

The lack of concern that SPD showed for the health and well-being of their own neighbors is highly relevant to the recall and should in all fairness be a part of it. These people - adults and children alike - were repeatedly assaulted in their own homes by SPD gassing them. For these reasons, either Charge E should be reinstated, or the language of Charge B should be expanded to include their suffering.

- E. The Superior Court erred when it failed to sustain Charge C, because it was well-supported that SPD: 1) attacked and harassed both press and volunteer medics onscene; 2) failed to provide care to protesters SPD injured; and 3) failed to use de-escalation techniques,**

**and Mayor Durkan had notice of these illegal acts, as she did of the inappropriate use of chemical weapons.**

The Superior Court struck Charge C on the basis that Mayor Durkan could not be held accountable via recall “for the actions of her subordinates, without her knowledge, not at her direction.” CP 301. This -- roughly speaking -- follows the reasoning of cases like In re Recall of Reed, 156 Wn.2d 53, 58-59, 124 P.3d 279 (2005) and In re Recall of Morrisette, 110 Wn.2d 933, 936, 756 P.2d 1318 (1988). But this case does not match those fact patterns.

In Reed, the Petitioners sought to recall Secretary of State Sam Reed, based upon the behavior of the King County Elections staff. But the King County Elections (KCE) staff does not report in any way, direct or indirect, to the Secretary of State. Instead, KCE staff are appointed and report to the King County Executive, a separately elected position. 156 Wn.2d at 58. As such, this court found that Reed could not be held responsible for “conduct beyond his knowledge or ability to direct,” because he could not be held responsible for the actions of “a wholly separate governmental agency.” Id.

Similarly, in Morrisette, the Petitioners attempted to recall the county sheriff, asserting that certain deputies in the sheriff’s department had failed to complete certain duties, or had performed those duties improperly. 110 Wn.2d at 935. This Court noted:

While this might be true as a principle of tort law [respondeat superior], appellants cite no authority for the proposition that a public official may be recalled for the act

of a subordinate done without the official's knowledge or direction.

Id. at 936.

Here, there is no question whether Mayor Durkan could have directed the police chief to institute different policies -- she certainly could. Or she could have taken over the SPD herself, given that there was an emergency declared. So the question remaining is whether the Mayor knew that these improper activities were taking place. The Superior Court found below that the Mayor could be assumed to have known about the improper tear gas attacks after some time had passed, and multiple parties had commented on the situation. So, too, the Mayor would have known about the other bad acts of the SPD in a short period of time, certainly before the Superior Court's final ruling on July 29th.

1. SPD attacked, harassed, and arrested members of the press, in violation of SMC 12.A.12.020, and this became well known. SMC 12A.12.020 addresses "public safety orders" and failure to disperse in regard to the press:

No such order shall apply to a news reporter or other person observing or recording the events on behalf of the public press or other news media, unless [they are] physically obstructing lawful efforts by such officer to disperse the group.

There were attacks on the press from early in the protests. In one video taken on June 1, a TV team is hit by what appears to be either a firework or a tear gas grenade (the item remains on the ground issuing smoke like such a grenade), and as the team is retreating, the reporter states that they

were hit by items that came from SPD.<sup>60</sup> Other reporters described early mistreatment at the hands of the police.<sup>61</sup>

There were also apparent incidents of reprisal. For example, Evan Hreha was not an official journalist, but he was the man who took the video of the child who was pepper sprayed by police on May 30.<sup>62</sup> Outraged by the activities of the police, he released that video almost immediately to social media. On June 6, he was arrested while walking home, allegedly for use of a laser to shine at police officers earlier in the night. Hreha says he was cooking hot dogs all evening, which he and his friends were distributing to hungry protesters for free. He offered to be searched, and said he didn't have a laser on him and does not even own one, but after his arrest, he was held for 46 hours with no charges or opportunity to be released. The Seattle City Attorney has apparently declined to file charges in Hreha's case.

These happened prior to the filing of charges, but when the CHOP was forcibly disbanded by SPD on July 1, there was a clear goal of keeping journalists away from the activity, and one UK reporter was arrested and held. For example, a reporter from The Stranger emailed Petitioners to explain how he was blockaded by SPD from getting to his office in the CHOP by police. See CP 634 (email from Rich Smith).

---

<sup>60</sup> <https://twitter.com/Acyn/status/1267673936659021830>

<sup>61</sup> Picket, Jordan, Jun 8, 2020,

[twitter.com/jordanpicket/status/1269929380987334658?s=21%5D](https://twitter.com/jordanpicket/status/1269929380987334658?s=21%5D). Sowersby, Shauna, Jun 6, 2020, [https://twitter.com/Shauna\\_Sowersby/status/1269463849725390849](https://twitter.com/Shauna_Sowersby/status/1269463849725390849)

<sup>62</sup><https://www.kuow.org/stories/he-captured-footage-of-child-pepper-sprayed-during-seattle-protest-then-was-arrested>;

<https://techcrunch.com/2020/07/18/for-seattles-cop-free-protest-zone-tech-is-both-a-revolutionary-asset-and-disastrous-liability/>

Omari Salisbury reported from inside the CHOP that all journalists had been moved out of the CHOP the morning of the clearing.<sup>63</sup>

Omari Salisbury, whose office at Converge Media is in the same block as The Stranger, was forced by police to stand on his doorstep as he repeatedly explained to officers that he was press and they could not hold him. CP 626.<sup>64</sup> They also warned him that he had to stop broadcasting or he would be arrested. Id.<sup>65</sup> He live streamed this whole interaction, including the police officer repeatedly telling him there could be no media inside the CHOP, “by order of Mayor Jenny Durkan.” Id.<sup>66</sup>

This was covered later by John Helmiere in Real Change:

Thousands of us watched Omari Salisbury livestream the SPD sweep of CHOP and return to the East Precinct. We saw cops repeatedly harass Salisbury. They demanded he leave the area and threatened to arrest him. His office is next door to the precinct, he has been at the scene daily for a month, he displayed his press credentials and he gently explained that he was a journalist. The officers got more agitated. Salisbury kept filming, but backed far enough from the scene that it was hard to see what the police were doing. Salisbury soon tweeted about the police, citing an order by Durkan, disallowing him from broadcasting. The police eventually tweeted back, “We are not limiting [Converge Media’s/Salisbury’s] ability to broadcast. This was a misunderstanding...”.

SPD’s public relations department could see Salisbury’s footage showing what their officers did, but when given the choice to accept responsibility or lie ... they chose to lie.<sup>67</sup>

---

<sup>63</sup> <https://www.youtube.com/watch?v=6Jl8lFZNkz8> (discussion of moving the journalists out begins at 6:30).

<sup>64</sup> <https://www.youtube.com/watch?v=6Jl8lFZNkz8> (discussion of SPD telling him to move begins at 8:04).

<sup>65</sup> <https://twitter.com/Omarisal/status/1278412776403202049>

<sup>66</sup> <https://twitter.com/Omarisal/status/1278371101261697029> (video, two of the discussions with police happens at 17:00, where Salisbury is walked out of the park by an officer and told to return to his office, and then again at 1:02:48 in the video, the SPD officer says that media is not allowed to move around in the CHOP without being invited and accompanied by the SPD, “by order of the mayor”).

<sup>67</sup> <https://www.realchangenews.org/2020/07/08/deceit-conceit-and-mercy-durkan-s-seattle>

Even worse, on the same date, a UK reporter was actually arrested and jailed, seemingly for just being present in the CHOP. Andrew Buncombe showed his State Department-issued press credentials, but was nonetheless arrested and jailed.<sup>68</sup> He was held in the King County Jail, in conditions that he reported were unsanitary, inhumane, and unsafe.<sup>69</sup>

This information from the dismantling of the CHOP could not be before the judge at the time of the charges being filed, because such acts had not yet occurred, but it was first noted July 2, the morning of oral argument, CP 291-96, and then expanded upon with details when Petitioners filed their response to the Mayor's Motion to Reconsider, CP 625-27. Thus it is properly preserved to argue before this Court.

When the SPD officer explained to at least two reporters that media was not allowed in the CHOP, and another reporter apparently was arrested because he disobeyed that order, those two facts alone justify the reinstatement of this charge. But in addition to these, there was coverage of the assaults on the media,<sup>70</sup> and two of the affidavits filed regarding the police violence on July 25th were from members of the media who were attacked by the police. CP 735-37, 750-53.

---

<sup>68</sup><https://www.kuow.org/stories/british-journalist-arrested-at-the-chop-protest-tells-his-story>

<sup>69</sup><https://www.independent.co.uk/news/world/americas/journalist-arrest-seattle-chaz-protest-police-prison-black-lives-matter-a9606846.html>

<sup>70</sup> See also Charles Woodman, *Seattle Considers Resolution To Protect Media, Medics At Protests*, Patch.com, Aug. 16, 2020, <https://patch.com/washington/seattle/seattle-considers-resolution-protect-media-medics-protests>

Mayor Durkan must have had notice of the problem of attacks on the media at some point in this process prior to the final ruling, so this charge should be reinstated as regards the SPD treatment of the press.

2. The Seattle Police Department violated SCM 14.090-POL-10(b) regulations regarding the provision of medical care in a crowd management setting, and violated international norms of conduct when they targeted volunteer medics, blocked medical care, and destroyed aid stations and medical supplies. SPM 14.090-POL-10(b) directly addresses the duty of police officers to provide medical care to victims of crowd control techniques and so-called less-lethal weapons:

Officers will request medical response or assistance for subjects exposed to OC when they complain of continued effects after having been decontaminated, or they indicate that they have a pre-existing medical condition (e.g. asthma, emphysema, bronchitis, heart ailment, etc) that may be aggravated by OC.

Officers will request medical response or assistance for subjects who appear to have been injured by a blast ball or who complain of pain or injury from having been struck by a blast ball.<sup>71</sup>

As this situation has unfolded, SPD officers have inflicted hundreds of injuries on the public, including near-lethal injuries.<sup>72</sup> There is no evidence they have ever provided medical care.

Indeed, at times, the injured were blocked from entering aid stations by SPD, and medical aid stations or supplies were wrecked by

---

<sup>71</sup> Notably, as the CPC wrote in a memo to the Mayor and the Chief, there are no policies on CS gas; the SPD has no training on the gas and no policies for it.

<sup>72</sup> *'It's pretty traumatizing': Protester hit by SPD flash bang says she nearly died*, Komo News, Jun 9, 2020, [komonews.com/news/local/protester-injured-by-exploding-flash-bang-shares-her-story](https://www.komonews.com/news/local/protester-injured-by-exploding-flash-bang-shares-her-story).

officers.<sup>73</sup> In addition, SPD continued to detonate devices around medics attempting to aid the injured.<sup>74</sup> Should these acts have been committed in a military setting, they could easily be classified as war crimes.<sup>75</sup>

Moreover, after the violence of July 25th, a nurse acting as a medic explained in her declaration how she was assaulted and threatened with assault while trying to help patients, while wearing her nurse's scrubs. CP 223-247. Finally, this issue was also covered in the local media.<sup>76</sup>

Mayor Durkan nonetheless did nothing to protect street medics or assist them in their role, despite being warned of the attacks on medics by both the Statement of Charges in this case and later-filed documents. The interference caused by police between protesters and their medical care likely contributed to the death of Lorenzo Anderson in the CHOP on June 20, 2020.

Before June 20, street medics had reached out to the Seattle Fire Department to make sure they had coordinated plans for emergency

---

<sup>73</sup> T, @t\_shortstack, Jun 6, 2020, [twitter.com/t\\_shortstack/status/1269463231090888704?s=2](https://twitter.com/t_shortstack/status/1269463231090888704?s=2); WorriedPotato, @velaharigaming, Jun 7, 2020, [twitter.com/velaharigaming/status/1269685373816332289](https://twitter.com/velaharigaming/status/1269685373816332289); *Folks, I need your help*, Reddit, Jun 8, 2020, [reddit.com/r/Seattle/comments/gywxhz/folks\\_i\\_need\\_your\\_help/](https://reddit.com/r/Seattle/comments/gywxhz/folks_i_need_your_help/).

<sup>74</sup> *Id.* See also <https://youtu.be/qjkbPbEPfPc> (video of attack where protester shot by SPD projectile); <https://www.youtube.com/watch?v=yQUsbmAzLrs> (also video of protester being shot by SPD projectile, different view, relevant portion of video starts at 1:48)

<sup>75</sup> *Rule 25. Medical Personnel*, International Humanitarian Law (“IHL”) Database, reviewed Jun 12, 2020, [ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule25](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule25); *The Guardian view on targeting medics in wartimes: protect those who serve*, The Guardian, Sep 29, 2016, [theguardian.com/commentisfree/2016/sep/29/the-guardian-view-on-targeting-medics-in-wartime-protect-those-who-serve](https://theguardian.com/commentisfree/2016/sep/29/the-guardian-view-on-targeting-medics-in-wartime-protect-those-who-serve)

<sup>76</sup> Lilly Fowler, *Medics say police have targeted them at Seattle protests*, Crosscut, June 18, 2020, <https://crosscut.com/2020/06/medics-say-police-have-targeted-them-seattle-protests>

evacuation when it might be needed.<sup>77</sup> But SFD declined to follow the plan in the case of Lorenzo Anderson. The medics in the CHOP believed SFD were on the way, as seen by the video, but SFD declined to move into the CHOP without an okay from SPD. This despite a medic sprinting to Station 25 and begging on her hands and knees for the SFD to go to the injured young man.<sup>78</sup> and a different protester approaching an SFD aid car and similarly begging the car to respond.<sup>79</sup> The street medics eventually transported Anderson themselves,<sup>80</sup> but he had lost too much blood and died soon afterward at Harborview Hospital.<sup>81</sup>

SPD arrived much later than expected, demanding to be allowed to get to the victim, who had already left minutes before.<sup>82</sup> SPD claimed later that they could not enter the area because of a hostile crowd, but body cam footage made it obvious that this was a lie from SPD.<sup>83</sup>

---

<sup>77</sup>[https://www.youtube.com/watch?time\\_continue=394&v=3LZMjbtzXTQ&feature=emb\\_logo](https://www.youtube.com/watch?time_continue=394&v=3LZMjbtzXTQ&feature=emb_logo) (Discussion with a street medic who has been at the protests continuously - specific discussion of the red zone/green zone rendezvous points arranged between street medics and SFD to make sure they had coordinated plans to take out severely injured persons, starts at 1:19. This medic was among those who treated Lorenzo Anderson).

<sup>78</sup>[https://www.youtube.com/watch?time\\_continue=394&v=3LZMjbtzXTQ&feature=emb\\_logo](https://www.youtube.com/watch?time_continue=394&v=3LZMjbtzXTQ&feature=emb_logo) (story told at 21:20)

<sup>79</sup><https://twitter.com/spekulation/status/1274574573426507776> (video of protester begging SFD aid team to go to the aid of Anderson)

<sup>80</sup><https://www.youtube.com/watch?v=-m-WUbXrdR0&feature=youtu.be&t=356> (livestreamed footage of medics and protesters arguing about whether to move Anderson themselves).

<sup>81</sup> Ashley Hiruko, "Seattle police claimed protesters blocked way to dying man. In fact, miscommunication with Seattle Fire was problem," [KUOW](https://www.kuow.org/stories/seattle-police-and-fire-confusion-slowed-response-to-chop-shooting-not-protesters) (July 26, 2020) <https://www.kuow.org/stories/seattle-police-and-fire-confusion-slowed-response-to-chop-shooting-not-protesters>

<sup>82</sup><https://www.youtube.com/watch?v=n4Nui661FPA> (report by KING 5)

<sup>83</sup>[https://twitter.com/spekulation/status/1275130917187547136?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1275130917187547136%7Ctwgr%5E&ref\\_url=https%3A%2F%2Fthreadreaderapp.com%2Fthread%2F1275659022365057025.html](https://twitter.com/spekulation/status/1275130917187547136?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1275130917187547136%7Ctwgr%5E&ref_url=https%3A%2F%2Fthreadreaderapp.com%2Fthread%2F1275659022365057025.html) (local activist Matt Spek Watson created a very helpful annotated version of some of the bodycam footage released by SPD).

SFD is required to follow its orders, and they later told protesters they could not respond without SPD's clearance. But SPD delayed response and then blatantly lied about the circumstances of that delay. Given that Mayor Durkan knew that the CHOP was staffed by volunteer street medics, and had been informed that they had been attacked on a number of occasions by SPD, the question was not whether a tragedy would occur, but when. And in this case, all SPD had to do to kill yet another young black man was to just not bother to show up as quickly as they could, and then lie about it to blame the protesters.

In part because Mayor Durkan had sufficient notice about the situation and did nothing to make sure the medics would have backup from the City's regular EMS responders, a young man died on June 20. This matter was raised before the Superior Court during the Motion for Reconsideration, because of briefing filed on July 21, so this issue has been fully preserved to argue to this Court. CP 596-630. Because Mayor Durkan would have had knowledge of this behavior, and nonetheless took no action to prevent tragedy, Charge C should go forward to the voters as regards the street medics.

3. The Seattle Police Department disregarded SPM 8.100-POL-1 regulations regarding the use of de-escalation techniques.

SPM 8.100-POL-1 addresses the duty of police officers to use de-escalation techniques: "When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use

De-Escalation Tactics in Order to Reduce the Need for Force.” The joint  
OIG, CPC, and OPA report of June 5 expressly discussed  
recommendations for deescalation from those agencies:

Wherever possible, the use of dialogue and  
communication should always precede the use of force.  
Police commanders must be trained in dialogue and  
engagement and should use these tactics before any  
decisions are made to resort to the use of force.

CP 201.

SPD, simply speaking, has not tried to deescalate, pretty much  
since these protests began. Given that the mayor has had plenty of notice  
that the SPD initiates and escalated violent encounters with protesters, this  
charge should be reinstated.

Interestingly, Mayor Durkan seems to argue that this case is all  
about enforcing the new City Council ordinance, which hadn't even  
passed when these charges were filed. See AOB at 29, 31. She argues that  
if she had enforced the ordinance, in light of the federal consent decree,  
then she would be reasonably facing impeachment, because she would  
have (supposedly) violated the law. AOB at 31.

Petitioners have explained that Mayor Durkan had any number of  
options here to stop the violence, she just chose not to do any of them.  
But Petitioners will focus briefly on one counter-example: the TRO was  
signed by Judge Jones on June 12, shortly before the recall charges were  
filed. If Mayor Durkan had just enforced the TRO, which she concedes

was lawful, and had prevented SPD from using these weapons except for life safety situations, we wouldn't be here seeking her recall today.

Petitioners have never asked or wanted Mayor Durkan to violate any laws. All we have wanted is for her to perform her duty, and protect the public by enforcing them.

## **V. CONCLUSION**

Respondents and Cross-Appellants request this Court reject the Mayor's argument that Charge B is insufficient and instead expand the charge with language from the incorrectly-dismissed Charge E to include the protection of bystanders. This Court should also restore Charge C, as the assaults on medics and the press began early and have continued without much interruption, as has their failure to deescalate, and the Mayor has had ample time to learn of them both via the press and social media. Such assaults violate both the law and international standards of decency, and they should have been sustained as a valid charge against the Mayor.

DATED this 14th day of September, 2020.

---

By Elliott Grace Harvey