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NO. 91843-1

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE:
THE RECALL OF TROY KELLEY

**BRIEF OF RESPONDENT TROY KELLEY
(ON PROPOSED CHARGE #2)**

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ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES.....	2
III.	STATEMENT OF THE CASE.....	3
	A. Factual Background.....	3
	B. Procedural Background.....	7
IV.	SUMMARY OF ARGUMENT.....	7
V.	ARGUMENT.....	9
	A. Standard Of Review.....	9
	B. Washington’s Recall Process Is Available Only If The Proponent Demonstrates That The Charges Are Legally And Factually Sufficient.....	10
	C. Mr. Knedlik Fails To Properly Present A Claim To This Court.....	13
	1. Mr. Knedlik Abandoned His Claims By Failing To Support Them With Proper Argument And Authority.....	13
	2. Issues Properly Before The Court Relate Only To Recall, And A Claim In The Nature Of <i>Quo</i> <i>Warranto</i> Or An Election Contest Are Not Before The Court.....	16
	D. The Recall Charge Is Not Legally Sufficient To Establish A Duty Regarding Audits Of Sound Transit.....	19
	1. Proposed Charge #2 Regarding The Audit Of Sound Transit, A Local Agency, Relies On Statutes Applicable To State Agencies And Thus Fails To Provide A Legal Basis For Recall.....	20

2.	Auditor Kelley May Not Be Recalled For Exercise Of Lawful Discretionary Authority	23
E.	Mr. Knedlik's Proposed Charge Regarding Sound Transit Audits Should Be Dismissed as Factually Insufficient.....	31
1.	Proposed Charge #2 Lacks Sufficient Detail Regarding The Date, Time, Location, Or Nature Of The Alleged Acts.....	31
2.	Mr. Knedlik Fails To Assert Any Facts Demonstrating The State Auditor Intended To Act Unlawfully	32
VI.	CONCLUSION	34

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	14
<i>Chandler v. Otto</i> , 103 Wn.2d 268, 693 P.2d 71 (1984).....	10, 23, 24, 27, 28, 30, 31
<i>Cole v. Webster</i> , 103 Wn.2d 280, 692 P.2d 799 (1984).....	30, 33
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	13, 16
<i>Darkenwald v. State Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	14
<i>Dewey v. Tacoma School Dist. No. 10</i> , 95 Wn. App. 18, 974 P.2d 847 (1999).....	19
<i>Greco v. Parsons</i> , 105 Wn.2d 669, 717 P.2d 1368 (1986).....	23
<i>Green Mountain Sch. Dist. No. 103 v. Durkee</i> , 56 Wn.2d 154, 351 P.2d 525 (1960).....	18
<i>In re Ackerson</i> , 143 Wn.2d 366, 20 P.3d 930 (2001).....	19, 31
<i>In re Recall of Bolt</i> , 177 Wn.2d 168, 298 P.3d 710 (2013).....	19
<i>In re Recall of Cy Sun</i> , 177 Wn.2d 251, 299 P.3d 651 (2013).....	10, 13
<i>In re Recall of Pearsall-Stipek</i> , 129 Wn.2d 399, 918 P.2d 493 (1996).....	33

<i>In re Recall of Pearsall-Stipek,</i> 141 Wn.2d 756, 10 P.3d 1034 (2000).....	33
<i>In re Recall of Piper, No. 90883-4,</i> slip op. at 3 (Wash. December 10, 2015).....	11
<i>In re Recall of Reed,</i> 156 Wn.2d 53, 124 P.3d 279 (2005).....	15, 23, 31
<i>In re Recall of Robinson,</i> 156 Wn.2d 704, 132 P.3d 124 (2006).....	10
<i>In re Recall of Sandhaus,</i> 134 Wn.2d 662, 953 P.2d 82 (1998).....	11, 25, 26
<i>In re Recall of West,</i> 155 Wn.2d 659, 121 P.3d 1190 (2005).....	9, 10
<i>In re Recall of Zufelt,</i> 112 Wn.2d 906, 774 P.2d 24 (1989).....	11
<i>Jewett v. Hawkins,</i> 123 Wn.2d 446, 868 P.2d 146 (1994).....	23, 30
<i>Kellogg Brown & Root Servs., Inc. v. United States,</i> 102 F. Supp. 3d 648, 2015 WL 1966532 (D. Del. 2015)	28, 29
<i>Loveridge v. Fred Meyer, Inc.,</i> 125 Wn.2d 759, 887 P.2d 898 (1995).....	14
<i>Matter of Pearsall-Stipek,</i> 136 Wn.2d 255, 961 P.2d 343 (1998).....	33
<i>Matter of McNeill,</i> 113 Wn.2d 302, 778 P.2d 524 (1989).....	23, 30
<i>McBride v. Merrell Dow & Pharmaceuticals, Inc.,</i> 800 F.2d 1208, 1210 (D.C. Cir. 1986).....	15
<i>Pacific Nw. Shooting Park Ass'n v. City of Sequim,</i> 158 Wn.2d 342, 144 P.3d 276 (2006).....	17

<i>Pierce Cty. v. State</i> , 150 Wn.2d 422, 78 P.3d 640 (2003).....	22
<i>Recall of Telford</i> , 166 Wn.2d 148, 206 P.3d 1248 (2009).....	11, 23, 24, 31
<i>Recall of Wasson</i> , 149 Wn.2d 787, 72 P.3d 170 (2003).....	11, 12, 27
<i>Sane Transit v. Sound Transit</i> , 151 Wn.2d 60, 85 P.3d 346 (2004).....	1, 5, 6, 14
<i>Sloan v. U.S. Dep't of Hous. & Urban Dev.</i> , 236 F.3d 756 (D.C. Cir. 2001).....	28, 29
<i>State ex rel. Dore v. Superior Court for King Cty.</i> , 167 Wash. 655, 9 P.2d 1087 (1932)	18
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 969 P.2d 64 (1998).....	18
<i>State v. Dennison</i> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	15
<i>Teaford v. Howard</i> , 104 Wn.2d 580, 707 P.2d 1327 (1985).....	23
<i>United States v. Gaubert</i> , 499 U.S. 315, 325 (1991).....	29
<i>Washington Fed'n of State Employees v. State</i> , 127 Wn.2d 544, 901 P.2d 1028 (1995).....	23
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	13
<i>Woodward v. Lopez</i> , 174 Wn. App. 460, 300 P.3d 417 (2013).....	15

Statutes

RCW 29A.36.071.....	22
RCW 29A.56.110.....	10, 11, 12, 31, 32
RCW 29A.56.120.....	3, 12
RCW 29A.56.130.....	3, 16
RCW 29A.56.140.....	12, 17
RCW 29A.56.150(2).....	12
RCW 29A.56.210.....	19
RCW 29A.56.260.....	17
RCW 29A.56.270.....	7, 18, 19
RCW 29A.68.011.....	17
RCW 29A.72.060.....	22
RCW 42.40	20, 21, 24, 25
RCW 42.40.020(2).....	20
RCW 42.40.020(6)(a)	20
RCW 42.40.040	20
RCW 42.40.040(1)(b)	24
RCW 43.09.010	4
RCW 43.09.020	25
RCW 43.09.050(3).....	20
RCW 43.09.200-.2855	25

RCW 43.09.260	25
RCW 43.09.280	25
RCW 43.10.030(3).....	1
RCW 43.88	21
RCW 43.88.010	21
RCW 43.88.020	21
RCW 43.88.160(6)(e)	21
RCW 43.88.160(6)(f).....	21
RCW 81.112.010	5
RCW 81.112.030	5

Constitutional Provisions

Const. art. I, § 33.....	10, 24, 33
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I. INTRODUCTION

A recall case is not the vehicle for a litigant to air generalized policy concerns or raise allegations that may only be raised in an election contest or *quo warranto* action. Yet this is what this case has become, with recall proponent Will Knedlik using his opening brief to vet his personal grievances against Sound Transit rather than against the ostensible target of the recall, State Auditor Troy Kelley. This includes a quixotic attempt to relitigate this Court's decade-old decision in *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 85 P.3d 346 (2004), as if the issues of that case were actually at issue in this one; they are not.¹ And, rather than addressing the law of recall, Mr. Knedlik contends not merely that his recall effort should proceed but that the office of State Auditor should be declared retroactively vacant. These are not proper issues for a recall proceeding, and by focusing on them Mr. Knedlik has effectively abandoned the basis for his appeal.

Even if the Court considers the merits of Mr. Knedlik's recall

¹ The undersigned counsel represent Auditor Kelley only as to Proposed Charge #2 (a) through (d) as set forth on page 4 below. Proposed Charge #2 stems directly from actions taken in Auditor Kelley's official capacity, and therefore raises issues germane to the institutional interests of the Office of the State Auditor, and not to Auditor Kelley in his private capacity. See RCW 43.10.030(3). This limited representation should not in any way reflect on the sufficiency of the remaining charges. Auditor Kelley is *pro se* as to Proposed Charges #1 and #3.

effort, the recall charge addressed in this brief is legally insufficient. Mr. Knedlik fails to establish a legal duty on the part of the State Auditor to do the things that Mr. Knedlik alleges he should have done. An elected official generally cannot be recalled from office for taking a discretionary action. Mr. Knedlik's allegations regarding state audits of Sound Transit raise at most discretionary decisions entrusted to the judgment of the State Auditor and his staff. The recall charge is also factually insufficient because it lacks facts from which either Auditor Kelley or the electorate could determine how or when he allegedly failed to discharge his duties. Mr. Knedlik's recall charge therefore fails. Even if the Court reaches the merits of the recall charge, it should affirm the judgment of the superior court.²

II. ISSUES

The State Auditor addresses the following two issues in this brief:

1. Should the Court decline to reach the merits of this appeal, in which the Recall Proponent fails to support his position with adequate argument and authority?

² Auditor Kelley filed a motion on the merits with this Court simultaneously with filing this brief. Because Mr. Knedlik's position is clearly without merit, Auditor Kelley respectfully suggests that oral argument would not materially benefit the decision-making process in this case and that the Court should therefore grant the motion on the merits and affirm the trial court's decision without oral argument.

2. Is the charge that the State Auditor should be recalled from office for activities relating to audits of Sound Transit (Charge #2) factually and legally insufficient?

The answer to both questions is “yes.”

III. STATEMENT OF THE CASE

A. Factual Background

Mr. Knedlik seeks to recall State Auditor Troy Kelley based upon a statement of charges he filed with the Secretary of State. CP 6-9.³ The Secretary provided copies of the charges to the Attorney General’s Office, as well as to Auditor Kelley. RCW 29A.56.120 requires the Attorney General to prepare the ballot synopsis for the charges.

In accordance with his statutory obligation, the Attorney General prepared a ballot synopsis. CP 10-11. The Attorney General petitioned the superior court for a determination of the sufficiency of the recall charges and to approve the ballot synopsis.⁴ CP 1-11; *see* RCW 29A.56.130. “[T]he Attorney General does not authenticate, substantiate, or validate any legal or factual allegations charged in support of recall. Rather, the Attorney General is merely the person designated by

³ The Clerk’s Papers from the superior court are cited as “CP.”

⁴ The Attorney General, through separate counsel from those who prepare the petition and synopsis, also represents statewide elected officials when charges stem from actions taken in their official capacity. *See supra* fn. 1.

statute to place this matter before the court for hearing.” CP 1.

The charges, as summarized in the proposed ballot synopsis, allege:

1. That Auditor Kelley resides in Pierce County and the Washington Constitution and RCW 43.09.010 require the Auditor to reside “at the seat of government,” which is located in Olympia;
2. That Auditor Kelley has not faithfully discharged his duties under state law to identify and investigate improper government activity and/or report irregularities to the Attorney General, by failing to:
 - a. perform reasonably competent audits, report to work, and diligently oversee the work of state auditors;
 - b. ensure a junior taxing district obtained annual independent performance audits, as promised in a ballot title, which aided and abetted fraudulent ballot title assurances made to the Washington State Supreme Court;
 - c. investigate or report a junior taxing district for taking \$2 million per day from state taxpayers based on a false pretense in a ballot title; and
 - d. investigate or report a junior taxing district’s evasion of a negotiated long-term debt ceiling of \$800 million to attain additional debt of \$2.2 billion; and
3. That Auditor Kelley pressured his staff to hire Jason JeRue without vetting him through standard qualification processes for state employment.

CP 10-11.

Proposed Charge #2 focuses on audit activity about Sound Transit, a regional transit authority established by King, Pierce, and Snohomish counties in 1993. Since Mr. Knedlik fails to set forth facts in his

Statement of Charges to support Proposed Charge #2, the following background information is provided to assist the Court.

The counties formed Sound Transit as a separate entity authorized by RCW 81.112.030. *Sane Transit*, 151 Wn.2d at 63-64. The Legislature authorized the creation of a new “local agency” to implement a high capacity transit system for these areas, finding the transportation facilities inadequate in the state’s most populous areas. RCW 81.112.010. In 1996, voters approved Sound Transit’s implementation plan, which included the imposition of local taxes. *Sane Transit*, 151 Wn.2d at 66.

Sound Transit’s expenditure of taxes gathered pursuant to that election has previously been challenged. The original plan put before the voters proposed a 21-mile light rail system. After the taxes were approved, Sound Transit determined that it did not have sufficient funding to construct the entire 21-mile route and decreased the initial construction of the route to 14 miles. A nonprofit corporation and an individual filed suit contending this decrease constituted an unlawful substantial deviation from the voters’ approval. This Court concluded that the voters had provided Sound Transit with discretion to adjust the original plan. *Sane Transit*, 151 Wn.2d at 74. This Court further found that Sound Transit had authority to continue collecting taxes beyond the originally-envisioned 10 year period in order to finance additional construction and maintenance

and operating costs. *Id.* at 79.

In 2007, then-State Auditor Brian Sonntag released the performance audit of Sound Transit mentioned by Mr. Knedlik in Proposed Charge #2, Performance Audit Report No. 1000005.⁵ The audit contained a recommendation that Sound Transit engage in annual performance audits of its activities. *Id.* at 35-38. A 2009 report issued by Auditor Sonntag stated that all recommendations contained in the 2007 audit had been implemented. Performance Audit Report No. 1002767 at A5.⁶ In a 2012 Performance Audit of Sound Transit, Auditor Sonntag again noted that Sound Transit had implemented all recommendations from prior performance audits. Performance Audit Report No. 1008277 at 99.⁷ Mr. Knedlik provides no facts regarding his contention that Auditor Kelley failed to identify an alleged Sound Transit “fraud to evade a \$800 million ceiling on long-term debt as negotiated with King County.” CP 8.

⁵ Available online at: <http://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1000005&isFinding=false&sp=false> (last visited December 7, 2015). Mr. Knedlik’s reference to this audit report appears at CP 7.

⁶ Available online at: <http://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1002767&isFinding=false&sp=false> (last visited December 7, 2015).

⁷ Available online at: <http://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1008277&isFinding=false&sp=false> (last visited December 7, 2015).

B. Procedural Background

The Pierce County Superior Court determined that none of Mr. Knedlik's recall charges were legally or factually sufficient. CP 31-36. The court not only considered Mr. Knedlik's proposed charges, but also considered Mr. Knedlik's "Motion for Judicial Determinations" that raised a number of issues unrelated to a recall action. CP 31. In that motion, Mr. Knedlik asked the court to declare the office of State Auditor had been vacant from the beginning of Auditor Kelley's term. CP 12-21. The court ruled that the issues raised by Mr. Knedlik's motion were not properly before it because the validity of Auditor Kelley's 2012 election and his initial assumption of office are not properly at issue in a recall. CP 31; *see also* CP 3.

After the court denied Mr. Knedlik's motion to reconsider, CP 66, he appealed directly to this Court. CP 67-68; *see also* RCW 29A.56.270 (providing for direct review of recall matters).

IV. SUMMARY OF ARGUMENT

Mr. Knedlik has abandoned his argument that Proposed Charge #2 against Auditor Kelley is factually and legally sufficient by failing to offer any argument or authority in support of that contention. The section of his opening brief devoted to Proposed Charge #2 is devoid of any relevant

argument, citation to the record, or citation to authority. Opening Br. at 24-36. Mr. Knedlik instead devotes those pages to attacking a prior decision of this Court unrelated to a recall.

Additionally, Mr. Knedlik fails to address the standards for assessing the legal and factual sufficiency of recall charges, choosing instead to focus much of his arguments on issues that would only be relevant if this appeal presented an election contest or a petition for *quo warranto*. Opening Br., at 24-36. Since those types of issues are not before the Court, and because Mr. Knedlik fails to offer any relevant argument, this Court should affirm the trial court's ruling without reaching the merits.

If the Court does reach the merits of his appeal of Proposed Charge #2, it should also affirm the court below on the basis that Mr. Knedlik fails to meet his burden of showing that Proposed Charge #2 is legally and factually sufficient. It is legally insufficient because it lacks any legal authority for the proposition that Auditor Kelley was under a legal duty to take any action that Mr. Knedlik alleges he should have taken. The supporting statutes cited relate to audits of state agencies, but his charge relates to a local governmental audit.

Mr. Knedlik also fails to provide any authority for the notion of "ballot title fraud" mentioned, but never explained, in his charges.

Additionally, Mr. Knedlik's charge merely addresses discretionary actions, including an alleged failure to comply with government auditing standards, and elected officials generally may not be recalled based upon discretionary acts.

Proposed Charge #2 is also factually insufficient because it fails to state in sufficient detail the facts constituting what Mr. Knedlik alleges to be misfeasance, malfeasance, or a violation of the oath of office. This specificity requirement is designed to afford both the elected official and the voters with enough information upon which to respond to or evaluate the charge. But Mr. Knedlik describes only facts that occurred before Auditor Kelley assumed office, and fails to ever describe what actions Auditor Kelley allegedly took or did not take that support the charge. Without any explanation of what action constituted an offense subject to recall, the charge is factually insufficient.

For these reasons, this Court should affirm the judgment of the superior court rejecting Mr. Knedlik's recall charges.

V. ARGUMENT

A. Standard Of Review

This Court reviews *de novo* the superior court's initial determination of the sufficiency of recall charges. *In re Recall of West*, 155 Wn.2d 659, 663, 121 P.3d 1190 (2005). The charges as a whole must

give the elected official enough information to respond to the charges and the voters enough information to evaluate them. *Id.* “Although the court does not evaluate the truthfulness or falsity of the allegations, it stands as a gatekeeper to ensure that elected officials are not subject to recall for frivolous reasons.” *In re Recall of Cy Sun*, 177 Wn.2d 251, 255, 299 P.3d 651 (2013). “This requires the court to determine that the recall petitioner ha[s] knowledge of the acts complained of, RCW 29A.56.110, and that the allegations are both factually and legally sufficient.” *Id.* (internal quotation marks omitted).

B. Washington’s Recall Process Is Available Only If The Proponent Demonstrates That The Charges Are Legally And Factually Sufficient

Recall is a process by which an elected public officer may be removed from office before the expiration of his or her term. *Chandler v. Otto*, 103 Wn.2d 268, 270, 693 P.2d 71 (1984). In Washington, the right to recall an elected official from office can be exercised only on the basis of sufficient cause and not on the basis of a voter’s disagreement with the elected official’s discretionary actions. *In re Recall of Robinson*, 156 Wn.2d 704, 708, 132 P.3d 124 (2006). Cause requires a showing of malfeasance, misfeasance, or violation of an oath of office. Const. art. I, §§ 33-34; *Chandler*, 103 Wn.2d at 270-71.

A proposed recall cannot proceed unless the proponent shows that

the charges are both factually and legally sufficient. *In re Recall of Sandhaus*, 134 Wn.2d 662, 668, 953 P.2d 82 (1998). “In recall proceedings, courts ensure that public officials are not subject to frivolous or unsubstantiated charges by confirming that the charges are legally and factually sufficient before placing the charges before the voters.” *In re Recall of Piper*, No. 90883-4, slip op. at 3 (Wash. December 10, 2015). The Court must determine sufficiency from the face of the recall petition. *In re Recall of Zufelt*, 112 Wn.2d 906, 914, 774 P.2d 24 (1989).

A charge is *legally* sufficient only if it defines “substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office” and no legal justification exists for the challenged conduct. *Recall of Telford*, 166 Wn.2d 148, 154, 206 P.3d 1248 (2009), quoting *Recall of Wasson*, 149 Wn.2d 787, 791, 72 P.3d 170 (2003). Misfeasance or malfeasance in office is defined as “wrongful conduct that affects, interrupts, or interferes with the performance of official duty.” RCW 29A.56.110. Misfeasance also includes “the performance of a duty in an improper manner.” Malfeasance in office means “the commission of an unlawful act”. *Id.* “Violation of the oath of office” is defined as “the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.” *Id.* “Lawful, discretionary acts are not a basis for recall.” *Recall of Telford*, 166 Wn.2d at 154. A charge is

factually sufficient only if the facts “establish a prima facie case of misfeasance, malfeasance, or violation of the oath of office.” *Recall of Wasson*, 149 Wn.2d at 791.

The recall process begins with the filing of a statement of charges with the officer who accepts declarations of candidacy for elections to the office in question, here, the Secretary of State. RCW 29A.56.110 (describing the contents of the statement of charges); RCW 29A.56.120 (describing the officer with whom the statement is filed). A court then conducts a hearing and decides (1) whether the recall proponent has demonstrated a sufficient factual and legal basis for recall, and (2) whether the ballot synopsis is adequate. RCW 29A.56.140. The recall proponent may not begin collecting voters’ signatures that are required in order to place the recall on the ballot until a court determines the statement of charges to be sufficient, and until any appeal is resolved. RCW 29A.56.150(2). Either party may appeal the court’s decision on this question directly to the Washington Supreme Court. RCW 29A.56.140. The superior court’s decision with regard to the ballot synopsis is final. RCW 29A.56.140.

C. Mr. Knedlik Fails To Properly Present A Claim To This Court

1. Mr. Knedlik Abandoned His Claims By Failing To Support Them With Proper Argument And Authority

Appellate courts do not consider issues that are “not supported by any reference to the record nor by any citation of authority.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Mr. Knedlik’s entire discussion of Proposed Charge #2 is devoid of any citation to relevant authority. Opening Br. at 22-26. Such bare conclusory arguments and “bald assertions lacking cited factual and legal support” without “developed argument for [the Court’s] consideration on appeal” do not merit review. *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012).

As the proponent of this recall action, Mr. Knedlik bears the burden of establishing the legal and factual sufficiency of his charges against Auditor Kelley. *In re Recall of Cy Sun*, 177 Wn.2d at 255. Mr. Knedlik, however, does not even attempt to establish that his charges against Auditor Kelley satisfy the standards for legal and factual sufficiency. *See generally* Opening Br. at 5-49. Rather, Mr. Knedlik describes this appeal as a different kind of quest, in which he seeks objectives other than pursuing “a quotidian recall matter.” *Id.* at 5. But recall is the one and only subject of this case.

In his entire argument regarding Proposed Charge #2, Mr. Knedlik cites only this Court's decision in *Sane Transit*. Opening Br. at 24-36. But the issues resolved in *Sane Transit* are not the issues of this case. *Sane Transit* involved a request to enjoin a local governmental entity from expending certain funds. *Sane Transit*, 151 Wn.2d at 63. Mr. Knedlik argues that this Court's decision was misguided. *See, e.g.*, Opening Br. at 25-26. This Court's decision in *Sane Transit* long ago became final and this appeal does not provide a vehicle for an implicit collateral attack against it. *See Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (describing the preclusive effect of a final decision against rearguing a prior case). *Sane Transit* accordingly bears no relevance to the present issues.

More importantly, *Sane Transit* has no relevance to Mr. Knedlik's burden to show that his charges against Auditor Kelley are legally and factually sufficient. Mere reference to a single inapt case fails to provide sufficient argument. This Court should "not consider the issue in the absence of adequate argument." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000); *see also Darkenwald v. State Emp't Sec. Dep't*, 183 Wn.2d 237, 248-49, 350 P.3d 647 (2015) ("[I]ssues not supported by argument and citation to authority will not be considered on appeal").

Auditor Kelley cannot be recalled from office based on the actions of others in a case resolved over a decade ago and almost nine years before he even took office. Even if there was any merit to Mr. Knedlik's contentions, the actions of others cannot serve as the basis for recalling an elected official from office. *See In re Recall of Reed*, 156 Wn.2d 53, 58-59, 124 P.3d 279 (2005) (rejected attempt to recall the Secretary of State based on the actions of another governmental entity). As noted, Auditor's Kelley's predecessor fully resolved any issues concerning the predecessor's audits of Sound Transit. *See* discussion at 6, above.

Mr. Knedlik abandons any argument that his recall charges are legally or factually sufficient by failing to offer any reasons, or to cite to any authority, as to why they are sufficient. *See State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); *Woodward v. Lopez*, 174 Wn. App. 460, 469, 300 P.3d 417 (2013). To put the matter more starkly, since Mr. Knedlik failed to address the issues actually before the Court, this Court should not find any reason to disturb the judgment of the trial court. *Cf. McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986) (declining to "disturb judgments on the basis of claims not adequately briefed on appeal"). Even if Mr. Knedlik attempts in his reply brief to argue the law of recall for the first time at the appellate level, it will be "too late to warrant

consideration.” *Cowiche Canyon Conservancy*, 118 Wn.2d at 809 (arguing matters plainly at issue for the first time in a reply brief is too late to merit consideration).

Mr. Knedlik has accordingly abandoned his argument concerning the sufficiency of Proposed Charge #2 in favor of railing against an eleven year-old decision on unrelated issues. He offers no argument, and cites to no authority, relating to the sufficiency of recall charges. This Court should not reach the merits.

2. Issues Properly Before The Court Relate Only To Recall, And A Claim In The Nature Of *Quo Warranto* Or An Election Contest Are Not Before The Court

Mr. Knedlik seeks relief not merely related to the law of recall; he also seeks a ruling by this Court that the office of State Auditor has been vacant retrospectively to the beginning of Auditor Kelley’s term in office. Opening Br. at 39-41. That is not a proper issue in this case. This is a recall action; statutorily, it presents neither a contest to Auditor Kelley’s 2012 election nor a petition in the nature of *quo warranto*. Instead, the Attorney General commenced this action in response to Mr. Knedlik’s proposed recall charges pursuant to RCW 29A.56.130. The petition merely seeks a judicial determination of the sufficiency of recall charges against Auditor Kelley, and no other determination. CP 1-3. Put simply, Mr. Knedlik now on appeal seeks relief exceeding the scope of the

pleading on which this case was commenced. CP 1-3; Opening Brief, 24-36. The trial court concluded that his request to declare that “the office of State Auditor [has been vacant] since January 16, 2013, is not properly before this Court.” CP 31. The court was correct. This Court accordingly should not consider Mr. Knedlik’s request to address any matter other than the legal and factual sufficiency of his recall charges.

Not content to simply pursue his recall charges, Mr. Knedlik filed a motion below asking the trial court to judicially hold Auditor Kelley’s office vacant. CP 12-30. But that motion did not address the issues properly presented in this case; instead, the motion sought to inject an unrelated question. An elected official is not actually removed from office by way of recall unless and until the *voters* decide to do so through an election. RCW 29A.56.260. Mr. Knedlik’s request is neither within the scope of a recall action under RCW 29A.56.140, nor within the scope of the petition that commenced this action. *See Pacific Nw. Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006); *see also* CP 1-3.

If Mr. Knedlik wanted to contest the validity of Auditor Kelley’s 2012 election, he needed to do so by commencing a contest action “no later than ten days following the official certification of the election.” RCW 29A.68.011. It therefore follows that Mr. Knedlik cannot now

contest the 2012 election even if the contest were within the scope of the petition commencing this case. CP 1-3.

Nor would Mr. Knedlik have had standing to challenge Auditor Kelley's right to hold office in a *quo warranto* action. Such a petition for a writ of *quo warranto* is "the proper and exclusive method of determining the right to public office." *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 893, 969 P.2d 64 (1998) (quoting *Green Mountain Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 159, 351 P.2d 525 (1960)). Two types of *quo warranto* actions are recognized in Washington: "a public *quo warranto* action brought by the prosecutor, and a private *quo warranto* action available only where the petitioner can assert and prove a special interest in the office." *State ex rel. Quick-Ruben*, 136 Wn.2d at 896. This obviously is not a case filed by a county prosecutor seeking relief in the nature of public *quo warranto*. CP 1-3. And in order to assert a private *quo warranto* action, Mr. Knedlik would have needed to plead and prove that he, rather than Auditor Kelley, has "some right or title" to hold office as State Auditor. *State ex rel. Quick-Ruben*, 136 Wn.2d at 896 (quoting *State ex rel. Dore v. Superior Court for King Cty.*, 167 Wash. 655, 657-59, 9 P.2d 1087 (1932)). Claiming no such right, Mr. Knedlik could not have sought *quo warranto* even if he had made such an attempt.

Neither RCW 29A.56.270 nor the petition's general request for

“other” relief, CP 3, is sufficient to place before the Court Mr. Knedlik’s request to declare the office vacant. The statute merely authorizes the Court to compel certain actions “in relation to the recall.” RCW 29A.56.270. A request to declare the office vacant is not an action relating to the recall, because a recall proceeding does not directly remove the officer from office; rather, it simply determines the sufficiency of the charges. RCW 29A.56.210 (providing for a recall election). And a party cannot inject a new issue into a case simply by inserting the issue into a brief “and contending it was in the case all along.” *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999).

D. The Recall Charge Is Not Legally Sufficient To Establish A Duty Regarding Audits Of Sound Transit

To be legally sufficient, a petition must identify the “standard, law, or rule that would make the officer’s conduct wrongful, improper, or unlawful.” *In re Recall of Bolt*, 177 Wn.2d 168, 174, 298 P.3d 710 (2013) (quoting *In re Ackerson*, 143 Wn.2d 366, 377, 20 P.3d 930 (2001)). Mr. Knedlik does not assert a legal basis for the duties that he contends Auditor Kelley failed to faithfully discharge. This Court should affirm the trial court’s order.

1. Proposed Charge #2 Regarding The Audit Of Sound Transit, A Local Agency, Relies On Statutes Applicable To State Agencies And Thus Fails To Provide A Legal Basis For Recall

Mr. Knedlik's claim that Auditor Kelley failed to faithfully discharge his duty as set forth in RCW 43.09.050(3) to "[i]nvestigate improper governmental activity under chapter 42.40 RCW" (CP 7) fails for several reasons.

As its title states, RCW 42.40 is the *state* Whistleblower Act, which does not apply to local governmental actions. Sound Transit, as discussed above, is a local governmental entity. Under RCW 42.40.040, Auditor Kelley has the authority to investigate allegations of "improper governmental action" reported to his office. The statute defines "improper governmental action" as "action by an *employee* undertaken in the performance of the employee's official duties..." RCW 42.40.020(6)(a) (emphasis added). RCW 42.40.020(2) defines "employee" as "any individual employed or holding office in any department or agency of *state* government." (emphasis added.) Accordingly, the responsibilities set forth in RCW 42.40 extend only to activities of a *state* agency or a state employee, not those of a *local* governmental entity like Sound Transit. RCW 43.09.050(3) simply does not impose a legal duty on the

State Auditor to investigate alleged improper governmental activity by Sound Transit.

Similar difficulties attach to the other statutes Mr. Knedlik cites in his Proposed Charge #2. For example, Mr. Knedlik contends that Auditor Kelley failed in his duties by neglecting to “promptly report any irregularities to the attorney general,” citing RCW 43.88.160(6)(e). CP 7. RCW 43.88 is entitled “State Budgeting, Accounting, and Reporting System.” This chapter governs budgeting and accounting matters related again to *state* agencies, as opposed to *local* government entities. See RCW 43.88.010 (establishes a system for state government activities); RCW 43.88.020 (defines “agency” to mean every state office, institution, or department). The provision cited by Mr. Knedlik, RCW 43.88.160(6)(e), governs Auditor Kelley’s authority over audits of *state* agencies. Here again, the statute relied upon by Mr. Knedlik does not establish any legal duty regarding *local* government entities, including Sound Transit.

Next, Mr. Knedlik’s charge that Auditor Kelley failed to investigate Sound Transit’s taxing activities suffers from the same infirmities discussed above. CP 8. To establish a duty in this regard, Mr. Knedlik relies on RCW 43.88.160(6)(f) and RCW 42.40 both of which, as described above, are inapplicable to the activities of a local

government entity. Thus, this charge also fails because it is legally insufficient.

Finally, Mr. Knedlik alleges that Auditor Kelley failed to investigate “ballot-title fraud.” CP 8. While Mr. Knedlik mentions debt ceiling and loan guarantees in this section of his charges, he does not explain what he means by “ballot-title fraud.” CP 8. Nor does he cite to any legal authority establishing that Auditor Kelley has a duty regarding the investigation of “ballot-title fraud.” CP 8.

More fundamentally, Washington law does not recognize any such legal doctrine as “ballot-title fraud.” A legal duty to act must be found, if such a duty even exists, in the text of the law rather than in a ballot title. *Cf. Pierce Cty. v. State*, 150 Wn.2d 422, 433-34, 78 P.3d 640 (2003) (holding that the legislative content of an initiative appears in its text, not in an intent section). A ballot title, however, is not part of the actual law, but is simply a statutorily-required brief description of a proposed law written by either the Attorney General, for a state measure, or a county Prosecuting Attorney for certain local measures. RCW 29A.72.060 (role of Attorney General in drafting state ballot titles); RCW 29A.36.071 (role of county prosecutor in drafting local ballot titles). The title merely provides a brief summary of a measure for the benefit of voters.

See Washington Fed'n of State Employees v. State, 127 Wn.2d 544, 554, 901 P.2d 1028 (1995). The ballot title of a local measure cannot and does not create any legal duty for the State Auditor.

2. Auditor Kelley May Not Be Recalled For Exercise Of Lawful Discretionary Authority

A recall charge is legally sufficient only if the charge defines “substantial conduct clearly amounting to misfeasance, malfeasance or a violation of the oath of office, and there is no legal justification for the challenged conduct.” *Recall of Telford*, 166 Wn.2d at 154 (internal punctuation marks omitted). The charges must sufficiently “specify why the acts constitute misfeasance, malfeasance or violation of the oath of office.” *Teaford v. Howard*, 104 Wn.2d 580, 587, 707 P.2d 1327 (1985). “[A]n elected official cannot be recalled for appropriately exercising the discretion granted him or her by law.” *In re Recall of Reed*, 156 at 59. “If a discretionary act is the focus of the petition, the petitioner must show that the official exercised discretion in a manifestly unreasonable manner.” *Jewett v. Hawkins*, 123 Wn.2d 446, 448, 868 P.2d 146 (1994) (citing *Chandler*, 103 Wn.2d at 274, and *Greco v. Parsons*, 105 Wn.2d 669, 672, 717 P.2d 1368 (1986)). Mere disagreement with a discretionary decision, in contrast, is not sufficient. *Matter of McNeill*, 113 Wn.2d 302, 308, 778 P.2d 524 (1989); *Jewett*, 123 Wn.2d at 450-51.

The state constitutional provision governing recalls was specifically crafted to prevent recall elections based upon the popularity of decisions made by elected officials. *Recall of Telford*, 166 Wn.2d at 159-60 (describing Const. art. I, § 33, and quoting *Chandler*, 103 Wn.2d at 270-71). There, this Court noted the danger that recall could encourage abuse absent the safeguard of showing cause. This abuse includes a recall attempt motivated solely by political objectives. *Id.* This point is essential to the nature of recall in Washington. The process cannot be based upon a desire to remove an elected official from office because of disagreement with one or more of an elected official's discretionary decisions. Const. art. I, § 33 (requiring that recall be based only on a showing of sufficient cause). Mr. Knedlik's allegations in Proposed Charge #2 go to the heart of Auditor Kelley's discretionary powers.

Mr. Knedlik focuses on the Auditor's authority to investigate "improper governmental action" under RCW 42.40, the state Whistleblower Act. CP 7-8. As discussed above, this statute does not apply to audits of local governments. *See* discussion at pp. 20-22, above. Even if this Court were to consider the State Whistleblower Act, it states that the Auditor "has the authority to determine **whether** to investigate any assertions received." RCW 42.40.040(1)(b) (emphasis added).

Accordingly, the Legislature specifically provided that the Auditor may exercise discretion in determining what actions to review under RCW 42.40.

In regard to his general audit responsibilities, the State Auditor “shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith as may be prescribed by law.” RCW 43.09.020. The legislature set forth some general direction regarding local government audits such as their frequency (RCW 43.09.260) and the method for paying for them (RCW 43.09.280). The statutes, however, do not provide any specific direction regarding the scope or method of conducting such audits. *See generally*, RCW 43.09.200-.2855. Rather, such operational decisions must fall within the judgment of the State Auditor, including Auditor Kelley, and are thus discretionary. With thousands of entities to audit and a finite number of staff, the Auditor must make decisions regarding how to most effectively deploy those resources. It is entirely appropriate for a State Auditor to exercise discretion in this way.

This Court rejected a similar challenge to the deployment of government resources as a basis for recall in *Sandhaus*. In that action, the Adams County Prosecuting Attorney was charged with not devoting

sufficient resources to civil legal matters. In finding the petition insufficient, the Court stated:

Balancing priorities in a public office with limited funds and personnel is a matter within the discretion of the office supervisor, and whether Sandhaus is doing a satisfactory job of managing his office is a quintessential political issue which is properly brought before the voters at a regular election. Where discretion is involved, the recall petitioner must show manifest abuse. The petition here fails to make that showing.

In re Recall of Sandhaus, 134 Wn.2d at 670 (citation omitted).

Here Mr. Knedlik contends Auditor Kelley failed to take sufficient action regarding certain aspects of Sound Transit's operations. Opening Br. at 24-36. He asserts that Auditor Kelley should have discovered "ballot title and debt limit fraud," investigated improper governmental activity by Sound Transit, and reported "irregularities" to the Attorney General through performance and other audits or investigations of that local entity. CP 7-8. Determining which specific areas to audit, as well as the conclusions to be drawn from such audits, requires the exercise of the audit staff's judgment. In essence, Mr. Knedlik challenges Auditor Kelley's office staff's decisions regarding the scope and conduct of Sound Transit audits. Those decisions are clearly discretionary in nature and thus cannot form the basis for recall.

Finally, Mr. Knedlik now asserts that the Auditor failed to comply

with Generally Accepted Government Auditing Standards (GAGAS) in carrying out his audit responsibilities toward Sound Transit. Opening Br. at 30-34. GAGAS, also known as the “Yellow Book”, are standards produced under the direction of the United States Government Accountability Office to provide a “framework” for the conduct audits of government entities. *See* <http://www.gao.gov/yellowbook/overview>.

First, Mr. Knedlik did not allege a failure to meet the GAGAS standards as a basis for recall in his statement of charges. CP 6-9. The statute required him to set forth the legal violations and related detailed description of supporting facts so as to inform the electorate and the official of the charges; he failed to do so. *Chandler*, 103 Wn.2d at 278.

Second, a recall charge is required to designate with specificity the duty which is alleged to be violated. *See Recall of Wasson*, 149 Wn.2d at 792 (general statement in charge without citation to specific legal authority is insufficient). Mr. Knedlik’s brief to this Court contains only a general statement that the State Auditor failed to comply with GAGAS requirements. Opening Br. at 30-34. The closest he comes to a specific citation to the standards is where Mr. Knedlik references GAGAS principles through a parenthetical that asserted those principles are “(outlined below in a filing providing quotations as to central auditing responsibilities and also available herein for this Honorable Court within

Clerk's Papers at ___)". Opening Br. at 30. It is unclear to what "filing" Mr. Knedlik refers. His failure to cite to specific portions of the record or to established authorities constitutes abandonment of this argument. See discussion at pp. 13-16, above.

Finally, rather than supporting Mr. Knedlik's argument, an examination of these standards demonstrates that auditor judgment is central to conducting audits and confirms the State Auditor's position. The GAGAS standards provide that "[a]uditors must use professional judgment in planning and performing audits and in reporting the results." GAGAS 3.60.⁸ This Court has recognized that the exercise of judgment is not a basis for recall. *Chandler*, 103 Wn.2d at 275.

Other courts have specifically addressed the discretionary nature of the GAGAS standards. See *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 763-765 (D.C. Cir. 2001); *Kellogg Brown & Root Servs., Inc. v. United States*, 102 F. Supp. 3d 648, 2015 WL 1966532 (D. Del. 2015). As discussed below, these courts determined that the

⁸ Government Auditing Standards: 2011 Revisions at p. 53 available as a PDF entitled "Full Report" at <http://gao.gov/products/GAO-12-331G>. Additionally, the standards recognize their application is not a guarantee of a certain outcome, noting: "While this standard places responsibility on each auditor and audit organization to exercise professional judgment in planning and performing an audit, it does not imply unlimited responsibility, nor does it imply infallibility on the part of either the individual auditor or the audit organization." GAGAS 3.68. *Id.* at 55.

exercise of judgment inherent in the standards renders compliance with them a discretionary act.

In *Sloan*, the plaintiffs argued that because the United States Department of Housing and Urban Development (HUD) was required to comply with the federal audit standards, the department's actions were not discretionary. The court found the standards provided for the exercise of judgment. In concluding that HUD was entitled to immunity, the court noted the United States Supreme Court had defined a discretionary act as one that "involves choice or judgment." *Sloan*, 236 F.3d at 762-64 (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)). The plaintiffs in *Kellogg* made a similar argument that because the auditors were required to follow the GAGAS standards, the auditing actions were not discretionary. The court, citing *Sloan*, found that position to be an "untenable contention" and determined that audits involve the use of professional judgment and thus are discretionary actions. *Kellogg Brown & Root Servs., Inc.*, 102 F. Supp. 3d 648, 2015 WL 1966532 at *3.

While these decisions were rendered in the context of the discretionary function immunity under the Federal Tort Claims actions, the courts' conclusions are equally valid in the present setting. Even if the use of GAGAS is mandatory, GAGAS accords discretion in the manner in which the audit is conducted.

A challenge to such discretionary actions is sufficient for recall only if charges set forth sufficient facts demonstrating that the elected official exercised his or her discretion in a manner that was “manifestly unreasonable, or exercised that discretion on untenable grounds or for untenable reasons”. *Cole v. Webster*, 103 Wn.2d 280, 284-85, 692 P.2d 799 (1984). Mere disagreement with a discretionary decision, in contrast, is insufficient. *Matter of McNeill*, 113 Wn.2d at 308; *Jewett*, 123 Wn.2d at 450-51.

While Mr. Knedlik may disagree with decisions made by Auditor Kelley or his staff, he has made no showing that Auditor Kelley’s discretionary decisions regarding the scope and content of audit activities were “manifestly unreasonable,” or that Auditor Kelley exercised his discretion “on untenable grounds or for untenable reasons.” *Cole*, 103 Wn.2d at 284-85. A mere attack on an officer’s judgment is not sufficient in the absence of any allegation of fraud or arbitrary, unreasonable misuse of discretion by the elected official. *Chandler*, 103 Wn.2d at 275. Mr. Knedlik's allegations suffer from a similar absence of fraud. Nor do those allegations demonstrate that Auditor Kelley acted in an arbitrary or unreasonable manner. Accordingly, Proposed Charge #2 is legally insufficient and should be dismissed.

E. Mr. Knedlik's Proposed Charge Regarding Sound Transit Audits Should Be Dismissed as Factually Insufficient

1. Proposed Charge #2 Lacks Sufficient Detail Regarding The Date, Time, Location, Or Nature Of The Alleged Acts

In addition to the requirement that a recall charge be *legally* sufficient, a recall charge also must be *factually* sufficient to establish a prima facie case of misfeasance, malfeasance, or violation of the oath of office. *Chandler*, 103 Wn.2d at 274. To be factually sufficient, recall charges must “state the act or acts complained of in concise language [and] give a detailed description including the approximate date, location, and nature of each act complained of.” RCW 29A.56.110; *In re Recall of Reed*, 156 Wn.2d at 58.

A charge must provide specifics regarding when, where, and how the alleged violations occurred. *In re Ackerson*, 143 Wn.2d at 374. This “specificity” requirement enables the elected official to prepare a defense and ensures that the electorate could understand the charge if it reaches the ballot. *Recall of Telford*, 166 Wn.2d at 154. Proposed Charge #2 does not contain the required specificity. The trial court properly rejected it.

Here, the only “facts” Mr. Knedlik asserted about the Sound Transit audit related to activities that occurred before Auditor Kelley was elected and assumed office. CP 7-8. Mr. Knedlik fails to ever specify

what actions he alleges Auditor Kelley took or failed to take during his term, when those alleged actions took place, where they occurred, or the nature of the alleged violation. State law requires that the recall proponent provide such specificity, and Mr. Knedlik should not be permitted to evade that requirement. RCW 29A.56.110.

This void is particularly evident as it relates to Mr. Knedlik's "ballot-title" fraud allegations. Mr. Knedlik provides no explanation of what he means by "ballot-fraud," nor does his allegation contain any facts from which an understanding could be gleaned. CP 8. Similar difficulties attach to his allegations of debt-ceiling fraud. CP 8.

Nor does the recall charge contain a factual statement as to why any of these alleged acts constitute misfeasance, malfeasance, or violation of the oath of office. Consequently, the electorate would be unable to make an informed decision regarding the actions of Auditor Kelley from the information contained in this proposed charge.

**2. Mr. Knedlik Fails To Assert Any Facts Demonstrating
The State Auditor Intended To Act Unlawfully**

Even assuming his recall charges contained sufficient information that the official violated the law, Mr. Knedlik would still be required to

demonstrate Auditor Kelley's intent to commit an unlawful act. *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 263, 961 P.2d 343 (1998) (*Pearsall-Stipek II*). "This means that for the factual sufficiency requirement to be satisfied, the petitioner is required to demonstrate not only that the official intended to commit the act, but also that the official intended to act unlawfully." *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 765, 10 P.3d 1034 (2000) (*Pearsall-Stipek III*) (quoting *Pearsall-Stipek II*, 136 Wn.2d at 263). Again, Mr. Knedlik provides no alleged facts from which the Court could conclude that Auditor Kelley personally participated or was aware of the alleged misconduct or that he had any intent to violate the law. See *In re Recall of Pearsall-Stipek*, 129 Wn.2d 399, 405, 918 P.2d 493 (1996) (*Pearsall-Stipek I*).

These specificity requirements leave intact the inherent right of the people to recall elected officials for cause. Const. Art. 1, §§33, 34 (amend. 8). The only burden is that recall must be based on specific and definite charges. This is not a cumbersome burden

Cole, 103 Wn.2d at 285.

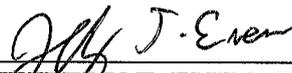
For these reasons, Mr. Knedlik's allegations about the Sound Transit audit and Auditor Kelley are factually insufficient and should be dismissed.

VI. CONCLUSION

The trial court correctly determined that the charges Mr. Knedlik filed in this matter were both factually and legally insufficient to support a recall proceeding. But this Court should not even reach the merits of Mr. Knedlik's recall charges because Mr. Knedlik has abandoned them, instead devoting his opening brief on appeal to a critique of a prior unrelated decision of this Court. Further, Mr. Knedlik's arguments relating to declaring the office of State Auditor vacant are not before the Court because they do not pertain to recall. This Court should affirm the Superior Court's judgment.

RESPECTFULLY SUBMITTED this 23rd day of December, 2015.

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