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WASHINGTON STATE
SUPREME COURT

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No. 96765-2

SENATOR
ATTORNEY GENERAL
STATE OF WASHINGTON

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**IN RE
INSLEE**

Review of a decision entered
by the Honorable Judge Lanese
of the Thurston County Superior Court

**APPELLANT'S
RESPONSE BRIEF**

Arthur West
120 State Ave. NE # 1497
Olympia, Washington, 98501

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III. ARGUMENT

1. The respondent's Reply Brief completely fails to address duties imposed by the Faithful Execution Clause of the State Constitution upon the Chief Executive Officer of the State of Washington in the face of an open and notorious statewide public health and safety emergency.

A notable omission of the Reply Brief is that it completely fails to address or even mention the central issue, the unique duties imposed upon Chief Executive Officers like a Governor or the President by the constitutional Faithful Execution Clause.

This omission evades a key issue in this case: the duty of the Governor of the State of Washington to faithfully execute the laws and to act in the case of public health and safety emergencies such as the statewide homelessness crisis in Washington.

The Corpus Juris Secundum (CJS) notes that:

“State constitutions also charge the governor with the duty of seeing that legislative acts are carried into effect and the responsibility for faithful execution of the laws. He or she must apply his or her full energy and resources to ensure that the intended goals of duly enacted legislation are effectuated.” CJS, STATES, at 254, citing *American Federation of State, County and Municipal Employees v. Martinez*, 132, 257 P.3d 952 (2011)

In *Martinez*, the Supreme Court of New Mexico, construing a clause virtually identical to Washington's Article III, section 5¹, held:

¹ The governor... shall see that the laws are faithfully executed.

Article V, Section 4 requires the Governor to "take care that the laws be faithfully executed." In order to carry out this constitutional mandate, the Governor is required to apply his or her full energy and resources to ensure that the intended goals of duly enacted legislation are effectuated. *Martinez*, citing *Op. of the Justices to the Senate*, 376 N.E.2d 1217, 1221 (Mass. 1978).

In viewing the actions of the Honorable Jay Inslee, it cannot be reasonably asserted that he "appl(ied) his...full energy and resources to ensure that the intended goals of duly enacted legislation (we)re effectuated in regard to the sanitary, nuisance and environmental laws that are as a result of the homelessness crisis being ignored, waived and/or flaunted across the State.

Respondent argues, as the counselors for the King of England in the *Case of Ship Money*² and Assistant Attorney General Baldrige in the *Case of Steel Seizure*³ that these prerogative powers are wholly discretionary and "no subject for the tongue of a lawyer"⁴ and that "the executive determines the emergencies and the courts cannot even review whether it is an emergency"⁵

² R v Hampden 3 State Tr 826 (1637)

³ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

⁴ See, generally, Bernard Schwartz, *Commentary on the Constitution of the United States*, (1983), at P. 79: "The last important restriction on Presidential prerogative...is that it is subject to judicial review. This restriction alone makes for an essential difference between the prerogative in our time and that asserted by the Stuart Kings. Today we recognize that to claim, as once did James I, that the prerogative is "no subject for the tongue of a lawyer" is a heresy inconsistent with the essence of our constitutional structure."

⁵ See Schwartz, *supra*, at P. 66, citing to the argument before the district court in the

Petitioner argued, and the Governor has not denied, that, viewed in the context of existing precedent on executive powers in our constitutional system, there is a recognized, judicially reviewable “organic” duty on the part of the executive to act to preserve the peace and security of the community over which he or she presides. See in accord, *In re Neagle*, 135 U.S. 1 (1890).

As the Attorney General of the State of Washington recognized in AGO 1991 No. 21:

Executive power given to the Governor by Washington's Constitution closely resembles, for obvious historical reasons, similar powers given to the President by the Federal Constitution. Thus, the Question of the extent of presidential power has instructive value in the interpretation of a state's Constitution with respect to the powers of its chief executive officer. Brown v. Barkely, 628 S.W.2d 616, 622 (Ky. 1982); Chang v. University of Rhode Island, 375 A.2d 925, 928, 118 R.I. 631 (1977) (See AGO 1991 No. 21)

The *Take Care Clause*, also known as the *Faithful Execution Clause* of our federal constitution provides that the President must "take care that the laws be faithfully executed." This clause in the Constitution imposes a duty on the President to enforce the laws of the United States.

Addressing the North Carolina ratifying convention, William

Steel Seizure case: THE COURT: So you contend the executive has unlimited power in time of an emergency? Mr. Baldrige: He has the power to take such action as is necessary to meet the emergency.... THE COURT: And the executive determines the emergencies and the court cannot even review whether it is an emergency. Mr. Baldrige: That is correct.

Maclaine declared that the Faithful Execution Clause was "one of the [Constitution's] best provisions." If the President "takes care to see the laws faithfully executed, it will be more than is done in any government on the continent; for I will venture to say that our government, and those of the other states, are, with respect to the execution of the laws, in many respects mere ciphers."

President George Washington interpreted this clause as imposing on him a unique duty to ensure the execution of federal law. Washington observed, "*it is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to [that duty.]*"

Similarly, in *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court explained unequivocally how the President executes the law: "The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, **"shall take Care that the Laws be faithfully executed,..."** (emphasis added)

In his Memoirs, Truman noted that: "Whatever the six Justices of the Supreme Court meant in their differing opinions of the constitutional powers of the president, we must always act in a national emergency"

In the present case it cannot reasonably be disputed that there is a widespread statewide emergency threatening the peace and security of the people of the State of Washington. Numerous government agencies have declared public health and safety emergencies to exist and requested State

assistance from the Governor, pointing out that only with a regional approach and sufficient resources can any progress be hoped for.

Yet after over 3 years of what has, through his inaction, become a perpetual state of emergency, our executive has refused to act to declare that an emergency exists or address a growing crisis which exists not only throughout the State but within walking distance of the offices of the three branches of the government of the State of Washington.

The Honorable Jay Inslee, (possibly due to his preoccupation with campaigning and attempting to use state resources to “do anything (he) can” to secure the passage of I-1631), has clearly failed “to apply his or her full energy and resources to ensure that the intended goals of duly enacted legislation are effectuated.” in the State of Washington.

State nuisance law, public health and safety laws and regulations, and the environmental laws protecting water, air and the quality of the environment have been “trampled upon with impunity” throughout this State for over 3 years, and yet the Governor, the only officer with authority to act in a decisive manner to end this perpetual state of emergency, and compel the faithful execution of the laws, refuses to perform his duty to act to preserve peace and security of the People of this State, even at the seat of government.

For the foregoing reasons, this Court should remand this case with instructions to approve the Ballot Synopsis.

2. The respondent's Brief fails to refute that the Petition and charges demonstrated an unreasonable failure to act to declare an emergency and to address the widespread breakdown in the administration of the sanitary, nuisance and environmental laws in the face of the statewide homelessness crisis, an open and notorious public health and safety emergency.

As no lesser authority than Jeffrey Meyers, WCIA counsel for the City of Olympia recently observed:

These (homeless) encampments do not have adequate sanitation, potable water, and are strewn with discarded needles, human and pet waste, rotting food, garbage, and trash which poses a significant risk of the spread of disease.

Failure to act in the face of this legislatively and judicially declared⁶ emergency in Olympia and throughout the State has resulted in an untenable permanent state of emergency where thousands remain unsheltered in unsafe, unhealthy, medieval style accommodations, and where the once thriving downtown areas of our cities are reduced to garbage, needle and feces ridden "mitigation site" wastelands where manifestly unhealthy and unsafe conditions are perpetuated, with no end in sight.

In failing to act to address this open, notorious, and ongoing emergency, Governor Inslee egregiously abused what little discretion he may have had in the performance of his duties under the Faithful Execution Clause, thereby committing misfeasance, malfeasance and a

⁶ See the December 21, 2018 ruling of the Honorable Judge Dixon in Cause No. 18-2-06080-34.

breach of his constitutional duties in a manner subject to recall.

The January 14, 2016 correspondence from the City of Bellingham filed in this case along with the Ballot Synopsis the Governor has been on notice of the nature of the homeless emergency and local jurisdictions inability to address it for some time now. The Bellingham letter stated...

Dear Governor Inslee,

I am writing to ask you to declare a state of emergency for the State of Washington around the issue of homelessness...*This is a crisis faced by communities throughout the West Coast, and we are asking that Washington join Hawaii in declaring this a state-wide emergency.* I believe it is *only with support at the state level that local jurisdictions will be able to adequately address this homelessness crisis... this endangers the health, safety and welfare of the people*,...and poses a threat to the environment and community development. We need decisive and swift action to prevent further suffering from this humanitarian disaster,.... (emphasis added)

A few Months later, Bellingham, along with 17 other Cities throughout the state sent another letter asking the governor to declare an emergency and to address homelessness as a statewide emergency.

Dear Governor Inslee:

As you are well aware, many of our communities throughout this state remain in crisis with regard to the growing number of people experiencing homelessness. Our state's current needs outweigh current capacity, leaving too many seniors, families, youth and individuals vulnerably sleeping on the street. The reasons underlying this crisis are many. No

local government or the State can solve this issue alone. This is why *we, the undersigned, are making a formal request to you as governor of the state of Washington to continue to build on your investments today by acknowledging the crisis at hand and officially declaring a state of emergency.* (emphasis added)

In light of this compelling demonstration that an emergency existed that only the governor's prerogative powers could address by nearly a score of elected officials throughout the State, and in his failure to act to declare an emergency even when this statewide severe public health and safety emergency created a severe public health and safety emergency in the very seat of government of the State of Washington, under which sanitation, nuisance, and environmental laws were suspended, governor Inslee committed misfeasance and violated his oath of office by failing to act to ensure that the laws of the State were faithfully executed.

By unreasonably failing to act to declare and address the open and notorious statewide homelessness emergency while this open, notorious, and undeniable emergency threatened the health and well being of citizens throughout the State, to say nothing of the environment, the Governor acted in a manner properly subject to recall.

In so doing, Governor Inslee violated constitutional and statutory duties unique in both kind and scope from those of lesser ministerial officials such as Mayor West.

In the case of the unique and supreme executive office held by the Governor, the constitutional grant of supreme executive authority and the concomitant duty to ensure that the laws are faithfully executed are as different from those of a Mayor or Port Commissioner as those of the King as opposed to a Reeve, Steward, or Bailiff.

Unlike a “Governor”, President or King, such lesser officials as Mayors, City Council members and Port Commissioners, (or Reeves, Stewards, and Bailiffs) lack supreme executive powers and have no duty to ensure that the laws are faithfully executed. This is a critical distinction which has not yet been explored extensively in published precedent in the context of recall proceedings, in that the recall of executive officers is vanishingly rare.

Yet there is good cause to hold that the unique powers of the Governor require a special standard. As CJS, GOVERNORS, at 255 notes:

(a)ll statutes concerning the rights and powers of the governor must be read in the context provided by sections of the state constitution that grant supreme executive authority to the governor and require that the governor take care that the laws be faithfully executed. CJS, GOVERNOR, at 255, citing Governor Bob Riley et al. v. Cornerstone Community Outreach 57 so. 3D 704 (Ala. 2010)

The principle set forth in the Governor Riley case that “*The*

Constitution makers did not leave any such loophole as to permit statutes enacted for general observance throughout the state to be set aside, or in practical effect repealed, in any particular section or area by the device of a failure or refusal of the local authorities to enforce such statutes” applies with particular effect to the conditions in Washington today where many local jurisdictions such as the City of Olympia are powerless or unwilling or unable to enforce the sanitary, nuisance and public health and environmental laws, due to the budgetary and political considerations, the sheer magnitude of the homeless emergency or vague and unworkable interpretations of the ruling of the 9th Circuit in the City of Boise case.

As the Riley Court observed:

It was foreseen, however, by the framers of the Constitution that for one cause or another, local conditions would sometimes arise which would render the local authorities powerless to enforce the laws, or unwilling or afraid to do so. It was to meet such conditions, as one of its purposes, that the constitutional and statutory authority which we have above mentioned in respect to the execution of the laws was vested in the Governor. The Constitution makers did not leave any such loophole as to permit statutes enacted for general observance throughout the state to be set aside, or in practical effect repealed, in any particular section or area by the device of a failure or refusal of the local authorities to enforce such statutes.

“Thus and for the stated reason, the chief executive was given the authority and it was made his duty to act to enforce the laws, duly and constitutionally enacted, in every

portion of the state, so that every citizen and all property would have the protection of the laws and that every criminal statute should be observed. Thus the power to enforce the laws is not left as a matter of finality to the discretion of the local authorities or the local inhabitants; but power was placed in the head of the executive department to act, in case of need, for the whole state. See Governor Bob Riley et al. v. Cornerstone Community Outreach 57 so. 3D 704 (Ala. 2010) (appended as an exhibit hereto)

The Governor of the State of Washington is not a mere Mayor or Port Commissioner, but possesses powers and duties unique to his office. The recall statutes should be construed in light of these unique powers and duties of the Governor, and the Ballot Synopsis should be approved.

3. The respondent's Brief completely fails to refute that the petition and charges demonstrated a pattern of deliberate violation of the mandatory duties imposed by RCW 43.06.040 and Article III.

The irreducible minimum of the acts complained of in this case stemming from the governor's out of state travel is that, on ten (10) occasions, in 2018 alone, the clear, mandatory terms of RCW 43.06.040 were knowingly and deliberately violated⁷.

The Petition, as filed, clearly demonstrated a deliberate pattern of violation of Article III⁸ and RCW 43.06.040 in that the Governor failed to

⁷ See exhibits of correspondence from Jay Inslee attached filed with the Ballot Synopsis at CP 19-38.

⁸ Respondent has asserted the Article III claims were waived but this is based upon an excerpt of argument that fails to meet the legal standard for such waiver. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to

reside at the seat of government, frequently absenting himself from Olympia and/or the State of Washington, and neglected to perform the duty of ensuring that the Lieutenant Governor would assume the office of Governor when the elected Governor was out of State.

The language of the statute is clear and unambiguous, and includes the imperative term “shall”.

If the governor absents himself or herself from the state, he or she shall, prior to his or her departure, notify the lieutenant governor of his or her proposed absence, and during such absence the lieutenant governor **shall** perform all the duties of the governor.
(RCW 43.06.040, emphasis added)

As this Court has recognized, absent contrary legislative intent the term “shall” in a statute is presumptively imperative and operates to create a duty:

The dispositive question is whether the word "shall" in the statute is a mandatory directive. The basic rule is clear. It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty. . . . The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent. *State v. Krall*, 125Wn.2d 146, 881 P.2d 1040 (1994), citing *Erection Co. v. Department of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)

waive; waiver will not be inferred from doubtful or ambiguous factors. *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346 354, 779 P.2d 697 (1989); *Wagner*, 95 Wn.2d at 102. The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver. *Rhodes v. Gould*, 19 Wn. App. 437, 441, 576 P.2d 914, review denied, 90 Wn.2d at 1026 (1978).

No contrary intent appears in Title 43.06 RCW, and therefore the word "shall" in RCW 43.06.040 is imperative and operates to create a duty.

Yet it is apparent in the records filed with the Petition (See CP 20-38) on 11 separate occasions the Honorable Jay Inslee deliberately violated this duty as evidenced by the communications to Secretary of State Wyman stating:

“While RCW 43.06.040 requires me to notify Lieutenant Governor Habib of my departure; he will also be out of state and is unable to serve as Acting Governor. Below are the dates and times I would like to ask you to serve in my place.” (CP 19-38)

Under these circumstances, there simply cannot be any legitimate claim that the duties created by the clear, mandatory terms of RCW 43.06.040 or the statute itself were “faithfully executed”, when this law was deliberately trampled upon with impunity as a matter of course.

While it may be possible for counsel to split hairs as to what the term “reside” in Article III, Section 24 requires, or whether the governor's frequent absences from the seat of government on business other than that of the People of the State of Washington were derelictions of duty per se, a pattern of orchestrating repeated deliberate violations of duties expressly required by law such as those in RCW 43.06.040 constitutes knowing misfeasance, malfeasance, and a violation of statutory and constitutional

duties.

Nor does Article III § 10 help the respondent in that it requires a **vacancy** in office.

Article III, § 10 provides that:

"In case of the removal, resignation, death or disability of the governor, the duties of the office shall devolve upon the lieutenant governor; and **in case of a vacancy** in both the offices of governor and lieutenant governor, the duties of the governor shall devolve upon the secretary of state.

The deliberate and repeated creation of a vacancy in office is undeniably misfeasance, malfeasance or breach of duty, and the Ballot Synopsis should be approved on this basis as well.

4. The charges, as set forth and supported by the petitioner, were legally and factually sufficient, when viewed as a whole, to give the elected official enough information to respond to the charges and the voters enough information to evaluate them.

The Trial Court, in entering the Order of January 11, 2019 (CP 207-8) erred in adopting a hyper-technical interpretation of the recall procedure completely at odds with that set forth by the Attorney General in their Amicus Memorandum or this Court in its' ruling in the recall of Mayor West. (See *In re Recall of West*, 155 Wn.2d 659, (2005))

As this Court held in the Mayor West recall:

Recall statutes are construed in favor of the voter. *Id.* at 814 (citing *Skidmore v. Fuller*, 59 Wn.2d 818 , 823-24, 370 P.2d 975 (1962)).

Technical violations of the governing statutes are not fatal, so long as the charges, read as a whole, give the elected official enough information to respond to the charges and the voters enough information to evaluate them. *Id.* Notwithstanding the petitioner's duty to plead with specificity, we will not strike recall efforts on merely technical grounds. *Id.* Accordingly, we may consider supporting documentation to determine whether the charges are factually sufficient. *See, e.g., id. Recall of West, at 663*

In rejecting the very same type of hyper-technical argument advanced by the respondent in this case, the Supreme Court in the recall of Mayor West approved the corrected synopsis and ruled:

Charges are factually sufficient to justify recall when, "taken as a whole they . . . state sufficient facts to identify to the electors and to the official being recalled acts **or failure to act** which without justification would constitute a prima facie showing of misfeasance." *Chandler v. Otto* , 103 Wn.2d 268 , 274, 693 P.2d 71 (1984). *Voters may draw reasonable inference from the facts; the fact that conclusions have been drawn by the petitioner is not fatal to the sufficiency of the allegations.* *Id.* 665 (Emphasis added)

As to the facts, this Court in the Recall of West held that:

We conclude the charge is factually sufficient...Read broadly, as a whole, and in favor of the voter,...

While the charges subscribed by the petitioner and filed along with the Ballot Synopsis in this case may not meet the elevated and hyper-technical standards suggested by the respondent, the charges allege

specific acts of misfeasance, malfeasance, and failure of duty to uphold the laws and oath of office of an executive officer, and, read as a whole, do give the elected official enough information to respond to the charges and the voters enough information to evaluate them. This is the correct standard, under which the Petition and Synopsis in this case should be approved.

CONCLUSION

This Court should rule in accord with its previous rulings and conclude the petition and charges in this case are legally and factually sufficient, when read broadly, and as a whole, and in favor of the voter.

For the foregoing reasons, appellant respectfully requests that this Court reverse the Trial Court's ruling in every respect and remand this matter back to the Superior Court with instructions to approve the ballot synopsis.

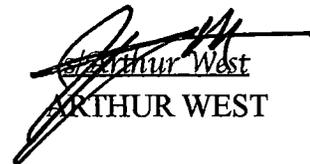
Respectfully submitted this 5th day of August, 2019.


~~Arthur West~~
ARTHUR WEST

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2019, I caused to be served a true and correct copy of the preceding document on the party listed below at their addresses of record via Email:

Jeffrey Even, Attorney for Respondent.


~~Arthur West~~
ARTHUR WEST