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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE RECALL OF JAY INSLEE,
Governor of the State of Washington.

**RESPONSE BRIEF OF JAY INSLEE, GOVERNOR OF THE
STATE OF WASHINGTON**

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I. INTRODUCTION

Elected officials are subject to recall by Washington voters only upon a showing of sufficient cause. Appellant Arthur West seeks to recall Governor Jay Inslee from office, but he fails to allege or demonstrate substantial conduct by the Governor constituting misfeasance, malfeasance, or the violation of the oath of office. Mr. West instead contends: (1) that the Governor sometimes leaves the state; (2) that the Governor's Mansion fails to constitute a residence for the Governor at the seat of government because the Governor has a one-person office in Washington, D.C., and a personal home elsewhere in the state; (3) that the Governor should have done more to combat homelessness; and (4) that the Governor illegally expressed support for a ballot measure. Mr. West fails to demonstrate that any of his charges are factually or legally sufficient to support a recall effort.

II. ISSUE

Is Mr. West's statement of charges factually and legally sufficient to support the proposed recall of the Governor?

III. STATEMENT OF THE CASE

Arthur West seeks the recall of Governor Inslee based on what the Attorney General articulated as a set of five charges.¹ CP 38. Paraphrased

¹ Separate and distinct from the Attorney General's role to provide representation to the Governor, RCW 43.10.030(3), separate counsel at the Attorney General's Office also prepared the ballot synopsis and petition that commenced this matter before the superior

in brief, Mr. West contends that the Governor should be recalled from office because he allegedly:

1. leaves the state frequently, thus in Mr. West's view creating a vacancy in the office of Governor, sometimes with the result of the Secretary of State serving as acting governor. CP 16-17;

2. fails to maintain a residence at the seat of government. CP 16-17;

3. failed to see that environmental, nuisance, and criminal laws are faithfully executed by allowing the City of Olympia to usurp the Governor's emergency's powers. CP 15, 17;

4. failed to use his executive powers to address homelessness, "a critical public safety and health emergency in the City of Olympia and throughout the State of Washington." CP 15; and

5. improperly used state resources to campaign for a ballot initiative. CP 17-18.

Mr. West submitted a variety of materials in support of these recall charges.

See CP 39-134; 144-46; 182-206.²

court. RCW 29A.56.130. These roles are unrelated and are performed by separate sets of counsel.

² The record also includes additional material Mr. West submitted in support of his motion for reconsideration, after filing his notice of appeal. CP 213 (notice of appeal); CP 214-19 (motion for reconsideration and materials in support). Those documents are not properly before this Court because Mr. West failed to note a hearing in the superior court

The superior court rejected Mr. West's charges. The court concluded that all of the charges are both legally and factually insufficient, and approved the Attorney General's ballot synopsis.³ CP 211-12. The court rejected Mr. West's first charge (that the Governor abdicated his office by being absent from the state and allowing the Secretary of State to serve as acting governor), ruling that it did not state a violation of law or include any facts showing an intent to violate the law. VRP 5:15 to 6:23.⁴ The court rejected Mr. West's second charge (that the Governor does not maintain a residence at the seat of government) without much elaboration because Mr. West agreed to "remove" the charge. VRP 5:6-14. Taking charges three and four together, the superior court acknowledged the seriousness of the homeless problem, but explained that the Governor's actions with regard to that topic are entirely discretionary. VRP 6:24 to 7:23. Finally, as to the fifth

on his motion for reconsideration. The trial court therefore never had occasion to consider those additional materials.

³ Mr. West now argues that the superior court "should have approved the synopsis composed by the Attorney General or corrected the ballot synopsis to more specifically reflect the charges, as supplemented." Appellant's Opening Br. at 22. As noted, the superior court did approve the synopsis. CP 211-12. Mr. West offers no cogent argument as to why the superior court should have changed the synopsis that he says should have been—and was—approved. Appellant's Opening Br. at 22-23. The point matters little, if at all, since the superior court's decision on the ballot synopsis is final and not subject to appeal. RCW 29A.56.140.

⁴ The record includes two transcripts of proceedings held on January 11, 2019. One records the argument of counsel, while the other sets forth the court's oral ruling. All citations are to the court's oral ruling, except in one instance noted otherwise. *See* note 6, *infra*.

charge, the court held that Mr. West failed to provide evidence that the Governor had improperly devoted state resources to the support of a ballot measure. VRP 7:24 to 9:5. The court denied Mr. West's request to modify the ballot synopsis. CP 211.

This appeal followed.

IV. SUMMARY OF ARGUMENT

All five of Mr. West's charges are both factually and legally insufficient to support his effort to recall the Governor from office. Mr. West's first charge asserts that the Governor should be recalled because of his out-of-state travel, sometimes leaving the Secretary of State to serve as acting governor when the Lieutenant Governor is absent as well. This charge is both factually and legally insufficient, because Mr. West offers only vague specifics as to the act or acts he contends supports this charge, and because there is no legal authority for the proposition that the Governor acts illegally in travelling out of state. Mr. West similarly offers no support for his notion that the Governor's absence from the state causes a vacancy in office, a claim that is not properly before the Court in this recall action in any event.

Mr. West abandoned his second charge in the superior court, and therefore it is not before this Court on appeal. In that charge, Mr. West originally contended that the Governor fails to maintain a residence at the

seat of government because he maintains a one-person office in Washington, D.C., and because he has a private residence elsewhere in the state. Mr. West admitted before the trial court that he has no basis in knowledge for contending that the Governor does not maintain a residence at the Governor's mansion and that this charge could be "removed" from his statement of charges. Mr. West attempts to argue the point on appeal anyway, but offers no sufficient basis for this charge.

Mr. West's third and fourth charges both relate to his claim that the Governor has not exercised his discretion in ways that Mr. West would prefer with regard to combatting homelessness. Policy differences such as this form no basis for a recall charge, and these charges are factually and legally insufficient.

Mr. West's fifth and final charge asserts that the Governor violated the law by supporting a 2018 ballot measure. This charge is factually insufficient because Mr. West makes no allegations regarding specific actions of the Governor to support the ballot measure. More fundamentally, it is legally insufficient because Washington law no more prohibits the Governor from taking a position on a ballot measure than it prohibits anybody else from doing so. The law prohibits only the use of state resources, beyond certain statutory exceptions, for this purpose. Mr. West

suggests no facts demonstrating any improper use of state resources by the Governor in support of a ballot measure.

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 and the voters enough information to evaluate the charges. *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. To Qualify for the Ballot, Charges Must Be Both Legally and Factually Sufficient

Washington requires that a recall be justified "for cause"; it is the only state, among those that provide a process for recall, to impose that requirement. *Estey v. Dempsey*, 104 Wn.2d 597, 600, 707 P.2d 1338 (1985). By requiring cause, Washington does not allow for purely political recalls.

Cole v. Webster, 103 Wn.2d 280, 285-86, 692 P.2d 799 (1984). To the contrary, Washington law limits recall, “to allow recall for cause yet free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations.” *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984). These limits are well-established and consistent with the intent of the framers of the recall provision. *In re Recall of Telford*, 166 Wn.2d 148, 152, 206 P.3d 1248 (2009).

Recall must be based on one or more acts of misfeasance, malfeasance, or violation of the oath of office. Misfeasance and malfeasance both mean “any wrongful conduct that affects, interrupts, or interferes with the performance of official duty.” RCW 29A.56.110(1). Misfeasance additionally means “the performance of a duty in an improper manner.” RCW 29A.56.110(1)(a). Malfeasance also means, “the commission of an unlawful act.” RCW 29A.56.110(1)(b). “‘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(2).

“The proponent of the recall petition bears the burden of establishing that the charges alleged in the recall petition are both legally and factually sufficient.” *In re Recall of Kelley*, 185 Wn.2d 158, 163, 369 P.3d 494 (2016). Factual sufficiency requires the proponent to concisely state each

charge, including “a detailed description including the approximate date, location, and nature of each act” that if true would constitute misfeasance, malfeasance, or the violation of the oath of office. *Recall of Sun*, 177 Wn.2d at 255. Each charge must demonstrate that the petitioner “knows of identifiable facts that support the charge.” *In re Recall of Reed*, 156 Wn.2d 53, 58, 124 P.3d 279 (2005). “[C]harges are factually sufficient only if they enable the voters and the challenged official to make informed decisions.” *Recall of Kelley*, 185 Wn.2d at 164 (citing *In re Recall of Wasson*, 149 Wn.2d 787, 791, 72 P.3d 170 (2003)).

To be legally sufficient, the petitioner must “state with specificity *substantial conduct clearly amounting* to misfeasance, malfeasance, or violation of the oath of office.” *In re Recall of Bolt*, 177 Wn.2d 168, 174, 298 P.3d 710 (2013) (emphasis by the court) (citing *Chandler*, 103 Wn.2d at 274). The petitioner states legally sufficient charges only if he or she identifies the “standard, law, or rule that would make the officer’s conduct wrongful, improper, or unlawful.” *In re Recall of Ackerson*, 143 Wn.2d 366, 377, 20 P.3d 930 (2001). “If recall is sought for acts falling within the elected official’s discretion, the official must have acted with a manifest abuse of discretion” for those acts to constitute legally sufficient charges. *Recall of Sun*, 177 Wn.2d at 255 (citing *Recall of Bolt*, 177 Wn.2d 168).

C. None of Mr. West’s Charges Are Factually or Legally Sufficient

The superior court found all of Mr. West’s charges legally and factually insufficient. CP 212. None of the grounds on which Mr. West relies demonstrate misfeasance, malfeasance, or a violation of the oath of office. RCW 29A.56.110.

1. The Governor’s Out-of-State Travel Neither Constitutes a Basis for Recall nor Creates a Vacancy in Office

Mr. West’s first charge concerns the Governor’s travels and residence. He asserts that the Governor took 32 trips out of state between January and August of 2018, and others thereafter. CP 16. This first charge is factually insufficient because Mr. West fails to concisely state each charge, including “a detailed description including the approximate date, location, and nature of each act” that he alleges constitutes the charge. *Recall of Sun*, 177 Wn.2d at 255.

This charge is also legally insufficient because Mr. West offers no showing that an absence from the state is illegal. State law contemplates that the Governor will travel out of state. In a statute that dates to the early days of statehood, the Legislature has provided by law:

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 (originally enacted as Laws of 1890 p. 629, § 6).

A statute instructing the Governor to give notice to the Lieutenant Governor before leaving the state necessarily implies that the Governor may leave the state. If it was illegal for the Governor to leave the state, RCW 43.06.040 would be entirely superfluous. *See Ralph v. Dep't of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (statutes must be construed such that they are not superfluous). Not surprisingly, Mr. West identifies no circumstance under which travel out of state would constitute misfeasance, malfeasance, or a violation of the oath of office, nor does he attempt to explain how any trip by the Governor falls within any such circumstance. *Recall of Bolt*, 177 Wn.2d at 174 (to be legally sufficient, the petitioner must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office).

Instead, Mr. West argues that the Governor violated RCW 43.06.040 when he travelled out of state and notified the Secretary of State of his absence. The Governor's letters to the Secretary of State upon which Mr. West relies reflect in each instance that he notified the Secretary because the Lieutenant Governor was unavailable to serve as acting governor. CP 25-35. This does not violate RCW 43.06.040, which merely requires notice to the Lieutenant Governor, who then acts as Governor. Mr. West offers no indication that the Governor failed to notify the Lieutenant Governor. To the contrary, the Governor's recitation of the

Lieutenant Governor's unavailability implies that the Governor did provide such notice. The Governor would otherwise have no apparent basis for making that statement to the Secretary.

Nothing in RCW 43.06.040 prohibits the Governor from leaving the state if the Lieutenant Governor is unavailable. Rather, the established practice over the decades has been that when both the Governor and Lieutenant Governor are out of state, the role of acting Governor devolves in turn on other executive offices in the order of succession set forth in the Constitution. Const. art. III, § 10; *see also State ex rel. Meyers v. Reeves*, 194 Wash. 503, 504, 78 P.2d 590 (1938) (lead opinion of Millard, J.). The question in *Meyers* differed from the issue presented in this case, but two of the concurring opinions document a general understanding that in the absence of both the Governor and Lieutenant Governor the Governor's duties devolve upon the Secretary of State. *Id.* at 509 (Robinson, J. concurring); *see also id.* at 512 (Geraghty, J., concurring). This was also the conclusion the Attorney General reached in advice to the Secretary of State while the facts of *Meyers* were occurring. Op. Att'y Gen. 1937-38 (1938), at 319-20 ("When the governor and lieutenant governor were both absent from the state, she, being secretary of state, became acting governor.").⁵

⁵ At issue in *Meyers* was whether the Secretary of State was subject to a writ of mandamus ordering her to attach the state seal to a proclamation calling the Legislature into special session. The Lieutenant Governor signed the proclamation while the Governor

Given this long understanding, Mr. West's reliance on RCW 43.06.040 provides no support to his recall effort.

Alternatively, the Court may conclude that Mr. West's first charge fails regardless of how the statute applies when the Lieutenant Governor is unavailable. That is because Mr. West does not show the Governor acted with "an intent to commit an unlawful act." *In re Recall of Lee*, 122 Wn.2d 613, 616, 859 P.2d 1244 (1993); *see also In re Recall of Sandhaus*, 134 Wn.2d 662, 670-71, 953 P.2d 82 (1998) (no evidence of intent to violate the law). The letters the Governor sent to the Secretary demonstrate that the Governor intended to fulfill legal and constitutional requirements, not violate them. This is obviously why the Governor notified the Secretary of his absence.

Mr. West's claim that out-of-state travel creates a vacancy in office similarly fails to state a basis for recall. A specific statute determines when an elective office becomes vacant. RCW 42.12.010. Travel out of state is

was out of state, but presented it to the Secretary to affix the seal only after the Governor returned to the state. *Meyers*, 194 Wash. at 504. This Court did not resolve in that case the question of who may exercise the powers of the Governor when both the Governor and the Lieutenant Governor are out of state. That issue is not before this Court, but candor to the tribunal obliges us to inform the Court that the question is currently pending in a request for a formal Opinion of the Attorney General independent of this case. For present purposes it is enough to note the longstanding understanding and practice, referenced in *Meyers*, that the Governor's authority devolves to the Secretary of State when both the Governor and Lieutenant Governor are absent. There can be no inference of an intent to violate the law by following this longstanding practice.

notably absent from the statutory list of causes of a vacancy. This argument is not even properly before the Court because the recall charges do not seek the Governor's removal on the basis that a vacancy already exists. CP 16-17 (arguing only that a vacancy in office exists when the Secretary of State serves as acting governor). All that is really before the Court is the sufficiency of the charges. CP 1-3; *see also Recall of Kelley*, 185 Wn.2d at 162 (allegation that an elected official's conduct created a vacancy in office was not properly before the court in a recall action). Even a judicial determination that a charge is sufficient would not result in declaring the office vacant; it would merely begin a petition process for placing a recall proposal before the voters. RCW 29A.56.150, .210.

In short, the first charge is both factually and legally insufficient. It is factually insufficient because Mr. West fails to identify the specific acts that he contends forms the basis of his charge. *Recall of Sun*, 177 Wn.2d at 255. The first charge is also legally insufficient because no law makes the Governor's travel or absences from Washington unlawful. This is not substantial conduct that constitutes misfeasance, malfeasance, or violation of the oath of office. The superior court properly held the first charge insufficient as a basis for recall.

2. Mr. West Fails to Demonstrate That the Governor Does Not Maintain a Residence at the Seat of Government

Mr. West’s second charge claims that the Governor fails to maintain a residence at the seat of government—Olympia—as required by article III, section 24 of the Washington Constitution. This charge is not properly before this Court on appeal because Mr. West abandoned it below. But even if this charge was presented, it would be both factually and legally insufficient for recall.

The superior court’s oral ruling noted that Mr. West abandoned this charge at hearing. VRP 5:6-14 (noting that Mr. West agreed to “remove” this charge). During oral argument at that hearing, the court asked Mr. West whether he continued to assert the second charge. Mr. West responded:

The residence issue, Your Honor, is not the strongest claim, and I openly admit that I have no personal knowledge to where the Governor is at each point during the day. That one, I think, could properly be removed”

VRP 11:18-22.⁶

A claim expressly abandoned before the trial court is not properly before an appellate court. *See Prostop v. State*, 186 Wn. App. 795, 822, 349 P.3d 874 (2015) (party waives an issue for review by failing to raise it with

⁶ As noted previously, the record includes two transcripts of the January 11, 2019 superior court hearing. *See* note 4, *supra*. One transcript sets forth the argument of counsel, while the other contains the court’s oral ruling. The passage quoted in text of Mr. West’s acknowledgment that charge 2 could be “removed” is the only citation in this brief to the transcript of the oral argument.

the trial court). Because Mr. West conceded that his charge regarding the Governor's residence lacked merit and "could be removed," Mr. West may not assert it before this Court. *Id.* In addition, Mr. West's open admission that he has no personal knowledge of the Governor's residence would defeat his recall claim in any event. *Recall of Reed*, 156 Wn.2d at 58.

This is enough to resolve this appeal as to Mr. West's second charge. But this charge would be factually and legally insufficient even if Mr. West had not conceded it. Mr. West's underlying assertion was that the Governor "failed to abide by article III, section 24 of the State Constitution by failing to reside at the seat of government in Olympia and, apparently, by maintaining books, papers and public records at his office in Washington D.C." CP 16. At no point did Mr. West dispute that the Governor maintains a residence at the Governor's Mansion in Olympia, which logically satisfies the constitutional requisite that the Governor "reside" at the seat of government. Const. art. III, § 24. Spending time elsewhere or employing a person in Washington, D.C. as a federal liaison is not illegal and suggests no violation of article III, section 24.

Mr. West's charges fail on their face to assert that the Governor does not "keep the public records, books and papers relating to [his] office[], at the seat of government," as required by article III, section 24. Mr. West simply alleges that the Governor has an office normally staffed by a single

employee in Washington, D.C. CP 126. Its existence in no way suggests that the Governor fails to keep records at the seat of government. *See Op. Att’y Gen. 24 (1987)*, at 19 (construing article III, section 24 to merely require that core administrative functions be located in Olympia).

Mr. West’s suggestion that the Governor has spent time on Bainbridge Island is also factually insufficient because Mr. West fails to allege any specific facts constituting the basis of his charge. *Recall of Kelley*, 185 Wn.2d at 165 (charge that the state auditor violated the residency provision was factually insufficient because charges failed to state any facts asserting he did not have a residence in Olympia). But even asserting that the Governor spends time away from the official residence does not demonstrate an intent to reside at Bainbridge, rather than the seat of government, making the charge legally insufficient as well. This conclusion is important because otherwise, under Mr. West’s theory, anytime a governor is absent from Olympia, a recall proponent could assert that he or she violated the residency requirement of article III, section 24. The Constitution is not that arbitrary, and the Governor does not become subject to recall simply by taking a vacation, spending Christmas at a family home, or attending a government function in Spokane.

Residency is a complex and often nuanced concept. *See Dumas v. Gagner*, 137 Wn.2d 268, 286, 971 P.2d 17 (1999) (“Residence is an

ambiguous word whose meaning in a legal phrase must be determined in each case.” (quoting *Restatement (Second) of Conflict of Laws* § 11 cmt. k (Am. Law Inst. 1971)). The State provides the Governor with an official residence, the Governor’s Mansion. Mr. West’s second charge is therefore legally insufficient.

This Court should affirm the superior court’s holding that Mr. West’s second charge is insufficient. Not only did Mr. West openly abandon it and concede the absence of the personal knowledge required to support it, the charges fail to demonstrate any violation of article III, section 24.

3. The Two Charges Related to the Governor’s Administration of Environmental, Nuisance, Criminal, Public Health, and Safety Laws with Regard to Homeless People Are Legally and Factually Insufficient

Mr. West next charges that the Governor should be recalled in connection with a general function of overseeing the “Environmental, Nuisance, and Criminal Laws of the State of Washington” and overseeing other powers related to public health and safety. CP 17. These charges are factually insufficient because they fail to identify any specific action by the Governor on any specific date that might constitute misfeasance, malfeasance, or violation of his oath of office. *Recall of Bolt*, 177 Wn.2d at 174 (to be legally sufficient, the petitioner must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance, or

violation of the oath of office). And they are legally insufficient because they are addressed only to the manner in which the Governor exercised discretion. “Lawful, discretionary acts are not a basis for recall.” *Recall of Telford*, 166 Wn.2d at 154. These charges do not claim that the Governor exercised discretion in a manifestly unreasonable manner, which would be the only circumstance under which discretionary actions could be the basis for recall. *Recall of Bolt*, 177 Wn.2d at 174 (citing *In re Recall of Shipman*, 125 Wn.2d 683, 685, 886 P.2d 1127 (1995)). General dissatisfaction with the exercise of discretionary authority does not provide a basis for recall. *In re Recall of Robinson*, 156 Wn.2d 704, 709, 132 P.3d 124 (2006) (“[T]he mayor’s reasonable exercise of discretion in negotiating contracts is not a legally sufficient reason for recall.”).

According to Mr. West, the Governor failed to see laws “faithfully executed” that would have—in some unarticulated way—addressed the effects of homelessness. That in turn, again according to Mr. West, allowed the City of Olympia “to usurp the preemptive Emergency Powers of the Governor of the State of Washington.” CP 17. Mr. West says, without support, that all this happened because the Governor was “occupied” with supporting an environmental initiative and traveling on non-State business. CP 17-18.

The discretionary nature of the Governor's role is plain on the face of the charges. Mr. West's charges offer no details about what the Governor did, on what day, or in what fashion. Rather, the charges simply allege that a condition exists in certain cities (unsheltered people, homeless encampments, and attendant problems) and that cities have been taking various measures to address those conditions. Mr. West implies that the Governor should have done something differently, without explaining what that would be. Mr. West's argument on this point distills to contending that a problem exists and that the Governor had a duty to resolve the problem in an unspecified way.

Disagreement with the Governor's exercise of discretion over broad subjects is no basis for recall. Mr. West's burden is to submit charges that specify how the Governor's discretion was illegally and knowingly exercised. Conclusory assertions that homelessness is a problem caused by the Governor's travel or support for an initiative are, at best, the kind of vague political arguments that this Court has repeatedly rejected. *See, e.g., Recall of Telford*, 166 Wn.2d at 159-60 (Washington's recall process is designed to avoid "reflecting on the popularity of the political decisions made by elected officers" (quoting *Chandler*, 103 Wn.2d at 270-71)); *In re Recall of Piper*, 184 Wn.2d 780, 791, 364 P.3d 113 (2015) (rejecting recall charges "motivated by a desire to politically reshape [a] PUD board");

Recall of Sandhaus, 134 Wn.2d at 670 (whether an elected official “is doing a satisfactory job of managing his office is a quintessential political issue” that does not properly form the basis of a recall charge); *In re Recall of DeBruyn*, 112 Wn.2d 924, 930, 774 P.2d 1196 (1989) (political disagreement does not provide a basis for recall); *Cole*, 103 Wn.2d at 286 (Washington does not allow recall based solely on political disagreement).

Mr. West argues that the Governor has the prerogative to “take care” to faithfully execute the laws, and that by failing to do so he permitted local governments to usurp his powers. Such a generalized approach to the Governor’s duties does not show how the charges meet the demanding requirements of Washington’s recall process. If recall could be based on arguments that an elected official is generally failing to exercise discretion in a way the recall proponent prefers, then every executive officer would always be subject to recall. Therefore the argument that the Governor did not respond to cities’ communications to him regarding homelessness in the way Mr. West would prefer—or take some action that Mr. West never specifies—underscores why these charges are factually and legally insufficient. Mr. West fails to identify specific acts or incidents of misfeasance, malfeasance, or violation of the oath of office.

Mr. West’s arguments fare no better when he argues that the Governor could take action using the law against nuisances in RCW 7.48 or

some unspecified environmental laws. That argument is no deeper than the social media meme Mr. West submitted in the superior court. CP 146. Political sloganeering does not meet the factual sufficiency obligation to specific actions wrongfully taken.

The fact that Mr. West's charges complain about action being taken by cities or agencies illustrates another reason why Mr. West does not show misfeasance, malfeasance, or the violation of the oath of office by the Governor. A public official cannot be recalled for the conduct of a separate agency (or, by extension, for the conduct of independent cities). *See Recall of Reed*, 156 Wn.2d at 58. Mr. West does little more than imply that the Governor could have taken some abstract action to address some problem associated with homelessness that the local governments were addressing.

Mr. West's third and fourth charges are insufficient because they lack specificity and charge the Governor with error in exercising discretion. His charges are neither factually nor legally sufficient.

4. Mr. West Makes No Showing to Support a Recall Charge based on the Governor's Support for Initiative 1631

Mr. West's final charge contends, without support, that the Governor used state resources and the authority of his office to campaign in support of Initiative 1631 (I-1631).⁷ CP 18. The problem is that Mr. West

⁷ Initiative 1631, relating to pollution, appeared on the November 2018 general election ballot. *See* election results at <https://results.vote.wa.gov/results/20181106/State->

identified neither any specific act that he contends was illegal, nor any authority for the notion that supporting an initiative would be illegal in the first place.

Mr. West's charge was not factually sufficient because his statement of charges gives no details about the alleged misuse of public resources—no dates, locations, or natures of acts. Further, his charge identifies no basis for his allegations—no demonstration that he knows facts showing a public official intended to violate the law. *See Recall of Bolt*, 177 Wn.2d at 174; *Recall of Telford*, 166 Wn.2d at 154. And as discussed in *Recall of Reed*, 156 Wn.2d at 58, there must be something more than the petitioner's personal belief that the charges are true. Mere conjecture or conclusory allegations are insufficient. *In re Recall of Roberts*, 115 Wn.2d 551, 554, 799 P.2d 734 (1990).

It is not illegal for a state official, including the Governor, to support or oppose a ballot measure. The only statute on the subject generally precludes any state officer or employee from using *the facilities of an agency* for the promotion of or opposition to a ballot proposition. RCW 42.52.180(1). The statute simply does not limit in any way, or even address, working for or against a ballot measure without using state

Measures-Initiative-Measure-No-1631-Initiative-Measure-No-1631-concerns-pollution.html.

resources. The statute further provides several exceptions even where the use of state resources is involved. It allows an elected official to comment on a ballot proposition so long as there is no “actual, measurable expenditure of public funds.” RCW 42.52.180(2)(b). And it allows “[d]e minimis use of public facilities by statewide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities.” RCW 42.52.180(2)(e).

The fact that it is generally legal, not illegal, for the Governor to support or oppose a ballot measure without an illegal use of state resources makes Mr. West’s fifth charge legally insufficient as well. Mr. West offers no indication that he is aware of any illegal use of state resources. For example, he cites an article from the Atlantic Magazine stating that the Governor supported I-1631. CP 122-24. But nowhere does the article suggest that the Governor made any illegal use of state resources. *Id.* Mr. West also cites emails and texts showing that staff informed Governor Inslee about a statement by Puget Sound Energy, and that there was a minor communication that related to him making a statement about I-1631 at an assembly of tribal governments. CP 109-13. These actions fit squarely into

RCW 42.52.180(2), and suggest no illegal use of state resources. It is axiomatic that Mr. West cannot state a sufficient basis for recall when he identifies no specific acts nor cites to any law that was violated. RCW 29A.56.110 (describing necessary content of recall charges).

VI. CONCLUSION

For these reasons, this Court should affirm the decision of the superior court holding that all of Mr. West's charges are factually and legally insufficient to support recall.

RESPECTFULLY SUBMITTED this 13th day of August 2019.

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DATED this 13th day of August 2019, at Olympia, Washington.

s/ Kristin D. Jensen
KRISTIN D. JENSEN
Confidential Secretary

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