FILED
SUPREME COURT
STATE OF WASHINGTON
7/27/2020 3:35 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 986835
Snohomish Co. Superior Court Cause No. 20-2-02972-31

WASHINGTON STATE SUPREME COURT

IN THE MATTER OF THE RECALL OF:

ADAM FORTNEY,
Sheriff, Snohomish County,

Respondent-Appellant.

APPELLANT'S OPENING BRIEF

George M. Ahrend
WSBA #25160
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000
gahrend@ahrendlaw.com

Mark Lamb
WSBA #30134
The North Creek Law Firm
12900 NE 180th St., Ste. 235
Bothell, WA 98011
(425) 368-4238
mark@northcreeklaw.com

Co-Counsel for Respondent-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ASSIGNMENTS OF ERROR 2

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

STATEMENT OF THE CASE.....3

A. In response to grievances filed by the Snohomish County Deputy Sheriff's Association, Fortney imposed discipline short of termination on two deputies and rehired a third deputy fired by his predecessor. 3

1. Allegations regarding Deputies Twedt and Boice. 3

2. Allegations regarding Deputy Wallin. 5

3. Fortney's response to union grievances on behalf of the deputies. 6

4. Recall petition regarding Fortney's response to the union grievances. 7

5. Superior court decision regarding Fortney's response to the union grievances. 9

B. Fortney made a factual public statement about an arrest that had been the subject of chatter on social media. 10

1. Allegations regarding the public statement.....12

2. Recall petition regarding the public statement.....14

3. Superior court decision regarding the public statement.....16

C. Fortney expressed disagreement in a Facebook post and a press conference with aspects of how the Governor's "Stay Home, Stay Healthy" order was being applied. 16

1. Allegations of "incitement." 18

2. Recall petition regarding "incitement." 23

3. Superior court decision regarding "incitement." 23

ARGUMENT 25

A. On de novo review, Petitioners cannot satisfy their burden to prove the factual and legal sufficiency of the grounds alleged for recalling Fortney. 25

1. Fortney's responses to the union grievances filed on behalf of Deputies Twedt, Boice and Wallin are factually and legally insufficient to justify recall. 28

2. Fortney's factual public statement about the arrest of S.W. does not violate Sheriff's Office Policy 1019 and is factually and legally insufficient to justify recall. 34

3. Questioning the Governor's stay-at-home order is factually and legally insufficient to justify recall on grounds of "incitement" 36

B. The superior court erred in correcting the ballot synopsis..... 38

C. If the superior court struck the declarations submitted with the motion for reconsideration, then doing so was manifestly unreasonable and the superior court erred by not considering them..... 41

CONCLUSION 43

CERTIFICATE OF SERVICE 44

TABLE OF AUTHORITIES

Cases

Brandenburg v. Ohio,
395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).....38

Chandler v. Otto,
103 Wn.2d 268, 693 P.2d 71 (1984).....25

Cole v. Webster,
103 Wn.2d 280, 692 P.2d 799 (1984).....32

In re Kelley,
185 Wn.2d 158, 369 P.3d 494 (2016).....26

In re Recall of Beasley,
128 Wn.2d 419, 908 P.2d 878 (1996)..... 27-28

In re Recall of Bolt,
177 Wn.2d 168, 298 P.3d 710 (2013).....32, 35

In re Recall of Burnham,
194 Wn.2d 68, 448 P.3d 747 (2019)..... 26-28

In re Recall of Estey,
104 Wn.2d 597, 707 P.2d 1338 (1985).....32

In re Recall of Levine,
194 Wn.2d 99, 448 P.3d 764 (2019).....27, 42

In re Recall of Pepper,
189 Wn.2d 546, 403 P.3d 839 (2017).....27

In re Recall of Reed,
156 Wn.2d 53, 124 P.3d 279 (2005).....27

In re Recall of Roberts,
115 Wn.2d 551, 799 P.2d 734 (1990) 27

In re Recall of Telford,
166 Wn.2d 148, 206 P.3d 1248 (2009) 25

In re Recall of Wade,
115 Wn.2d 544, 799 P.2d 1179 (1990) 27-28, 42

In re Recall of Washam,
171 Wn.2d 503, 257 P.3d 513 (2011) 35

In re Recall of West,
155 Wn.2d 659, 121 P.3d 1190 (2005) 26-27, 39

In re Recall of Young,
152 Wn.2d 848, 100 P.3d 307 (2004) 33

In re Zufelt,
112 Wn.2d 906, 774 P.2d 1223 (1989) 32, 39

Kreidler v. Eikenberry,
111 Wash.2d 828, 766 P.2d 438 (1989) 39

Overlake Hosp. Ass'n v. Dep't of Health of State of Washington,
170 Wn.2d 43, 239 P.3d 1095 (2010) 39

Shanghai Commercial Bank Ltd. v. Kung Da Chang,
189 Wn.2d 474, 404 P.3d 62 (2017) 41

State v. Bauer,
180 Wn.2d 929, 329 P.3d 67 (2014) 37

State v. Coleman,
155 Wn. App. 951, 231 P.3d 212 (2010), *rev. denied*,
170 Wn.2d 1016 (2011) 38

State v. Ferguson,
164 Wn. App. 370, 264 P.3d 575 (2011), *rev. denied*,
173 Wn.2d 1035 (2012) 38

State v. Graham,
194 Wn.2d 965, 454 P.3d 114 (2019) 41-42

State v. Roberts,
142 Wn.2d 471, 14 P.3d 713 (2000) 37

Statutes, Rules and Regulations

CR 59(a)(4) 42

RCW 9A.08.020(2)(c) & (3)(a)(i) 37

RCW 29A.56.110(1) 26

RCW 29A.56.110(1)(a) & (b) 26

RCW 29A.56.110(2) 26

RCW 29A.56.110-.270 25

RCW 29A.56.140 ..... 25, 38-39, 42

RCW 29A.56.140 and .270 25

RCW 36.28.010 ..... 7, 10, 23, 29-30

RCW 36.28.010(2) 24

RCW 36.28.010(6) 24

RCW 36.28.011 .....14, 16, 23, 25

RCW 36.28.020 .....14, 16

RCW 41.56.010 33

RCW 41.56.030(4) & 41.56.080 33

RCW 41.56.905 33

RCW 43.06.220(5) 17

Wash. Const. Art. I, §§ 33-34 25

INTRODUCTION

Adam Fortney ("Fortney") was duly elected as Sheriff of Snohomish County by a significant majority of the voters of the county last fall. Four Snohomish County lawyers, Colin McMahon, Brittany Tri, Samantha Sommerman, and Terry Preshaw (collectively "Petitioners"), seek to overturn the results of that election by recalling him from office. The superior court approved the sufficiency of their recall petition based on the following: (1) in response to grievances filed by the Snohomish County Deputy Sheriff's Association, Fortney imposed discipline short of termination on behalf of two deputies and rehired a third deputy who had been fired by his predecessor; (2) he made a factual public statement about an arrest that had been the subject of chatter on social media; and (3) in a Facebook post and at a press conference he questioned aspects of how the Governor's "Stay Home, Stay Healthy" order was being applied. Fortney asks the Court to reverse the superior court because the foregoing conduct is neither factually nor legally sufficient to justify a recall election and the wording of the recall ballot synopsis is unfair and misleading. Allowing recall to proceed under these circumstances would represent an unprecedented expansion of the recall power.

ASSIGNMENTS OF ERROR

1. The superior court erred in approving the recall petition as to ballot questions #2, #3 and #4. CP 36-37.[1]

2. The superior court erred in denying Fortney's motion for reconsideration as to ballot questions #3 and #4. CP 1-7.[2]

3. The superior court erred in wording the ballot synopsis as to ballot questions #3 and #4. CP 38.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are the grounds for recall stated in ballot questions #2, #3 and #4 factually and legally sufficient? (Assignments of error #1 & 2.)

2. Is the wording of ballot questions #3 and #4 adequate? (Assignment of error #3).

---

[1] The superior court also ruled that Fortney was subject to recall on ballot question #1, based on a separate Facebook post, following guidance he received from the Washington Association of Police Chiefs and Sheriffs, stating that he would not arrest anyone for violating the Governor's stay-at-home order. CP 36-38. Fortney does not appeal this aspect of the court's ruling and will stand for a recall election on this issue. The superior court rejected Petitioners' attempt to recall Fortney based on safety measures related to the COVID-19 virus that have been implemented at the Snohomish County Jail. CP 36 (order); CP 462-65 (petition). Petitioners have not cross appealed this issue.

[2] Although there is no order expressly striking declarations submitted by Fortney in support of his motion for reconsideration, Fortney assigns error to the extent the declarations were not considered. Fortney submitted the same four declarations for two purposes, first in connection with his objection to the ballot synopsis, and then in support of his motion for reconsideration. Petitioners moved to strike these declarations in both cases. CP 34 (lines 13-16, motion to strike in connection with reconsideration). The court orally granted the motion to strike in connection with the ballot synopsis. 6/9/20 RP at 8:21-10:9 & 53:3-8. The court orally reserved ruling on whether it would strike the declarations in connection with reconsideration. 6/9/20 RP at 9:25-10:3 & 53:3-8. The court subsequently denied Petitioners' motion to strike the motion for reconsideration in its written order. CP 3 (lines 23-25). The court also stated that the declarations did not constitute newly discovered evidence, CP 4 (lines 29-30), but the court nonetheless appeared to consider the declarations in ruling on the merits of the motion for reconsideration, CP 5-7. Thus, Fortney does not believe that the declarations were, in fact, stricken and only assigns error out of an abundance of caution.

STATEMENT OF THE CASE

A. In response to grievances filed by the Snohomish County Deputy Sheriff's Association, Fortney imposed discipline short of termination on two deputies and rehired a third deputy fired by his predecessor.

Before he was elected as Snohomish County Sheriff, Fortney raised concerns that he was subject to a politically motivated investigation into his conduct by the former sheriff who was his opponent in the election and boss in the workplace. CP 333-34. He filed a complaint with the Snohomish County Executive's Office regarding the investigation. *Id.* Fortney also expressed concern that three deputies who supported his campaign were fired in the month before the election for political reasons. CP 334. Fortney served as President of the Snohomish County Deputy Sheriff's Association for 12 years before he announced his candidacy, and the investigations of himself and the other deputies were being conducted contrary to the normal standards for such investigations. CP 333-34.

1. Allegations regarding Deputies Twedt and Boice.

Shortly before the election, Deputies Evan Twedt and Matthew Boice were terminated by the prior Sheriff on grounds of performing an illegal inventory search of a vehicle trunk and then trying to cover it up, based on events that occurred approximately two years beforehand. CP 292-316. Deputy Twedt had been a member of the Sheriff's Office for more than

four years, with positive performance evaluations and commendations, and no discipline. CP 301.

Deputy Boice had been a member of the Sheriff's Office for over 11 years, and he was Patrol Deputy of the Year in 2016. CP 314 & 326. He had positive performance and commendations, with only two incidents of discipline in his record. CP 314. When he was terminated, Deputy Boice was President of the Deputy Sheriff's Association, which had endorsed Fortney in the election. CP 324 & 342.

Before the election, Fortney noted that the deputies in the Snohomish County Sheriff's Office had not been adequately trained on a change in policy regarding inventory searches of a vehicle trunk, and that there were inconsistencies in the office's policies. CP 325 & 328. He wrote, "it has been learned that MOST OF THE PATROL WAS NOT AWARE OF THIS CHANGE IN POLICY." CP 325 (formatting in orig.). The new policy regarding inventory searches of vehicle trunks "is deep in a sheriff's policy manual written by the national law enforcement policy company Lexipol, on page 348 of 1,703." CP 325. In another reference on page 616, the manual does not specify what to do with items in the trunk. *Id.*

After he was elected, but before he took office, Fortney said that he "questioned the outgoing sheriff's conclusions" about Deputies Twedt and Boice, and that "he planned to give the case another look when he takes

office." CP 324. "He said he has not decided whether he will rehire the two deputies[.]" *Id.* (brackets added). If the deputies were dishonest, he said he would concur with the prior sheriff's termination of their employment. CP 324 & 330. He "made no promises to the fired deputies, except to say he'd give their case another look," when he assumed office. CP 330.

2. Allegations regarding Deputy Wallin.

Also before the election, Deputy Arthur Wallin was terminated by the prior Sheriff based on an incident involving an allegedly improper vehicle pursuit and use of deadly force. The only evidence in the record regarding the grounds for termination is contained in a letter later issued by Fortney that reinstated Deputy Wallin. CP 247-53. According to this evidence, the pursuit was in compliance with Sheriff's Office policy, CP 250-51, and the use of deadly force was justified, CP 251-53. The conclusion regarding the use of deadly force, in particular, was confirmed by the Snohomish County Prosecuting Attorney, who independently concluded:

> I believe a jury would likely find that Deputy Wallin, under the totality of the circumstances, was justified in using the force that resulted in [the decedent's] death …. Simply put, a jury would likely find that Deputy Wallin, based on all of the facts known to him at the time, had an objectively reasonable good faith belief in the necessity of using force and that he did so without malice.

CP 67 (brackets & ellipses added).[3]

The record does not otherwise reflect Deputy Wallin's length of service, performance evaluations, or commendations, although Petitioners have submitted certain disciplinary and training information unrelated to the incident that led to his termination by the prior sheriff. CP 199-220.

3. Fortney's response to union grievances on behalf of the deputies.

The Snohomish County Sheriff's Deputies Association submitted grievances regarding the terminations of Deputies Twedt, Boice and Wallin, pursuant to the collective bargaining agreement with Snohomish County. In response to the grievances, Fortney reviewed all documents compiled in the course of the investigations, and issued detailed letters explaining the reasoning for his decisions. CP 240-46 (Twedt and Boice); CP 247-53 (Wallin). He reinstated Deputies Twedt and Boice with formal reprimands, and he reinstated Deputy Wallin without further discipline. *Id.* Fortney informed the public of his decisions in these cases, stating:

> I wanted to reach out to the greater Snohomish County community and talk about the three deputies that I have reinstated over the last two weeks. I reinstated Deputy Wallin two weeks ago and last Friday I reinstated Deputy Boice and Deputy Twedt ….
>
> I fully realize that there are some in our community that will not agree with my decision(s) and that is okay. I am definitely aware I will never please some in social media circles and that's okay too. I

[3] The Prosecuting Attorney's report, CP 63-68, is an attachment to the declarations of Fortney filed in support of the motion for reconsideration.

> would hope that before you render a judgement, at a minimum, read my decision letters so you can see my reasoning for the reinstatement. Then I would like to ask those in our community that are vocal and disagree with my decision, did you consider, even for a second, that maybe, just maybe, the former Sheriff terminated these employees without cause? I believe the word I used during the campaign was "corrupt". What if that is an accurate statement and these employees never deserved to be terminated in the first place? They were fired in the heat of a very heated political campaign and each one of them were very loud vocal supporters of mine and not the sitting Sheriff at the time. One was even the union president of the Deputy Sheriff's Association that chose to endorse me and not the Sheriff. Did that factor in the former Sheriff's decision? I would say it did. Did you know that the former Sheriff berated the same union president just prior to his termination and blamed him personally for what was going wrong with his election campaign? Did this reflect in his decision making? Why did one deputy (not a vocal supporter) receive very minor discipline but the two vocal supporters of mine were terminated? Why was the treatment so disparate yet the alleged behavior so similar? I reinstated these deputy sheriff's because it was the absolute right thing to do and I stand by it 100%.

CP 342 (ellipses added).

4. Recall petition regarding Fortney's response to the union grievances.

The Petitioners' recall petition alleges that Fortney "endangered the peace and safety of the community and violated his statutory duties under RCW 36.28.010 when he rehired [these] deputy sheriffs[.]" CP 465. (brackets added). Specifically, the petition characterizes the imposition of discipline short of termination on Deputies Twedt and Boice and the rehiring Deputy Wallin as acts of "misfeasance." CP 465-66. With respect to Deputies Twedt and Boice, the alleged misfeasance consists of

"diminish[ing] public trust in law enforcement," "plac[ing] a shadow on the Snohomish County Sheriff's Office," and "cronyism." CP 466 (brackets added). With respect to Deputy Wallin, the misfeasance consists of "poor judgment, reckless decision making, and a complete lack of accountability within Sheriff Fortney's department." CP 465-66. The allegations of the petition were not supported by citation to any documentation. *See* CP 465-66.

When the petition was submitted to the superior court, one of the Petitioners filed a declaration, CP 288-359. The declaration attached the pre-disciplinary hearing letters for Deputies Twedt and Boice, issued by the prior Sheriff, CP 292-303 (Twedt); CP 305-16 (Boice); three memoranda and an email allegedly supporting the allegations in their pre-disciplinary hearing letters, CP 318-21 & 336-40; two newspaper articles, CP 323-31, & 345-49; and two Facebook posts by Fortney, one before and one after he was elected Sheriff, CP 333-34 & 342.

Petitioners attached additional documents to their reply, including another memorandum regarding the allegations of the pre-disciplinary hearing letters issued to Deputies Twedt and Boice, CP 184-97; and certain unrelated disciplinary and training information regarding Deputy Wallin, CP 199-220.

While Petitioners' declaration and reply did not attach the revised disciplinary letters issued by Fortney, they were submitted by Fortney in response to the petition. CP 240-46 (Twedt and Boice); CP 247-53 (Wallin). [4] Fortney also submitted the Prosecuting Attorney's report declining to charge Deputy Wallin in support of his motion for reconsideration. CP 63-68.

5. Superior court decision regarding Fortney's response to the union grievances.

On the basis of the allegations involving Deputies Twedt, Boice, and Wallin, the superior court ruled that the recall petition was sufficient to proceed with a special recall election. CP 36-37. The court recognized Fortney's decisions to impose discipline short of termination on Deputies Twedt and Boice and rehire Deputy Wallin were discretionary. 6/2/20 RP at 92:23-24 (stating "I don't think there's any dispute that personnel decisions are discretionary decisions"). The court reasoned that these decisions could be construed as an abuse of discretion, based on the investigation and discipline imposed by Fortney's predecessor and Fortney's alleged conflict of interest. 6/2/20 RP at 94:9-95:9.[5]

---

[4] Petitioners also claim that Snohomish County paid a $1 million settlement and that Fortney himself was disciplined as a result of the incident for which Wallin was terminated. CP 465. However, there is no documentation in the record supporting these allegations, and the superior court did not rely on these allegations in upholding the petition.

[5] In the view of the superior court, the alleged conflict of interest consists of: (1) Fortney's status as former supervisor of the deputies; (2) the pre-election memorandum he wrote regarding the lack of training on inventory searches; (3) the fact that Fortney appeared at

The court phrased the relevant ballot question in the following terms:

> Should Adam Fortney, Snohomish County Sheriff, be recalled from office for misfeasance, malfeasance, and/or violation of the oath of office for any of the following charged allegations ….
>
> Adam Fortney endangered the peace and safety of the community, violated his statutory duties under RCW 36.28.010, and exercised discretion in a manifestly unreasonable manner by rehiring three deputy sheriffs previously discharged following investigation and findings of misconduct[?]

CP 38 (ellipses & brackets added). The superior court denied Fortney's motion for reconsideration on this charge, CP 5-6, and overruled Fortney's objections to the phrasing of the ballot question, CP 38 (final ballot synopsis, question #3); CP 141 (proposed ballot synopsis, question #3).

B. Fortney made a factual public statement about an arrest that had been the subject of chatter on social media.

On March 27, 2020, the Director of Communications of Snohomish County, Courtney O'Keefe, received a call from a Transit Unit sergeant and her counterpart at Community Transit. CP 69. They expressed concern that there was incorrect information on the internet regarding an arrest that had recently happened. CP 69-70. Although there was conflicting information on social media, she found that the following narrative predominated:

---

the scene of the incident for which Deputy Wallin was disciplined; (4) the fact that Fortney had previously been president of the union, albeit not when the grievances were filed; and (5) the fact that at least two of the three deputies openly supported Fortney's election campaign. 6/2/20 RP at 93:21-94:8.

> On March 21, [S.W.[6]] was walking to her bus stop after a long day at work. She was listening to music and decompressing. She noticed that her bus was coming and began to run to catch it before it left without her. As she was running, a person grabbed her and physically took her to the ground. It was a Snohomish County Sheriff.

CP 70 (brackets added).

Director O'Keefe did not see any social media posts requesting to file a complaint or initiate an investigation into the incident. CP 70 & 73. However, she was concerned that the narrative was false, based on her reading of the arrest report. CP 70. According to the report:

> On 3/21/2020 at approximat[e]ly 1608 hours, [the deputy] was traveling northbound on Highway 99 near the 217th block. As [he] was approaching the intersection of 216th Street SW and Highway 99, [he] noticed that the north and southbound lights at this intersection were green. At this time, [he] noticed a female, later identified as [S.W.] cross Highway 99 at 216th Street SW (west to east). [S.W.] did use the crosswalk. However, the north and south traffic lights were still green, which made the crossing illegal. Because of [S.W.'s] actions, the vehicle that [he] was in front of had to slow down, so [S.W.] could safety cross the street.
>
> [The deputy] activated [his] lights and pulled in front of the platform. [He] exited [his] vehicle and advised [S.W.] why [he] was contacting her. [He] told [S.W.] to have a seat on the platform bench, and added that she was not free to go. [He] asked for [S.W.'s] information, but she did not provide it. [S.W.] was visibly shaken up and started crying. [S.W.] admitted to crossing the street illegally. When asked why she crossed the street illegally, [S.W.] told [him] her grandmother was sick and in the hospital. Because of that, she was trying to get on the Swift Blue Line, to go see her grandmother. As she was telling [him] this, the coach passed [their] location and parked just north of the platform. [The deputy] told [S.W.] the next coach was due in about twenty minutes. [He] also told [S.W.] [he]

[6] This brief uses the initials of the arrestee.

> would be willing to drive her to where she was going, but [he] needed to verify her information first.
>
> [The deputy] continued to try to get [S.W.'s] information, but she continued to argue with [him] about getting on the coach. [He] told [S.W.] at least one more time she was detained and not free to go. Around this time, [S.W.] abruptly got off of the bench and ran towards the parked coach. As [the deputy] ran after Sharon, [he] remember[s] telling her to stop, or saying something to that effect. [He] caught up to [S.W.] after she passed the Transit Platform. Due to [S.W.] not stopping, [he] tackled her to the ground.

CP 54 (brackets added). The arresting deputy's version of events was corroborated by available video. CP 77 & 83.

Director O'Keefe prepared a narrative based on the information in the arrest report and brought it to Fortney. CP 70. He had no prior knowledge of the event before she brought it to his attention. CP 70. As a standard response, she recommended that Fortney make a post on social media to provide the public with correct information. CP 70. This is normal practice, and something that Director O'Keefe does whenever she becomes aware of inaccurate information spreading rapidly about an incident that the Snohomish County Sheriff's Office is involved in. CP 71.

1. Allegations regarding the public statement.

Before responding to the incident, Fortney took the time to review all the case reports from every deputy and sergeant on the scene to ensure that no important details were left out. CP 45-46, 72 & 222. Based on his review, Fortney issued the following statement:

I was notified of the arrest of [S.W.] earlier today. I have since had the opportunity to review the pertinent case reports from the incident. While I understand the community concern that has gained much attention on social media, as is so often the case with social media, it is not the whole story. I think this would be a good opportunity to hear directly from me and a reminder to all about the legal requirements of Washington State law.

This incident began when a deputy sheriff was driving in the 21700 block of SR 99, Edmonds. As the deputy was driving northbound he observed [S.W.] cross from the west to the east in a marked crosswalk. Although this was a marked crosswalk, [S.W.] chose to disregard the red stop pedestrian signal and cross while the traffic light was green for north and south traffic to continue. The deputy observed that at least one other vehicle had to slow down to allow [S.W.] to cross even though the vehicle traffic had the green light.

The deputy in this case chose to stop [S.W.] and talk to her about this infraction. To be clear this is a violation of law, the deputy has every right to stop and talk to the person no matter who it is or what they are wearing, and request their identification for purposes of a citation. In nearly ALL cases of this type that I have experienced over 23 years of service it is a 5-10 min (at most) interaction with law enforcement and it may end with a citation or warning.

Unfortunately, this case took a different direction. [S.W.] refused to identify herself. While the deputy was speaking with [S.W.] she made the decision to get up from a seated position and run from the deputy. At this point in the contact, the deputy had no way to know why [S.W.] made the decision to get up and run but he felt he had an obligation to try and stop her. Our deputies face these split second decisions every day and this deputy was placed in this position by the actions of [S.W.]. He ran after her, tackled her, and arrested her.

Law enforcement is judged based on whether their actions are objectively reasonable under the totality of the circumstances. [S.W.] chose to cross a major highway against a red pedestrian light. At least one vehicle had to slow down in order to not hit her. This was witnessed by a deputy sheriff in a marked patrol car and in full uniform. [S.W.] refused to identify herself after a lawful order to do so and then made the situation worse by getting up from a seated

> position and running. Based on these circumstances, the deputy's actions are reasonable.
>
> While this entire incident is unfortunate, it is unfortunate because of the actions of [S.W.]. It would simply be unreasonable to have an expectation of law enforcement to simply watch people who decide to suddenly get up and run from the police and watch them run away.
>
> I have worked in south Snohomish County, along the Hwy 99 corridor for over two decades. There have been many, many pedestrian car crashes with people who try to illegally cross the multi-lane highway. So while this may seem like a "low level" infraction, there is a safety and education component to it as well. If [S.W.] would have cooperated with this lawful stop, she would have been to her destination without any problems at all. The deputy sheriff even offered to drive her to her destination once the contact was over.

CP 468-69 (brackets added). The foregoing statement did not foreclose an investigation nor, did it "clear" any personnel of wrongdoing. CP 72.

Before any complaint was received by the Sheriff's Office, the conduct of the deputy who arrested S.W. was reviewed because it involved use of force and was determined to be appropriate by his supervisors. CP 80-81. The Sheriff's Office later received a complaint about the arrest. CP 89-90. As noted above, the arresting deputy's version of events was corroborated by available video. CP 77 & 83. An investigation by his supervisors again confirmed no misconduct. CP 77-78 & 82-88.

2. Recall petition regarding the public statement.

The Petitioners' recall petition alleges that "Fortney violated his statutory duties under RCW 36.28.011 and RCW 36.28.020 when [he]

failed to investigate" the deputy who arrested S.W. CP 466 (brackets added).[7] The petition alleges that Fortney's statement effectively "cleared" the deputy of any wrongdoing and foreclosed any investigation, and that Fortney failed to properly investigate the deputy in violation of Sheriff's Office Policy 1019. CP 467. The policy requires supervisors to investigate allegations of misconduct against their subordinates. CP 500-13.

The allegations of the petition were not supported by citation to any documentation other than Policy 1019. CP 466-69. No additional documentation regarding this incident was submitted to the superior court by Petitioners, either in their declaration, CP 288-359, or as an attachment to their reply, CP 145-220.

In response to the petition, Fortney submitted a declaration from the Snohomish County Undersheriff, Jeff Brand, regarding this incident. CP 221-24. In support of his motion for reconsideration, he also submitted declarations from himself, Director O'Keefe, Sergeant Glenn DeWitt, and Lieutenant David Bowman. CP 45-90.

[7] The petition describes the deputy as "white" and "male," and further describes S.W. as "black" and "female." CP 467. In this way, Petitioners insinuate racial and sex-based discriminatory animus even though there is no support for such a claim in the record. CP 466-69.

3. Superior court decision regarding the public statement.

The superior court ruled that the recall petition was sufficient to proceed with a special recall election on the charge arising from Fortney's public statement about the arrest of S.W. and failure to investigate. CP 36-37. The court did not specify any basis for the charge other than potential violation of Policy 1019. RP 95:10-99:15.

The court phrased the ballot question in the following terms:

> Should Adam Fortney, Snohomish County Sheriff, be recalled from office for misfeasance, malfeasance, and/or violation of the oath of office for any of the following charged allegations ….
>
> Adam Fortney violated his statutory duties under RCW 36.28.011 and/or 36.28.020 and exercised discretion in a manifestly unreasonable manner by making a public statement on March 27, 2020 that absolved a deputy sheriff of asserted wrongdoing for tackling a black woman related to a jaywalking incident without ensuring a proper investigation?

CP 38 (ellipses added). The superior court denied Fortney's motion for reconsideration on this charge, CP 6-7, and overruled Fortney's objections to the phrasing of the ballot question, CP 38 (final ballot synopsis, question #4); CP 141 (proposed ballot synopsis, question #4).

C. Fortney expressed disagreement in a Facebook post and a press conference with aspects of how the Governor's "Stay Home, Stay Healthy" order was being applied.

On March 23, 2020, the Governor issued a stay-at-home order to Washington residents due to the COVID-19 virus. CP 228-32. The order did not address enforcement except to say that "[v]iolators of this order may

be subject to criminal penalties pursuant to RCW 43.06.220(5)." CP 232. The cited statute provides that willful violation of the order is a gross misdemeanor. RCW 43.06.220(5).

The Governor issued enforcement guidelines to address "numerous questions about enforcement issues that have arisen at the state and local levels." CP 238. According to the guidelines:

> The goal of the compliance process is to encourage voluntary compliance by educating the individual or business on the proclamation requirements and consequences for failure to comply.
>
> The initial contact by law enforcement or an agency should be primarily focused on education ….
>
> Law enforcement agencies will determine appropriate actions based on the law enforcement agency policy. It is not contemplated that incarceration would be an alternative unless there was a public safety threat beyond following the proclamation.

CP 239 (4th column; ellipses added). Upon receiving the enforcement guidelines, Fortney directed his staff to focus on voluntary education and compliance as described therein. CP 226 (¶ 5).

The day before the Governor issued his stay-at-home order, the Washington Association of Sheriffs & Police Chiefs issued guidance regarding how to communicate with the public in anticipation of such an order. CP 233-37. The guidance provided WASPC members such as Fortney with the following examples of helpful public communications:

> The following messages are being used by law enforcement leaders in California when a "stay-at-home" order was given, and they could

be the types of messages you could also utilize if a stay-at-home order is mandated. These points are provided as examples:

- The Governor is not asking law enforcement to enforce the statewide stay-at-home order. To preserve public health and safety the hope is that people will self-regulate their behavior and home isolate, protect themselves and go about only the essential activities using social distancing and common sense.

- Your local law enforcement has no intention of carrying out such restrictions with an enforcement effort. Our communities have already shown they understand the severity of the situation we are all experiencing and are doing all they can already to keep themselves, their families and neighbors-safe and healthy.

- Our deputies are not by any means going around different neighborhoods and areas checking to see if people are out when they shouldn't be. We understand some people need to carry out essential duties. If you need to go to the pharmacy and pick up your medication, that's OK. If you're out in the grocery store to pick up food, that's fine. We're not actively seeking people out. Again, we just want people to listen to the order and stay home if they don't need to be out.

- I want to be perfectly clear that neither the Sheriff's Office, nor any of the police departments have any desire to make any arrests or take anybody to jail for violations. We view our role more as one of education. Educating people how to keep themselves safe, how to keep their families safe and most importantly, to keep the rest of the community safe. especially our vulnerable populations. is the purpose of this order.

CP 236 (formatting in orig.).

1. Allegations of "incitement."

On March 23, 2020, in response to a record number of 9-1-1 calls regarding the Governor's stay-at-home order, Fortney uploaded the following post to his campaign Facebook page:

> I want to clarify that the governor is NOT asking law enforcement to enforce a statewide stay-at-home order. To preserve public health and safety, the goal of today's announcement is to encourage people to self-regulate their behavior and home isolate, protect themselves and go about only the essential activities, while practicing social distancing and common sense ….
>
> As your elected sheriff, I have no intention of carrying out enforcement for a stay-at-home directive. For the most part, our communities have already shown they understand the severity of the situation we are all experiencing and are doing all they can already to keep themselves, their families and neighbors safe and healthy.
>
> Our deputies are not going to be going around neighborhoods to check to see if people are out when they shouldn't be. There are a lot of people in Snohomish County that we rely on to carry out essential duties. And we understand county residents need to carry out certain essential errands to keep their families and households safe. If you need to go to the pharmacy and pick up your medication, that's OK. If you’re out in the grocery store to pick up food, that's fine. We will not actively be seeking people out that may be in violation of this directive. We will not ask for badges, identification, or a letter that certifies why you are out. We just want people to listen to the order and stay home if they don't need to be out.
>
> The Snohomish County Sheriff's Office will not make any arrests or take anybody to jail for violations. We view our role more as one of education: educating people how to keep themselves safe, how to keep their families safe and most importantly, to keep the rest of the community safe, especially our elderly and other vulnerable populations.

CP 474-75 (ellipses added). The text of this Facebook post mirrors the guidance Fortney received from WASPC, quoted above. CP 236. Like the WASPC guidance, Fortney used the word enforcement to refer to arrest, CP 225-26 (¶ 4), as confirmed by the language of the post specifically

stating "[t]he Snohomish County Sheriff's Office will not make any arrests or take anybody to jail for violations," CP 475. (brackets added).

On April 21, 2020, in response to a speech by the Governor, Fortney uploaded the following post to his Facebook page:

> I just watched the Governor's speech to Washingtonian's regarding our approach to getting Washington back in business and I am left to wonder if he even has a plan? ….
>
> I want to start by saying this virus is very real and sadly, it has taken 97 lives in Snohomish County. This is a very serious issue and the appropriate precautions need to be taken to protect our most vulnerable populations. However, our communities have already shown and continue to show they understand the severity of the situation and are doing all they can already to keep themselves, their families and neighbors safe and healthy.
>
> I am worried about the economy and I am worried about Washingtonian's that need to make a living for their family. As more data floods in week by week and day by day about this pandemic I think it is clear that the "models" have not been entirely accurate. While that is okay, we cannot continue down the same path we have been on if the government reaction does not fit the data or even worse, the same government reaction makes our situation worse.
>
> As elected leaders I think we should be questioning the Governor when it makes sense to do so. Are pot shops really essential or did he allow them to stay in business because of the government taxes received from them? That seems like a reasonable question. If pot shops are essential, then why aren't gun shops essential? Our Governor has told us that private building/construction must stop as it is not essential, but government construction is okay to continue. So let me get this right, according to the Governor if you are employed or contracted by the government to build government things you can still make a living for your family in spite of any health risk. If you are a construction worker in the private sector you cannot make a living and support your family because the health risk is too high. This contradiction is not okay and in my opinion is bordering on unethical.

As I arrive to work at the courthouse, I see landscapers show up each day to install new landscape and maintain our flowerbeds. How has Governor Inslee deemed this essential work? However, a father who owns a construction company and works alone while outdoors is not allowed to run his business to make a living to provide for his wife and children? How has Governor Inslee deemed thousands of Boeing employees who work inside a factory building airplanes essential? But building residential homes is not essential? If a factory with 20,000+ employees each day can implement safe practices to conduct normal business operations, I am entirely confident that our small business owners and independent contractors are more than capable of doing the same.

If this Coronavirus is so lethal and we have shut down our roaring economy to save lives, then it should be all or nothing. The government should not be picking winners or losers when it comes to being able to make an income for your family. If the virus is so lethal it shouldn't matter whether you are building a school for the government, building a new housing development, restaurant owner, or you happen to be an independent contractor. To the contrary, if the virus is proving to not be as lethal as we thought, maybe it's time for a balanced and reasonable approach to safely get our economy moving again and allowing small businesses to once again provide an income for their families and save their businesses. This is what I hoped for from the Governor tonight but he is not prepared or ready to make these decisions. If we are going to allow government contractors and pot shops to continue to make a living for their families, then it is time to open up this freedom for other small business owners who are comfortable operating in the current climate ….

As I have previously stated, I have not carried out any enforcement for the current stay-at-home order. As this order has continued on for well over a month now and a majority of our residents cannot return to work to provide for their families, I have received a lot of outreach from concerned members of our community asking if Governor lnslee's order is a violation of our constitutional rights.

As your Snohomish County Sheriff, yes I believe that preventing business owners to operate their businesses and provide for their families intrudes on our right to life, liberty and the pursuit of happiness. I am greatly concerned for our small business owners and

> single-income families who have lost their primary source of income needed for survival.
>
> As your elected Sheriff I will always put your constitutional rights above politics or popular opinion. We have the right to peaceably assemble. We have the right to keep and bear arms. We have the right to attend church service of any denomination. The impacts of COVID 19 no longer warrant the suspension of our constitutional rights.
>
> Along with other elected Sheriffs around our state, the Snohomish County Sheriff's Office will not be enforcing an order preventing religious freedoms or constitutional rights. I strongly encourage each of you to reach out and contact your councilmembers, local leaders and state representatives to demand we allow businesses to begin reopening and allow our residents, all of them, to return to work if they choose to do so.
>
> The great thing about Snohomish County government is we have all worked very well together during this crisis. I'm not saying we agree all of the time, I'm saying we have the talent and ability to get this done for Snohomish County! This is not a time to blindly follow, this is a time to lead the way.

CP 477-80 (ellipses added). As with the prior Facebook post, Fortney used the word enforcement to refer to arrest. CP 225-26 (¶ 4).

Fortney reiterated the comments made in his Facebook posts during a press conference on April 23, 2020. CP 457 & 461. In an interview with the news media on May 22, 2020, Fortney stood by his Facebook posts. CP 351. One barber-shop owner in Snohomish County was reportedly "inspired" by the Facebook posts to reopen his shop. CP 352.

When the Snohomish County Sheriff's Office received a request from the Governor's office to enforce the stay-at-home order by serving

notice of revocation of a business license on a Snohomish County business, the office promptly served the notice without incident. CP 226 (¶ 6). The Sheriff's Office has not received any other requests for specific enforcement of the stay-at-home order. CP 226 (¶ 7).

2. Recall petition regarding "incitement."

The Petitioners' recall petition alleges that Fortney violated his duty to enforce the Governor's stay-at-home order and further that "he incited members of the public to violate" the order, thereby "endanger[ing] the peace and safety of the community and violat[ing] his statutory duties under RCW 36.28.010 and RCW 36.28.011." CP 456-62 (brackets added). While Fortney has not contested the sufficiency of the failure-to-enforce charge and will stand for a recall election on that issue, he does contest the sufficiency of the "incitement" charge. The petition does not specifically characterize the incitement charge in terms of misfeasance, malfeasance, or violation of the oath of office. CP 459-62. The petition cited Fortney's second Facebook post and press conference quoted and described above as the evidence supporting the incitement charge. CP 459-62.

3. Superior court decision regarding "incitement."

The superior court ruled that the recall petition was sufficient to proceed with a special recall election regarding the incitement charge. CP 36-37. While acknowledging Fortney's statement that "I strongly

encourage each of you to reach out and contact your councilmembers, local leaders and state representatives to demand we allow businesses to begin reopening and allow our residents, all of them, to return to work if they choose to do so," CP 479-80, the court was persuaded principally by the statement that the stay-at-home order does not warrant suspension of constitutional rights, 6/2/20 RP at 84:19-20, and the statement at the end of the post that "[t]his is not time to blindly follow, this is a time to lead the way," 6/2/20 RP at 84:25-85:21 (brackets added). The court concluded that these statements constituted a prima facie violation of RCW 36.28.010(2), which provides "[t]he sheriff … [s]hall defend the county against those who, by riot or otherwise, endanger the public peace or safety," RCW 36.28.010(6), which provides "[t]he sheriff … [s]hall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections," and Fortney's oath of office to "faithfully and impartially discharge the duties of his or her office to the best of his or her ability," RCW 36.16.040. 6/2/20 RP at 87:1-14.

The court phrased the relevant ballot question in the following terms:

> Should Adam Fortney, Snohomish County Sheriff, be recalled from office for misfeasance, malfeasance, and/or violation of the oath of office for any of the following charged allegations ….

> Adam Fortney endangered the peace and safety of the community and violated his statutory duties under RCW 36.28.0l0 and/or 36.28.011 and/or oath of office by inciting the public to violate Governor Inslee's "Stay Home - Stay Healthy" proclamation[?]

CP 38 (ellipses & brackets added).

From the foregoing decisions, Fortney timely seeks direct review by this Court pursuant to RCW 29A.56.140 and .270. CP 8-21.

ARGUMENT

A. On de novo review, Petitioners cannot satisfy their burden to prove the factual and legal sufficiency of the grounds alleged for recalling Fortney.

Washington's constitutional and statutory provisions governing recall are unique in that they require a showing of cause before a recall can proceed. *Chandler v. Otto*, 103 Wn.2d 268, 270, 693 P.2d 71, 72 (1984). This requirement "prevent[s] recall elections from reflecting on the popularity of the political decisions made by elected officers," and "protect[s] an elected official from being subjected to the financial and personal burden of a recall election grounded on false or frivolous charges." *In re Recall of Telford*, 166 Wn.2d 148, 159-60, 206 P.3d 1248, 1254 (2009) (quoting *Chandler*, 103 Wn.2d at 270-72; brackets added).

Elected officials in Washington may only be recalled for malfeasance, misfeasance, or violation of their oath of office. Wash. Const. Art. I, §§ 33-34; RCW 29A.56.110-.270. "'Misfeasance' or 'malfeasance' in office means any wrongful conduct that affects, interrupts, or interferes

with the performance of official duty[.]" RCW 29A.56.110(1). Further, "misfeasance" is "the performance of a duty in an improper manner," and "malfeasance" is "the commission of an unlawful act." RCW 29A.56.110(1)(a) & (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 Court serves an essential gatekeeping function "to ensure that the recall process is not used to harass public officials by subjecting them to frivolous or unsubstantiated charges." *In re Recall of Burnham*, 194 Wn.2d 68, 76, 448 P.3d 747, 751 (2019) (quoting *In re Recall of West*, 155 Wn.2d 659, 662, 121 P.3d 1190 (2005)). In discharging this function, the Court must determine whether the recall petition is both factually and legal sufficient. *Burnham*, 194 Wn.2d at 76.

The proponents of a petition for recall have the burden of proving factual and legal sufficiency. *In re Kelley*, 185 Wn.2d 158, 163, 369 P.3d 494, 496 (2016). "Factual sufficiency requires that a recall petition give a detailed description including the approximate date, location, and nature of each act complained of, which, if accepted as true, would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office." *Burnham*, 194 Wn.2d at 76 (quot. omitted). Legal sufficiency "requires that a recall petition state with specificity substantial conduct

clearly amounting to misfeasance, malfeasance or violation of the oath of office." *Id.* (quot. omitted). The petition "must identify a standard, law or rule that makes the elected official's conduct unlawful." *Id.* A discretionary act cannot serve as a legally sufficient basis for recall unless the elected official exercised discretion in a manifestly unreasonable manner. *Id.*

Factual and legal sufficiency are determined from the face of the recall petition and supporting documentation. *In re Recall of Reed*, 156 Wn.2d 53, 58, 124 P.3d 279, 281 (2005) (citing *West*, 155 Wn.2d at 663). The petitioner "need not have firsthand knowledge of the facts supporting a petition but must present some evidence beyond mere belief or speculation that the charges are true." *In re Recall of Levine*, 194 Wn.2d 99, 103, 448 P.3d 764, 767 (2019). "[M]ere insinuations, speculation, or a belief that the charges are true, absent other evidence, is not enough." *In re Recall of Pepper*, 189 Wn.2d 546, 555, 403 P.3d 839, 844–45 (2017) (brackets added); *accord In re Recall of Roberts*, 115 Wn.2d 551, 555, 799 P.2d 734, 736 (1990) ("conjecture" insufficient).

The Court may also consider information submitted in response to the petition. *See Levine*, 194 Wn.2d at 104. "[S]uch evidence is admissible for the purpose of determining whether there is any factual basis for the charges." *Id.* (quoting *In re Recall of Beasley*, 128 Wn.2d 419, 427, 908 P.2d 878, 882 (1996); brackets added); *accord In re Recall of Wade*, 115

Wn.2d 544, 550, 799 P.2d 1179, 1182 (1990) (considering affidavits submitted in opposition to petition).

This Court reviews a superior court determination regarding the sufficiency of a recall petition de novo. *Burnham,* 194 Wn.2d at 77. The Court does not owe any deference to the superior court and performs its own analysis of factual and legal sufficiency. *Id.* at 77. In this case, the Petitioners cannot satisfy their burden of establishing factual and legal sufficiency of the charges they have leveled against Fortney.

1. Fortney's responses to the union grievances filed on behalf of Deputies Twedt, Boice and Wallin are factually and legally insufficient to justify recall.

For the recall charge based upon reinstating Deputies Twedt, Boice, and Wallin, Petitioners do not allege malfeasance on the part of Fortney or violation of his oath of office. CP 465-66. The petition is limited to allegations of misfeasance, which consist of "diminish[ing] public trust in law enforcement," "plac[ing] a shadow on the Snohomish County Sheriff's Office," and "cronyism" with respect to imposing discipline short of termination on Deputies Twedt and Boice, and "poor judgment, reckless decision making, and a complete lack of accountability within Sheriff Fortney's department" with respect to reversing the termination of Deputy Wallin. CP 465-66. The ballot synopsis describes the alleged misfeasance in terms of "endanger[ing] the peace and safety of the community,

violat[ing] [Fortney's] statutory duties under RCW 36.28.010, and exercis[ing] discretion in a manifestly unreasonable manner[.]" CP 38 (brackets added).

These allegations are factually insufficient. There is nothing more than the naked assertion of Petitioners that imposing discipline short of termination on Deputies Twedt and Boice and reinstating Deputy Wallin in response to their union grievances diminishes public trust, casts a "shadow" over the Sheriff's Office, or endangers the peace and safety of the residents of Snohomish County.

There is no evidence of "cronyism" with respect to Deputies Twedt and Boice simply because Fortney previously supervised the deputies or served as President of the union of which they were all members. Nor is there any evidence of cronyism simply because deputies supported Fortney's election campaign. While Fortney was concerned with the way the deputies had been treated by the prior sheriff, he had not made a decision whether to rehire them. He stated that, if they had been dishonest, he would concur with the prior sheriff's termination of their employment. CP 324 & 330. It is significant that Fortney publicly raised his concerns about the prior sheriff's treatment of the deputies before the election occurred, so that the voters could take those concerns into account before casting their votes. It

would be perverse to subject him to recall after his election for following through on concerns he raised in the course of the campaign.

Not only is the recall petition in this case factually insufficient, it is also legally insufficient because Fortney did not violate any provisions of the collective bargaining agreement, internal policies of the Sheriff's Office, or any other standard, law or rule in responding to the grievances. Nothing prohibits the Sheriff from responding to a grievance submitted on behalf of former subordinates. They are still his subordinates. Nothing prohibits a Sheriff from responding to a grievance simply because he previously served as President of the union. Fortney resigned his position with the union before the grievances were submitted. Lastly, nothing prevents a Sheriff from responding to a grievance submitted on behalf of deputies that supported his campaign.

The only statute Petitioners and the ballot synopsis reference is RCW 36.28.010, which delineates the general duties of a sheriff as follows:

> The sheriff is the chief executive officer and conservator of the peace of the county. In the execution of his or her office, he or she and his or her deputies:
>
> (1) Shall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses;
>
> (2) Shall defend the county against those who, by riot or otherwise, endanger the public peace or safety;

> (3) Shall execute the process and orders of the courts of justice or judicial officers, when delivered for that purpose, according to law;
>
> (4) Shall execute all warrants delivered for that purpose by other public officers, according to the provisions of particular statutes;
>
> (5) Shall attend the sessions of the courts of record held within the county, and obey their lawful orders or directions;
>
> (6) Shall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they may call to their aid such persons, or power of their county as they may deem necessary.

Nothing in this statute addresses personnel or collective bargaining matters, let alone prohibits Fortney from taking the actions he took in response to the grievances in this case.

At root, the Petitioners simply disagree with the severity of the discipline that Fortney meted out to Deputies Twedt and Boice and his reversal of Deputy Wallin's termination. Petitioners rely on the fact that the former sheriff terminated them. However, this is akin to relying on an appellate court decision that has been reversed in order to support a legal argument. The discipline imposed by Fortney's predecessor was subject to review and reversal in the grievance process.

As Petitioners and the superior court recognized, Fortney's response to the grievances was discretionary. 6/2/20 RP at 92:23-24. There was no abuse of discretion because Fortney followed the grievance process,

considered all of the relevant materials, and issued a detailed written decision that explained his reasoning. CP 240-53. His reasoning is not manifestly unreasonable. *Id.* With respect to Deputies Twedt and Boice, his reasoning is supported by the concerns about lack of training that he raised before the election. CP 325 & 328. With respect to Deputy Wallin, his reasoning is bolstered by the Prosecuting Attorney's report that the deputy was justified in using deadly force. CP 67.

These are exactly the sort of discretionary personnel decisions that should be protected from recall. *In re Recall of Bolt*, 177 Wn.2d 168, 175-76, 298 P.3d 710, 716 (2013) (holding recall charge insufficient because no abuse of discretion to terminate employee for performance problems); *In re Zufelt*, 112 Wn.2d 906, 912, 774 P.2d 1223, 1227 (1989) (holding recall charge insufficient because no abuse of discretion to limit disciplinary action against police officer who damaged police car while intoxicated); *In re Recall of Estey*, 104 Wn.2d 597, 602, 707 P.2d 1338, 1342 (1985) (holding recall charge insufficient because refusing to renew employment contract is discretionary); *Cole v. Webster*, 103 Wn.2d 280, 286, 692 P.2d 799, 803 (1984) (holding recall charge insufficient because no abuse of discretion to knowingly and willingly retain an incompetent employee).

The Court should be especially reluctant to subject an elected official to recall based upon decisions made in the course of collectively

bargained-for dispute resolution proceedings, given both the discretion involved and the importance of collective bargaining for public employees. "The intent and purpose of [the Public Employees' Collective Bargaining Act (or "PECBA")] is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers." RCW 41.56.010 (brackets added). To achieve this purpose, the PECBA is subject to a rule of liberal construction. RCW 41.56.905. The rights expressly protected by the PECBA include grieving disciplinary actions by public employers. RCW 41.56.030(4) & 41.56.080.

An elected official should only be subject to recall for knowingly and willingly violating a collective bargaining agreement. *In re Recall of Young*, 152 Wn.2d 848, 853, 100 P.3d 307, 310 (2004) (stating "if an elective public officer knowingly and willingly breaks a collective bargaining agreement and thereby unnecessarily causes substantial financial harm, this may be considered an improper act and a violation of oath," subjecting the officer to recall). Since Fortney did not violate the collective bargaining agreement between the county and the Deputy

Sheriffs' Association, he should not be subject to recall for his response to the union grievances at issue in this case.

2. Fortney's factual public statement about the arrest of S.W. does not violate Sheriff's Office Policy 1019 and is factually and legally insufficient to justify recall.

For the recall charge based upon Fortney's statement about the arrest of S.W., Petitioners do not specify whether they consider Fortney's alleged conduct to constitute malfeasance, misfeasance, or violation of his oath of office. CP 466-69. They focus upon the alleged violation of Sheriff's Office Policy 1019, CP 467, as did the superior court, RP 95:8-99:15. This charge is factually insufficient because there is no violation of the policy, even assuming the Petitioners' allegations are true. The policy does not preclude a public statement based on the best-available factual information in order to respond to a false narrative that is being disseminated through social media. CP 500-13 (Policy 1019). This has been standard practice in the Sheriff's Office since before Fortney was elected. CP 71.

The statement made by Fortney did not foreclose a complaint or investigation under the policy, nor did it "clear" the arresting officer of any wrongdoing. CP 72. On the contrary, an investigation was conducted in response to a complaint the Sheriff's Office received regarding the incident. CP 77-78 & 82-88. The investigation of the deputy's actions by his supervisors, who are charged with conducting such an investigation under

the policy, concluded that he had not engaged in any wrongdoing. *Id.* Their conclusion was based in part on video evidence corroborating the deputy's version of what transpired during the arrest. CP 77 & 83. In the absence of any basis for concluding that a violation of Policy 1019 occurred, this recall charge is factually insufficient.

Moreover, the recall charge is legally insufficient because no Washington case has ever upheld the sufficiency of charge based solely on violation of an internal policy. *Bolt*, 177 Wn.2d at 175 (violation of progressive discipline policy held insufficient under the circumstances). The Court has not determined whether violation of a local ordinance is sufficient to justify recall, let alone an internal policy. *In re Recall of Washam*, 171 Wn.2d 503, 516 n.7, 257 P.3d 513, 519 n.7 (2011) (noting "Washam does not contend, and thus we do not consider, that violation of county ordinances is not a recallable offense"). Petitioners and the superior court assumed, without establishing, that violation of Policy 1019 warrants recall. As sheriff, Fortney should have discretion in interpreting and applying, or even changing, his office's internal policy without having to face the prospect of recall.

3. Questioning the Governor's stay-at-home order is factually and legally insufficient to justify recall on grounds of "incitement."

Separate and apart from the charge that Fortney's questioning of the Governor's stay-at-home order justified recall for failure to enforce the order, Petitioners argued, CP 456-62, and the superior court ruled, that it also constituted incitement for members of the public to violate the order. This conclusion is both factually and legally insufficient.

As a matter of factual insufficiency, Fortney unequivocally stated in his Facebook post "I strongly encourage each of you to reach out and contact your councilmembers, local leaders and state representatives to demand we allow businesses to begin reopening and allow our residents, all of them, to return to work if they choose to do so." CP 480. This is the only action that Fortney asked the readers of his Facebook post to take, and it does not constitute an injunction to violate the law. The balance of the Facebook post expressed frustration regarding the seeming inconsistencies in how the Governor's stay-at-home order was being applied. CP 477-80. It advocated for a consistent all-or-nothing approach that left room for the exercise of constitutional rights. *Id.* Relying on excerpts of the statement—none of which expressly asked or told members of the public to violate the Governor's stay-at-home order—in order to infer intent to incite the public

to violate the law effectively prevents Fortney from expressing any disagreement or criticism of the way the law has been applied.

As a matter of legal insufficiency, culpability for inciting the commission of a crime requires knowledge that the incitement will promote or facilitate the commission of the crime under the accomplice liability statute, RCW 9A.08.020(2)(c) & (3)(a)(i). Although Petitioners and the superior court were not specific regarding the legal basis for the charge of incitement, there is no other basis for incitement-based culpability. As stated in *State v. Roberts*, 142 Wn.2d 471, 510-11, 14 P.3d 713, 735 (2000):

> The language of the accomplice liability statute establishes a mens rea requirement of "knowledge" of "the crime." RCW 9A.08.020(3)(a). The statute's history, derived from the Model Penal Code, establishes that "the crime" means the charged offense. The comment to Model Penal Code § 2.06(3)(a), which is identical to RCW 9A.08.020(3)(a), requires the accomplice to "have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge* " and states, "*he will not be liable for conduct that does not fall within this purpose.*" MODEL PENAL CODE § 2.06 cmt. 6(b)(1985)(emphasis added). The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has "knowledge," the mens rea of RCW 9A.08.020.

(Emphasis in orig.; footnote omitted.) "For accomplice liability to attach, the defendant must have knowledge that his actions will promote or facilitate the commission of *the* particular crime at issue." *State v. Bauer*, 180 Wn.2d 929, 943, 329 P.3d 67, 74 (2014) (emphasis in orig.; quot. omitted). This approach to accomplice liability is necessary to protect

speech activities that are not performed in aid of a crime and that only consequentially further the crime. *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P.3d 212, 217 (2010), *rev. denied*, 170 Wn.2d 1016 (2011) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)); *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575, 578 (2011), *rev. denied*, 173 Wn.2d 1035 (2012) ("Because the [accomplice liability's] statute's language forbids advocacy directed at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*"; brackets added).

In this case, there is no evidence that Fortney had any intent to foster a particular crime. For his part, Fortney denied any such intent. CP 225. The most that Petitioners can point to is a single barbershop in Snohomish County that was "inspired" to reopen by Fortney's Facebook post. CP 352. This is insufficient to establish "incitement" because there is no evidence whatsoever that Fortney's Facebook post was intended to produce this act. As a result, he should not be subject to recall on these grounds.

B. The superior court erred in correcting the ballot synopsis.

The superior court has authority to "correct" a ballot synopsis, as the superior court did in this case. RCW 29A.56.140. However, the court cannot "correct" the basis for recall alleged in the petition by correcting the ballot

synopsis. *In re Recall of West*, 155 Wn.2d 659, 668-69, 121 P.3d 1190, 1195 (2005) (Madsen, J., concurring). If the recall charge is factually and legally sufficient, then the lower court has authority to ensure the ballot synopsis correctly sets forth the allegations that support the charge. *Id.* "If, conversely, the charge is legally and/or factually insufficient then the recall petition must be dismissed and no "correction" by the trial court to the ballot synopsis can save it." *Id.*

"Any decision regarding the ballot synopsis by the superior court is final." RCW 29A.56.140. Appellate review of the ballot synopsis by this Court is not generally available. *Zufelt*, 112 Wn.2d at 910 (citing *Kreidler v. Eikenberry*, 111 Wash.2d 828, 834, 766 P.2d 438 (1989)). However, the Court retains inherent power to determine whether the superior court's decision is arbitrary, capricious, or contrary to law. *Kreidler*, 111 Wn.2d at 837. A decision "is arbitrary and capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances." *Overlake Hosp. Ass'n v. Dep't of Health of State of Washington*, 170 Wn.2d 43, 50, 239 P.3d 1095, 1098 (2010).

In this case, the ballot synopsis approved is arbitrary and capricious in two significant respects. First, question #3 on the ballot synopsis states that Fortney "rehir[ed] three deputy sheriffs previously discharged following investigation and findings of misconduct[.]" CP 38 (brackets

added). The phrasing of this question reflects a willful and unreasoning disregard of the facts and circumstances because the deputies were not simply rehired. They were reinstated—with discipline short of termination in the cases of Deputies Twedt and Boice—in response to the union grievance process. They were not rehired in spite of prior findings of misconduct, but rather because the prior findings were determined to be unwarranted, as confirmed by Fortney's pre-election concerns regarding lack of training in the case of Deputies Twedt and Boice and the Prosecuting Attorney's finding regarding the justifiable use of force by Deputy Wallin. The ballot question improperly omits reference to the grievance process, the discipline imposed on Deputies Twedt and Boice, and the fact that the prior findings of misconduct against all three deputies were found to be unwarranted.

Second, question #4 on the ballot synopsis states that Fortney's public statement regarding the arrest of S.W. "absolved a deputy sheriff of asserted wrongdoing for tackling a black woman related to a jaywalking incident without ensuring a proper investigation." CP 38. This ballot question also reflects a willful and unreasoning disregard of the facts and circumstances. Contrary to the phrasing of the ballot question, Fortney's statement did not "absolve" the deputy who arrested S.W., nor did it foreclose an investigation into the circumstances of the arrest. The ballot

question incorrectly indicates that S.W. was tackled for jaywalking and that no investigation was conducted. Most importantly, the ballot question references the race and sex of S.W., even though there is no indication of racial or sex-based discriminatory animus. In this way, the phrasing of the ballot question seems to be cynically tapping into legitimate concerns that have recently come to the fore regarding disparate treatment of and disparate impact upon racial minorities in connection with law enforcement. These ballot questions are contentiously phrased to sidestep the merits of the recall charges and, if the recall is allowed to proceed with the questions as phrased, will prevent a fair recall election.

C. If the superior court struck the declarations submitted with the motion for reconsideration, then doing so was manifestly unreasonable and the superior court erred by not considering them.

The order denying Fortney's motion for reconsideration is ambiguous regarding whether the declarations submitted in support of his motion were considered or not. CP 3-7; *supra* note 2. In the event they are found to be stricken, then the superior court erred in doing so. The superior court's denial of the motion for reconsideration is reviewed for an abuse of discretion. *Shanghai Commercial Bank Ltd. v. Kung Da Chang*, 189 Wn.2d 474, 479, 404 P.3d 62, 65 (2017). "A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or

for untenable reasons." *State v. Graham*, 194 Wn.2d 965, 970, 454 P.3d 114, 116 (2019).

The new declarations were offered to provide further factual context for the court to consider when determining the sufficiency of the charges. Evidence submitted in response to a petition is "admissible for the purpose of determining whether there is any factual basis for the charges." *Levine*, 194 Wn.2d at 104. CR 59(a)(4) permits reconsideration when there is "[n]ewly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." (brackets added). The declarations were newly discovered. CP 23. The declarations are material and not cumulative because they provide further factual context to the incidents forming the basis of the charges. *Wade*, 115 Wn.2d at 550 (further factual evidence in affidavits used to show factual and legal insufficiency of charge). Considering the new declarations should have made it even clearer that the charges were factually and legally insufficient.

Fortney had a mere ten days from receipt of the petition to filing his response. CP 23; RCW 29A.56.140 ("Within fifteen days after receiving the petition, the superior court shall have conducted a hearing …"). In light of this short timeframe and the difficulty in gathering all the relevant facts, it

would be unreasonable not to consider the declarations submitted on reconsideration.

CONCLUSION

Based on the foregoing, Fortney asks the Court to reverse the decision of the superior court and hold that the petition for recall is factually and legally insufficient as to ballot questions #2, #3 and #4, and that ballot questions #3 and #4 are improperly worded as set forth herein. The recall election should be limited to ballot question #1.

Respectfully submitted this 27th day of July, 2020.

s/George M. Ahrend_____
George M. Ahrend, WSBA #25160
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000
Email gahrend@ahrendlaw.com

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I electronically filed the foregoing with the Washington State Appellate Court's Secure Portal system, which will send notification and a copy of this document to all counsel of record:

Attorney for Snohomish County:
Rebecca J. Guadamud
rebecca.guadamud@co.snohomish.wa.us
kmurray@co.snohomish.wa.us

Pro Se Recall Petitioners:
Colin J. McMahon
colinjamesmcmahon@gmail.com

Samantha Sommerman
ssommerm@gmail.com

Brittany M. Tri
brittanytri@gmail.com

Terry T. Preshaw
terrypreshaw@mac.com

and upon Mark Lamb via email pursuant to prior agreement for electronic service at: mark@northcreeklaw.com.

Signed at Moses Lake Washington on July 27, 2020.

Shari M. Canet, Paralegal

AHREND LAW FIRM PLLC

July 27, 2020 - 3:35 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98683-5
Appellate Court Case Title:	In Re Petition for Recall of Adam Fortney
Superior Court Case Number:	20-2-02972-4

The following documents have been uploaded:

- 986835_Briefs_20200727153255SC887562_8707.pdf
  This File Contains:
  Briefs - Attorneys Opening Brief
  The Original File Name was 2020-07-27 Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- Rebecca.Guadamud@co.snohomish.wa.us
- brittanytri@gmail.com
- colinjamesmcmahon@gmail.com
- kmurray@snoco.org
- mark@northcreeklaw.com
- ssommerm@gmail.com
- terrypreshaw@mac.com

Comments:

Sender Name: George Ahrend - Email: gahrend@ahrendlaw.com
Address:
100 E BROADWAY AVE
MOSES LAKE, WA, 98837-1740
Phone: 509-764-9000

Note: The Filing Id is 20200727153255SC887562