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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 REPLY BRIEF

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REPLY STATEMENT OF THE CASE

A. Fortney's response to grievances filed by the Snohomish County Deputy Sheriffs Association on behalf of Deputies Twedt and Boice.

Petitioners do not dispute the following facts regarding Fortney's response to the grievances filed on behalf of Deputies Evan Twedt and Matthew Boice:

- Before he was elected as Snohomish County Sheriff, Fortney raised concerns that three deputies were subject to a politically motivated investigation by the former sheriff, who was his opponent in the election and boss in the workplace. App. Br., at 3 (citing CP 333-34).

- Before he was elected, Fortney filed a complaint about the politically motivated investigation with the Snohomish County Executive's Office. App. Br., at 3 (citing CP 334).

- The investigations were conducted contrary to the normal standards for such investigations, based on Fortney's experience as President of the Snohomish County Deputy Sheriffs Association, a position he held for 12 years before announcing his candidacy for Sheriff. App. Br., at 3 (citing CP 333-34).

- Deputies Twedt and Boice were terminated by the prior Sheriff shortly before the election. App. Br., at 3 (citing CP 292-316).

- Before his termination, Deputy Twedt had a spotless record. App. Br., at 3-4 (citing CP 301).

- Deputy Boice was Patrol Officer of the Year in 2016 and President of the Deputy Sheriff's Association, which had endorsed Fortney in the election. App. Br., at 4 (citing (CP 314, 324, 326 & 342).

- The terminations of Deputies Twedt and Boice were based on events that occurred approximately two years before. App. Br., at 3 (citing CP 292-316).

• Deputies Twedt and Boice were terminated in part for allegedly violating Sheriff's Office policy regarding inventory searches of vehicle trunks. App. Br., at 3 (citing CP 292-316).

• Before the election or the terminations of Deputies Twedt and Boice, Fortney raised concerns that there were inconsistencies in the policy and a lack of adequate training. App. Br., at 4 (citing CP 325 & 328).

• After he was elected, but before he assumed office, Fortney stated that he would give the terminations "another look," but that he made no promises to the deputies and if he determined that their terminations were warranted, he would concur with the former sheriff. App. Br., at 4-5 (citing CP 324 & 330).

• The Snohomish County Deputy Sheriffs Association filed grievances on behalf of Deputies Twedt and Boice. App. Br., at 6 (citing CP 240-46).

• In the course of the grievance process, Fortney reviewed all documents compiled in the course of the former sheriff's investigation of Deputies Twedt and Boice. App. Br., at 6 (citing CP 240-46).

• Fortney reinstated Deputies Twedt and Boice with formal reprimands. App. Br., at 6 (citing CP 240-46).

• He explained his decision in a detailed letter and a public statement. App. Br., at 6-7 (citing CP 240-46 & 342).

Petitioners rely on the former sheriff's investigation and termination of Deputies Twedt and Boice. Resp. Br., at 8, and Fortney's alleged "personal connection and political allegiance to these deputies," *id.* at 27, to justify recalling Fortney. Petitioners do not claim that Fortney violated the collective bargaining agreement between Snohomish County and the Deputy Sheriffs Association, nor do they claim that he violated any other

standard, rule, or law in reversing the terminations of Deputies Twedt and Boice and reinstating them with lesser discipline.

B. Fortney's response to the grievance by the Snohomish County Deputy Sheriffs Association on behalf of Deputy Wallin.

Petitioners do not dispute the following facts regarding Fortney's response to the grievance filed on behalf of Deputy Arthur Wallin:

- Deputy Wallin was one of the deputies subject to the investigation about which Fortney complained prior to the election, described above.

- Deputy Wallin was terminated by the prior sheriff shortly before the election. App. Br., at 5 (citing CP 247-53).

- Deputy Wallin was terminated for an allegedly improper vehicle pursuit and use of deadly force. App. Br., at 5 (citing CP 247-53).

- The Snohomish County Deputy Sheriffs Association filed a grievance on behalf of Deputy Wallin. App. Br., at 6 (citing CP 247-53).

- In the course of the grievance process, Fortney reviewed all documents compiled in the course of the former sheriff's investigation of Deputy Wallin. App. Br., at 6 (citing CP 247-53).

- Based on his review of the relevant information, Fortney reinstated Deputy Wallin, concluding that he complied with Sheriff's Office policy regarding vehicle pursuits and the use of deadly force was justified. App. Br., at 5 (citing CP 250-53).

- Fortney explained his decision in a detailed letter and a public statement. App. Br., at 6-7 (citing CP 247-53 & 342).

- The Snohomish County Prosecutor independently reviewed Deputy Wallin's use of deadly force and confirmed that it was justified. App. Br., at 5-6 (citing CP 67).

As with Deputies Twedt and Boice, Petitioners rely on the former sheriff's investigation and termination of Deputy Wallin to justify recalling Fortney, although the investigation documents and the termination letter are not part of the record. Resp. Br., at 9. Also, as with Deputies Twedt and Boice, there is no evidence that Fortney violated the collective bargaining agreement or any other standard, rule, or law in reversing the termination of Deputy Wallin and reinstating him without further discipline.[1]

C. Fortney's public statement in response to incorrect information on social media about an arrest.

Petitioners do not dispute the following facts regarding Fortney's public statement about the arrest:

> • The Director of Communications of Snohomish County brought concerns about social media accounts of the arrest to the attention of Fortney. App. Br., at 10-11 (citing CP 69-70).
>
> • The information contained in the social media posts was contrary to the arresting deputy's report and video of the incident. App. Br., at 10-12 (citing CP 54, 69-70, 77 & 83).
>
> • The Director of Communications prepared a narrative based on the information in the arrest report and brought it to Fortney, recommending that he provide the public with correct information. App. Br., at 12 (citing CP 70).
>
> • This is a normal practice and something that the Director of Communications does whenever she becomes aware of inaccurate

[1] Petitioners also rely on an alleged civil suit against Snohomish County, allegedly based on Deputy Wallin's conduct. Resp. Br., at 9 (citing CP 465); *id*. at 29 (citing CP 348). The only support for these allegations is a single line in a newspaper article stating that "the county settled a federal civil-rights lawsuit filed by [the decedent's] parents for $1 million." CP 348 (brackets added). Nothing in the record describes the basis for the suit or the reasons for the settlement.

information spreading rapidly about an incident involving the Sheriff's Office, even before Fortney was elected. App. Br., at 12 (citing CP 71).

• Fortney reviewed the reports of every deputy and sergeant involved in the arrest. App. Br., at 12 (citing CP 45-46, 72 & 222).

• Based on his review, Fortney issued a public statement about the arrest corresponding to the reports. App. Br., at 13-14 (quoting CP 468-69).

• Afterward, the Sheriff's Office received a complaint about the arrest and conducted an investigation. App. Br., at 14 (citing CP 89-90). In response to the complaint, the arresting deputy's supervisors conducted an investigation and concluded that no misconduct occurred, based in part on the video that corroborated the deputy's report. *Id.* at 14 (citing CP 77-78 & 82-83).

Petitioners characterize Fortney's statement about the arrest as "clear[ing] the deputy of any wrongdoing," Resp. Br., at 10 (brackets added); and "publicly absolving him," *id.* at 32. Petitioners claim that Fortney violated an internal Sheriff's Office policy requiring investigation of complaints of excessive force by making the statement. Resp. Br., at 10-11. Petitioners do not allege that they have personal knowledge of the arrest, nor do they refer to any supporting documentation other than Fortney's statement and internal policy in their petition. Nonetheless, Petitioners continue to insinuate that the arrest was racially motivated. Resp. Br., at 31 (suggesting the complaint about the arrest was "related to racial discrimination"); *id.* at 33 (stating Fortney did not "address potential racial discrimination"); *id.* at 30, 32 & 39 (emphasizing the race of the arrestee).

D. Fortney's expression of disagreement with aspects of how the Governor's stay-at-home order was being applied.

Petitioners do not dispute the following facts regarding Fortney's expression of disagreement with how the stay-at-home order was being applied:

> • The stay-at-home order does 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)." App. Br., at 16-17 (citing CP 232).
>
> • Guidelines issued by the Governor's Office to law enforcement state that the goal of law enforcement should be to encourage voluntary compliance through education. App. Br., at 17 (quoting CP 239).
>
> • The Governor's Guidelines further state that "[l]aw enforcement agencies will determine appropriate actions based on the law enforcement agency policy" and "[i]t is not contemplated that incarceration would be an alternative unless there was a public safety threat beyond following the proclamation." App. Br., at 17 (quoting CP 239; brackets added).
>
> • The Washington Association of Sheriffs & Police Chiefs (WASPC) also issued guidance regarding communications with the public about the stay-at-home order, including the following examples of appropriate communications: "[t]he Governor is not asking law enforcement to enforce the statewide stay-at-home order"; "[y]our local law enforcement has no intention of carrying out such restrictions with an enforcement effort"; and "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." App. Br., at 17-18 (quoting CP 236; brackets added).
>
> • Fortney's public statements about the stay-at-home order reflected the guidance received from the Governor's Office and WSAPC. App. Br., at 19-22 (quoting CP 474-75 & 477-80).

• Fortney also expressed disagreement with what he perceived to be inconsistencies in the way the stay-at-home order was being applied, e.g., government construction projects could continue but private construction projects could not, Boeing could continue operating but small business owners could not, and marijuana stores could remain while other stores had to close. App. Br., at 20-22 (quoting CP 477-80).

• Fortney also expressed concern that the stay-at-home order was infringing on constitutional rights and stated "[t]he impacts of COVID 19 no longer warrant the suspension of our constitutional rights." App. Br., at 20-22 (quoting CP 477-80; brackets added).

• The only action Fortney encouraged readers of his statement to take was "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." App. Br., at 20-22 (quoting CP 477-80).

• Only one barber shop owner in Snohomish County was reportedly "inspired" by Fortney's statement to reopen. App. Br., at 22 (citing CP 352).

• The only time Fortney was asked to enforce the stay-at-home order by serving notice of revocation of a business license, he complied with the request. App. Br., at 22-23 (citing CP 226).

Petitioners characterize Fortney's statement as "inciting" the public and "encouraging active rebellion" because he stated that he would not impose criminal legal consequences for violating the stay-at-home order and that the pandemic did not warrant suspension of constitutional rights. Resp. Br., at 3 & 6-7. In order to characterize Fortney's statement in this way, Petitioners rely on isolated sentences from the statement without regard for the context in which they appear or the entire statement. They

ignore aspects of the statement emphasizing the seriousness of the pandemic, the need to protect vulnerable populations, or need to take precautions to stay safe and healthy. *Compare id.* with CP 477-80. As evidence of the incitement, they rely on the report of the barber shop owner who was inspired to reopen by the statements. *Id.* at 7-8 & 23-24. Petitioners acknowledge that Fortney did not intend the barber shop to reopen and that he did not know it would reopen based on his statements. *Id.* at 24-25 (acknowledging Fortney does not satisfy mens rea for accomplice liability).

E. Procedural history.

In his opening brief, Fortney noted that there was no order striking the additional declarations submitted in connection with his motion for reconsideration, and the superior court appeared to consider the declarations in ruling on reconsideration. App. Br., at 2 n.2. Fortney only assigned error to the superior court's finding that the declarations were not newly discovered evidence within the meaning of CR 59(a)(4) out of an abundance of caution. *Id.* In response, Petitioners do not argue that the declarations were stricken. Instead, they contend that Fortney's motion for reconsideration did not satisfy "any factor under CR 59," including but not limited to newly discovered evidence under subsection (a)(4) of the rule, Resp. Br., at 15, and argue that reconsideration was properly denied, "[e]ven if the court did consider" the declarations, *id.* at 17 (brackets added).

REPLY ARGUMENT

A. Petitioners should not be allowed to disregard the facts by reverting to allegations of the petition for recall that are not based on personal knowledge or supported by any documentation.

As noted in Fortney's opening brief, the role of the Court is to act as a gatekeeper to prevent recall petitions from reflecting on the popularity of political decisions made by elected officials and to protect elected officials from the financial and personal burden of false or frivolous recall charges. App. Br., at 25. Toward this end, the petition must present some evidence beyond mere belief or speculation that the charges are true. *Id.* at 27 (citing *In re Recall of Levine*, 194 Wn.2d 99, 103, 448 P.3d 764 (2019), *In re Recall of Pepper*, 189 Wn. 2d 546, 555, 403 P.3d 839 (2017), and *In re Recall of Roberts*, 115 Wn.2d 551, 555, 799 P.2d 734 (1990). Petitioners ignore this requirement and urge the Court to decide the matter solely on the allegations of their petition without regard for their lack of personal knowledge or supporting documentation and without consideration of undisputed evidence submitted by Fortney.

Petitioners have not alleged personal knowledge of any of the charges. With respect to Deputy Wallin, they have not submitted any supporting documentation other than irrelevant training and disciplinary information. With respect to Fortney's public statement about the arrest that

was the subject of social media chatter, Petitioners have not submitted any supporting documentation whatsoever, let alone the inflammatory insinuations of discriminatory racial animus. The allegations of the petition related to these matters are insufficient to justify recall. *Pepper,* 189 Wn.2d at 555 (stating "mere insinuations, speculation, or a belief that the charges are true, absent other evidence, is not enough").

With respect to the remaining matters alleged in the petition, Petitioners also cannot ignore the undisputed facts presented by Fortney. It is appropriate for the Court to consider materials submitted in opposition to the petition that provide relevant information that undercuts inferences of misconduct. App. Br., at 27 (citing *Levine,* 194 Wn.2d at 104, *In re Recall of Beasley,* 128 Wn.2d 419, 427, 908 P.2d 878 (1996), and *In re Recall of Wade*, 115 Wn.2d 544, 550-51, 799 P.2d 1179, 1182 (1990)). In this case, the undisputed facts described above defeat any inference of misconduct on the part of Fortney.

B. Petitioners' response makes it clear that the charge of incitement is no different than the charge of failure-to-enforce, and the charge of incitement does not independently justify recall.

Petitioners' response equates incitement to violate the law with failure to enforce the law. Resp. Br., at 25. Fortney is already going to stand for recall for failure to enforce the law, even though his statements about enforcement largely mirrored the guidance he received from the Governor's Office and WASPC. There is no basis for subjecting him to two recall charges for the same conduct. *In re Recall of Cy Sun*, 177 Wn.2d 251, 261, 299 P.3d 651 (2013) (rejecting recall charge that is based on "the same bundle of allegations" as another charge).

C. Contrary to Petitioners, Fortney did not abuse his discretion by imposing discipline short of termination on Deputies Twedt and Boice and reinstating Deputy Wallin in response to union grievances filed on their behalf.

Petitioners acknowledge that Fortney's responses to the union grievances were discretionary, and that such discretion must be abused before a public official may be subject to recall. Resp. Br., at 26-28. "[D]iscretionary acts of a public official are not a basis for recall insofar as those acts are an appropriate exercise of discretion by the official in the performance of his or her duties." *In re Recall of Bolt*, 177 Wn.2d 168, 174-75, 298 P.3d 710, 715 (2013) (brackets added, quot. omitted). "An official may be recalled for execution of discretionary acts only if the official

exercised discretion in a manifestly unreasonable manner." *Id.* (quot. omitted). An "official may not be recalled if his or her actions occurred in the course of justifiable conduct." *Id.* (quot. omitted). In determining whether an abuse of discretion occurred, the Court may consider the official's perspective on the facts. *In re Recall of Kast*, 144 Wn.2d 807, 818, 31 P.3d 677, 683 (2001) (considering affidavits offered by official in determining his actions were justifiable).

In this case, Petitioners simply disagree with the decision he reached at the conclusion of the process. Nonetheless, Fortney's explanations for his decisions rendered in response to the grievances filed on behalf of the deputies show that his conduct was justifiable and not an abuse of discretion. CP 240-46 (decision re: Deputies Twedt and Boice); CP 247-53 (decision re: Deputy Wallin).

While Petitioners attempt to compare this case to *Cy Sun*, 177 Wn.2d 251, the case is not even remotely comparable. Resp. Br., at 29-30. In *Cy Sun* the mayor "mistreated employees, refused to follow required procedures, and violated union contracts." *Id.* at 260. The mayor had engaged in a pattern of improper behavior that caused the city to lose insurance coverage. *Id.* at 259-60. Whistleblower statutes had been violated and union grievances had been filed. *Id.* In contrast, in this case, Fortney followed collectively bargained-for dispute resolution procedures in

imposing discipline short of termination on Deputies Twedt and Boice and reinstating Deputy Wallin.

D. Fortney did not "clear" or "absolve" a deputy by making a factual public statement about the arrest, nor did his statement violate any standard, rule, or law.

Petitioners complain that Fortney did not conduct any investigation in the short amount of time between learning of the arrest and issuing a statement about it. Resp. Br., at 32-33. They contend that this constitutes "a *prima facie* case of a failure to investigate, in violation of the law and his office's internal policies," citing RCW 36.28.011, RCW 36.28.020, and Snohomish County Sheriff's Office Policy 1019 regarding personnel complaints. Resp. Br. at 30-33. None of these proposed sources addresses, let alone prohibits, public statements about a matter of public interest prior to completion of an investigation.

RCW 36.28.011 does not apply because no violation of the criminal law came to Fortney's knowledge that required a complaint. RCW 36.28.020 does not apply because it is about liability on a sheriff's official bond. RCW 36.28.020 ("[…] and the sheriff shall be responsible on his or her official bond for their default or misconduct"). Policy 1019 is relevant, but Petitioners fail to allege facts establishing a prima facie case for a violation of the policy.

Petitioners cite no authority for the proposition that a Sheriff may not comment on an incident prior to performing an investigation. Resp. Br. at 33. Instead, Petitioners seek to shift their burden, stating "Fortney failed to cite to any authority indicating he was permitted to publicly clear a deputy of wrongdoing before adequately investigating a complaint that the deputy engaged in excessive force." *Id.* This attempt to place the burden on Fortney is legally incorrect. Petitioners must show that the charges are legally sufficient. It is not Fortney's burden to demonstrate their insufficiency. *Matter of Recall of Inslee*, 194 Wn.2d 563, 568, 451 P.3d 305, 308 (2019) ("The burden is on the petitioner to identify the standard, law, or rule that would make the officer's conduct wrongful, improper, or unlawful"; quot. omitted).

Fortney provided evidence that proper investigations were eventually completed. CP 77-78 & 82-88; *see* App. Br. at 34-35. Even if this evidence of the investigations is not considered, Petitioners fail to present any evidence that there either were no investigations or that the investigations violated the Policy. Instead they speculate, without any factual basis, that Fortney's statement "ma[de] it virtually impossible for his deputy supervisors to conclude otherwise in their investigation." Resp. Br. at 34 (brackets added). This sort of speculation is factually insufficient.

Even assuming that making a public statement violated Policy 1019, this would still be an insufficient legal basis for recall. A mere violation of internal policy is insufficient to establish malfeasance, misfeasance, or a violation of the oath of office. *Bolt*, 177 Wn.2d at 175. Petitioners have not established a link between the alleged duties "to investigate complaints of police misconduct and take responsibility for his deputy's misfeasance" and making a public statement prior to investigation. Resp. Br. at 34. The charge that Fortney "absolved a deputy sheriff of asserted wrongdoing […] without ensuring a proper investigation" is legally and factually insufficient. CP 38 (brackets added).

E. While the parties agree that the wording of the ballot synopsis is "final," Petitioners do not dispute that the recall petition must be reversed if the synopsis is arbitrary or capricious.

Petitioners do not dispute that recall charges must be reversed if the superior court's decision regarding the wording of the ballot synopsis is arbitrary and capricious. App. Br., at 39 (citing *Kreidler v. Eikenberry,* 111 Wn. 2d 828, 834, 766 P.2d 438 (1989)). Petitioners cannot dispute that ballot question #3 omits the fact that Deputies Twedt, Boice and Wallin were reinstated in response to the union grievance process, and that they were not reinstated despite misconduct, but rather because the misconduct warranted a lesser sanction in the case of Deputies Twedt and Boice, and no misconduct occurred in the case of Deputy Wallin. CP 14. The wording

wrongly conveys to voters that Fortney is deliberately rehiring bad deputies, rather than reinstating them after concluding a process designed to determine whether they should have been fired in the first place.

Petitioners also cannot dispute that ballot question #4 includes the race and gender of the arrestee and implies that she was tackled for jaywalking. *Id.* The wording wrongly conveys to voters that Fortney approves of the use of excessive force against black women for jaywalking, even though the use of force was not because of jaywalking and there is no a hint of racial or gender-based discriminatory animus. This is profoundly misleading and unfair and should not be upheld.

CONCLUSION

The Court should 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.

Respectfully submitted this 20th day of August, 2020.

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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:

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