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Supreme Court No. 98683-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PETITION OF RECALL FOR ADAM FORTNEY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF RESPONDENT

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INTRODUCTION

To proceed to the signature gathering phase and, ultimately, be put to the voters, a recall petition need only establish the factual and legal sufficiency of the charges levied against an elected official.

To be factually sufficient, petitioners must only make a *prima facie* showing of misfeasance, malfeasance, or violation of oath of office to support recall. *Cole v. Webster*, 103 Wn.2d 280, 288, 692 P.2d 799 (1984). A *prima facie* showing is an extreme low burden. To be met, the petitioners need only present facts which would allow the public electorate and the challenged elective official to make informed decisions in the recall process. *Teaford v. Howard*, 104 Wn.2d 580, 584, 707 P.2d 1327 (1985). “The court shall not consider the truth of the charges, but only their sufficiency.” RCW 29A.56.140.

The Respondents satisfied this burden before the Superior Court, establishing that four of the five original charges were factually and legally sufficient to proceed to the signature gathering phase. Yet, Appellant Adam Fortney (“Fortney”) argues incorrectly that the Respondents have not “proven the charges” against him, urging the court to apply a novel legal standard of his own making rather than challenging

the factual or legal sufficiency of the allegations lodged by the Respondents. Br. of Appellant at 32. Because the Superior Court rightly determined the Respondents had met their burden to proceed to the signature gathering phase, and because Fortney's arguments are without merit, this Court should affirm.

STATEMENT OF THE CASE

Fortney's oath of office requires him to enforce the laws of the State of Washington. CP 163¹; RCW 43.01.020.

A. Procedural history.

The Respondents, four Snohomish County attorneys, petitioned to recall Sheriff Adam Fortney, alleging he had committed misfeasance, malfeasance, and violations of his oath of office. CP 452-518. Respondents contended that Fortney violated his oath of office and committed misfeasance or malfeasance by refusing to enforce the law as required by Governor Jay Inslee's "Stay Home, Stay Healthy" proclamation. *Id.* Further, that he incited members of the public to violate the "Stay Home, Stay Healthy" proclamation by announcing he would not enforce the provisions of the order and indicating that the pandemic did not "warrant the suspension of our constitutional rights". *Id.*

The Respondents alleged Fortney endangered the rights, health, and safety of Snohomish County residents by exercising his discretion in a manifestly unreasonable manner when he rehired three deputies previously terminated for misconduct. *Id.*

¹ Clerk's Papers filed under this matter and consecutively paginated will be referred to as "CP" throughout the Respondents' Brief.

Finally, Respondents asserted that Fortney violated his statutory duties and exercised his discretion in a manifestly unreasonable way by failing to investigate an excessive force complaint and issuing a statement absolving the deputy in question without a full and thorough investigation into the incident. *Id.*

At the hearing on the petition, the Superior Court found four of the five charges brought against Fortney were factually and legally sufficient to proceed to the signature gathering phase. RP2 79-99.²

Following the court's approval of the four charges, the court granted Fortney leave to file additional briefing regarding the proposed ballot synopsis and, over Respondents' objection, ordered an additional hearing on the issue. RP2 99-105.

At the hearing, Respondents presented a proposed ballot synopsis and no additional briefing. Fortney filed substantive briefing with proposed ballot synopsis language and attempted to supplement the record with additional factual declarations not previously filed or presented to the court. CP 138-142; CP 92-137. Respondents filed a

² Verbatim Recording of Proceedings as filed in this matter and consecutively paginated will be referred to as "RP1" for Volume One or "RP2" for Volume 2 throughout the Respondents' Brief.

motion to strike the untimely declarations, arguing Fortney was trying to circumvent the court's previous rejection of additional factual information during the initial hearing. RP2 38. The court granted the request to strike the factual declarations. CP 13.

During the ballot synopsis hearing, Fortney objected to the proposed language on the basis it was overly inflammatory, in violation of applicable caselaw. CP 138-142. Specifically, he maintained the terms "Black" and "woman" were overly prejudicial. *Id.* The court indicated it would create a ballot synopsis after the hearing and issue its order. RP1 66.

Fortney filed a Motion for Reconsideration the night before the ballot synopsis hearing. CP 39-91. The motion included the same declarations that were attached to his ballot synopsis briefing and which had been stricken by the court. *Id.*

Respondents argued that reconsideration was not available in Recall proceedings, or in the alternative, Fortney had not met any of the necessary circumstances under CR 59(a)(4) to permit reconsideration. CP 28-35. Fortney's motion for reconsideration was based solely on newly produced factual declarations. CP 39-91. The declarations contained only information that had been readily available

to Fortney and his counsel prior to the filing of his initial response brief.

Id.

The court denied Fortney's motion for reconsideration, finding no basis to overturn its prior decision because the Respondents had established a sufficient factual and legal basis for each of the charges. CP 1-7.

Fortney's notice of appeal for direct review is broader than the specific relief requested in the conclusion of his opening brief. CP 8-21; Br. of Appellant at 43. The Notice of Appeal states that appellant seeks direct review of the "Order Determining Sufficiency of Recall Charge and Approving Ballot Synopsis," which would imply that each decision of the superior court would be brought under scrutiny of review. CP 8-21. However, through his Opening Brief, Fortney has conceded again with regard to allegation related to his refusal to enforce the Stay Home – Stay Healthy proclamation. Br. of Appellant at 43.

B. Incitement to violate the "Stay Home, Stay Healthy" Proclamation.

Fortney incited and encouraged active rebellion against the lawful "Stay Home, Stay Healthy" proclamation by stating repeatedly there would be no criminal legal consequences for business

owners who openly defied the proclamation and reopened their businesses in Snohomish County. CP 457.

“I have no intention of carrying out enforcement for a stay-at-home directive.” *Id.* “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.” CP 461. “[T]he Snohomish County Sheriff’s Office will not be enforcing an order preventing religious freedoms or constitutional rights.” *Id.*

In a letter to Fortney on April 28, 2020, Snohomish County Prosecutor Adam Cornell chided Fortney’s refusal to enforce the lawful order and likened Fortney’s statements to yelling “fire!” in a crowded theater. CP 484-85.

Coming from the highest-ranked law enforcement official in Snohomish County, Fortney’s repeated public statements that neither he nor his deputies would enforce the “Stay Home, Stay Healthy” order because he did not agree with it directly resulted in members of the public violating the governor’s proclamation. There was no more-publicized instance of this incitement than when the owner of the Stag Barbershop in Snohomish, WA opened his business in violation of the law. CP 459. When asked why he reopened, Bob Martin stated in no

uncertain terms that it was because Fortney informed the public the Sheriff's Office would not enforce the order. *Id.*

C. Rehiring Deputies Boice and Twedt.

Deputy Matthew Boice and Deputy Evan Twedt were each terminated after an internal investigation determined they had unlawfully searched a vehicle's trunk in violation of a citizen's privacy rights protected by article I, section 7 and the Fourth Amendment. CP 465-66. When confronted with this allegation, the deputies lied in an effort to cover up their malfeasance. *Id.*

Fortney was deeply involved with the internal investigations of both deputies, who were friends of his prior to his election. RP2 94-95. As the deputies' supervisor, Fortney wrote letters of support for Boice and Twedt, stating they had not been properly trained on the policies regarding illegal searches. CP 336-37.

Fortney rehired Boice and Twedt at the first opportunity upon his being sworn into office and justified his decision by attributing their previous terminations as being politically motivated rather than based upon facts. CP 342-43.

D. Rehiring Deputy Wallin.

Deputy Arthur Wallin was also terminated after an exhaustive internal investigation found he had exercised egregious excessive force when he shot and killed Nathan Peters, a 23-year-old Edmonds resident. CP 465-66. While Mr. Peters was seated in the driver seat of his immobilized pickup truck, Wallin opened fire on Mr. Peters and later reported he had acted on his “spidey sense³” in doing so. CP 348. Snohomish County later settled a civil suit with Mr. Peters’ family for approximately \$1 million. CP 465.

Additionally, Fortney was present at the scene when Mr. Peters was killed by Wallin, and approved the high speed pursuit that led up to the killing in violation of office policy, and was himself reprimanded for his actions related to the incident. CP 348.

Dep. Wallin was also rehired by Fortney at the first opportunity upon Fortney being sworn into office. *Id.*

³ “spidey sense” - Derived from the "Spidey sense" of the [comic book](#) superhero [Spiderman](#), it is generally used to mean a vague but strong sense of something [being wrong](#), dangerous, suspicious, a security situation from *Urban Dictionary* (<https://www.urbandictionary.com/define.php?term=Spidey%20sense>)

E. Failure to investigate excessive force.

Sharon Wilson was tackled by a deputy for jaywalking and then jailed for resisting arrest and obstructing a law enforcement officer. CP 467. Ms. Wilson spent nearly 24 hours in custody and no formal charges were filed. *Id.*

Fortney learned of the incident on March 27, 2020. CP 69-74. Although the force used against Ms. Wilson violated office policy SCSO Law Enforcement Policy Manual 300.2.10, Fortney did not investigate the complaint or the deputy involved. CP 466-69. Instead, he issued a statement just a few hours later through which he cleared the deputy of any wrongdoing. *Id.*

The Sheriff's Office manual outlines the policies through which a complaint about an officer can be made. CP 500-13. The policy, 1019(4), includes a non-exhaustive list of manners through which a complaint may be lodged and, while posts on social media are not specifically listed, there is no doubt that Fortney accepted this post as a formal complaint. *Id.* This much was made clear by Judge Loring in her decision that Fortney was responding to the complaint that was lodged on Facebook and, while not all Facebook posts could be considered formal complaints, responding directly to this incident caused it to meet

the threshold of a formal complaint, binding Fortney to the investigatory process as described in his own policies. RP2 98.

ARGUMENT

A. Duties of Snohomish County Sheriff Adam Fortney.

Snohomish County is a political subdivision of the State of Washington, established under by the territorial government in 1865, and subsequently made one the original counties of the State of Washington pursuant to article XI, section 1 of the Washington State Constitution. Article XI, section 5 of the Washington State Constitution provides, in relevant part, that:

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office.

RCW 36.28.010 prescribes the Sheriff's general duties:

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; [and]

(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.

RCW 36.28.011 further prescribes the Sheriff's duty to "make complaint of all violations of the criminal law, which shall come to their knowledge, within their respective jurisdictions."

Moreover, RCW 36.28.020 states:

...Persons may also be deputed by the sheriff in writing to do particular acts; including the service of process in civil or criminal cases, and the sheriff shall be responsible on his or her official bond for their default or misconduct.

Adam Fortney was elected as Snohomish County Sheriff on November 5, 2019 with 98,568 votes – 55.38 percent of the 177,973 votes cast for the office. CP 453. On December 30, 2019, Sheriff Adam Fortney signed and executed his oath of office which states as follows:

I, Adam Fortney, do solemnly swear (or affirm) that I will support the Constitution and Laws of the United States and the Constitution and Laws of the State of Washington and the provisions of the Charter and Ordinances of Snohomish County, and that I will faithfully and impartially discharge the duties of the office of Snohomish County Sheriff for a 4-year term according to law to the best of my ability[.]

Adam Fortney commenced duties to the elected position of Snohomish County Sheriff on January 1, 2020.

B. Summary of Charges

Since commencing the duties as sheriff of Snohomish County, Adam Fortney has (1) endangered the peace and safety of the community; (2) failed to defend the county against individuals who endanger the peace and safety of the community; (3) interfered with and obstructed lawful government orders; (4) failed to conduct adequate investigations; and (5) otherwise violated his duties as prescribed by RCW 36.28.010(1), (2) and (6) and RCW 36.28.011.

All the acts committed by Fortney, summarized above and further described below, were performed wrongfully, knowingly, and with intent and constitute malfeasance, misfeasance, and/or a violation of his oath of office.

C. The court did not err in denying Fortney’s motion to reconsider.

1. Fortney failed to meet any factor under CR59.

The superior court properly denied Fortney’s motion for reconsideration because he did not present any new evidence upon which the court could have reconsidered the sufficiency of the recall charges. The decision to hear additional evidence presented during a motion for reconsideration is within the sound discretion of the court. *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997). Here, the court found the additional factual declarations submitted by Fortney in support of the motion for reconsideration did not comport with CR59(a)(4). CP 4. The superior court did not abuse its discretion in making that finding.

The superior court determined correctly that the motion for reconsideration was not based on any newly discovered evidence that could not have been submitted with reasonable diligence. CP 1-7. Further, Fortney’s motion included additional factual declarations which, the court held, is outside the scope of a recall proceeding. It is not the purpose of the court to determine whether the allegations are true. Rather, the court simply acts as a gatekeeper to ensure there is a *prima facie* case to be presented to the electorate. *Id.*

CR 59(a)(4) allows for “newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial”. Fortney’s realization that the declarations he submitted during the initial hearing were inadequate does not meet this standard. *See, Adams v. W. Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989).

Forney argues the 15-day timeframe permitted under RCW 29A.56.140 gave him insufficient time to gather declarations, thus rendering them newly discovered evidence. His logic defies reason. First, evidence is not “newly discovered” simply because a party failed to obtain declarations memorializing that evidence in time for a hearing. Indeed, all the information contained in the untimely declarations was known to Fortney before the recall hearing, as can be seen through a plain reading of the declarations.

Moreover, there is no evidence Fortney made any attempts to obtain the declarations within the allotted time, nor did he request a continuance in order to complete the process. Rather, the timing suggests he grew concerned during oral argument that he would not prevail, and the untimely declarations were a last-minute attempt to bolster his case with additional information he had failed to previously provide to the

superior court. Fortney's counsel suggested the court could inquire of him directly when it came to the factual disputes upon which he was relying. The court indicated that it would only be considering "the materials that have been filed." RP2 38.

Fortney's claim that he did not have adequate time to gather evidence to respond to all of the charges is unpersuasive. CP 145-46. This is especially true considering one of the supplemental declarations which he asked the court to consider was his own. The additional declarations, which Fortney failed to present to the court in a timely manner, are not newly discovered evidence pursuant to CR 59(a)(4), and the superior court did not err by declining to consider them. Because Fortney offered no newly discovered evidence for the court's consideration, the court properly denied his motion for reconsideration.

2. Even if the court did consider the untimely declarations, the court properly denied Fortney's motion for reconsideration.

Even if the court had considered the additional evidence submitted by Fortney in the motion for reconsideration, the court did not abuse its discretion in denying the motion. Fortney argues the additional evidence provides factual context that defeats the factual sufficiency alleged in the petition. Br. of Appellant at 42-43. However, for a recall

petition to be factually sufficient, petitioners must only make a *prima facie* showing of misfeasance, malfeasance, or violation of oath of office to support recall. *Cole v. Webster*, 103 Wn.2d 280, 288, 692 P.2d 799 (1984).

Courts do not have the authority to determine the truthfulness of the charges in a recall. *Id.* The court's responsibility, in part, is to determine if the petition states facts that, if true, would be sufficient to recall an elected official. At best, Fortney's additional evidence creates a factual dispute over the charges against; it does not defeat the factual sufficiency of the petition for purposes of proceeding to the next phase. The court does not play the role of a factfinder in a hearing on the sufficiency of a recall petition. Fortney's evidence, even if considered, would only create a factual dispute, and thus the superior court did not abuse its discretion by denying the motion for reconsideration.

D. The charges levied against Fortney are factually and legally sufficient and should be presented to the electorate.

Article 5 of the Snohomish County Charter is entitled "The Powers Reserved by the People." Section 5.90 is entitled "The Recall" and provides, "The fourth power reserved for the people is the

recall as provided in the constitution and the laws of the state of Washington.”

The right to recall elected officials is a fundamental right of the people guaranteed by article I, sections 33 and 34 (amend. 8) of the Washington State Constitution. *Chandler v. Otto*, 103 Wn.2d 268, 270 (1984). Section 33 contains the substantive right of recall and provides “[e]very elective public officer of the State of Washington . . . is subject to recall and discharge by the legal voters of the state. . .” Section 34 permits the Legislature to “pass the necessary laws” to carry out section 33 “and to facilitate its operation and effect without delay.” Pursuant to this authority, the Legislature adopted Chapter 29.82 RCW, which was enacted “to provide the substantive criteria and procedural framework for the recall process.” *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 262-63, 961 P.2d 343 (1998). RCW 29.82 has since been re-codified as RCW 29A.56. Recall statutes are construed in favor of the voter, not the elected official. *In re Recall of Washam*, 171 Wn.2d 503, 510, 257 P.3d 513 (2011).

Elected officials in Washington may be recalled for malfeasance, misfeasance, or violating their oath of office. Const. art. I, § 33; “Courts act as a gateway to ensure that only charges that are

factually and legally sufficient are placed before the voters, but [they] do not evaluate the truthfulness of those charges.” *Washam*, 171 Wn.2d at 510 (citing RCW 29A.56.140).

Charges are factually sufficient if “taken as a whole they do state sufficient facts to identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a *prima facie* showing of misfeasance, malfeasance, or violation of oath of office.” *Chandler*, 103 Wn.2d at 274. “Voters may draw reasonable inference from the facts; the fact that conclusions have been drawn by the petitioner is not fatal to the sufficiency of the allegations.” *In re Recall of West*, 155 Wn.2d 659, 665 121 P.3d 1190 (2005).

“A charge is factually sufficient if the facts establish a *prima facie* case of misfeasance, malfeasance, or violation of the oath of office and are stated in concise language and provide a detailed description in order to enable the electorate and a challenged official to make informed decisions.” *In re Recall of Telford*, 166 Wn.2d 148, 154, 206 P.3d 1248 (2009) (internal citations omitted, emphasis in original). “In this context, ‘*prima facie*’ means that, accepting the allegations as true, the charge on its face supports the conclusion that the official

committed misfeasance, malfeasance, or violations of the oath of office.”
In re Recall of Wade, 115 Wn.2d 544, 548, 799 P.2d 1179 (1990).

RCW 29A.56.110 requires that “the person . . . making the charge . . . have knowledge of the alleged facts upon which the stated grounds for recall are based.” There is no requirement that the petitioner have firsthand knowledge of such facts. Rather he or she must have some knowledge of the facts underlying the charges. *In re Recall of Wasson*, 149 Wn.2d 787, 791, 72 P.3d 170 (2003); *In re Recall of Ackerson*, 143 Wn.2d 366, 372, 20 P.3d 930 (2001). When the charge is violation of law, the Supreme Court has repeated that the petitioner must have knowledge of facts indicating that the official intended to commit an unlawful act. *Pearsall-Stipek*, 136 Wn.2d at 263. The courts may use supplemental materials to determine whether there is a factual basis for the charge. *West*, 155 Wn.2d at 665-66.

Charges must also allege substantial conduct amounting to misfeasance, malfeasance, or violation of the oath of office to be legally sufficient. *Washam*, 171 Wn.2d at 514-15. This protects officials from being recalled for simply exercising discretion granted to him or her by law. *Chandler*, 103 Wn.2d at 274. “Officials may not be recalled

for their discretionary acts absent manifest abuse of discretion.” *Id.* at 515.

The definition of misfeasance, malfeasance and violations of oath of office are set forth in RCW 29A.56.110, as follows:

For the purposes of this chapter:

(1) “Misfeasance” or “malfeasance” in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty;

(a) Additionally, “misfeasance” in office means the performance of a duty in an improper manner; and

(b) Additionally, “malfeasance” in office means the commission of an unlawful act;

(2) “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.

1. Fortney incited the public to violate the law.

Respondents charged Fortney with inciting the public to violate the “Stay Home, Stay Healthy” order. This charge is based on his repeated statements that neither he nor his deputies would enforce the law because he does not believe it to be constitutional. With these statements, Fortney urged the public to violate the law. “This is not a time to blindly follow, this is at time to lead the way.” CP 461.

As Snohomish County Prosecutor Adam Cornell described it, these statements were akin to yelling “fire” in a crowded theater. CP 462. This analogy is commonly used and understood to mean that the statements would likely result in the audience to react in a manner that would be dangerous to public health and safety.

The statements coming from the County’s top law enforcement officer make them exponentially more concerning. As Respondents argued during the initial hearing on this matter, a blanket statement by law enforcement that it will not be enforcing a particular law will only have one effect – the public will violate that law. For example, if a city puts up a sign indicating a 30 mile-per-hour speed limit throughout the city, and the chief of police comes out and says that their department will not be enforcing that speed limit, the only logical outcome will be that the public will not abide by the speed limit. When asked why they felt comfortable violating the speed limit, the response will invariably be because they knew they would not face any consequences.

The same analysis applies here. However, in this case, we are not working with a hypothetical in the abstract. Instead, there is indisputable evidence that Fortney’s comments incited members of the

public to violate the “Stay Home, Stay Healthy” proclamation. The owner of the Stag Barbershop in the City of Snohomish did not mince words when asked why he reopened his shop in violation of the law. “Martin said he was emboldened to fully reopen after Snohomish County Sheriff Adam Fortney announced he would not enforce the governor’s stay home order, calling it ‘unconstitutional.’” CP 459.

Fortney argues that because he is charged with “inciting,” the legal standard is akin to that of accomplice liability in a criminal case. Br. of Appellant at 37; RCW 29A.56.140. He argues without support that because he did not intend to incite a specific crime, the recall petition charge that he incited the public to violate the law is legally insufficient. This Court should reject this argument.

There is no authority requiring respondents to prove Fortney’s actions were tantamount to that of an accomplice in a crime. Fortney is not charged with a criminal offense. Rather, the question is whether he should be subject to a recall vote in part because he incited members of the public to violate the law, using the plain, ordinary meaning of the word incite: “to move to action; stir up; spur on; urge on.” Merriam-Webster’s Dictionary. There is no question Fortney’s

statements urging the public openly violate the governor's order incited violations of the law.

Moreover, the accomplice liability statute requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. RCW 9A.08.020(2)(c); *State v. Coleman*, 155 Wn. App. 951, 960-60, 231 P.3d 212 (2010), *rev. denied* 170 Wn.2d 1016 (2011)(emphasis added). Therefore, by the State's text, its sweep avoids protected speech activities that are not performed in aid of a crime and only consequentially further a crime. See *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

Fortney's oath of office requires him to enforce the laws of the State of Washington. CP 163; RCW 43.01.020. An elected sheriff is charged with the duty to arrest and commit to prison those persons guilty of public offenses or who break the peace, or who gather unlawfully. RCW 36.28.010. Likewise, RCW 36.28.020(1) places a duty upon an elected sheriff to make complaints of all violations of criminal law that come to their knowledge within their jurisdiction. Failure of a sheriff to carry out his duties under RCW 36.28.020(1) constitutes willful neglect. See *State v. Twitchell*, 61 Wn.2d 403, 408, 378 P.2d 444

(1963) (holding that the statute places a mandatory non-discretionary duty on the sheriff to make a complaint of any known violation of criminal law). Fortney abdicated these duties and incited others to violate the law when he publicly, and in his official capacity, declared he would not enforce a legal order issued by Governor Jay Inslee.

Fortney is the chief law enforcement officer in Snohomish County and does not have the authority to incite citizens to violate a law simply because he disagrees with that law.

2. Fortney has endangered the health and safety of the public by rehiring three deputies who are documented to have violated individual constitutional rights and unjustifiably killed a citizen.

Discretionary personnel decisions are not immune from recall. *In re Recall of Bolt*, 177 Wn.2d 168, 174, 298 P.3d 710 (2013) (“An official may be recalled for execution of discretionary acts only if the ‘official exercised discretion in a manifestly unreasonable manner.’”); *Cole v. Webster*, 103 Wn.2d 280, 284, 692 P.2d 799 (1984) (“the decision to close schools is a discretionary act and members of a school board cannot be recalled unless they arbitrarily or unreasonably exercised such discretion.”); *In re Recall of Cy Sun*, 177 Wn.2d 251, 255,

299 P.3d 651 (2013) (holding that the mayor made discretionary personnel decisions in a manifestly unreasonable manner).

Respondents filed 11 exhibits totaling over 50 pages providing a factual basis for charge three. These documents detail, among other things, the misconduct committed by each officer resulting in their respective terminations. The Declaration of Samantha Sommerman included exhibits which describe Fortney's personal connection and political allegiance to these deputies. CP 322-37.

The facts laid out in the petition, declaration and supporting exhibits amount to far more than "naked assertion[s]" regarding these three officers, and easily satisfy the factual burden. Br. of Appellant at 29.

Rather than address the factual or legal sufficiency of the recall charges, Fortney seeks to litigate the facts underlying those charges. Br. of Appellant at 29. "[A]lthough the courts serve a gateway function in the recall process, [the courts] do not attempt to evaluate the truthfulness of the charges in a petition." *In re Recall of Kast*, 144 Wn.2d 807, 813, 31 P.3d 677 (2001).

Fortney attacks also the legal sufficiency for recall in the rehiring charge. Fortney's rehiring of these deputies was done in his

official capacity as Sheriff and was a manifest abuse of his discretion, which should subject him to recall. *Recall of Cy Sun*, 177 Wn.2d at 255 (holding misfeasance can be established regarding discretionary decisions where there is a manifest abuse of discretion).

Fortney also argues, citing *In re Recall of Young*, that he merely responded to union grievances as required by a collective bargaining agreement, and thus cannot be subject to recall unless he “willingly and knowingly violat[ed]” the agreement.” 152 Wn.2d 848, 853, 100 P.3d 307 (2004); Br. of Appellant at 33-34. This argument fundamentally misunderstands the holding of *Young*, in which the Court held that willful and knowing violation of a collective bargaining agreement is just one type of misfeasance rendering an elected official subject to recall. The assertion that Fortney did not violate such an agreement does not mean his decisions to rehire the deputies in question were not also manifestly unreasonable.⁴

As the lower court held:

It would be a reasonable inference the voters could conclude that Sheriff Fortney exercised his discretion in a manifestly unreasonable manner in rehiring those individuals who had been held to have been dishonest and

⁴ It is also important to note that no Collective Bargaining Agreement exists in the record, making it impossible to determine whether Fortney was required to take any action under its purview.

violated policy, violated civil rights, and certainly legal standards in case law. Again, that's including based on what could be reasonable inference that voters could conclude in terms of conflict of interest, disregard for the findings made in a previous investigation, as well as an inference that voters could make in terms of putting future prosecutions in jeopardy given what's been referenced being a disclosure the prosecutor's office has made and most likely would continue to make with regard to those officers.

RP2 94.

By rehiring these three deputies Fortney has opened the county up to substantial financial harm through civil liability for their actions as well. Deputy Wallin's actions have already cost the County over \$1 million. CP 348. Each time these officers testify in criminal trials, they are subject to cross examination about their misconduct, casting doubt on their investigations and testimony. CP 345-49. Fortney's manifestly unreasonable decision to rehire these officers undermines the integrity of the criminal justice system, places the community at risk of rights violations, assault, and possible death, and exposes the county to additional civil liability because these deputies are proven to engage in egregious misconduct.

These risks are not mere conjecture as Fortney would have this Court believe. In *Recall of Cy Sun*, the Pacific mayor's problematic personnel decisions resulted in employee mistreatment, vacant positions,

and potential union contract and procedural violations, leaving the city vulnerable to civil liability. 177 Wn.2d at 260. The Court held that exercise of discretion in this manner amounted to misfeasance. *Id.* The same is true here, where Fortney's personnel decisions have placed dangerous, violent, and dishonest deputies back on the streets of Snohomish County, creating an untenable risk of additional civil liability and civil rights violations against the community.

Respondents have met the very low burden of establishing a *prima facie* case of factual and legal sufficiency with regard to this charge and ask the Court to affirm the superior court's decision.

3. Fortney acknowledged a properly lodged complaint of excessive force by one of his deputies against a black woman and failed to undertake proper procedures to investigate that complaint.

The Superior Court properly found that the final charge in the recall petition was factually and legally sufficient. This charge asserted that Fortney committed malfeasance, misfeasance, and/or violated his oath of office when he failed to investigate a deputy who tackled a Black medical student for jaywalking. CP 454, 456.

Under RCW 36.28.011, a sheriff must make a complaint of all violations of the criminal law that come to his or her attention and

is also responsible under RCW 36.28.020 for the misconduct of his or her deputies.

The Snohomish County Sheriff's Office's own internal policies and procedures require compliance with the duties enumerated in RCW 36.28.011 and RCW 36.28.020. CP 416-29. These policies and procedures require supervisors to "initiate a complaint based upon observed misconduct or receipt from any source alleging misconduct that, if true, could result in disciplinary action" and investigate the alleged misconduct. CP 501. (emphasis added). Moreover, the supervisor must respond to the complaint in a courteous and professional manner, follow up with complainants within 24 hours, take additional steps through the chain of command if the complaint is related to racial discrimination, obtain witness information, follow procedural rights of the accused deputy, and ensure interviews of the complainant are conducted at reasonable hours. CP 501-09. The policy manual also requires such investigations to be formatted with an introduction, synopsis, evidence description, conclusion, exhibits, and a disposition of unfounded, exonerated, non-sustained, sustained, or undetermined. CP 505.

Sheriff Fortney swore to perform all duties described above when he signed and executed his oath of office on December 30, 2019. The record contains substantial evidence showing Fortney violated these duties when he failed to investigate a report of misconduct by one of his deputies before publicly absolving him. On March 26, 2020, an attorney issued a public statement on Facebook complaining that a deputy engaged in excessive force when he tackled and injured a Black medical assistant, Sharon Wilson, after she allegedly jaywalked. CP 467.

This public complaint may not have triggered the Sheriff's sworn duties but for Fortney's having addressed the complaint directly. RP2 98-99. Responding to the complaint, Fortney issued a statement on his official Sheriff Fortney Facebook page, publicly absolving the deputy of any wrongdoing mere hours after learning of the complaint and without conducting any investigation. CP 468-69.

Fortney declared the deputy's actions were "reasonable" because Ms. Wilson refused to identify herself and ran from the deputy. CP 468-69. Fortney did not conduct any investigation in the short amount of time between learning of the complaint and issuing his statement excusing the deputy's behavior. Instead, he has stated that he read the reports that were created in relation to the arrest, well before a

complaint was ever lodged, and made his determination based on that information alone. He did not generate a report, interview witnesses, or address potential racial discrimination.

As such, the charge is factually sufficient because Respondents established a *prima facie* case of a failure to investigate, in violation of the law and his office's internal policies. The charge is also legally sufficient because it contains substantial evidence that Fortney committed misfeasance, violated his oath of office, and exercised his discretion in a manifestly unreasonable manner.

Fortney argues the charge was factually insufficient because his duties did not preclude him from issuing a public statement based on "best-available factual information . . . to respond to a false narrative." Br. of Appellant at 34. However, 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.*

Fortney also argues that publicly absolving his deputy of wrongdoing did not foreclose his office from investigating his deputy's actions, and thus was not improper. *Id.* Fortney relied on the reports of

the deputies that related to investigation and arrest for obstructing a law enforcement officer.

Fortney argues that adequate investigations were eventually completed, citing to declarations filed in support of his motion to reconsider. Br. of Appellant at 34. Even assuming these investigations were sufficient to satisfy Fortney's duties of office, they were all completed after he had already determined his deputy committed no misconduct, making it virtually impossible for his deputy supervisors to conclude otherwise in their investigation. CP 77-78 & 82-88.

Lastly, Fortney argues the charge is legally insufficient because no Washington case has upheld the sufficiency of a charge based solely on a violation of an internal policy. Br. of Appellant at 35. However, the case he relies on, *In re Recall of Bolt*, found a charge legally insufficient because the petitioners "[did] not explain how [a] personnel decision amount[ed] to malfeasance, misfeasance, or a violation of the oath of office." 177 Wn.2d at 175. Here, Respondents have established Fortney violated his duties to investigate complaints of police misconduct and take responsibility for his deputy's misfeasance – duties he swore to perform when he executed his oath of office.

Thus, the Superior Court's ruling finding the this charge sufficient for recall should be affirmed.

4. Fortney has conceded with regard to the first charge and the Court should affirm that charge as well.

Appellant's Notice of Appeal seeks review of the "Order Determining Sufficiency of Recall Charge and Approving Ballot Synopsis, entered June 9, 2020." CP 8. This designation calls into question each charge and every decision made by the superior court. However, in his opening brief, Fortney concedes he will be subjected to recall based on the charge related to his refusal to enforce the law, regardless of the Court's determinations pertaining to the remaining charges. Accordingly, Respondents request that the Court affirm the superior court's ruling regarding collateral estoppel and sufficiency on the merits.

5. The Ballot Synopsis cannot be challenged.

"Any decision regarding the ballot synopsis by the superior court is final." RCW 29A.56.140. This is an express and unequivocal bar to Appellant's challenge regarding the superior court's correction of the ballot synopsis.

Appellant correctly states that “[t]he superior court has authority to ‘correct’ a ballot synopsis, as the superior court did in this case.” Br. of Appellant at 38; RCW 29A.56.140. Additionally, he concedes that any decision regarding the ballot synopsis by the Superior Court is final, without recourse to appeal. Br. of Appellant at 39. Nevertheless, Fortney asks this Court to review the Superior Court’s corrections to the ballot synopsis. This Court should reject this argument.

The Superior Court’s role in correcting the ballot synopsis is important, but limited, and allows the court to reword a charge it deems inadequate. RCW 29A.56.140. As Justice Madsen’s concurrence in *In re Recall of West* explains, “[a]lthough the trial court has the authority to ‘correct’ the ballot synopsis to adequately reflect the charge, regardless of whether the ‘correction’ pertains to factual or legal matters, the court cannot ‘correct’ the charge by correcting the ballot synopsis.” 155 Wn.2d at 668 (Madsen, J, concurring). Here, as in *West*, when the charge is sufficient, and any ballot synopsis corrections accurately state the petitioned charge, there is no error.

Even if this Court could review the trial court’s ballot synopsis language, Fortney’s arguments fail. He argues the trial court acted in an arbitrary and capricious manner by approving the final

language of question three on the ballot synopsis. That charge, as originally presented in the Petition alleged:

Adam Fortney committed misfeasance or violation of oath of office by endangering the peace and safety of the community and violating his duties under RCW 36.28.010 by rehiring three deputies previously terminated after one deputy had used unjustified excessive force resulting in the death of a citizen and the two other deputies violated individual constitutional rights and attempted to cover it up.

CP 144.

As explained above, this charge is factually and legally sufficient. The court corrected the operative language for clarity, leaving a ballot synopsis charging that Fortney “rehir[ed] three deputy sheriffs previously discharged following investigation and findings of misconduct.” CP 38. In other words, the challenged language of this charge omitted the specific nature of the deputies’ underlying conduct and noted instead that they were simply rehired “following investigation and findings of misconduct.” Such a revision not only contains no error but seems to favor Appellant by masking the prejudicial detail of the misconduct at issue: blatant privacy violations and an unjustified killing.

Still, Fortney contends this showed the court’s “willful and unreasoning disregard of the facts.” Br. of Appellant at 40. In doing so, Fortney again demonstrates his misunderstanding of the court’s

gatekeeping function in recall proceedings. The “courts must determine ‘whether, accepting the allegations as true, the charges on their face support the conclusion that the officer abused his or her position.’” *In re Recall of Bolt*, 177 Wn.2d at 173-74 (quoting *In re Recall of Wasson*, 149 Wn.2d at 792). “It is the voters, not the courts, who will ultimately act as the fact finders.” *In re Recall of West*, 155 Wn.2d at 662.

In challenging the ballot synopsis, Fortney continues the recurring theme of attempting to engage the Court in factual disputes. He attempts to argue that the superior court omitted necessary facts that will prevent a fair recall election. Br. of Appellant at 41. Fortney again attempts to convince the Court there should be a “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.” Br. of Appellant at 40. A claim that remains without merit in the record.

These factual disputes and explanations for why each fired deputy was rehired are not relevant to this Court’s analysis. Any factual disputes are reserved solely for the voters, and the omission of these facts from the ballot synopsis does not render the trial court’s choice of language improper, much less arbitrary and capricious.

There is no authority in Washington caselaw on which to determine if the language of a ballot synopsis in a recall proceeding meets the definition of “arbitrary and capricious.” However, the term is most commonly defined as “willful and unreasoning action in disregard of facts and circumstances.” *State v. Ford*, 110 Wn.2d 827, 830, 755 P.2d 806 (1988)(internal citations omitted). In this case, the language of the ballot synopsis is reflective of the allegations as charged. Accordingly, it cannot be determined that the court acted with a willful and unreasoning disregard of the facts and circumstances.

Fortney also challenges the language of question four of the ballot synopsis, which stated in its original form that Fortney “committed misfeasance or violation of oath of office, exercising his discretion in a manifestly unreasonable manner, by failing to investigate a complaint and absolving a deputy accused of tackling and injuring a black woman.” CP 144.

The court corrected the proposed language by adding clarification, charging that Fortney “absolved a deputy sheriff of asserted wrongdoing for tackling a black woman related to a jaywalking incident without ensuring a proper investigation.” CP 38. Again, he accuses the court of willfully disregarding the facts, contending that 1) he would not

characterize his treatment of the deputy as “absolution”; 2) his absolution did not foreclose an investigation; 3) the synopsis “incorrectly indicates that S.W. was tackled for jaywalking, and 4) because the corrected charge indicates S.W.’s race and gender although the deputy’s discriminatory animus has not been established. Br. of Appellant at 40-41. None of these challenges warrant reversal of the court’s decision.

First, the superior court did not insert the word “absolve” as a correction, but merely adopted Petitioners’ proposed language. As such, the language of the ballot synopsis simply reflects the allegation as charged. While the voters will ultimately decide, the use of the word “absolve” cannot possibly be considered arbitrary and capricious.

Second, the superior court actually corrected the charge to remove any allegation that Fortney failed to investigate the incident. Instead, it asks whether Fortney absolved the deputy without ensuring proper investigation was conducted. CP 14. The charge is factually sufficient, and as explained above, there are enough valid concerns about this investigation to warrant the voters’ consideration. The issue of propriety can and should be debated before the voters.

Third, the corrected charge states that the deputy tackled Sharon Wilson “related to a jaywalking incident,” which is true and

uncontested. It does not state or imply the deputy tackled Ms. Wilson for jaywalking. This language does not misrepresent the incident or why the deputy tackled Ms. Wilson.

Finally, Fortney complains the superior court willfully disregarded the facts by stating that Ms. Wilson was a Black woman, which is indisputable. It is unclear how this constitutes a willful disregard of the facts, and it is unclear how this would call the charge's factual sufficiency into question. Unable to argue within the standard, Fortney contends the superior court should have corrected the charge to delete factual information, to erase the gender and race of this Black woman assaulted by a police officer because he is aware the public is concerned about police assaults on Black people. While conceding the legitimacy of such concerns, Fortney asks this Court to ignore RCW 29A.56.140's finality bar and direct the lower court to delete factual information to shield him from those very concerns. To say such argument fails to establish error is a gross understatement.

The legislature and this Court have been repeatedly clear: the superior court's corrections to a ballot synopsis may not be challenged on appeal. Fortney has done nothing to persuade this Court

otherwise, and this Court should not reach the meager merits of his challenges to the ballot synopsis.

CONCLUSION

The superior court did not err in any of the rulings that have been challenged by Sheriff Fortney in his opening brief. As there is a sufficient factual and legal basis for each of the approved charges, Respondents respectfully request this Court affirm the orders of the Snohomish County Superior Court and approve this recall petition to proceed to the signature gathering phase.

Respectfully submitted,

/s/ Colin McMahon
Colin McMahon

/s/ Samantha Sommerman
Samantha Sommerman

/s/ Brittany Tri
Brittany Tri

/s/ Terry Preshaw
Terry Preshaw

CERTIFICATION OF SERVICE

We, the respondents, hereby swear under penalty of perjury that on August 14, 2020, the foregoing document was electronically filed via the Washington Appellate Courts, which will effect service on all attorneys of record.

Signed in Everett, Washington this 14th day of August
2020.

/s/ Colin McMahon
Colin McMahon

/s/ Samantha Sommerman
Samantha Sommerman

/s/ Brittany Tri
Brittany Tri

/s/ Terry Preshaw
Terry Preshaw

COLIN MCMAHON - FILING PRO SE

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