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(King County No. 78443-9-I)

SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE RECALL CHARGES AGAINST CITY OF
SEATTLE MAYOR, JENNY DURKAN

APPELLANT'S REPLY BRIEF AND
RESPONSE TO CROSS-APPEAL

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TABLE OF CONTENTS

	Page
APPELLANT’S REPLY BRIEF	1
I. INTRODUCTION	1
II. ARGUMENT	2
A. Petitioners fail to identify any conduct that is wrongful, unlawful, or a violation of Mayor Durkan’s oath of office.	2
1. Petitioners fail to establish any violation of Mayor Durkan’s discretionary authority pursuant to Seattle City Charter, Article V, Section 2.....	2
2. Petitioners fail to show any violations of the state and federal constitutions.....	7
3. Petitioners fail to establish any violation of a legal duty based on the remaining state and local laws cited in the Petition.	9
B. Petitioners do not dispute that the Consent Decree prevented Mayor Durkan from unilaterally implementing new SPD policies and procedures.....	9
C. Petitioners fail to set forth any facts from which this Court could infer that Mayor Durkan violated any law, much less that she intended to do so.....	10
D. Petitioners fail to identify any action or inaction sufficient to justify recall.	13
RESPONSE TO CROSS-APPELLANT’S BRIEF	18
III. INTRODUCTION	18
IV. STATEMENT OF THE CASE.....	18
V. ARGUMENT	20
A. The trial court appropriately dismissed Charge C.	20
B. Charge E fails for the same reasons as Charge B.	22
VI. CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Anderson</i> , 131 Wn.2d 92, 929 P.2d 410 (1997).....	4
<i>Black Lives Matter Seattle-King County v. City of Seattle</i> , 2020 WL 3128299 (W.D. Wash., June 12, 2020).....	5, 17, 19
<i>Chandler v. Otto</i> , 103 Wn.2d 268, 693 P.2d 71 (1984).....	8
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979).....	8
<i>In re Heiberg</i> , 171 Wn.2d 771, 257 P.3d 565 (2011).....	6, 20
<i>Recall of Kelley</i> , 185 Wn.2d 158, 369 P.3d 494 (2019).....	14, 17
<i>In re Matter of Recall of Morrisette</i> , 110 Wn.2d 933, 756 P.2d 1318 (1988).....	6, 19, 20
<i>Matter of McNeil</i> , 113 Wn.2d 302, 778 P.2d 524 (1989).....	8
<i>Matter of Recall Charges Against Seattle School District Board of Directors</i> , 162 Wn.2d 501, 173 P.3d 265 (2007).....	13
<i>In re Recall of Ackerson</i> , 143 Wn.2d 366, 20 P.3d 930 (2001).....	2
<i>In re Recall of Bolt</i> , 177 Wn.2d 168, 298 P.3d 710 (2013).....	3, 4
<i>In re Recall of Davis</i> , 164 Wn.2d 361, 193 P.2d 98 (2008).....	12
<i>Matter of Recall of Inslee</i> , 194 Wn.2d 563, 451 P.3d 305 (2019).....	3, 10
<i>In re Recall of Kast</i> , 144 Wn.2d 807, 31 P.3d 677 (2001).....	11

<i>In re Recall of Lindquist</i> , 172 Wn.2d 120, 258 P.3d 9 (2011).....	13
<i>In re Recall of Pearsall-Stipek</i> , 141 Wn.2d 756, 10 P.3d 1034 (2000).....	12
<i>In re Recall of Pepper</i> , 189 Wn.2d 546, 403 P.3d 839 (2017).....	11
<i>Matter of Recall of Riddle</i> , 189 Wn.2d 565, 403 P.3d 849 (2017).....	13
<i>In re Recall of Sandhaus</i> , 134 Wn.2d 662, 953 P.2d 82 (1998).....	12, 14
<i>In re Recall of Telford</i> , 166 Wn.2d 148, 206 P.3d 1248 (2009).....	5, 6
<i>Snedigar v. Hoddersen</i> , 114 Wn.2d 153, 786 P.2d 781 (1990).....	7
<i>United States of America v. City of Seattle</i> , No. 2:12-cv-01282-JLR, Dkt. 630 (W.D. Wash., July 25, 2020).....	9
Statutes and Court Rules	
KCLCR 59	19
RCW 29A.56.110.....	5
RCW 29A.56.140.....	22
RCW 35.18.200	9
SMC 10.02.010A	9

APPELLANT'S REPLY BRIEF

I. INTRODUCTION

As their extensive factual allegations reflect, Petitioners fundamentally disagree with Mayor Durkan's management of chaotic and sometimes violent events that occurred amidst a pandemic. Yet disagreement with Mayor Durkan's discretionary decisions does not provide a legally and factually sufficient basis for recall.

Specifically, Petitioners fail to (1) identify any conduct that is wrongful, unlawful, or a violation of Mayor Durkan's oath of office, (2) explain how Mayor Durkan may be subject to recall for not implementing policy initiatives unilaterally in violation of a federal court order, (3) provide any basis for this Court to infer that Mayor Durkan intended to violate the law, and (4) identify any act Mayor Durkan carried out, or declined to carry out, that would subject her to recall.

Despite their troubling proclamation that absent recall, their only recourse would be "force,"¹ Petitioners' own filings rely in significant part on a federal court action in which individuals and advocacy groups successfully sought relief based on alleged harms committed by the Seattle Police Department ("SPD"). Outside of the courts, individuals may pursue relief through SPD's oversight entities or otherwise seek to

¹ Petitioners argue that if not permitted to proceed with a recall election, individuals who are dissatisfied with the actions of the police will have no recourse other than "resorting to force themselves." Response at 1. In today's increasingly polarized political climate, such rhetoric is irresponsible.

effectuate their preferred policies through the democratic process. There are forums in which Petitioners may continue to express their policy disagreements with Mayor Durkan. Washington law simply does not permit them to use such disagreements as the basis for a recall election.

Mayor Durkan respectfully requests that this Court reverse the trial court and dismiss the Petition in its entirety.

II. ARGUMENT

A. Petitioners fail to identify any conduct that is wrongful, unlawful, or a violation of Mayor Durkan’s oath of office.

A petition states legally sufficient charges only if it identifies the “standard, law, or rule that would make the officer’s conduct wrongful, improper, or unlawful.” *In re Recall of Ackerson*, 143 Wn.2d 366, 377, 20 P.3d 930 (2001). In their Response Brief (the “Response”), Petitioners fail to allege any violation of the various constitutional and statutory provisions they rely upon.

1. Petitioners fail to establish any violation of Mayor Durkan’s discretionary authority pursuant to Seattle City Charter, Article V, Section 2.

Petitioners allege that to avoid being subject to a recall election, Mayor Durkan should have:

- “taken charge of the police department”;
- “dismissed the Chief of Police”;
- “issued unambiguous orders to the Chief to ensure . . . [compliance] with the federal TRO”;
- ordered “mediation between the parties” and/or

- done “something entirely unimagined herein.”

Response at 21-22.²

Putting aside whether these suggestions would have reflected sound policy decisions, at the very least, none is sufficient to form the basis of a valid recall petition. Article V, Sec. 2 of the Seattle City Charter explicitly confirms Mayor Durkan’s discretionary authority in emergency situations: “[The Mayor] may, in any emergency, of which the Mayor shall be the judge, assume command of the whole or any part of the police force of the City.” Here, it is undisputed that Mayor Durkan did not exercise her discretionary authority to assume command of SPD.

As Petitioners concede, an elected official cannot be recalled for appropriately exercising the discretion granted to her by law. Response at 37 (citing *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984)). Rather, the exercise of discretionary authority cannot be grounds for recall unless the exercise is manifestly unreasonable. *In re Recall of Bolt*, 177 Wn.2d 168, 174, 298 P.3d 710 (2013). This Court has consistently shown deference to public officials’ discretionary exercise of their executive and/or emergency authority. *See Matter of Recall of Inslee*, 194 Wn.2d 563, 573, 451 P.3d 305 (2019) (governor’s failure to declare a state of emergency to address homelessness was an appropriate exercise of discretion and therefore not legally sufficient); *Bolt*, 177 Wn.2d at 175

² Notably missing from this list is any claim that Mayor Durkan should have “instituted new policies and safety measures for [SPD] when using crowd control measures,” as Charge B originally claimed. CP 15.

(noting that “[s]upervising an employee inherently involves a substantial amount of discretion” and holding that mayor’s termination of employee without following personnel policy was insufficient for recall).

Any suggestion that it was manifestly unreasonable for Mayor Durkan not to “dismiss” Chief Best or otherwise usurp her authority by assuming command of the police force is meritless. Chief Best is a nationally recognized law enforcement leader who is committed to constitutional policing, police reform, and community safety. Mayor Durkan reasonably trusted Chief Best to lead SPD through a period of unprecedented difficulty.

In addition, the record contradicts Petitioners’ suggestion that Mayor Durkan and Chief Best did not mandate compliance with Judge Jones’ TRO. A recall petition is not factually sufficient where there is no factual basis for the charge. *See In re Anderson*, 131 Wn.2d 92, 95, 929 P.2d 410 (1997). There is no basis for this Court to conclude that City and SPD leadership did not understand, convey, and intend compliance with a federal court order. Indeed, Mayor Durkan’s July 1, 2020, Executive Order 2020-08 unambiguously provides that “[a]ny [SPD] use of force shall be consistent with SPD policy and the terms of the Preliminary Injunction issued in *Black Lives Matter v. City of Seattle*, No. 20-CV-887.” CP 292, 294.³

³ The hyperlink to Mayor Durkan’s July 1, 2020, Executive Order appears in footnote one on CP 292. For the Court’s reference, the link is provided again here: http://clerk.seattle.gov/~CFS/CF_321741.pdf.

Moreover, Petitioners' demands for mediation or "something entirely unimagined" lay bare the vague nature of their claims. Petitioners fail to identify who the "parties" to such a mediation would be, among other critical missing details, and recall surely cannot be based on failure to perform "something entirely unimagined." *See* RCW 29A.56.110 (factual sufficiency requires "a detailed description including the approximate date, location, and nature of each act complained of); *In re Recall of Telford*, 166 Wn.2d 148, 154, 206 P.3d 1248 (2009) (Legal sufficiency requires that a charge define "substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office.").

In addition to their policy suggestions, Petitioners broadly contend that Mayor Durkan (1) violated her duty to "maintain peace and order" by not stopping SPD from "violat[ing] the law and the rights of Seattle citizens" and (2) violated her oath of office to "faithfully conduct" herself as mayor by not "protecting her electorate." Response at 30-31. After conceding that Mayor Durkan cannot be subject to recall for not implementing an outright ban on chemical irritants as sought in their Petition, Petitioners now claim that Seattle's mayor may be subject to recall whenever there are allegations of excessive force against police officers pursuant to her duty to "maintain peace and order." Petitioners' claim fails for several reasons. First, Charge B refers to Mayor Durkan's purported failure to institute new policies and safety measures relating to

“the use of chemical agents,” not allegations of misconduct against police officers generally. CP 303-04.

Second, if the Court were to adopt Petitioners’ interpretation, Seattle’s mayor could be subject to perpetual recall, regardless of the officeholder. In a city of nearly a million people with over 1,000 sworn officers, the mayor cannot reasonably have a legal duty for purposes of the recall statute to personally prevent any allegation of excessive force against a police officer, nor could she, regrettably, reasonably prevent all instances of violence directed towards police officers or other residents of Seattle. Public safety in any major city is a complex apparatus, involving, at minimum, public officials, the police department, the judiciary, and oversight entities. There is no basis for a violation of a provision as general as the duty to “maintain peace and order” to be the basis for a recall petition. *See Telford*, 166 Wn.2d at 154.

Third, this Court has previously established that an official cannot be recalled for an act of a subordinate where the official did not direct or have knowledge of the act. *In re Matter of Recall of Morrisette*, 110 Wn.2d 933, 936, 756 P.2d 1318 (1988); *see also In re Heiberg*, 171 Wn.2d 771, 780, 257 P.3d 565 (2011) (holding that for recall purposes, the mayor was not responsible for the clerk’s destruction of a document simply by virtue of the mayor’s supervisory capacity over the clerk). Where, as here, Petitioners set forth general allegations of misconduct

without any evidence that Mayor Durkan directed or had prior knowledge of such misconduct, there is no basis for a recall petition.

2. Petitioners fail to show any violations of the state and federal constitutions.⁴

As was the case in Petitioners' prior briefing, the Response fails to provide any specific unconstitutional act or analysis of how Mayor Durkan purportedly violated any of the constitutional provisions Petitioners identify.⁵ Mayor Durkan does not highlight Petitioners' failure to include any legal analysis in their briefing out of a "dismissive attitude," as Petitioners claim. Response at 33. Rather, without any specification of Petitioners' legal theory, Mayor Durkan cannot respond to their allegations. Indeed, the Fourth Amendment alone requires the following complex analysis:

The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the

⁴ Petitioners devote a significant portion of their constitutional argument to an unsworn first person account (presumably an unidentified petitioner) of alleged events the author viewed on social media in early September. Response at 31-32. While the probative value of these allegations to the instant matter is unclear, in addition to various evidentiary issues, these allegations were not presented to the trial court and should not be considered by this Court. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990) ("[A] record on appeal may not be supplemented by material which has not been included in the trial court record.").

⁵ For the first time in the pendency of this case, Petitioners allege that Mayor Durkan violated the 14th Amendment of the U.S. Constitution and the 7th Amendment of the Washington Constitution. Response at 33. The Petition and voluminous supplemental materials Petitioners submitted therewith and thereafter did not reference either of these provisions; on this basis alone, this Court should reject Petitioners' claims under the Fourteenth Amendment of the U.S. Constitution and the Seventh Amendment of the Washington Constitution.

exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions. Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against an objective standard, whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon some quantum of individualized suspicion, other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field."

Delaware v. Prouse, 440 U.S. 648, 654-55 (1979) (internal citations omitted).

Petitioners fail to provide even the most basic legal analysis of (1) how their allegations support a violation of the Fourth Amendment or any of the other constitutional provisions they rely upon and (2) how such allegations are imputable to Mayor Durkan. Petitioners thus fail to establish any violation of a legal duty based on the identified constitutional provisions. *See Matter of McNeil*, 113 Wn.2d 302, 305, 778 P.2d 524 (1989) (holding that recall charge was legally insufficient where petitioners failed to "explain how due process guaranties enter into this case").

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3. Petitioners fail to establish any violation of a legal duty based on the remaining state and local laws cited in the Petition.

The Petition alleged violations of RCW 35.18.200 and SMC 10.02.010A. The Response offers no argument or authority in support of such claims. Petitioners accordingly do not contest that the Petition does not allege any violation of RCW 35.18.200 or SMC 10.02.010A.

B. Petitioners do not dispute that the Consent Decree prevented Mayor Durkan from unilaterally implementing new SPD policies and procedures.

Contrary to the trial court's holding that Mayor Durkan's failure to "step in and stop" the use of chemical crowd control measures was a sufficient basis for recall, Judge Robart held in the Consent Decree litigation that policies relating to the use of crowd control tools must be submitted to the Federal Monitor, the DOJ, and Judge Robart prior to implementation. CP 650; *see also* Order, *United States of America v. City of Seattle*, No. 2:12-cv-01282-JLR, Dkt. 630 at *6-8 (W.D. Wash., July 25, 2020). Thus, a federal court order precluded Mayor Durkan from unilaterally implementing changes to SPD's court-approved use of force and crowd management policies.

In their Response, Petitioners cite to a decision Judge Robart issued two days prior to the above-referenced decision under a different procedural posture, relegating Judge Robart's subsequent decision to a footnote. Response at 23-24. Petitioners do not otherwise dispute that the Consent Decree precluded Mayor Durkan from unilaterally implementing changes to SPD's court-approved use of force and crowd management

policies. Mayor Durkan cannot have a legal duty to implement policy unilaterally in violation of a federal court order. On this basis alone, this Court should dismiss the remaining charge.

C. Petitioners fail to set forth any facts from which this Court could infer that Mayor Durkan violated any law, much less that she intended to do so.

Petitioners incorrectly claim that the requirement that a petitioner demonstrate facts indicating a public official's intent to violate the law "only applies to recall charges that are based on violation of a statute." Response at 36. Just last year, this Court rejected a petition seeking to recall Governor Inslee for residing outside Olympia in violation of the Washington State Constitution, holding that the petition did not "specifically identify conduct or behavior indicating Governor Inslee intended to reside outside Olympia." *Inslee*, 194 Wn.2d at 571. Thus, the intent requirement applies equally to the allegations here, where Charge B

alleges that Mayor Durkan “violated her duties under state and local laws and her oath to uphold the federal and state constitutions.”⁶

Here, there is no evidence that Mayor Durkan violated any law, let alone that she intended to do so. As evidence of Mayor Durkan’s intent, Petitioners broadly claim that Mayor Durkan was asked to “intervene in the unlawful conduct of the police,” but “made an informed choice to let the police continue in their crimes.” Response at 37. As discussed in detail below, Petitioners conflate Mayor Durkan’s discretionary decision not to adopt the policies they apparently prefer with an intent to violate the law. Indeed, the record clearly reflects Mayor Durkan’s significant efforts to balance the rights of all parties involved in recent events, including peaceful protestors, by requesting review of SPD crowd management policies from the City’s accountability partners, promising budgetary support for OPA and OIG’s review of recent events, and publicly stating

⁶ Oddly, Petitioners appear to cite *In re Recall of Kast*, 144 Wn.2d 807, 31 P.3d 677 (2001) and *In re Recall of Pepper*, 189 Wn.2d 546, 403 P.3d 839 (2017) in support of the proposition that a public official may be subject to recall even without technically violating the law. Even if true, the point is inapposite, as Petitioners have alleged throughout this process that Mayor Durkan violated a range of laws. See CP 12-13. If Petitioners no longer allege that Mayor Durkan violated any laws, the Petition should plainly be dismissed. To the extent Petitioners suggest that they may show a violation of Mayor Durkan’s oath of office without having to show evidence of unlawful intent, such reasoning is, at best, circular, as Mayor Durkan’s oath of office is essentially an oath to uphold the law. See CP 30 (“I, Jenny A. Durkan, swear that I possess all the qualifications prescribed in the Seattle City Charter and the Seattle Municipal Code for the position of Mayor; that I will support the Constitution of the United States, the Constitution of the State of Washington, and the Charter and Ordinances of the City of Seattle; and that I will faithfully conduct myself as Mayor for the City of Seattle.”).

her support for Chief Best’s decision to prohibit the use of CS gas except in life safety circumstances.

Moreover, the cases upon which Petitioners rely provide no support for this Court inferring intent to violate the law here. Instead, they only reinforce that this Court will not lightly infer unlawful intent in the context of a recall petition.

For example, in the primary case upon which Petitioners rely, *In re Recall of Davis*, 164 Wn.2d 361, 370-71, 193 P.2d 98 (2008), this Court held that it could infer that a port commissioner understood the legal necessity of voting in a public session before obligating the port to a monetary agreement, but nonetheless intentionally violated the law by entering into an agreement without a public vote to pay more than \$230,000 to an outgoing employee. Here, there is no evidence of any “legal necessity” that Mayor Durkan disregarded, let alone an action or failure to act in violation of such a legal necessity. *See also, In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 779, 10 P.3d 1034 (2000) (holding there was sufficient evidence to infer official’s intent to violate the law where she was administered an oath on page one of a trial transcript and made an untruthful statement on page two); *In re Recall of Sandhaus*, 134 Wn.2d 662, 671-72, 953 P.2d 82 (1998) (finding that official’s intent to improperly exceed budget appropriations could “probably” be found in evidence showing that official knew he was overspending and did so even

after the Board of County Commissioners and auditor warned him to stop, but nonetheless finding charge legally insufficient).

D. Petitioners fail to identify any action or inaction sufficient to justify recall.

Petitioners conflate Mayor Durkan declining to adopt their preferred policy proposals with a failure to act in violation of a specific legal duty that would justify recall. Mayor Durkan does not dispute that, as Petitioners argue in their Response, where there is a duty to act, a failure to do so may be a basis for recall. As this Court recognized in *Matter of Recall of Riddle*, 189 Wn.2d 565, 570, 403 P.3d 849 (2017), a charge is factually sufficient where it alleges a “failure to act which without justification would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office.” For instance in *Riddle*, the petition was factually sufficient where a court clerk knowingly failed to perform her statutorily mandated duty to enter child support and temporary restraining orders for up to eight months. *Id.* at 575.

Where, as here, the allegations do not implicate a specific duty to act, the failure to act cannot be a factually sufficient basis for recall. *See In re Recall of Lindquist*, 172 Wn.2d 120, 134, 258 P.3d 9 (2011) (holding that charge of failure to investigate was legally and factually insufficient, as the prosecuting attorney does not perform investigations); *Matter of Recall Charges Against Seattle School District Board of Directors*, 162 Wn.2d 501, 511, 173 P.3d 265 (2007) (charge was legally insufficient

where directors had no legal duty to hold the hearing petitioners claimed they failed to timely hold); *see also Sandhaus*, 134 Wn.2d at 670 (“Balancing priorities in a public office with limited funds and personnel is a matter within the discretion of the office supervisor, and whether [a public official] is doing a good job of managing [the] office is a quintessential political issue which is properly brought before the voters at the next election.”).

Here, Petitioners fail to allege that any purported failure of Mayor Durkan to act was in violation of a specified legal duty.⁷

Initially, Petitioners misconstrue Mayor Durkan’s recitation of the underlying facts, claiming she depicts protestors as being “typically the aggressors.” Response at 17. To the contrary, Mayor Durkan’s briefing throughout this recall process has emphasized the peaceful nature of most of the protestors:

Seattle residents powerfully took to the streets to mourn Mr. Floyd, rightfully proclaim that Black lives matter, and demand an end to systemic racism. The vast majority of protestors exercised their First Amendment rights in a peaceful manner. Indeed, on June 12, 2020, alone, more than 60,000 people peacefully marched in an event organized by Black Lives Matter Seattle-King County. In certain instances, however, individuals disrupted otherwise peaceful protests by engaging in acts of violence against

⁷ Petitioners’ attempt to distinguish *Recall of Kelley*, 185 Wn.2d 158, 369 P.3d 494 (2019) on this point is unpersuasive. Petitioners’ vague reference to Mayor Durkan’s purported “inaction in the face of her assigned duties under the City Charter” does not satisfy *Kelley*’s requirement that a petition state “specific facts” showing how the public official deficiently performed her duties. *Id.* at 169. For the reasons discussed above, Petitioners fail to identify such specific facts here.

community members and police officers, and causing widespread property damage in Seattle's downtown core.

CP 122-123.

Petitioners, however, paint a starkly one-sided version of recent events, in which police officers were the sole aggressors, and civil unrest posed no safety risks to peaceful protestors, bystanders, or surrounding businesses. Some of the very materials Petitioners rely upon reflect a far more complex and chaotic scene, including the Seattle Times' description of events outside the East Precinct on June 6, 2020:

The protest had remained peaceful throughout the afternoon and evening, with police initially remaining far back from the crowd in the area around the Seattle Police Department's East Precinct.

Tensions rose throughout the night as some demonstrators advanced past a line of barricades that police had installed, ignoring repeated admonitions by a police commander, whose warnings on a loudspeaker drew boos. By the time of the shooting, the crowd had torn down the barricades, throwing a line of metal barriers up the street to create a new perimeter closer to the precinct.

'Many of you are proclaiming to be peaceful, and yet you continue to advance well beyond the barrier that we set up so everybody could stay safe,' the SPD commander at the scene warned at around 10:20 pm as the crowd inched closer to the line of police in riot gear.

Throughout the night, demonstrators shouted back that it was the police who had stoked conflicts, as some demanded the authorities clear the way for a march. "Whose streets? Our streets!" they shouted. While some organizers with bullhorns urged the crowd to back up, others kept pushing toward the line of officers, drawing further warnings.

CP 12, n.40.

Likewise, on page 7 of the Response, Petitioners claim that at 9:10 p.m. on June 1, 2020, police deployed blast balls and chemical irritants “on a group of peaceful protestors.” The very Clerk’s Papers (66-69) Petitioners rely on, however, again paint a more complicated and chaotic scene, including the following entries:

- 3:53 pm: Officer struck by rock/unknown injury
- 4:46 pm: Male in orange jersey picking up rocks at 516 James Street
- 5:05 pm: Man attempting to break into a medic van
- 5:40 pm: Crowd now approximately 7000, crowd talking about marching to East Precinct
- 6:34 pm: Sneaker City just looted
- 9:04:16 pm: they are attempting to push through barricade
- 9:04:28 pm: we need more units they are pushing hard
- 9:04:37 pm: need support 11/pine
- 9:06 pm: Group pushed through fence line, activate cameras, threw 1 bottle
- 9:22 pm: Taking bottles, rocks & pyro
- 9:29 pm: Car tried to hit an officer
- 9:31 pm: Rolling dumpsters down the hill in front of Hugo House at 11 ave
- 9:34 pm: Individuals throwing rocks & bottles pushing north

- 9:48 pm: Group at Pine and Boren confrontational, throwing things, jumping on things
- 9:50:58 pm: Assault rifle @ the iHop parking lot in grey car
- 9:52:30 pm: 1 injured officer being treated @ East Precinct

Moreover, Petitioners’ “matrix” (Response at 25-29) does not provide a basis for recall. Of the 13 “requests,” seven refer primarily to requests to ban CS gas and other chemical irritants, which Petitioners have already conceded Mayor Durkan had no duty to effectuate. Three refer to non-specified reforms of SPD tactics (*i.e.*, a coalition of tech leaders demanding implementation of “CPC police reforms”). The remainder provide recitations of facts without discussion of any particular policies.⁸

The legality and propriety of law enforcement and protestor actions will continue to be reviewed by the appropriate entities, likely for years to come. Moreover, in litigation, public discourse, and in the halls of government, debates will continue regarding whether, as Petitioners believe, the police response went too far, or whether, as others believe, it did not go far enough. At the very least, however, the record is clear that

⁸ Notably, Judge Jones also declined to adopt an outright ban on chemical irritants. Instead, his order did not “preclude officers from taking necessary, reasonable, proportional, and targeted action to protect against a specific threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property.” *Black Lives Matter Seattle-King County*, 2020 WL 3128299, at *5 (W.D. Wash., June 12, 2020). Judge Jones further permitted Chief Best to authorize CS gas in life-safety situations. *Id.* No federal court nationwide has ordered an outright ban on chemical irritants relating to the recent demonstrations. *See* Appellant’s Brief at 30-31 (citing cases).

these were difficult, unprecedented circumstances, requiring City leadership to make complex policy decisions in real time based on rapidly unfolding public safety risks in city streets. Petitioners have not identified and cannot identify an action or failure to act from Mayor Durkan that violated a particular legal duty.

RESPONSE TO CROSS-APPELLANT’S BRIEF

III. INTRODUCTION

The trial court appropriately dismissed Charges C and E of the Petition. This Court should affirm the dismissal of both charges. Charge C is insufficient because Mayor Durkan cannot be subject to recall for purported actions of her subordinates without her knowledge, direction. Moreover, even accepting Petitioners’ factual allegations as true, there is no evidence that Mayor Durkan intended any of the allegations described. Charge E, as the trial court held, is duplicative of Charge B and fails for the same reasons discussed above.

IV. STATEMENT OF THE CASE⁹

Charge C alleges:

Mayor Durkan endangered the peace and safety of the community and violated her duties under RCW 35.18.200, Seattle Charter Art. V, Sec. 2, SMC 10.02.010A, and her oath to uphold U.S. Const., Amend. 4, Washington Constitution, Art. 1, Sec. 3 and 5, when she failed to enforce Seattle Police Officer compliance with the Seattle Municipal Code and the Seattle Police Manual, when the police deliberately attacked members of the press despite their identification as such, attacked street medics

⁹ To avoid duplication, Mayor Durkan incorporates by reference the Statement of the Case provided in her Opening Brief.

attempting to treat the injured, destroyed medical supplies, and deliberately did not use appropriate de-escalation techniques.

CP 6. Charge E alleges:

Mayor Durkan endangered the peace and safety of the community and violated her duties under RCW 35.18.200, Seattle Charter Art. V, Sec. 2, SMC 10.020.010A, and her oath to uphold U.S. Const., Amends. 1 and 4, Washington Constitution, Art. 1, Sec. 3-5, when she wrongfully subjected bystanders to chemical weapons and crowd control measures.

Id.

On July 10, 2020, the trial court dismissed both charges. CP 301. With regard to Charge C, the trial court held that “Mayor Durkan is not accountable by way of recall for the actions of her subordinates without her knowledge, not at her direction.” *Id.* (citing *Morrisette*, 110 Wn.2d at 936). Charge E, the trial court further held, was duplicative of Charge B.

On July 21, 2020, Petitioners purported to file a Cross-Motion for Reconsideration asking the trial court to re-consider its dismissal of Charges C and E. CP 596, 621. The trial court did not request that Mayor Durkan respond. CP 640; *see* KCLCR 59(b) (stating that a party shall not respond to a motion for reconsideration unless requested to do so by the court). On July 29, 2020, the trial court stated that Petitioners’ cross-motion was not noted for hearing and therefore was not properly before the court for consideration. CP 793.

On August 12, 2020, Petitioners filed a motion for an expedited briefing schedule in this Court, emphasizing the limited trial court record:

“[t]he record can be designated as only briefing, if required, and exhibits, and no transcripts need be generated.” Emergency Motion at 3. Three days after this Court imposed an expedited briefing schedule, however, Petitioners filed a Motion to Supplement the Record with New Evidence, seeking to supplement the record primarily with additional declarations filed in *Black Lives Matter Seattle-King County v. City of Seattle*. On August 28, 2020, this Court denied Petitioners’ Motion to Supplement. Despite this denial, in their briefing, Petitioners include nearly 20 news articles, social media posts, and YouTube videos as factual support for their claims, none of which are part of the trial court record. Response at n. 2, 6 (two previously uncited YouTube videos), 12 (three previously uncited news articles), 13 (two previously uncited news articles), 14, 15, 31, 37, 58, 59, 74, 76, 81.

V. ARGUMENT

A. **The trial court appropriately dismissed Charge C.**

Petitioners fail to identify any basis for this Court to impute alleged actions of any individual police officers to Mayor Durkan. Washington law is clear that an official cannot be recalled for an act of a subordinate where the official did not direct or have knowledge of the act. For example, in *Morrisette*, 110 Wn.2d at 936, petitioners sought to recall a sheriff in part based on the actions of one of his deputies. The Court, however, held that the allegations were insufficient, stating:

[A]ppellants do not allege that Sherriff Morrisette knew of these incidents or that he directed the deputy’s actions. Appellants contend Sherriff Morrisette is legally

responsible for the actions of his subordinates. While this may be true as a principle of tort law, appellants cite no authority for the proposition that a public official may be recalled for the act of subordinates done without the official's knowledge or direction.

See also In re Heiberg, 171 Wn.2d 771, 780, 257 P.3d 565 (2011) (holding that for recall purposes, mayor was not responsible for the clerk's destruction of a document simply by virtue of the mayor's supervisory capacity over the clerk).

Here, Petitioners allege that police officers violated the Seattle Municipal Code and SPD policies in their interactions with medics and media members, as well as a general failure to de-escalate. Even accepting that individual officers violated Seattle Municipal Code or SPD policies, Petitioners fail to establish that Mayor Durkan had prior knowledge of, directed, or intended any of the allegations of misconduct described in their briefing. Indeed, elsewhere in their briefing, Petitioners criticize Mayor Durkan for not assuming control of SPD. Mayor Durkan has consistently stated that any use of force should be consistent with law and SPD policies. *See* CP 462 (“Chief Best and I have had so many conversations over the years, and we know and agree and reaffirm that every encounter of police they use and try to determine how to de-escalate as a first stop. The use of any force—whether it be the use of hands-on force or pepper spray or tear gas should only be done as circumstances require.”).

There is simply no basis in the record for this Court to conclude that Mayor Durkan directed or intended for any individual officer to engage in any misconduct, including violating the Seattle Municipal Code or SPD policies. *See* Mayor Durkan’s Opening Brief at Section IV(B)(2).

B. Charge E fails for the same reasons as Charge B.

As the trial court acknowledged, Charge E is duplicative of Charge B. Charge E therefore suffers from the same deficiencies identified herein and in Mayor Durkan’s Opening Brief with regard to Charge B. Moreover, Petitioners’ suggestion that this Court should “expand [Charge B] with language from the incorrectly-dismissed Charge E” is contrary to law. Response at 50. Pursuant to RCW 29A.56.140, “[a]ny decision regarding the ballot synopsis by the superior court is final.”

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VI. CONCLUSION

For the foregoing reasons, Mayor Durkan respectfully requests that this Court (1) deny Petitioners' cross-appeal and (2) dismiss the Petition.

DATED this 17th day of September, 2020.

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CERTIFICATE OF SERVICE

I, Sabrina Mitchell, declare under penalty of perjury of the laws of the State of Washington that on this 17th day of September, 2020, I caused the foregoing document to be filed with the Clerk of the Supreme Court and served on petitioners/respondents, via email and U.S. Mail, First Class postage prepaid, addressed as follows:

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