

FILED
SUPREME COURT
STATE OF WASHINGTON
9/22/2020 1:25 PM
BY SUSAN L. CARLSON
CLERK

NO. 98897-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE MATTER OF RECALL CHARGES AGAINST

CITY OF SEATTLE

MAYOR JENNY DURKAN

Appellant.

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

The Honorable Mary E. Roberts

REPLY BRIEF OF CROSS-APPELLANT

PETITIONER ELLIOTT GRACE HARVEY

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....3

 A. The authority of the Mayor over the police as outlined the City Charter – both the authority over the Police Chief and over the force itself in the event of emergency—must have meaning.....3

 B. The duties of the Mayor under the City Charter, to enforce the law and keep the peace and order of the City, must also have meaning7

 C. The SPD repeatedly violated the federal TRO. If the Mayor had prevented or stopped such violation, there would not continue to be significant basis for recall.....10

 D. The Mayor claims to not understand the constitutional questions raised when residents are forced to breathe harmful gases in their homes, or indeed, when protesters are gassed in the streets for the content of their speech12

 E. The Mayor’s novel legal argument that this recall requires a showing of the Mayor’s intent is not supportable, but the Mayor’s intent is shown nonetheless, insofar as is necessary for the recall13

 F. The constitutional right of recall is intended to allow ordinary citizens to assert improper conduct by their elected officials17

 G. In addition to all the above reasons, Charge E simply wasn’t duplicative as held by the Superior Court21

 H. This Court need understand that the constitutional rights of protesters and residents alike are still in play, every day, in Seattle21

III. CONCLUSION24

TABLE OF AUTHORITIES

Constitutional Provisions

United States Constitution, Amend. 4.....	13
Washington Constitution, art. 1, § 7	13
Washington Constitution, art. I, § 33	18
Washington Constitution, art. I, § 34.....	18

Cases

In re Recall Charges Against Davis

164 Wn.2d 361, 193 P.3d 98 (2008).....	22 n.15
--	---------

In re Recall of Inslee

194 Wn.2d 563, 573, 451 P.2d 305 (2019).....	5
--	---

In re Recall of Kast

144 Wn.2d 807, 31 P.3d 677 (2001).....	10
--	----

In re Recall of Pearsall-Stipek

141 Wn.2d 756, 10 P.3d 1034 (2000).....	18, 22 n.13
---	-------------

In re Recall of Pepper

189 Wn.2d 546, 403 P.3d 839 (2017).....	22 n.14
---	---------

In re Recall of Washam

171 Wn.2d 503, 257 P.3d 513 (2011).....	18
---	----

In re Recall of West

155 Wn.2d 659, 121 P.3d 1190 (2005).....	18
--	----

Pederson v. Moser

99 Wn.2d 456, 462, 662 P.2d 866 (1983).....	18
---	----

Rivard v. State

168 Wn.2d 775, 783, 231 P.3d 186 (2010).....	6, n.1
--	--------

State v. Dennis

191 Wn.2d 169, 421 P.3d 944 (2018).....	6, n.1
---	--------

Statutes

RCW 29A.56.110.....14

RCW 29A.56.140.....10

Other Authorities

Seattle City Charter, Art. V, §2.....3, 4, 7

Seattle City Charter, Art. VI, §24

Seattle City Charter, Art. VI, §43, 4

I. INTRODUCTION

Nearing the end of a lengthy recall case, the Petitioners' question of the Court remains uncomplicated: Are elected officials permitted to protect the commission of crimes of those under their employ by simply turning a blind eye? In the case of Mayor Durkan, is she afforded protection from the consequences of her inaction, when the people of her City are forced to quietly bear those consequences—harm on their bodies and violation of their civil rights—at the hands of the Mayor's Police Department?

Petitioners assert that this case, this severe neglect of duty, is the quintessential circumstance for which recall was written into our Constitution. Recall is not an erosion of our democratic process, it is not going against the will of the voters, it is exactly the will of the voters—nothing more and nothing less. Recall is built into the foundations of our electoral process in the State of Washington and is an egalitarian right afforded to voters when they most need accountability. It is the opportunity Washington voters have at any time to make a strong, specific statement to their elected officials: “We assert our right to vote for—or against— your removal from office when you violate your oath or neglect your duty.”

Unsurprisingly, the Mayor's argument of their own appeal of Charge B and their opposition of Petitioners' cross-appeal of Charge E, run exactly in tandem. Indeed, these perfectly parallel arguments are:

- The rules and duty outlined in the Seattle City Charter for mayoral oversight of the Seattle Police Department do not apply to this Mayor.
- The clearly defined role and duties of mayor for the City of Seattle, as outlined in the Seattle City Charter, are purely decorative and nonbinding.
- Protection against violent misconduct by city employees is reserved for individuals with the means to file a civil suit.
- This Court should overlook the Seattle Police Department's repeated violations of the federal TRO prohibiting the use of CS gas ("tear gas") and OC gas ("pepper spray" or "pepper bombs") except for cases involving life and safety, because the Mayor did not explicitly direct them to violate the law, but only permitted it.
- This Court should disregard the provisions for recalls based on "misfeasance" or "violation of one's oath of office" and instead require "intent," even where a recall case is not based on the official's violation of the law.
- Constitutional rights of residents in the City of Seattle are not implicated when these residents suffer physical harm or are evicted from their homes by the Seattle Police Department's indiscriminate use of CS or OC gas.

- And finally, the Constitutionally-protected right of recall has no meaning, if your allegation is that an elected official stood back and allowed someone else to violate the law, even when:
 - Civil rights were violated over weeks or months, with continued and pointed requests for relief;
 - The elected official alone had the right to fire the employee supervising the violation of your rights, and could have taken over control from that supervisor if they chose; and
 - The official’s fundamental duties, assigned by law, directly conflict with the actions of those violating your rights.

Contrary to these, Petitioners believe this Court will find the City Charter, the recall statutes and indeed, the constitutional right of recall itself, are not meaningless. We will address each of these in turn.

II. ARGUMENT

A. **The authority of the Mayor over the police as outlined in the City Charter—both the authority over the Police Chief and over the SPD itself in the event of emergency—must have meaning.**

The Mayor acknowledges at least one proclaimed emergency was in effect at all relevant times, often two. Appellant’s Opening Brief (“**AOB**”) at 2, 3. Moreover, the Mayor agrees that under the City Charter, she could have either taken charge of the SPD per its emergency provisions, ordered the Police Chief to take further action, or dismissed the Police Chief. AOB at 27-28, Mayor’s Reply/Response Brief (“**MRB**”) at 2-3, citing Seattle City Charter, Art. V, §2 and Art. VI, §4. Appellant’s

only defense is her assertion that she had unfettered discretion when she consistently declined to intervene. MRB at 2-7.

Petitioners have acknowledged that the Appellant had, for a limited period of time, some discretion in this matter. Indeed, the Superior Court found exactly this when it specified the timeframe of Charge B to cover the time after the Mayor had an opportunity to learn more about CS and OC gas and their specific dangers during the pandemic. CP 300-01, 303, 791-92 (Superior Court Orders).

Petitioner's argument has been consistent. After it became clear that the SPD was routinely violating the rights of protesters and the rights of those simply residing in Seattle, and after it became abundantly clear that the use of chemical gasses during a respiratory pandemic was unreasonably dangerous, it became incumbent for the Mayor to use her power to intervene. This is not, as Appellant argues, a mere "political dispute," but a real-world application of dangerous and violent police tactics and clear harm to the bodies and minds of the people the Mayor was elected to serve.

If it is true that there is no point at which it becomes an abuse of the Mayor's discretion to allow the police under her employ to do whatever they please, then her leadership and power over the SPD—over the Chief of Police at all times under Article V, §2, and Article VI, §§2 and 4; and over the officers themselves at times of emergency under Article V, §2—is meaningless in terms of whether she has fulfilled her

duties. If the Mayor has the prerogative to allow the police to initiate their own form of extrajudicial “justice,” and not face impeachment for it, then residents of the Capitol Hill neighborhood and the City of Seattle have lost far more than their right to a given recall election. They have lost the rule of law itself.

The Mayor suggests In re Recall of Inslee, 194 Wn.2d 563, 573, 451 P.2d 305 (2019), is on point here. In Inslee, the governor declined to declare a state of emergency regarding homelessness, and this Court found this a reasonable use of discretion. Id.

Inslee is instructive, but not truly on point. Suppose, in Inslee, the governor had failed to declare a state of emergency in a time of grave fire danger, when conditions were extremely dry and multiple wildfires were ravaging the state. See Governor’s Proclamation 20-68. Or, indeed, if a historic, global pandemic struck the state, being first discovered in one case in the state on January 11th, and having spread to 85,688 confirmed cases in a little over a month. See Governor’s Proclamation 20-5 (first COVID-19 emergency proclamation).

Would it ever be an abuse of discretion for the Governor to refuse to issue a valid proclamation for what was clearly a major emergency?

Here, of course, emergencies were already proclaimed, so that specific determination was not at issue. Instead, the Mayor chose not to intervene when faced with complaint after complaint that the police were

acting recklessly and lawlessly, a far more pressing matter than whether or not a particular emergency is officially declared.

The Seattle police—in a position of great trust and power—committed assaults against both residents sheltering inside their homes and peaceful protestors exercising their First Amendment rights. By releasing gas and then also by attacking medics and press, the SPD committed acts against the residents of Seattle that would constitute war crimes, were we at war. Put another way, were the ground of Seattle a designated international war zone, the residents therein would be afforded better protections.

The Mayor—the only elected official with power over the SPD—declined to intervene, despite many individuals and groups begging her to do so. This was an abuse of discretion. If it can be seen as within her discretion to not take control despite such extreme circumstances, then her power over the police, as delineated by the City Charter, lacks any meaning whatsoever.

We reject that outcome as fundamentally opposed to the constitution and the rule of law, opposed even to those lesser rules governing the statutory interpretation of written law.¹ We assume this Court will reject it as well.

¹ This Court has repeatedly found that one of the rules of statutory interpretation is that it will “render no portion [of the law] meaningless or superfluous.” State v. Dennis, 191 Wn.2d 169, 421 P.3d 944 (2018), quoting Rivard v. State, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). Here, the rules of statutory construction require that all parts of the Seattle City Charter must be interpreted so as to have meaning.

B. The duties of the Mayor under the City Charter, to enforce the law and keep the peace, should have meaning.

Article V, §2, of the Seattle City Charter delineates the “Power and Duties of [the] Mayor.” The first sentence reads:

The Mayor shall see that the laws in the City are enforced, and shall direct and control all subordinate officers of the City, except in so far as such enforcement, direction and control is by this Charter reposed in some other officer or board, and shall maintain peace and order in the City. (Emphases added.)

These are, at their heart, the very purposes of an executive branch of government. They are, without exaggeration, the reason why Seattle (or any municipality) has a mayor. But Mayor Durkan suggests that if these are the grounds upon which a mayor can be recalled, it will break our system of government:

Seattle’s mayor could be subject to perpetual recall, regardless of the officeholder... There is no basis for a violation of a provision as general as the duty to “maintain peace and order” to be the basis of a recall petition.

MRB at 6. The Mayor suggests that such an allegation is the equivalent of requiring her to “personally prevent any allegation of excessive force against a police officer.” Id.

The Mayor and the City Attorney’s office have frequently called the protests “unprecedented.” CP 122, 223, 242. In their opening brief, the Mayor calls this “the most widespread civil unrest Seattle has seen in decades.” AOB at 1. Indeed, the fact of multiple emergency proclamations being in effect indicates this was an unusual, if not unique,

context. CP 45-52 (Proclamations re: COVID-19); CP 146-49 (Proclamation re: Protests).

Conversely, the Mayor now suggests that recent SPD action against protestors is somehow commonplace—that a recall based on SPD’s video-documented, wide-scale mistreatment of residents over the past 3.5 months would somehow subject her to individual liability for SPD officers’ every illegal action. MRP at 5-6. Or more specifically as regards this reply, she implies that their release of vast clouds of noxious gas on the city’s residential streets, without just cause, is something that would subject the Mayor of Seattle to “perpetual recall.” MRP at 6.

This is a petition for recall, not a criminal, or indeed, a civil trial. The behavior of the police here has been widespread, terrifying, and vicious, and has made it actively dangerous to be a protester in Seattle, or indeed, to simply live in the vicinity of where First Amendment activity occurs. The Office of Police Accountability (“OPA”), reports they have received some 19,000 calls about police misconduct since May 30.²

There must be a point at which the Mayor has to act, and act decisively. There must be a point at which her responsibility to “peace and order,” to the enforcement of the law, and most ethically, to the safety of the people of Seattle becomes preminent. If there is no point at which

² <https://www.seattle.gov/opa/case-data/demonstration-complaint-dashboard>. Per the same website, these 19,000 calls have resulted in 118 cases. As of this writing, OPA has made determinations on only six cases. Two have been sustained, and the other four have been dismissed. Id.

the unlawful conduct of City “peace officers” can cause the recall of the executive of the city, then the Mayor’s fundamental, Charter duties of “see[ing] that the laws in the City are enforced, and...maintain[ing] peace and order in the City” are themselves without meaning.

Petitioners need not propose a bright-line rule for when the lawlessness of a police force is sufficient for it to be the basis for a supervising Mayor’s recall. Petitioners do, however, argue that after weeks of tear gas and pepper spray choking residents and some 19,000 complaints, not to mention specific, repeated allegations of abuse, assault, and injury inflicted on protesters, we are well past that point now.

The Mayor thus finds herself sitting comfortably within the realm of “manifestly unreasonable.” She nevertheless claims a hypothetical danger of this precedent, a risk of “chilling” the discretion of future mayors. But the real and present danger in this case, however, is the deep erosion of the constitutional rights of voters and residents.

If it is true that an elected official may freely permit the commission of crimes from those employees under their oversight, and that the voters no longer have any right to recall based on harm inflicted by the hands of the Mayor’s subordinates, this case will surely empower elected officials in this State to permit or even encourage any manner of lawlessness without fear of either constraint or loss of power.

The Mayor airily reviews the suggested actions by Petitioners and dismisses them all as insufficient. But as Petitioners noted in our prior

brief, no portion of recall law requires Petitioners to propose exactly what path the Mayor had to take (and indeed, the language approved by the Superior Court does not say exactly what path the Mayor should have taken). CP 300-01, 791-92.

Petitioners need only to state in their charges what the Mayor wrongly did, or failed to do. And in this case, what the Mayor has done, over and over, was nothing—specifically nothing designed or intended to protect the residents of Seattle sheltering in their homes under her curfew from the gas recklessly released by her own police department. Either at some point this failure to act became an abuse of discretion, or the words of the City Charter defining her very role are futile and meaningless.

C. The SPD repeatedly violated the federal TRO. If the Mayor had prevented or stopped such violation, there would not continue to be significant basis for recall.

It is well-established that this Court does not weigh the evidence in a recall case; that is for the voters of Seattle. RCW 29A.56.140; In re Recall of Kast, 144 Wn.2d 807, 813, 31 P.3d 677 (2001). Moreover, the federal TRO clearly prohibited the use of tear gas and pepper spray unless “life safety” was at risk, and indeed, the Mayor does not argue differently. MRB at 4. See also CP 81-82 (full order at CP 72-83).

The Mayor does not, in fact, even directly argue that the TRO was not violated. See MRB at 4. Indeed, such an argument would be difficult in view of the many witness statements and videos immediately available showing SPD releasing gas in such clouds in residential streets, that the

people inside buildings were affected, and in some cases, had to flee their own homes during a curfew and a pandemic. See, e.g., CP 22,³ 86 (testimony before Public Safety and Human Services Committee meeting), 89-90 (declaration by Petitioner Elliott Grace Harvey).

Instead, the Mayor asserts that because she ordered once, on July 1, 2020, that SPD's use of force should be consistent with the TRO, that she completed any duty required of her. MRB at 4, quoting [Executive Order 2020-08](#). The cited order is 5-pages, mostly single-spaced, executed at 2am on July 1, the primary purpose of which was to close Cal Anderson Park and evict the protesters later that morning. The item pointed to by the Mayor is one sentence of the order, on page 4, item 4 in a list of 16. MRB at 4, quoting [Executive Order 2020-08](#).

If this is the measure by which the Mayor executes her duty of care of her residents' civil rights, it is difficult to not categorically find it wanting. [Executive Order 2020-08](#) was, moreover, an order about a specific event, and it has no application to either the many days of offenses that came before it (even counting from June 12, when the TRO was issued, until July 1), or the many assaults that happened after, including the violent weekend of July 25th. Id.

³ Citing *Call to Action for Businesses and Residents Subjected to SPD Tear Gas During the Capitol Hill Protests*, Capitol Hill Seattle Blog, Jun 5, 2020, <https://www.capitolhillseattle.com/2020/06/capitol-hill-community-post-a-call-to-action-for-businesses-and-residents-subjected-to-spd-tear-gas-during-the-capitol-hill-protests/>.

If the police violence had halted on June 12, the date of Judge Jones' TRO,⁴ then this recall might never have reached this point. Instead, the violence continued and no one in the SPD was accountable for either the assaults or the violations of residents' constitutional rights. Indeed, until Chief Carmen Best's resignation—evidently issued because the City Council reduced her pay—the Mayor described Chief Best in glowing terms, thanking her repeatedly for her work, and rarely even alluding to the allegations of atrocious police conduct, let alone addressing them.⁵

There were no consequences for the officers' violence, so—as we could easily predict—it did not stop, and it has not since. This all happened under the Mayor's supervision. This is her bailiwick, both as an executive officer in general, and as the City Charter specifically indicates. The recall charges are therefore fully supported by the facts and law.

D. The Mayor claims to not understand the constitutional questions raised when residents are forced to breathe harmful gases in their homes, or indeed, when

⁴ CP 72-83 (Order).

⁵ See, for example,

<https://www.youtube.com/watch?v=rE4VMjClqI&feature=youtu.be&t=1126> (joint press conference with Mayor Durkan and Chief Best on 6/11/20, where Mayor Durkan's thanking of Chief Best begins at 12:30, with her stating, "they have worked so hard to adjust and improve every day, and they are guided by doing all they can for the businesses and residents of Seattle"; then at 31:45, Mayor Durkan states unambiguously, "I have confidence in the Chief..." jokes about a "Thelma and Louise moment," and closes with her statement that the Chief and she will move forward together); <http://seattlechannel.org/mayor-and-council/mayor/city-of-seattle-mayor-videos/?videoid=x114620> (joint press conference with Mayor Durkan and Chief Best on 6/5/20, during which the Mayor asserted that Chief Best was "making continued adjustments" to improve communication between officers and protesters and "formalize more deescalation teams on both sides" starting at 3:30, and the Mayor expresses her "continuing admiration and gratitude for the work that [Chief Best] is doing. She has led this department through this unprecedented moment, with a level of grace, restraint, and resolve that I think is unmatched....Seattle is really fortunate to have her leadership." starting at 10:38). Both these conferences were cited by the Mayor at CP 325.

protesters are gassed in the streets for the content of their speech.

The Mayor expresses bafflement that constitutional questions have somehow been raised by this case. MRB 7-8. Perhaps the Mayor does not understand or agree that individuals have the right to experience safety in their own homes? Even so,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

US Const., Amend. 4. And:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Washington Constitution, Article 1, §7.

Petitioners are evidently expected to explain how these foundational principles of life and liberty apply to the SPD's releasing vast clouds of noxious gas in such a way that the gas invaded someone's home, causing some residents to flee and others to suffer through dangerous, painful fumes. CP 22, 86, 89-90. Petitioners have already described additional dangers due to the pandemic, and have already detailed occasions where police had no lawful cause to release such gas.

Petitioners sincerely believe the constitutional point has been made. We also refer this court to such other rights as freedom of the press, freedom of assembly, and the like, all of which were impaired by SPD's violence against residents, protesters, the press, and volunteer medics.

E. The Mayor's novel legal argument that this recall requires a showing of the Mayor's intent is not

**supportable, but the Mayor’s intent is shown
nonetheless, insofar as is necessary for the recall.**

Petitioners have pointed out that the behavior of the Mayor—whether by allowing police to gas protesters or bystanders—amounts at minimum to misfeasance and violation of her oath of office, neither of which require: (a) a law be violated by the Mayor or, indeed, (b) the Mayor have intended to violate such law. RCW 29A.56.110.

The Mayor argues for the first time that all the reasons listed for recall have an intent element. This matters little, as there is a great deal of evidence that the Mayor was aware of the violations of residents’ and protesters’ rights alike, and that she knowingly decided not to intervene.

Nonetheless, Petitioners have not claimed that the Mayor directly violated the residents’ rights, but rather, that the Seattle Police did so, and that the Mayor failed to intervene to protect the residents from such acts, even after pleas to do so and repetitive violations.

It matters very little to those forced to flee their homes whether their Mayor “intended” to evict them from their home by gassing them during a pandemic, or if she simply closed her eyes to the results of her inaction. Just as it matters very little to the peaceful, unthreatening protester shot by a blast ball at close range—whose heart stopped three times en route to the hospital—that the Mayor herself did not pull the trigger.

Petitioners argue these are consequences severe enough that—especially in the case of persistent violations—they must fall outside the

necessity of “intent.” When the Mayor decided, day after day, to not take control, to not stop the violence, to not implement any restraints when the SPD violated residents’ rights over and over, she accepted the ramifications, whether she intended any precise outcome or not. She had ample evidence that serious consequences would continue to unfold after they had already done so multiple times.

Even so, there is plenty of evidence that the Mayor was sufficiently aware of the violations to the degree that she “intended” them within the meaning of the recall statutes. She is a former US Attorney, who would naturally be familiar with constitutional rights and the ways in which a police force can violate them. She was doubtless made aware of the many occasions where gas was released in residential neighborhoods, where peaceful protesters were abused, and where individuals and groups called for her assistance. See Petitioner’s Opening Brief of 9/14 (“POB”) at 25-29. Yet the Mayor’s regular, public approval of Chief Best’s actions indicated that she had few or no issues with how the police were behaving.

Thus, the Mayor neither did, nor attempted to do, anything that might truly compel or convince the SPD to behave lawfully. Instead, she seemed regularly to congratulate them for a job well-done.

The Mayor often claims Petitioners “conceded” she had no duty to ban CS gas, a strained interpretation at best. Petitioners have stated repeatedly that CS and OC gas were used in neighborhood streets, on bystanders and protesters alike, without justification. If the Mayor had

effectively banned CS and OC gas (a question not on the table except for the Mayor herself putting it there), then yes, these Petitioners might not have acted. But there were any number of steps the Mayor could have taken short of a “ban” to solve the problem of Seattle Police violence, including simply enforcing the federal TRO, perhaps by creating consequences to its violation so that the police would discontinue their persistent violation of it.

Similarly, the Mayor argues Petitioners “do not dispute that the Consent Decree prevented [her] from unilaterally implementing new SPD policies or procedures.” MRB at 9. Again, this is a forced reading. Petitioners have pointed out that the Mayor is trying to use the letter of the Consent Decree to violate its intent, which was to protect Seattle residents from unconstitutional behavior by the SPD. See POB at 24.

The Mayor has argued throughout this case that the Consent Decree somehow prevents her from imposing limitations on the SPD’s prodigious armory (a troubling argument, since the Consent Decree has never addressed or permitted tear gas, and yet the SPD somehow used it repeatedly, early in this process). Petitioners disagree with this premise, but this will doubtless be decided in federal court, not here. In the recall case, the Consent Decree is not a critical issue, given the Mayor could have used any number of other options to create consequences for the police or to otherwise convince them to behave differently, including simply enforcing the federal TRO that she acknowledges was valid.

Mayor Durkan did nothing— knowingly so—to create any consequences for violating the TRO and the rights of the residents of Seattle. If anything, the manifest lack of consequences and regular public approval of the actions of Chief Best and the SPD gave police a clear, bright green light to continue their abuses. This was not, as the Mayor claims, “balanc[ing] the rights of all parties,” MRB at 11. This was instead writing off the constitutional rights of Seattle residents in favor of the SPD’s apparent desire to commit violence and inspire terror.

The Mayor again takes a stab at claiming this is a political dispute, based on purely policy decisions. But the “policies [Petitioners] apparently prefer,” as the Mayor describes them, MRB at 11, include people not being gassed in their homes because they failed to live in the Mayor’s neighborhood, or indeed, not being gassed on the streets for their political views. This seems much less a “political view” and much more a “constitutional baseline.” The fact that the Mayor sees permitting such police conduct as a “policy” largely makes Petitioners’ point for them. Unlawful, repeated physical harm inflicted on City residents by City employees cannot morally or legally be deemed a “policy disagreement.”

F. The constitutional right of recall is intended to allow ordinary citizens to assert improper conduct by their elected officials.

The Mayor asserts, with no apparent sense of irony, that the protesters (and presumably the affected residents as well) are protected from violations of their constitutional rights, because they may file civil

cases in federal court, a la the Black Lives Matter Seattle-King County case currently in litigation in the Western District. MRB at 20.

Petitioners note that the venerable ACLU, Korematsu Center, and Perkins Coie, a large Seattle law firm, have volunteered to litigate that case pro bono. While the case has had significant success, with the TRO being extended by agreement to September 30, no actual consequences have been imposed on the SPD, and the violence and gassing have largely continued since the TRO was entered on June 12. Not only are civil cases thus shown to be unsuccessful in restraining SPD's violence, they also plainly require a prohibitive investment of time and funds.

The right to recall is a constitutionally protected one, for the residents of the state of Washington—not just to its lawyers, or to residents wealthy enough to afford them, but to everyone. Washington Constitution, Art. I, §§33, 34. This is, perhaps, one of the reasons why, when the recall statutes must be interpreted, such interpretations are made in a Petitioner's favor, not the elected official. In re Pearsall-Stipek, 141 Wn.2d 756, 765, 10 P.3d 1034 (2000), citing Pederson v. Moser, 99 Wn.2d 456, 462, 662 P.2d 866 (1983). And why cases typically permit, if not encourage, the lower courts to correct a charge, if something about it is technically incorrect, rather than to dismiss such a charge altogether. See, e.g., In re Recall of West, 155 Wn.2d 659, 121 P.3d 1190 (2005); In re Recall of Washam, 171 Wn.2d 503, 257 P.3d 513 (2011).

Voters should not be expected to rely on the generosity of a gratis attorney or law firm when an elected official violates their duty, or, as in this case, repeatedly allows a police department to violate residents' rights. Moreover, even such professional efforts have yet to bear fruit beyond an un-enforced TRO, demonstrating another problem with civil suits—sometimes mayors, not to mention police departments, ignore them.

The Mayor alternately suggests that the system of officer discipline will protect the rights of the residents of Seattle. MRB at 1. But of 19,000 calls to OPA, 118 cases have been instigated, only 6 of which have been adjudicated, and only 2 of which were sustained.⁶

Nearly 4 months into protests, and thus far, OPA has determined that: 1) a police officer should not put their knee on an arrestee's neck during an arrest; and 2) when a political protester says, "Fuck, I hate cops," that same officer should not reply by saying, "Yeah you're a bitch;" nor should that same officer state that they will "fuck up" a particular protester, even to another officer, 2020OPA-0324,⁷ and 3) a second police officer should not publicly state, "I have a hard-on for this shit and, if they cross the line, I will hit them," 2020OPA-0348.⁸ Everything else, for all intents and purposes, has been either unaddressed or dismissed.

⁶ OPA Complaint Dashboard at: <https://www.seattle.gov/opa/case-data/demonstration-complaint-dashboard>

⁷ This case report is available from the dashboard, or directly at: <https://www.seattle.gov/Documents/Departments/OPA/ClosedCaseSummaries/2020OPA-0324ccs08-21-20.pdf>

⁸ This case report is available from the dashboard, or directly at: <https://www.seattle.gov/Documents/Departments/OPA/ClosedCaseSummaries/2020OPA-0348ccs08-30-20.pdf>

Notably, the first case involved: a) an officer placing his knee on one arrestee's head and then placing his knee on a second arrestee's neck a few minutes later, and this only a few days after George Floyd's murder,⁹ and b) that behavior being recorded on video by a bystander's cell phone,¹⁰ and c) that behavior being actively interrupted by another officer who had to physically remove the first officer's knee from the second arrestee's neck when the first officer did not respond to verbal feedback,¹¹ still did not find a violation of the actual SPD Policy 8.300-POL-9 (which used to make choke holds impermissible), because it assumed good faith on the part of the officer.¹²

Despite the Mayor holding a position that putatively enforces the laws in Seattle and maintains its "peace and order," she created zero consequences for Seattle police officers' repeated violations of the law, and indeed, seemed determined to obstruct any other entity from trying to enforce any consequences. POB at 22-24. Seattle Police officers then acted in accordance with this apparent protection and insulation.

The recall statute is the only way voters may create consequences for the Mayor, and that is, perhaps, the only way for ordinary residents to slow or stop a police officer's violence against them. To say that there are

⁹ See 2020OPA-0324, at pages 1, 2-3.

¹⁰ Id. at page 3.

¹¹ Id. at page 3.

¹² Id. at page 4, 5.

other ways to stop such violence is to engage in dismissive speculation, and even so, the avenues the Mayor suggests have been tried, to no avail.

G. In addition to all the above reasons, Charge E simply wasn't duplicative as held by the Superior Court.

The Superior Court held Charge E to be duplicative of Charge B, when it facially was not. Charge B related to the treatment of protesters who were attempting to exercise their rights to freedom of speech and to assemble and petition for redress of grievances. Charge E related to residents being assaulted by chemical weapons in their own homes when the police released clouds of gas into residential streets. CP 15-16, 21-23. This Court should find accordingly. If, as the Mayor argues, the wording of the Charges truly takes precedence over whether or not a charge has been wrongly dismissed, see MRB at 22, then the appropriate action is clear: Charge E must be fully reinstated as a separate charge.

H. This Court need understand that the constitutional rights of protesters and residents alike are still in play, every day, in Seattle.

The Mayor argues that some facts alleged by Petitioners should not be considered by this Court. Petitioners will concede one thing, and one thing only, that the specific facts of September 7th events are not properly before this Court.

But justice demands that the Court understand that the trampling of the rights of the people of Seattle did not discontinue on July 10th, when the Superior Court first ruled. Or on July 25th, when the SPD attacked many protesters, apparently enraged by the threatened “defunding” by the

City Council. Or on July 29th, when the Superior Court ruled on the Mayor's Motion for Reconsideration. Or on August 12, when the Mayor filed her appeal.

The rights of the people of Seattle are still being violated, and they will evidently continue to be until someone blocks the Seattle Police from violating them. Mayor Durkan has not done so herself, despite both pleas and demands, nor has the implementation of a federal TRO succeeded.

Recalls have been filed and succeeded before this Court for such activities as lying about one's educational qualifications,¹³ failure to attend council meetings,¹⁴ and wrongly offering severance to a public employee.¹⁵ These cases involved consequences, certainly, but not consequences with the scale and import of what is now before the Court. Here we see the costs of a decade of police militarization coming home to roost. Here we have a Mayor who, for whatever reason, chose to allow repeated violence against the residents of her own city, instead of controlling her overaggressive police force, despite plea after plea.

The Mayor also claims 13 footnotes contain previously uncited articles or videos. Petitioners apologize if there was error within, most of these citations are either used as background information and not for argument, or are simply incorrect on the Mayor's part. Here is a table quickly addressing each footnote the Mayor cites to (MRB at 20):

¹³ In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 772, 778, 10 P.3d 1034 (2000).

¹⁴ In re Recall of Pepper, 189 Wn.2d 546, 559, 403 P.3d 839 (2017).

¹⁵ In re Recall Charges Against Davis, 164 Wn.2d 361, 370-71, 193 P.3d 98 (2008).

Citation	Notes
p.5 n.2	Citations all present in the charging letter, CP 13-14, n.13-15.
p.7, n.6	The article is present in the charging letter, CP 16, n.30. The YouTube links are new, but in relevant part, these videos were also provided to the Superior Court on July 22 for the Motion for Reconsideration, and were considered in that ruling. CP 635-36, 637 (videos labeled 2 and 3), CP 790. The full set of supplemental videos given to the Superior Court is still located at the same online location as it was below (see CP 639), at https://drive.google.com/file/d/1yI2pxgVafwAw8R8Q7QltAv6cDoEzY6Ns/view?usp=sharing
p.9 n.12	These articles are new, but this is just a side note that no one knows who, if anyone, ordered the abandonment of the East Precinct, a matter not known to be at issue in this case. No argument is made herein on this topic.
p.9, n.13	These articles are new, but are only given as rough background on the CHOP/CHAZ and are not cited for any specific facts. If the Court wishes to exclude them, they are only present for the Court's convenience and are not used in argument.
p.9, n.14	These are all facts that were before the Superior Court below. This article simply summarizes what happened on the date the CHOP was cleared by the Mayor's order. Its background may be useful to this Court, but it is not cited in argument.
p.10, n.15	This is an article cited only to indicate that a suit was filed by Black Lives Matter Seattle-King County, <u>et al.</u> This suit was well-known and reviewed by the Court below.
p.16, n.31	This article admittedly was not cited in the Court below, because it was not written until after the Superior Court ruled.
p.23, n.37	The Mayor acknowledges her intent is a matter in contention in this case. See AOB at 18-23; MRB at 10-12. The fact that the Mayor has <u>continued</u> to shield the SPD, even <u>after</u> this petition for recall has been filed and appealed, is legitimate to raise before this Court as continuing evidence of such intent.
p.32, n.58	Petitioners acknowledge the specific facts of September 7 are not properly before this Court, but the fact that protesters and residents are <u>still having their rights violated on a regular basis should be known</u> by this Court to grasp the current, real-world implications of the case and the dangers still faced by those below
P.34, n.59	Intent is at issue in this case, as noted. The Mayor's appointment of an "Interim Chief," and her decision to not seek a permanent

	Chief does, <u>in fact</u> , shield the appointment of such chief from review by the City Council, as was doubtless intended. This evidence of continued intent is probative on a matter at issue.
p.46, n.74	The Twitter and Reddit citations were cited previously, including in the charging letter. CP 17, n.34-36. The first video was cited in the Response to the Motion for Reconsideration. CP 616, n.39. The second video is new, but nearly identical to footage taken of the same event and timely given to the Superior Court to be considered on the Motion to Reconsider. CP 635-36, 638, 639. https://drive.google.com/file/d/1yI2pxgVafwAw8R8Q7QltAv6cDoEzY6Ns/view?usp=sharing (video of collapsed protester getting dragged back by medics while SPD continues to fire gas and projectiles at them starts at 20:44).
p.46, n.76	This article contains mostly a summary of prior complaints by medics, and was published on June 18, 2020. Petitioners believe that media coverage legitimately goes to the Mayor’s knowledge, and therefore intent regarding the treatment of medics, especially given that it was released just prior to the disastrous death of Lorenzo Anderson on June 20.
p.47, n.81	This is a new article, though it only reviews the same allegations covered by Petitioners in their briefing and declarations in the Superior Court. In fact, because it suggests that the death of Mr. Anderson was due to “miscommunication,” it is somewhat more sympathetic to SPD than the video created by Matt “Spek” Watson. That video was used in the Superior Court by Petitioners to explain the timeline of June 20th (CP 628, n.82). If the Court prefers to review the video, which came before the Superior Court, and exclude the article, Petitioners have no objection and offer sincere apologies. https://twitter.com/spekulation/status/1275130917187547136

III. CONCLUSION

At base, the Mayor labors to convince this Court that recall of an elected official cannot be premised on permitting or neglecting to prevent a subordinate from committing an illegal act or acts, even if 1) the elected official always had authority over the immediate supervisor of the people doing the illegal acts, and moreover could have chosen to temporarily be the supervisor of the people committing the illegal acts; 2) the nature of

the offenses committed and the people committing them directly conflicts with the elected official's most fundamental duties; 3) the illegal acts happened repeatedly, and the elected official was repeatedly implored to take action; and 4) the illegal acts involved the violation of constitutional rights, and were violent and shocking. If, under all these circumstances, the voters of Seattle cannot seek the Mayor's recall, then the constitutional rights of ordinary residents cannot be safe against the proven physical violence of the Mayor's Police Department, as no official responsible to the voters holds any duty to prevent their violence and unlawfulness.

Petitioners ask this Court to reject the Mayor's argument that Charge B is insufficient and instead expand the charge to include the protection of bystanders such as residents - a charge incorrectly dismissed below as being "duplicative." In the alternative, this Court should simply restore Charge E. This Court should also restore Charge C, as the assaults on medics and the press began early and have continued since, giving the Mayor ample time to learn of them via the press and social media. Such assaults violate both the law and international standards of decency, and they should have been sustained as a valid charge against the Mayor once she had time to learn of them, just as she had time to learn of the reckless and inappropriate use of CS gas and OC gas in this case.

DATED this 22nd day of September, 2020.



By Elliott Grace Harvey

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE MATTER OF NO. 98897-8
RECALL CHARGES AGAINST DECLARATION OF SERVICE OF
CITY OF SEATTLE MAYOR REPLY BRIEF OF CROSS-
JENNY DURKAN (HARVEY) APPELLANT

I, Elliott Grace Harvey, declare under penalty of perjury of the laws of the State of Washington that this 22nd day of September, 2020, I caused the attached true and correct copy of the Response Brief and Opening Brief of Cross-Appellant to Washington Supreme Court to be filed with the Clerk of the Washington State Supreme Court and served on any registered parties via the Washington State Appellate Courts' Portal, including: Janine Joly, Jennifer Atchison, G. William Shaw, and Ryan Groshong. The same document was served via email, on this 22nd day of September, 2020, to Janine Joly, Jennifer Atchison, Rebecca Roe, Matthew Clark, G. William Shaw, Ryan Groshong, Alan L. Meekins, Jr., Courtney Scott, Leah Solomon, Charlie Stone, and Matthew Cromwell.

DATED this 22nd day of September, 2020.

A handwritten signature in black ink, appearing to read "Elliott Grace Harvey", written over a horizontal line.

By Elliott Grace Harvey

ELLIOTT HARVEY - FILING PRO SE

September 22, 2020 - 1:25 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 98897-8
Appellate Court Case Title: In Re the Matter of the Recall Charges Against City of Seattle Mayor, Jenny Durkan

The following documents have been uploaded:

- 988978_Answer_Reply_20200922132314SC116361_0649.pdf
This File Contains:
Answer/Reply - Other
The Original File Name was Reply Brief of Cross-Appellant Harvey SC.pdf

A copy of the uploaded files will be sent to:

- bill.shaw@KLGates.com
- charliehorsepower26@gmail.com
- courtneykscott@me.com
- janine.joly@kingcounty.gov
- jennifer.atchison@kingcounty.gov
- matt.clark@klgates.com
- nullagent@gmail.com
- paoappellateunitmail@kingcounty.gov
- roe@sgb-law.com
- ryan.groshong@klgates.com
- sabrina.mitchell@klgates.com
- solomon.lm@gmail.com

Comments:

Sender Name: Elliott Harvey - Email: elliottgraceharvey@gmail.com

Address:

1505 11th AVE Apt 203

Seattle, WA, 98122

Phone: (206) 734-1262

Note: The Filing Id is 20200922132314SC116361