

State Supreme Court's ruling on Fortney recall was 6-3 split

Justices issued a ruling Thursday explaining why they allowed three charges in the recall, as well as a dissent.

by [Jerry Cornfield](#)

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Snohomish County Sheriff Adam Fortney during an interview June 17, 2020. (Sue Misao / Herald file)

OLYMPIA — In court filings, Snohomish County Sheriff Adam Fortney argued that his public refusal to enforce the governor's stay-home order did not amount to inciting the public to break the law.

The state Supreme Court disagreed, explaining why in a 6-3 ruling Thursday.

"Fortney underestimates both the significance of his words and the power of his office," Justice Mary Yu wrote in the court's legal opinion released Thursday, in a case about the recall effort against the sheriff.

The state's highest court had decided in September what the sheriff's opponents could write in a petition seeking to remove Fortney from office. Until now, justices had not explained in detail why they approved three of the charges to proceed.

Two charges were tied to Fortney's public criticism of Gov. Jay Inslee in April, when the sheriff stated in a viral Facebook post that Inslee's order amid the coronavirus pandemic was unconstitutional, and that his deputies would not enforce it.

A third charge stemmed from the rehiring of three deputies who had been fired for misconduct by the previous sheriff.

Opponents are still gathering signatures on petitions. They must turn in roughly 45,000 by early March to get the recall in front of voters.

[A 16-page dissent](#) revealed why three justices opposed inclusion of the charge arising from Fortney's comments on Facebook. The majority opinion was [23 pages](#).

"Fortney does not have the authority as Snohomish County sheriff to determine the constitutionality of laws. That is the role of the courts," Justice Yu wrote.

"While Fortney may be entitled to his private opinions as a citizen, he is not protected from the scrutiny of the voters when he uses the power of his office to effectuate his own legal conclusions," she wrote.

Yu noted the sheriff's comments had "inspired" Bob Martin, 79, owner of The Stag Barber shop in Snohomish, [to keep cutting hair in defiance of the governor's order](#).

Justices brushed off Fortney's assertion that including the incitement charge would essentially prevent him from ever publicly disagreeing with the way the state law was applied.

Yu pointed out the sheriff did more than simply express disagreement. He used his title "to leverage his enforcement authority" to effectively nullify a state law, she wrote.

In the dissent, Justice Sheryl Gordon McCloud wrote that when comments made by Fortney in March are read in context with those in April, it shows he did not overstep his authority.

In March, right after the stay-home order was announced, the sheriff indicated his department — like others in the state — would focus on education and not enforcement. In April, he offered a much more impassioned rebuke of the policy, and even asserted the order was unconstitutional.

"Sheriffs are not required to arrest every violator and that a public announcement of a countywide arrest decision does not amount to 'incitement' of lawlessness," McCloud wrote.

“Instead, the decision about how to enforce is clearly discretionary,” she wrote. “Announcing that discretionary enforcement decision to the public constitutes transparency, not incitement.”

Yu, in her opinion, points to McCloud’s conclusion as a further reason for including the charge in the petition.

“That reasonable minds may disagree about the interpretation of Fortney’s words is precisely why this charge should proceed to the voters,” she wrote.

All nine justices agreed the allegations surrounding Fortney’s rehiring of deputies Art Wallin, Matt Boice and Evan Twedt merited inclusion in the petition.

The former sheriff, Ty Trenary, fired Wallin for violating department policy when he pursued and then fatally shot a man near Lynnwood. Trenary terminated Boice and Twedt after concluding they covered up a warrantless search.

All three deputies were fired in the fall of 2019 as the sheriff’s election was ongoing. Fortney suggested the firings were politically motivated, as all three were vocal supporters.

Those pushing the recall contend Fortney “exercised discretion in a manifestly unreasonable manner,” and the court agreed that they had a valid case.

Fortney conducted his own review of their terminations “despite potential conflicts of interest,” Yu wrote. He was on the scene the night of Wallin’s shooting and used physical force himself; he was involved in Boice’s and Twedt’s termination investigation; and he had their public backing in the election.

“Fortney’s personnel choices were not merely ‘unpopular decisions’ but potentially harmful liabilities for Snohomish County residents,” she wrote. “We agree with the trial court that voters could reasonably conclude that Fortney exercised his discretion in a manifestly unreasonable manner when he reinstated these deputies.”

Justices tossed out one charge brought by recall petitioners that had been allowed by a lower court. It dealt with a public statement the sheriff made in a case where a deputy tackled a Black medical worker who was accused of jaywalking.

Recall proponents alleged Fortney didn’t carry out his duty to properly investigate the complaint before making his comment. But they did not provide the court with the actual complaint.

“Without this information the petitioners have failed to show ‘identifiable facts’ to support their allegations and assess Fortney’s actions,” Yu wrote.

Colin McMahon, a public defender and one of four local attorneys behind the recall effort, said there were “no surprises” in the order.

“I think justices laid it out very well why this recall is moving forward, and it refutes a lot of the arguments that Mr. Fortney was making,” he said.

As for the improper investigation charges justices tossed out, he said: “There just wasn’t a lot of information we could provide to the court.”

Fortney’s lawyer, Mark Lamb, of Bothell, called the ruling “an interesting read on both parts” and pointed to the dissent as taking into account “all of the facts and the totality of Mr. Fortney’s comments.”

“It captured what happened with his statements in this case,” he said. “He took COVID seriously and he took his duties seriously.”

Meanwhile, the clock is ticking on gathering signatures.

To qualify for the ballot, the committee has until March 9 to submit at least 44,494 valid signatures of registered voters to the Snohomish County Auditor’s Office. If successful, an election would be held between 45 and 90 days once the signature count is certified by the county elections staff.

“We are confident we are going to get to that threshold,” McMahon said.

He declined to say how many signatures have been collected.

Herald reporter Jerry Cornfield: jcornfield@heraldnet.com | [@dospueblos](https://twitter.com/dospueblos)



Jerry Cornfield covers politics and state government for The Daily Herald from a bureau at the state Capitol in Olympia. He writes a weekly column and a daily newsletter, The Cornfield Report, during legislative sessions. [Sign up for his newsletter here.](#)