NO. 99089-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF RECALL CHARGES AGAINST
CITY OF SEATTLE COUNCILMEMBER KSHAMA SAWANT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
Case No. 20-2-13314-1 SEA
The Honorable Jim Rogers

RESPONDENTS ERNEST H. LOU AND THE RECALL CITY OF SEATTLE COUNCILMEMBER KSHAMA SAWANT COMMITTEE'S ANSWERING BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Washington Constitution makes "[e]very elective public officer of the state of Washington [except] judges of courts of record . . . subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected." Wash. Const. art. I, § 33.

There are limits to this process. Unlike in many other states—which allow recall for any reason, or no reason at all—elected officials in Washington may be recalled by the voters if they have "committed some act or acts of malfeasance or misfeasance while in office" or violated an "oath of office." Wash. Const. art. I, § 2, 33. To protect public officials "from petitions based on frivolous or unsubstantiated charges[,] . . . the courts serve a gateway function in the recall process," evaluating whether a recall petition states facts which, if true, constitute a recallable offense. *In re Recall of Kast*, 144 Wn.2d 807, 813 (2001).

But the courts do not decide whether the facts alleged in the petition are true, or whether a particular offense is sufficiently egregious to justify recall, because "[t]he right of recall is guaranteed to the citizens of this State, and it is for the people to decide if [some wrongful act] is of sufficient severity to warrant a recall election." *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 770 (2000).

City Councilmember Kshama Sawant ("Councilmember Sawant") seeks to deny Washington citizens their constitutional right to recall, disputing the Superior Court's emphatic ruling that all proffered charges are sufficient to allow citizens to decide this question. Her appeal lacks merit and Ernest H. Lou, a registered voter residing in Seattle's City Council District 3, and the registered voters comprising the Recall City of Seattle Councilmember Kshama Sawant Committee (collectively, "Petitioners") ask this Court to affirm the Superior Court's order in all respects.

II. BACKGROUND

Petitioners exercised their constitutional rights by filing a statement of charges against Councilmember Sawant. The statement recited six acts of malfeasance, misfeasance, or violation of the Councilmember's oath of office. CP 247-253.

The Superior Court for King County held a hearing to determine the factual and legal sufficiency of those charges, before which the parties submitted additional briefing and factual materials, and Petitioners dismissed two of the six charges. *See* CP 200.

In a well-reasoned opinion, the Superior Court determined that the four remaining charges were factually and legally sufficient and separately issued an order on the required Ballot Synopsis to aid voters in the

Councilmember's district. CP 197-212; 243-244. Councilmember Sawant moved for reconsideration of the Superior Court's Order on Sufficiency, which the Court denied, and appealed both the Superior Court's order denying reconsideration and its order on the ballot synopsis.

Councilmember Sawant, as much as any litigant, has the right to pursue an appeal, but it is clear she contests not the *sufficiency* of the charges against her, but the truth and seriousness of them. The allegations against her are detailed and supplemented by substantial evidence—newspaper articles, photographs, records of agency proceedings, and Tweets. Many of her criticisms of the decision below boil down to disagreeing with the Superior Court's interpretation of this evidence. The voters have the constitutional right to interpret those facts in our state's recall process.

Councilmember Sawant repeatedly denies that there is evidence of her intent to act unlawfully, when there is substantial evidence from which to infer her intent. Voters have the right to draw that inference and determine the facts.

Councilmember Sawant splits hairs between her conduct and the law, insisting that one interpretation of the facts does not meet her chosen definition of a word. Yet, the voters have the right to weigh and interpret the facts and consider their import under the law.

In short, Councilmember Sawant wants to argue the truth of the charges here in the courts, rather than to the voters as the Constitution requires.

The four charges against Councilmember Sawant should proceed to the voters. They are based on detailed allegations. Those allegations are based on an extensive record. The charges state how Councilmember Sawant endangered Seattle residents and City employees, violated the Seattle City Code and state laws, and her oath of office.

The charges allege Councilmember Sawant abandoned her duty to make employment decisions to a private political organization (Charge A), used City property and resources for a political initiative (Charge B), disregarded health orders by admitting protestors to a closed City Hall (Charge C), and led a protest march to Mayor Jenny Durkan's confidential residence address (Charge D).

Councilmember Sawant vigorously disputes that these charges justify her recall. She has every right to. This Court should affirm the Superior Court and allow the recall process to move forward so the Councilmember can make her appeal to the voters directly.

The Court should also decline Councilmember Sawant's request to revise the language of the ballot synopsis, both because her appeal is directly precluded by statute and this Court's clear precedent, and because

the language the Superior Court adopted is reasonable and consistent with past synopses.

III. ARGUMENT

Washington's recall process safeguards against voters with a grudge harassing elected officials for making a decision the voter did not like, or for minor, innocuous mistakes. *See, e.g., Pearsall-Stipek*, 141 Wn.2d at 767.

"Courts act as a gateway to ensure that charges are factually and legally sufficient before they are placed before the voters." *Matter of Recall of Boldt*, 187 Wn. 2d 542, 548 (2017). "A petition is factually sufficient when the charges, taken as a whole, identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office." *In re Recall of Pepper*, 189 Wn. 2d 546, 555 (2017) (internal citations omitted). A petition is legally sufficient if it "state[s] with specificity substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office." *Chandler v. Otto*, 103 Wn. 2d 268, 274 (1984).

When there is evidence that an elected official violated the law or her oath of office, voters have the constitutional right to interpret that evidence, decide its import, and determine whether it justifies the official's

removal. Wash. Const. art. I, § 33. Voters may also "draw reasonable inferences from the facts; the fact that conclusions have been drawn by the petitioner is not fatal to the sufficiency of the allegations." *Boldt,* 187 Wn.2d at 549 (quoting *In re Recall of West,* 155 Wn.2d 659, 665 (2005) (citing *Chandler v. Otto,* 103 Wn.2d 268, 274 (1984))).

This Court should decline the Councilmember's invitation to weigh the evidence against her, because the "role of the courts in the recall process is highly limited." *Kast*, 144 Wn.2d at 813. The Superior Court correctly found the four charges against Councilmember Sawant were legally and factually sufficient and approved a revised ballot synopsis. CP 197-212, 243-244.

This Court "reviews the superior court decision in the recall action de novo," but should "affirm the trial court's factual conclusions so long as substantial evidence exists supporting the trial court's conclusions." *Pepper*, 189 Wn.2d at 554 (quoting *In re Recall of Harrison*, 144 Wn.2d 583, 587 (2001) (*citing Miller v. City of Tacoma*, 138 Wn.2d 318, 323 (1999)). The Councilmember should make her arguments to the voters directly. RCW 29A.56.140; *Pepper*, 189 Wn.2d at 554 ("It is the voters, not the courts, who will ultimately act as the fact finders").

A. The Superior Court Correctly Certified the Four Charges

The Superior Court correctly certified four of the charges Petitioners advanced and approved a ballot synopsis stating them. CP 197-212, 243-244.

Those charges are that:

- Councilmember Sawant improperly delegated her duty to make employment decisions to a private political organization (Charge A);
- Councilmember Sawant improperly used City property and resources for a ballot initiative (Charge B);
- Councilmember Sawant opened the locked doors to Seattle City Hall and allowed hundreds of others to enter at night, exceeding her authority and violating the Governor's COVID-19 Proclamations. (Charge C); and
- Councilmember Sawant led a protest march to Mayor Jenny Durkan's home, knowing that Mayor Durkan's address was protected by state confidentiality laws (Charge E).

CP 243-244.

Each is legally and factually sufficient to proceed to the voters.

1. Councilmember Sawant Improperly Delegated Employment Decisions

Charge A is that Councilmember Sawant "Delegated City employment decisions in her Council office to a political organization outside the City government." CP 244.

a. The Charge is Factually and Legally Sufficient

This charge alleges that Councilmember Sawant improperly delegated control over staffing decisions in her City Council office to the National Executive Committee and the Seattle Executive Committee ("SEC") of the Socialist Alternative Party. CP 92. The Socialist Alternative Party declared it had authority to control "the running and staffing" of the Councilmember's City Council office and was "responsible for making decisions about council staff" (but would "consult" with Councilmember Sawant on these matters). CP 146-147. The charge alleges the Socialist Alternative Party exerted that authority when it terminated City employees. *See* CP 151 ("The EC . . . has every right to take decisions. This includes deciding to lay off Freeman and Whitney.").

Petitioners' knowledge of these facts was based on internal documents from the Socialist Alternative Party, including a letter written

by the Councilmember; they were submitted in support of the charge. CP 140-159.

As the Superior Court found, the Councilmember's delegation of authority to an outside body was shown by the fact she "had to persuade the SEC to concur with her decision to fire an employee, not simply ask advice." CP 203. Taken as true, these allegations "establish a prima facie case of misfeasance, malfeasance, and violation of the oath of office under the cited Seattle Municipal Code of Ethics." CP 203.

Councilmember Sawant's oath of office required her to "support . . . the Charter and ordinances of The City of Seattle," which includes the Seattle Municipal Charter's Code of Ethics. Seattle Municipal Code ("SMC"), The Charter of the City of Seattle, § 4. That Code of Ethics "requires that public officers and employees be independent, impartial, and responsible to the people; that government decisions and policy be made in the proper channels of the governmental structure." SMC 4.16.020.A. The Code also prohibits councilmembers (among others) from performing "any official duties when it could appear to a reasonable person . . . that the covered individual's judgment is impaired because of . . . a personal or business relationship." SMC 4.16.070(A)(3).

By delegating responsibility for the hiring and firing of City employees in her City Council office, Councilmember Sawant abdicated

her independence and impartiality, violating the Code of Ethics she swore to uphold. SMC 4.16.020.A.

By delegating employment decisions in her City Council office to the Socialist Alternative Party, Councilmember Sawant performed her official duties when her judgment was "impaired because of . . . a personal or business relationship." SMC 4.16.070(A)(3). The Code of Ethics does not require the Councilmember's judgment to *actually* be impaired, just the appearance of it. SMC 4.16.070(A)(3). Councilmember Sawant expressly acknowledged her independent judgment was impaired when she told the Socialist Alternative Party she was "accountab[le] to . . . the organization." Voters can decide for themselves whether Councilmember Sawant meant what she said, or merely appeared to.

b. Voters Should Decide the Councilmember's Independence for Themselves

Councilmember Sawant contends she could not have improperly delegated staffing decisions because she had discretion to hire and fire City employees in her office, that her relationship with the Socialist Alternative Party was political (and therefore not personal), and that there was no disagreement between her and this outside organization. Each of these arguments comes down to a factual dispute over what the allegations and record *mean*, which voters should decide.

First, Councilmember Sawant argues that staffing decisions are inherently discretionary. Appellant's Opening Br. at 19. Of course, the discretion to hire and fire can be exercised so unreasonably as to support a recall charge. S*ee In Re Recall of Fortney*, 471 P.3d 180 (Wash. 2020). The charge here is not that Councilmember Sawant exercised her discretion to hire or fire unreasonably, but instead that she abdicated her authority—her discretion—over employment decisions to a political party. As the Superior Court stated: "[T]he allegations are not about the exercise of discretion but about the delegation of discretion to a body outside City government." CP 204.

Second, Councilmember Sawant argues that because her relationship with the Socialist Alternative Party is *political*, the Seattle Municipal Code provision targeting business or personal relationships does not apply. *See* Appellant's Opening Br. at 20-21; SMC 4.16.070(A)(3). Of course, the political is often personal, and some enduring political philosophies are based on deconstructing artificial distinctions between the personal and the economic. *See, e.g.,* Karl Marx, Economic and Philosophic Manuscripts of 1844 *in* The Marx-Engels Reader (2nd ed. 1978) ("What applies to a man's relation to his work . . . also holds of a man's relation to the other man.").

The issue here is not the political philosophy of the outside organization to which the Councilmember delegated her authority, it is that delegating her authority impaired her judgment. The fact that the outside organization was political does not mean her relationship with it was not personal. Sawant's letter to the Socialist Alternative Party reports a number of personal concerns. CP 140, 142 ("Phillip has . . . concerns"; "James and Rebekah . . . reported these rumors"; "Ty was frustrated"). Councilmember Sawant herself questioned whether the *political* forces driving the staffing decisions in her City Office were motivated by something else entirely:

> My question is, if SEC comrades do not have any political disagreements, why are they making such accusations about the Council Office?

CP 142.

Councilmember Sawant also quibbles that the Superior Court used the wrong definition of "impaired," and invites the Court to find a distinction between that which is "lacking in full function," and that which is "diminish[ed] in function." Appellant's Opening Br. at 21. Whatever difference there may be, it does not alter the Superior Court's conclusion that the Code requires "people employed by the City decide who staffs the Councilmember's office, not an outside body." CP 204.

Third, Councilmember Sawant argues the charges do not show that she "actually disagreed with, much less substituted, Socialist Alternative Party's judgment for her own." Appellant's Opening Br. at 21-22. But the Superior Court addressed this same argument and found substantial evidence in the record that the Councilmember "had to persuade the SEC to concur with her decision not to fire an employee, not simply ask advice." CP 202; *see* CP 142-143, 146-147, 149, 151-152, 158. Voters may find it compelling that Councilmember Sawant never disagreed with the organization she delegated her authority as evidence it controlled her, but the decision is rightly theirs.

Councilmember Sawant's points out the Seattle Ethics and Elections Commission ("SEEC") did not find an ethics violation. Appellant's Opening Br. at 22. But Judge Rogers also considered and rejected this argument, finding the SEEC's opinion was "not persuasive" and inconsistent with the Seattle Municipal Ethics Code. CP 204.

Fourth, Councilmember Sawant argues the charge is factually insufficient because she did not hold "an appreciation that her consultation with a political party violated the law." Appellant's Opening Br. at 23. Letters between Councilmember Sawant and the Socialist Alternative Party rather clearly suggest the Councilmember knowingly and intentionally permitted the Party to make employment decisions for her.

CP 142-143, 146-147, 149, 151-152, 158. The charge is not that the Councilmember made a "simple mistake" in her letter, but that she knowingly and intentionally agreed to toe the Party line on such matters. *Pearsall-Stipek*, 141 Wn.2d at 765. That charge is supported by the record. CP 143 ("I completely reject the idea that the Council Office is failing—in any way—. . . to be accountable to the SEC and the organization."). Voters may well decide in a recall election that they elected Councilmember Sawant to hire and fire her council staff, not some political collective.

After a full briefing, the Superior Court addressed Councilmember Sawant's arguments and rejected them. CP 200-205. Councilmember Sawant has not provided any compelling reason showing how the Superior Court was wrong. This Court should find that the charge is legally sufficient and affirm the Superior Court's certification. CP 201, 203-204.

2. Councilmember Sawant Improperly Used City Resources to Promote a Ballot Initiative, Warranting a Canvass and Vote on the Charge

Charge B is that Councilmember Sawant "Used City resources to support a ballot initiative and failed to comply with the public disclosure requirements related to such support." CP 244.

a. The Charge is Factually and Legally Sufficient

The charge alleges that Councilmember Sawant used City resources to promote the "Tax Amazon" ballot initiative. The SEEC and the Washington State Public Disclosure Commission ("PDC") have investigated these charges, but have yet to issue decisions. Documents from those investigations indicate that Councilmember Sawant posted an online message inviting supporters to "join my council office" in a meeting to discuss the proposed ballot initiative, and that her City Council office spent $2,000 to "advertise meetings on January 25 and February 9 to organize a 'ballot initiative,' provide food for the meetings; and purchase posters and wood pickets for the signs." CP 164, 176. Councilmember Sawant admitted she "spearheaded the 'Tax Amazon' campaign" and Petitioners provided other evidence showing Councilmember Sawant promoted the Tax Amazon initiative as a member and team organizer. CP 175-186, 188; CP 79-80 ¶ 3.

On February 10, 2020, the SEEC concluded there was "reasonable cause to believe that Councilmember Sawant has committed material violations of the Seattle Ethics and Election Codes" and issued a "Notice of Charges" against her. CP 161-167. The Recall Committee also provided

a PDC case disposition finding that the Tax Amazon movement did not timely file committee registration and reports. CP 188.

Petitioners' knowledge of these facts was based on records of the SEEC's charges and PDC case disposition against Councilmember Sawant and documents attached to those, a financial statement submitted by Councilmember Sawant to the Seattle City Clerk, and news coverage of the "pending allegations of law-breaking against Seattle City Council member Kshama Sawant." CP 160-188.

Taking those facts as true, they are sufficient to establish violations of state law and the Seattle Municipal Code, both of which prohibit elected officials from using "the facilities of a public office or agency, directly or indirectly, . . . for the promotion of or opposition to any ballot proposition." SMC 2.04.300; RCW 42.17A.555 (extending the prohibition to employees of the elected official's office and "any person appointed to or employed by any public office or agency").

b. Councilmember Sawant Knowingly Violated the Law

Councilmember Sawant does not dispute that violations of RCW 42.17A.555 and SMC 2.04.300 are sufficient to support a recall charge. Instead, she argues those laws do not apply to ballot propositions that have not yet been filed—but they do. She then maintains she could

not have intended to violate those laws, because they did not clearly apply to her conduct—but they did.

Councilmember Sawant argues the Superior Court erred when it applied a "novel interpretation of the applicable statutes." The Councilmember gets there by arguing the definition of "ballot proposition" at RCW 42.17A.005(4) is limited to propositions that have been filed with an elections officer or circulated for signatures.

But this Court has considered her exact argument and rejected it:

> EFF counters that the plain language of the statute controls, arguing that because the signatures were already gathered when the proposed initiatives were filed with the local election officials, the definition of "ballot proposition" is not met and no reporting requirement is triggered. But this reading not only undermines the stated purpose of the [Fair Campaign Practices Act], it also ignores the language added to RCW 42.17A.005(4) in 1975 that expressly applies that provision to local initiatives.

State v. Evergreen Freedom Found., 192 Wn.2d 782, 794–95 (2019), *cert. denied,* 139 S. Ct. 2647 (2019). If a ballot proposition is *subsequently* filed with the election official (which the "Tax Amazon" ballot initiative was), the prohibitions at RCW 42.17A.555 applies to actions taken *before* it was filed:

> In sum, giving meaning to all of the language in RCW 42.17A.005(4) and complying with the [Fair Campaign Practices Act's] directive for liberal construction, we determine that the amended language in

> RCW 42.17A.005(4) was intended to pick up the expenditures prior to signature gathering, regardless of when they are gathered, but only if the measure is actually filed with an election official.

Evergreen, 192 Wn.2d at 796; *see* CP 69-78.

Similarly, for the purposes of the prohibitions at SMC 2.04.300, "ballot initiative" is more broadly defined as a "measure, question, initiative, referendum, recall, or Charter amendment submitted to, or proposed for submission to, the voters of the City." The SMC 2.04.010 definition does not contain any timing limitations.

In an attempt to sidestep that broad definition, Councilmember Sawant argues that an SEEC advisory opinion from 1994 adopts her "no violation for pre-filing actions" argument. Appellant's Opening Br. at 26-27. But that opinion addressed whether a City officer or employee could issue a statement in response to a specific query about a proposed ballot issue. Re: Request For Advisory Opinion No. 94-2a-0107-1 Comment On Proposed Ballot Issue, 1994 WL 903573, at *2. That opinion also noted "the Seattle law is exactly the same as the state law," which this Court later interpreted in *Evergreen* to apply to pre-filing actions. *Evergreen*, 192 Wn.2d at 796.

In fact, the SEEC filed charges against the Councilmember for participating in pre-filing actions, strongly suggesting the SEEC does not

interpret its advisory opinion the same way the Councilmember does. CP 161-167.

Because the state and local laws *did* apply to Councilmember Sawant's conduct, her argument that she could not have intended to violate them also fail. The Councilmembers stated that she "spearhead[ed]" the Tax Amazon campaign, hosted a conference to file a "grassroots ballot initiative," and served as a member of the initiative coordinating committee for the initiative. Voters are entitled to infer that she intended to support and promote the Tax Amazon initiative, which she is forbidden by law to do. CP 79-80 ¶ 3; CP 161-167, 175-186. Her statements about her subjective intent are irrelevant. *Pepper*, 189 Wn.2d at 559 ("Pepper's assertion that she reasonably believed [her actions] were legal does not answer this allegation and therefore does not negate the intent element of a recall petition."); *State v. Grocery Manufacturers Ass'n*, 195 Wn.2d 442, 471 (2020).

Councilmember Sawant also argues there is no factual support for the charge that she violated public disclosure requirements. Appellant's Opening Br. at 28. She is wrong. The Recall Committee provided Councilmember Sawant's Financial Affairs Statement to the Seattle Ethics and Elections Committee—she fails to disclose her involvement with the Tax Amazon movement, even as she admits she spearheaded it, and other

evidence shows she was on the coordinating committee. CP 161-167, 169-173, 175-186. This would violate SMC 2.04.165.

The Superior Court correctly certified the charge, rejecting Councilmember Sawant's arguments. CP 205-208, 294-295. It found that pre-filing actions would violate RCW 42.17A.555. *Id.* And the Superior Court also correctly held that SMC 2.04.010 would apply to pre-filing ballot proposal actions as stated in the petition and charges. *Id.* Councilmember Sawant has failed to show any meaningful error in that decision, and this Court should affirm the Superior Court's charge certification.

3. Councilmember Sawant Organized the "Occupation" of City Hall by a Crowd of Hundreds, in Violation of the Governor's Orders and the Seattle Municipal Code

Charge C is that Councilmember Sawant "Disregarded state orders related to COVID-19 by admitting hundreds of people into City Hall on June 9, 2020, when it was closed to the public." CP 244.

a. The Charge is Factually and Legally Sufficient

The charge alleges that Governor Jay Inslee issued several orders intended to combat the spread of coronavirus in Washington, including Governor's Proclamation 20-25, which was in effect on June 9. *See* CP 109-121. Proclamation 20-25 prohibited "all people in Washington

State from leaving their homes or participating in social, spiritual and recreational gatherings of any kind regardless of the number of participants." CP 110. Petitioner also alleged that on June 9, Seattle City Hall "was closed to the public because of COVID-19." CP 89.

Councilmember Sawant had special access and a key to Seattle City Hall by virtue of her position as a councilmember. CP 90. On the evening of June 9, 2020, during protests against police brutality and systemic racism, Councilmember Sawant led a crowd to City Hall and used her special access and key to open the doors of City Hall, allowing hundreds of people to enter the building, where Councilmember Sawant delivered a speech and protestors chanted political slogans. CP 89-90.

Petitioners' knowledge of these facts was based on news coverage of the events and Twitter posts reporting on or describing the events, including posts which Councilmember Sawant amplified or endorsed by "retweeting." CP 103, 105, 107, 123-128.

Councilmember Sawant's actions violated both the Governor's emergency proclamation in response to COVID-19, which prohibited "all people in Washington State from leaving their homes or participating in social, spiritual and recreational gatherings of any kind regardless of the number of participants," and the Seattle Municipal Code, which prohibits

using City property "for other than a City purpose." CP 110; SMC 4.16.070(B)(2).

Although elected city councilmembers "do not have a general duty to enforce" nor "an obligation to uphold" public health orders, they undoubtedly have the same duty as all Washingtonians to *follow* those laws. *See Matter of Recall of White*, 474 P.3d 1032, 1034 (Wash. 2020). Public officials also violate their oath of office when they endanger the peace and safety of their communities by inciting the public to violate those laws. *See Recall of Fortney*, 471 P.3d 180.

The charges allege Councilmember Sawant did far more than fail to uphold or criticize the Governor's Proclamations: she encouraged, incited, and facilitated a large-scale violation of it when she intentionally led a crowd of hundreds to City Hall, used her key to admit them, and gave a speech celebrating their presence. *See* CP 89-91. By encouraging, facilitating, and leading a gathering that violated the Governor's Proclamation, by facilitating the unlawful entry of hundreds of protestors into City Hall, and by facilitating their unlawful "occupation" of City Hall, Councilmember Sawant also violated her oath to "uphold . . . the Charter and ordinances of The City of Seattle." SMC § 4.

The Councilmember's actions also amount to the use of City property "for other than a City purpose." SMC 4.16.070(B)(2); *see also*

SMC 2.04.300 (barring use of city facilities to promote or oppose candidates and ballot measures). On June 9, 2020, City Hall was closed to the public because of COVID-19. *Any* public gathering in direct violation of the City's rules necessarily could not be for a "City purpose." CP 89.

The Councilmember also has admitted that that the protest was intended as an opposition or obstruction to City business by approvingly retweeting a description of the protest as an "occupation." CP 107 ("Seattle City Councilmember Kshama Sawant led protesters to occupy City Hall for about an hour this evening.").

Those allegations are legally and factually sufficient to put before the voters the issue of Councilmember Sawant's malfeasance and violation of her oath of office.

b. The Councilmember's Arguments Do Not Alter the Facts

Councilmember Sawant makes three arguments against this charge: that the Governor's order "does not prohibit political gatherings," that her decision to lead an occupation of City Hall was a discretionary act, and that the charge does not allege facts sufficient to suggest that the Councilmember *intended* to violate any applicable law. None of the arguments withstand scrutiny.

First, although the Governor's Proclamation prohibited "all people in Washington State from leaving their homes or participating in social, spiritual and recreational gatherings of any kind," Councilmember Sawant maintains it does not prohibit "political gatherings," because it does not expressly say so. Appellant's Opening Br. at 29.

The Councilmember searches for ambiguity in the text where none exists. The Proclamation is written expansively, prohibiting "all people" from participating in "public gatherings . . . of any kind." CP 110. *See Watson v. City of Seattle*, 189 Wn.2d 149, 185 (2017) (use of expansive language before a list indicates the list is non-exhaustive). And the Proclamation defines these terms broadly to include "community, civic, public . . . events . . . and similar activities." CP 112; *see definition of "civic"* at Merriam-Webster.com, https://www.merriam-webster.com/dictionary/civic (last visited Dec. 2, 2020) ("of or relating to a citizen, a city, citizenship, or community affairs."). The Proclamation also does not expressly prohibit "violent gatherings," "secular gatherings," or "artistic gatherings," but surely a riot, a weekly atheists coffee meet-up, or a figure drawing class would be prohibited.

The Proclamations also expressly exempted from the prohibition certain outdoor activities, individuals whose homes were unsafe, individuals who experienced homelessness, and essential businesses

operating in compliance with state and federal safety guidelines. CP 111. If the Governor had intended to exempt "political gatherings," he could easily have included them among the other exemptions.

The Councilmember also suggests that "a reasonable person" would believe "political gatherings" were exempted from the Proclamation because "political demonstrations [are] a core First Amendment-protected activity." Appellant's Opening Br. at 29-30, 32. But the First Amendment does not protect the unlawful occupation of a government building after hours. *See, e.g., Adderley v. State of Fla.*, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."). Nor could a reasonable person conclude that the Proclamations contained an implied exception for political gatherings when they *explicitly* prohibited social and religious gatherings—both squarely protected by the First Amendment. *See Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) (First Amendment encompasses the right "to engage in association for the advancement of . . . political, economic, religious or cultural" beliefs).[1]

[1] To the extent the Councilmember is arguing a recall based on her participation in a "political gathering" violates the First Amendment, this Court already has found that a

Nor does the fact that Governor Inslee spoke in support of lawful protests suggest that the unlawful occupation of a government building was exempt from the Proclamations. *See* Appellant's Opening Br. at 30. The charges are not based on Councilmember Sawant's participation in social justice protests, and the Councilmember has pointed to no evidence that Governor Inslee spoke approvingly of late-night occupations of government buildings.

Second, Councilmember Sawant contends she had discretion to organize an unlawful protest within City Hall because doing so was not expressly prohibited by the Governor's Proclamations. Appellant's Opening Br. at 30 ("Absent such a prohibition, there is no legal basis to conclude that Councilmember Sawant did not have the discretion to bring people into City Hall.").

But, as discussed above, the Proclamations expressly did prohibit the Councilmember's occupation of City Hall, and facilitating an unlawful protest in City Hall is not an act in the course of the Councilmember's duties. *Cole v. Webster*, 103 Wn.2d 280, 283 (1984) ("[D]iscretionary acts of a public official are not a basis for recall insofar as those acts are an appropriate exercise of discretion by the official in the performance of his

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recall petition is private, not government, action. *See Matter of Recall of Riddle*, 189 Wn.2d 565, 584 (2017), *as amended* (Oct. 26, 2017).

or her duties."). Sawant has not identified *any* duty that might encompass late-night protests. None of the specific acts described in the Charge—leading a protest, unlocking the doors to City Hall, speechifying to protestors—are duties of a councilmember.

Third, Councilmember Sawant claims "the Petitioner has failed to allege any facts that show that Councilmember Sawant *intended* to act unlawfully." Appellant's Opening Br. at 31. The Councilmember's actions—leading a crowd of hundreds to City Hall, unlocking the doors, and subsequently acknowledging that she had organized an "occupation" of City Hall speak for themselves. *See* CP 107.

In the Councilmember's telling, certain facts indicate an absence of intent: she had heard that Governor Inslee discussed the Proclamation and previously participated in Black Lives Matter protests, and therefore "reasonably believed" the Governor's Proclamation did not apply to her conduct. But a reasonable voter could also find those same facts indicate the Councilmember was aware of the Governor's Proclamations, was recently reminded that they prohibited protests, and then intentionally violated them.

Councilmember Sawant concedes she was aware of the Governor's Proclamation on the evening she organized the protest in City Hall. *See* Appellant's Opening Br. at 32-33 (describing the Councilmember's

"beliefs" about the Proclamation at the time of the protest). She nevertheless organized a protest of hundreds of people and used her key to allow those protestors to enter City Hall after hours and when it was closed to the public. CP 249. Accepting these allegations as true, they neatly state "a situation . . . in which the official violated a law after having just been admonished of a clear and ambiguous legal standard." Appellant's Opening Br. at 33; *see In re Recall of Wasson*, 149 Wn.2d 787, 792 (2003) (the Court's role is to determine "whether, accepting the allegations as true, the charges on their face support the conclusion that the officer abused his or her position.").

In addition to this inferred intent, the allegations rely on Councilmember Sawant's expressly stated intent: shortly after the protest, Councilmember Sawant "retweeted" a description of it stating "Seattle City Councilmember Kshama Sawant led protestors ***to occupy*** City Hall for about an hour this evening." CP 107 (emphasis added)]; *see definition of "occupy*" at Merriam-Webster.com, https://www.merriam-webster.com/dictionary/occupy (last visited Dec. 2, 2020) (among other definitions: "to take or hold possession or control of // *enemy troops* occupied *the ridge*."). Of course, there are meanings of "occupy" which do not suggest unlawful conduct. Whether the Councilmember intended these others is a question for the voters.

4. Councilmember Sawant Improperly Revealed Mayor Durkan's Confidential Address, Warranting a Vote on the Charge

Charge D is that Councilmember Sawant "Led a protest march to Mayor Jenny Durkan's private residence, the location of which Councilmember Sawant knows is protected under state confidentiality laws." CP 244.

a. The Charge is Factually and Legally Sufficient

This charge alleges that Mayor Durkan's address is "protected by confidentiality laws due to her prior role as the United States Attorney for the Western District of Washington," that Councilmember Sawant knew Mayor Durkan's address by virtue of holding office on the Seattle City Council, knew it was protected by state confidentiality laws, and that Councilmember Sawant nonetheless led a protest—and a crowd of protestors—to the Mayor's house. CP 91. Once there, protestors vandalized Mayor Durkan's home. *Id.*

Petitioners' knowledge of these facts was based on news coverage of the events, including a letter Mayor Durkan sent to the Seattle City Council, in which she alleges that Councilmember Sawant "us[ed] her official position to lead a march" to Mayor Durkan's home, and despite

knowing that the Mayor's address "was protected under the state confidentiality program." CP 124.

Taken as true, these facts allege substantial conduct amounting to a violation of the Seattle Municipal Code, which prohibits councilmembers (among others) from "[d]isclos[ing] or us[ing] any confidential information gained by reason of his or her official position for other than a City purpose." SMC 4.16.070(D). By engaging in conduct clearly prohibited by the Seattle Municipal Code, Councilmember Sawant both engaged in malfeasance and violated her oath of office. *See* RCW 29A.56.110(1)(b) (defining "malfeasance" as "the commission of an unlawful act."); *In the Matter of the Recall of Terecia F. Bolt, Mayor of the Town of Marcus,* 177 Wn.2d 168, 173 (2013); SMC § 4 (oath of office).

The Superior Court also found that the Councilmember's actions amounted to criminal harassment in violation of RCW 9A.46.020. CP 211. That provision makes it a crime to "knowingly threaten" another person with bodily injury, property damage, confinement, or other acts intended to harm the person's health and safety, if those threats place the person in reasonable fear that the threat would be carried out. RCW 9A.46.020(1).

As the Superior Court noted, harassment is a gross misdemeanor unless certain aggravating circumstances apply, one of which is that the

harassment is directed towards "a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties," in which case the offense is a class C felony. RCW 9A.46.020 (2)(b).

Councilmember Sawant contends that there are "no facts to support the claim that [she] made any threats at all, much less threats that would satisfy these criteria." Appellant's Opening Br. at 36. To the contrary, Petitioners alleged that Councilmember Sawant led her supporters to Mayor Durkan's home, where those supporters "vandalized the property by spray-painting obscenities on the fence surrounding it." CP 91.

Petitioner's knowledge of these facts was based on news coverage of the event, including a newspaper article reporting Mayor Durkan's statement that Councilmember Sawant's "followers vandalized my home by spray-painting obscenities." CP 125. A photograph in that article shows Councilmember Sawant giving a speech atop a platform directly in front of the gates to Mayor Durkan's home. CP 123. Another shows those same gates, slightly ajar and defaced with the words "FUCK COPS" and "ACAB"—an acronym for the phrase "All Cops Are Bastards." CP 126.

Taken as true, these facts are sufficient to establish that Councilmember Sawant engaged in conduct amounting to a threat—

subsequently realized—to cause physical damage to Mayor Durkan's property or intended to substantially harm the Mayor's physical or mental health or safety. RCW 9A.46.020. That kind of harassment is unlawful, whether Councilmember Sawant did it directly or simply solicited, encouraged, or requested her followers to do it, after leading them to Mayor Durkan's home. *See* RCW 9A.08.020 (concerning liability for crimes committed by another).

b. Questions About the Councilmember's Knowledge, Leadership, and Intent Are Best Left to the Voters

Councilmember Sawant disputes the sufficiency on this charge in part by denying the existence of evidence plainly in the record, and partly on the basis of conflicting evidence. Neither is a sufficient basis to reverse the Superior Court's Order.

Councilmember Sawant erroneously asserts "Petitioner has failed to identify any alleged facts to support his claim that the Councilmember knew Mayor Durkan's home address, revealed Mayor Durkan's home address, or intended to violate the law." Appellant's Opening Br. at 34. In fact, as discussed above, Petitioners alleged that Councilmember Sawant led the march to Mayor Durkan's home. CP 91. Three quarters of a million people live in Seattle. Barring a remarkable coincidence by which the protestors ended up in front of the home belonging to Mayor Durkan,

and not one of these hundreds of thousands of other Seattleites, it is reasonable to infer that whoever led the protest knew Mayor Durkan's address.

Now, Councilmember Sawant disputes that she led or organized the protest, citing news articles stating that the protest was organized by the Seattle Democratic Socialists of America or the Murdered Indigenous People & Families. Appellant's Opening Br. at 34. But there is also evidence that Councilmember Sawant led the march, and determining the import of that evidence should be left to voters. *See Recall of Kast*, 144 Wn.2d at 813.

According to Councilmember Sawant, it is clear she did not "lead" because there is "no evidence that she walked at the front of the march, [or] held a bullhorn." Appellant's Opening Br. at 34 fn.9. On the other hand, there is evidence that Councilmember stood in front of the march and held a microphone. CP 123.

Councilmember Sawant will have ample opportunity to dispute the accuracy or veracity of the charges against her directly to the voters in her district. She may show them news articles, or cite her declarations from these proceedings, or give speeches. For now, the allegations are that Councilmember Sawant intentionally led protestors to Mayor Durkan's home—unlawfully using information she obtained by dint of her position

on the Seattle City Council—and, once there, those protestors defaced and damaged Mayor Durkan's home. Accepting those allegations as true, they are sufficient to show Councilmember Sawant committed malfeasance and a violation of her oath of office.

B. The Superior Court is the Correct Forum to Challenge the Language in the Ballot Synopsis

Councilmember Sawant has appealed and devotes considerable words to criticizing the Superior Court's ballot synopsis. *See* Appellant's Opening Br. at 36-44. The Councilmember's arguments fly directly against this Court's clear and repeated pronouncements that "[t]he decision of the superior court concerning the adequacy of the ballot synopsis is 'final' under RCW 29.82.023 and is therefore not reviewable by this court." *In re Zufelt*, 112 Wn.2d 906, 910 (1989); *Riddle*, 189 Wn.2d at 587; RCW § 29A.56.140 ("Any decision regarding the ballot synopsis by the superior court is final"); *see also* November 12, 2020 Letter Ruling (denying request to address the ballot synopsis through supplemental briefing).

Although the Councilmember's arguments on this issue are directly precluded by this Court's clear precedent, it is worth noting they are consistent with the Councilmember's efforts to deny voters their Constitutional right to the recall process. Councilmember Sawant seeks to

"correct" the synopsis to more "accurately" state the allegations against her. *See* Appellant's Opening Br. at 42 (claiming the Ballot Synopsis "misleadingly conveys to votes [sic] that Sawant *did* know" Mayor Durkan's address). But these are precisely the questions that the voters will be called upon to decide.

Additionally, Councilmember Sawant's arguments are disingenuous: she already asked the Superior Court to alter the ballot synopsis to reflect that the charges are unproven.[2] She does not make any new arguments but does propose new language. The Superior Court already amended the synopsis to indicate the charges are "based upon allegations." The final language in the ballot synopsis is similar to other recall ballot synopses. *See Riddle*, 189 Wn.2d at 569. The Superior Court's amendment of the language is reasonable and accurate and Councilmember Sawant lacks any legal basis to contest it.

Councilmember Sawant also proposes new language that the Superior Court did not consider. She cannot argue such new language now. *See US W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 112 (1997), as amended (Mar. 3, 1998). Once the Court decides

[2] In an apparent scrivener error, the Superior Court's amended synopsis reads: "based upon charges that are **upon** [sic] based upon allegations." CP 244 (emphasis added). The second "upon" should be deleted.

the charges' legal and factual sufficiency, it should not consider Councilmember Sawant's arguments regarding the ballot synopsis content.

IV. CONCLUSION

The Washington Constitution enshrined the right of citizens of the state to recall elected officials and remove them from office in special elections called for this purpose. In these proceedings, the courts act as a gateway to ensure the minimal legal and factual sufficiency of recall petitions and to protect public officials from harassment through frivolous or unsubstantiated charges. Once the Court has determined that charges are factually and legally sufficient—as they are here—it is up to the voters to determine whether the charges justify the recall of the official.

Petitioners Ernest Lou and the Recall City of Seattle Councilmember Kshama Sawant Committee respectfully request this Court affirm the Superior Court's decision as to the sufficiency of the charges. The Court should dismiss Councilmember Sawant's appeal of the Superior Court's Order Correcting Ballot Synopsis and permit these matters to proceed expeditiously to the voters as provided under the Washington Constitution and state law.

RESPECTFULLY SUBMITTED this 3rd day of December, 2020.

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that on this 3rd day of December 2020, he electronically filed the foregoing document with the Washington State Supreme Court, which will send notification of such filing to the attorneys of record listed below. The attorneys of record listed below were also served with the foregoing document via email.

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December 03, 2020 - 1:20 PM

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