

NO. A23-1780

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**OFFICE OF
APPELLATE COURTS**

State of Minnesota
In Court Supreme Court

Kay "KT" Jacobs,

Appellant,

v.

City of Columbia Heights, Minnesota; Sara Ion,
in her official capacity as City Clerk,

Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

I. WHETHER THE RECALL PETITION TO REMOVE APPELLANT FROM OFFICE WAS PROCEDURALLY INFIRM.

The issue was raised by Appellant's Petition. (Doc. Index 1, ¶¶ 26–36.)

The District Court determined that the contents of the recall petition were governed by the City of Columbia Heights City Charter rather than Rule 8205.1010 promulgated by the Minnesota Secretary of State. (ADD. 6–10.)

The issue was preserved pursuant to Appellant's filing her Notice of Appeal. (Doc. Index 22.)

Most apposite authority:

- Minn. Stat. § 410.20;
- Minn. Stat. § 410.21.

II. WHETHER THE DISTRICT COURT PROPERLY FOUND THAT APPELLANT'S CONDUCT ROSE TO A LEVEL OF MALFEASANCE.

The issue was raised by Appellant's Petition. (Doc. Index 1.)

The District Court determined that Appellant's actions rose to a level of malfeasance where it was found that Appellant violated the City Council's Code of Conduct and was subsequently stripped of her committee assignments. (ADD. 10–14.)

The issue was preserved pursuant to Appellant's filing her Notice of Appeal. (Doc. Index 22.)

Most apposite authority:

- Jacobsen v. Nagel, 96 N.W.2d 569 (Minn. 1959).

STATEMENT OF THE CASE

This case was heard before the Honorable Karin L. McCarthy, Judge of District Court, County of Anoka. (ADD. 1.)

The case involves a phone call to a candidate for Columbia Heights City Council. (Doc. Index 12, Ion Decl. p. 008, ¶ C(1)(a).) During the phone call, the candidate was found by an independent investigation to have been berated and questioned regarding his racial identity. (Pet. Ex. A.) Appellant, a sitting City Council member, was found by an independent investigator to have been the caller. (Id.)

The situation was brought to the Columbia Heights City Council, and the City Council voted to hire an investigator to determine whether the policy of the City of Columbia Heights was violated by Appellant. (Doc. Index 12, Ion Decl. p. 004.) The investigator interviewed Appellant. (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(g).) Following the investigation, the investigator determined that Appellant had repeatedly lied before and during the investigation. (Doc. Index 12, Ion Decl. p. 012.) The investigator determined that Appellant had violated City rules. (Id.; Doc. Index 12, Ion Decl. p. 012, ¶ D.) The City Council then removed Appellant from committees and board assignments and censured Appellant. (Pet. Ex. A.)

A group of citizens of Columbia Heights then formed a committee to recall Appellant from her position as City Council member. (Doc. Index 1, Ex. A.) The citizen group circulated a Recall Petition consistent with the requirements of Columbia Heights City Charter and obtained sufficient signatures to trigger a recall election. (Doc. Index 12, Ion Decl. p. 97.)

Appellant then petitioned the District Court to correct a ballot error pursuant to Section 204B.44. (Doc. Index 1.) Appellant principally raised two issues: First, whether the Recall Petition had all of the information required by Rule 8205.1010. (Doc. Index 1.) Second, whether Appellant's conduct rose to a level of malfeasance. (Doc. Index 1.)

The District Court found that the Recall Petition was not governed by Rule 8205.1010 and, as the recall Petition contained the information required by Columbia Heights City Charter, was not procedurally infirm. (ADD. 6–10.) Second, the District Court found that Appellant's conduct rose to a level of malfeasance. (ADD. 10–14.) This appeal followed.

STATEMENT OF FACTS

THE CITY OF COLUMBIA HEIGHTS

Respondent City of Columbia Heights is a charter city in the Minneapolis-St. Paul Metropolitan Area. The City of Columbia Heights is headed by a City Council consisting of four Council members and the mayor of Columbia Heights. (City of Columbia Heights Website, Mayor & City Council.)

Appellant is a member of the Columbia Heights City Council. (Doc. Index 1, ¶ 1.)

The Columbia Heights City Council Handbook is a document created for City Council members to “provide information about the opportunities and topics related to their role as elected officials and the general local government operations.” (September 9, 2019,

Council Meeting Agenda at 104.)¹ Chapter 13 of the Council Handbook includes the Code of Conduct. (Id. at 140.) The preamble to the Code of Conduct states, “After taking the oath of office as a city council member, [City Council members] agree to conduct themselves in accordance with the following code of conduct[.]” (Id.) The City Council adopted the Council Handbook and the Code of Conduct within it on September 9, 2019. (September 9, 2019 Meeting Minutes, at 2–3.)² Appellant was present at the meeting where the Code of Conduct was adopted as a private citizen. (Id. at 1.)

THE CITY COUNCIL ELECTION

On August 9, 2022, the City of Columbia Heights held a primary to fill two seats on the City Council. (Doc. Index 12, Ion Decl. p. 005, p. 1.) In the summer of 2022 and during the events in question, Mr. Justice Spriggs was running in the Columbia Heights City Council primary. (Id.) At the time, Mr. Spriggs was a medical student at the University of Minnesota. (Id.; see also Justice Spriggs for Columbia Heights, About Page, ¶ 5.) Mr. Spriggs’ campaign website indicated that Mr. Spriggs’ grandfather “was one of the first African-Americans to graduate with a Ph.D in education from the University of Minnesota, going on to pioneer modern-day special education in Minnesota.” (Justice Spriggs for

¹ Available at <https://find.ci.columbia-heights.mn.us/WebLink/DocView.aspx?id=637791&dbid=0&repo=ColumbiaHeights> (last visited January 5, 2024).

² Available at <https://find.ci.columbia-heights.mn.us/WebLink/DocView.aspx?id=638287&dbid=0&repo=ColumbiaHeights> (last visited January 5, 2024).

Columbia Heights, About Page, ¶ 1.)³ Mr. Spriggs’ campaign website also contained the following:

It is also critical to have public officials who represent our communities. Being biracial, I understand and recognize the racism that has impacted both my family and our community, and I will always fight for racial, social, and economic justice. Historically, younger generations have also not been equally represented in our government. Young people face many barriers in running for public office, including the burden of student loans and smaller amounts of savings available. Despite this, my generation’s voices still need to be heard and represented. If elected, I would be the second person of color elected to the Columbia Heights city council and one of the youngest members at 26 years old.

(Id. ¶ 8.) Mr. Spriggs’ campaign website also contained a “Get Involved” button which linked to a Google form for prospective volunteers to fill out. (Justice Spriggs for Columbia Heights, Get Involved; Doc. Index 12, Ion Decl. p. 008, ¶ IV(C)(1)(a).)

THE PHONE CALL

On Sunday, July 24, 2022 at 7:36 a.m., a person purporting to be “Kathy Huff” filled out a form for Mr. Spriggs’ campaign by following the “Get Involved” link. (Doc. Index 12, Ion Decl. p. 008, ¶ C(1)(a).) A note on the form indicated, “I would like to have a conversation with you about your campaign focus – please call me Monday, July 25 before 11 or between 1 and 4 pm. Thank you.” (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(a).) “Kathy Huff” gave her phone number. (Doc. Index 12, Ion Decl. p. 008, ¶ C(1)(a).)

Because Mr. Spriggs would be occupied with classes on July 25, 2022, on July 24, 2022, Mr. Spriggs texted the number “Kathy Huff” provided on the form to indicate that

³ Available at <https://www.justicespriggs.com/about> (last visited January 5, 2024).

he was free for a conversation. (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(a).) Mr. Spriggs then received a phone call which came up on the caller ID as “Jacobs Kay.” (Id.) The phone number belonged to Appellant. (Doc. Index 12, Ion Decl. p. 008–9, ¶ C(1)(a).)

The call between the caller and Mr. Spriggs lasted two hours and seventeen minutes. (Doc. Index 12, Ion Decl. p. 008, ¶ B.) During the call, Mr. Spriggs sat at a table with his father, Dan Spriggs, and used the phone’s speaker function so that both could listen. (Id.) The caller questioned Mr. Spriggs regarding his bi-racial identity and asked if Mr. Spriggs was raised in a Black or a White household. (Id.) When Mr. Spriggs explained that his grandfather was Black, the caller responded, “That’s not how that works.” (Id.) Both Mr. Spriggs and his father identified the voice of the caller as belonging to Appellant based upon hearing Appellant speak on multiple occasions. (Doc. Index 12, Ion Decl. p. 011, ¶ 6.) Mr. Spriggs asked the caller if the caller was KT Jacobs. (Doc. Index 12, Ion Decl. p. 008, ¶ B.) After a hesitation of approximately five seconds, the caller responded, “No.” (Id.)

On July 25, 2022, Appellant left a voicemail for Mr. Spriggs, indicating that Appellant believed that a family member had called Mr. Spriggs using Appellant’s phone. (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(c).)

At a July 25, 2022 City Council meeting, candidate Mr. Spriggs spoke to describe the phone call and his concerns related to the allegations made in the phone call. (Doc. Index 12, Ion Decl. p. 006.) Following the meeting, Appellant discussed Mr. Spriggs’ allegations with the City Manager and City Attorney. (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(d).) Appellant indicated that her husband’s niece from Green Bay, Wisconsin had

made the call. (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(d).) Appellant refused to give the name of the niece from Green Bay, Wisconsin who had allegedly made the call to Mr. Spriggs. (Id.)

THE INVESTIGATION

On August 1, 2022, the City of Columbia Heights held a special City Council meeting to discuss the allegations made by Mr. Spriggs. (Doc. Index 12, Ion Decl. pp. 003–4.) The City Council voted in favor of hiring an independent investigator to look into the allegations made by Mr. Spriggs. (Doc. Index 12, Ion Decl. p. 004.) The City of Columbia Heights hired Red Cedar Consulting, LLC. (See Doc. Index 12, Ion Decl. pp. 003–4.) Isaac Kaufman, the principal of Red Cedar Consulting, conducted the investigation and submitted an Investigative Report to the City of Columbia Heights on or about September 21, 2022. (Doc. Index 12, Ion Decl. pp. 005–12.)

Mr. Kaufman interviewed Appellant on August 25, 2022. (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(g).) During the interview, Appellant denied making the call to Mr. Spriggs and again stated that her niece had made the call. (Id.) Appellant stated that the niece’s name who made the call was Kathy Huff. (Id.) Appellant indicated that Kathy Huff was about 30 years old and had “low-level mental health issues.” (Id.) Appellant indicated that she was continuing to refuse to give the contact information for the niece. (Id.)

The investigator was unable to identify and locate a 30-year-old person by the name of Kathy Huff in the Green Bay area. (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(h).)

The investigator noted to Appellant that Ms. Jacobs’ ex-husband’s surname was “Huff.” (Doc. Index 12, Ion Decl. p. 009, ¶ C(1)(i).) Appellant responded that her niece’s

name is spelled “Hough” rather than “Huff.” (Id.) However, the form supposedly filled out by the alleged niece indicated that the niece’s name was Kathy “Huff” and not Kathy “Hough.” (Id.)

In her interview with the investigator, Appellant indicated that she went shopping the morning of July 24, 2022, leaving her niece alone with Appellant’s cellphone. (Doc. Index 12, Ion Decl. p. 010, ¶ C(3).) Appellant indicated that she went to Sam’s Club, Walmart, Target, Cub Foods, and Caribou Coffee. (Id.) Appellant stated that she made all of her purchases that morning in cash, had no receipts for any of the purchases, and could not identify anyone that could vouch for her whereabouts that morning. (Id.)

Appellant did supply notes to the investigator which Appellant had typed up herself related to Justice Spriggs’ campaign website. (Doc. Index 12, Ion Decl. p. 009, ¶ C(4).) The typed notes also have handwritten notations on them. (Id.) At the top of the notes is Mr. Spriggs’ handwritten phone number. (Id.) Appellant acknowledged that this was her writing, but denied that the other handwritten notes belonged to her. (Id.) Appellant suggested to the investigator that “Kathy Hough” had used Appellant’s notes as a script when calling Mr. Spriggs. (Doc. Index 12, Ion Decl. p. 011, ¶ C(4)(d).)

The investigator concluded that,

[I]n her comments to Justice Spriggs during the July 24, 2022 Phone call – particularly questioning his biracial heritage and then misidentifying herself – KT Jacobs failed to conduct herself in accordance with the City Council Code of Conduct. KT Jacobs further failed to meet the City’s reasonable expectations regarding respectful and professional communications.

(Doc. Index 12, Ion Decl. p. 012, ¶ D.)

The investigator also found,

Both prior to and during this investigation, KT Jacobs has repeatedly maintained that she did not make the July 24, 2022 phone call to Justice Spriggs. . . . [B]ased on a full consideration of the evidence in the record, it is more likely than not that KT Jacobs' assertions regarding the July 24 phone call have been untruthful. The Investigator finds that by making these repeated untruthful statements – and in addition to her conduct during the phone call itself – KT Jacobs has failed to conduct herself ethically and in accordance with the City Council Code of Conduct.

(Doc. Index 12, Ion Decl. p. 012.)

THE PETITION TO REMOVE APPELLANT FROM OFFICE

Pursuant to the City of Columbia Heights City Code, five City of Columbia Heights residents formed a committee to circulate a Recall Petition to remove Appellant from the City Council. (Pet. Ex. A.) Pursuant to the Columbia Heights City Charter, on May 30, 2023, the committee presented to Respondent City Clerk the name of the councilmember to be recalled and the grounds for the recall. (Pet. Ex. A.) The Recall Petition gave a Statement for the Grounds for Removal as follows:

KT Jacobs, a Columbia Heights City Council member, engaged in unethical behavior during the lead-up to the most recent election. She used a fake name to call and berate then-candidate Justice Spriggs, making derogatory comments about his heritage and family background. After an independent investigation funded by the city, Jacobs was found to be untruthful and subsequently stripped of her ability to serve on boards and commissions and was censured by the council. Jacobs has refused to step down despite calls for her resignation, leaving the community with a disgraced elected official who cannot represent her constituents legitimately.

(Pet. Ex. A.)

The committee of citizens obtained sufficient signatures to trigger a recall election. (Doc. Index 12, Ion Decl. p. 97.) The issue of the Recall Petition was placed on the agenda for the July 24, 2023 City Council Meeting. (Doc. Index 12, Ion Decl. p. 16.) On July 24, 2023, the City Council passed a resolution to hold a recall election. (Doc. Index 12, Ion Decl. p. 119.) Appellant attended the meeting and voted against approval of the resolution. (Id.)

PROCEDURAL HISTORY

Nearly two months after the resolution to hold a recall election was passed, Appellant filed her Petition on September 21, 2023. (Doc. Index 1.) Respondents filed answers on October 13, 2023. (Doc. Index 9–10.) The District Court held a hearing on the Petition on October 19, 2023. (Doc. Index 7.) On November 20, 2023, the District Court issued an Order and Memorandum dismissing the Petition. (ADD. 1–2.) The court administrator entered judgment on November 30, 2023. (Doc. Index 23.)

STANDARD OF REVIEW

The Court should apply de novo review. A question of statutory interpretation is reviewed de novo. Roberts v. State, 945 N.W.850, 853 (Minn. 2020). The Court reviews the application of law to undisputed facts de novo. State v. Anderson, 941 N.W.2d 724, 727 (Minn. 2020). Here, the facts are not disputed by Appellant and the review is therefore de novo.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE PETITION.

The District Court properly dismissed the Petition. Appellant petitioned the District Court pursuant to Section 204B.44 for correction of an alleged ballot error. (Pet. at 1.) Section 204B provides,

(a) Any individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions, or wrongful acts which have occurred or are about to occur:

. . . .

(4) any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.

Minn. Stat. § 204B.44.

Petitioner's claim under Section 204B.44 fails. First, the Recall Petition in this matter is not procedurally infirm. Second, the District Court properly found that Appellant's conduct arose to a level of malfeasance. As a result, the Court should affirm the decision of the district court.

A. The Recall Petition is not procedurally infirm.

The Recall Petition is not procedurally infirm. First, the Recall Petition comports with the Columbia Heights City Charter. Second, state law does not preempt Section 48 of the Columbia Heights City Charter. As a result, the Court should affirm the decision of the District Court.

1. *The Recall Petition comports with the Columbia Heights City Charter.*

The Recall Petition comports with the Columbia Heights City Charter. Under Minnesota law, a city is either a “statutory city” or “home rule charter city.” Minn. Stat. § 410.015. A charter city is a city which has adopted a charter. *Id.* There are 107 charter cities in Minnesota. Alexis Stangl, SENATE COUNSEL, RESEARCH, AND FISCAL ANALYSIS, STATE OF MINNESOTA, Structures of Counties, Cities, and Towns, at 2 (Jan. 2017).⁴ The City of Columbia Heights, Minnesota is one such charter City. See generally, Columbia Heights City Charter.⁵

“The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld.” A.C.E. Equipment Co. v. Erikson, 152 N.W.2d 739, 741 (Minn. 1967). A city’s charter commission is tasked with framing and amending the charter. Minn. Stat. § 410.05, subd. 1. Minnesota Statute provides:

Such commission may also provide for the **recall** of any elective municipal officer and for removal of the officer by vote of the electors of such city, and may also provide for submitting ordinances to the council by petition of the electors of such city and for the repeal of ordinances in like manner; and may also provide that no ordinance passed by the council, except an emergency ordinance, shall take effect within a certain time after its passage, and that if, during such time, a petition be made by a certain percentage of the electors of the

⁴ Available at

https://www.senate.mn/storage/scrfa/Structures_of_Counties_Cities_Towns.pdf

⁵ Available online at

https://cms5.revize.com/revize/columbiaheights/document_center/Government/Updated%20City%20Charter%20OCT%202016.pdf

city protesting against the passage of such ordinance until the same be voted on at an election held for such purpose, and then such ordinance to take effect or not as determined by such vote.

Minn. Stat. § 410.20 (emphasis added). A charter commission may adopt any “charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ from those of existing general laws. The adoption of such a charter is legislation.” A.C.E. Equip., 152 N.W.2d at 741.

Thus, Section 410.20 specifically gives the charter commission the power to adopt charter provisions related to the recall of an elected municipal officer. Minn. Stat. § 410.20.

In accordance with this grant of authority, the City of Columbia Heights has adopted a procedure for the recall of elected municipal officials. Briefly, Sections 47 through 52 of the Columbia Heights City Charter allow a committee of citizens to form to seek the recall of the elected official. Columbia Heights City Charter §§ 47–52. The committee must then provide to the city clerk the name of the elected official and, in fewer than 250 words, describe the “grounds for removal.” Columbia Heights City Charter § 47. If the committee obtains signatures of 25% of the electors who cast their votes in the preceding election, the city clerk is to transmit the petition to the city council. Columbia Heights City Charter §§ 49–50. The city council “shall” then vote to hold a recall election. Columbia Heights City Charter § 50.

Importantly, the City of Columbia Heights City Charter also provides the specific form to be used for the recall petition:

RECALL PETITION

proposing the recall of _____ from the office of _____ which recall is sought for the reasons set forth in the attached certificate. This movement is sponsored by the following committee of electors:

NAME	ADDRESS
1. _____	_____
2. _____	_____
3. _____	_____
4. _____	_____
5. _____	_____

The undersigned electors, understanding the nature of the charges against the officer herein sought to be recalled, desiring the holding of a recall election for that purpose:

NAME	ADDRESS
1. _____	_____
2. _____	_____
3. _____	_____

Columbia Heights City Charter § 48. Section 48 has been in place since 1984. Id.

Charter cities across Minnesota have adopted similar provisions. The cities of Bloomington⁶, Fridley⁷, Richfield⁸, St. Francis⁹ all provide the same form within their charters.

Similarly, while not giving an example of a specific form, the cities of Anoka¹⁰, Brooklyn Park¹¹, Duluth¹², Ramsey¹³, St. Paul¹⁴, only require a name and address of the signatory on recall petitions.

⁶ In addition to name and address, the City of Bloomington also requires a birth year.

Bloomington City Code § 5.16

(https://codelibrary.amlegal.com/codes/bloomington/latest/bloomington_mn/0-0-0-121943#JD_Chtr.5.16)

⁷ Fridley City Charter § 5.17

(https://fridley.municipalcodeonline.com/book?type=charter#name=Sec_5.17_Recall_Petitions.)

⁸ Richfield City Charter § 5.15

(https://library.municode.com/mn/richfield/codes/code_of_ordinances?nodeId=APXACI_CHRI_CH5INRERE_S5.15REPE)

⁹ St. Francis City Charter § 6.07

(https://www.stfrancismn.org/sites/default/files/fileattachments/administration/page/2581/city_charter_-_revised_2018.pdf.)

¹⁰ Anoka City Charter § 5.02.

¹¹ Brooklyn Park City Charter § 5.02 (<https://www.brooklynpark.org/wp-content/uploads/2022/01/City-Charter-with-May-2022-Update.pdf>)

¹² Duluth City Charter § 50.

(https://library.municode.com/mn/duluth/codes/legislative_code?nodeId=a%20-%20Charter)

¹³ Ramsey City Charter § 5.2.2.

(https://library.municode.com/mn/ramsey/codes/code_of_ordinances?nodeId=PTICH_CH5INRERE_S5.8RE.)

¹⁴ St. Paul requires that the signatory also identify the council ward or legislative district and precinct of the signatory. St. Paul City Charter § 8.02.2

(https://library.municode.com/mn/st._paul/codes/code_of_ordinances?nodeId=PTICICH_CH8INRERE)

While other charter cities have not exercised their authority to provide for recall elections, cities such as Brooklyn Center¹⁵ have prescribed similar forms of petitions for initiatives or referenda.

The Recall Petition in this case was not procedurally infirm. The Recall Petition in this case provided the information specifically required by the Columbia Heights City Charter. (Doc. Index 1, Ex. C.) The City of Columbia Heights had statutory authority to prescribe the form of the petition. Minn. Stat. § 410.20. This provision of the City of Columbia Heights City Charter has been in place for nearly 40 years. Columbia Heights City Charter § 48. Charter cities across the state use the same form. Supra p. 10–11. The Recall Petition was not deficient and the Court should affirm the decision of the District Court.

2. *Section 48 of the Columbia Heights City Charter is not preempted.*

Section 48 of the Columbia Heights City Charter is not preempted. Appellant argues that Columbia Heights City Charter Section 48 is preempted by Minnesota statute. (Appellants' Br. 22–30.) Appellant is wrong.

Generally, “[c]ities have no power to regulate in a manner that conflicts with state law or invades subjects that have been preempted by state law.” Jennissen v. City of Bloomington, 913 N.W.2d 456, 459 (Minn. 2018). There are several ways in which a state statute might preempt a charter provision. Appellant argues that the Columbia Heights City

¹⁵ Brooklyn Center City Charter § 5.11.
(<https://www.brooklyncentermn.gov/home/showpublisheddocument/286/638091128603030000>)

Charter Section 48 is preempted by Rule 8205.1010 as a result of conflict preemption and field preemption. (Appellant’s Br. at 23.) Section 48 is not preempted by state law. First, there is no conflict between Section 48 and Rule 8205.1010. Second, the field of municipal recall elections is not occupied by state law. As a result, the Court should affirm the decision of the District Court.

a. *There is no conflict between Section 48 and Rule 8205.1010.*

There is no conflict between Section 48 and Rule 8205.1010. “A conflict exists between state law and a municipal regulation when the law and the regulation contain express or implied terms that are irreconcilable with each other, when the ordinance permits what the statute forbids, or when the ordinance forbids what the statute expressly permits.” Bicking v. City of Minneapolis, 891 N.W.2d 304, 313 (Minn. 2017) (internal quotations and emphasis omitted).

It has been long held in Minnesota that,

[T]he provisions of home rule charters upon all subjects proper for municipal regulation prevail over the General Statutes relating to the same subject-matter, except in those cases where the charter contravenes the public policy of the state, as declared by the general laws, and in those instances where the Legislature expressly declares that a general law shall prevail, or a purpose that it shall so prevail appears by fair implication, taking into consideration the subject and the general nature of the charter and general statutory provisions.

Am. Elec. Co. v. City of Waseca, 113 N.W. 899, 901 (Minn. 1907) (citing Grant v. Berrisford, 101 N.W. 940 (Minn. 1904)); Peterson v. City of Redwing, 111 N.W. 840 (Minn. 1907); Turner v. Snyder, 112 N.W. 868 (Minn. 1907)). This principal was codified two years later in Section 410.21:

The provisions of any charter of any such city adopted pursuant to this chapter shall be valid and shall control as to nominations, primary elections, and elections for municipal offices, notwithstanding that such charter provisions may be inconsistent with any general law relating thereto, and such general laws shall apply only in so far as consistent with such charter.

Minn. Stat. § 410.21. Thus, the Minnesota Legislature specifically allowed for charter cities to draft regulations for recall elections. Minn. Stat. § 410.20; see also Johnson-Lee v. City of Minneapolis, No. 02-1139(JRT/FLN), 2004 WL 2212044, *3 (D. Minn. Sept. 30, 2004) (“As an initial matter, the City is explicitly permitted to adopt Charter provisions relating to local elections that conflict with general state law”). The Minnesota Legislature further provided that in exercising that power, the regulations of the charter cities would be controlling over any other state laws. Minn. Stat. § 410.21. Thus, there is no conflict where Minnesota Statute provides that Section 48 is controlling.

Even ignoring Section 410.21 for the sake of argument, there is still no conflict where Rule 8205.1010 is not intended to apply to charter cities. A rule is to be construed to not violate the Minnesota Constitution. Minn. Stat. § 645.17(3). “An agency has the power to issue binding administrative rules only if, and to the extent, the legislature has authorized it to do so.” Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 485 (Minn. 1995).

Rule 8205.1010 is an administrative rule promulgated by the Minnesota Secretary of State. Rule 8205.1010. The authority for the Secretary of State to promulgate Rule 8205.1010 arises from Sections 204B.071, 211C.03, 211C.04, and 211C.06. Rule 8205.1010.

Section 204B.071 provides, “The secretary of state shall adopt rules governing the manner in which petitions required for any election in this state are circulated, signed, filed, and inspected. The secretary of state shall provide samples of petition forms for use by election officials.” Minn. Stat. § 204B.071. However, this section falls within the chapter related to **nominating** petitions. See Minn. Stat. 204B.03 et seq. Thus, the “petitions required for any **election**” as described in the rule-making authority refers to those petitions which are used to **nominate** candidates for the referenced election. As a recall petition is not a **nominating** petition “required for any election[,]” the authority to make rules related to recall petitions cannot spring from this particular legislative grant of authority.

Chapter 211C specifically deals with **recall** petitions, but the recall petitions are narrowed to specified offices. Chapter 211C is entitled “Recall of State Elected Officials.” Minn. Stat. Ch. 211C. Section 211C.02 provides “A state officer other than a judge may be subject to recall for serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office for a serious crime.” Minn. Stat. § 211C.02. Section 211C.03 then describes the contents that a recall petition for a state officer must contain, including the name of the “state officer.” Minn. Stat. § 211C.03. The chapter defines “state officer” as “an individual occupying an office subject to recall under the Minnesota Constitution, article VIII, section 6.” Minn. Stat. § 211C.01, subd. 5. Article VIII, section 6 of the Minnesota Constitution provides in full,

A member of the senate or the house of representatives, an executive officer of the state identified in section 1 of article V of the constitution, or a judge of the supreme court, the court of appeals, or a district court is subject to recall from office by the voters. The grounds for recall of a judge shall be

established by the supreme court. The grounds for recall of an officer other than a judge are serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office of a serious crime. A petition for recall must set forth the specific conduct that may warrant recall. A petition may not be issued until the supreme court has determined that the facts alleged in the petition are true and are sufficient grounds for issuing a recall petition. A petition must be signed by a number of eligible voters who reside in the district where the officer serves and who number not less than 25 percent of the number of votes cast for the office at the most recent general election. Upon a determination by the secretary of state that a petition has been signed by at least the minimum number of eligible voters, a recall election must be conducted in the manner provided by law. A recall election may not occur less than six months before the end of the officer's term. An officer who is removed from office by a recall election or who resigns from office after a petition for recall issues may not be appointed to fill the vacancy that is created.

Minn. Const. Art. VIII, § 6 (emphasis added). Article V, section 1 refers to the “governor, lieutenant governor, secretary of state, auditor, and attorney general[.]” Minn. Const. Art. V, § 1.

Section 211C.04 provides,

A petition to recall a **state officer** may be proposed by 25 or more persons, who must be eligible to sign and shall sign the proposed petition for the recall of the officer. The persons submitting the petition must designate in writing no more than three individuals among them to represent all petitioners in matters relating to the recall. The proposed petition must be submitted to the secretary of state in the manner and form required by the secretary of state and be accompanied by a fee of \$100.

Minn. Stat. § 211C.04 (emphasis added).

Thus, the legislative mandate under which the Minnesota Secretary of State promulgated Rule 8205.1010 limits the Secretary of State to creating rules related to “A member of the senate or the house of representatives, an executive officer of the state identified in section 1 of article V of the constitution, or a judge of the supreme court, the court of appeals, or a district court is subject to recall from office by the voters” and gave the Secretary of State no authority to promulgate rules which would supersede the procedure developed by the Columbia Heights City Charter. On the other hand, Section 410.20 specifically provided charter cities with the power to adopt procedures for the recall of a city official. Minn. Stat. § 410.20. Section 410.21 provides that those procedures are controlling. Minn. Stat. § 410.21. As a result, the Court should affirm the decision of the District Court.¹⁶

- b. *The field of municipal recall elections is not occupied by state law.*

The field of municipal recall elections is not occupied by state law. “The preemption doctrine has also been known as the ‘occupation of the field’ concept[.]” Mangold Mw.

¹⁶ Appellant argues that because Section 204B.071 is unambiguous that this Court need not consider the canons of construction. (Appellant’s Br. 21–22.) This Court “read[s] the statute as a whole and turn[s] to statutes relating to the same subject in order that [the Court] may avoid conflicting interpretations and give effect to all statutory provisions.” City of St. Paul v. Eldredge, 800 N.W.2d 643, 648 (Minn. 2011). Section 410.20 provides that charters cities may provide for recall elections. Minn. Stat. § 410.20. Section 410.21 provides that those regulations adopted for recall elections will control over the general law. Minn. Stat. § 410.21. The Legislature could not have intended for charter cities to have discretion to provide for recall of elected officials and give the Secretary of State the authority to dictate the form of recall petitions which have already been determined. Thus, in order to give effect to each provision, the Court must look at Sections 410.20; 410.21; 204B.071; and Rule 8205.1010 together in context.

Co. v. Village of Richfield, 143 N.W.2d 813, 819 (Minn. 1966). According to the Minnesota Court of Appeals:

In determining whether or not preemption has occurred, Minnesota courts consider four factors: (1) the subject matter regulated; (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern; (3) whether any partial legislation on the subject matter evinces an intent to treat the subject matter as being solely a state concern; and (4) whether the nature of the subject matter is such that local regulation will have an adverse effect on the general state population.

Nordmarken v. City of Richfield, 641 N.W.2d 343 (Minn. Ct. App. 2002) (citing Mangold Mw. Co., 143 N.W.2d at 820).

None of these factors support finding that the State occupies the field in recall elections. First, the factor of the subject matter regulated does not support a finding of field preemption. The subject matter here, the recall of city council members, falls solely within the province of municipalities. As quoted in full above, Section 410.20 states that charter commissions, in framing charters, are allowed to provide for recall of municipal elected officials. Minn. Stat. § 410.20. This general grant of authority includes the ability to create necessary regulations for the procedure of recalling a city council member. A.C.E. Equip., 152 N.W.2d at 741. Thus, the subject matter to be regulated, the municipal recall election, is solely within the province of Minnesota charter cities.

Second, the subject matter is not fully covered by state law. Just the opposite, the Minnesota Legislature has provided that charter cities are the sole authority for providing regulation related to municipal recall elections. Minn. Stat. § 410.21. This factor weighs against a finding of field preemption.

Third, there is no partial legislation on the subject matter. The only possible source of legislation is Rule 8205.1010. Rule 8205.1010. As described above the Minnesota Legislature, however, provided that regulations adopted by charter cities are controlling. Minn. Stat. § 410.21. Moreover, as described above, Rule 8205.1010 cannot be read in such a way to extend to charter cities. Supra Section I.A.2.a. Such a reading would render the Rule unconstitutional. Id. Thus, there is no partial legislation on the subject matter.

Fourth, the subject matter is fully within the domain of local regulation. The Minnesota Legislature has provided that charter cities may provide for recall elections. Minn. Stat. § 410.20. The broad grant of authority comes with authority to enact regulations necessary for recall elections to occur. A.C.E. Equip., 152 N.W.2d at 741. A charter provision, when in conflict with state law, takes precedence. Minn. Stat. § 410.21. Thus, such regulations are solely within the domain of charter cities. There is simply no meritorious argument that the field is preempted by state law. The Court should affirm the decision of the District Court.¹⁷

¹⁷ Appellant argues that the timing of the passage of Chapter 211C and Section 204B.071 suggests that 204B.71 was intended to apply to municipal recall elections. (Appellant's Br. 32–33.) Appellant's argument is speculation. Appellant speculates that because Chapter 211C was passed three years prior to Section 204B.071, that Section 204.071 was intended to refer to recall petitions in municipal elections. (Id.) More likely, Section 204.071 was passed to allow the Secretary of State to make regulations related to nominating petitions as argued above. Supra Section I.A.1.

B. The District Court properly found that Appellant’s conduct rose to a level of malfeasance.

The District Court properly found that Appellant’s conduct rose to a level of malfeasance.¹⁸ Article VIII, Section 5, of the Minnesota Constitution provides, “[t]he legislature of this state may provide for the removal of inferior officers for malfeasance or nonfeasance in the performance of their duties.” Minn. Const. Art. VIII, § 5. In Jacobsen v. Nagel, this Court found that Article VIII, Section 5 applied to the recall of elected municipal officials. 96 N.W.2d 569, 572 (Minn. 1959). As a result, municipal elected officials, “may not be removed except for malfeasance or nonfeasance in office.” Id.

According to the Jacobsen Court, “That which constitutes malfeasance in an official capacity is not susceptible of an exact definition.” Id. at 573 (internal quotations omitted). In Daugherty v. Ells, cited by the Jacobsen Court with approval, the court described malfeasance as follows: “To establish malfeasance in office it is not necessary to show a specific intent to defraud, or that the act is criminal or corrupt in character.” Daugherty v. Ellis, 97 S.E.2d 33, 42–43 (W.Va. 1959); see also Jacobsen, 96 N.W.2d at 573 n. 1.). The conduct in question must affect official duties of the official. 96 N.W.2d at 572.

¹⁸ Appellant may argue that Respondents took no position on the issue below. Respondents argued that the committee which drafted and circulated the Recall Petition should be made parties to the proceeding. (Doc Index 11, pp. 13–16.) In the context of that argument, Respondents argued that the committee would have argued that Appellants’ conduct rose to a level of malfeasance if the committee had been made parties and how Appellant’s conduct amounted to malfeasance. (Id. at 16 n. 11.) In addition, Respondents presented the facts to the District Court which established that Appellant’s conduct amounted to malfeasance. (ADD. 12.) Thus, Respondents appropriately preserved the issue of whether the District Court correctly determined that Appellant’s conduct rose to a level of malfeasance.

In the context of state officials, the legislature has defined ‘malfeasance’ as, “the intentional commission of an unlawful or wrongful act by a state officer other than a judge in the performance of the officer’s duties that is substantially outside the scope of the authority of the officer and that substantially infringes on the rights of any person or entity.” Minn. Stat. § 211C.01, subd. 2.

In interpreting the term ‘wrongful’ as used in Section 211C.01, subd. 2, this Court found,

[C]onsistent with the context in which the terms are used and the role of courts in making judgments based on legal standards, is to construe the phrase “unlawful or wrongful” in [Section 211C.01’s] definition of malfeasance to mean conduct that is contrary to a legal standard established by law, rule or case law.

In re Ventura, 600 N.W.2d 714, 719 (Minn. 1999). The alleged “conduct must be such as affects the performance of official duties rather than conduct which affects the official’s personal character as a private individual.” Jacobsen, 96 N.W.2d at 573. “[T]he conduct must relate to something of a substantial nature directly affecting the rights and interests of the public.” Id. (quoting State ex rel. Kinsella v. Eberhart, 133 N.W. 856, 860 (Minn. 1911) (internal quotation marks omitted)).

“Allegations in a proposed recall petition must be made with sufficient precision and detail to enable the challenged official and the electorate to make informed decisions in the recall process.” Id. at 717. However,

Courts can take notice of how difficult it is to prepare and to circulate any petition. Frequently such petitions are prepared by laymen, not skilled in the technical aspects of the law. Courts should exercise extreme caution in ruling out, on mere

technicalities, such documents which are the result of democracy working at the grassroots level.

Bogen v. Sheedy, 229 N.W.2d 19, 24 (Minn. 1975).

In application of these principals, in the Jacobsen case, Nagel was recalled upon the grounds that Nagel was not elected by a majority, he obtained tight control of city affairs through the use of a taxpayer group, he increased tax assessments for sewer and water trunk lines, and he ignored the petitions of his constituents. Id. at 572. This Court concluded that “the grounds indicate political criticisms of Nagel’s actions as an alderman.” Id. at 573.

In the Ventura case involving Article VIII, Section 6 of the Minnesota Constitution,¹⁹ voters sought to recall Governor Jesse Ventura on the allegations that Governor Ventura used state security personnel during a book tour, that Governor Ventura used his position as governor to seek increased prices for his book, that Governor Ventura accepted gifts and favors, and that Governor Ventura suffered from a conflict of interest in that the more bizarre his behavior as governor, the more opportunity he had for personal gain. 600 N.W.2d at 716. The Court found the petition to be deficient. Id. at 717–20. First, the allegations related to increased prices for his book did not relate to his position. Id. at 717. Second, the allegations related to receiving gifts were too vague. Id. Third, the Court

¹⁹ Article VIII, Section 6 of the Minnesota Constitution and Minnesota Statutes Section 211C.02 provide that elected state officials may only be recalled for “serious malfeasance.” Minn. Const. Art. VII, § 6; Minn. Stat. 211C.02. However, Article VIII, Section 5 of the Minnesota Constitution allows for inferior officers to be removed for “malfeasance” rather than “serious malfeasance.” Art. VIII, § 5. It is Section 5 which is applied here. Jacobsen, 96 N.W.2d at 572–73 (applying the predecessor to Art. VIII, § 5). Similarly, In re Kiffmeyer, involved a determination of “serious malfeasance” under Section 211C.02. 673 N.W.2d 827, 828 (Minn. 2004).

found allegations related to Governor Ventura’s conflict of interest to be both too vague and personal to Governor Ventura. Id. at 718. Finally, the Court found that using state personnel on personal business was not uncommon for governors and the conduct was neither unlawful nor wrongful. Id.

Appellant engaged in malfeasance.²⁰ Here, it can hardly be doubted that lying is a “wrongful” act.²¹ Cultures throughout the world universally view lying as wrong. Exodus 20:16 (“Thou shalt not bear false witness against thy neighbor”); 1 Kings 21; Surah 22:30 (“And whoever honours the rituals of Allah, it is best for them in the sight of their Lord. . . . So shun the impurity of idolatry, and shun words of falsehood.”); Analects 1.4 (“Master Zeng said, ‘Every day I examine myself on three counts: in my dealings with others, have I in any way failed to be dutiful? In my interactions with friends and associates, have I in any way failed to be trustworthy? Finally, have I in any way failed to repeatedly put into practice what I teach?’”); Socrates, (“Lies are the greatest murder. They kill the truth.”)

The law has reflected society’s shared disdain for dishonesty through criminal codes, civil causes of action, and general laws. For instance, perjury is a criminal act. Minn.

²⁰ The conduct at issue here is not political criticism of Appellant’s actions, but instead is due to conduct detrimental to the rights and interest of the public during an official city investigation and violation of the Code of Conduct.

²¹ Appellant argues that Respondents failed to meet their burden to “show cause” at the hearing on the Petition. (Appellant’s Br. at 19–20.) Appellant relies on Section 204B.44 for the proposition that Respondents have the burden at the hearing. (Id.) While Respondents argued that the citizen committee should be made parties to the proceeding, the District Court specifically found that Respondents met any burden that they might have under the law by submitting evidence to the District Court. (ADD. 12.) Thus, Respondents met any burden it might have under the law by supplying evidence to the District Court whether or not Respondents took any position.

Stat. § 609.48, subd. 1. Lying to Congress or the Federal Bureau of Investigation is a criminal act. 18 U.S.C. § 1001. One who lies may have a civil complaint brought against them for fraud. Hoyt Props., Inc. v. Prod. Res. Grp., 736 N.W.2d 313, 318 (Minn. 2007). One who engages in a deceptive trade practice may have suit brought against them by the Attorney General or a private attorney general. Minn. Stat. §§ 325D.44; 8.01. In addition, lying in an employment investigation is generally considered an offense worthy of termination. See, e.g., Bollinger v. Billings Clinic, 434 P.3d 885, 892 ¶ 33 (Mont. 2019). There are few acts which are more reviled in the law than lying.

Much closer to home than the lofty moral principles of dishonesty and the legal concepts of perjury and fraud, Appellant violated the City of Columbia Heights Code of Conduct. (ADD. 13–14.) The City of Columbia Heights Code of Conduct was adopted by motion by the City Council on September 9, 2019. (September 9, 2019 Meeting Minutes).²²

Under the City Council Handbook,

The mayor and council members are dedicated to promoting values and integrity of local government and democracy and are committed to governing efficiently and effectively. After taking the oath of office as a city council member, **they agree to conduct themselves in accordance with the following code of conduct:**

- The professional and personal conduct of council members **must be above reproach** and avoid the appearance of impropriety. **Members should refrain from abusive conduct, personal charges, or verbal attacks upon the character or motives of other members of the council,**

²² Available at <https://find.ci.columbia-heights.mn.us/WebLink/DocView.aspx?id=638287&dbid=0&repo=ColumbiaHeights> (last visited January 5, 2024).

boards, commissions, staff or the public intended to disrupt and not further the City’s business.

....

Ethical leadership is vital to the functioning of the City and to maintaining the public’s trust and confidence in the City and the democratic process.

Key traits of ethical leaders:

....

Know the importance of conscientious and ethical government as a value in itself. Ethical council members do not use their office or authority for revenge, prestige, or personal gain. Ethical council members recognize that government is a human institution. As a result, the human motivations of those in government will determine if the government itself is effective or ineffective, good or bad, ethical or unethical. Ethical council members care enough to make a positive difference and then act accordingly.

(Doc. Index 12, pp. 007–8 (emphasis added).)

The independent investigator found that Appellant’s conduct violated the City of Columbia Heights’ Code of Conduct, which Appellant agreed to abide by, in two ways. First, the investigator found that Appellant violated the City Council Code of Conduct by attacking the candidate regarding his bi-racial heritage. (Doc. Index 12, Ion Decl. p. 012, ¶ C(4)(d).) Moreover, the investigator found that Appellant violated the City Council Code of Conduct by repeatedly lying about the events surrounding the phone call both before and during the investigation. (Doc. Index 12, Ion Decl. p. 012.) Both of these violations of the City Council Code of Conduct are reflected in the Recall Petition. (Pet. Ex. A.) The Recall Petition alleges that “[Appellant] used a fake name to call and berate then-candidate

Justice Spriggs, making derogatory comments about his heritage and family background.” (Pet. A.) The Recall Petition further Alleges that “After an independent investigation funded by the city, Jacobs was found to be untruthful and subsequently stripped of her ability to serve on boards and commissions and was censured by the council.” (Id.) Thus, Appellant’s actions were wrongful and constituted malfeasance.

Appellant’s conduct in berating the candidate for City Council violated the Code of Conduct as found by the independent investigator. (Doc. Index 12, Ion Decl. p. 012, ¶ D.) Appellant’s conduct in repeatedly lying about Appellant’s actions violated the Code of Conduct as found by the independent investigator. (Doc. Index 12, Ion Decl. p. 012.) The Code of Conduct is a code adopted by the Columbia Heights City Council and agreed to by Appellant. As such, the Code of Conduct falls within the definition of wrongful outlined by this Court. In re Ventura, 600 N.W.2d at 719.

Appellant’s actions affected the performance of Appellants’ official duties. As the District Court pointed out, Appellant was stripped of her board and committee assignments as a result of her conduct.²³ (ADD. 12.) Appellant was also censured by the City Council. (Id.) The District Court also found that these repercussions affected the rights of

²³ Appellant misconstrues the District Court’s analysis as an attempt to “redefine malfeasance to include the conduct of others.” (Appellant’s Br. at 21–22.) The District Court was simply applying the definition of malfeasance as some action that has an “affect[] on the performance of official duties[.]” (ADD.12 (quoting Jacobsen, 96 N.W.2d at 573).) To ‘affect’ means to “to produce an effect upon.” Affect, Webster’s New Collegiate Dictionary (1973 ed.). The District Court simply noted—correctly—that Appellant’s conduct had the effect of causing Appellant to be removed from committees and to be censured which resulted in the effect of making Appellant a less effective council member. (ADD. 12.)

Appellant's constituents by causing Appellant to be a less effective member of the five-member City Council. (Id.)

Moreover, when Appellant was elected, Appellant agreed to be bound by the Code of Conduct. (Doc. Index 12, p. 007.) That Code of Conduct acknowledged that "Ethical leadership is **vital** to the functioning of the City and to maintaining the public's trust and confidence in the City and the democratic process." (Doc. Index 12, pp. 008.) Thus, ethical leadership and the Code of Conduct do not simply "affect" Appellant's duties and the rights of Appellant's constituents, as agreed by Appellant, they are "vital" to the functioning of Columbia Heights and the public's trust in government.

The City Council voted to hire an independent investigator to determine whether Appellant violated City policy. (Doc. Index 12, p. 7, ¶ E.) During that investigation into whether Appellant violated City policy, the independent investigator found that Appellant lied repeatedly. (Doc. Index 12, p. 12.) The independent investigator found that Appellant's repeated untruthful statement also violated City policy in addition to the statements made in the phone call. (Id.) Thus, the Recall Petition alleges that Appellant lied in an investigation paid for by the City to determine whether Appellant violated City policy. (Pet. Ex. A.) The conduct in question was not of a personal nature to Appellant but affected her position as a City Council member. Appellant's conduct constituted malfeasance. As a result, the Court should affirm the decision of the District Court.

CONCLUSION

The Court should affirm the decision of the District Court. First, the District Court correctly determined that the Recall Petition was not procedurally infirm. Second, the

District Court correctly determined that Appellant's conduct rose to a level of malfeasance.

As a result, the Court should affirm the decision of the District Court.

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Dated: January 9, 2024

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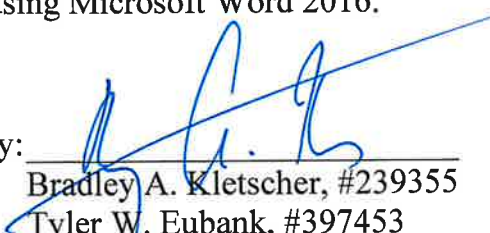
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3 for a brief with a proportional 13-point font. The length of this brief is 7,739 words. This brief was prepared using Microsoft Word 2016.

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