

No. 81857-6

SUPREME COURT OF THE STATE OF WASHINGTON

COMMUNITY CARE COALITION OF WASHINGTON *et al.*

Petitioners,

v.

SAM REED, Secretary of State,

Respondent,

and

PEOPLE FOR SAFE QUALITY CARE and LINDA LEE,

Interveners.

**BRIEF OF INTERVENERS AND
MOTION TO DISMISS**

Knoll D. Lowney, WSBA No. 23457
Smith & Lowney, PLLC
2317 East John St.
Seattle, WA 98112
(206) 860-2883

Michael C. Subit, WSBA No. 29189
Frank Freed Subit & Thomas, LLP
705 Second Ave., Suite 1200
Seattle, WA 98104
(206) 682-6711

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INTRODUCTION

This action concerns an initiative to the People proposed by Interveners Linda Lee and People for Safe Quality Care (“Proponents” or “Interveners”) pursuant to the Washington Constitution, Article II, Section 1(a) and RCW 29A.72.010. That measure, designated as Initiative to the People 1029 by the Secretary of State (“Secretary”), would improve long term care for the elderly and people with disabilities by requiring providers to obtain additional training, criminal background checks, and certification. Proponents spent approximately \$ 600,000 on a signature gathering campaign to place the measure on the November 2008 ballot and obtained over 318,000 signatures.

Unbeknownst to Proponents, the signature petitions inadvertently contained some verbiage suggesting that I-1029 was an initiative to the Legislature in addition to having language indicating the measure was an initiative to the People. In the exercise of his statutory discretion, the Secretary ruled that the erroneous language on the signature petitions did not justify barring I-1029 from the November 2008 ballot. A group of I-1029 opponents (“CCCW” or “Petitioners”) then filed a petition in this Court to overturn the Secretary’s placement of the measure on the ballot and have it sent to the Legislature instead. For the reasons set forth below, this Court should deny CCCW’s request for extraordinary review,

uphold the decision of the Secretary placing I-1029 on the November ballot, and dismiss the petition with prejudice.

STATEMENT OF ISSUES

1. Should this Court dismiss Petitioners' action (a) for lack of standing, (b) because they have not alleged facts sufficient to invoke the Court's extraordinary review powers, and/or (c) because compliance with the statutory specifications for initiative signature petitions is not a "procedural requirement" for ballot access?

2. Should this Court overturn the Secretary's discretionary decision to file the Initiative 1029 signature petitions and to certify the measure for the November 2008 ballot?

STATEMENT OF THE CASE

A. The Initiative Process.

The People of Washington reserved for themselves the power to legislate by initiative through enactment of the Seventh Amendment to the Washington Constitution in 1912. "The first power reserved by the people is the initiative." Art. II, sec. 1. The Seventh Amendment adopted a single initiative process, but allowed a qualified initiative to be submitted to either the People or to the Legislature. The singular mandate for initiative petitions is that they "shall include the full text of the measure so proposed." *Id.* Once adequate signatures are collected on

the petition, the timing of its filing controls whether the initiative is referred to the People or to the Legislature.

The constitutional scheme allows initiative proponents to determine the timing of their petition filing, and thus control whether their measure is treated as an initiative to the People or as an initiative to the Legislature. It provides “Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify [the measure to the legislature].” Art. II, sec. 1(a). Thus, the only *constitutional requirement* for placing a measure before the voters is the collection of a sufficient number of signatures on a petition containing “the full text of the measure so proposed” and the filing of the petition at least four months before the election.

The Seventh Amendment specifies that Article II, section 1 “*is self executing*, but legislation may be enacted especially to facilitate its operation.” Art. II, sec. 1(d) (emphasis added). In 1913, the Legislature adopted House Bill 523 titled “An Act to facilitate the operation of the

provision of section 1 of article II of the constitution relating to initiative and referendum.” 1913 Laws of Washington Ch. 138. Over the years these “facilitating statutes” have been slightly modified and they were recently re-codified as RCW Chapter 29A.72.

Consistent with the constitutional scheme, the facilitating statutes provide that an initiative’s proponents drive the process. The first step is for a “legal voter” to submit a proposed measure to the Secretary. RCW 29A.72.010. The statute gives the initiative’s proponents the choice of filing an initiative to the People or an initiative to the Legislature. Based on the proponents’ selection of the type of initiative being submitted, the Secretary assigns the measure a serial number. RCW 29A.72.040 requires the Secretary to use one series of numbers for initiatives to the People and another series for initiatives to the Legislature. Currently the Secretary is assigning “1000” numbers to initiatives to the People and “400” numbers to initiatives to the Legislature. *See* Agreed Statement of Facts (July 31, 2008) (“ASF”) Exhibit O at p. 2 n.1. Before giving a proposed initiative a serial number, the Secretary sends a copy of it to the code reviser, who may confer with the initiative sponsor about any suggested changes. RCW 29A.72.020.

Once an initiative is filed and a serial number is assigned to it, the Attorney General prepares a ballot title and summary, which the

Secretary provides to the initiative sponsor and any person who has requested the information. RCW 29A.72.060-070. Any person dissatisfied with the ballot title and summary can challenge them in Thurston County Superior Court. RCW 29A.72.080. Once the ballot title and summary are set, the initiative sponsor prepares signature petitions for the measure. Chapter 29A.72 sets forth several specifications for the petitions beyond the petition requirements established by the Constitution. The specifications include the type and size of paper, the number of signature lines on a page, a statutory warning to voters that must be “not less than four square inches on the front of the petition sheet,” certain boilerplate petitioning language, and a form for the signature gatherer’s certification. RCW 29A.72.100 through .140.

RCW 29A.72.110 and .120 specify certain language for petitions for initiatives to the Legislature and the People, respectively. Most of the language these provisions specify is the same regardless of the form of the proposed initiative. RCW 29A.72.110 and .120 do provide for slightly different “petitioning language” for initiatives to the Legislature and initiatives to the People. Petitions must only be “substantially” in the form set forth in 29A.72.110 and .120. *Id.* Unlike other language for signature petitions specified by RCW 29.72, the “petitioning language” itself does not need to be emphasized by location or size. *Compare* RCW

29A.72.140 (warning to voter must be at least four square inches on the front of the petition) *with* RCW 29A.72.100 (specifying “readable, true, and correct copy of the measure printed on the reverse side of petition”).

Once an initiative’s proponents have collected the number of signatures required by law, they may choose to submit the signature petitions to the Secretary. RCW 29A.72.150 (“When the person proposing any initiative measure has obtained [sufficient] signatures of legal voters . . . the petition containing the signatures *may be submitted* to the secretary of state for filing.” (emphasis supplied)). Initiative sponsors are not required to file the signature petitions for a measure they have proposed. In other words, even after hundreds of thousands of voters have signed petitions for an initiative measure, the sponsors have the absolute right to abandon the effort.

RCW 29A.72.160 incorporates the signature petition submittal deadlines the Constitution provides. Signature petitions for initiatives to the People must be submitted not less than four months before the next general election. Petitions for initiatives to the Legislature must be submitted not less than 10 days before the commencement of the next regular session. *Id.* As a practical matter, the deadline for the submission of signature petitions for an initiative to the People is early July and the deadline for petitions for an initiative to the Legislature is late December.

After the initiative sponsors submit the signature petitions, the Secretary decides whether to accept or reject them for filing. RCW 29A.72.170. The Legislature gave the Secretary discretion to reject signature petitions on three grounds, only one of which is at issue in this case. The relevant statute provides: “The secretary of state *may* refuse to file any initiative or referendum petition” if “the petition does not contain the information required by RCW 29A.72.110, 29A.72.120, or 29A.72.130.” RCW 29A.72.170 (emphasis added). While the Legislature gave the Secretary discretion to apply or not apply the strong medicine of rejecting technically deficient signature petitions, the Legislature gave the Secretary no discretion to reject signature petitions that comply with RCW 29A.72.

Recognizing the pre-eminence of the right of initiative sponsors to have a measure they proposed put before the People, RCW 29A.72.180 provides if the Secretary refuses to file the submitted initiative petitions, the “person proposing the measure” may apply to the Thurston County Superior Court for a writ of mandate to compel the Secretary to file the petitions. If the Superior Court grants the application and requires the filing of the initiative, that decision is not subject to further review. *Id.* The Superior Court’s *refusal* to issue a writ of mandamus to the initiative

proponents is subject to accelerated review by the Supreme Court. RCW 29A.72.190.

Once the signature petitions are filed, the Secretary canvasses them. If the petitions have the number of valid signatures required by the Constitution, an initiative to the People is referred to the ballot. RCW 29A.72.230 & 250. “Any persons” dissatisfied with the Secretary’s determination of sufficiency or non-sufficiency regarding the number of signatures may file an action in Thurston County Superior Court within five days. RCW 29A.72.240. The Superior Court’s determination of the issue is subject to review by this Court. *Id.*

B. The History of Initiative 1029.

Intervener Linda Lee is a long-term care worker who has been a passionate advocate for improving long term care in Washington. For several years she has been working on this issue with her Union and advocates for the elderly and people with disabilities. Intervener People for Safe Quality Care is a group of concerned citizens who believe that Washington *urgently* needs a system of increased training, certification, and background checks for long term care workers. It is the official ballot committee for I-1029. ASF at ¶¶ 28-29; Declaration of Adam Glickman (Aug. 22, 2008) (“Glickman Dec.”) at ¶ 2.

The eventual Proponents of I-1029 lobbied the Legislature for long term care reforms during the 2007 and 2008 legislative sessions. They fully intended to proceed to the ballot in November 2008 if they could not obtain timely legislation. In 2007 they began to gather signatures for an initiative to the People, I-973, but abandoned the effort after the Governor signed HB 2284 establishing a workgroup to study training reforms. *Id.* at ¶¶ 2-3.

In late 2007 and early 2008, Proponents began testing concepts and language for a 2008 initiative to the People. *Id.* at ¶ 4. As is common and legal,¹ this drafting and revision process is reflected in the various initiatives proposals they submitted, which varied as to training requirements, implementation timelines, and exemptions. Proponents did not proceed with signature gathering efforts for any of the initiative measures that were filed prior to Initiative 1029. *Id.* at ¶ 5.

On March 12, 2008, the day before the 2008 legislative session ended, Ms. Lee submitted with her Union's assistance the final draft of what became I-1029 to the Secretary of State. She deliberately designated the measure as an "Initiative to the People." ASF at ¶ 1 and Exhibit A thereto; Glickman Dec. at ¶ 6. Ms. Lee listed her Union's

¹ See *Washington Citizens Action of WA v. State*, 162 Wn.2d 142, 157, 171 P.3d 486 (2007) ("[I]nitiative proponents can effectively "amend" an initiative simply by filing a new version of an initiative under a different number. Proponents then gather signatures on only their preferred version of the proposed initiative.")

address as her contact information. *Id.* Proponents made a deliberate decision **not** to gather signatures for an initiative to the Legislature and to move forward only on an initiative to the People. Glickman Dec. at ¶ 7. The Secretary designated Proponents' proposed ballot measure as an initiative to the People by assigning it number "1029" rather than a legislative initiative number in the 400s. ASF ¶ 10; Exhibit O to ASF at p.2 n.3. Every item of correspondence to or from the government and every entry on the Secretary of State's website recognizes that I-1029 was filed as an initiative to the People.²

When the ballot title and summary were set, I-1029's Proponents hired an outside consulting firm to prepare the signature petition. Upon receiving the draft petition, an employee of Ms. Lee's Union proofread the text of the initiative printed on the petition. Glickman Dec. at ¶¶ 8-9. Unfortunately, Proponents failed to proofread the remainder of the petition and did not recognize that their consultant had mistakenly inserted boilerplate "petitioning language" referring to submission of the measure to the Legislature. *Id.* at ¶ 10; ASF Ex. M at p. 1. The signature

² See, e.g., ASF Ex. D (Secretary of State's acknowledgment of filing of "Initiative to the People"); Ex. E (Letter transmitting proposed "Initiative to the People" to Code Reviser); Ex. F (Certificate of Review titled "In the Matter of the Proposed Initiative to the People"); Ex. H (Letter to proponents confirming filing and serial number for "your proposed Initiative to the People"); Ex. J (Letter assigning ballot title to "Initiative No. 1029 to the People"); Ex. K (list of initiatives to the People including I-1029); and Ex. L (Secretary of State letter notifying proponents of ballot title).

petitions were printed and circulated with this undiscovered error. Glickman Dec. at ¶ 10. The references to the “legislature” on the signature petitions for I-1029 were simply a mistake. The language was not the result of a tactical or strategic ploy. Proponents did not intentionally put the “legislature” language into the signature petitions or allow such language to be put in the petitions. *Id.* at ¶¶ 11 & 21.

Proponents collected signatures for I-1029 in two teams. They had volunteers and union members collecting signatures and also hired a professional signature-gathering firm. *Id.* at ¶ 12. Every signature gatherer was trained that I-1029 was an initiative to the People and that is what they were instructed to tell voters. The critical closing “pitch” was that the voter’s signature would merely place the measure on the November ballot. Declaration of Nathasja Skorupa (Aug. 20, 2008) (“Skorupa Dec.”) at ¶¶ 2-5 and Attachment A thereto; Declaration of John Michael (Aug. 20, 2008) (“Michael Dec.”) at ¶¶ 2-4. Voters often signed the petitions for I-1029 after being told that their purpose was to put the initiative on the ballot. Michael Dec. at ¶ 7; Skorupa Dec. at ¶ 5.

From the beginning of the process, Proponents always intended I-1029 to be an initiative to the People. Glickman Dec. at ¶ 13. There was no intention to deceive people into thinking it was an initiative to the Legislature. *Id.* No signature gatherer was ever told that I-1029 was an

initiative to the Legislature. Skorupa Dec. at ¶ 3; Michael Dec. at ¶ 3. The signature petitions indicated in several ways Initiative 1029 was an initiative to the People, despite the error in the petitioning language:

- The most prominent words on the Petition were the “YES I-1029” logo and the headline “I-1029 WILL IMPROVE CARE FOR SENIORS, PERSONS WITH DISABILITIES, AND THE VULNERABLE”. (The initiative number in the 1000 range boldly indicated that it was an initiative to the People.)
- The title of the measure is “the better background checks and improved training for long-term care workers for the elderly and persons with disabilities *initiative of 2008.*” I-1029, § 21 (emphasis added). (An initiative for the 2009 legislative session would have been titled an *initiative of 2009.*)
- The petition stated, in bold font, “FIRST CLASS MAILING DEADLINE IS JUNE 25, 2008.” (The deadline for an initiative to the Legislature would be in late December, six months later.)

Proponents made a major push to gain endorsements from organizations and individuals. Each endorsement form asked the endorser to pledge to “Gather ___ signatures to qualify I-1029 for the

ballot.” Glickman Dec. at ¶ 14 & Exhibit A thereto. On April 22, Proponents placed an Op-ed in the *Seattle Post-Intelligencer*. It read

We have a tradition in Washington of going to the voters when the Legislature fails to act on critical issues. Perhaps this is one of those special situations where the initiative process is especially fitting. The Legislature has had two opportunities to do the right thing for seniors and people with disabilities and failed. Maybe it's time for the people to finish what the Legislature started?

Glickman Dec. at ¶ 18 and Exhibit H thereto. Proponents sent out press releases and media communications that always indicated I-1029 was intended for the ballot. For example, Proponents sent a June 25 press release to various outlets throughout the state, stating: “Citizens have been collecting signatures for weeks, aiming towards a July 3 deadline to get the measure on the November ballot.” Glickman Dec. at ¶ 15 and Exhibit B thereto.

Proponents’ educational materials for I-1029 consistently described the legislative inaction that required us to take our proposal to the people. This was discussed with voters, in endorsement requests, communications with editorial boards, and in fact-sheets. *Id.* at ¶ 16 & Exhibits C-F thereto. Media reports described I-1029 as an initiative to the People heading towards the ballot. *Id.* at ¶ 17 & Exhibit G thereto. The signature gatherers for the initiative talked to over half a million voters in collective over 318,000 signatures. Skorupa Dec. at ¶ 6;

Michael Dec. at ¶ 7. Yet, *nobody* ever brought the petition's error to the attention of the signature gatherers or the Proponents. *Id.* On or about June 25, a citizen brought the petition's error to the attention of the Secretary. ASF at ¶ 13. Proponents were unaware of the error until then. Glickman Dec. at ¶ 19.

On July 3 Proponents submitted the I-1029 signature petitions to the Secretary's office. ASF at ¶ 16. Proponents asked the Secretary to accept the petitions for filing and certify I-1029 to the voters of the state of Washington for their approval or rejection at the general election to be held on November 4, 2008. *Id.* Upon the request of CCCW, the Secretary investigated the mistake on the signature petitions. *Id.* at ¶¶ 17-19. The Secretary decided to accept I-1029 for filing despite the mistake. CCCW's petition to this Court admits: "Petitioners requested Secretary of State Reed to reject and not certify I-1029 as an initiative to the people. *Secretary of State Reed accepted and filed I-1029 as an initiative to the people.*" Petition (July 22, 2008) at ¶ 24 (emphasis added).

The Secretary's investigation and decision is documented in the letter written on his behalf by the Attorney General's Office dated July 12, 2008. He determined that

Although, in a single respect, the petitions submitted in support of I-1029 do not fully comport with the governing statute, the petitions submitted and the surrounding

circumstances are sufficiently in keeping with an initiative to the people that their rejection is not warranted. Under the circumstances, the law does not require their rejection. . . . Accordingly, after consulting with our office, *the Secretary of State has determined that the signatures should be processed and counted as signatures in support of a petition for an initiative to the people. If sufficient signatures have been submitted, the measure will be certified for inclusion on the November 2008 general election ballot.*

The alternative you request—rejecting the petitions for I-1029—would fail to afford Washington’s voters the opportunity to consider, and either approve or reject the measure, where a constitutionally requisite number of voters expressed support for its enactment to be considered. The action that you request also would give no effect to circumstances where a requisite number of citizens in almost every way—and in what appears under the circumstances to be every critical way—meet the statutory standards for submission of an initiative to the people. . . .

ASF Ex. O, at pp.1, 3 (emphasis added).

On August 13 the Secretary certified the sufficiency of the more than 318,000 signatures that Proponents had submitted in support of I-1029. See “Certification of Initiative 1029 to the People”, Appendix A hereto. He also referred it to the county auditors for placement on the November ballot. See Appendix B hereto. He notified the auditors that his certification of I-1029 is subject to revision “if a court of competent jurisdiction issues an order removing I-1029 from the ballot.” *Id.*

Proponents have spent well over \$ 600,000 securing I-1029's place on the November ballot. Their campaign to pass I-1029 in November is well underway. They have hired staff and consultants, conducted public opinion polling, and developed a campaign strategy geared towards the 2008 general election ballot. All of this work would be wasted if the Court prevented the People from voting on I-1029 this November. Glickman Dec. at ¶ 20.

ARGUMENT

I. SUMMARY OF ARGUMENT

The Legislature enacted RCW 29A.72 to facilitate the constitutional right of initiative. The Legislature provided the Secretary with broad discretion to decide whether signature petitions are substantially in the form specified by the statute and to approve technically deficient petitions in the exercise of that discretion. The Legislature re-enforced this "pro-filing policy" by allowing only initiative proponents to challenge the Secretary's decision regarding the filing of the petitions, and providing no judicial review when, as here, the Secretary accepts the signature petitions for filing. Therefore, compliance with the signature petition form specifications set forth in RCW 29A.72.120 is not a "procedural requirement" for ballot access that gives rise to the right of pre-election judicial review of an initiative measure.

CCCW are not entitled to a writ of mandamus or prohibition because the Secretary's decision to file I-1029 is neither mandatory nor a quasi-judicial act. CCCW do not have standing to seek review under this Court's inherent powers because their interests as opponents of I-1029 do not fall within the zone of interests protected by constitutional and statutory provisions governing the initiative process. Petitioners cannot demonstrate an "injury in fact" from the Secretary's decision to certify I-1029 as an initiative to the People. Petitioners' remedies are political; they should make their arguments against I-1029 to the electorate.

Schrempp v. Munro requires this Court to hold the Secretary's decision to approve I-1029 was neither arbitrary and capricious, nor contrary to law. He concluded the signature petitions did not warrant rejection based on the facts before him, including language on their face indicating they were for an initiative to the People. The Secretary also considered the lack of any evidence voters had signed the petitions for I-1029 because they thought it was an initiative to the Legislature. The policy of promoting voting strongly supports the Secretary's decision.

Without question, I-1029's sponsors always intended the measure to go on the November 2008 ballot and have met every constitutional requirement for doing so. They have also satisfied every true procedural requirement for ballot access set forth in the statutes. This State's highest

election official has exercised his statutory discretion to allow the petitions to be filed despite a technical error that, according to all evidence, went unnoticed and was harmless. This Court should reject CCCW's attempt to remove I-1029 from the ballot and have it sent to the Legislature.

II. THE TECHNICAL DEFECTS IN THE SIGNATURE PETITIONS FOR I-1029 DO NOT PROVIDE A BASIS FOR COURT INTERVENTION IN THE INITIATIVE PROCESS.

This Court recently reaffirmed that “[p]reelection review of initiative measures is highly disfavored.” *Futurewise v. Reed*, 161 Wn.2d 407, 410, 166 P.3d 708 (2007). The fundamental reason is that “the right of initiative is nearly as old as our constitution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government.” *Coppernoll v. Reed*, 155 Wn.2d 290, 296-97, 119 P.3d 318 (2005). The Court “will therefore consider only two types of challenges to an initiative prior to an election: that the initiative does not meet the procedural requirements for placement on the ballot . . . and that the subject matter of the initiative is beyond the people's initiative power.” *Futurewise*, 161 Wn.2d at 411. No one claims that I-1029 is beyond the People's initiative power, so only the first ground for pre-election review is even potentially applicable.

Neither article II, section 1 nor the statutes facilitating it support the claim that Initiative 1029 does not meet the procedural *requirements*

for placement on the ballot due to the language error on the signature petitions. The Constitution enumerates only three procedural requirements for the adoption of an initiative directly by the People. *State ex rel. Donohue v. Coe*, 49 Wn.2d 412-13, 302 P.2d 202 (1956). They are (1) the required number of voters must sign petitions setting forth the full text of the measure; (2) the petitions must be filed with the Secretary no less than four months before the election at which the initiative is to be voted on; and (3) the measure must receive a majority of the votes cast thereon, and the votes cast must equal one third of the total votes cast at such election. *Id.* at 412-413. Other than requiring the inclusion of the full text of the measure, the Constitution does not make the use of a particular form of signature petition a “procedural requirement” for an initiative measure to reach the ballot.

The Legislature deliberately chose *not* to make compliance with RCW 29A.72.120 a procedural *requirement* for the placement of an initiative before the People. “The statute provides that the Secretary of State *may* refuse to file a petition if it is not in the form required by the statute. ... The Secretary's right to refuse is conditioned by the discretionary word “may.” *Schrempp v. Munro*, 116 Wn.2d 929, 937, 809 P.2d 138 (1991) (emphasis in original); see RCW 29A.72.170. If the Legislature had intended that signature petition compliance with RCW

29A.72.120 was a procedural requirement for placing an initiative on the ballot, it would have written that the Secretary “must” refuse to file the measure where there has been non-compliance. But the Legislature did not do so. By giving the Secretary discretion to allow an initiative measure to appear on the ballot even where there were defects in the signature petitions, the Legislature empowered the Secretary to evaluate all of the facts and circumstances to determine whether the errors were of such significance to justify a refusal to put the measure to a popular vote.

Furthermore, the Legislature decided to allow judicial review only of a decision by the Secretary *refusing* to accept signature petitions for filing. RCW 29A.72.180. If after reviewing his decision the Thurston County Superior Court orders the petitions filed, its decision is not subject to further review. Only a Superior Court decision upholding the Secretary’s refusal to accept the signature petitions is subject to further review by the Supreme Court. *Id.*³ This carefully crafted scheme of judicial review shows the Legislature intended in some circumstances to allow an initiative measure to be placed on the ballot despite deficiencies in the form of the signature petitions. The entire statutory framework and the Constitution establish that signature petition compliance with RCW

³ By contrast, on a signature count challenge, the Supreme Court may review the decision of the Thurston County Superior Court either granting or refusing to grant the requested writ of mandate or injunction. RCW 29A.72.240.

29A.72.120 is not a procedural *requirement* for placement of an initiative measure on the ballot subject to review in a pre-election court challenge.

III. CCCW ARE NOT ENTITLED TO EITHER A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION.

Mandamus is an extraordinary writ. *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994); *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d (2003). A petitioner bears a “demanding burden” of establishing entitlement to such relief. *Eugster*, 118 Wn. App. at 403. A petitioner must show (1) standing; (2) a clear duty to act; and (3) no plain, speedy and adequate remedy in the ordinary course of law. *Id.* at 402.

A writ of mandamus is the appropriate vehicle for requiring a state official to perform, or prohibiting a state official from performing, a specific *mandatory* duty. *Walker*, 124 Wn.2d at 408; *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 54-56, 65 P.3d 1203 (2003); *Washington Farm Bureau Fed. v. Reed*, 154 Wn.2d 668, 672, 115 P.3d 301 (2005). Mandamus will not lie to compel the performance of acts or duties that call for the exercise of discretion on the part of a public official. *Walker*, 124 Wn.2d at 410; *Vangor v. Munro*, 115 Wn.2d 536, 543, 798 P.2d 1151 (1990) (per curiam). A court may order an executive official to exercise his discretion where he has previously refused to do so, but a court cannot control the manner in which the official exercises that

discretion. *In re Personal Restraint of Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001); *Eugster*, 118 Wn. App. at 405.

A writ of mandamus is not intended to be a tool through which a petitioner can have this Court “usurp the authority of the coordinate branches of government.” *Walker*, 124 Wn.2d at 410. In considering a petition for a writ of mandamus, this Court should be especially careful not to infringe on the historical and constitutional rights of a coordinate branch of government. *Id.* at 407. The jurisdiction given to this Court under article IV, section 4 to issue writs of mandamus to state officers does not authorize it to assume general control or direction of official acts. *Id.* Mandamus is limited to ministerial acts to avoid separation of powers concerns. *See id.* at 410; *Eugster*, 118 Wn. App. at 405.

The Legislature has given the Secretary the primary responsibility to carry out the constitutional mandate and statutory provisions facilitating the People’s right to exercise the initiative. *Sudduth v. Chapman*, 88 Wn.2d 247, 254, 559 P.2d 1351 (1977); *State ex rel. Case v. Superior Court of Thurston County*, 81 Wash. 623, 633-34, 143 P. 461 (1914). There are less than a handful of circumstances in which RCW 29A.72 gives the courts any supervision over the manner of exercise of the power of initiative. *See State ex rel. Donohue v. Coe*, 49 Wn.2d 410, 413-14, 302 P.2d 202 (1956). The Secretary is “the chief elections officer of the

state.” Ruling on Original Action, No. 81857-6, p. 2 (July 29, 2008). These factors counsel against the issuance of a writ of mandamus with respect to the initiative process except in limited and compelling circumstances. *See Washington State Labor Council*, 149 Wn.2d at 54-55.

But in the specific context of the Secretary’s decision to *accept* and file an initiative petition, the courts have no power to issue a writ of mandamus. The Secretary’s decision to accept and file an initiative is a discretionary action. *Schrempp v. Munro*, 116 Wn.2d 929, 937, 809 P.2d 1381 (1991); *People ex. rel. Harris v. Hinkle*, 130 Wash. 419, 429, 227 P. 861 (1924); *see also Vangor*, 115 Wn.2d at 543. RCW 29A.72.170 gives the Secretary discretion to determine whether an initiative petition substantially complies with the requirements of the statute. *Schrempp*, 116 Wn.2d at 937. That section also provides the Secretary with discretion to file an initiative petition even where it does not substantially comply with the requirements of the statute. *See id.* While CCCW may not like the manner in which the Secretary chose to exercise his discretion, there is no question that he exercised it here. This case is unlike *State ex rel. O’Connell v. Meyers*, 51 Wn.2d 454, 319 P.2d 828 (1957), cited by CCCW in their brief. The Secretary’s duties at issue in that case were mandatory. *See id.* at 460. Because the Secretary’s decision here was discretionary rather than ministerial, mandamus cannot issue.

CCCW attempt to get around the obviously discretionary nature of the Secretary's decision to accept and file I-1029 as an initiative to the People by speciously asserting that RCW 29A.72.110 required him to submit I-1029 to the Legislature. Nothing in RCW 29A.72 requires the Secretary to certify as an initiative to the Legislature a ballot measure its sponsors proposed as an initiative to the People under RCW 29A.72.010, and to which the Secretary assigned an initiative to the People serial number under RCW 29A.72.040, because the signature petitions contain a typographical error suggesting it is an initiative to the Legislature.⁴ RCW 29A.72 does not allow the Secretary to take such an action. Initiative 1029 is, and always has been, an initiative to the People. The Secretary has neither the duty nor the authority to submit an initiative to the People to the Legislature. CCCW are not entitled to a writ of mandamus.

In the alternative, CCCW request this Court issue a writ of prohibition under article iv, section 4 of the Constitution. The issuance of a writ of prohibition is a drastic measure. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989). It may issue only if where (1) a

⁴ In making this argument, CCCW also ignore that the I-1029 petitions did not fully comply with the specifications that are set forth in either 29A.72.110 or .120, just as in *Schrempp*. For example, the I-1029 petitions failed to contain the banner headline specified in both sections. Furthermore, as set forth below, the petitions for I-1029 also contained considerable language inconsistent with an initiative petition to the Legislature. Due to the lack of full compliance with *either* 29A.72.110 *or* 29A.72.120, the Secretary's decision to file and approve I-1029 was discretionary not mandatory. RCW 29A.72.170.

court has taken action without jurisdiction; *and* (2) there is no plain speedy, adequate remedy in the course of legal procedure. *See id.* If either requirement is not met, a writ of prohibition cannot issue. *Id.* While the superior courts may issue writs of prohibition against executive or administrative acts under RCW 7.16.290, article IV, section 4 allows this Court to issue writs of prohibition *only* against acts of a judicial or quasi-judicial nature. *Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 893-94, 529 P.2d 1072 (1975). The Supreme Court cannot issue a writ of prohibition against an executive or administrative action under article IV, section 4 no matter how illegal such an act may be. *Id.* at 894.⁵

The Secretary's determination to accept and file an initiative petition is an administrative act. *Schrempp*, 116 Wn.2d at 937. It is not a judicial or quasi-judicial act. For that reason alone, this Court cannot issue a writ of prohibition. Moreover, the Secretary acted *within his jurisdiction* in approving I-1029 to appear on the November ballot. CCCW claim that his decision was wrong *on the merits*, but that is a far cry from an assertion that the Secretary lacked jurisdiction.

⁵ This Court granted a writ of prohibition against the Secretary in *Andrews v. Munro*, 102 Wn.2d 761, 689 P.2d 399 (1984), without mentioning *Citizens Council Against Crime* or the limits on writs of prohibition that can be by this Court issued under art. iv, sec. 4. In *Washington State Labor Council*, this Court clarified that its action in *Andrews* was properly viewed as a writ of mandamus to prevent the Secretary from performing a mandatory duty. 149 Wn.2d at 54-56.

This Court granted a writ of prohibition against the Secretary in *Harris v. Hinkle* because it concluded he was attempting to engage in a quasi-judicial action that exceeded his statutory authority. There the Secretary decided to allow voters who had validly signed petitions to place an initiative measure on the ballot to withdraw their signatures subsequent to the filing of the petitions. *Id.* at 420. This Court concluded the statutory framework governing statewide initiatives did not permit the Secretary to allow a voter to withdraw his or her signature once an initiative petition was filed. *Id.* at 435. Only a court has the power to order the amendment of an initiative petition. A writ of prohibition was appropriate in *Harris* because the Secretary was going to engage in a quasi-judicial act beyond his jurisdiction. *Id.* at 429-30. That is not the case here.

IV. THE COURT SHOULD DECLINE TO EXERCISE ITS INHERENT SUPERVISORY POWERS IN THIS CASE.

A. CCCW Lack Standing To Seek Review Of The Secretary's Decision Under Inherent Powers.

As noted above, the Secretary's decision to accept and file an initiative is an administrative act. *Schrempp*, 116 Wn.2d at 437.⁶ In order

⁶ One can question the characterization of the Secretary's decision to accept and file the signature petitions for an initiative measure as an "administrative" act subject to a writ of review or certiorari under art. IV, § 4, rather than as an "executive" act subject only to a writ of mandamus. Article III, section 1 of the Constitution establishes the Secretary as a high-level member of the Executive Department. The Secretary's duties are defined in section 17 of article III ("The Executive"). As shown in section III above, CCCW are not entitled to a writ of mandamus.

to bring a court challenge to an administrative decision based on the judiciary's inherent supervisory power of certiorari, a petitioner must have standing. *Wilson v. Nord*, 23 Wn. App. 366, 373, 597 P.2d 914 (1979); *Bankhead v. City of Tacoma*, 23 Wn. App. 631, 635, 597 P.2d 920 (1979); *Hough v. State Personnel Board*, 28 Wn. App. 884, 888, 626 P.2d 1017 (1981); *Foss v. Dep't of Corrections*, 82 Wn. App. 355, 362, 918 P.3d 521 (1996). The petitioner must show (1) the interest it seeks to protect is arguably within the "zone of interests" to be protected or regulated by the statute in question; and (2) injury in fact, *i.e.*, that it will be specifically and perceptibly harmed by the action at issue. *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52-53, 882 P.2d 707 (1994); *Trepainier v. City of Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 524 (1992).

To establish standing for certiorari, a petitioner must present evidentiary facts that show a direct, adverse effect upon it if the court does not exercise its extraordinary authority of review under inherent powers. *Snohomish County Property Rights Alliance*, 76 Wn. App. at 53. Where a petitioner alleges threatened injury, as opposed to an existing injury, it must show an immediate, concrete and specific injury to itself. *Id.*; *Trepainier*, 64 Wn. App. at 383. A conjectural or hypothetical injury is insufficient to confer standing to seek review under inherent powers. *Id.*

Having an “interest” in a matter is not the same as establishing an “injury.” See *Retired Public Employees Council of WA v. Charles*, 148 Wn.2d 602, 620, 62 P.3d 470 (2003). The presence of some violation of law is not a sufficient basis for the court to exercise review under inherent powers if the party lacks standing to challenge the violation. *Bankhead*, 23 Wn. App. at 635.

In *Schrempp* the courts assumed *without deciding* that the opponents of an initiative have standing to challenge the Secretary’s decision to accept and file initiative petitions on the ground they were not in the form the law specifies. 116 Wn.2d at 931, 933. The Court did not even begin to analyze whether the *Schrempp* petitioners had actually demonstrated that (1) their interests fell within the “zone of interests” that the statutory framework protects and (2) they would suffer a particularized “injury in fact” if the Court did not exercise its inherent review powers. CCCW have not even attempted to make these showings.

Opponents of an initiative have no rights under the Constitution except to campaign against the measure’s passage. *Id.* at 935-36. Similarly, neither the petition form nor the procedures for the Secretary filing a petition protect the interests of opponents to a proposed ballot measure as such. This is illustrated by a statutory scheme that does not allow an opponent, or any citizen other than the initiative sponsor, to

appeal the Secretary's decision to file an initiative signature petitions. *Id.* at 934; RCW 29A.72.120, & .170-.200. Indeed, none of the provisions of RCW 29A.72 give any specific rights to the opponents of an initiative. Furthermore, there is no evidence that CCCW took advantage of the process that RCW 29A.72 provides for citizens interested in a particular initiative. CCCW's interests as opponents of I-1029 are outside the "zone of interests" that the statutes in question are designed to protect.

In addition, CCCW cannot show an "injury in fact" from the Secretary's decision to submit I-1029 to the voters in November. The only "injury" that any of the Petitioners claim they will suffer from the Secretary's allegedly erroneous decision to put I-1029 on the ballot is the expenditure of taxpayer funds in connection with the election. The only Petitioners who claim this potential injury are Cynthia O'Neill and Ron and Lois Ralph. *Compare* Petition at ¶¶ 20-21 *with* ¶¶ 17-18. Because this is a threatened, as opposed to an existing, injury, these Petitioners must show the alleged injury is specific to them. They have failed to do so. Any financial "injury" these individuals might experience as a result of the Secretary's decision to place I-1029 on the ballot is no different than the "injury" to every other taxpayer. A future generalized harm is insufficient to establish an "injury in fact" for standing.

None of the other “interests” CCCW assert they have in this matter will be injured as a result of the Secretary’s certification of I-1029 as an initiative to the People and placement on the ballot. *See* Petition at ¶¶ 17-21. None of the Petitioners claim they signed an I-1029 petition thinking it was an initiative to the Legislature rather than an initiative to the People. It may well be that some of the Petitioners would be adversely affected if the voters *enact* I-1029 in November. *See id.* This case is not a challenge to Initiative 1029. It is a challenge to the Secretary’s decision to put I-1029 on the ballot. To obtain review of *that decision* from this Court under inherent powers, CCCW must establish they have standing with respect to *that decision*. They have failed to meet their burden.

B. CCCW Must Discharge a Heavy Burden to Obtain Judicial Review of the Secretary’s Decision Under Inherent Powers.

The scope of judicial review of an administrative decision under a court’s inherent supervisory powers is quite narrow. *Williams v. Seattle School District No. 1*, 97 Wn.2d 215, 221, 643 P.2d 426 (1982). The judiciary will review the actions of an administrative agency only if its *conclusions* may be said to be, *as a matter of law*, arbitrary, capricious or contrary to law. *Id.* (emphasis in original; internal citation omitted); *Schrempp*, 116 Wn.2d at 936-97. Under this test, judicial review will

seldom be granted and the agency action at issue will seldom be reversed. *Wilson v. Nord*, 23 Wn. App. 366, 373, 597 P.2d 914 (1979).

The person seeking to overturn an agency decision on the basis that it was arbitrary and capricious “must carry a heavy burden.” *Pierce County Sheriff v. Civil Service Comm’n for Sheriff’s Employees of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). An agency’s decision will be deemed to have been arbitrary and capricious only when it was “willfully unreasonable, without consideration, and in disregard of facts or circumstances.” *Kreidler v. Eikenberry*, 111 Wn.2d 828, 837, 766 P.2d 438 (1989); *Buell v. City of Bremerton*, 80 Wn. 2d 518, 526, 495 P.2d 1358 (1972); *Western Ports Transp., Inc., v. Employment Security Dep’t*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002).

Where there is room for two opinions, agency action will not be held to be arbitrary and capricious, as long as the decision was reached honestly and upon due consideration of the facts. *Buell*, 80 Wn.2d at 526; *State v. Ford*, 110 Wn.2d 827, 830, 755 P.2d 806 (1988). Where an agency has based its decision on conflicting or disputed evidence, its decision cannot be deemed to have been arbitrary and capricious. *Saldin Secur. Inc. v. Snohomish County*, 134 Wn.2d 288, 297, 949 P.2d 370 (1998). A court cannot find a decision to be arbitrary and capricious merely because the court would have reached a different conclusion given

the same facts. *Id.*; *Buell*, 80 Wn.2d at 526. An agency decision is contrary law where it violates the rules that govern the exercise of its discretion. *Pierce County Sheriff*, 98 Wn.2d at 694.

C. The Secretary’s Decision To Approve Initiative To The People 1029 For Filing Was Not As A Matter Of Law Arbitrary And Capricious Or Contrary to Law.

1. *Schrempp* Requires this Court to Defer to the Secretary’s Placement of I-1029 on the Ballot.

The Legislature, rather than this Court, has primary responsibility to facilitate operation of article II, section 1(a) of the Constitution. *State ex rel. Case v. Superior Court of Thurston County*, 81 Wash. 623, 633-34, 143 P. 461 (1914); *Walmart Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 644-45, 989 P.2d 524 (1999) (Madsen, J., concurring). The Legislature has in turn delegated that duty primarily to the Secretary. *Sudduth v. Chapman*, 88 Wn.2d 247, 254, 559 P.2d 1351 (1977). Filed initiative petitions are presumed valid, and the party challenging the placement of an initiative on the ballot has the burden of proof. *Id.* at 255 n.3. This presumption of validity entitles the proponents of an initiative measure to have it appear on the ballot even if the signed petitions are technically deficient. *See id.* at 255; *see also Case*, 81 Wash. at 629-30.⁷

⁷ *Case* involved the Secretary’s refusal to certify an initiative because the signature petitions failed to comply with the then-existing statutory specifications they (1) contain not more than 20 signature lines; and (2) be signed “in ink” by a local voter registration officer. *Id.* at 469-470. This Court held these statutory requirements were “directory”

In *Schrempp* this Court declined to review under its inherent powers the Secretary's decision to certify an initiative to the Legislature. The signature petitions for the measure were technically deficient in that they contained the statement "Initiative Petition for Submission to the People." 116 Wn.2d at 933. This Court held the initiative's opponents had failed to meet their burden of showing that the Secretary's decision was either contrary to law or arbitrary and capricious. The Secretary's determination was not contrary to law because he was acting pursuant to a grant of discretionary authority from the Legislature to make the very decision at issue. The Secretary's decision was not arbitrary and capricious because his decision was not willful and unreasoning, without consideration and in disregard of the facts or the circumstances. *Id.* at 938 (citing *Kreidler v. Eikenberry*, 111 Wn.2d 828, 837, 766 P.2d 438 (1989)). This Court made it abundantly clear that its inherent powers did not allow it to substitute its judgment for the Secretary's. *Id.*

Schrempp controls this case. It completely disposes of any argument that the Secretary acted contrary to law by approving I-1029 for placement on the ballot in November. As in *Schrempp*, here the Secretary acted pursuant to his statutory authority under RCW 29A.72.170. The

rather than "mandatory" and the petitions could not be rejected for non-compliance with them. *Id. Contra Thomson v. Wyoming In-Stream Flow Committee*, 651 P.2d 778 (Wyo. 1982) (requiring Wyoming initiatives to strictly comply with all statutory specifications).

Secretary based his decision to approve I-1029 for the ballot on the facts and circumstances of this case. He reasoned the I-1029 petitions contained most of the specifications set forth in RCW 29A.72.100 and RCW 29A.72.120. He noted there was no evidence any Proponents had described I-1029 to any signatories as an initiative to the Legislature. The Secretary considered the fact that the Proponents' media campaign for the initiative made clear that it was intended for the November 2008 ballot. He found there was no evidence any voters had signed I-1029 because they believed they were signing an initiative to the Legislature rather than one to the People.

CCCW have failed to meaningfully distinguish the Secretary's decision here from his decision in *Schrempp*. Both cases involved defects in the form of the signature petitions.⁸ In both cases the signature petitions contained some verbiage in conflict with the true nature of the initiative measure. As in *Schrempp*, the signature petitions for I-1029 on their face contained several indicia that were consistent with the type of initiative the proponents had filed. The petitions had "I-1029" in very large print in

⁸ Neither this case nor *Schrempp* involves a decision by the Secretary to approve an initiative petition that did not comply with the mandates established by art. II, § 1 of the Constitution. The grounds for rejection of signature petitions set forth in subsection (1) of RCW 29A.72.170 differ from grounds (2) and (3) in that those subsections concern constitutional requirements, while (1) does not. A decision by the Secretary to approve signature petitions that failed to comply with either ground (2) or (3) in RCW 29A.72.170 would present very different considerations than this case or *Schrempp*.

several places. By definition, an initiative numbered “I-1029” had to be an initiative to the People rather than one to the Legislature. The petitions stated that the due date for signatures was June 25, 2008, slightly more than four months before the November 2008 general election.

The text of the I-1029 expressly stated it was a “2008 initiative.” Initiative § 21, ASF Ex. M at p. 3. If I-1029 had been an initiative to the Legislature, it would have been a “2009 initiative” since the Legislature will not meet again until 2009. In numerous places the initiative requires the Department of Health to adopt implementing rules by August 1, 2009. *See* Initiative §§ 3, 4(4), 5(7), 5(8), 6(6), 7(7), 8(4), 9(6), 9(7), 11, 12(5), 13(6), ASF Ex. M at pp 2-3. Compliance with these deadlines would be well nigh impossible if the timetable for initiatives to the Legislature were followed. This further demonstrates that voters who actually read the signature petitions for I-1029 would have understood they were signing a petition that would place the measure on the November 2008 ballot.

CCCW claim the Secretary should have ignored every fact about I-1029 except the erroneous verbiage that appeared in small print on one page of the signature petitions. They argue voters would have solely relied upon this less than obvious language and could not have believed they were signing a petition for an initiative to the People. CCCW make this argument by postulating a hypothetical voter who understands only

some but not all of the differences between an initiative to the People and an initiative to the Legislature. CCCW cannot have it both ways. If this Court assumes that voters would understand the difference between an initiative to the People and one to the Legislature, then it must assume voters who are fully informed of all of the differences. A truly informed voter would have understood from I-1029's number, the due date for the signature petitions, and its identification as a "2008 initiative" that it was an initiative to the People regardless of the incorrect language that appeared in one place on the signature petition.

Schrempp holds that where the signature petitions for an initiative contain some indicia the initiative measure of the type the proponents have filed, the Secretary's decision to place the initiative on the ballot is not subject to inherent review by a court. Just like the signature petitions at issue in *Schrempp*, the petitions for I-1029 contained more indications the initiative was of the type the proponents had actually filed than erroneous contraindications. However, neither RCW 29A.72.170 nor *Schrempp* purports to confine the Secretary discretion to an examination of the four corners of the signature petitions for the measure. The Legislature empowered the Secretary to evaluate all of the facts and circumstances in deciding whether to permit an initiative measure to appear on the ballot. The Secretary did just that in approving I-1029.

CCCW have not shown that even *one* voter signed I-1029 because he or she thought it was an initiative to the Legislature rather an initiative to the People, let alone a number sufficient to invalidate the signature petitions. There have been over 1000 proposed initiatives to the People. There have been only about 400 to the Legislature. People are generally more familiar with initiatives to the People. The signature petitions have the words "BALLOT TITLE" and "BALLOT MEASURE SUMMARY" in large type, much larger than the spurious references to the "legislature." Many voters might well assume signing a petition for an "initiative" means an initiative that will be voted on in the next general election. Moreover, the signature gathers for I-1029 informed voters that signing the petitions would put the measure on the ballot. The signature gathers never mentioned anything about sending the measure to the Legislature. If the erroneous references to the "legislature" in small print on the I-1029 petitions had caused a significant number of voters to sign something they did not intend, CCCW should have been able to adduce such evidence. In approving I-1029 for the ballot, the Secretary expressly relied on the absence of *any* evidence that voters signed the petitions based on a mistaken belief that it was an initiative to the Legislature.

CCCW essentially argue the Secretary should have concluded the voters who signed the petitions for I-1029 did not understand what they

signing. This Court has heard and rejected similar arguments before. In *Edwards v. Hutchinson*, 178 Wash. 580, 35 P.2d 90 (1934), an initiative opponent challenged the Secretary's decision to file an initiative based upon the claim that

corrupt and fraudulent practices have been indulged in pursuant to a conspiracy by the proponents of the initiative measure, by means of which they have deceived and deluded many persons into signing the petition without their knowing the nature of the proposed measure.

178 Wash. at 581. Like CCCW here, the petitioner in *Edwards* sought to remedy the alleged fraud on the voters by a challenge to the Secretary's decision to file the signature petitions. Recognizing that the Secretary's decision was not subject to appeal, the initiative opponent sought to invoke the extraordinary equitable power of the court to enjoin the canvassing of the signatures and the certifying of the measure to prevent a fraud on the voters from occurring. *Id.* at 582-84.

This Court held that "we see no possibility of granting the desired relief without disregarding all precedent and usurping political powers which have never been granted to or assumed by the courts." *Id.* at 584. Refusing to entertain the petition, the Court held that "[m]anifestly, the courts cannot undertake to set aside elections or to interfere with the action of electors upon the theory that some one has been deceived." *Id.* at 585. The factors militating against overturning of the Secretary's

decision to send the initiative measure to the ballot are even stronger here than in *Edwards*. There is no evidence here that any voters were “deceived” and, unlike in *Edwards*, the circumstances that CCCW speculate could have “deceived” some voters into signing something they did not understand were inadvertent rather than intentional.

2. The Strong Public Policy in Favor of Voting Supports the Secretary’s Decision in this Case.

This Court should give substantial deference to the Secretary’s decision that the public interest is served by allowing I-1029 to appear on the November ballot. See *Washington Independent Telephone Ass’n v. Washington Utilities & Transp. Comm’n*, 110 Wn. App. 498, 516, 41 P.3d 1212 (2002). The Secretary is “the chief elections officer of the state.” Ruling on Original Action, No. 81857-6, p. 2 (July 29, 2008). He determined the most prudent course for the public interest in this case would be to submit I-1029 to the voters in November 2008 ballot and let them decide whether to enact the measure. CCCW claim the references to the “legislature” on the I-1029 signature petitions renders them an unreliable measure of popular support for the initiative to be placed on the ballot this year. The Secretary properly recognized the best way to measure the true level of popular support for I-1029 is by letting the People vote on it. Two other initiatives have been certified for the

November ballot. While there will be some marginal financial cost to having three initiatives on the ballot rather than two, the social costs of denying the People the opportunity to vote on I-1029 are far greater.

CCCW vainly attempt to analogize the present situation to a “subject in title” case arising under article II, section 19, or a case involving article II, section 37’s requirement that amendatory legislation identify the statutes it amends. CCCW ignore the fundamental distinction between a voter’s decision that a ballot measure should be enacted into law and a voter’s decision to sign a petition placing a measure on the ballot. Both are important steps in the electoral process. The requisite level of popular support necessary for each step to succeed are very different because the consequences of the two decisions are vastly different. State ballot measures must be approved by at least 50% of the voters plus one to become law. An initiative will qualify for the ballot if only 8% of the number of voters who cast ballots in the most recent gubernatorial election sign a petition. Art. II, sec. 1(a); RCW 29A.72.150.

The Constitution sets such a low threshold of popular support for placing a measure on the ballot because we have a strong public policy encouraging the submission of proposed initiative measures to People. By setting the ballot threshold at only 8%, the Constitution encourages statewide votes on measures that do not enjoy the support of a majority of

Washingtonians and will never become law. Both the Constitution and RCW 29A.72 “place a thumb on the scale” of holding an election for a proposed initiative measure with only limited popular support, even when that election might involve what turns out to be the unnecessary expenditure of taxpayer funds. By contrast, there is no public policy in favor of the *enactment* of a particular initiative by voters. Article II, section 19 and article II, section 37 ensure that no initiative measure is enacted unless it actually has the support of a majority of Washington voters. Those constitutional provisions have no application to the preliminary question whether voters will have the opportunity to cast their ballots at all.

This case is far removed from *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889 (D.C. 1981). There, the proponents of an initiative revised the *substance* of the measure after the circulation of the signature petitions to voters because a subsequent court ruling had declared the measure as originally written to be beyond the scope of the initiative power. *Id.* at 900 (plurality opinion). Three of the nine judges on the D.C. Court of Appeals concluded under the particular facts of the case the post-circulation revisions to the initiative measure were improper, but under other circumstances might be allowed. *Id.* at 901 & n. 21. Four judges would have allowed the

initiative to go to ballot despite the substantive revisions following the filing of the signature petitions. *See id.* at 921 (dissenting opinion). (Two judges did not reach that issue.).

In contrast to *Convention Center Referendum Committee*, the substantive initiative measure that will be before the voters in November *is exactly the same as* the initiative measure that appeared on the signature petitions for I-1029. No one has rewritten I-1029 itself. *Cf.* 441 A.2d at 901. The issue in this case is whether an inadvertent error on the signature petitions which, when taken out of context, indicated I-1029 might be a different form of initiative measure than it actually was should preclude the People from having an opportunity to consider the initiative measure at the next general election. The difference between this case and *Convention Center Referendum Committee* is the distinction between “form” and “substance.” *See Washington Citizens Action of WA v. State*, 162 Wn.2d 142, 157 n. 3; 171 P.3d 486 (2007) (*substantive changes to the text of an initiative not allowed after signatures have been submitted to the Secretary*); *Save Our State Park v. Hordyk*, 71 Wn App. 84, 92, 856 P.2d 734 (1993) (“the term ‘proper form’ cannot be construed to mean ‘proper substance’”).

CCCW claim that upholding the decision of the Secretary approving I-1029 for the November ballot will give initiative proponents

an incentive to “hedge their bets” by filing an initiative in one form but circulating petitions for the other form. This argument is not well-taken. Regardless of the Court’s decision here, the Secretary will retain the discretion to reject future initiatives where the circumstances indicate the variances between the language of the filed measure and the circulated signature petitions were a tactical maneuver as opposed to the innocent error that occurred in this case. Initiative proponents who undertake such gamesmanship will do so at their peril.

Rouso v. Meyers, 64 Wn.2d 53, 60, 390 P.2d 557 (1964), rejected an argument similar to the one CCCW make here. There, the signature petitions for an initiative were stolen from the Secretary’s office before he could perform the statutorily mandated canvass of signatures. Both parties argued that a decision in favor of the other party would create an incentive for the future theft of initiative petitions. *Id.* at 58. This Court refused to countenance such an argument, and instead upheld the decision of the Secretary to place the measure on the ballot based on the facts and circumstances of the case before him. The Court should do the same here.

In sum, CCCW have utterly failed to meet their burden of proof the Secretary’s decision to approve I-1029 for the November ballot was arbitrary and capricious or contrary to law.

V. THIS COURT SHOULD NOT ORDER THE SECRETARY TO CERTIFY INITIATIVE TO THE PEOPLE 1029 TO THE LEGISLATURE.

CCCW ask this Court to overturn the Secretary's submission of I-1029 to the voters in November and to order him to certify the initiative to the Legislature instead. CCCW cite no authority even suggesting someone other than an initiative's proponents has the right to choose whether a proposed initiative will be in the form of one to the People or one to the Legislature. RCW 29A.72.010 gives the sponsors of an initiative the exclusive right to decide that. By law, the Secretary assigns a filed initiative its serial number based on the sponsors' election between submitting an initiative to the People and an initiative to the Legislature. RCW 29A.72.040. Even after hundreds of thousands of voters have signed petitions for an initiative measure, by law it is the sponsors who still control the initiative. *See* RCW 29A.72.150. CCCW's attempt to hijack control of I-1029 away from Proponents is unprecedented in almost a century of Washington initiative jurisprudence.

The Secretary properly recognized that I-1029 is and always has been an initiative to the People, not an initiative to the Legislature, regardless of the erroneous verbiage on the signature petitions. The Secretary has *not* made a determination the signature petitions for I-1029 substantially comply with the specifications for an initiative to Legislature

under RCW 29A.72.110. Proponents have spent approximately \$600,000 on gathering signatures for I-1029 and on an initiative campaign to place I-1029 on the ballot this November. That campaign succeeded. More than 318,000 people signed the I-1029 petitions. Proponents have turned their efforts to educating the voters of Washington that I-1029 should be approved. To frustrate the enactment of I-1029, CCCW asks this Court to remove I-1029 from the ballot and send it to the Legislature. This stratagem could delay enactment of I-1029 by a full year.

The text of the I-1029 expressly states it is a “2008 initiative.” Initiative § 21. The voters who signed the petitions for the initiative did not intend for the I-1029 to be a “2009 initiative.” Both the proponents of I-1029 and those who signed the petitions for it intended the measure take effect in 2008, and in numerous places the initiative requires the Department of Health to adopt implementing rules by August 1, 2009. *See* Initiative §§ 3, 4(4), 5(7), 5(8), 6(6), 7(7), 8(4), 9(6), 9(7), 11, 12(5), 13(6). The November 2008 election is the only general election before August 1, 2009. The inevitable delay that would result from a certification of the initiative to the Legislature would frustrate the intentions of both the initiative’s sponsors and supporters. Such a long delay “would, in effect, constitute a fraud upon the electors” who expected prompt action, *Bremerton Municipal League v. City of Bremerton*, 13 Wn.2d 238, 245,

124 P.2d 798 (1942), and deprive the sponsors and supporters of the initiative of their constitutional rights. This Court should not order the Secretary to certify I-1029 as an initiative to the Legislature.

CONCLUSION

This Court should deny CCCW's request for extraordinary review, uphold the decision of the Secretary placing I-1029 on the November ballot, and dismiss the petition with prejudice.

RESPECTFULLY SUBMITTED this 22nd day of AUGUST, 2008.

SMITH & LOWNEY, PLLC



Knoll D. Lowney, WSBA # 23457

FRANK FREED SUBIT/& THOMAS, LLP



Michael C. Subit, WSBA #29189
Attorneys for Interveners Linda Lee and
People for Safe Quality Care
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Appendix A



CERTIFICATION OF INITIATIVE TO THE PEOPLE 1029

Pursuant to Article II, Section 1 of the Washington State Constitution, RCW 29A.72.230, and WAC 434-379-010, the Office of the Secretary of State has caused the signatures submitted in support of Initiative to the People 1029 to be examined in the following manner:

1) It was determined that 318,047 signatures were submitted by the sponsors of the initiative. A random sample of 9,706 signatures was taken from those submitted;

2) Each sampled signature was examined to determine if the signer was a registered voter of the state, if the signature was reasonably similar to the one appearing on the record of that voter, and if the same signature appeared more than once in the sample. We found 8,452 valid signatures, 1,243 signatures that were invalid due to non-registration or improper form, and 11 pairs of duplicated signatures in the sample;

3) We calculated an allowance for the chance error of sampling (53) by multiplying the square root of the number of invalid signatures by 1.5;

4) We estimated the upper limit of the number of signatures on the initiative petition which were invalid (42,464) by dividing the sum of the number of invalid signatures in the sample and allowance for the chance of error of sampling by the sampling ratio;

5) We determined the maximum allowable number of pairs of signatures on the petition (50,703) by subtracting the sum of the number of signatures required by Article II, section 1 of the Washington State Constitution (224,880) and the estimate of the upper limit of the number of invalid signatures on the petition from the number of signatures submitted;

6) We determined the expected number of pairs of signatures in the sample (47) by multiplying the square of the sampling ratio by the maximum allowable number of pairs of signatures on the initiative petition;

7) We determined the acceptable number of pairs of signatures in the sample (36) by subtracting 1.65 times the square root of the expected number of pairs of signatures in the sample; and

8) Since the number of pairs of signatures in the sample is less than the acceptable number of pairs of signatures in the sample, I hereby declare Initiative to the People 1029 to be sufficient.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the State of Washington this 13th day of August, 2008.


SAM REED
Secretary of State

Appendix B



Washington
Secretary of State
SAM REED

ELECTIONS DIVISION
520 Union Avenue SE • PO Box 40229
Olympia, WA 98504-0229
Tel: 360.902.4180
Fax: 360.664.4619
www.secstate.wa.gov/elections

TO THE COUNTY AUDITORS:

I, Sam Reed, Secretary of State of the State of Washington, certify that the following are the full, true, and correct copies of the official ballot titles of those measures which have been referred pursuant to state law to the voters of this state for their approval or rejection at the state general election to be held on Tuesday, November 4, 2008. The following headings and ballot order are as prescribed by RCW 29A.36.121, RCW 29A.72.050, 29A.72.290 and WAC 434-230-020:

Proposed by Initiative Petition

INITIATIVE MEASURE NO. 985

Initiative Measure No. 985 concerns transportation.

This measure would open high-occupancy vehicle lanes to all traffic during specified hours, require traffic light synchronization, increase roadside assistance funding, and dedicate certain taxes, fines, tolls and other revenues to traffic-flow purposes.

Should this measure be enacted into law? Yes [] No []

Proposed by Initiative Petition

INITIATIVE MEASURE NO. 1000

Initiative Measure No. 1000 concerns allowing certain terminally ill competent adults to obtain lethal prescriptions.

This measure would permit terminally ill, competent, adult Washington residents, who are medically predicted to have six months or less to live, to request and self-administer lethal medication prescribed by a physician.

Should this measure be enacted into law? Yes [] No []

Proposed by Initiative Petition

INITIATIVE MEASURE NO. 1029

Initiative Measure No. 1029 concerns long-term care services for the elderly and persons with disabilities.

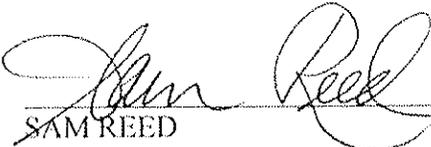
This measure would require long-term care workers to be certified as home care aides based on an examination, with exceptions; increase training and criminal background check requirements; and establish disciplinary standards and procedures.

Should this measure be enacted into law? Yes [] No []

Note: The certification of Initiative Measure No. 1029 is subject to possible modification if a court of competent jurisdiction issues an order removing I-1029 from the ballot.



IN WITNESS WHEREOF, I have set
my hand and affixed the seal of the state
of Washington, this 13th day of August,
2008.


SAM REED
Secretary of State