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	Date: July 31, 2009
	Time: 1:30 p.m.
	Judge: Anne Hirsh

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

ROBERT EDELMAN, a Washington
citizen,

No. 08-2-02317-3

Petitioner,

**OPENING BRIEF OF PETITIONER
IN SUPPORT OF PETITION FOR
REVIEW OF AGENCY ACTION**

v.

SECRETARY OF STATE,

Respondent.

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1 **I. Introduction**

2 Petitioner, Robert Edelman, by and through his attorneys, Michael J. Reitz and
3 Jonathan D. Bechtle, respectfully submits this Opening Brief in Support of the Petition
4 for Judicial Review of Agency Order.
5

6 Petitioner Robert Edelman appeals the order of the Office of the Secretary of State
7 regarding the Secretary’s compliance with federal election law, which requires states to
8 maintain an accurate statewide voter registration database. Docket No. 2008-SOS-0001.
9 Mr. Edelman alleges that the Secretary’s practices and procedures have resulted, and will
10 continue to result in placing ineligible, underage voters in the statewide voter registration
11 database, violating the duty to maintain an accurate election system.
12

13 **II. Statement of the Case**

14 **A. Facts Leading to Administrative Complaint.**

15 Robert Edelman is a registered voter from Black Diamond, Washington, and
16 volunteers as a senior research analyst for the Evergreen Freedom Foundation, a not-for-
17 profit public policy organization. Among its activities, the Foundation publishes research
18 and recommendations for ensuring the accuracy of the electoral process. Mr. Edelman
19 devotes a significant amount of his time to reviewing election procedures to identify
20 flaws that reduce the accuracy of voting results.
21
22

23 In a March 2008 review of the statewide voter registration database, Mr. Edelman
24 discovered 16,085 underage registrations between January 2000 through March 2008.
25 Administrative Record (“AR”) 0003. An “underage registration” is one where the
26 registrant will not turn 18 on or before the day of the next election. Further analysis

1 revealed 127 votes cast by probable underage individuals between January 2000 and
2 February 2008. AR 0004.

3 The processing of voter registration applications is handled by county auditors.
4 AR 0952. Counties sometimes receive registration applications from applicants who will
5 not turn 18 before the next election. *Id.* The Secretary has allowed auditors to accept
6 these underage applications. *Id.* The auditor will “pend” the underage application in one
7 of two ways: the auditor either physically places the registration application in a drawer,
8 or the auditor adds the applicant to local election management system (which is synced
9 with the state voter registration database) with a “pending” status. AR 0431, 0953. When
10 the applicant is of voting age, the auditors are expected to either add the information from
11 the registration application into the county election system, or if the applicant has been
12 already entered electronically, place the applicant on “active” status. AR 0432, 0953.

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16 **B. Administrative Complaint.**

17 Among its provisions, Title III of the Help America Vote Act (HAVA) requires
18 each state’s chief election officer to create and maintain a computerized statewide voter
19 registration list. 42 U.S.C. § 15483. HAVA also requires states to establish a state-based
20 administrative procedure to allow any person who believes there is a violation of Title III
21 to file a complaint. 42 U.S.C. § 15512. Washington state authorized the Secretary of State
22 to implement this procedure. RCW 29A.04.611(52). Washington’s administrative
23 complaint procedures for HAVA violations are found in chapter 434-263 WAC.
24

25 On June 13, 2008, pursuant to WAC 434-263-020, Mr. Edelman through counsel
26 filed an administrative complaint against the Office of the Secretary of State, alleging

1 multiple violations of Title III of the Help America Vote Act. AR 0001-09. Specifically,
2 Mr. Edelman's complaint alleged: (1) allowing county election officials to add ineligible,
3 underage voters to the official statewide voter registration list as active voters violates the
4 duty to maintain an accurate list, 42 U.S.C. § 15483(a)(4); (2) allowing county election
5 officials to delay entry of registration information into the statewide voter registration list
6 violates the obligation to enter registration information on an "expedited basis," 42
7 U.S.C. § 15483(a)(1)(A)(vi); and (3) Washington state's official mail-in voter registration
8 form does not include a statement required by 42 U.S.C. § 15483(b)(4)(A)(iii). AR 0002.
9
10

11 The complaint requested the following remedies be required of the Secretary of
12 State: (1) establish a written procedure requiring staff to examine all mail-in registration
13 forms received by the Secretary of State's office and reject those where the applicant will
14 not reach the age of eighteen by the next election; (2) advise county auditors in writing
15 that it is illegal to register an applicant who will not reach the age of eighteen by the next
16 election, it is illegal to delay entry of registration data for eligible applicants, and that
17 applications from ineligible registrants should be rejected; (3) add automatic controls to
18 the voter registration list so that no underage registration can be given active status; (4)
19 add the statement required in 42 U.S.C. § 15483(b)(4)(A)(iii) to the state mail-in
20 registration forms, and destroy existing non-compliant forms; and (5) take any other
21 action that shall be deemed necessary to bring the state of Washington into compliance
22 with HAVA's voter database requirements. AR 0008.
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1 **C. Initial Decision by Administrative Law Judge.**

2 The Secretary of State scheduled the matter for a brief adjudicative proceeding and
3 designated an administrative law judge as the presiding officer pursuant to WAC 434-
4 263-050(1)(e). Administrative Law Judge Rebekah R. Ross was assigned as the presiding
5 officer. After each party presented its views in written argument and exhibits, oral
6 argument was conducted by telephonic conference on August 15, 2008. AR 1132. On
7 August 19, 2008, Judge Ross issued an Initial Decision, ordering that the complaint be
8 dismissed. AR 0951-59.
9

10 **D. Final Determination.**

11 On September 5, 2008, Mr. Edelman requested an administrative review of Judge
12 Ross' Initial Decision. AR 0961-63. Pursuant to WAC 434-263-070 the Secretary of
13 State designated Director of Elections Nick Handy as the reviewing officer. AR 1035. In
14 his request for administrative review, Mr. Edelman requested that the Secretary and his
15 elections staff be disqualified for prejudice and a neutral officer be appointed to conduct
16 the review. AR 0963. Mr. Edelman also filed a request to admit new evidence to the
17 record, most of which became available through public records requests after the Initial
18 Decision issued. AR 1050-55.
19
20

21 On September 12, 2008, Mr. Handy issued a Final Determination, granting in part
22 and denying in part the requested relief. AR 1091-1104. Before addressing the substance
23 of the complaint, the Final Determination addressed the two preliminary matters. First,
24 Mr. Handy denied Mr. Edelman's request to disqualify himself as the reviewing officer.
25 AR 1094. (This denial is not raised on appeal.) Second, Mr. Handy agreed to supplement
26

1 the record and admit five new exhibits into evidence, in the interest of creating a more
2 complete record. AR 1097. Mr. Handy entered several findings of fact based upon the
3 additional exhibits. AR 1098.

4
5 The Final Determination then turned to the substantive claims raised in the
6 complaint. Mr. Handy adopted by reference all the findings of fact and conclusions of
7 law set forth in the Initial Decision. AR 1102, ¶ 32.

8 The Final Determination made two modifications to the Initial Decision. AR 1102.
9 First, Mr. Handy concluded—“as a matter of policy, not legal requirement”—that there
10 was merit to modifying the voter registration form to include the statement in 42 U.S.C. §
11 15483(b)(4)(A)(iii). AR 1102, ¶ 33. Mr. Handy instructed the staff of the Elections
12 Division to consider the matter and provide him with written analysis and
13 recommendations for modifying the form, though Mr. Handy made no commitment to
14 actually modify the form.¹ *Id.*

15
16
17 In the second modification to the Initial Decision, Mr. Handy concluded that
18 “practices and procedures designed to both minimize registration and voting by ineligible
19 voters and to maximize registration and voting by eligible voters could be improved by
20 developing carefully written practices and procedures.” AR 1102, ¶ 34. Mr. Handy
21 directed the staff of the Elections Division to develop by January 5, 2009, written
22 practices and procedures for use in screening voter registrations, checking for and
23 removing underage voters from the registration list, and communicating with county
24

25
26 ¹ The subsequent recommendation developed by the Election Division is not contained within the record.
A judicial review of agency action is generally confined to the record developed before the agency. RCW
34.05.558.

1 auditors and prosecutors regarding potential or actual underage voting. AR 1102-03.² He
2 did not, however, direct staff to begin rejecting underage registrations, and made no
3 determination that such rejections would be legally mandated.

4 Pursuant to Chapter 34.05 RCW, the Administrative Procedures Act, Mr. Edelman
5 timely filed this Petition for Judicial Review in Thurston County Superior Court on
6 October 8, 2008.

8 III. Assignments of Error

9 A. The Secretary of State erred in the Final Determination of September 12, 2008,
10 denying Mr. Edelman's complaint. The Secretary determined that the agency has not
11 violated the Help America Vote Act. Specifically, the Secretary erred in the conclusions
12 of law in the Initial Decision, Paragraphs 4.4, 4.6; and the findings of fact in the Initial
13 Decision, Paragraphs 3.9, 4.3, 4.8, and in the Final Determination, Paragraphs 25(b)-(d).³

14 The following issues pertain to the Assignment of Error:

- 15 1. Whether the Secretary erred in holding that HAVA places no obligation on
16 election officials to prevent entry of ineligible voters in the statewide voter
17 database.
- 18 2. Whether the Secretary erred in determining that the agency's practices
19 allowing entry of inaccurate data in the voter registration database do not
20 result in a violation of HAVA.
- 21 3. Whether the Secretary erred in determining that agency practices satisfy the
22 obligation to conduct periodic reviews, to discover and correct errors, and
23 to prevent underage voting.
- 24 4. Whether the Secretary erred in determining that election officials are
25 permitted to delay processing voter registration applications received from
26 ineligible, underage voters.
5. Whether the Secretary erred in determining there is no legal obligation to
modify the state's voter registration application.

² The subsequent procedures are not contained within the record.

³ Findings in the Initial Decision were incorporated into the Final Determination by reference. AR 1102.

1 **IV. Standard of Review**

2 The standard of review is established in the Administrative Procedures Act,
3 specifically RCW 34.05.570. Four principles govern judicial review of agency actions:

- 4 (a) The burden of demonstrating the invalidity of agency action is on the party
5 asserting invalidity;
- 6 (b) The validity of agency action shall be determined in accordance with the
7 standards of review provided in this section, as applied to the agency action at the
8 time it was taken;
- 9 (c) The court shall make a separate and distinct ruling on each material issue on
10 which the court's decision is based; and
- 11 (d) The court shall grant relief only if it determines that a person seeking judicial
12 relief has been substantially prejudiced by the action complained of.

13 RCW 34.05.570(1)(a)-(d).

14 The applicable standards for judicial review of an agency order are found in RCW
15 34.05.570(3). Mr. Edelman argues that the Secretary “erroneously interpreted [and]
16 applied the law,” and “[t]he order is not supported by evidence that is substantial when
17 viewed in light of the whole record before the court” RCW 34.05.570(3)(d) and (e).

18 On review of administrative interpretation and application of law, the court
19 determines the meaning and purpose of a statute de novo, although courts give substantial
20 weight to an agency’s interpretation of an ambiguous statute the agency administers. *Pub.*
21 *Utility Dist. No. 1 v. State Dep’t of Ecology*, 146 Wn.2d 778, 790 (2002). Findings of fact
22 are reviewed under the “substantial evidence” standard. RCW 34.05.570(3)(e).
23 Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person
24 of the truth of the declared premises.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607
25 (1995) (citations omitted). Resolving a mixed question of law and fact requires
26

1 “establishing the relevant facts, determining the applicable law, and then applying that
2 law to the facts.” *Tapper v. State Employment Sec. Dep’t*, 122 Wn.2d 397, 403 (1993):

3 4 **V. Argument**

5 **A. The Help America Vote Act Requires Election Officials to Maintain an 6 Accurate Database.**

7 **1. The Secretary of State erred in holding that HAVA places no obligation on 8 election officials to prevent entry of ineligible voters in the statewide voter 9 database.**

10 The fundamental question in this action is whether Title III of the Help America
11 Vote Act, 42 U.S.C. §§ 15481-15485, places an affirmative duty on the Secretary of State
12 to *prevent* ineligible registrations. Mr. Edelman contends that HAVA requires prevention
13 of improper registrations. The Secretary contends that HAVA only requires reasonable
14 efforts to correct inaccuracies.

15 The Initial Decision stated: “Moreover, HAVA requires only that the Secretary of
16 State make a reasonable effort to *remove* registrants who are ineligible to vote. It does not
17 discuss steps to prevent erroneous registration of underage voters” AR 0957, ¶ 4.4.

18 Conclusions of law are reviewed de novo, and the Secretary’s interpretation of
19 HAVA should not be accorded great weight as HAVA is unambiguous. *Postema v.*
20 *Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77 (2000).

21 The duty to prevent ineligible voters can be understood in light of the motivation
22 of Congress when enacting HAVA. The Act was passed in 2002 in part as a response to
23 the controversy surrounding the 2000 presidential election. As a first line of defense
24 against election error and fraud, HAVA required states to create a “single, uniform,
25
26

1 official, centralized, interactive computerized statewide voter registration list . . . that
2 contains the name and registration information of every legally registered voter in the
3 State.” 42 U.S.C. § 15483(a)(1)(A). This list serves as the “single system for storing and
4 managing the official list of registered voters throughout the State.” 42 U.S.C. §
5 15483(a)(1)(A)(i). Washington state law charges the Office of the Secretary of State with
6 the responsibility of creating and maintaining the statewide voter registration list and
7 complying with HAVA. RCW 29A.08.651.⁴ Among other eligibility factors, the voting
8 age in Washington is 18. WASH. CONST. art. VI, § 1.
9
10

11 The accuracy of the statewide voter registration database is of paramount
12 importance under Washington’s predominantly vote-by-mail system, because all active
13 voters receive a ballot in the mail, making it easy for an ineligible voter on the rolls to
14 cast a ballot. HAVA was intended to combat this danger by requiring states to ensure
15 only eligible voters are in the database.
16

17 The Secretary’s position is that HAVA only mandates a “system of file
18 maintenance that makes a reasonable effort to remove registrants who are ineligible to
19 vote from the official list of eligible voters.” 42 U.S.C. § 15483(a)(4)(A). The Secretary
20 emphasizes his obligation of “reasonable” efforts to remove ineligible registrations, and
21 denies any legal obligation to *prevent* ineligible registrations.
22

23 This argument ignores other obligations under HAVA. For example, the voter
24 database is to serve as the “official list of registered voters throughout the State.” 42
25

26 ⁴ Recodified at RCW 29A.08.125, Laws of 2009, ch. 369, § 12 (effective July 26, 2009).

1 U.S.C. § 15483(a)(1)(A)(i). There is no authority for adding ineligible voters to this list.
2 Additionally, HAVA requires “provisions to ensure that voter registration records in the
3 State are accurate and are updated regularly . . .” 42 U.S.C. § 15483(a)(4) (emphasis
4 added). In other words, the state is required to adopt procedures to ensure database
5 accuracy. Reasonable list maintenance is not the exclusive safeguard for accuracy.
6

7 One of the best ways to ensure the accuracy of any database is to verify the
8 accuracy of information when it is entered. This is contemplated by HAVA, which
9 advises ineligible voters “do not complete this form.” 42 U.S.C. § 15483(b)(4)(A)(iii).
10 Furthermore, underage voters are a readily-identifiable category of ineligible voters, both
11 when they register and after they are added to the database. It would be relatively simple
12 for the Secretary to prevent them by instructing auditors to reject ineligible registrants,
13 and by automatically preventing entry of underage applicants into the database.
14

15 The Final Determination ignores HAVA’s intent by only emphasizing the
16 Secretary’s corrective responsibility. AR 0957, ¶ 4.4. The Secretary apparently believes
17 that the moment *before* entry of an underage registration the Secretary has no duty to
18 reject the registration, but the moment *after* entry he has a duty to remove it.
19

20 The Secretary emphasizes the state’s public policy of encouraging all eligible
21 voters to participate fully in elections. “[N]ot only should the rolls of registered voters *not*
22 include ineligible individuals, but they *should* include eligible voters who submit
23 completed and timely applications for registration.” AR 1101. The Secretary expressed
24 concern that rejecting underage registrations would drive young people from the electoral
25 process. AR 0436. This is purely speculative, and there is no evidence that a 17-year-old
26

1 would be incapable or unwilling to register when eligible. The Secretary could minimize
2 any risk by instructing auditors to maintain a list of individuals who were rejected as
3 being too young, and the auditors could mail a registration application to these
4 individuals upon reaching the age of eligibility.
5

6 The Secretary's interest in encouraging young people to participate in elections is
7 commendable, but his practices could actually have a deleterious effect on new
8 applicants. Rather than advising applicants to return when eligible, the Secretary allows
9 an ineligible person to register, exposes that person to the possibility of committing voter
10 fraud, and may eventually remove the young voter from the registration list. This process
11 is far more likely to cause confusion and dishearten young people.
12

13 **2. The Secretary of State erred in determining that the agency's practices do**
14 **not result in placing inaccurate data in the voter registration database.**

15 The Secretary's procedures have also resulted in adding inaccurate information
16 into the voter database, and this constitutes a violation of the duty to maintain an accurate
17 list under HAVA. 42 U.S.C. § 15483(a)(4).
18

19 The Secretary made several factual determinations to find that underage voters
20 have not been added to the voter database. The Secretary concludes that "[w]hen the
21 applicant is put in active status, the registration date that shows on the VRDB is the date
22 the voter registration is mailed or received. Accordingly, *after* the voter is of age, it might
23 appear from a review of the database that the voter was registered too early." AR 0953, ¶
24 3.7. Furthermore, "the fact that the database does not accurately reflect the date of
25 registration, but instead the receipt date of the application, does not mean that the
26

1 registration is actually happening prematurely.” AR 0953, ¶ 3.11. Finally, “there is no
2 evidence that this procedure [of “pending” underage registrations] allows underage
3 applicants to actually show up on the computerized database as registered voters.” AR
4 0957, ¶ 4.3.
5

6 In other words, the Secretary’s position is that underage voters are not being
7 entered into the database—it only appears this way because counties hold the registration
8 form or pend the record until the voter is eligible, and the registration date in the database
9 is the date the county *received* the registration application from the underage voter.
10

11 These findings of fact are not supported by substantial evidence when viewed in
12 light of the entire record. RCW 34.05.570(3)(e). If these findings were accurate, underage
13 voter registrations would be a mere clerical anomaly. Yet Mr. Edelman supplied evidence
14 that underage voters are listed as “active” in the database, and that 17-year-olds are
15 receiving and casting ballots.
16

17 Specifically, Exhibit 3 (AR 0927-30) is a list of 127 votes cast by underage voters
18 between January 2000 and February 2008. The Secretary has no explanation for how
19 these individuals were able to cast ballots. Next, Exhibit 9 is a list of 49 underage
20 individuals who were listed as “active” in the voter database in the months of May, June,
21 and July of 2008—several months after Mr. Edelman had alerted the Election Division of
22 this problem. AR 0949-50. The Secretary had no explanation for why 18 of the 49
23 underage registrations were still listed as active after Mr. Edelman filed his complaint.
24 AR 0435. Underage voting continued after Washington state created its statewide voter
25
26

1 registration database: 13 individuals voted in 2006 elections before they turned 18, and
2 four underage individuals voted in 2008. AR 0953.

3 The facts contradict the Secretary's assertion that "there is no evidence that this
4 procedure allows underage applicants to actually show up on the computerized database
5 as registered voters." AR 0957, ¶ 4.3.

7 The Secretary's explanation for underage registrations is not supported by the
8 record. Instead, Mr. Edelman has offered substantial evidence that, whatever the
9 Secretary's procedures may be, underage individuals are being placed as "active" in the
10 voter database. These individuals are receiving ballots, and in some cases these underage
11 individuals are casting ballots illegally. Using the *Heinmiller* test, a "fair-minded person"
12 would conclude that a substantial number of underage voters have been and are being
13 entered into the registration database, and that the Secretary has allowed this to occur.

14 The Secretary has failed to safeguard against underage registrations, allowing
15 entry of inaccurate information into the voter registration database, which is a violation of
16 the Secretary's duties under the Help America Vote Act.

17
18
19 **3. The Secretary of State erred in finding that the agency's practices satisfy**
20 **the obligations to conduct periodic reviews, to discover and correct errors,**
21 **and to prevent underage voting.**

22 The Secretary determined as a matter of law that his office has satisfied the
23 obligations under HAVA and state law to ensure database accuracy. "There is no
24 evidence that the Secretary of State is failing to make reasonable efforts to remove
25 registrants who are ineligible to vote, or is failing in any duty with respect to list
26 maintenance." AR 0957, ¶ 4.4. In addition to the factual assertions above, the Secretary

1 entered other findings of fact. The Secretary determined his office “is actively working
2 with the counties to prevent any reoccurrence” of voting by 17-year-olds. AR 0953 ¶ 3.9.
3 The Secretary also determined that several exhibits provided by Mr. Edelman did not
4 contradict assertions the Secretary had made regarding his actions to address underage
5 registrations and voting. AR 1098-1100, ¶¶ 25(b)-(d).
6

7 As previously mentioned, the Secretary has an obligation to ensure that voter
8 registration records are “accurate and are updated regularly,” 42 U.S.C. § 15483(a)(4),
9 and to make a “reasonable effort” to remove ineligible registrants. 42 U.S.C. §
10 15483(a)(4)(A). The duty to comply with HAVA is reiterated in state law. RCW
11 29A.08.651(11)(a). The conclusion that the Secretary is satisfying his obligation to
12 prevent, discover, and correct errors is not supported by substantial evidence when
13 viewed in light of the entire record.
14

15
16 **a. Underage registration and voting occurred even after Mr. Edelman
17 alerted elections officials.**

18 The evidence provided by Mr. Edelman demonstrates that the Secretary’s efforts
19 to identify and remove underage voters are not part of a reasonable system of file
20 maintenance, but are merely a reaction to problems uncovered by Mr. Edelman. There is
21 no evidence that any of the underage voters would have been discovered by the Secretary
22 if Mr. Edelman had not brought the matter to his attention.
23

24 This can be seen in the sequence of events laid out in Exhibits 2-5. AR 0923-39.
25 Mr. Edelman discovered the existence of underage voters and communicated it to Mr.
26 Paul Miller, the Secretary’s Technical Services Manager. At no point in their

1 communication does Mr. Miller indicate that the Secretary had any procedures to scan the
2 database for underage voters. He says that with the voter database he is “now able to
3 track and warn counties about underage voting registrations,” but never confirms this
4 actually occurs. AR 0934. Mr. Edelman notified the Secretary of the problem of underage
5 registrations on December 17, 2007, and continued to follow up on the problem for the
6 next month. AR 0932. Despite these warnings, the Secretary admits at least four underage
7 votes were cast in the February 19, 2008, presidential primary. AR 0930.

8
9 Additionally, Exhibit 9 shows a steady stream of underage registrations added to
10 the database through July 2008. AR 0949-50. Nineteen of the 49 underage voters
11 identified in the exhibit were active voters on the database for the entire three-month
12 period. The Secretary professed to have dealt with these underage voters identified by
13 Mr. Edelman (AR 0435), but the fact remains that these errors were flagged by Mr.
14 Edelman, rather than by any effort the Secretary had in place to identify and correct
15 ineligible registrants.
16
17

18 Prior to the filing of this action, the Secretary assured Mr. Edelman that the
19 statewide voter registration database had “significantly improved” the state’s ability to
20 prevent underage registrations. AR 0004. Yet Exhibit 8 shows that the rate of underage
21 voter registrations has *risen* since the creation of the statewide voter database. AR 0947.
22 Merely relying on the voter registration database as a safeguard is not a “reasonable”
23 effort on the part of the Secretary.
24
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26

1 **b. The Secretary of State fails to adequately follow up with county auditors**
2 **when errors in the database are discovered.**

3 The Secretary's efforts to identify and remove ineligible voters can further be
4 characterized as unreasonable upon closer examination of the Secretary's process.
5 Although HAVA places the primary duty for list maintenance on the chief election
6 officer, 42 U.S.C. § 15483(a)(1)(A), the Secretary is not removing underage registrants.
7 When an underage registrant appears, the Secretary merely "refers the matter to the
8 county auditor for appropriate action." AR 0432. The Secretary has provided no evidence
9 to show what the counties are doing with referrals of underage voters. The only evidence
10 was submitted by Mr. Edelman in Exhibit 14. AR 1068-69. Four votes were cast by
11 underage individuals in the February 2008 presidential primary. Upon notification from
12 the Secretary of State, three of the four counties (Whitman, Thurston, and King) took no
13 new corrective action to prevent ineligible votes.
14
15

16 **c. Contrary to his assertions, the Secretary of State had no procedure in**
17 **place to identify underage voters.**

18 As stated above, HAVA requires a "reasonable" system of file maintenance and
19 provisions to ensure the accuracy of voter records. The Secretary has asserted throughout
20 this adjudicative process that his efforts have been reasonable, and that he "continues to
21 work . . . to develop solutions to prevent these problems" AR 0436.
22

23 Yet the Secretary was unable to produce any such written procedure. Mr. Edelman
24 filed a formal public records request (AR 1057) seeking:

- 25 1. All formal, documented procedures established by the Office of the
26 Secretary of State (OSOS) for the processing of voter registration

1 applications received from applicants who will not attain the age of
2 18 by the next election (underage applicants).

- 3 2. All documented direction to county auditors from the OSOS for
4 processing applications from underage applicants.
- 5 3. All internal documented procedures established by the OSOS for
6 disposition of registrations from underage applicants if and when
7 such registration information is entered into the Voter Registration
8 Database (VRDB). . . .

9 On September 3, 2008—after the Initial Decision issued in this proceeding—the
10 Secretary of State’s public disclosure officer responded: “We do not have any records for
11 your items 1, 2, and 3 below.” AR 1056. This establishes the fact that the Secretary’s
12 practices for identifying and correcting underage registrations are not reasonable. Any ad
13 hoc practices are inconsistent and can be modified at any time.

14 **d. Current practices are inadequate and unreasonable.**

15 Evidence submitted by Mr. Edelman demonstrates that the Secretary of State’s
16 practices for identifying underage voters are anything but reasonable. AR 1058-61. On
17 February 19, 2008—the day of Washington state’s presidential primary—Voter Services
18 Manager David Motz sent an email to county auditors in which he included a list of 115
19 active voters who were not yet 18, and were thus ineligible to vote in the primary. In
20 reply to a phone conversation with Stevens County Auditor Beverly Lamm, Mr. Motz
21 acknowledged: “My mistake was that I sent the email too late. In order to be completely
22 effective, I should have sent it before your ballots went to print.” AR 1058.

23 Indeed, Mr. Motz’ list contained the names of the four underage individuals who
24 successfully cast ballots in the February 2008 presidential primary (AR 0930)—a strong
25 indication that the Secretary’s practices are woefully inadequate.
26

1 **B. The Help America Vote Act Requires Election Officials to Process Voter**
2 **Registration Information Expeditiously.**

3 The Secretary of State concluded as a matter of law that the Help America Vote
4 Act was not violated by the county auditor procedure of “pending” underage
5 registrations. AR 0957, ¶ 4.6. This interpretation should not be afforded great weight as
6 the statute is unambiguous.

7 HAVA states, in pertinent part: “All voter registration information obtained by any
8 local election official in the State shall be electronically entered into the computerized list
9 on an expedited basis at the time the information is provided to the local official.” 42
10 U.S.C. § 15483(a)(1)(A)(vi) (emphasis added).

11 As described in above sections, the Secretary of State has allowed county auditors
12 to accept underage voter registration applications, and to hold the application by either
13 physically placing the registration application in a drawer, or by adding the applicant to
14 the registration database under a “pending” status. AR 0431, 0953.

15 Neither federal or state law permit the county auditors to set completed
16 registration applications aside for eventual entry. The Secretary’s interpretation of 42
17 U.S.C. § 15483(a)(1)(A)(vi) ignores the mandate that registration information be added
18 into the database “on an expedited basis.” There is nothing in that section or any other
19 part of HAVA that allows the current practice of holding completed applications from
20 underage voters for months before entering them into the database.

21 The Initial Decision said it was “absurd” to conclude that HAVA requires election
22 officials to add ineligible underage voters to the database. AR 0957, ¶ 4.6. This
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1 mischaracterizes Mr. Edelman's position. HAVA requires all registrations to be
2 expeditiously processed at the time an official receives them, and if a registration is
3 submitted by an ineligible applicant, that registration should be rejected. State law
4 duplicates this provision, granting officials the authority to delay processing only if an
5 application is incomplete. RCW 29A.08.651(7).
6

7 Washington's current practice of delaying completed registrations not only
8 violates HAVA, but also opens the door to other violations of state and federal law.

9 First, it means that election officials are knowingly accepting applications
10 containing false statements. If a voter indicates via birth date that he or she will be
11 younger than 18 by the next election, but signs the oath at the bottom of the form
12 swearing to the fact that the voter "will be at least eighteen years old when I vote," he or
13 she is likely making a false statement, yet the Secretary condones acceptance of such
14 forms by county auditors. AR 0945.
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17 Second, by condoning the practice the Secretary is intentionally allowing the
18 database to be inaccurate, as registration dates will not reflect the actual registration date
19 of the voter. In fact, the dates may be months apart. For example, underage voter Rachel
20 Jones cast a vote on February 7, 2006—a full 17 months before her birthday on July 24,
21 2007. AR 0930. This procedure decreases the accuracy of the database in violation of the
22 Secretary's duty to ensure accuracy. Any delay between submission of the registration
23 application and entry into the system increases the likelihood that the information may be
24 inaccurate. During the delay the voter may move, commit a felony, change their name, or
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1 any number of things that will affect their eligibility and decrease the accuracy of the
2 database.

3 Both HAVA and state law provide a bright line to reduce confusion and
4 inaccuracy in the registration process. That bright line is at the time of registration, when
5 election officials must quickly process registrations from legal voters and reject those
6 from ineligible applicants. The Secretary erred in concluding that HAVA is not violated
7 by allowing auditors to delay the entry of registrations from underage voters.
8

9
10 **C. Washington State’s Voter Registration Form Omits Required Language.**

11 The Secretary also erred by determining there is no legal mandate to include a
12 specific statement from HAVA on the state’s voter registration form. 42 U.S.C. §
13 15483(b)(4)(A) states in relevant part:

14 The mail voter registration form . . . shall include the following:

- 15 (i) The question “Are you a citizen of the United States of
16 America?” and boxes for the applicant to check to indicate whether
17 the applicant is or is not a citizen of the United States.
- 18 (ii) The question “Will you be 18 years of age on or before election
19 day?” and boxes for the applicant to check to indicate whether or not
20 the applicant will be 18 years of age or older on election day.
- 21 (iii) The statement “If you checked ‘no’ in response to either of these
22 questions, do not complete this form.” . . .

23 The voter registration form currently in use by the state, however, does not include
24 required statement (iii) above. AR 0945. The Secretary determined the statement is not
25 required on the state voter registration form. AR 0958, ¶ 4.8. The Secretary admitted,
26 however, as a matter of policy there was merit to including the statement. AR 1102, ¶ 33.

1 Regardless of any policy concessions, Mr. Edelman appeals the determination that the
2 statement is not legally mandated.

3 The Secretary relies on voluntary guidance from the U.S. Election Assistance
4 Commission (EAC) to support his position. AR 0456. The EAC guidance states, “HAVA
5 requires that the federal mail-in registration form include check-off boxes for citizenship
6 and being 18 years of age by Election Day” (emphasis added). *Id.* Later the guidance
7 document adds, “HAVA does not require states to redesign their state voter registration
8 forms to include check-off boxes” (emphasis added). *Id.* The Initial Decision relied on
9 this latter statement to find that states also do not have to add the “do not complete”
10 statement to the form. But the Initial Decision failed to note the significance of the
11 distinction between state and federal forms: 42 U.S.C. § 15483(b)(4)(A) only concerns
12 registration forms developed to comply with the National Voter Registration Act. Some
13 states may have separate state voter registration forms which do not fall under this federal
14 mandate. Washington uses only one form, and state law requires that it be in compliance
15 with the NVRA. RCW 29A.08.220(1).
16

17 By failing to add the “do not complete” statement to Washington’s voter
18 registration form the Secretary violates HAVA and weakens the security and accuracy
19 protections provided by the form.
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23 **D. The Petitioner is Substantially Prejudiced by the Secretary of State’s Order.**

24 The Administrative Procedures Act states that this court may grant relief “only if it
25 determines that a person seeking judicial relief has been substantially prejudiced by the
26 action complained of.” RCW 34.05.570(1)(d). As a registered Washington voter, Mr.

1 Edelman is substantially prejudiced by the Secretary's failure to prevent ineligible
2 underage voters from registering and voting. Mr. Edelman has cast ballots in previous
3 state and federal elections, and will continue to vote in subsequent elections.
4

5 The U.S. Supreme Court recently held, "the right of suffrage can be denied by a
6 debasement or dilution of the weight of a citizen's vote just as effectively as by wholly
7 prohibiting the free exercise of the franchise." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)
8 (citations omitted). The Supreme Court has explicitly affirmed that states have important
9 interests in preventing voter fraud and enhancing the public's confidence in the electoral
10 process. *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008). Mr.
11 Edelman's interest in participating in accurate elections by casting ballots that will not be
12 diluted should be contemplated by the Secretary when operating the state voter
13 registration system. The system was intended to increase the accuracy of elections, thus
14 decreasing disenfranchisement of voters and dilution of votes. A judgment in his favor
15 would substantially eliminate the prejudice to Mr. Edelman by reducing the likelihood
16 that underage voters would be able to register and cast a ballot, thus protecting Mr.
17 Edelman's vote from dilution and increasing his confidence in the accuracy of the
18 electoral process.
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VI. Conclusion and Request for Relief

The Secretary of State's Final Determination erroneously interpreted and applied the law, and is not supported by substantial evidence. RCW 34.05.570(3)(d) and (e).

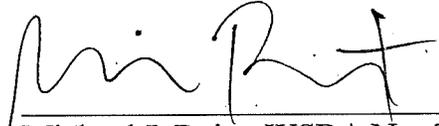
Pursuant to RCW 34.05.574, Petitioner respectfully requests that the Court:

1. Set aside the Secretary of State's Final Determination dated September 12, 2008;
2. Make findings and conclusions identifying each violation or error in the Final Determination;
3. Order the Secretary of State to comply with the Help America Vote Act; and
4. Remand this action to the Secretary of State for modification of agency action.

Petitioner also requests reasonable attorney fees and costs pursuant to RCW 4.84.350, and any other relief the Court deems just and reasonable under the circumstances.

DATED this 16th day of June, 2009.

EVERGREEN FREEDOM FOUNDATION

By: 

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Declaration of Service

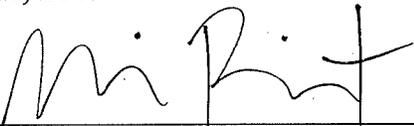
I, Michael J. Reitz, declare under penalty of perjury and the laws of the State of Washington that on June 16, 2009, I caused to be served on the persons listed below by the manner indicated this Opening Brief in Support of Petition For Judicial Review in *Edelman v. Secretary of State*, Thurston County Superior Court, No. 08-2-02317-3.

Thurston County Clerk's Office
Ms. Betty J. Gould, Clerk
Thurston County Superior Court
2000 Lakeridge Drive SW, Bldg. 2
Olympia, WA 98502
Original filed by delivery

Thurston County Clerk's Office
Ms. Trina Wendel, Judicial Assistant
Thurston County Superior Court
2000 Lakeridge Drive SW, Bldg. 2
Olympia, WA 98502
Judge's working copy by delivery and e-mail

Mr. Spencer W. Daniels
Assistant Attorney General
7141 Cleanwater Dr. SW
P.O. Box 40108
Olympia, WA 98504-0108
U.S. Mail, postage prepaid

DATED this 16th day of June, 2009



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