☐ No Hearing Set
☑ Hearing is Set
Date: March 29, 2019
Time: 9:00 a.m.
The Honorable Christopher Lanese

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

KAN QIU, SZIMING YU, and GANG CHENG, Plaintiffs, v. KIM WYMAN, in her official capacity as Secretary of State of the State of Washington, Defendant.	NO. 19-2-00829-34 DEFENDANT KIM WYMAN'S REPLY IN SUPPORT OF CR 56 MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs' opposition to the Secretary's Motion for Summary Judgment consists almost entirely of mischaracterizations of the Secretary's arguments, the governing law, and the underlying facts, while completely ignoring their own burden to establish grounds for the extraordinary relief sought in this case. Plaintiffs cannot avoid the inevitable conclusion that undisputable facts require dismissal of Plaintiffs' complaint.

First, Plaintiffs do not dispute that any challenge under RCW 29A.72.240 is narrowly circumscribed and precludes much of the relief that Plaintiffs request here, including their request for a declaration that (1) the challenged signatures in support of Initiative 1000 (I-1000) are invalid and cannot be counted; and (2) the Secretary must conduct a manual recount of the signatures for I-1000.

Second, Plaintiffs do not dispute that any challenge under RCW 29A.72.240 must be "speedily heard and determined" and that, despite filing their complaint more than six weeks

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ago, Plaintiffs have yet to come forward with any evidence establishing the sole basis for relief under the statute: that I-1000 "does not contain the requisite number of signatures of legal voters." Plaintiffs do not even attempt to argue that they have met the high burden for enjoining the Secretary's certification of I-1000. They instead suggest that merely raising questions about the Secretary's statistical sampling process should extend the time for Plaintiffs to make their challenge, or to at least obtain discovery. But that is not the law. Plaintiffs' inability to show that I-1000 does not have sufficient signatures of voters necessary for certification to the Legislature is fatal to their claims.

Third, Plaintiffs' effort to cast doubt on the Secretary's sampling process is based on mischaracterizations of the law and the underlying facts. Plaintiffs' primary argument is that the Secretary did not properly interpret and apply the Secretary's own implementing regulation for selecting an "unrestricted random sample." But Plaintiffs are not free to substitute their own interpretation for that of the Secretary's, especially where, as here, the underlying statute explicitly grants the Secretary broad discretion to choose "any" sampling methodology consistent with the regulations, and the Secretary has been using the same basic methodology for selecting an unrestricted random sample since the regulation first passed in 1978. The Secretary's interpretation is entitled to substantial deference by this Court and Plaintiffs proffer no basis for substituting their interpretation for that of the Secretary's. Plaintiffs' other efforts to challenge the Secretary's decision-making process are similarly based on mischaracterizations of the underlying facts and law.

Fourth, Plaintiffs' request for an order that the Secretary submit all I-1000 petition sheets to this Court for review underscores that Plaintiffs' aim in this litigation is not to determine whether I-1000 has sufficient signatures of legal voters, but rather to obstruct the certification of I-1000 altogether. Plaintiffs propose no way for this Court to validate nearly 400,000 signatures in support of I-1000, or anything else that could be achieved through submission of the sheets to this Court.

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Because Plaintiffs have failed to meet their burden for obtaining relief under RCW 29A.72.240, Plaintiffs' complaint should be dismissed as a matter of law.

II. ARGUMENT

A. Plaintiffs Misstate the Secretary's Arguments and Controlling Law

Plaintiffs mischaracterize the governing law and arguments set forth in the Secretary's motion. The Secretary never argued that the court has no oversight of the initiative process, but only that such oversight is narrowly construed and that any pre-election review of the initiative process must be grounded in statute or the constitution, as repeatedly confirmed by the Washington State Supreme Court. *See Ball v. Wyman*, No. 961931-3, slip op. at 3 (Wash. Aug. 24, 2018); *State ex rel. Donohue v. Coe*, 49 Wn.2d 410, 416, 302 P.2d 202 (1956). Plaintiffs do not dispute that the majority of the relief sought by Plaintiffs is barred as a matter of law, including their request for a declaration that (1) the challenged signatures in support of I-1000 are invalid and cannot be counted; and (2) the Secretary of State must conduct a manual recount of the signatures for I-1000. *See* RCW 29A.72.240.

Plaintiffs misleadingly suggest that the Secretary demanded conclusive proof at the pleading stage to warrant relief under RCW 29A.72.240. The Secretary made no such argument. But there can be no dispute that Plaintiffs have not filed a motion for preliminary injunction, or submitted *any* evidence showing that I-1000 does not have sufficient signatures of legal voters, which is the sole basis for relief under RCW 29A.72.240.

Plaintiffs also misleadingly suggest that the Secretary argued that the law establishes a "bias in favor of ignoring the constitutional minimum signature count." Pls.' Opp'n at 13. Again, the Secretary made no such argument. There is, however, a well-established presumption "that petitions that have been circulated, signed, and filed are valid, and the burden of proof to show their invalidity rests upon those protesting them." *Sudduth v. Chapman*, 88 Wn.2d 247, 255 n.3, 559 P.2d 247 (1977) (citations omitted). Plaintiffs fail to grapple with this burden, which fundamentally undermines their argument that they are entitled

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to some form of relief simply by raising "questions" about the validation process.

As much of Plaintiffs' requests for relief are undisputedly barred as a matter of law, and because Plaintiffs have failed to meet their burden of proving that there are not sufficient signatures of legal voters to warrant certification of I-1000 to the Legislature, Plaintiffs' complaint challenging the certification of I-1000 should be dismissed.

B. Plaintiffs Have No Grounds for Challenging the Secretary's Choice of Statistical Sampling Methodology or Certification of I-1000

Plaintiffs' arguments for challenging the Secretary's choice of statistical sampling method are not only insufficient to sustain their claims, they are also based on misstatements of the law, mischaracterizations of the underlying facts, and pure conjecture. Such claims do not provide a basis for the extraordinary relief sought in this case.

To start, Plaintiffs argue that the Secretary does not exercise *any* discretion in validating signatures of registered voters in support of an initiative. Plaintiffs are plainly wrong. Plaintiffs' primary argument challenges the Secretary's choice of statistical sampling methodology, which is a matter left expressly to the Secretary's discretion, to be exercised consistent with the Secretary's own implementing regulations. RCW 29A.72.230 ("The secretary of state may use *any* statistical sampling techniques for this verification and canvass which have been adopted by rule as provided by chapter 34.05 RCW") (emphasis added).

While Plaintiffs suggest that the Secretary did not select an "unrestricted random sample" under WAC 434-379-010, they admit that the term is not defined in the regulation. Plaintiffs nevertheless proffer a technical definition of the term that has no basis in the history of the underlying regulation, and conflicts with the Secretary's decades-long practice and interpretation.[1] As explained in the second declaration of Lori Augino, WAC 434-379-010 was

[1] Plaintiffs' expert's definition of "unrestricted random sample" would seem to require the use of statistical sampling software and a random number generator, which were not likely even invented, and certainly not in widespread use in 1978 when WAC 434-379-010 was adopted. Plaintiffs do not show how the Secretary could have implemented such a method using paper copies of petitions, much less that this methodology was intended by the Secretary in 1978.

originally passed in 1978, and the Secretary of State's Office has been using the same basic statistical methodology for selecting an unrestricted random sample, with minor variations, since that timeframe. Second Augino Decl. ¶¶ 5-7.

The Secretary's interpretation and implementation of the regulation is itself the best evidence regarding the meaning of its terms. *Ctr. for Envtl. Law v. Dep't of Ecology*, 196 Wn. App. 360, 380, 383 P.3d 608 (2016) (courts shows deference to "an agency's interpretation of its own regulations"). "An agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts." *Pac. Wire Works v. Dep't of Labor & Indus*., 49 Wn. App. 229, 236, 742 P.2d 168 (1987). Accordingly, courts will "uphold an agency's interpretation of a regulation if it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent and purpose of the enabling statute." *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 107, 161 P.3d 387 (2007) (internal citations omitted).

Plaintiffs do not argue that the Secretary's interpretation of WAC 434-79-010 is not a "plausible" construction of the regulation; they simply offer an alternative interpretation. But that is insufficient as a matter of law. *Id*. Further, while Plaintiffs suggest that their proposed method for selecting a sample would lead to a "fairer" result because it would be more likely to capture clusters of duplicate signatures collected by a single signature gatherer (Huber Report ¶ 19), the Secretary views the established process as more fair because it is much more likely to obtain a sample that is representative of the entire population as a whole. Second Augino Decl. ¶ 7. Ultimately, if Plaintiffs have concerns about the governing statute or the underlying regulation, there are mechanisms available under the legislative process or the Administrative Procedure Act, RCW 34.05, to address those concerns. They are not free, however, to substitute their own policy preferences or views of fairness on a matter committed to the discretion of the Secretary. As nearly all of Plaintiffs' expert opinion is based on the erroneous

assumption that the Secretary must apply the expert's proposed method for selecting the random sample, his opinion cannot create a basis for enjoining certification of I-1000. *See* Huber Report ¶¶ 12-26.

Second, Plaintiffs argue that differences between the first and second sampling results for I-1000 show that one or both of the samples were not randomly selected. This inference is unsupportable, however, as even Plaintiffs' own expert seems to acknowledge. The difference between the two sample results is readily explained by the fact the first sample was interrupted mid-process, before due diligence by the Secretary's election staff could be completed. Second Augino Decl. ¶ 19. The 25 pairs of duplicate signatures identified in the first-round results are interim findings and cannot be compared to the 13 duplicate signature sets identified in the second sample, which were confirmed *after* due diligence by the Secretary's permanent election staff. *Id.* ¶¶ 17, 19. The Secretary conducts such due diligence as a precautionary measure to eliminate measurement error in the process of comparing voter signatures, which has an inherently subjective component, and may be subject to variable determinations by temporary election staff, which change from validation to validation. *Id*. ¶ 17. While Plaintiffs' expert acknowledges that there are "many possible ways in which the sample outcomes could have changed" and that the "available data cannot provide an explanation" for the variation he identified between the samples, he nevertheless concludes, without basis, that "one of these samples, or possibly both, was not actually random." Huber Report ¶ 37. His conclusion is unsupportable and evinces an outcome-driven analysis that cannot serve as grounds for enjoining the I-1000 certification.

Third, Plaintiffs accuse the Secretary of excluding certain petition sheets from the sample in order to manufacture a modified "acceptable" sample population. Pls.' Opp'n at 15; *see also* Huber Report ¶ 27. Plaintiffs' accusations are entirely unsupported. Each decision made by the Secretary's Election Staff was consistent with governing law and the proper exercise of the Secretary's discretion. Plaintiffs do not dispute that the first category of sheets

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(with proper text on front and back) were properly included in the Secretary's sample. Plaintiffs appear to argue that the second category of petition sheets (with proper text on a sticker on the front, but improper text on the back) should have been excluded pending an "investigation" to determine whether the stickers had been added before or after signatures were collected. Pls.' Opp'n at 17. Plaintiffs' suggestion, however, is pure conjecture, and expressly contradicted by the only evidence in the record. *See* Declaration of Jesse Wineberry ¶ 3.

In any event, excluding the petition sheets would have been inconsistent with the holding of *Ball*, in which the Supreme Court confirmed that the Secretary's discretion to reject initiative petitions is limited to the grounds set forth in RCW 29A.72.170. The grounds for rejection do not include a requirement that "a readable, full, true and correct copy of the initiative appear on the back of every petition." RCW 29A.72.170. Nor do they include any reference to text being added by sticker. *Id.* Moreover, Plaintiffs' argument that the stickers may have been added to the initiative petitions *after* the signatures were gathered is simply not cognizable under RCW 29A.72.240. *Ball*, at *2. Plaintiffs' argument goes to the "process" for gathering the petitions and is not subject to pre-election court review. *Id*. at 3. Ultimately, the Secretary has neither the resources, nor the legal basis to refuse to accept petitions on the nebulous suspicion that fraud may have occurred in the gathering of petition sheets. This argument cannot serve as a basis to enjoin certification.

Finally, Plaintiffs seem to agree that the Secretary should have excluded the third category of petition sheets (with the text of a different initiative on both the front and back of the sheet), nevertheless they argue that the exclusion of such sheets resulted in a cherry-picked sample. Plaintiffs cannot have it both ways. The fact is, the Secretary appropriately excluded the petition sheets because they were not I-1000 petition sheets, having no text for I-1000 on either the front or the back sheets. While Plaintiffs suggest that the Secretary could have re-run the sample a third time, after Election Staff later discovered three additional petition sheets

with improper text on the front and back of the sheets, Plaintiffs cannot show that the Secretary's decision not to do so had any impact on the determination that I-1000 had sufficient signatures to warrant certification. After careful consideration, the Secretary's staff appropriately determined (1) that none of the three petition sheets were included in the second random sample; (2) the second sample was drawn from an even larger universe than necessary and that re-running the sample would not result in a larger random sample requiring validation; (3) it was statistically improbable that the results from a third sample would materially impact the results given the large margin for error; and (4) re-running the sample a third time would result in needless public expense and delay that was not warranted based on the circumstances. Second Augino Decl. ¶ 22. These facts and circumstances more than justify the Secretary's decision.

Plaintiffs also argue that if Election Staff had found just one more set of duplicate signatures, it would have invalidated the sample. But Plaintiffs' argument is based on the interim results of the first sample, *before* due diligence was complete. The results of the second sample identified only 13 sets of duplicate signatures. Thus, to invalidate the sample and thus require a manual recount, Plaintiffs would need to show that re-running the sample would likely result in nearly double the number of duplicate signatures sets. Plaintiffs' own expert admits that such variation is statistically improbable. Huber Report ¶ 35. The Secretary's staff thus appropriately determined that re-running the sample for the three petition sheets did not justify the attendant costs and delay.

Ultimately, Plaintiffs' expert opines only that re-running the sample after excluding the three petition sheets *could have* had an impact on the results. But the suggestion that the outcome *might have* been different is not sufficient to meet the Plaintiffs' burden. Plaintiffs request a drastic remedy, and cannot successfully interfere with the constitutionally protected initiative process based on mere uncertainty.

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C. Plaintiffs Cannot Demonstrate that the Secretary Acted Arbitrarily and Capriciously

Plaintiffs also fail to show that the Secretary acted arbitrarily and capriciously in validating the signatures for I-1000. An agency action is arbitrary and capricious "if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. WUTC*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). If "there is room for two opinions, an action taken after due consideration is not arbitrary and capricious." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

Plaintiffs challenge three different decisions by the Secretary's office, but nowhere do they show that such decisions were willful and unreasoning in light of the facts and circumstances. First, Plaintiffs challenge the Secretary's decision not to re-run the sample after discovering three additional invalid petition sheets after the second sample was complete. But, as discussed above, this decision was more than justified under the circumstances and certainly not "willful and unreasoning." *WUTC*, 148 Wn.2d at 905.

Second, Plaintiffs argue that the Secretary acted arbitrarily and capriciously in failing to respond to a staff member's discovery that errors in the optical character recognition (OCR) process may have resulted in undercounting of petitions with improper text. Contrary to Plaintiffs' argument, however, Election Staff responded to that concern by visually scanning every single petition to ensure that all variations were captured. Second Augino Decl., ¶¶ 20-21. That is how the three additional petition sheets were identified. *Id*. Plaintiffs' bald assertion that the Secretary's office took no act in response to this issue being raised is baseless.

Third, Plaintiffs argue that the Secretary acted arbitrarily and capriciously by accepting 218 petition sheets with stickers on the front of the petition, without first conducting an investigation into whether the stickers were added before or after the petition sheets were signed. As discussed above, this argument is incorrect as a matter of law, and ultimately irrelevant because Plaintiffs cannot show that if the petition sheets had been excluded, it would

have made any difference to the ultimate outcome. Further, even if the Secretary had a legal basis to reject the 218 petition sheets, RCW 29A.72.170 is clear that the Secretary retains the discretion to accept the petition sheets anyway. RCW 29A.72.170 ("The secretary of state *may* refuse to file any initiative or referendum petition being submitted" upon the enumerated grounds) (emphasis added). Finally, even if the 218 petition sheets could have been excluded, this contention still is not cognizable under RCW 29A.72.240. *Ball*, at *2. Plaintiffs' assertions that fraud may have been committed in the process of collecting signatures is simply not subject to pre-election review. *Id.*

D. Plaintiffs Proffer No Viable Remedy

Plaintiffs implicitly concede that they have not offered sufficient evidence to enjoin the Secretary's certification of I-1000. While they claim that they have raised enough questions about the Secretary's validation process to warrant submission of the petition sheets to the Court, Plaintiffs do not suggest that this Court could possibly verify the nearly 400,000 signatures at issue or what the Court would do with such petition sheets. Plaintiffs' impractical request for relief only underscore its true intentions in this case action: interference with the political process. It should be rejected.

III. CONCLUSION

For all of the reasons stated above, this Court should dismiss Plaintiffs' complaint as a matter of law.

DATED this 27th day of March 2019.

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CERTIFICATE OF SERVICE

I further certify, under penalty of perjury under the laws of the state of Washington, that on this date I served a true and correct copy of the foregoing document via electronic mail on the following:

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DATED this 27th day of March 2019.

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Confidential Secretary