

1 EXPEDITE
2 No hearing set
3 Hearing is set
4 Date: March 29, 2019
Time: 9:00 am
Judge: Hon. Christopher Lanese

5 STATE OF WASHINGTON
6 THURSTON COUNTY SUPERIOR COURT

7 KAN QIU, ZHIMING YU, and GANG
8 CHENG,

9 Plaintiffs,

10 v.

11 KIM WYMAN, in her official capacity as
12 Secretary of State of the State of Washington,

13 Defendant.

No. 19-2-00829-34

PLAINTIFFS' OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

14
15 **I. INTRODUCTION**

16 The Secretary of State's Motion relies on three fundamental errors of law. First, it
17 misstates the standard established by the Legislature for an action under RCW 29A.72.240
18 ("§ 240"). Second, it mischaracterizes the relief available under § 240. Third, in the guise of
19 a motion under CR 56, it actually seeks dismissal under CR 12, thereby establishing an
20 impossibly high pleading standard with no basis in § 240, the civil rules, or any case law.

21 The Secretary seeks summary judgment because the plaintiffs

22 [N]ever once allege, and cannot demonstrate, that the petitions for Initiative 1000
23 do not contain [the] "requisite number of signatures of legal voters for certification
24 to the Legislature" the exclusive grounds for challenging the initiative under [RCW
25 29A.72.240].

26 Mot. at 1:23-26.

1 This proposed pleading standard has no statutory basis. The Legislature granted every
2 citizen the right to seek judicial review of the Secretary’s certifications decision if that citizen
3 is “*dissatisfied with the determination of the secretary of state* that an initiative or referendum
4 petition contains or does not contain the requisite number of signatures of legal voters . . .”
5 RCW 29A.72.240 (“§ 240”) (emphasis added). “Dissatisfaction” cannot require dispositive
6 proof at the pleading stage. Nothing in the statute requires a dissatisfied citizen to include
7 dispositive proof in the complaint that the citizen already knows the exact number of valid,
8 non-duplicate signatures of registered voters, the Secretary’s proposed standard.

9 Second, § 240 gives the Court three forms of relief it can order. Those three different
10 forms of relief must necessarily correspond to three different eventual proofs by a dissatisfied
11 citizen. These three forms of relief contradict the Secretary’s assertion that the exclusive
12 grounds for challenge under § 240 is proof at the pleading stage that the Secretary certified an
13 initiative with too few signatures.

14 First, the Court can issue “a citation requiring the secretary of state to submit the
15 petition to said court for examination.” Second, the Court can issue “a writ of mandate
16 compelling the certification of the measure and petition.” Third, the Court can issue “an
17 injunction to prevent the certification thereof to the legislature.” § 240.

18 Obviously, a writ of mandate compelling certification would be the relief granted to an
19 initiative proponent dissatisfied with denial of certification, and who proves that the petitions
20 *did* contain the requisite number of signatures of legal voters. An injunction preventing
21 certification would be relief granted to an initiative challenger dissatisfied with a grant of
22 certification, and who proves that the petitions *did not* contain the requisite number of
23 signatures of legal voters. Nothing in the statute, civil rules, or case law suggests that a § 240
24 complaint must satisfy the CR 56 standard of proving the signature total, as the Secretary
25 suggests.

1 The third avenue of relief—submitting the actual sheets to this Court for
2 examination—further belies the Secretary’s proposed, and insurmountable, standard. Final
3 proof of sufficient signatures would result in a mandate for certification. Final proof of
4 insufficient signatures would result in an injunction against certification. But submitting the
5 sheets for examination makes no sense as relief ordered after definitive final proof of too few
6 signatures, nor relief ordered after definitive final proof of sufficient signatures. It is instead
7 the relief this Court would order after a dissatisfied citizen proves that the Secretary’s
8 certification is *uncertain*.

9 Final proof of *uncertainty*. It may strike the Court as odd for a plaintiff to promise proof
10 of uncertainty, but that follows naturally from the Legislature’s decision to allow the Secretary
11 to count a 3% sample of submitted signatures and project a likely result. By making available
12 the relief of examination in lieu of either a mandate or an injunction, the legislature
13 acknowledged that even the final outcome of a § 240 challenge might not be dispositive as to
14 the actual number of valid signatures of registered voters. When the final outcome might not
15 show the “right answer,” it is impossible to conclude that the complaint must already
16 demonstrate that tally.

17 There is one other lethal blow to the Secretary’s proposed pleading standard. It took
18 the Secretary several weeks to process and review a mere 3% of the proffered signatures and,
19 based on that fractional review, project a likely number of valid signatures. When the legislature
20 required a citizen to institute § 240 challenge with five days of certification, it cannot possibly
21 have meant that the complaint itself contained definitive proof of the final outcome—especially
22 when that proof was not the basis for certification. Not even the Secretary can offer that
23 definitive proof today.¹

24
25
26 ¹ Again, the only possible way for a § 240 complaint to contain such a proof is if the Secretary certified an
initiative for which the sponsors had submitted fewer sheets than 1/20 the total required number of valid
signatures. It would be literally impossible for those few sheets to contain sufficient signatures, compelling

1 Finally, as Mr. Qiu and his co-plaintiffs demonstrate below, while the Secretary insists
2 that Plaintiffs must prove in the complaint that the signature sheets contain 140,000 or so
3 invalid or duplicate signatures, the Secretary has already acknowledged that they likely contain
4 well over 100,000 invalid or duplicate signatures—around 25% of the total submission.
5 Evidence from the Secretary of State, analyzed by Plaintiffs’ expert statistician Dr. William
6 Huber, also demonstrates the Plaintiffs are likely to prevail on the merits, inasmuch as they can
7 show that the Secretary’s statistical analysis is fundamentally flawed and entirely unreliable.
8 They can also show serious questions about the presence or absence of petitions that the
9 Secretary claims to have counted but which are not in the pdf files of supposedly counted
10 petitions.

11 The evidence shows that the Secretary received a set of signature sheets that included
12 some that the Secretary acknowledged should not be tallied. It shows that the Secretary made
13 arbitrary and capricious decisions with respect to certain types of sheets, and inconsistent
14 decisions in treatment of others. The unusually problematic submission from sponsors,
15 coupled with the inconsistent decisions on treatment and a failure to make a true random
16 sample, results in a certification that cannot be relied on. Plaintiffs demonstrate that there is at
17 least a genuine issue of material fact as to whether or not they are entitled to the statutory relief:
18 submission of the petition sheets to this Court for examination. Indeed, in light of Dr. Huber’s
19 conclusion that the Secretary’s projection lacks statistical validity, this Court could reasonably
20 conclude that it should immediately order that relief in favor of Mr. Qiu and his co-plaintiffs.

21 II. STATEMENT OF FACTS

22 Many of the facts asserted by the Secretary of State require clarification in the form of
23 additional pertinent detail. As shown below and in the accompanying expert report of Dr.
24 Huber, variations in the Secretary’s treatment of identical problems that arose during the

25 _____
26 an anti-certification injunction. Other available § 240 relief can only flow from proof that is not available in
a complaint.

1 processing of the 3% sample of I-1000 signatures result in serious doubt about the projections
2 on which the Secretary based her decision to certify I-1000. Missing sheets and inconsistent
3 counts exacerbate the problem.

4 1. On January 11, 2019, the Secretary of State issued a sheet count receipt. “The
5 petition sheets were numbered during the imaging process and the final number is 21,400. This
6 is the official number of petition sheets submitted for I-1000.” *See* Qiu Decl. Exh. B.

7 2. The Secretary of State scanned petition sheets to pdf and organized the pdf files.
8 *See* Qiu Decl. Exh. J.

9 3. According to the Secretary of State. “PDF file 108 contained 141 sheets from
10 Box 23 which required the back of the sheets scanned for the fraud investigation to be removed
11 to allow counting of the signatures.” *See* Qiu Decl. Exh. J.

12 4. PDF file 108, which the Secretary of State provided in response to a Public
13 Records Act request, contains images of only 63 petition sheets. *See* Qiu Decl. ¶ 16.

14 5. On January 15, 2019, the Secretary of State issued a signature count receipt.
15 “We have completed the signature count. The official number of signatures submitted is
16 393,313.” *See* Qiu Decl. Exh. C.

17 6. On January 16, 2019, the Secretary of State issued an updated receipt for the
18 total number of signatures received for Initiative 1000. “The official number of signatures
19 submitted is 394,716.” *See* Qiu Decl. Exh. D.

20 7. Between January 16 and January 25, 2019, the Secretary of State sampled 11,881
21 signatures. *See* Qiu Decl. Exh. E.

22 8. Upon completion of the check of the 11,881 sampled signatures, the Secretary
23 confirmed 9,150 were valid and non-duplicate; 1,964 were not signatures of registered voters,
24 10 signatures were not in the state database, 732 of the signatures did not match the voter
25 registration signature, and there were 25 pairs of duplicate signatures. *See* Qiu Decl. Exh. E.
26

1 9. Based on the requirements of the WAC, had the Secretary found 26 pairs of
2 duplicate signatures, she would have been forbidden to certify the initiative and instead have
3 been required to check every submitted signature for validity. *See* Qiu Decl. Exh. F.

4 10. On January 24, 2019, during the process of checking the signatures for validity,
5 the Secretary of State discovered the petition language was markedly different from one sheet
6 to another. *See* Qiu Decl. Exh. J.

7 11. The Secretary of State determined that the sponsors had submitted two
8 different versions of signature sheets. *See* Qiu Decl. Exh. J.

9 12. On January 25, 2019, the Secretary of State identified 61 sheets containing 891
10 signatures with language that was not I-1000 and differed from the official ballot title and
11 summary created by the Office of the Attorney General. *See* Qiu Decl. Exh. E.

12 13. The Secretary of State decided not to include those 61 sheets and their
13 signatures in the total signatures for verification and certification of I-1000. *See* Qiu Decl. Exh.
14 E.

15 14. The Secretary of State identified an additional 216 sheets containing 4,144
16 signatures that contained different wording on the reverse side than the final text filed for the
17 initiative. The Secretary of State elected to include those signatures in the total set of
18 signatures for sampling and certification. *See* Qiu Decl. Exh. E.

19 15. On January 29, 2019, the Secretary of State removed the 61 sheets from the
20 submission and issued a new receipt to the sponsor. *See* Qiu Decl. Exh. E.

21 16. The Secretary of State issued an updated receipt for the total number of
22 signatures received for Initiative 1000. “After removing the 61 petition sheets, which resulted
23 in the removal of 891 signatures, the official number of signatures submitted is 393,825. *See*
24 Qiu Decl. Exh. H.

25 17. On January 30, 2019, the Secretary of State discovered one additional box of
26 petition sheets that were inadvertently omitted from the random sampling on January 29, 2019.

1 18. The Secretary of State identified this as a “special handling” box, which
2 contained petition sheets from a gatherer under investigation by the Washington State Patrol
3 for signature fraud. *See* Qiu Decl. Exh. E.

4 19. The Secretary of State now concluded the total potential signature count was
5 395,981.

6 20. The Secretary of State ran a new random number generator for a sample size set
7 at 11,919. *See* Qiu Decl. Exh. E.

8 21. Between January 31 and February 4, 2019, the Secretary of State processed and
9 verified petition signatures selected from the complete set of 395,981 potentially valid
10 signatures. *See* Qiu Decl. Exh. E.

11 22. On February 4, 2019, Secretary of State employee Christopher Donald sent an
12 email to Sheryl Moss and Shannon Cortez which stated “I found a total of 64 pages with the
13 incorrect text, not 61 as originally thought.” *See* Qiu Decl. Exh. I.

14 23. He also stated “Please note, this is NOT a definitive list of all the sheets that
15 contain the incorrect language on the front. With the poor quality images we have, OCR had
16 trouble recognizing the correct text (hence why I manually confirmed each page we missed).”
17 *See* Qiu Decl. Exh. I.

18 24. Mr. Donald proposed a method of searching for and finding all the sheets that
19 contain the incorrect language on the front. *See* Qiu Decl. Exh. I.

20 25. The Secretary of State did not conduct any further searching for sheets that
21 contain the incorrect language on the front.

22 26. Instead, on February 5, 2019, the Secretary of State confirmed identification of
23 the three additional incorrect sheets identified by Mr. Donald, containing 43 signatures. *See*
24 Qiu Decl. Exh. E.

25 27. The Secretary of State also discovered two additional stickered sheets. *See* Qiu
26 Decl. Exh. E.

1 28. Despite excluding three additional sheets containing 43 signatures from the total
2 set of available signatures, the Secretary of State did not resample 3% of the final confirmed set
3 of all signatures appearing on petition sheets the Secretary had deemed valid. *See* Qiu Decl.
4 Exh. E.

5 29. Instead, the Secretary of State, in a break from prior practice, removed those
6 signatures from the full set but continued verification from the set without regenerating
7 random numbers and starting over. *See* Qiu Decl. Exh. E.

8 30. On February 5, 2019, the Secretary of State completed verification of signatures
9 and posted unofficial results to the website.

10 31. According to the Secretary of State, after check of 11,919 signatures, the Office
11 found that 9,047 should be accepted and 2,859 rejected. Specifically, 1,973 registrations were
12 not found, 9 signatures were not on the state database, 877 signatures did not match the voter
13 registration signature, and the check found 13 pairs of duplicate signatures. *See* Qiu Decl. Exh.
14 F (Initiative # 1000 Final Report).

15 32. On February 6, 2019, the Secretary of State certified the sufficiency of signatures
16 on the I-1000 petitions to the Legislature.

17 33. The Secretary's certification, made in lieu of a check of every single submitted
18 signature, is based on her projection that the final set of 395,981 signatures the Office checked
19 likely contained 94,984 invalid signatures and 14,349 duplicate signatures. *See* Qiu Decl. Exh.
20 F.

21 III. ARGUMENT

22 The Secretary asserts that the fact dispute between Mr. Qiu and her office about the
23 number of valid signatures of registered Washington voters submitted by the I-1000 sponsors
24 is a political question, not subject to any oversight except by the Legislature or voters of the
25 state. The Legislature disagreed when it enacted RCW 29A.72.240. The Secretary's own
26 documents demonstrate a significantly large number of errors in the submitted petitions. They

1 confirm significant errors in the signatures. The documents show that the Secretary was
2 compelled to restart sampling after finding improper sheets in the mix. Expert analysis of the
3 two sampling attempts shows significant variation in projections that cannot be explained by
4 proper random sampling as required by the WAC. The documents show that the Secretary
5 certified I-1000 in the face of evidence that the sponsors may well not have met the standards
6 established in law and regulation for that certification. Under these circumstances, granting
7 summary judgment for the Secretary would definitively excise RCW 29A.72.240 from the
8 Code.

9 Because the Secretary did not make consistent decisions regarding treatment of errors
10 in the materials submitted by the I-1000 sponsors, her projection of the likely number of valid
11 signatures submitted by the sponsors is incorrect. While proper and consistent treatment could
12 result in certification, it very well might not. This conclusion is not a pie-in-the-sky guess, but
13 follows directly from the Secretary's own reporting of the scope of errors in the submitted
14 petitions, and the significant variation in outcomes between the Office's first analysis and
15 second analysis, where the second sampling process diverted from the procedures used to
16 resolve the first set of errors and resulted in a signature sample set that was not the required
17 "unrestricted random sample."

18 The Secretary's records of processing the I-1000 petitions, which included wet sheets
19 that had to be dried out, sheets with stickers, sheets with incorrect text, and sheets from a
20 signature gatherer under WSP investigation for fraud, do not reflect the apparent number of
21 sheets eventually included in the sample population. As described in the Qiu Declaration at
22 ¶ 16, the Secretary's statements regarding the number of suspect sheets does not match the
23 pdf of sheets the Office provided as the full set of sheets reviewed. With no explanation for the
24 disappearance of some sheets, it appears possible the Secretary selected a number of signatures
25 to check based on a higher count, then checked against a lower count and therefore fewer
26 signatures than identified as on file. If so, the projection can't be reliable.

1 Finally, the Secretary’s decision to accept for submission some 200-odd sheets with a
2 sticker obscuring the original and incorrect ballot title and summary, while rejecting 64 that
3 had that same incorrect ballot tile and summary with no later-attached obscuring sticker is
4 arbitrary and capricious, when evaluated on the facts known to the Secretary and based on the
5 only conceivable rationale for her actions.

6 **A. Standard Of Review**

7 The Secretary recites the well-known standard for summary judgment, asserting that
8 judgment can be rendered in her favor based on, *i.a.*, depositions, answers to interrogatories,
9 and answers to request for admission. Motion at 4. Notably, no such discovery is available to
10 Mr. Qiu and his co-plaintiffs, because the Secretary insisted that no discovery is permitted
11 under § 240. Nonetheless, this Opposition, together with the Qiu Declaration and Expert
12 report of Dr. William Huber (“Huber Report”) show that, at the least, there is a genuine issue
13 of material fact as to the Secretary’s compliance with WAC 434-379-010. That non-compliance
14 could be dispositive as to her decision to certify I-1000 because of her treatment of problem
15 petitions discovered in the midst of the second review.

16 Further, it appears from the Secretary’s documents that, at a minimum, the Secretary
17 failed to locate and remove all the petitions that had the incorrect front text, despite evidence
18 from her own employees that some such sheets had not been located. This is demonstrated by
19 the email from Christopher Donald attached to the Qiu Declaration. Plaintiffs are entitled to
20 seek discovery on that topic, in addition to the questions raised in the Huber Report regarding
21 the sampling methodology.

22 Alternatively, in light of the demonstrated failures of the sampling methodology and
23 suspected continued inclusion of petitions the Secretary had elected to remove, the Court
24 could immediately grant the statutory relief and issue “a citation requiring the secretary of
25 state to submit the petition to said court for examination.”
26

1 **B. The Secretary’s Count Of Signatures Is Non-Discretionary And Subject To**
2 **Legislatively Mandated Judicial Oversight**

3 The Secretary relies on *Ball v. Wyman*, No. 961931-3 (Wash. Aug. 24. 2018), to urge
4 the Court that certification decision based on a tally of signatures is committed to her
5 discretion, with no avenue of review of what she characterizes as a political question. *Ball v.*
6 *Wyman* could not be less relevant. In that challenge, also raised post-certification under § 240,
7 Ball urged that either the Secretary or this Court should elect to review petitions for
8 compliance with RCW 29A.72.100. The Supreme Court held that the legislature had not
9 obliged the Secretary to police that section, and that it was therefore within the Secretary’s
10 discretion to ignore flaws on the back of petition sheets.

11 Here, by contrast, the Secretary has been given an explicit mandate to count signatures.
12 She does not exercise discretion when she tallies how many valid, non-duplicate signatures of
13 registered Washington voters appear on petition sheets. Furthermore, § 240 explicitly
14 mandates judicial review of the Secretary’s non-discretionary, fact determination. Thus, *State*
15 *ex rel. Donohue v. Coe*, 49 Wash. 2d. 410 (1956) also cited by the Secretary, actually compels
16 this Court’s involvement and review. As the Secretary quoted from that case, “[a]ny
17 interference with the secretary of state in the performance of the duties imposed upon him by
18 the constitution and the statute relative to the handling and processing of initiatives can be
19 justified only by express statutory or constitutional provisions making the question
20 judicial . . .” *Donohue*, 49 Wash. 2d at 416. § 240 is that exact required “express statutory
21 . . . provision making the question judicial.”

22 **C. § 240 And The Balance Of The Process For Submitting, Accepting, Rejecting,**
23 **Counting, And Certifying Initiatives Demonstrates That Review Is Allowed**
24 **Under § 240**

25 RCW 20A.72.240 itself commands this Court’s review of the Secretary’s count, and
26 offers three possible forms of relief, depending on the final outcome of the Court’s review.
Importantly, the interplay between § 240 review and the earlier stages of available review

1 makes clear the legislature’s codified bias in favor of counting signatures (not in favor of simply
2 putting initiatives on the ballot) as well as making meaningful review of the Secretary’s
3 decisions available to both initiative sponsors and initiative opponents.

4 The Secretary begins review of a sponsor’s attempt to qualify an initiative under RCW
5 29A.72.170. If the sponsor presents so few petition sheets “[t]hat the petition clearly bears
6 insufficient signatures,” RCW 29A.72.170(2), she may refuse to accept it for filing, and forego
7 the obviously futile exercise of counting signatures. However, her decision is subject to judicial
8 review: “If the secretary of state refuses to file an initiative or referendum petition when
9 submitted for filing, the persons submitting it for filing may, within ten days after the refusal,
10 apply to the superior court of Thurston county for an order requiring the secretary of state to
11 bring the petitions before the court, and for a writ of mandate to compel the secretary of state
12 to file it.” RCW 29A.72.180.

13 Importantly, no person who believes the petition *lacks* the required number of
14 signatures may challenge the Secretary’s decision to accept it for filing. While the Secretary
15 insists that the Code has a bias in favor of initiatives appearing on the ballot, that is belied by
16 the constitutional standard and the presence of § 240. Instead, the Code reflects a bias towards
17 requiring the Secretary to count signatures. Thus, if the Thurston County court orders
18 acceptance and filing in a proceeding under RCW 29A.72.180, that decision is final. Not even
19 the Secretary may appeal.

20 After the submission is accepted, the Secretary counts signatures to determine if the
21 petition submitted does, in fact, contain “the requisite number of signatures of legal voters.”
22 RCW 29A.72.230. In doing so, the Secretary “may use any statistical sampling techniques for
23 this verification and canvass which have been adopted by rule as provided by chapter 34.05
24 RCW.” However, “[n]o petition will be *rejected* on the basis of any statistical method
25 employed, and no petition will be accepted on the basis of any statistical method employed if
26 such method indicates that the petition contains fewer than the requisite number of signatures

1 of legal voters.” RCW 29A.72.230 (emphasis added). Again, this does not reflect a bias in favor
2 of ignoring the constitutional minimum signature count, but a bias in favor of certainty in
3 counting.

4 That leads to the operative section for this action, RCW 29A.72.240.

5 Any citizen dissatisfied with the determination of the secretary of state that an
6 initiative or referendum petition contains or does not contain the requisite number
7 of signatures of legal voters may, within five days after such determination, apply to
8 the superior court of Thurston county for a citation requiring the secretary of state
9 to submit the petition to said court for examination, and for a writ of mandate
10 compelling the certification of the measure and petition, or for an injunction to
11 prevent the certification thereof to the legislature, as the case may be.

12 Just as with the sponsor’s challenge to a rejection of the submission, the question posed
13 by a challenge under RCW 29A.72.240 is not “political” but factual: how many valid
14 signatures did the sponsors submit?

15 In brief, then, the Secretary may refuse to count a petition that she believes has
16 indisputably too few potentially valid signatures. A sponsor may request that this Court compel
17 her to defend that decision, and ask the Court to compel her to count the submission. If the
18 Court agrees, she must count. When she counts, she may sample as few 3% of the signatures,
19 and project the likely result from analysis of that subset, but only in accordance with WAC 434-
20 379-010. If after review of the 3% sample, she projects that the submission likely has too few
21 valid signatures or likely has too many duplicates, she *must* count every single signature
22 submitted before refusing to certify. If she certifies, based on her 3% review and projection, that
23 the submission appears to contain more than the requisite number of valid signatures by the
24 required margin, any voter who contends she erred may then challenge the certification. That
25 challenge raises factual, not political questions, and is the very issue the legislature charged this
26 Court with reviewing and ruling on.

1 **D. The Secretary’s Certification Decision Is Demonstrably Suspect, Precluding**
2 **Summary Judgment**

3 Here, there can be no disagreement that the Secretary’s decision to certify I-1000 did
4 not result from an actual count of every signature. The Secretary elected to follow the
5 permitted procedure of WAC 434-379-010 and review a 3% sample of signatures. As
6 demonstrated below and substantiated in the Expert Report of Dr. William Huber (“Huber
7 Report”), a report based on his analysis of the documents from the Secretary of State, Mr. Qiu
8 and his co-plaintiffs can substantiate that the Secretary did not strictly comply with the WAC
9 requirement to take an unrestricted random sample of signatures, and thereafter made
10 inconsistent decisions about how to treat the submission when the Office discovered that the
11 petition sponsors had proffered signature sheets which the Secretary did not include in the
12 total group of potentially valid signatures.

13 The sponsors submitted many apparently invalid signatures and many duplicate
14 signatures. Qiu Decl. Exh. F. Faced with an unusually error-laden set of documents, the
15 Secretary committed demonstrated errors with regard to WAC compliance and demonstrated
16 disparate treatment when finding identical problems in the petitions. Qiu Decl. Exh. E.
17 Because the sponsors gave the Secretary such a difficult task with so little margin for error, the
18 Secretary’s errors may be dispositive to the final outcome. As discussed in the Huber Report,
19 the final outcome of the Secretary’s sample and projection is not statistically reliable, and
20 precludes the certification the Secretary issued.

21 Mr. Qiu and his co-plaintiffs are entitled to proceed in this case because analysis of the
22 steps the Secretary of State took demonstrate that she did not comply with the WAC
23 requirement to take an “unrestricted random sample” of signatures. *See* Huber Report at ¶
24 2(a). Further, because the Secretary of State modified the total set of possible signatures amidst
25 the check process, she “introduce[d] unquantifiable, but possibly large, uncertainties in the
26 determinations made from the sample results.” Huber Report at ¶2(b). Finally, Dr. Huber

1 analyzed the large differences between results of the two procedures the Secretary performed
2 on nearly identical signature sets for I-1000. His conclusion: “The statistical variation
3 ordinarily exhibited by random samples cannot explain this large difference. It is likely,
4 therefore, that at least one (and possibly both) of these samples do not reflect the populations
5 of signatures they are intended to represent. This calls into question all inferences made by the
6 SoS about the numbers of valid and invalid signatures in either population.” *See* Huber Report
7 at ¶2(c).

8 Dr. Huber supports his conclusions with a comparison of the process used by the
9 Secretary of State to the process that would actually entail using an unrestricted random
10 sample. Huber Report at ¶¶ 12-27. Dr Huber also explains that because the Secretary did not
11 use a true unrestricted random sample, the Office’s response to discovery of the myriad
12 problems presented to them by the I-1000 sponsors resulted in a statistically invalid conclusion
13 on which the certification decision was based:

14 In effect, this process of sampling, discovering batches of invalid sheets, removing
15 the sheets from the population, and then resampling just part of the population is
16 tantamount to an iterative way of discovering problems in the population and
17 removing them until the modified population is “acceptable.” In effect, the process
18 followed by the SoS may have acted as a mechanism to adjust the population to the
sample rather than using the sample to characterize the population, as intended. This
is not statistically valid, because it is no longer possible to draw any objective
connection between statistical properties of the sample and corresponding
properties of the population.

19 Huber Report at ¶ 27.

20 This conclusion precludes the possibility of summary judgment for the Secretary of
21 State: “it is no longer possible to draw any objective connection between statistical properties
22 of the sample and corresponding properties of the population.” Dr. Huber reviewed the
23 Secretary’s own documents. He recognized that the Secretary does not comply with WAC
24 434-379-010 inasmuch as the Office does not take a true unrestricted random sample as
25 required. Furthermore, he notes the uncontested fact that the Office changed the full set of
26 signatures subject to review amidst that review, during the second iteration of review. This was

1 a different choice than the Secretary made the first time problems were discovered. Dr. Huber
2 analyzed the procedure, and explains that the initial failure to take an unrestricted random
3 sample, coupled with the ad hoc method of coping with the problems presented by the
4 sponsors, means that the Secretary “has not shown an objectively valid basis to certify the I-
5 1000 petition.” Huber Report at ¶ 3.

6 Dr. Huber also compared the results of the two sampling procedures, and shows that
7 the differences in outcome cannot likely be explained by variation in true random samples.
8 Instead, he “conclude[s] that one of these samples, or possibly both, was not actually random
9 and therefore does not represent the population from which it was drawn. There are many
10 possible ways in which the sample outcomes could have changed, such as differences in how
11 the petition reviewers determined matches with voter registration signatures. The foregoing
12 examination of the available data cannot not provide an explanation: it only demonstrates that
13 some difference in sampling procedures occurred that was not likely due to the random
14 mechanism used to select signatures for the samples.” *See* Huber Report at ¶ 37. In other
15 words, just as alleged in the Complaint at ¶ 25, the Secretary did not, as required by the WAC,
16 select an unrestricted random sample of signatures for review.

17 **E. The Secretary’s Arbitrary And Capricious Actions Preclude Summary Judgment**

18 The Secretary made three arbitrary and capricious decisions in processing I-1000. First,
19 when she discovered petitions that had to be excluded from the population, she took drastically
20 different actions. Treating the same problem in different ways is arbitrary and capricious.

21 When the Secretary first found 61 sheets to exclude, she excluded them, re-tallied the
22 total, re-ran the random numbers², and restarted the sample and check. Qiu Decl. Exh. E. But
23 the second time she found the same error, she did not exclude them, re-tally the total, re-run
24 the random numbers, and restart the sample and check. Instead, after confirming that the

26 ² Actually, these were not random, as Dr. Huber shows.

1 existing set of 'random' numbers would not require a check of any signatures on those
2 petitions, she simply continued. But as Dr. Huber shows, this resulted in a demonstrably
3 different outcome than had she restarted.

4 The Secretary also acted in an arbitrary and capricious manner in response to Mr.
5 Donald's discovery that he method used to identify petitions that needed to be excluded had
6 undercounted. His email attached as Qiu Decl. Exh. I, carefully describes the problem, and
7 proposes a solution that would ensure that the Secretary's decision to exclude petitions with
8 the incorrect text was actually implemented. The Secretary did not proceed to ensure that the
9 sample population was proper, nor provide any reasons for continuing to run a signature check
10 that could very well include more petitions she had decided had to be excluded but which had
11 not been found.

12 Finally, deciding to include the sticker-covered sheets with no investigation as to the
13 timing of signing and adding stickers was arbitrary and capricious. The Secretary's review of
14 the materials submitted in purported support of I-1000 identified 282 signed petition sheets
15 which, when they had been printed, did not contain the correct ballot title and summary. *See,*
16 *e.g.,* Qiu Decl. Exh. G. Of those, 218 had a sticker affixed to the front at some point in time after
17 they were printed but before they were submitted with signatures to the Secretary. That sticker
18 contained the ballot title and summary for I-1000. The other 64 sheets identified by the
19 Secretary never had a sticker affixed, and were circulated for signature with a different text on
20 the front than the approved ballot title and summary.

21 The Secretary elected to accept the 218 sheets which, when presented to her office, had
22 a sticker containing the correct ballot title and summary. She also elected to reject the 64 sheets
23 which had a different ballot title and summary, despite that those 64 had signatures and were
24 submitted by sponsors of I-1000 as supposedly in support of the initiative.

25 There is only one possible rationale for the Secretary's decision: she considered that if
26 a person signed a petition that had the correct text when signed, that signature should be

1 considered as affixed in support of I-1000. If a person signed a petition that had a different text
2 when the person signed, that signature should be considered as *not* affixed in support of I-1000.
3 There is no other rational basis for the Secretary’s decision to accept sticker-covered sheets
4 and reject those without stickers.

5 The Secretary identified 284 suspect petition sheets. She decided to accept those with
6 a sticker containing the correct text, but reject those with the incorrect text and no sticker. In
7 doing so, she necessarily ignored the evidence in front of her that the sticker-covered sheets
8 might have been signed without a sticker on them, and that the sticker was affixed later. That
9 evidence is *the 64 ‘no sticker’ sheets*. Again, the only rationale for excluding certain sheets is
10 that the Secretary considers that a person who signed a sheet with improper text did not sign
11 in favor of I-1000, and therefore that sheet should be excluded. With that rationale, she *must*
12 evaluate whether or not the 218 had the stickers placed on them after signatures were added.
13 If it is possible the signatures came first—and the presence of the 64 sheets with signatures but
14 no stickers evince that possibility—then the Secretary’s decision to assume that the sticker
15 was affixed after signatures, without undertaking any investigation at all, is arbitrary and
16 capricious.

17 There can be no doubt whatsoever that at least 64 petitions were circulated for signature
18 with the wrong ballot title and summary, and no sticker correcting the error, because 64 such
19 sheets were submitted. For the other 218 or more, how does anyone know that they were
20 circulated only after the sticker was affixed?

21 The Declaration of Jesse Wineberry only buttresses this conclusion. He swears that a
22 single print run of petitions had incorrect text. He swears that those incorrect sheets had a
23 sticker affixed “before they were distributed to signature gatherers for signature gathering.”
24 He concludes that “The sticker with the correct ballot title and summary was accordingly on
25 the 218 petition sheets at issue in this case before anyone signed those petitions sheets.”
26

1 This either omits certain significant details, or evinces a lack of knowledge of what
2 actually happened. First, there are more than 218 sheets at issue. Former Rep. Wineberry
3 ignores the 64 identified sheets with incorrect text and no sticker, but filled with signatures.
4 Were they part of that “one print run” he identifies? He is careful not to say that “only” one
5 print run contained errors, nor does he identify the number of incorrect sheets, nor the dates
6 of the print run or the date stickers were affixed, nor any steps taken to ensure that stickers
7 were on all ‘incorrect’ petitions prior to circulation. He omits any explanation of the existence
8 of at least 64 sheets with incorrect text, no sticker, and signatures. At least some petitions,
9 contrary to the Wineberry Declaration, were circulated for signature before a sticker was
10 affixed. There is no evidence at all to support the Secretary’s conclusion that all the 218 sticker-
11 covered sheets were circulated after, not before, the sticker was affixed. Her decision to accept
12 them, while rejecting the 64 with no sticker, and doing so with no investigation or explanation,
13 is arbitrary and capricious.

14 Winberry also opines that removing the 218 suspect petitions has no effect on the
15 certification. He offers no basis for this opinion, but instead asserts it as mathematical fact. It
16 is wrong. As Dr. Huber concludes:

17 The foundation of [the sponsor’s] argument is the implicit assumption that most, if
18 not all, of the signatures submitted to the SoS are valid. This assumption is
19 unverified. My conclusions (b) and (c) raise doubts concerning the reliability of
20 inferences made about the numbers of valid signatures based on any of the samples
21 used by the SoS. The sample results already show that an appreciable portion of all
22 signatures are invalid or duplicates. Flaws in the sampling procedures (conclusions
23 (a) and (b)) and significant inconsistencies in the results (conclusion (c)) preclude
an objective assessment of whether enough valid signatures are present to meet the
threshold for certification. In principle, the inclusion or exclusion of even 218
petition sheets could make a difference. This appears to be a real prospect because
the number of duplicates found in the first sample (25) was as close as it is possible
to get to failing certification and because the projected numbers of invalid signatures
have varied appreciably between samples.

24 See Huber Report at ¶ 4. Exclusion of these arbitrarily and capriciously included sheets is the
25 correct approach, but the sponsors are incorrect aht it can make no difference to the outcome
26 of the litigation or certification decision.

1 **F. The Secretary’s Sheet Count Does Not Add Up**

2 The Secretary asserts that the contents of the “special handling” box are represented
3 by pdf file 108 among the scans of sheets provided to Mr. Qiu in response to his PRA request.
4 She asserts that the box, and the file, contain 141 sheets. But the file actually provided contains
5 only 63. Particularly in light of the fact that these sheets and corresponding files were set aside
6 due to the Office’s genuine fraud concerns, it raises a genuine question as to the processing,
7 sampling, and projection on which the certification was based that over half those files appear
8 to have ceased to exist.

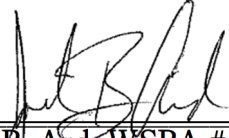
9 **IV. CONCLUSION**

10 The Secretary cannot show that there is no genuine issue of material fact regarding her
11 decision to certify I-1000. The evidence and analysis discussed above demonstrates a genuine
12 issue regarding her compliance with the first step of the WAC-mandated process for sampling.
13 The evidence also shows that she engaged in arbitrary and capricious decision making about
14 how to proceed when problems were found in the signature population during sample review.
15 The first time she found problems, she excluded sheets, and restarted the entire process. The
16 second time, she continued after excluding sheets, despite that doing so alters the population
17 from which the sample is drawn and to which the results are projected. Her decision not to
18 actually locate all the excludable sheets is arbitrary and capricious, as is her decision to include
19 sticker-covered sheets without any investigation of when stickers were attached compared to
20 when the sheets were signed. Because of the problems in the random sample, these arbitrary
21 and capricious decisions could have a drastic effect on the ultimate outcome.

22 The Secretary is undoubtedly not entitled to a grant of summary judgment in her favor.
23 At a minimum, the Court must deny the secretary’s Motion. Given the evidence of
24 shortcomings and errors in the Secretary’s treatment of I-1000 signature petitions, the Court
25 could elect now to grant the statutory relief to Mr. Qiu and his co-plaintiffs, and issue a citation
26 requiring the secretary of state to submit the petition to said court for examination.

1 March 21, 2019.

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CERTIFICATE OF SERVICE

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that on March 21, 2019, I served the foregoing Brief, together with the Declaration of Kan Qiu and Exhibits, and Expert Report of Dr. William Huber, via email per agreement between the parties on Callie Castillo, at CallieC@atg.wa.gov, and on Tera Heintz, at TeraH@atg.wa.gov.

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