EXPEDITE
Hearing is Set:
Date: Sept. 8, 2009
Time: 1:30 p.m.
Judge McPhee

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

WASHINGTON FAMILIES STANDING TOGETHER and ANNE LEVINSON, Plaintiffs, v. SECRETARY OF STATE SAM REED, in his official capacity and PROTECT MARRIAGE WASHINGTON, Defendants.	NO. 09-2-02145-4 MOTION TO DISMISS AND RESPONSE TO MOTION FOR INJUNCTIVE RELIEF

I. NATURE OF THE CASE

Plaintiffs ask this Court to reject the signatures of over 36,000 Washington voters and deny all of Washington's voters the opportunity to vote at the general election on Referendum Measure 71 (RM-71). Plaintiffs ask this Court to take this extraordinary step despite the fact that the proponents of a referendum exercise a constitutional right when they propose a measure and bring it forth for a public vote. *Schrempp v. Munro*, 116 Wn.2d 929, 935, 809 P.2d 1381 (1991). "By contrast, the opponents can claim no constitutional right to impede the exercise of the proponents' constitutional rights." *Id.* Indeed, the Washington Supreme Court

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has recognized more than once that a "presumption of validity . . . attaches to a signature upon a petition." *Vangor v. Munro*, 115 Wn.2d 536, 543, 798 P.2d 151 (1990). "There is a presumption that petitions that have been circulated, signed, and filed are valid, and the burden of proof show their invalidity rests upon those protesting against them." *Sudduth v. Chapman*, 88 Wn.2d 247, 255 n.3, 558 P.2d 806 (1977).

II. RELIEF REQUESTED

Defendant, Secretary of State Sam Reed, requests that this Court deny any relief, dismiss this action, and permit preparations for the statewide general election to proceed.

III. STATEMENT OF FACTS

Under the state constitution, a referendum "may be ordered on any act, bill, law, or any part thereof passed by the legislature" with exceptions not at issue in this case. Const. art. II, § 1(b). In order to qualify a referendum to the ballot, the state constitution requires the filing of petitions with the Secretary of State that contain the valid signatures of Washington registered voters in a number equal to at least four percent of the votes cast for the office of governor at the most recent gubernatorial election. *Id.*

The sponsors of RM-71 propose to ask the voters whether they approve or reject Engrossed Second Substitute Senate Bill 5688, passed by the 2009 Legislature, relating to the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners. Decl. of Nick Handy, ¶ 7. On July 25, 2009, sponsors submitted signed signature petitions to the Secretary of State at his Olympia office. *Id.*, ¶ 8. The petitions contained a gross total of 137,881 signatures. Decl. of Shane Hamlin, Ex. A. By law, 120,577 valid signatures are required in order to qualify RM-71 to the ballot. *Id.*

As required by RCW 29A.72.230, the Secretary of State promptly began the process of checking the signatures in order to determine whether they contained sufficient valid signatures Handy Decl., ¶ 13. The Secretary completed this check on Tuesday, September 1,

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2009. *Id.* The Secretary formally certified that the petitions bore sufficient signatures to qualify RM-71 to the ballot on September 2, 2009. Hamlin Decl., Ex. A.

The Secretary and the county auditors now have a very limited window in which to prepare to conduct the election. The Secretary is constitutionally required to mail a Voters' Pamphlet to every residence in the state, and materials related to RM-71 will occupy a significant portion of that publication. County auditors are required by law to mail ballots to military and overseas voters by no later than October 3, 2009. RCW 29A.40.070(2); 42 U.S.C. § 1973ff-1. In order to prepare and mail ballots and Voter Pamphlet's to meet these deadlines, the Secretary must know whether RM-71 will appear on the ballot by no later than September 10, 2009. Handy Decl., ¶ 6. The Secretary and the auditors are currently preparing the Voters' Pamphlets and ballots for printing. Hamlin Decl., ¶ 7.

IV. STATEMENT OF ISSUES

1. Should thousands of valid signatures of registered voters on petitions supporting a proposed referendum be rejected because the circulator of the petition sheet did not sign the back of referendum petitions?
2. Should the signatures of hundreds of registered voters on petitions supporting a proposed referendum be rejected because of speculation that they might have registered to vote simultaneously with signing petitions?
3. Should this action be dismissed because Plaintiffs have failed to plead facts sufficient to establish any abuse of discretion by the Secretary of State in verifying signatures of registered voters on petitions filed in support of a proposed referendum measure?

V. EVIDENCE RELIED UPON

The Secretary relies upon this Response, and upon the accompanying Declarations of Nick Handy, Shane Hamlin, and Donald F. Whiting.

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VI. AUTHORITY

A. Legal Principles Governing Initiative And Referendum Signature Gathering.

This action challenges the Secretary's certification that RM-71 has 122,007 valid signatures, and therefore qualifies for the November 2009 general election. In considering challenges to the Secretary's actions with regard to signature gathering, the Washington Supreme Court has established five important principles that govern this case.

First, "The proponents are exercising a constitutional right to petition." *Schrempp*, 116 Wn.2d at 935 (citing const. art. 2, § 1(a)). In "contrast "opponents [have] no constitutional right to impede the exercise of the proponents' constitutional rights." *Id*. Opponents have the constitutional right to express their opposition to a measure and to vote against it, but there is no constitutional right to prevent a measure from going onto the ballot. *Id*.

Second, there "is a 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 against them." *Sudduth v. Chapman*, 88 Wn.2d 247, 255 n.3, 558 P.2d 806 (1977). In one case, the Washington Supreme Court ordered that a referendum appear on the ballot even when the theft of the petition pages precluded the signatures from being checked at all, relying upon what it called, in that case, an "inference of validity." *Rousso v. Meyers*, 64 Wn.2d 53, 59, 390 P.2d 557 (1964).

Third, the "provisions of the constitution which reserve the right of initiative and referendum are to be liberally construed to the end that this right may be facilitated[.]" *Sudduth*, 88 Wn.2d at 251. This constitutional right should "not [be] hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." *Id*.

Fourth, "comparing and certifying genuine and spurious signatures on petitions are acts of 'authorized discretion"' on the part of the Secretary. *Vangor v. Munro*, 115 Wn.2d 536,

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543, 798 P.2d 1151 (1990) (quoting *State ex rel. Harris v. Hinkle*, 130 Wash. 419, 429, 227 P. 861 (1924)).

Fifth, the "sponsor of such petition [is] not the agent of any of the signers to the extent that his offenses would bind the signers or invalidate their signatures." *Edwards v. Hutchinson*, 178 Wash. 580, 587, 35 P.2d 90 (1934). *Sudduth*, 88 Wn.2d at 251 ("when a legal voter has signed a referendum petition, his signature must be counted, even though the person soliciting his signature has violated the law.").

B. Standard of Review.

The decisions of the Secretary of State "in comparing and certifying genuine and spurious signatures on petitions are acts of 'authorized discretion.'" *Vangor v. Munro*, 115 Wn.2d 536, 543, 798 P.2d 1151 (1990) (quoting *State ex rel. Harris v. Hinkle*, 130 Wash. 419, 429, 227 P. 861 (1924)). The Secretary's exercise of this discretion is reviewed only for abuse of discretion. *Id*. Discretion is exercised in an arbitrary and capricious manner only if it amounts to "a 'willful and unreasoning action, without consideration and in disregard of facts or circumstances.'" *Cmty. Care Coalition v. Reed*, 165 Wn.2d 606, 618, 200 P.3d 701 (2009). Because petition signatures are presumed valid, Plaintiffs bear the burden of proving otherwise. *Vangor*, 115 Wn.2d at 543.

C. Court Should Not Invalidate 36,000 Valid Signatures Because Signature Gatherers Failed To Sign The Back Of The Petition.

Plaintiffs primarily contend that the Secretary must reject the valid signatures of over 36,000 registered voters on the RM-71 petitions because the back of those petitions do not contain a signature from the petition circulator. Decl. of Hamilton, Ex. E. Yet, each and every one of the signatures of voters that the Secretary accepted on these pages was reviewed by the Secretary and found to be that of a registered voter. Handy Decl., ¶ 10. Plaintiffs find this signature requirement in RCW 29A.72.130, which provides in part:

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> Petitions ordering that acts or parts of acts passed by the legislature be referred to the people at the next ensuing general election, or special election ordered by the legislature, must be substantially in the following form: …
> The following declaration must be printed on the reverse side of the petition: I, ..., swear or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct. I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, such violations being punishable by fine or imprisonment or both.

Plaintiffs assert that RCW 29A.72.130 requires the circulator's signature in order to validate the signatures of the voters who exercise their constitutional right to support a referendum. If those signatures are invalidated, RM-71 would fail to qualify to the ballot. Plaintiffs' theory in this point is incorrect for three reasons.

1. The Failure Of Signature Gatherers To Sign The Back Of The Petition Does Not Invalidate The Signatures Of Registered Voters.

The 122,007 registered voters who signed RM-71, including the more than 36,000 who signed petitions not signed by the circulator, were "exercising a constitutional right to petition." S*chrempp*, 116 Wn.2d at 935. The actions or inactions of the sponsor or signature gatherers do not invalidate the registered voters' signatures. The Court established the principle in *Edwards*, 178 Wash. 580, and *Sudduth*, 88 Wn.2d 247. In *Edwards*, an initiative opponent argued that signatures should not be counted because "paid workers secured the signatures of legal voters [and the] law forb[ade] the employment of paid workers." *Edwards*, 178 Wash. at 584. Despite "the fact that the paid worker violated the law, [was] guilty of a misdemeanor and liable to the penalties provided for such an offense, yet, still the fact remains *that a legal voter has signed the petition and his signature must be counted*." *Id*. (emphasis

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added). The Court went on to explain that "nowhere in the statute do we find a word or a line which invalidates the signature of a legal voter because it was obtained by the solicitation of a paid worker." *Id.*

In *Sudduth* the Court also emphasized the importance of counting legal signatures. *Sudduth* dealt with duplicate signatures. In *Sudduth*, petitions were required to include a warning that it was against the law for a person to "knowingly sign[] more than one of these petitions[.]" RCW 29.79.070 (1976), Laws of 1965, ch. 9, § 29.79.090. The same warning is required today. RCW 29A.72.140. In addition, the law expressly provided that: "If the secretary of state finds the same name signed to more than one petition he shall reject the name as often as it appears." *Sudduth*, 88 Wn.2d at 249 (citing RCW 29.72.200). Under RCW 29.72.200, then, none of a voters' signatures would be counted if the voter signed more than one petition. The Court ruled that this restriction was unconstitutional. According to the Court, the intent of amendment 30, which changed the number of signatures required to qualify for the ballot, "*was to require that an initiative measure be placed upon the ballot if the requisite number of registered voters sign it.* Refusing to count a duplicate signer as one petitioner frustrates, rather than furthers this purpose." *Sudduth*, 88 Wn.2d at 251 (emphasis added). The Court found it "significant that RCW 29.79.090, which directs that signers be warned of criminal sanctions, does not require that they be warned that duplicate signatures will not be counted." *Id*. at 252.

Edwards and *Sudduth* control this case. The signatures of the 36,000 registered voters must be counted, even if it was improper for the signature gatherers not to sign the back of the petition. As in *Edwards*, there is no statute that provides for the invalidation of legal signatures because of a failure to sign the back of the petition. RCW 29A.72.170 only provides that the Secretary "*may* refuse to file any initiative or referendum petition being submitted upon any of the following grounds: "(1) That the petition does not contain the information required by [RCW] 29A.72.130." (Emphasis added.) RCW 29A.72.170 provides only that the Secretary

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"may" refuse to file. It does not require the rejection of valid signatures. Thus, in adopting the statutes governing the initiative and referendum procedure, "[v]ery plainly it was the legislative purpose that *the proposed measure, if it meets the test as to legal signatures, shall be submitted to the voters.*" *Edwards*, 178 Wash. at 584 (emphasis added). And in *Sudduth*, even when a statute expressly required the Secretary to disregard the signature of a registered voter, the Court required the signature to be counted. And as in *Sudduth*, none of the warnings required to be on the petition inform the voter that his or her signature will not be counted if the signature gatherer does not sign the back of the petition. The rule in Washington is that valid signatures should be counted. That rule applies in this case.

2. RCW 29A.72.130 Does Not Require Signature Gatherers To Sign The Back Of The Petition.

Plaintiffs' claim that RCW 29A.72.130 requires signature gatherers to sign the back of the petition is also incorrect. Two of the fundamental principles are again important in considering RCW 29A.72.130. First, voters "are exercising a constitutional right" when they sign a petition. *Schrempp*, 116 Wn.2d at 935. Second, the "provisions of the constitution which reserve the right of initiative and referendum are to be liberally construed to the end that this right may be facilitated[.]" *Sudduth*, 88 Wn.2d at 251. This constitutional right should "not [be] hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." *Id.* Applying this principle of liberal construction requires that RCW 29A.72.130 be viewed as an additional warning on the petition, rather than a requirement that the petition be signed on the back by the signature gatherer.

Plaintiffs argue that RCW 29A.72.130 plainly requires the person who circulated the petition to fill out the declaration. Mot. at 8-9. Plaintiffs are mistaken. The language at issue was added to RCW 29A.72.130 in 2005 in Laws of 2005, ch. 239, § 3 (Engrossed House Bill (EHB) 1222). The amendment added the following language to RCW 29A.72.130:

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> The following declaration must be printed on the reverse side of the petition:
>
> I, ..., swear or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct. I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, such violations being punishable by fine or imprisonment or both.
>
> RCW 9A.46.020 applies to any conduct constituting harassment against a petition signature gatherer. This penalty does not preclude the victim from seeking any other remedy otherwise available under law.

Laws of 2005, ch. 239, § 3. Although section 3 uses the word "declaration", the language of section 3 does not require a declaration in the proper form. A declaration:

> (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
>
> (2) Is subscribed by the person;
>
> (3) States the date and place of its execution; and
>
> (4) States that it is so certified or declared under the laws of the state of Washington.

RCWA 9A.72.085.

Section 3 of the 2005 Act includes language that the person "swear[s] or affirm[s] under penalty of law[.]" However, section 3 does not require that the date and place of execution be set forth, or that the declaration is made under the laws of the state of Washington. There is also no place for the signature gatherer to sign. This last point is particularly significant because RCW 29A.72.130 expressly sets out the requirements for voters signing the petition. RCW 29A.72.130 provides: "The *petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county* at which he

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or she is registered to vote." (Emphasis added.) There is no similar requirement in RCW 29A.72.130, or any other statute, that a signature gatherer sign the back of the petition.

The fact that section 3 uses the term "declaration" but does not provide for the proper form of a declaration creates an ambiguity. When a statute is ambiguous, the "court may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent[.]" *Rest. Dev., Inc. v. Cananwill, Inc*., 150 Wn.2d 674, 682, 80 P.3d 598 (2003). In this case, the legislative history of EHB 1222 demonstrates that there was significant confusion about what the bill would accomplish. The two sponsors of the bill disagreed about the effect of EHB 1222. In floor debate on March 8, 2005, in the House, Representative McDermott stated: "This bill would require the signature gatherer to sign each page of the petition that they have gathered those signatures and aware of penalties for those acts." House Floor Debate HB 1222, Mar. 8, 2005 (quoted at AGO 2006 No. 13 at 8). In contrast, Representative Nixon explained that the bill "*does not penalize those who fail to sign the statement. But the statement does have to be printed on the initiative petitions. It also does not invalidate the petition forms if the signature is not provided of the circulator.* So, again, the primary purpose is to provide information to the petition circulators and I urge your support." *Id*. (emphasis added) (quoted at AGO 2006 No. 13 at 9). In floor debate on April 20, 2005, after the bill was amended in the Senate, the two sponsors again disagreed about the effect of the bill. According to Representative McDermott, "the Senate has amended this bill to require that the person gathering the signatures actually sign the back of the petition[.]" House Floor Debate EHB 1222, Apr. 20, 2005 (quoted at AGO 2006 No. 13 at 9). Representative Nixon expressed a different view that "[a]ll the bill really does is inform

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signature gatherers of the legal penalties associated with falsifying signatures or, and other ways crimes associated with circulating petitions." *Id*. (quoted at AGO 2006 No. 13 at 9).[1]

In light of the fact that voters are exercising a constitutional right when they sign a petition, and the requirement of liberal construction to facilitate that right, RCW 29A.72.130 is properly interpreted as providing a warning to the signature gatherers. It is not a requirement that they sign the back of the petition. In its present form, RCW 29A.72.130 will do little to prevent fraud. Although there is a line for a name, there is no requirement that the signature gatherer provide an address. Moreover, even if the signature gatherer signed a line at the bottom, he or she could not be prosecuted for perjury or false swearing because the necessary requirements for a proper declaration are not present.[2]

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[1] The Plaintiffs argue that the legislative history supports their interpretation of RCW 29A.72.130. They point to language in the House and Senate Bill Reports that requiring a signature gatherer to sign would help prevent fraud. Mot. at 9. However, the language to which the Plaintiffs refer is a summary of testimony in favor of the bill. As the Final Bill Report makes clear, the legislature is silent about the purpose of the amendment.

[2] Plaintiffs argue that every state that requires a signature gatherer declaration requires it to be signed. Mot. at 9 n.7. The state laws cited by Plaintiffs expressly require that the signature gatherer sign the declaration. There is no similar requirement in RCW 29A.72.130 or any other statute. Alaska Stat. § 15.45.130 ("Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition."); Ariz. Rev. Stat. § 19-112 ("Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition"); Ark. Code Ann. § 7-9-108 ("Each part of any petition shall have attached thereto the affidavit of the person who circulated the petition to the effect that all signatures appearing thereon were made in the presence of the affiant"); Cal. Elec. Code § 104 ("Wherever any petition or paper is submitted to the elections official, each section of the petition or paper shall have attached to it a declaration signed by the circulator of the petition"); Colo. Rev. Stat. § 1-40-111 ("To each petition section shall be attached a signed, notarized, and dated affidavit executed by the person who circulated the petition"); Idaho Code § 34-1807 ("Each and every sheet of every such petition containing signatures shall be verified on the face thereof in substantially the following form, by the person who circulated said sheet"); 10 Ill. Comp. Stat. § 5/28-3 ("At the bottom of each sheet of such petition shall be added a circulator's statement, signed by a person…certifying that the signatures on that sheet of the petition were signed"); ME. Rev. Stat. Ann., tit. 21-A § 354 ("The circulator of a nomination petition shall verify by oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations"); Mont. Code Ann. § 13-27-302 ("An affidavit, in substantially the following form, must be attached to each sheet or section submitted to the county official: I, (name of person who is the signature gatherer), swear that I gathered the signatures on the petition"); Neb. Rev. Stat. § 32-628(3) ("Every sheet of a petition which contains signatures shall have upon it, below the signatures, an affidavit as provided in this subsection"); Nev. Rev. Stat. §295.0575 ("Each document of a petition must have attached to it when submitted an affidavit executed by the circulator thereof stating"); Okla. Stat. tit. 34, § 6 ("Each sheet of every such petition containing signatures shall be verified on the back thereof, in substantially the following form, by the person who circulated said sheet of said petition, by his or her affidavit thereon"); OR. Rev. Stat. § 250.045 ("The circulator shall certify on each signature sheet of the initiative or referendum petition that the circulator"); S.D. Codified Laws § 2-1-10 ("Each person, who circulates and secures signatures to a petition to initiate a constitutional

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In 2006, the Attorney General considered this issue in AGO 2006 No. 13, and concluded that "Laws of 2005, ch. 239 does not require a signature gatherer to sign the declaration required to be printed on the reverse side of the petition." AGO 2006 No. 13 at 1. The opinion found that the "2005 amendments simply require a statement to be included on the petition that warns signature gatherers about the penalties associated with forging signatures or paying anyone to sign a petition." *Id*. at 9. For this reason the opinion concluded that the Secretary was "authorized to refuse to file petitions that omit the statement." *Id*. at 13.

"Opinions of the Attorney General are entitled to considerable weight, but are not controlling upon [the] court." *Wash. Fed'n of State Employees, Coun. 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 164, 849 P.2d 1201 (1993). It is significant that the Secretary has been following AGO 2005 No. 13, and accepting petitions that were not signed on the back. Handy Decl., ¶ 17. Despite this fact, the legislature has not amended RCW 29A.72.130 to overturn the opinion.

The Plaintiffs argue that some of the petitions did not have a name filled in the blank space in "I, ..., swear[.]" RCW 29A.72.130. According to the Plaintiffs, this is inconsistent with the Attorney General's Opinion, because it relied in part on the contrast between the existence of this space and the lack of a space for a signature gatherer to sign. Mot. at 12. This argument misses the point. The Attorney General's opinion concluded that the purpose of the language in question was to give signature gatherers a warning about penalties associated with signature gathering. Filling in a name in the space is unrelated to providing a warning to signature gatherers. Moreover, RCW 29A.72.170 provides that the Secretary "*may* refuse to file any initiative or referendum petition being submitted upon any of

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amendment or other measure or to refer legislation to the electors, shall sign a verification before filing the petition"); Utah Code Ann. § 20A-7-206.3(2) ("Each person, who circulates and secures signatures to a petition to initiate a constitutional amendment or other measure or to refer legislation to the electors, shall sign a verification before filing the petition"); Wyo. Stat. Ann. § 22-24-114(a) ("Before a petition is filed, it shall be verified by the sponsor or other individual who personally circulated it. The verification shall be in affidavit form and shall state in substance that").

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the following grounds: (1) That the petition does not contain the information required by RCW . . . 29A.72.130." It is certainly within the Secretary's discretion to accept petitions without a name in the blank space in light of the fact that a name—with nothing more—is of little assistance in preventing fraud.

The fact that the language on the back of the petition provides a warning to signature gatherers also answers the Plaintiffs' argument that the AGO's interpretation conflicts with the principle that the legislature does not perform useless acts. Mot. at 11. It is certainly not useless for the legislature to require a warning on the petitions. Indeed, the front of the petition is required to include warnings to the voter about signing petitions. RCW 29A.72.130. Part of the 2005 amendments required a warning on the back of the petition that: "RCW 9A.46.020 applies to any conduct constituting harassment against a petition signature gatherer. This penalty does not preclude the victim from seeking any other remedy otherwise available under law." Laws of 2005, ch. 239, § 3. This warning has nothing to do with signing the back of the petition, but it was clearly not a useless act for the legislature to require it to be included on the petition.

RCW 29A.72.130 does not require signature gatherers to sign the back of the petition. For this additional reason, the valid signatures of the 36,000 registered voters who signed RM-71 should be counted.

3. Proponents Are Entitled To Rely On Advice From The Secretary.

Because proponents of a referendum are exercising a constitutional right, *Schrempp*, 116 Wn.2d at 935, they are entitled to rely upon governmental advice that the absence of a signature by a *circulator* will not invalidate signatures by a *voter*. The Court applied this principle of reliance in *Donohoe v. Shearer*, 53 Wn.2d 27, 33, 330 P.2d 316 (1958). *Donohoe* concerned the Official Election Calendar prepared by the Secretary of State. Pursuant to statute, the "[f]iling period for [the] state primary [was] set as July 1st to 20th, inclusive. However, [an] Attorney General opinion dated 9/12/51 extend[ed the] period to Monday, July

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21st, since last day falls on Sunday." *Donohoe,* 53 Wn.2d at 29. The "county auditor, relying upon and acting pursuant to the direction of the secretary of state, accepted and filed Mr. Vander Stoep's declaration of candidacy on Monday." *Id*. The question was whether Vander Stoep's declaration was timely. The Court held that the election statute was "clear and unambiguous. It fixes a definite date--not 'later than the preceding July 20th."' *Id*., at 32. However, the Court did not disqualify Vander Stoep because of the "official state election calendar, prepared by the secretary of state after advice from the state attorney general. It was given wide publicity; it was the official pronouncement of the state's chief election officer by which election officials and aspirants for office governed themselves." *Id*. at 33. Thus, "Vander Stoep as a potential candidate and respondent as county auditor had a right to rely thereon." *Id*.

The same principle applies in this case. AGO 2006 No. 13 concluded that signature gatherers were not required to sign the back of the petition. The Secretary consistently has advised ballot measure proponents that, based upon AGO 2006 No. 13, the failure of a circulator to sign the back of a petition will not invalidate the signatures of registered voters on its face, including oral representation to this particular sponsor. Handy Decl., ¶ 19. Whatever construction the court were to give RCW 29A.72.130 *prospectively* it could not be applied to this petition consistent with the principle that legislation to facilitate the referendum process is construed liberally in favor of the voter. *See Sudduth,* 88 Wn.2d at 254.

4. Alleged Deception On Part Of RM-71 Proponents Does Not Invalidate Signatures.

Plaintiffs allege in their Complaint that the sponsors and signature gatherers engaged in deception when collecting the signatures, and that this deception is a basis for not counting the valid signatures of registered voters. Compl. at ¶ 13. Plaintiffs do not discuss this claim in their motion, and there is no basis for it. The Court rejected the same claim in *Edwards*. In *Edwards,* initiative opponents claimed that there was "a conspiracy by the proponents of the

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initiative measure, by means of which they have deceived and deluded many persons into signing the petition without their knowing the nature of the proposed measure[.]" *Edwards*, 178 Wash. at 581. The opponents sought to enjoin the Secretary of State from verifying the signatures and certifying the measure.

The Court denied this claim. The Court stated: "Manifestly the courts cannot undertake to set aside elections or to interfere with the action of electors upon the theory that some one has been deceived. Attempts to deceive can only be met by publicity and a campaign of education." *Id*. at 585. According to the Court, "[e]ver since popular elections were instituted, in every one held, some one, perhaps many voters, have been deceived, and so long as the political field remains free and open, as it should and must if we are to have free popular government, there is no way to prevent prejudices being appealed to, and voters to a greater or less degree will always be deceived." *Id*. The same is true in this case. Claims of deception do not provide a basis to disregard the valid signatures of 122,007 registered voters.

D. The Constitutional Right Of Voters To Sign Referendum Petitions May Not Be Denied Based On The Date Of Registration Shown In The Voter Registration Database.

Plaintiffs allege, secondarily, that signatures of registered voters should be invalidated based upon their speculation that some petition signers might have been unregistered at the time they signed the petition. Plaintiffs are wrong, because voters who sign a petition and simultaneously register to vote exercise a constitutional right when doing so. In addition, because petition sheets are not dated, there is no evidence that signers were *not* already registered before signing and their signatures are accordingly presumed to be valid. *Sudduth*, 88 Wn.2d at 254-55 (noting liberal construction of voting laws in favor of the voter and the presumption of validity attached to petition signatures). Finally, only 43 voters signed the petition and have dates of registration after July 25; a number that makes no difference to the certification of RM-71 to the ballot. Hamlin Decl., ¶ 5(b)(iii).

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Ballot measure proponents routinely register voters to vote on the spot, when requesting their signatures on petitions. Handy Decl., ¶ 39. Such application cards are mailed to the Secretary of State afterward. When election officials process the application, they enter the new voter into the voter registration database showing the date of postmark on the application as the date of registration. RCW 29A.08.020(2); Handy Decl., ¶ 41. Plaintiffs' argument depends upon the untenable notion that the voter does not acquire a constitutional right to sign a referendum petition until the postal service affixes a postmark to his or her application card. To put the matter bluntly, this is no way to treat a voter trying to exercise a constitutional right. The voters' constitutional right to initiative and referendum "are to be liberally construed to the end that this right may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof . . . ." *Sudduth*, 88 Wn.2d at 251. Plaintiffs' argument depends upon just such a technical construction, and would lead to the absurd conclusion that if an otherwise-qualified voter signs a petition, his or her signature would be invalid merely because he or she filled out a voter registration card at somewhere near the same time.

Washington law defines the date of registration for the administrative purpose of determining who should get a ballot at an election. RCW 29A.08.020 (noting the use of the date of mailing for purposes of the registration cutoff before an election). The voters, however, do everything that they need to do to become registered when they fill out the application. No Washington statute provides any deadline for registering to vote for the purpose of signing an initiative or referendum petition. Given the liberal construction mandate to facilitate the referendum process, and the constitutional nature of the voter's right to sign petitions, the date of registration cannot be regarded as the determining factor when considering the validity of a petition signature.

Plaintiffs' argument fails for an additional reason. The signatures of voters on initiative and referendum petitions are not dated. RCW 29A.72.130 (describing petition form); Handy Decl., ¶ 36. Neither the Plaintiffs nor the Secretary of State have any way of knowing on what

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date any voter signed the petition. Handy Decl., ¶ 37. As noted, the validity of the voters' signatures are presumed. *Vangor*, 115 Wn.2d at 543; *Sudduth*, 88 Wn.2d at 255. There is no basis for jumping to the conclusion that any voter whose signature was matched with that of a registered voter was unregistered at the time he or she signed the petition. The sole possible exception would include those voters whose date of registration falls after the deadline for submitting petitions, but even then there can be no evidence that the voter did not fill out a registration application before, or at the same time as, signing the petition. Even so, the petitions in support of RM-71 contained only 43 such signatures, a number that makes no difference to its validation.[3] Hamlin Decl., ¶ 5(b)(iii).

This analysis gives effect to both Washington's mandate of liberal construction of laws that facilitate the right of referendum, and the constitutional nature of the right to sign a petition. The highest court of a sister state with laws similar to ours has reached the same conclusion. *NW Cruiseship Ass'n v. Alaska*, 145 P.3d 573, 576-77 (Alaska 2006). That case involved a challenge to the validity of signatures because it was not known whether the voter registered to vote before or after signing the petition. *Id.* at 576. As in Washington, the petition sheets were undated, and so the election officials accepted signatures if the voter was registered as of the date of the signature check. *Id.* The court concluded that this process was

[3] Petitioners do not explain how many signatures they believe might be invalid based on their argument, and for good reason—there is no way of knowing when a voter signed the petition. Handy Decl., ¶ 37. They seem to suggest that their argument might apply to voters whose registration records were located during the recent registration check (described at Handy Decl., ¶ 29). Such a notion would make no sense, because there is no way of overcoming the presumption of validity and proving that any voter, including a recently-registered one, did not register before signing. The burden of proof rests with them. *Vangor*, 115 Wn.2d at 543. Additionally, of the 1720 signatures verified during the recent registration check, 690 showed dates of registration before June 19, 2009. The bulk of the remainder, 987, had their registration cards postmarked between June 19 and July 25, 2009. Hamlin Decl., ¶ 5. There is no way of knowing when, within that period, they signed the petition. Registration cards for only 43 were postmarked after July 25, 2009. *Id.*

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"reasonable given that there was no statutory requirement that each signature be dated." *Id.* at 576-77.[4]

E. This Action Should Be Dismissed, And Preparations For The Election Allowed To Proceed, Because Plaintiffs Have Failed To Overcome The Presumption Of Validity Of Petition Signatures Or To Show Any Arbitrary And Capricious Action.

Plaintiffs' remaining claims are without merit, and this action should be dismissed so that preparations for the general election can continue. As noted, the Secretary and the county auditors have a limited amount of time in which to prepare to conduct the general election—not only with regard to RM-71, but with regard to all offices and measures. Handy Decl., ¶ 6 (noting that election officials must know by September 10 whether RM-71 will appear on the ballot). Not only is the Secretary currently preparing for publication of the statewide Voters' Pamphlet, but county auditors are preparing to print ballots and are seeking information from the Secretary regarding the inclusion of RM-71. Hamlin Decl., ¶ 7.

Plaintiffs' remaining claims essentially amount to an assertion that they would have exercised discretion differently than the Secretary did regarding certain petition signatures. Plaintiffs offer declarations from two of the observers they had present during the verification process, both of whom assert that they would have made different decisions regarding some signatures than did the Secretary's staff. Decl. of Mona Smith; Decl. of Michael Snyder. This is unsurprising, given that the review of petition signatures is a discretionary act. *Vangor,* 115

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[4] The out-of-state cases cited in dicta by the King County court in Plaintiffs' earlier action are distinguishable because they all depend on the specific laws of their particular states, which differ from Washington's. *See, e.g., Mays v. Cole*, 374 Ark. 532, *5, ___ S.W.3d ___ (Ark. 2008) (state law specifically provided that the voter was not registered until the election official received acknowledged application); *In re Protest*, 49 Ohio St. 3d 102, 551 N.E.2d 150 (Ohio 1990) (discussing requirement that voter's residence address be up to date on registration records); *Ahrens v. Kerby*, 44 Ariz. 269, 350, 37 P.2d 375 (Ariz. 1934) (noting generalizing requirement that voter be registered in order to vote); and *In re Initiative Petition No. 365*, 55 P.3d 1048, 1051 (Okla. 2002) (concluding, without analysis, that petition signatures were invalid if the date of registration post-dated the date of the petition signature). Aside from dependence on the laws of other states, these cases are inapposite for the simple reason that, as noted by the Alaska court, if the petition signature is undated, the presumption that the signatures are valid cannot be overcome by other evidence. *NW Cruiseship*, 145 P.3d at 576-77.

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Wn.2d at 543. There often is not a single, clear-cut answer as to whether some signatures do or do not match a voter registration record. Handy Decl., ¶ 32. The Secretary, however, has extensive experience in matching signatures, stemming not only from the initiative and referendum processes, but from the fact that Washington voters primarily vote by mail. Handy Decl., ¶ 24. The Secretary has adopted standards for signature matching recommended by the Washington State Patrol, and receive training from the Patrol. *Id.* Signature checkers receive training as to these standards, and many have extensive experience in the activity, some for more than 20 years. Handy Decl., ¶ 23.

Against this trained and experienced exercise of the Secretary's discretion, Plaintiffs offer the speculation of two of their observers that they would have reached different conclusions. Mona Smith, for example, speculates that some of the signatures she saw accepted would have been rejected by another checker. Smith Decl., ¶ 10. She further states that she disagreed with checkers as to whether handwriting matched, whether a signature had been crossed out, or whether names were correctly identified. *Id.* at ¶ 12. Michael Snyder similarly says that he disagreed with the discretionary decisions of the checkers, because he disagreed as to whether handwriting matched. Snyder Decl., ¶ 11.

Plaintiffs appear to envision a process by which their partisan advocates will conduct their own review of the petitions, and ask this Court to reverse the Secretary's exercise of discretion because they subjectively disagree. Compl., ¶¶ 50-55. The discretion to determine the sufficiency of the petitions, however, is vested in the Secretary, not in partisan third parties. *Vangor*, 115 Wn.2d at 543. Moreover, since we know that the proponents also subjectively disagreed with some of the Secretary's decisions to reject signatures, Handy Decl., ¶¶ 50, 53, the extraordinary proceeding Plaintiffs seek has the potential to disrupt preparations for the general election based on nothing more than partisan disagreement and speculation. Handy Decl., ¶ 6 (election officials must know by September 10 whether RM-71 will appear on the ballot). More than mere subjective disagreement is necessary to entitle Plaintiffs to such a

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proceeding. *Vangor,* 115 Wn.2d at 540-41 (Plaintiffs' speculation insufficient to support allegation that Secretary engaged in arbitrary and capricious conduct).

It is not sufficient for Plaintiffs to show that two of their partisan observers disagreed with the discretionary decisions of the Secretary; Plaintiffs are required to show that the Secretary clearly abused his discretion. *Id.* at 543. Neither Ms. Smith nor Mr. Snyder states any basis upon which they could be regarded as experts in signature verification. Plaintiffs thus fail to present sufficient facts to support their request, in their Complaint, that the Secretary be ordered to submit the petition and related voter registration records to this Court for a *de novo* review of some or all of the signatures.[5]

Plaintiffs next assert that a review of a sample of the petition signatures that they believe were improperly accepted demonstrates that further signatures should be reviewed. They are wrong, because the results of that review were not as the Plaintiffs describe. Plaintiffs say that the Secretary reviewed 222 previously-accepted petition signatures, and as a result reversed their decisions and rejected 29. Snyder Decl., ¶ 12. This is untrue, but from this meager and incorrect data they seek to extrapolate the invalidity of a large number of signatures that the Secretary examined and determined to be valid.

Plaintiffs refer to a special review conducted by the Secretary at their request of 222 signatures their observers thought might be questionable. Handy Decl., ¶ 53. Only 14 of the 29 signatures that Plaintiffs state were reversed were in fact reversed. The other 15 were subsequently fully researched and none of them had been accepted in error. Hamlin Decl., ¶ 6. Of those 15, 8 had never been accepted in the first place, but were incorrectly identified by the Plaintiffs as signatures they believed had been incorrectly accepted. *Id.* The other 7 were properly matched with registration records and properly accepted as valid signatures. *Id.* This

[5] That process took over a month the first time, even utilizing double shifts of checkers over 15-hour days. Handy Decl., ¶ 13.

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means that, instead of rejecting 29 out of 222 signatures as a result of this sample review as Plaintiffs assert, the Secretary in fact rejected only 14 signatures out of 214—thus, 6.5% of them changed, not the 13% claimed by Plaintiffs.

Moreover, those changes in Plaintiffs' favor were almost exactly offset by changes in the proponents' favor when the Secretary reviewed a similar number of signatures about which they complained. Handy Decl., ¶ 53. Far from showing any arbitrary and capricious exercise of the Secretary's discretion, these examples merely illustrate the subjective and discretionary nature of reviewing petition signatures. Handy Decl., ¶ 32. They reveal an exercise of discretion, not its abuse.

These facts become important when considering another of Plaintiffs' claims. Plaintiffs speculate that there might be as many as 15,000 signatures that might be as questionable as the 214 that the Secretary reviewed at their request. Compl., ¶ 44. Plaintiffs came up with this number based only on a projection. Plaintiffs say that their observers disagreed with the Secretary as to a total of 3,000 signatures, which they project to mean that 15,000 might be questionable. *Id.* They then assert that if 13% of those signatures turned out to be invalid, the measure would not qualify. *Id.* This argument is specious, for three reasons: First, the notion that speculative projections and guesswork as to how many invalid signatures *might* have been accepted does not provide an adequate basis upon which to challenge the sufficiency of the petitions. *Vangor*, 115 Wn.2d at 540. Second, they derive their guess that 13% might be invalid from the special review discussed above, at which only 6.5% of the decisions to accept signatures were changed by a second checker. Even taking Plaintiffs' guess of 15,000 signatures they might question, this would result in the invalidation of only 975 signatures, an insufficient amount to change the result of the petition check. Third, partisan disagreement with the Secretary's exercise of discretion cuts both ways. The proponents of RM-71 also objected to some of the discretionary decisions made with regard to petition signatures. Handy

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Decl., ¶ 53. When the Secretary checked a similar number of signatures they questioned, the results offset the results of the check conducted for Plaintiffs almost exactly. *Id.*

Plaintiffs also contend that the Secretary acted in an arbitrary and capricious manner because his staff did not stop looking for the valid signatures of registered voters soon enough. They challenge, in this regard, the Secretary's search for recent voter registrations that were not reflected in the database used by the initial checkers and the master checkers. Compl., ¶ 22. While Plaintiffs acknowledge that it was "laudable" that the Secretary searched for the voter registration records of signers who had registered between June 19 and July 25, they complain that the Secretary found too many. They seem to suggest that somehow it was an arbitrary and capricious act to find over 1,700 valid signatures of registered voters at this stage. *Id.* To state this assertion is to refute it.[6] Ironically, in both of the reported Washington cases regarding challenges to the Secretary's verification of petitions, the argument was exactly the opposite—that the Secretary should have continued to search further for more valid signatures. *Vangor*, 115 Wn.2d at 543-44 (rejecting argument that Secretary did not search hard enough for additional recent voter registrations); *Sudduth*, 88 Wn.2d at 254 (Secretary had a duty to keep current voter registration records so that all valid signatures could be identified). Nowhere does Washington precedent suggest any duty on the Secretary's part to stop searching before being finished.

Additional steps to identify valid signatures are routinely taken when the question of whether a measure will qualify to the ballot is a close one. Although Plaintiffs complain that

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[6] Plaintiffs seem to think there might be something unfair about the fact that 690 of the signatures accepted at this stage showed registration dates before June 19, 2009. Hamlin Decl., ¶ 5. This fact can be explained in two ways. First, there is a certain "needle in the haystack" quality to the search for signatures, particularly when a voter's signature on the petition is unclear. Handy Decl., ¶ 31. Second, the recent registration check revealed not only newly-registered voters, but voters who had changed their names or addresses recently as well. Handy Decl., ¶ 29. For example, voters who change their names as a result of marriage or divorce will not be located in a database that lists them by their prior name, but updated information may make it possible to locate a registration record and match a petition signature. *Id.*

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the Secretary added a check for recent registrations, this is an established practice. The Court in *Vangor* noted that, although the technology was different at that time, when the process of reviewing signatures by the initial and master checkers left the measure short of the number needed to qualify, the Secretary "compared previously unaccepted signatures to an alphabetical computer list of county registration records which had been transmitted by the counties to the Secretary that week." *Vangor*, 115 Wn.2d at 538. Such steps are often unnecessary because the proponent often submits a sufficiently large number of signatures that the Secretary can conclude that the petitions are sufficient without going to additional lengths beyond the initial and master checkers. Additional steps are necessary only when the matter is close. Handy Decl, ¶ 30. This has been a long historical practice, for the same reason. Whiting Decl., ¶¶ 4-5.

Finally, Plaintiffs strenuously assert that the Secretary acted arbitrarily and capriciously by accepting signatures that were identified and matched by only the initial checker. But of course, signatures on petitions supporting initiatives and referenda are presumed valid in the first place. *Vangor*, 115 Wn.2d at 543; *Sudduth*, 88 Wn.2d at 255. "Longstanding experience with the signature checking process informs us that once a checker has found a voter and matched the signatures, that this decision is reliable and final." Handy Decl., ¶ 33. This experience is confirmed by the testimony of Don Whiting, who served in various roles from Assistant Director of Elections, to Director of Elections, to Assistant Secretary of State in a career spanning the years 1968 to 2000. As he recounts, during his tenure, signatures found to validly match the records of registered voters were accepted as valid and not further reviewed. Whiting Decl., ¶ 4. Given the presumption in favor of validity of a signature, no signature is ever rejected based solely on the judgment of a single person. Handy Decl., ¶ 27; Whiting Decl., ¶ 4. Moreover, as noted above, when the Secretary further reviewed the acceptance or rejection of certain signatures as requested by both sides, the results offset each other almost exactly. Handy Decl, ¶ 53; Hamlin Decl, ¶ 6.

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But all this aside, the bottom line is that signatures are presumed valid, the Secretary's decision in verifying them is entitled to respect unless Plaintiffs establish that his discretion was exercised in an arbitrary and capricious manner, and the Plaintiffs have the burden of proving that signatures should be rejected. In this they have failed.

VII. CONCLUSION

For these reasons, the Court should deny all relief and dismiss this action.

DATED this ____ day of September, 2009.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have e-mailed the parties listed below a copy of:

Motion to dismiss and Response to Motion for Injunctive Relief
Declaration of Shane Hamlin
Declaration of Nick Handy
Declaration of Donald Whiting

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DATED this _____ day of September, 2009, at Olympia, Washington.

_____
Jeffrey Even
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