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NO. 100921-6

SUPREME COURT OF THE STATE OF WASHINGTON

GERALD HANKERSON,

Petitioner,

v.

STEVE HOBBS, in his official capacity as Secretary of State of
Washington,

Respondent.

v.

JESSE WINEBERRY SR.; DR. TERRYL ROSS; APRIL
FEATHERKILE; LIVIO De La CRUZ; REGIS COSTELLO;
MICHAEL McKEE; DEMOND JOHNSON; TIM EYMAN;
KARIM ALI; GEORGENE FARIES; JULIA BOBADILLA-
MELBY; KAN QIU; LARRY JENSEN; LYNN FRENCH; and
CLINT RHOADS,

Interested Parties.

**ANSWER TO MEMORANDUM OF AMICUS CURIAE
WASHINGTON COMMUNITY ACTION NETWORK**

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I. INTRODUCTION

This Court should decline Amicus Washington CAN's invitation to grant review of issues not raised in the petition for review. Relying on cases interpreting equal protection principles, amicus argues that this Court should grant review and apply strict scrutiny to ballot access regulations. But Mr. Hankerson's petition does not raise an argument under the Equal Protection Clause or article I, section 12 of the Washington Constitution. The petition for review relies exclusively on article II, section 1 and article I, section 4 of the Washington Constitution. Nor does the petition for review argue for the application of strict scrutiny. Instead, Mr. Hankerson advocates a novel "easy, easier, or less difficult" standard. Pet. for Review at 5, 21. Amicus' argument about the applicability of (and standard of review under) equal protection provisions is not within the scope of the petition for review.

Amicus also misses the mark in encouraging the Court to grant review of a different as-applied challenge than the one

raised in Mr. Hankerson's petition for review. Mr. Hankerson seeks review of the constitutionality of the original ink signature requirement as applied to the specific system he proposed, which results in unverifiable *paper copies* of information submitted electronically. Given the scope of Mr. Hankerson's challenge, the evidence, briefing and decisions in this case predictably focused on the specific system proposed by Mr. Hankerson. Sidestepping these actual claims and arguments, Amicus instead argues for review of some hypothetical system that results in the submission of genuine electronic signatures to the Secretary. This Court should not grant review of arguments and challenges raised only by Amicus.

Amicus clearly supports a policy permitting electronic signatures. Under the Court of Appeals decision in this case, Amicus is free to pursue that policy through legislation or even a petition for rulemaking under the Administrative Procedure Act. But neither Amicus's policy preference nor the new legal

issues it addresses support review of the Court of Appeals decision in this case.

II. ARGUMENT

A. The Petition for Review Does Not Raise An Equal Protection Claim

Amicus urges this Court to grant review to address whether equal protection principles require the application of strict scrutiny to the original ink signature requirement. Amicus Br. at 9-15. This issue does not support review.

Amicus' discussion of the strict scrutiny standard seeks to raise an equal protection issue under the Fourteenth Amendment and/or article I, section 12 of the Washington Constitution. Amicus contends that strict scrutiny applies, citing *Macias v. Department of Labor & Industries*, 100 Wn.2d 263, 267, 668 P.2d 1278 (1983). Amicus Br. at 10. The cited portion of *Macias* applies an "equal protection analysis." 100 Wn.2d at 267. The other cases cited by amicus also address issues under the Equal Protection Clause and/or the equal protection component of article I, section 12 of the Washington Constitution. *Fisher v.*

Univ. of Tex. at Austin, 570 U.S. 297, 302, 310, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013) (applying strict scrutiny in case brought under Equal Protection Clause); *Nielsen v. Wash. State Bar Ass’n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978) (discussing “the appropriate standard of judicial scrutiny” in an “equal protection analysis”).

But the petition for review does not raise the issue of equal protection; it relies exclusively on article II, section 1 and article I, section 4 of the Washington Constitution. Pet. at 5. Nor did Mr. Hankerson argue for application of equal protection principles or a strict scrutiny standard below. CP at 187-92 (relying, in Mr. Hankerson’s summary judgment motion, only article II, section 1 and article I, section 4). Accordingly, the issue of the correct standard under equal protection guarantees has not been developed by the parties. *E.g.*, CP at 946-47 (in Secretary’s cross-reply on summary judgment, noting and relying on absence of equal protection claim). Nor were these arguments addressed by the courts below, and this Court should

not address them in response to an amicus brief. *E.g.*, *Ctr for Env't'l Law & Policy v. Dep't of Ecology*, 196 Wn.2d 17, 36 n.14, 468 P.3d 1064 (2020) (declining to consider issue raised by amicus where petitioner “did not seek review of that determination”); *see also* RAP 9.12 (“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.”).

Amicus also insinuates—with a single citation to the record—that the original ink signature requirement constitutes “invidious discrimination” and has a “discriminatory impact.” Amicus Br. at 9, 12. These insinuations are unsupported and baseless. Initiatives reflecting all manner of perspectives on racial justice have successfully gathered a sufficient number of original ink signatures in the past. *E.g.*, Laws of 1999, ch. 3 (I-200) (prohibiting affirmative action); Laws of 2019, ch. 160 (I-1000) (authorizing affirmative action), *rejected by Referendum 88* (Nov. 2019).

Further, the Court of Appeals opinion in this case does not preclude a party from bringing an equal protection claim or challenging the standard of review in an appropriate case. The Court of Appeals opinion does address the degree of scrutiny that would apply under equal protection principles, noting that Mr. Hankerson had “expressly disavow[ed]” any constitutional argument. *Hobbs v. Hankerson*, 21 Wn. App. 2d 628, 634 n.10, 507 P.3d 422 (2022). The issue raised by amicus (i.e., the level of scrutiny under equal protection principles) is one that a party can raise in a future case.

The issue of the standard under equal protection principles is not raised by the petition for review, nor has it been developed by the parties. Accordingly, this issue, raised only by Amicus, does not support granting Mr. Hankerson’s petition for review.

B. The Petition for Review Does Not Involve Rejection of Genuine Signatures

Amicus also addresses another issue not raised by the petition for review. Amicus seeks to challenge the constitutionality of the original ink signature requirement as

applied to some hypothetical electronic signature system that generates “genuine electronic signatures” for submission to the Secretary. Amicus Br. at 8-9. But Mr. Hankerson’s petition presents only the issue of the constitutionality of the original ink signature requirement as applied to the particular signature-collection system that he proposed. *E.g.*, Pet. for Review at 1, 3, 22-23, 25, 27 (referring to “the DocuSign system”); *see also id.* at 10-11 (describing “the DocuSign on line signature system” that “Petitioner proposed”). Mr. Hankerson’s system would not generate electronic signatures for submission to the Secretary. Instead, it would generate only unverifiable printed copies of electronic signatures.

The signature-collection system proposed by Mr. Hankerson is uniquely flawed. Mr. Hankerson proposed to set up a website at which users could enter certain information and then draw, with a finger, computer mouse, or styles, a signature. CP at 538, 541, 543, 887. The website would not verify the identity of the user (such as by requiring nonpublic

information). *See* CP at 881, 889 (denying adopting additional steps or measures to prevent fraud or deception related to gathering signatures online). Under Mr. Hankerson’s proposed system, the Secretary would receive these signature images and information “in paper form.” CP at 888. But receipt of the signature pages in paper form removes all of the hallmarks of reliability inherent to electronic signatures (such as metadata corroborating the user’s identity). Even where the signature matched the signature on file for the voter, there would be no way for the Secretary to verify that the paper copy of the signature received by the Secretary was the same signature applied on the website. For example, with Mr. Hankerson’s proposed system, electronic signatures collected for one initiative could, between the printing of the signature pages and the submission to the Secretary, easily be cut and pasted onto the signature pages for another initiative and the Secretary would have no mechanism for verifying the authenticity and reliability of such signatures. The chain of custody—a protection relied on

by many states to protect the integrity of the initiative process—would be broken, creating an opportunity for fraud that the Secretary would be unable to detect.

Amicus fails to acknowledge that the issue raised by the petition for review concerns the constitutionality of the original ink signature requirement as applied to the specific system Mr. Hankerson proposes. Instead, Amicus urges the Court to address a different issue, which is the constitutionality of some hypothetical system that results in the presentation of valid electronic signatures to the Secretary. Amicus Br. at 8 (framing issue as whether “the Secretary may reject genuine electronic signatures *en masse* without inquiring into their authenticity”). But that is not the issue presented by Mr. Hankerson’s petition for review.

Amicus would have this Court hold that the Washington Constitution requires a system without showing that such a system is feasible. The only system addressed in the record of this case is clearly *not* feasible. This illustrates the importance of

addressing the issue through the political branches of government, where policymakers can hold hearings and hear from experts and all stakeholders. The Court of Appeals decision in this case allows for that the political process to continue.

III. CONCLUSION

This Court should deny Mr. Hankerson's petition for review. The amicus brief seeks to raise issues not presented by the petition for review and, therefore, does not support granting Mr. Hankerson's petition.

This document contains 1,552 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 3rd day of August 2022.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served all parties, according to the Court's protocols for electronic filing and service.

DATED this 3rd day of August 2022, at Olympia, Washington.

s/ Leena R. Vanderwood
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