No. 100921-6

WASHINGTON STATE SUPREME COURT

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

Respondent,

v.

GERALD HANKERSON,

Appellant.

MEMORANDUM OF AMICUS CURIAE WASHINGTON COMMUNITY ACTION NETWORK

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I. Introduction

This case presents the three-way interplay between a venerable and fundamental constitutional right, the mammon-fueled metastasis of power politics, and technological innovation that may yet preserve the blessings of the former from the hazards of the latter.

Conceived in liberty and dedicated to the proposition that government for the people must needs be government by the people, Washington's Constitution reserves to the people as their "first power" the right to propose legislation by initiative. Yet the sheer expense of collecting in person the signatures needed to present a petition threatens to transform the people's power into a play toy of the privileged.

Facing the challenge to collect in-person voter signatures in the midst of a remorseless and lethal pandemic, Appellant Gerald Hankerson presented a proposal by which the Secretary might consider electronic signatures, subject to constitutionally-required verification of their validity. The Secretary rejected that proposal – out of hand and without fact-based analysis, says Hankerson – but offered no narrower alternative, insisting that his conclusory "no" was "no" enough to end the analysis. Now, before this Court the Secretary jealously defends his discretion to require all who would sign an initiative petition to do in person what they could more easily accomplish remotely, to attain with the fountain pen what they could more safely achieve with a smartphone.

Hankerson challenges the Secretary's refusal to allow the submission of any electronic signatures, period, regardless of their authenticity. In so doing, he raises fundamental and important questions about the continuing role of the constitutional power of initiative in a technologically advanced democracy. This Court should take the opportunity to answer these questions. It should grant Hankerson's petition for review.

II. Identity and Interests of Amicus Curiae

Amicus curiae Washington Community Action Network is dedicated to bringing about a society in which all have a voice in their government, in those who represent them in that government, and in determining our community's values, priorities, and policies.

Washington CAN is dedicated to fighting for racial, gender, and economic justice in Washington State and in our nation as a whole. Its mission is to achieve racial, gender, economic, and social equity in order to establish a democratic society characterized by justice and fairness, with respect for diversity. Its vision is to be one of the nation's most effective economic and racial justice organizations, building a movement of people whose collective action ensures that all communities are healthy, prosperous, and have an equal voice in determining their future.

Washington CAN has experience with preparing and presenting initiative petitions. Such petitions are just one way in which Washington CAN pursues its mission and vision.

The unfortunate fact about initiatives is their significant expense, much of it due to the sheer amount of effort required to collect enough "wet" signatures on paper. This financial barrier threatens to transform the constitutional right of the people to enact legislation into a private tool of privilege and power.

Unequal access to technology poses challenges of its own. Yet large numbers of individuals, including those of limited means, have access to smartphones. This is a potential game-changer. In Washington CAN's experience, access to the internet means access to both the ballot and to the initiative, and drastically reduces the expense of mobilizing concerned citizens to serve their communities and improve their lives.

III. Statement of the Case

Amicus curiae joins in the statement of the case presented by Gerald Hankerson.

IV. Argument

Amicus curiae supports the petition for review. This case implicates the most fundamental right of a free people, to enact laws for their own benefit, a right enshrined in our State Constitution.

A. The people's power to enact laws by initiative is a "fundamental" constitutional right.

Article II, Section 1 expressly reserves to the people "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature." The very "first" such reserved power "is the initiative."[1] Courts recognize it as a fundamental

[1] CONST. art. II, §1(a).

right.[2] It is "the first of all the sovereign rights of the citizen."[3]

The parties themselves do not gainsay the significance of this right, at least in abstract. Neither did the Court of Appeals.

And neither does amicus, which is why Washington CAN supports Hankerson's petition for review.

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[2] *See, e.g., Vangor v. Munro,* 115 Wn.2d 536, 541 (1990); *Save Our State Park v. Hordyk,* 71 Wn. App. 84, 90 (1993).

[3] *State ex rel. Mullen v. Howell,* 107 Wn. 167, 171 (1919).

B. The question presented is not whether the Secretary is required to accept signatures that are not genuine, but whether the Secretary may reject genuine electronic signatures *en masse* without inquiring into their authenticity.

As amicus understands it, the question Hankerson presents is not, as the court below viewed it, whether the Secretary must accept all electronic signatures on initiative petitions. Nor is that question the one posed by the Secretary: whether the Constitution "requires" the Secretary to treat "unverifiable copies" as "valid signatures on initiative petitions."

Rather, the question presented is this: May the Secretary constitutionally reject genuine signatures on an initiative petition *en masse,* with no effort to examine them and verify their authenticity? To put a finer point on it: May the Secretary do so when such a

categorical rejection has a direct, adverse, and discriminatory impact?

Answering this question requires answering another: By which standard should the Court review the constitutionality of the Secretary's differential treatment of voters who submit electronic versus paper signatures?

C. Government action involving a "fundamental" constitutional right calls for strict scrutiny to ensure that the action is narrowly tailored to achieve a compelling governmental interest.

Without saying so, the Court of Appeals effectively limited its review of the Secretary's actions to "rational relation" scrutiny, recasting a question of fundamental constitutional import as one of mere regulatory authority. This minimal scrutiny is limited to evaluating whether governmental action is

rationally related to some legitimate governmental objective.[4] And in looking for some rational relation, courts "may assume the existence of any necessary state of facts which [they] can reasonably conceive."[5]

Yet the constitutional right to the initiative is a fundamental right.[6] Because the differential treatment of voters who submit paper versus electronic signatures "involves a fundamental right," it is subject to strict scrutiny.[7] To survive strict scrutiny,

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[4] *See, e.g.*, *State v. Smith,* 93 Wn.2d 329, 336 (1980).

[5] *Id.*

[6] *See supra* note 2.

[7] *See, e.g.*, *Macias v. Dept. of Labor & Indus.*, 100 Wn.2d 263, 267 (1983) (quoting *Smith*, 93 Wn.2d at 335-36).

government action must be "necessary to the accomplishment" of a "compelling interest."[8]

A "compelling interest" is one that is "both constitutionally permissible and substantial."[9] There is no doubting the government's compelling interest in protecting the initiative process from fraud, manipulation, and abuse, or in enacting legislation "especially to facilitate" the initiative process.[10] This interest surely underlies the Constitution's requirement that initiative petitions be supported by "the number of valid signatures legally required."

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[8] *See, e.g.*, *Nielsen v. Wash. State Bar Ass'n*, 90 Wn.2d 818, 820 (1978).

[9] *See, e.g.*, *id.*

[10] CONST. art. II, §1(d).

But the government likewise has no defensible interest in unnecessarily, unreasonably, or arbitrarily abridging this constitutional "first" power of voters to present initiative petitions.[11] Nor does it have any compelling interest to engage in invidious discrimination, particularly that which would foreclose access to the initiative or the ballot.

Strict scrutiny "is a searching examination," and "it is the government that bears the burden to prove" that its reasons are "clearly identified and unquestionably legitimate."[12] To survive strict scrutiny, government action must not only further a compelling interest, but must be "narrowly" or

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[11] CONST. art. I, §4.

[12] *Fisher v. Univ. of Texas*, 570 U.S. 297, 310 (2013).

"precisely" tailored to achieve a compelling interest.[13] This requirement that government action be narrowly tailored to the government's objective is reflected in the rule that the fundamental right to the initiative must 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."[14] In assessing whether governmental action is narrowly tailored to a compelling interest, the government "receives no deference."[15]

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[13] *Fisher*, 570 U.S. at 308; *Elster v. City of Seattle*, 193 Wn.2d 638, 642 (2019).

[14] *Sudduth v. Chapman*, 88 Wn.2d 247, 251 (1977).

[15] *Fisher*, 570 U.S. at 311.

D. The Court of Appeals did not subject the Secretary's categorical refusal to accept authentic electronic signatures to strict and searching scrutiny.

The court below did not conduct the "searching examination" called for, nor did it abstain from "deferring" to the Secretary. Rather, in a single paragraph the court uncritically accepted the Secretary's proffered justification for its precise actions without acknowledging or addressing Hankerson's concern that these justifications were mere speculation unsupported by any factual inquiry by the Secretary.[16]

Likewise, the court below made no attempt to discern whether the Secretary could have achieved its only constitutionally permissible purpose – protecting the sanctity of the constitutional right to the initiative

[16] *Hobbs v. Hankerson*, 21 Wn. App. 2d 628, 630 (2022).

– through more narrowly tailored means. For example, while the Secretary dismisses Hankerson's proposal outright, there is no indication that the Secretary explored narrower options that would have fostered the submission of electronic signatures and addressed the Secretary's professed concerns with Hankerson's proposal.

E. The Secretary's categorical refusal to accept authentic electronic signatures, and the lower courts' failure to apply strict scrutiny to that refusal, present "significant" constitutional issues meriting this Court's review.

Hence, this case, the questions it presents, and the Court of Appeals' disposition of these questions, are of constitutional importance. They implicate a foundational and most sacred right of all true democracies: the right of the people to choose the laws

and the representatives by which and by whom they will be governed.

In short, this case presents "a significant question of law under the Constitution of the State of Washington." RAP 13.4(b)(3). It therefore warrants review and consideration by this Court.

V. Conclusion

For the foregoing reasons, this Court should grant Gerald Hankerson's Petition for Review.

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DATED this 11th day of July, 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 11th day of July, 2022, at Seattle, Washington.

s/ Cara Lowrance
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