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STATE OF WASHINGTON
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No. 81857-6

SUPREME COURT OF THE STATE OF WASHINGTON

COMMUNITY CARE COALITION OF WASHINGTON *et al.*

Petitioners,

v.

SAM REED, Secretary of State,

Respondent,

and

PEOPLE FOR SAFE QUALITY CARE and LINDA LEE,

Interveners.

INTERVENERS' RESPONSE TO PETITIONERS' REQUEST FOR JUDICIAL NOTICE

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In the guise of a Request for Judicial Notice, Petitioners Community Care Coalition of Washington *et al.* ("Petitioners" or "CCCW") have moved this Court to augment the record with additional documentary evidence. Interveners Linda Lee and People for Safe Quality Care ("Interveners") have no objection to augmentation of the record *per se*. Interveners offered to stipulate to the inclusion of all of the additional documentary evidence Petitioners have sought to bring before the Court in their Request for Judicial Notice, if Petitioners agreed to allow Interveners to submit additional factual evidence in rebuttal. Petitioners declined. While, for the reasons set forth below, the documentary evidence Petitioners seek to add to the record is not a proper subject to judicial notice under ER 201, Interveners do not object to the inclusion of this additional evidence as long as the Court permits Interveners to submit further evidence necessary for this case to be decided on a full and fair factual record.

On July 22 CCCW filed an original Petition in this Court naming the Secretary of State ("Secretary") as Respondent. It was Petitioners' choice to file this action in the Supreme Court rather than in Superior Court where there would have been an opportunity for the development of a factual record. On July 28 the parties stipulated to the intervention of the proponents of I-1029. On July 29 this Court ordered an Agreed Statement of Facts to be submitted by July 31. Counsel for Interveners had limited opportunity to participate in the development of the Agreed Statement of Facts and did not sign the Statement. *See* Agreed Statement

of Facts (July 31, 2008), at p. 12. The Agreed Statement of Facts expressly provides: "This Statement of Facts is not intended to preclude the parties from citing additional factual matters, or matters with respect to which the Court may take judicial notice." *Id.* at ¶ 31.

Petitioners filed their opening brief on August 8, along with a "Request for Judicial Notice." Petitioners asked the Court to take judicial notice under ER 201 of certain documents that Petitioners had obtained from the Secretary's files through a public records act request. *See* Request for Judicial Notice at 1. The documents at issue are attached as Exhibits B-J to the Declaration of Narda Pierce. In their Opening Brief, CCCW relied on this documentary evidence to suggest that Interveners had attempted to manipulate the initiative process and the erroneous verbiage on the signature petitions for I-1029 referring to "the legislature" was not just a mistake. *See* CCCW Brief at 8-10; 34-35.

Interveners sharply dispute CCCW's innuendos and implications. Interveners will be submitting brief declarations and supporting documentary evidence that rebut Petitioners' charges and speculations along with their responsive brief on August 22. The additional evidence Interveners will submit also provide substantiation for the Secretary's determination the I-1029 media campaign made it clear to any potential signer that the measure was an initiative to the People not one to the Legislature. It was Petitioners, not Interveners, who chose to file this case in the Supreme Court rather than in the Superior Court.

That tactical decision should not work to deny Interveners the ability to present relevant evidence. The need for much of the rebuttal evidence Interveners intend to present was not apparent until Petitioners filed their opening brief along with the additional documentary evidence they seek to introduce under the guise of judicial notice.

Evidence Rule 201 governs judicial notice of *adjudicative facts*. ER 201(a). A judicially noticed fact must be "one not subject to reasonable dispute." ER 201(b). An adjudicative fact is not subject to judicial notice unless it is either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable and accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Id.* Washington State Evidence Rule 201 is identical to Fed. R. Evid. 201 and federal authorities are persuasive in construing the state rule. *State v. Royal*, 122 Wn.2d 413, 417-18, 858 P.2d 259 (1993). The 1972 Commentary to Fed. R. Evid. 201 states: "The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite."

CCCW's Request for Judicial Notice does not meet the criteria of ER 201(b) because Petitioners are not seeking the Court take judicial notice of *adjudicative facts*. Instead they are attempting to supplement the record in this

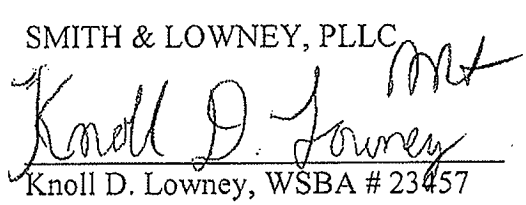
Court through the inclusion of additional evidentiary documents. Petitioners contend all of these documents are proper subjects for judicial notice because they were obtained from the Secretary's files through a public records act. CCCW conflate the prerequisites for the admission of public records as *evidence* under the exception to the hearsay rule set forth in ER 801(8) and RCW 5.44.040 with the requirement for judicial notice under ER 201 that a particular *fact* be "capable and accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."

A document is not an "adjudicative fact" of which judicial notice should be taken. A properly authenticated document admissible under the Rules of Evidence is one way of proving an adjudicative fact. Witness testimony is another method of proving an adjudicative fact, and is in fact the most common method. *See* Commentary to Fed. R. Evid. 201. Petitioners' counsel said they would not agree to inclusion of Interveners' proposed declarations in record before this Court because they were "declarations" not "documents." From an evidentiary perspective, this is a distinction without a difference. Moreover, the only way Interveners can respond to many of the documents CCCW seek to add to the record is through the testimony of witnesses with knowledge of those very documents. Petitioners should not be granted the right to supplement the record and Interveners denied the same right because the Interveners' evidence is testimonial rather than documentary.

Strictly speaking, this Court should deny Petitioners' Request for Judicial Notice because it pertains to evidentiary documents rather adjudicative facts. Many of these documents are of dubious relevance under ER 401-402. Attachments I and J are inadmissible hearsay. But as stated earlier, Interveners would agree to the inclusion of all of CCCW's additional evidence in the record as long as the Court also accepts the supplemental evidence that Interveners intend to proffer.

RESPECTFULLY SUBMITTED this 21st day of August, 2008.

SMITH & LOWNEY, PLLC



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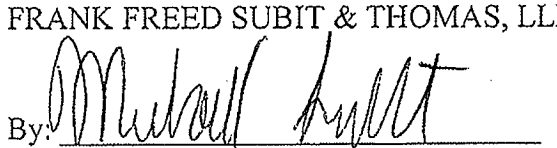
By: 

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CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2008, pursuant to agreement among the parties, I caused to be served the attached INTERVENERS' RESPONSE TO PETITIONERS' REQUEST FOR JUDICIAL NOTICE on the following individuals in the manner indicated:

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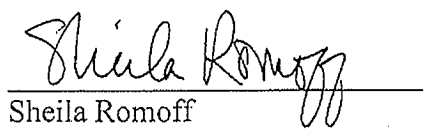
Dated this 21st day of August, 2008.



Sheila Romoff