NO. 81857-6

SUPREME COURT OF THE STATE OF WASHINGTON

COMMUNITY CARE COALITION OF WASHINGTON; HOME CARE OF WASHINGTON, INC.; THE FREDRICKSON HOME; CYNTHIA O'NEILL, a Washington Citizen and Taxpayer; RON RALPH and LOIS RALPH, husband and wife and Washington Citizens and Taxpayers, Petitioners, v. SAM REED, Secretary of State, Respondent, LINDA LEE and PEOPLE FOR SAFE QUALITY CARE, Intervenors/Respondents.	SECRETARY OF STATE'S RESPONSE IN OPPOSITION TO REQUEST FOR JUDICIAL NOTICE

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STATE OF WASHINGTON
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Respondent Secretary of State submits this response in opposition to Petitioners' Request For Judicial Notice. Although many of the documents Petitioners ask the Court to judicially notice are properly subject to such notice, they are irrelevant to this case. Others are *both* irrelevant (and otherwise inadmissible) and not properly subject to judicial

notice. Respondent accordingly requests that the Court deny Petitioners' Request For Judicial Notice.

Petitioners' motion does not explain the purpose for which they seek judicial notice of any of these documents. Initiatives other than I-1029 are not at issue, and this case is not before this Court to make evidentiary rulings or find facts concerning them. Petitioners brought this matter as an original action before the Washington Supreme Court, and sought an agreed statement of facts, briefing, argument, and decision on an accelerated basis. This is not a forum for evaluating, or arguing from, unsworn statements, such as email exchanges among employees of the Office of the Secretary of State. For reasons explained in brief of the Secretary of State that will be filed tomorrow, this case is not properly before this Court at all, but even if it was, it would be here solely on the legal issue of whether the Secretary of State acted arbitrarily and capriciously in accepting the petitions supporting I-1029 and in certifying the measure to the ballot for a vote of the people.

As Petitioners note, in order for a fact to be judicially noticeable, it "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). Exhibits B

through H to the Declaration of Narda Pierce In Support of Request for Judicial Notice (Pierce Declaration) consist entirely of official records of the Secretary of State reflecting the filing of proposed initiatives in his office.[1] They include affidavits filed by initiative sponsors, certificates from the code reviser attesting to their review of proposed initiatives, and letters from the Attorney General's Office conveying ballot titles. These records all satisfy the standard set forth in ER 201(b) for judicial notice.

Those records are, however, irrelevant to the case before the Court. None of the proposed initiatives to which Exhibits B through H relate are at issue in this case. They have nothing to do with the question of whether the Secretary of State properly exercised his discretion to accept petitions supporting I-1029. Accordingly, Respondent would object to their consideration on the basis of relevance. ER 402 (irrelevant evidence inadmissible).

Exhibits I and J to the Pierce Declaration, in contrast, are not judicially noticeable. They consist of internal email messages between and among employees of the Secretary of State's Office. They do not

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[1] Exhibit A to the Pierce Declaration is a copy of a public records request that Petitioners' counsel submitted to the Secretary of State. Respondent understands the Petitioners to have simply supplied the Court with a copy of the letter in order to explain how they obtained the other documents attached to the Declaration, and not to request judicial notice of any fact asserted in their letter. If this understanding is mistaken, then Respondent objects to the Court taking judicial notice of any facts asserted in the letter, because assertions of Petitioners' counsel are not subject to judicial notice. ER 201(b).

contain judicially noticeable facts. ER 201(b). Characterization of, or comments upon, the events addressed in the emails are irrelevant, and consist merely of unsworn hearsay statements. Similarly, Exhibit J consists of an email exchange among staff consisting of unsworn statements that are irrelevant to the Court's analysis. The qualifications of individual participants in the messages to characterize events or draw conclusions concerning them, including legal conclusions, are not established, and are irrelevant to the legal questions before the Court. In addition, to the extent they contain legal conclusions, any relevant legal issues properly would be explored through the briefing of counsel and not through the unexamined statements of lay staff recorded casually in email.

As noted, this case is not before this Court for purpose of trial. In a trial court, the admissibility and significance of exhibits could be elucidated and tested through discovery, including depositions or other testimony to explore their meaning or the basis for any statements made within them. This case is presented for the limited purpose of resolving issues of law, and is based upon an agreed statement of facts. It is not a forum for trial based upon the submission of unsworn statements obtained through a public records request.

Addressing a separate but related matter, Respondent has been advised that Intervenor-Respondents will offer sworn declarations to rebut

speculation regarding facts suggested in Petitioner's opening brief. The Agreed Statement of Facts (ASF) contemplates that the parties may offer "additional factual matters, or matters with respect to which the Court may take judicial notice." ASF, ¶ 31. Sworn declarations do not suffer from the same defects as the unsworn email messages offered by Petitioners, and as Respondent understands it, they will be offered to respond to speculative matters suggested by Petitioners' brief. For these reasons, Respondent would not object to the Intervenor-Respondents' submission of sworn declarations of competent witnesses for these purposes.

RESPECTFULLY SUBMITTED this 21st day of August, 2008.

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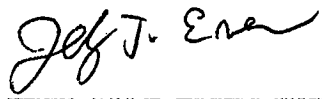
Solicitor General



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