100921-6

No. 83302-2-I
WASHINGTON COURT OF APPEALS, Division I

STEVE HOBBS,[1] in his official capacity as Secretary of State of Washington,
Respondent / Plaintiff below,

v.

GERALD HANKERSON,
Appellant / Defendant below,

JESSE WINEBERRY, SR.; DR. TERRYL ROSS; APRIL FEATHERKILE; LIVID 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 named below

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

[RAP 13.4]

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[1] *Former Secretary of State Kim Wyman was the original plaintiff below; current Secretary of State Steve Hobbs substituted in as plaintiff/respondent after he succeeded Secretary Wyman on November 22, 2021.*

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I. TERSE SUMMARY

Part V of this Petition outlines facts not disputed below. In short: this case involves the collection of signatures for Petitioner's anti-discrimination initiative measure in the second half of 2020 – the same time the highly transmissible coronavirus was disproportionately infecting, hospitalizing, and killing our State's racial minority citizens. To minimize potentially fatal health dangers involved with physically collecting and handling petition signatures *on paper*, Petitioner requested that the Secretary of State accept handwritten petition signatures collected *on line* with the DocuSign system designed for collecting handwritten initiative petition signatures.

The Secretary rejected this request without evaluating (or even looking at) the DocuSign system – and sued Petitioner for a declaratory judgment that her rejecting the DocuSign system without looking at it was a lawful exercise of discretion.

The Court of Appeals affirmed her discretion claim.

This Court should accept review under RAP 13.4(b)(3) because this case involves a significant question of law under our State Constitution. *Infra*, Part VI.B.1. The right to petition for legislation by initiative is the first, foremost, and fundamental constitutional right of every Washington citizen. Article II, §1. State officials cannot diminish or curtail this constitutional right to petition. Article I, §4. And while the State can facilitate a citizen's exercise of their constitutional right to petition, the State cannot frustrate or hamper a citizen's exercise of this fundamental constitutional right. Article II, §1(d).

But curtail, frustrate, and hamper the safe exercise of this constitutional right by our State's minority citizens is exactly what the plaintiff Secretary's decision in this case did.

This Court should also accept review under RAP 13.4(b)(4) because this case involves an issue of substantial public interest that deserves to be addressed and settled by our Supreme Court. *Infra*, Part VI.B.2. Our State

Constitution is premised on the principle that "All political power is inherent in the people", and thus "The first power reserved by the people is the initiative." Articles I, §1 & II, §1 (underline added). This core principle upon which our State Constitution is based confirms the Washington public's substantial interest in the "discretion" State officials have to hamper, frustrate, and suppress the safe exercise of Washington citizens' right to petition for legislation by initiative.

This Court should also accept review under RAP 13.4(b)(1) & (2) because upholding the plaintiff State officer's "discretion" claim conflicts with published decisions of this Court and the Court of Appeals. *Infra*, Part VI.B.3. Upholding the Secretary's summary rejection of the DocuSign signature system without even looking at it conflicts with published decisions holding that lawful discretion requires the government official to examine and give due consideration to the facts involved – not choose instead to remain ignorant of those facts and thus speculate.

II. PETITIONER

The Petitioner (Mr. Hankerson) is a sponsor of the anti-discrimination initiative measure that prompted the Secretary of State to file this suit for a declaratory judgment upholding her refusal to accept any handwritten initiative signature collected with the DocuSign signature system Petitioner proposed using. CP 3 & 6. He is the only party named as the defendant in this suit; President of the NAACP's multi-state conference for Washington, Oregon, & Alaska; and co-sponsor of the Initiative 1234 anti-discrimination measure. CP 3 at ¶9; CP 553-555.

In accordance with the Declaratory Judgment Act, the plaintiff Secretary's Complaint also named the sponsors of other potential initiatives as "interested parties" CP 3-4 at ¶¶10-22.

III. COURT OF APPEALS DECISION

The April 11, 2022 Court of Appeals decision is attached at Appendix A. The legal arguments that Petitioner raised (and that the Court of Appeals therefore rejected) were presented in the Opening & Closing briefs attached at Appendices B & C.

IV. ISSUE PRESENTED FOR REVIEW

Do Articles II, §1 & I, §4 of our State Constitution allow a Secretary of State the "discretion" to categorically refuse to accept for signature examination and verification a voter's handwritten initiative petition signature if the voter's signature is collected with an on line signature system that the Secretary of State refuses to examine or even look at?

V. STATEMENT OF THE CASE

A. Anti-Discrimination Initiatives 1000 & 1776

Initiative 1000, Initiative 1776, and Initiative 1234 were three similar anti-discrimination initiatives in the 2018-2020 time frame.

2018: ***395,938 voters*** signed the Initiative 1000 petitions in 2018.[2]

2019: ***952,053 voters*** voted in favor of I-1000 when Referendum 88 put it to a general election vote in 2019 (although that vote ultimately repealed I-1000 by a 49.44% to 50.56% margin).[3]

First half of 2020: Even though it was similar to the I-1000 measure that 952,053 voters had just voted for, securing the needed 300,000 signatures for Initiative 1776 using the pre-COVID practice of physically collecting and handling petitions with wet ink signatures *on paper* proved unworkable once COVID established its disproportionate infliction of infection, hospitalization, and death in our racial minority communities.[4] Petitioner therefore asked the Secretary of State

[2] *CP 556-557 at ¶8.*
[3] *CP 556-557 at ¶8.*
[4] *CP 557 at ¶9.*

to accept handwritten signatures safely collected *on line*, and in July 2020 the Secretary of State said no.[5]

B. On the Ground Realities Impacting Initiative 1234

Filed in the *second* half of 2020 (August), Initiative 1234 was similar to the Initiative 1000 measure that 952,053 voters had voted for in the fall of 2019, and had a constitutionally-set December 31, 2020 signature deadline.[6]

The record below established five on-the-ground realities with respect to this anti-discrimination initiative:

- Discrimination: Discrimination disproportionately impacts racial minority citizens such as the Petitioner – an undisputed fact candidly confirmed by the plaintiff Secretary's sworn testimony.[7]

- COVID: The ever-mutating, microscopic, and highly contagious corona virus disproportionately infects, hospitalizes, and kills our State's racial minority citizens

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[5] *CP 557 at ¶9; CP 442-450; CP 584-586; CP 374-375.*

[6] *CP 563-583; CP 4 at ¶26; Washington Constitution, Article II, §1(a); accord, Secretary of State's website at https://www.sos.wa.gov/elections/initiatives/initiatives.aspx?y=2020&t=l ("To be certified, petitions must ... be submitted no later than 5:00pm on December 31, 2020").*

[7] *CP 555 at ¶5; CP 298:20-299:18.*

– an undisputed fact candidly confirmed by the plaintiff Secretary's sworn testimony.[8]

- Intimidation: Given the above, it is rational for many minority citizens to fear that forcing them to physically collect and handle wet ink signatures on physical pieces of paper handled by other people will endanger the health and safety of themselves, their families, and their communities – an undisputed fact candidly confirmed by the plaintiff Secretary's sworn testimony.[9]

- Money: Requiring in-person contacts, circulation, and collection of wet ink signatures *on paper* to gather the 300,000 signatures required for an initiative petition costs a lot of money – and as Petitioner's sworn (and undisputed) testimony confirmed, this economic reality hamstrings low income citizens who attempt to exercise their constitutional right to petition for legislation by initiative.[10]

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[8] *CP 555-556 at ¶¶6-7; CP 194:12-14; CP 194-195 at n.25; CP 299:19-300:3.*

[9] *CP 555-557 at ¶¶6-9; CP 558-559 at ¶13; CP 300:4-301:2.*

[10] *RP 26:1-10 ("I am not collecting handwritten signatures for I-1234 in wet ink on paper or on line, for I do not possess the financial resources to pay for the in-person wet ink signature collecting from the approximately 300,000 persons needed to exercise my constitutional rights to petition the Legislature by initiative for enactment of this anti-discrimination legislation, and the on line signature system that the Secretary of State refuses to accept is what would allow the safe collection of initiative petition signatures among the racial minority members like myself who are disproportionally*

C. Collecting & Transmitting Signatures On Line Is Not Novel in Today's World

The on line collection and acceptance of handwritten signatures for legal documents is common in today's world. For example, the Secretary of State's office uses on line or electronically transmitted and stored signatures for:

- contract signatures.[11]
- legal document signatures.[12]
- on line voter registration signatures.[13]
- in person voter registration signatures.[14]
- initiative sponsor signatures.[15]
- referendum sponsor signatures.[16]
- the validation of initiative signatures.[17]

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infected, hospitalized, and killed by the invisible but deadly COVID-19 pandemic that continues to rage on.").

[11] *CP 293:25-295:20.*

[12] *CP 288:25-290:10.*

[13] *CP 266:13-23, 267:8-21, 297:16-298:19.*

[14] *CP 262:12-263:6, 342:24-343:5.*

[15] *CP 297:5-12; CP 296:6-297:4, 344:19-345:12, 351:10-13, 561-562.*

[16] *CP 297:13-15.*

D. The DocuSign On Line Signature System

DocuSign designs on line signature systems widely used and accepted in today's world for signing legal documents – processing literally hundreds of millions of electronic signatures and transactions for government entities, financial institutions, insurance companies, nonprofit entities, educational institutions, real estate transactions, healthcare providers, and legal services – a modern reality the Secretary does not dispute.[18]

Petitioner proposed using the DocuSign on line signature system previously developed for Initiative 1776.[19] A step-by-step, screen-by-screen, demonstration of what a voter has to do to handwrite their signature on the initiative petition and transmit that handwritten signature using this DocuSign system is at CP 220-236. *See also* CP 242 and CP 537-552 (Wyman

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[17] *CP 260:8-21, 261:4-262:11, 340:7-342:5; CP 260:8-21, 261:4-262:11, 340:7-342:5.*

[18] *See CP 197; CP 291:5-20.*

[19] *See CP 197.*

Exhibit 18), which is gone through step-by-step in the sworn testimony of the Secretary's designee at CP 318:3-326:9.

E. Procedural History

Petitioner requested that the Secretary accept for verification handwritten petition signatures that DocuSign would collect with the above DocuSign signature system.[20]

The Secretary rejected Petitioner's request, and on September 17, 2020 filed this suit reiterating that "Secretary Wyman will reject" any handwritten signature collected with the DocuSign system Petitioner proposed, and demanding a declaratory judgment upholding that rejection.[21] The Secretary's sworn testimony later acknowledged that her office did not look at the DocuSign system before rejecting it.[22] Her sworn testimony also admitted that the signature verification standard used to evaluate the validity of a voter's initiative petition signature can be equally applied to a wet ink signature

[20] *CP 557-558 at ¶10; CP 451-455.*
[21] *CP 558 at ¶11; 593-595; CP 6 at¶45.*
[22] *CP 291:21-292:17, 318:6-326:9.*

collected *on paper* or a handwritten signature collected *on line* with the DocuSign system in this case.[23]

Less than 24 hours after receiving the Secretary's rejection, Petitioner filed an Article IV, §4 Petition Against State Officer in this Court.[24] He did so because the Secretary's pre-emptive rejection suppressed signature gathering by the racial minority citizens that Initiative 1234 would protect.[25]

This Court dismissed Petitioner's direct action suit based on the Secretary's argument that her declaratory judgment lawsuit in the superior court provided Petitioner a "plain, speedy, adequate remedy at law."[26]

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[23] *CP 263:20-23, 315:12-316:2, 345:13-346:7; see generally CP 204:20-206:2.*

[24] *CP 558 at ¶12; CP 456-518 (Supreme Court no. 99050-6).*

[25] *CP 456-518; CP 555-559 at ¶¶5-13.*

[26] *CP 398-399 (Secretary's demanding dismissal on the grounds that her declaratory judgment suit provided a "Plain, Speedy, and Adequate Remedy at Law"); CP 164-165 (Supreme Court Commissioner granting dismissal on the grounds that the Secretary's declaratory judgment suit provided Petitioner "a plain, speedy, and adequate remedy at law").*

The superior court denied Petitioner's motion for an expedited summary judgment schedule.[27]

Petitioner nonetheless filed his summary judgment motion less than a week after the Secretary made her authorized designee available for deposition.[28]

His summary judgment motion plainly summarized the relief sought, stating he

> seeks nothing more (and nothing less) than a timely court order upholding and protecting the unabridged exercise of his constitutional right to petition for anti-discrimination legislation by initiative as guaranteed by Article II, §1 & Article I, §4 of our State Constitution.

CP 186:18-26. His summary judgment motion accordingly requested a court order mandating the following:

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[27] *CP 596-598.*

[28] *CP 179-242 (motion); 253:6-22 (deposition transcript); 519-534 (deposition notices).*

> The Secretary of State must accept handwritten petition signatures which are collected using the DocuSign on line signature system [Petitioner] requested.
>
> The Secretary of State must then assess whether the resulting initiative petitions satisfy the three requirements specified in Article II, section 1 for the exercise of a citizen's constitutional right to petition for legislation by initiative – namely:
>
> (1) full text: did the initiative petitions include the initiative's full text?
>
> (2) number: did the total number of valid signatures reach the specified 8%?
>
> (3) deadline: were the petitions filed at least 10 days before the legislative session?

CP 187:3-9.

The Secretary responded with a cross-motion asserting that she had exercised the discretion the Washington Constitution allows to summarily reject any and all handwritten initiative signatures collected *on line* (without looking at the on line signature system proposed).[29] The superior court agreed

[29] *CP 694:6-7 (Secretary's Opposition & Cross-Motion asserting that "The Secretary has exercised her discretion and declined to accept electronic signatures on initiative petitions, instead requiring an original ink signature").*

with the Secretary's discretion argument,[30] and thus denied Petitioner's summary judgment motion and granting the Secretary's on December 28, 2020 (three days before the December 31 signature deadline).[31]

Petitioner appealed and sought direct review in this Court – but on June 30, 2021 this Court transferred his appeal to Division Two.[32]

Then on October 18, 2021 Division Two transferred his appeal to Division One.[33]

And on April 11, 2022, Division One filed the decision attached to this Petition at Appendix A.

VI. ARGUMENT

A. Mootness

Petitioner acknowledges that Initiative 1234 died once the December 31, 2020 signature deadline passed. But the legal

[30] *RP 21:20-24, 44:13-16.*
[31] *CP 643-646.*
[32] *6/30/2021 Order, Supreme Court case no. 99424-2.*
[33] *10/18/2021 Order Transferring Cases, Division II case no. 560143.*

issue noted in Part IV above is not dead. And as the running out of the clock in this suit illustrates, this legal issue is capable of repetition again while again evading review. Mootness case law accordingly dictates that this appeal remains justiciable.[34]

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[34] E.g., Gerstein v. Pugh, *420 U.S. 103, 107 n.2, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (mootness does not defeat constitutional challenge to arrest law because claim was capable of repetition yet evading review);* Roe v. Wade, *410 U.S. 113, 125, 93 S.Ct. 705, 35 L Ed.2d 147 (1973) (mootness does not defeat constitutional challenge to abortion law because claim is capable of repetition yet evading review due to 9-month pregnancy being a temporary condition);* Moore v. Ogilvie, *394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) (mootness does not defeat former candidate's constitutional challenge to election law because the claim was capable of repetition and thus warranted review: "But while the 1968 election is over, the burden which [the decision below] allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935");* Masters, Mates, & Pilots v. Brown, *498 U.S. 466, 473, 112 L.Ed.2d 991, 111 S.Ct. 880 (1991) (mootness does not defeat candidate's challenge to the legality of union's conduct in the union election he lost because was capable of repetition); see also,* In re Marriage of Irwin, *64 Wn.App. 38, 60, 822 P.2d 797 (1992) (Washington appellate courts review moot cases when the error at issue is "capable of repetition, yet evading review");* In re Marriage of Horner, *151 Wn.2d 884, 893, 93 P.3d 124 (2004) (review of moot child relocation case appropriate because claim likely to arise in other child relocation proceedings);* State v. Hale, *94 Wn.App. 46, 52, 971*

B. Tests Established in RAP 13.4(b)

1. Significant Question of Law under the Washington State Constitution

This Court should accept review under RAP 13.4(b)(3) because this case involves a significant question of law under our State Constitution.

First, Foremost, and Fundamental: Our State Constitution is premised on the principle that "All political power is inherent in the people." Article I, §1. Our Constitution accordingly dictates that "the people reserve to themselves the power to propose bills", and thus "The first power reserved by the people is the initiative." Article II, §1 (underline added).

P.2d 88 (1999) (review of moot drug treatment claim appropriate because the question would persist); accord Secretary's April 21, 2021 Response Brief at 12 n.2.

Washington courts have therefore long emphasized that a citizen's constitutional right to petition for legislation by initiative is foremost and fundamental.[35]

The Three Petition Requirements: The words of Article II, §1 impose only three requirements on Washington citizens' exercise of this fundamental constitutional right with an initiative petition:

(1) their petition must include the initiative's full text,

(2) they must collect valid signatures of legal voters equal to 8% of the votes cast for governor in the last election, and

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[35] *Mullen v. Howell, 107 Wash. 167, 168-171, 181 P. 920 (1919) ("the first of all, the sovereign rights of the citizen") (underline added); Schrempp v. Munro, 116 Wn.2d 929, 932 & 935, 809 P.2d 1381 (1991) (courts must "remember that, first, exercise of the initiative process is a constitutional right", and that "The proponents [of an initiative] are exercising a constitutional right to petition."); Save Our State Park v. Hordyk, 71 Wn.App. 84, 90, 856 P.2d 734 (1993) ("The right of initiative is a fundamental constitutional right") (underline added); Save Our State Park v. Board of Clallam County Commissioners, 74 Wn.App. 637, 643, 875 P.2d 673 (1994) ("The right of the people to enact laws through the initiative process is, of course, one of the foremost rights of the citizens of the State of Washington") (underline added).*

(3) for initiatives to the legislature (like Petitioner's Initiative 1234), they must file their petitions with the Secretary of State no less than 10 days before the legislature's regular session.

Article II, §1(a).

Not Diminish or Curtail: Our State Constitution also commands that "The right of petition ... shall never be abridged." Article I, §4. Since Washington law holds that the words used in our State Constitution must be given their

common English dictionary meaning,[36] this not be "abridged" command means not be diminished or curtailed.[37]

Facilitate, Not Hamper: Article II, §1 allows a statute or regulation to facilitate a citizen's exercise of his or her

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[36] *E.g., Zachman v. Whirlpool Financial, 123 Wn.2d 667, 670-71, 869 P.2d 1078 (1994) ("In construing constitutional language, words are given their ordinary meaning unless otherwise defined.... When the common, ordinary meaning is not readily apparent, it is appropriate to refer to the dictionary."); State ex rel. O'Connell v. Slavin, 75 Wn.2d 554, 557, 452 P.2d 943 (1969) ("Words in the constitution must be given their common and ordinary meaning."); State ex rel. Albright v. City of Spokane, 64 Wn.2d 767, 770, 394 P.2d 231 (1964) ("It is axiomatic that words in the constitution must be given their common and ordinary meaning."); see also Brower v. State, 137 Wn.2d 44, 58, 969 P.2d 42 (1998) (citizens' legislative rights under Article II, section 1 "are to be liberally construed in order to preserve them and render them effective") (citing State v. Superior Court for Thurston County, 97 Wash. 569, 577, 166 P. 1126 (1917).*

[37] *E.g., Merriam Webster dictionary: "abridge" means* ***to reduce in scope DIMINISH*** *(https://www.merriam-webster.com/dictionary/abridge); Black's Law dictionary: "abridge" means* ***To reduce or diminish*** *<abridge one's civil liberties> (Black's Law Dictionary (11th ed. 2019, available on Westlaw); Oxford English Dictionary: "abridge" means* ***Curtail*** *(a right or privilege) (https://www.lexico.com/en/definition/abridge); American Heritage Dictionary of the English Language: "abridge" means* ***To limit; curtail*** *(https://ahdictionary.com/word/search.html?q=abridge)*

constitutional right to petition for legislation, expressly stating that "This section is self-executing, but legislation may be enacted especially to facilitate its operation." Article II, §1(d) (underline added).

Washington law holds that the words used in our Constitution carry their commonly understood dictionary meaning, and must be construed to render a citizen's initiative petitioning right to be effective.[38] Washington law accordingly reads the word "facilitate" in Article II, §1 to mean make easy, easier, or less difficult.[39]

This Court has therefore repeatedly emphasized that rules regarding initiatives must facilitate rather than frustrate or

[38] *Supra, footnote 36.*

[39] *Merriam Webster dictionary: "facilitate" means* ***to make easier : help bring about*** *(https://www.merriam-webster.com/dictionary/facilitate); Black's Law Dictionary: "facilitate" means* ***To make the occurrence of (something) easier; to render less difficult*** *(Black's Law Dictionary (11th ed. 2019) available on Westlaw); Oxford English Dictionary: "facilitate" means* ***Make (an action or process) easy or easier*** *(https://www.lexico.com/en/definition/facilitate); American Heritage Dictionary of the English Language: "facilitate" means* ***To make easy or easier*** *(https://ahdictionary.com/word/search.html?q=facilitate).*

hamper citizens' exercising their right to petition for legislation.[40]

But the Secretary's pre-emptive refusal to accept any initiative signature safely collected on line with the DocuSign system in this case did the opposite by frustrating and

[40] *Coppernoll v. Reed, 155 Wn.2d 290, 297 & n.4, 119 P.3d 318 (2005) (Washington citizens' right of initiative "must be vigilantly protected by our courts", and thus "provisions will be liberally construed to the end that the right of initiative be facilitated" and "The principle that statutes are to be construed to 'facilitate,' rather than frustrate, the right of initiative derives from the plain language of the Washington Constitution.") (underline added); Sudduth v. Chapman, 88 Wn.2d 247, 251, 558 P.2d 806 (1977) (citing Rousso v. Meyers, 64 Wn.2d 53, 390 P.2d 557 (1964) (provisions concerning initiatives and referenda "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, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right."); Community Care Coalition of Washington v. Reed, 165 Wn.2d 606, 612, 200 P.3d 701 (2009) ("the legislature's authority to affect the initiative process is limited to facilitating its operation.") (underline added); Schrempp v. Munro, 116 Wn.2d 929, 932, 935, 809 P.2d 1381 (1991) ("it is well to remember that .... legislation concerning the initiative or referendum process may be enacted only to facilitate its operation" and "The proponents are exercising a constitutional right to petition. Legislation impacting that constitutional right can only be enacted "especially to facilitate its operation.") (underline added).*

hampering citizens' exercise of their constitutional right to petition for legislation – especially the racial minority citizens that an anti-discrimination initiative like the one in this case would protect.

In sum: the parties disagree on the scope of the judicial branch's protection of Washington citizens' constitutional right to petition for legislation by initiative – the first, foremost, and fundamental constitutional right of every Washington citizen that the Secretary cannot lawfully diminish, curtail, frustrate, or hamper. This disagreement raises a significant question of law under the Washington Constitution.

The Court of Appeals answer to this protection question was "none" – for its upheld the constitutionality of the Secretary's hampering, frustrating, and curtailing racial minority citizens' exercise of their first, foremost, and fundamental right to petition for legislation by summarily rejecting Petitioner's request to use the DocuSign signature system without examining or even looking at that system.

2. Issue of Substantial Public Interest that Should Be Determined by the Supreme Court

This Court should likewise accept review under RAP 13.4(b)(4) because this case involves an issue of substantial interest to the Washington public that should be addressed and settled by the Washington Supreme Court.

As noted earlier, two core principles upon which our State Constitution is based are that "All political power is inherent in the people", and thus "The first power reserved by the people is the initiative." Articles I, §1 & II, §1 (underline added). One need look no further than these two core principles to see the substantial public interest in a State officer's exercise of "discretion" to restrict or suppress the safe exercise of Washington citizens' constitutional right to petition for legislation by initiative.

Petitioner maintained that the Secretary's "discretion" has limits – e.g., the Secretary must undertake to know and consider the facts relating to the restriction the Secretary imposes on citizens' constitutional right to petition for

legislation by initiative.[41] The Secretary of State disagreed with the Petitioner. It is in the public interest of Washington citizens to have this disagreement concerning the scope of a State officer's exercise of "discretion" to restrict Washington citizens' constitutional right to petition addressed and decided by the Washington Supreme Court.

3. Conflict with Published Decisions of this Court and the Court of Appeals

This Court should also accept review under RAP 13.4(b)(1) & (2) because upholding the Secretary's "discretion" claim conflicts with published decisions of this Court and the Court of Appeals – for prior decisions establish that for the Secretary's rejection of the DocuSign signature system to be a lawful exercise of discretion, the Secretary had to have given due consideration to that DocuSign system in light of the attending facts or circumstances. *See, e.g., Rios v. Washington Dept. of Labor & Industries,* 145 Wn.2d 483, 501, 39 P.3d 961, 970 (2002) (quoting *Hillis v. Dept. of Ecology*,

[41] *Appendix B at 37-40; Appendix C at 12-14.*

131 Wn.2d 373, 383, 932 P.2d 139 (1997); *Merritt School District No. 50 v. Kimm,* 22 Wn.2d 887, 891, 157 P.2d 989, 991 (1945) ("Discretion implies knowledge and prudence and that discernment which enables a person to judge critically of what is correct and proper. It is judgment directed by circumspection. The discretion given by law to certain individuals ... does not mean that they have a power of free decision or that they may pursue an undirected course. The discretion is one regulated by well known and established principles of law and equity.").

But the Secretary's sworn testimony confirmed that her office did not even look at the DocuSign signature system before summarily rejecting it.[42]

4. RAP 13.4(b) Result

As outlined above, this Petition satisfies more that just one of the in RAP 13.4(b) tests for review.

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[42] *CP 291:21-292:17, 318:6-326:9.*

If this Court believes the Secretary's subsequent Answer to this Petition raises a credible opposition to such review, however, Petitioner respectfully requests an opportunity to reply pursuant to RAP 13.4(d).

VII. CONCLUSION

This case concerns the right of Washington citizens to petition for the enactment of legislation by initiative as promised and protected by Article II, §1 & Article I, §4 of the Washington Constitution.

If first, foremost, fundamental constitutional rights matter in our State, our State Constitution does not allow the Secretary "discretion" to hamstring or inhibit disadvantaged citizens' signature gathering during an emergency like a pandemic by summarily refusing to consider any handwritten signature collected with the DocuSign signature system – especially when the Secretary chooses to not even look at that DocuSign system or attempt to understand how it works.

Petitioner respectfully requests that this Court accept review of the issue noted in Part IV of this Petition because he believes that Washington citizens' first, foremost, and fundamental constitutional right to petition for legislation by initiative should actually matter in our State.

RAP 18.17(b) & (c)(10) Word Limit Certification:

I certify that this Petition For Review, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits), contains 4362 words (less than 5000).

RESPECTFULLY SUBMITTED this 11th day of May, 2022.

Foster Garvey PC

s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA No. 14844

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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 served a true and correct copy of the attached document, via electronic mail, on the following:

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

/s/McKenna Filler
McKenna Filler, Legal Practice Assistant

APPENDIX A
to Petition for Review

FILED
4/11/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE HONORABLE STEVE HOBBS,† in his official capacity as Secretary of State of Washington, Respondent, v. GERALD HANKERSON, Appellant, 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; and LARRY JENSEN, Defendants.	)	No. 83302-2-I DIVISION ONE PUBLISHED OPINION

BOWMAN, J. — Washington citizens enjoy the right to enact or change laws by petitioning the legislature under article II, section 1 of the Washington State Constitution. This process requires that sponsors of an initiative submit a petition with "valid signatures" of registered voters to the Office of the Secretary of State (Secretary). Gerald Hankerson appeals a Thurston County Superior Court judgment declaring that the Secretary need not accept electronic voter signatures

† Former Secretary of State Kim Wyman filed the original complaint for declaratory judgment. Steve Hobbs succeeded Wyman on November 22, 2021. We grant the attorney general's unopposed motion to substitute Hobbs for Wyman.

Citations and pin cites are based on the Westlaw online version of the cited material.

on initiative petitions. Because the Secretary has the responsibility to determine the validity of initiative petition signatures and the discretion to accept electronic signatures, we affirm.

FACTS

Hankerson is the Pacific Northwest regional president for the National Association for the Advancement of Colored People (NAACP). In 2020, he cosponsored "Washington Anti-Discrimination Act" Initiative 1234 (I-1234) to the legislature.[1] The stated purpose of I-1234 is " 'to prohibit discrimination against all Washington state residents in public education, public employment, public contracting, and public health and safety without any quotas or preferential treatment.' "

According to Hankerson, health risks associated with the COVID-19 pandemic[2] prevented volunteers from obtaining original, handwritten, "wet ink" signatures for the I-1234 petition. So he asked the Secretary to accept electronic signatures[3] using DocuSign instead. DocuSign is a secure, online platform that allows a person to sign a document "using their index finger or a stylus just as they would a pen." Hankerson wanted to submit a printed copy of the electronic signatures supporting I-1234 to the Secretary.

[1] Hankerson first cosponsored Initiative 1776, a similar initiative to the people. He later withdrew that initiative and reformulated his petition to the legislature as I-1234.

[2] COVID-19 is the World Health Organization's official name for "coronavirus disease 2019," first discovered in December 2019 in Wuhan, China. COVID-19 is a severe, highly contagious respiratory illness that quickly spread throughout the world.

[3] The Uniform Electronic Transactions Act, RCW 1.80.010(10), defines "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."

The Secretary eventually rejected Hankerson's proposal because "[e]very signature submitted on [an initiative] petition sheet must be checked against the voter's signature on file," and the Secretary could not verify the validity of electronic signatures under its existing protocols and procedures. According to the Elections Division director and a Washington State Patrol forensic document examiner, the individualized features of wet ink signatures are critical to the signature verification process. Both expressed concern that "there are likely to be significant differences in the characteristics of [an electronic] signature with the [ink] signature in the voters' registration file," compromising the signature comparison process. They were also concerned that electronic signatures may be forged or manipulated. Hankerson's proposal amplified these concerns because the Secretary could not trace printed copies of signatures to their original source without associated metadata.

To help "resolve this matter quickly and in a manner that ensures all interested parties have an opportunity to participate," the Secretary notified Hankerson that it would "soon be filing a declaratory judgment action." It then filed a complaint in Thurston County Superior Court under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, asking the court to declare that the Secretary "is not required to treat electronic signature representations as signatures when verifying and canvassing signatures on initiative petitions."[4]

[4] The complaint for declaratory judgment listed several sponsors of different initiatives as interested parties. Only Hankerson is appealing the declaratory judgment order.

Meanwhile, Hankerson petitioned the Washington Supreme Court to issue a writ of mandamus directing the Secretary to accept electronic signatures.[5] Hankerson argued that the pandemic disproportionally affected people of color and low-income communities and that without the use of electronic signatures, the Secretary unjustly impeded their constitutional freedom to petition. A Supreme Court commissioner dismissed Hankerson's writ of mandamus, ruling that Hankerson had an adequate remedy at law in the superior court.

Hankerson then moved for summary judgment in superior court. The Secretary cross moved for summary judgment. The court denied Hankerson's motion for summary judgment, granted summary judgment for the Secretary, and issued a judgment declaring that the Secretary "is not required to accept electronic signatures [or] printed copies of electronic signatures on initiative petitions."

Hankerson appeals.

ANALYSIS

Hankerson argues the trial court erred "as a matter of law" by declaring that the Secretary need not accept electronic signatures on initiative petitions.[6] We disagree.

[5] The NAACP was also a petitioner.

[6] Hankerson also argues the Secretary abused its discretion in refusing to accept electronic signatures during a pandemic and refusing to investigate the DocuSign program. Whether the Secretary abused its discretion under these circumstances is beyond the scope of the question raised for declaratory judgment, which is only whether the Secretary has the discretion to reject electronic signatures. As a result, we do not address those arguments.

We review orders, judgments, and decrees under the UDJA de novo. Borton & Sons, Inc. v. Burbank Props., LLC, 196 Wn.2d 199, 205, 471 P.3d 871 (2020). We also review a trial court's order granting a motion for summary judgment de novo. Frisino v. Seattle Sch. Dist. No. 1, 160 Wn. App. 765, 776, 249 P.3d 1044 (2011). We undertake the same inquiry as the trial court and consider the evidence and the reasonable inferences from it in the light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Summary judgment is appropriate where there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c); Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012). By cross moving for summary judgment, the parties concede there are no material issues of fact. Pleasant v. Regence BlueShield, 181 Wn. App. 252, 261, 325 P.3d 237 (2014) (citing Tiger Oil Corp. v. Dep't of Licensing, 88 Wn. App. 925, 930, 946 P.2d 1235 (1997)).

Statutory interpretation is an issue of law also subject to de novo review. Spokane County v. Dep't of Fish & Wildlife, 192 Wn.2d 453, 457, 430 P.3d 655 (2018). When interpreting a statute, we first look to its plain language. HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). We give the words in a statute their common and ordinary meaning. Garrison v. Nursing Bd., 87 Wn.2d 195, 196, 550 P.2d 7 (1976). "A statute that is clear on its face is

not subject to judicial construction." State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Instead, we are " 'required to assume the Legislature meant exactly what it said and apply the statute as written.' " HomeStreet, 166 Wn.2d at 452 (quoting Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)). These rules of statutory construction also apply to administrative rules and regulations. Dep't of Licensing v. Cannon, 147 Wn.2d 41, 56, 50 P.3d 627 (2002).

Under article II, section 1(a) of the Washington State Constitution, initiative petitions must "include the full text of the measure proposed," have the required number of "valid signatures of legal voters,"[7] and be timely filed with the Secretary. The Secretary is then "guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor." Id. § 1(d).

Under RCW 29A.72.170, the Secretary must accept and file a petition that meets the requirements in article II, section 1(a). RCW 29A.72.230 then requires the Secretary to "verify and canvass" the names and signatures on the petition. But neither article II, section 1 nor chapter 29A.72 RCW define "valid signature." So we look to the administrative code to determine the procedures the Secretary must use to verify signatures.

Under WAC 434-379-012(3)(a), the Secretary must accept a petition signature if it is "handwritten and matches the signature in the voter registration record according to the standards in WAC 434-379-020." Under WAC 434-379-

[7] The number of valid signatures of legal voters required "shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election." Art. II, § 1(a).

020, the Secretary "must" evaluate particular characteristics of petition signatures to "determine whether they are by the same writer." That rule reiterates that the petition signature should be handwritten and that its style, general appearance, individual letter proportions, spacing, slants, and other distinctive traits agree with voter registration records. Id.

Article II, section 1(a) of our constitution requires that a petition contain valid signatures of registered voters. The legislature delegated to the Secretary the responsibility to determine whether a petition signature is valid. And the administrative code gives the Secretary broad authority in making that determination. Nothing in the constitution, statutes, or administrative code requires the Secretary to accept electronic signatures.[8] Indeed, under the Uniform Electronic Transactions Act, the legislature empowered the Secretary to create the specific manner, format, process, and procedure by which it can securely use electronic signatures. RCW 1.80.170(1), (2).[9] And even there, the legislature was careful to provide that "this chapter does not require a

[8] Compare with RCW 29A.04.255, which requires the Secretary to accept, under certain circumstances, the following electronic submissions: (1) declarations of candidacy, (2) county canvass reports, (3) voters' pamphlet statements, (4) arguments for and against ballot measures that will appear in a voters' pamphlet, (5) requests for recounts, (6) certification of candidates and measures by the Secretary, (7) direction by the Secretary for the conduct of a recount, (8) requests for ballots, and (9) any other election related document authorized by rule adopted by the Secretary under RCW 29A.04.611.

[9] The Uniform Electronic Transactions Act applies to electronic signatures relating to government "transactions." RCW 1.80.020. A "transaction" is "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." RCW 1.80.010(18). The parties do not contest that the statute applies to gathering signatures in support of an initiative petition.

governmental agency of this state to use or permit the use of . . . electronic signatures." RCW 1.80.170(3).[10]

The trial court did not err in concluding that the Secretary need not accept electronic signatures or printed copies of electronic signatures on initiative petitions. We affirm.

Brennan, J.

WE CONCUR:

Mann, J.

Leach, J.P.T.

[10] Hankerson also appears to argue that the statutory scheme giving the Secretary discretion to reject electronic signatures is unconstitutional as applied. But in his reply brief, Hankerson expressly disavows such a claim, so we do not address it ("while the [Secretary's] Response Brief [on appeal] characterizes Mr. Hankerson's claim as being that a statute is unconstitutional, that characterization misses [Hankerson's] point").

APPENDIX B
to Petition for Review

No. 99424-2

SUPREME COURT OF THE STATE OF WASHINGTON

KIM WYMAN, in her official capacity as Secretary of State of Washington,
Respondent (Plaintiff below),

v.

GERALD HANKERSON,
Appellant (Defendant below),

and

JESSE WINEBERRY, SR.; DR. TERRYL ROSS; APRIL FEATHERKILE; LIVID 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 below)

APPELLANT'S OPENING BRIEF

[corrected to be 12 point font instead of 14 point font]

[NAACP REGIONAL PRESIDENT GERALD HANKERSON]

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I. INTRODUCTION
the Constitutional dispute presented

The first, foremost, and fundamental constitutional right of a citizen under our State Constitution is the right to petition for legislation by initiative. Article II, §1.

Our State Constitution commands that State officials shall not diminish or curtail this constitutional right to petition. Article I, §4.

And it promises that while the State can facilitate a citizen's exercise of their constitutional right to petition, the State cannot frustrate or hamper a citizen's exercise of this right. Article II, §1(d).

In an attempt to exercise his constitutional right to petition for the enactment of anti-discrimination legislation by initiative, appellant Gerald Hankerson co-sponsored the anti-discrimination initiative measure that gave rise to this case: Initiative 1234.

Recognizing the COVID-connected risks and perpetual economic burdens imposed on minority and low income citizens by the physical collection and handling of petition signatures *on paper*, Mr. Hankerson proposed collecting the handwritten signatures of willing voters *on line* with a specific DocuSign on line signature system.

The respondent State Officer responded with a blanket refusal to consider (or even look at) any such handwritten signature – declaring that her State office would only look at a voter's signature *on paper*.

Mr. Hankerson believes that this blanket refusal unconstitutionally suppresses the previously-noted constitutional right of minority and poor Washington voters to petition for the enactment of legislation by initiative.

This case accordingly asks:

> Does the Washington Constitution allow the Secretary of State to categorically refuse to accept for signature verification a voter's handwritten initiative signature collected on-line with the DocuSign on-line signature system Mr. Hankerson proposed?

The Washington Secretary of State filed this lawsuit against Mr. Hankerson insisting that the answer to the above question is "yes".

The Washington superior court answered the above question "yes".

But as the following pages explain, the Washington Constitution answers the above question "no".

II. ASSIGNMENT OF ERROR

One thing the appellant's and respondent's cross-motions agreed on is that this dispute can be decided as a matter of law on the existing factual record.

Mr. Hankerson's summary judgment motion requested an order providing the following relief:

> The Secretary of State must accept handwritten petition signatures which are collected using the DocuSign on line signature system Mr. Hankerson requested.
>
> The Secretary of State must then assess whether the resulting initiative petitions satisfy the three requirements specified in Article II, section 1 for the exercise of a citizen's constitutional right to petition for legislation by initiative – namely:
>
> (1) full text: did the initiative petitions include the initiative's full text?
>
> (2) number: did the total number of valid signatures reach the specified 8%?
>
> (3) deadline: were the petitions filed at least 10 days before the legislative session?

CP 187:1-9.

The Secretary's cross-motion argued the Washington Constitution allows her the discretion to summarily reject any and all handwritten initiative signatures collected on line, and require citizens to only collect physical wet ink signatures on physical pieces of paper instead, and the December 28 court order on appeal granted the Secretary's cross-motion and denied Mr. Hankerson's summary judgment motion. CP 643-646.

A. Error Below

The lower court's denial of the previously-quoted summary judgment order that Mr. Hankerson requested (and its granting the Secretary's order instead) was error as a matter of Washington constitutional law.

B. Legal Issue Pertaining to that Error

Put succinctly, the legal issue pertaining to that lower court error (and thus the issue on appeal) is:

> Does the Washington Constitution allow the Secretary of State to categorically refuse to accept for signature verification a voter's handwritten initiative signature collected on-line with the DocuSign on-line signature system Mr. Hankerson proposed?

III. STATEMENT OF THE CASE
the facts in the record

This case concerns the right of a citizen to petition for the enactment of legislation by initiative as promised and protected by Article II, §1 and Article I, §4 of our State Constitution. The following outlines relevant facts not disputed in the lower court record.

A. The Parties

1. Appellant

The appellant (Gerald Hankerson) is the only party the Secretary of State named as the defendant in this case. CP 3 at ¶9. He is President of the NAACP's multi-state conference for Washington, Oregon, & Alaska, and a co-sponsor of the Initiative 1234 anti-discrimination measure that prompted this case ("I-1234"). CP 553-555.

2. Respondent

The respondent State Officer (Kim Wyman) is the Washington Secretary of State. CP 3 at ¶8. She filed this lawsuit against Mr. Hankerson requesting a declaratory judgment affirming her blanket refusal to accept any handwritten initiative signature collected with the DocuSign on line signature system that Mr. Hankerson proposed using. CP 6.

3. "Interested Parties" Below

The Secretary's declaratory judgment complaint named other initiative sponsors and co-sponsors as "interested parties" who might have an interest in the declaration sought. CP 3-4 at ¶¶10-22. Although one of those "interested parties" filed briefing below, none have appeared after the December 28 order on appeal.

B. The Four Interrelated Anti-Discrimination Measures *(2018-2020)*

1. Initiative 1000 *(2018)*

Initiative 1000 ("I-1000") was an anti-discrimination measure similar to the I-1234 anti-discrimination measure in this case. CP 556-557 at ¶8. I-1000 was an "Initiative To The Legislature" – which meant that if proponents collected the required number of voter signatures by

December 31, 2018 it would be submitted to the legislature for enactment or rejection when it convened in January 2019.[1]

395,938 Washington voters signed the Initiative 1000 petitions before the December 31, 2018 deadline. CP 556-557 at ¶8. The legislature then enacted Initiative 1000 into law during its 2019 legislative session.

2. Referendum 88 *(2019)*

Persons opposed to the legislature's enactment of this anti-discrimination measure responded by filing Referendum 88, which submitted Initiative 1000 to the general electorate to approve or reject on the November 2019 general election ballot.

952,053 Washington voters voted in favor of Initiative 1000. CP 556-557 at ¶8. Slightly more (973,610) voted against. CP 556-557 at ¶8. The 2019 legislature's enactment was accordingly repealed by this 49.44% to 50.56% margin. CP 556-557 at ¶8.

---

[1] *Washington Constitution, Article II, §1(a) ("Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature"). As an initiative to the legislature, Initiative 1000 accordingly had a December 31 signature deadline.*

3. Initiative 1776 *(first half of 2020)*

Included within the 952,053 Washington voters who had voted in favor of Initiative 1000 were persons who wanted to respond with what is commonly called an "Initiative To The People" – which meant that if proponents collected the required number of voter signatures by the July 2020 deadline, it would be submitted to voters for enactment or rejection on the November 2020 ballot.[2]

Their initiative measure (Initiative 1776) was an anti-discrimination measure similar to the Initiative 1000 anti-discrimination measure that **952,053** Washington voters had just voted for. CP 557 at ¶9.

Even though the signature requirement for Initiative 1776 was less than a third of that number (about **300,000**), the old practice of physically collecting and physically handling initiative petitions with wet ink signatures *on paper* proved unfeasible once the invisible and highly contagious COVID virus established its disproportionate infliction of

---

[2] *Washington Constitution, Article II, §1(a) ("Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature"). As an initiative to the people, Initiative 1776 accordingly had a July signature deadline for submission on the November 2020 ballot.*

infection, hospitalization, and death in our racial minority communities. CP 557 at ¶9.

Mr. Hankerson accordingly asked the respondent State Officer to accept handwritten signatures collected *on line*. CP 557 at ¶9. CP 442-450.

In July 2020, the respondent State Officer said no. CP 557 at ¶9; CP 584-586; CP 374-375.

4. Initiative 1234 *(second half of 2020)*

In August 2020, anti-discrimination proponents therefore filed the Initiative 1234 anti-discrimination measure in this case as an "Initiative To The Legislature" – which accordingly had a constitutionally-set December 31, 2020 signature deadline. CP 4 at ¶26.[3]

A full copy of Initiative 1234 is at CP 563-583.

Titled the "WASHINGTON ANTI-DISCRIMINATION ACT (WADA)" (CP 564), its provisions explained that it:

---

[3] *Washington Constitution, Article II, §1(a) ("Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature"). The Secretary accordingly confirmed that the signature deadline for initiatives to the legislature such as Initiative 1234 was December 31, 2020. E.g., https://www.sos.wa.gov/elections/initiatives/initiatives.aspx?y=2020&t=l ("To be certified, petitions must ... be submitted no later than 5:00pm on December 31, 2020").*

- Is "AN ACT Relating to prohibiting discrimination in public health and safety, public education, public employment, and public contracting." (CP 568 at first sentence)

- "[T]he subject of this act is 'Prohibiting discrimination in Washington state.'" (CP 583 at Section 15)

- "The intent of the people in enacting this law is to prohibit discrimination against all Washington state residents in public education, public employment, public contracting, and public health and safety without any quotas or preferential treatment." (CP 567 at Section 4)

And to that end, it had the following three substantive parts:

- "PROHIBITING DISCRIMINATION IN VACCINATION AVAILABILITY"

- "PROTECTION FROM LAW ENFORCEMENT'S DISCRIMINATORY USE OF DEADLY FORCE"

- "PROHIBITION OF DISCRIMINATION AND PREFERENTIAL TREATMENT"

CP 568-582.

C. Five Realities On The Ground

1. Discrimination Reality: *discrimination disproportionately impacts racial minority citizens*

Discrimination disproportionately impacts racial minority citizens such as Mr. Hankerson and his fellow NAACP members. CP 555 at ¶5.

This discrimination reality is an undisputed fact that the Secretary's sworn testimony candidly confirmed is true. CP 298:20-299:18

2. <u>COVID Reality</u>: *this virus disproportionately infects, hospitalizes, & kills racial minority citizens*

The ever-mutating, microscopic, and highly contagious COVID virus disproportionately infects, hospitalizes, and kills our State's racial minority citizens. CP 555-556 at ¶¶6-7; CP 194:12-14; CP 194-195 at n.25.

This infection, hospitalization, and death reality is an undisputed fact the Secretary's sworn testimony confirmed is true. CP 299:19-300:3

3. <u>Intimidation Reality</u>: *hesitancy & fear of physical signature gathering in racial minority communities*

In light of the mutating, invisible, and highly contagious COVID virus's disproportionate threat of danger and death on our State's racial minority citizens, it is rational for many minority citizens to fear that forcing them to physically collect and handle wet ink signatures on physical pieces of paper handled by people across the State will endanger the health and safety of themselves, their families, and their communities. CP 555-557 at ¶¶6-9; CP 558-559 at ¶13.

This intimidating reality is an undisputed fact that the Secretary's sworn deposition testimony confirms. CP 300:4-301:2.

4. <u>Economic Reality</u>: *price disproportionately hamstrings low income citizens*

Requiring in-person contact, circulation, and collection of wet ink signatures *on paper* for the hundreds of thousands of signatures required for an initiative petition costs a lot of money. Mr. Hankerson's sworn (and undisputed) testimony confirmed the fact that this economic reality hamstrings low income citizens like him who attempt to exercise their constitutional right to petition for legislation by initiative. He explained:

> I am not collecting handwritten signatures for I-1234 in wet ink on paper or on line, for I do not possess the financial resources to pay for the in-person wet ink signature collecting from the approximately 300,000 persons needed to exercise my constitutional rights to petition the Legislature by initiative for enactment of this anti-discrimination legislation, and the on line signature system that the Secretary of State refuses to accept is what would allow the safe collection of initiative petition signatures among the racial minority members like myself who are disproportionally infected, hospitalized, and killed by the invisible but deadly COVID-19 pandemic that continues to rage on.

RP 26:1-10.

5. <u>Legal Signature Reality</u>: *on line signatures now common in today's world*

The on line collection and acceptance of electronic images of handwritten signatures for legal documents is common in today's world. Indeed, it has as a matter of fact been the legally accepted norm in our State since June 2020 – for our State's adoption of the Uniform Electronic Transactions Act established:

(1) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(3) If a law requires a record to be in writing, an electronic record satisfies the law.

(4) If a law requires a signature, an electronic signature satisfies the law.

Laws of 2020, chapter 57, Section 7 (effective June 11, 2020).

And while this statute was not a legal mandate to all government agencies, its provisions confirm the modern reality that accepting handwritten signatures transmitted as electronic images on line is, in fact, a widely accepted practice in today's world.

The Secretary's widespread acceptance of handwritten signatures transmitted as electronic images on line further confirms this factual reality. For example:

(a) contract signatures

The Secretary of State's office uses on line signatures for legally binding contracts. CP 293:25-295:20.

(b) legal document signatures

Secretary of State officials email electronic images of their signatures for legal documents. CP 288:25-290:10.

(c) on line voter registration signatures

When a person registers on-line to vote in Washington, the Secretary of State does not require that person to physically submit a wet ink signature on a paper voter registration card. Instead, the Secretary collects and accepts an electronic image of that person's handwritten signature that is transmitted on line for her office to store in that person's voter registration record. CP 266:13-23, 267:8-21, 297:16-298:19

(d) in person voter registration signatures

When a person registers to vote in person by physically signing a paper registration card, the Secretary does not keep that wet ink signature on paper. Instead, she stores an electronic image of it in the voter registration file her office uses to match initiative petition signatures. CP 262:12-263:6, 342:24-343:5.

(e) initiative sponsor signatures

The Secretary collects and accepts the handwritten signatures of Initiative sponsors and co-sponsors that are transmitted as electronic images on line. CP 297:5-12. Thus, for example, the Secretary accepted the handwritten signature of Mr. Hankerson that was transmitted as an electronic image on line to verify the validity of his signature as an Initiative 1234 co-sponsor. CP 296:6-297:4, 344:19-345:12, 351:10-13, 561-562.

(f) referendum sponsor signatures

The Secretary likewise collects and accepts the handwritten signatures of Referendum sponsors and co-sponsors that are transmitted as electronic images on line. CP 297:13-15.

(g) validating initiative signatures

To determine if an initiative signature is a valid signature of that voter, the Secretary matches the initiative petition signature to the person's voter registration file signature. CP 260:8-21, 261:4-262:11, 340:7-342:5. But her office usually does not look at any wet ink signatures on the petition. CP 260:8-21, 261:4-262:11, 340:7-342:5. Instead, her office compares an electronic image of that person's initiative signature (PDF or TIFF) to an electronic image of that person's corresponding signature in the voter registration file. CP 260:8-21, 261:4-262:11, 340:7-342:5.

D. The Resulting Dispute In This Case

1. Mr. Hankerson Proposes Using A Specific DocuSign On Line Signature System

DocuSign is one of the on line signature systems widely used and accepted in today's world for signing legal documents – having processed literally hundreds of millions of electronic signatures and transactions for government entities, financial institutions, insurance companies, nonprofit

entities, educational institutions, real estate transactions, healthcare providers, and legal services. See CP 197.

The Secretary does not dispute this on line signature reality. CP 291:5-20

The specific DocuSign on line signature system that Mr. Hankerson proposed is the one DocuSign developed for the previously-discussed Initiative 1776. See CP 197

A step-by-step, screen-by-screen, demonstration of what a person has to do to handwrite his or her signature on the initiative petition and transmit that handwritten signature using this DocuSign system is at CP 220-236; *see also* CP 242; *cf.* CP 537-552 (Wyman Exhibit 18), which is gone through step-by-step in the sworn testimony of the Secretary's designee at CP 318:3-326:9.

2. The Secretary Rejects Mr. Hankerson's Using this DocuSign System

The Attorney General issued his proposed ballot title wording for the Initiative 1234 petitions on September 3, 2020, and in response to a ballot title challenge filed by opponents of this anti-discrimination measure, the court eventually finalized that wording on September 25. See CP 199.

Meanwhile, in light of the health danger and economic burden that physical *on paper* signature collecting imposes on minority and poor citizens, Mr. Hankerson had requested that the Secretary accept for verification handwritten signatures of willing voters collected *on line* with the specific DocuSign on-line signature system in this case. CP 557-558 at ¶10; CP 451-455.

The Secretary rejected his request on September 17. CP 558 at ¶11; 593-595.

3. The Secretary Sues Mr. Hankerson *(declaratory judgment suit in superior court)*

Later that same day (September 17), the Secretary filed her Complaint against Mr. Hankerson in this case, reiterating that "Secretary Wyman will reject" any handwritten signature collected on line with the DocuSign system Mr. Hankerson had proposed, and asking the court to uphold her refusal. CP 6 at¶45.

Her sworn testimony confirmed that she does not claim Washington law prohibits her from accepting initiative signatures collected with the DocuSign system Mr. Hankerson proposed. CP 353:9-354:25.

Her sworn testimony also acknowledged that she did not look at that DocuSign system before rejecting it. CP 291:21-292:17, 318:6-326:9

Instead, she contends that nothing requires her to look at an initiative signature collected with that DocuSign system if she does not want to. CP 353:9-354:25.

4. NAACP & Mr. Hankerson Sue The Secretary
(direct action suit in this Court)

Less than 24 hours after receiving the Secretary's rejection, the NAACP and Mr. Hankerson filed an Article IV, §4 Petition Against State Officer in this Court. CP 558 at ¶12; CP 456-518 (Supreme Court no. 99050-6).

They did so because the Secretary's pre-emptive refusal hampered and frustrated signature gathering by the low income and racial minority citizens that Initiative 1234 would protect. CP 456-518; CP 555-559 at ¶¶5-13.

5. Commissioner Dismisses NAACP/Hankerson Suit
(on ground that the superior court suit sufficed)

On October 22, this Court's Commissioner dismissed the NAACP/Hankerson direct action suit based on the Secretary's argument that her superior court suit against Mr. Hankerson would provide the NAACP and Mr. Hankerson a "plain, speedy, adequate remedy at law." CP 398-399 (Secretary's demanding dismissal on the grounds that her superior court suit provided a "Plain, Speedy, and Adequate Remedy at Law"); CP 164-165 (Commissioner's dismissing original action on the

grounds that Mr. Hankerson had "a plain, speedy, and adequate remedy at law").

6. Superior Court Issues the December 28 Order on Appeal

The superior court denied Mr. Hankerson's motion for an expedited summary judgment schedule in the plaintiff Secretary's lawsuit against him. CP 596-598.

He filed his summary judgment motion less than a week after the Secretary's authorized designee was made available for deposition. CP 179-242 (motion); 253:6-22 (dep. tpt.); 519-534 (dep. notices).

His motion plainly summarized the relief he sought:

> Mr. Hankerson seeks nothing more (and nothing less) than a timely court order upholding and protecting the unabridged exercise of his constitutional right to petition for anti-discrimination legislation by initiative as guaranteed by Article II, §1 & Article I, §4 of our State Constitution.

CP 186:18-26.

His motion accordingly requested a court order mandating the following:

> The Secretary of State must accept handwritten petition signatures which are collected using the DocuSign on line signature system Mr. Hankerson requested.
>
> The Secretary of State must then assess whether the resulting initiative petitions satisfy the three requirements specified in Article II, section 1 for the exercise of a citizen's constitutional right to petition for legislation by initiative – namely:

(1) full text: did the initiative petitions include the initiative's full text?

(2) number: did the total number of valid signatures reach the specified 8%?

(3) deadline: were the petitions filed at least 10 days before the legislative session?

CP 187:3-9.

The Secretary responded with a cross-motion asserting that the Washington Constitution allows her the discretion to summarily reject any and all handwritten initiative signatures collected *on line*, and require citizens to instead physically collect wet ink signatures *on paper*, and the superior court agreed with the Secretary's discretion argument. RP 21:20-24, 44:13-16.

On December 28, 2020, the superior court entered the order on appeal denying Mr. Hankerson's motion and granting the Secretary's. CP 643-646.

7. Signature Deadline Expires December 31

As noted earlier, Initiative 1234 had a December 31, 2020 signature deadline since it was an initiative to the legislature. *Supra*, Part III.B.4 & footnote 3.

IV. ARGUMENT
applying the law to the facts in the record

A. De Novo Standard of Review

The standard of review is de novo because the issue before this Court presents a question of Constitutional law. *E.g., State v. Murray*, 190 Wn.2d 727, 732, 416 P.3d 1225 (2018) ("We also review questions of constitutional law de novo").

B. Initiative Rights Under Our State Constitution

1. Article II, §1: *Washington Citizens' First Power*

Our State Constitution is expressly premised on the principle that "All political power is inherent in the people." Article I, §1. Our State Constitution accordingly dictates that "the people reserve to themselves the power to propose bills", and thus: "The first power reserved by the people is the initiative." Article II, §1 (underline added).

Washington courts have thus long emphasized that a citizen's constitutional right to petition for legislation by initiative is first, foremost and fundamental. *E.g., Mullen v. Howell*, 107 Wash. 167, 168-171, 181 P. 920 (1919) (when voters amended Article II, §1 in 1912 to establish their initiative and referendum power, they established "the first of all, the sovereign rights of the citizen") (underline added); *Schrempp v. Munro*, 116 Wn.2d 929, 932 & 935, 809 P.2d 1381 (1991) (citing Article II,

section 1(a) to reiterate that courts must "remember that, first, exercise of the initiative process is a constitutional right", and that "The proponents [of an initiative] are exercising a constitutional right to petition"); *Save Our State Park v. Board of Clallam County Commissioners*, 74 Wn. App. 637, 643, 875 P.2d 673 (1994) ("The right of the people to enact laws through the initiative process is, of course, one of the foremost rights of the citizens of the State of Washington") (underline added); *Save Our State Park v. Hordyk*, 71 Wn. App. 84, 90, 856 P.2d 734 (1993) ("The right of initiative is a fundamental constitutional right" (underline added)).

2. Article II, §1(a): *The Three Petition Elements*

Article II, §1(a) states what a citizen must do to exercise this first, foremost, and fundamental constitutional right to petition for legislation by initiative:

> The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.
>
> Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature.

Washington Constitution, Article II, §1(a) (underlines added).

Our Constitution accordingly states only three requirements for a citizen to exercise their first, foremost, and fundamental constitutional right to petition for legislation by initiative:

> (1) full text: their petition must include the initiative's full text.
>
> (2) number: they must collect valid signatures of legal voters equal to 8% of the votes cast for governor in the last election.
>
> (3) deadline: for initiatives to the legislature, they must file their petitions with the Secretary of State no less than 10 days before the legislature's regular session.

Washington Constitution, Article II, §1(a).

3. Article I, §4: *Constitution's Never-Abridge Promise*

Our State Constitution explicitly protects every Washington citizen's right to so petition for legislation by unequivocally promising that "The right of petition ... shall never be abridged." Washington Constitution, Article I, §4.

Washington law holds that the words used in our State Constitution must be given their common English meaning – a meaning determined by referring to the dictionary. *E.g., Zachman v. Whirlpool Financial,* 123 Wn.2d 667, 670-71, 869 P.2d 1078 (1994) ("In construing constitutional language, words are given their ordinary meaning unless otherwise defined.... When the common, ordinary meaning is not readily apparent, it is appropriate to refer to the dictionary."); *State ex rel. O'Connell v.*

Slavin, 75 Wn.2d 554, 557, 452 P.2d 943 (1969) ("Words in the constitution must be given their common and ordinary meaning."); *State ex rel. Albright v. City of Spokane*, 64 Wn.2d 767, 770, 394 P.2d 231 (1964) ("It is axiomatic that words in the constitution must be given their common and ordinary meaning. This is so because the constitution is the expression of the people's will, adopted by them."); *cf. Brower v. State*, 137 Wn.2d 44, 58, 969 P.2d 42 (1998) (citizens' legislative rights under Article II, §1 "are to be liberally construed in order to preserve them and render them effective") (citing *State v. Superior Court for Thurston County*, 97 Wash. 569, 577, 166 P. 1126 (1917)).

Dictionaries define "abridge" to mean diminish or curtail:

- Merriam Webster dictionary defines "abridge" to mean: **to reduce in scope DIMINISH**[4]
- Black's dictionary defines "abridge" to mean: **To reduce or diminish** <abridge one's civil liberties>[5]
- Oxford dictionary defines "abridge" to mean: **Curtail** (a right or privilege)[6]
- American Heritage dictionary defines "abridge" to mean: **To limit; curtail**[7]

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[4] *Merriam Webster Dictionary (https://www.merriam-webster.com/dictionary/abridge).*

[5] *Black's Law Dictionary (11th ed. 2019) (on Westlaw).*

[6] *Oxford English Dictionary (https://www.lexico.com/en/definition/abridge).*

Our State Constitution's promise that a citizen's right to petition for legislation by initiative shall never be "abridged" accordingly means that as long as a citizen's initiative petition satisfies the three previously-noted elements specified in Article II, §1 (full text, valid signature number, & filing deadline), that citizen's constitutional right to petition for legislation shall never be diminished or curtailed by a State Official such as the plaintiff in this case.

(Although Mr. Hankerson's lower court briefing explained this same diminish-or-curtail legal meaning of "abridge" in Article I, §4 (*e.g.,* CP 189-190), the Secretary's briefing below did not claim or argue otherwise.)

4. Article II, §1(d):
Constitution's Facilitate-But-Not-Hamper Command

Article II, §1 allows a statute or regulation to facilitate a citizen's exercise of his or her constitutional right to petition for legislation, stating that "This section is self-executing, but legislation may be enacted especially to facilitate its operation." Washington Constitution, Article II, §1(d) (underline added).

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[7] *American Heritage Dictionary of the English Language (https://ahdictionary.com/word/search.html?q=abridge)*

As noted earlier, Washington law holds that the words used in our Constitution carry their commonly understood dictionary meaning, and must be construed to render a citizen's initiative petitioning right effective. *Supra*, Part IV.B.3.

Dictionaries define "facilitate" to mean make easy, easier, or less difficult:

- Merriam Webster dictionary definition of "facilitate": **to make easier : help bring about**[8]
- Black's dictionary definition of "facilitate": **To make the occurrence of (something) easier; to render less difficult**[9]
- Oxford dictionary definition of "facilitate": **Make (an action or process) easy or easier**[10]
- American Heritage dictionary definition of "facilitate": **To make easy or easier**[11]

Citing the above "facilitate" provision, this Court has repeatedly emphasized that a statute **cannot frustrate or hamper** a citizen's exercise of their right to petition for legislation by initiative. *E.g., Coppernoll v. Reed*, 155 Wn.2d 290, 297 & n.4, 119 P.3d 318 (2005) (Washington

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[8] *Merriam Webster Dictionary (https://www.merriam-webster.com/dictionary/facilitate).*

[9] *Black's Law Dictionary (11th ed. 2019) (on Westlaw).*

[10] *Oxford English Dictionary (https://www.lexico.com/en/definition/facilitate).*

[11] *American Heritage Dictionary of the English Language (https://ahdictionary.com/word/search.html?q=facilitate).*

citizens' right of initiative "must be vigilantly protected by our courts", and "provisions will be liberally construed to the end that the right of initiative be facilitated", and this "principle that statutes are to be construed to 'facilitate,' rather than frustrate, the right of initiative derives from the plain language of the Washington Constitution." (underlines added)); *Sudduth v. Chapman*, 88 Wn.2d 247, 251, 558 P.2d 806 (1977) (provisions concerning initiatives and referenda "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, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right" (underlines added)) (citing *Rousso v. Meyers*, 64 Wn.2d 53, 390 P.2d 557 (1964); *State ex rel. Howell v. Superior Court*, 97 Wash. 569, 577-578, 166 P. 1126 (1917); *State ex rel. Case v. Superior Court*, 81 Wash. 623, 143 P. 461 (1914)); *Community Care Coalition of Washington v. Reed*, 165 Wn.2d 606, 612, 200 P.3d 701 (2009) ("the legislature's authority to affect the initiative process is limited to facilitating its operation") (underlines added); *Schrempp v. Munro*, 116 Wn.2d 929, 932, 935, 809 P.2d 1381 (1991) ("it is well to remember that .... legislation concerning the initiative or referendum process may be enacted only to facilitate its operation"; "The proponents are exercising a constitutional right to petition. Legislation

impacting that constitutional right can only be enacted 'especially to facilitate its operation.'" (underlines added)).

In short: the "facilitate" command in Article II, §1(d) dictates that initiative statutes (or Secretary of State regulations promulgated under such statutes) can make it easy, easier, or less difficult for a citizen to satisfy the three previously-noted elements specified in Article II, §1 (full text, valid signature number, & filing deadline). But they cannot hamper or frustrate a citizen's satisfying those three elements.

(Although Mr. Hankerson's lower court briefing explained this same facilitate-not-hamper-or-frustrate legal meaning of "facilitate" in Article II, §1(d) (*e.g.,* CP 190-192), the Secretary's briefing below did not claim or argue otherwise.)

C. The Secretary's Article II, §1(a) Violation

As the following pages explain, the DocuSign on line signature system in this case allows disadvantaged citizens like Mr. Hankerson to meet all three elements specified in Article II, §1(a) to exercise their first, foremost, and fundamental constitutional right to petition for legislation by initiative (full text, valid signature number, & filing deadline). The Secretary's blanket rejection of Mr. Hankerson's request to use that DocuSign system for his anti-discrimination initiative accordingly

suppressed and violated the constitutional petitioning right of citizens like him that is promised by Article II, §1(a).

1. Form: *the text element*

The Secretary's sworn testimony confirmed that the full text requirement is satisfied as long as the initiative's full text is "available to the voter at the time that they made the decision to sign." CP 270:20-272:1, 275:18-276:4; see also CP 305:7-306:23 (Secretary has no authority to refuse to accept petition even if the full initiative text on it is "really really tiny").

The Secretary's above testimony makes sense. For example, we are all familiar with the stereotypical signature gatherer carrying a clipboard with petition sheets that he or she gets people to sign without flipping the page over to even see the full initiative text printed on the back.

The DocuSign on line signature system in this case satisfied the above full-text-available requirement – for as the step-by-step screenshots from that system illustrate, it makes the initiative's full text available for the person to read (and expand on screen to whatever reading size a person wants) before that person signs. See CP220-236. The Secretary's sworn testimony accordingly confirmed that the DocuSign system's petition form is acceptable, and that the Secretary would accept that petition if it was a

physical piece of paper with a wet ink signature on it. CP 324:19-325:2 (would accept wet ink signature on the 11th page of Wyman Exhibit 18 [CP 232 & 457]); CP 325:9-24 (would accept wet ink signature on the 14th page of Wyman Exhibit 18 [CP 234 & 550]); accord, CP 313:21-315:3 (would accept wet ink signature on the last page of Wyman Exhibit 9 [CP 455]).

2. Time: *December 31, 2020 deadline element*

As noted earlier, the signature filing deadline specified in Article II, §1(a) for Mr. Hankerson's anti-discrimination initiative was December 31, 2020. *Supra*, Part III.B.4 & footnote 3. That deadline cannot support the Secretary's September 17 rejection of the DocuSign system in this case because that rejection was more than 3 months before that deadline.

3. Signature: *the number & validity element*

(a) Number

There is no dispute about the number of signatures constitutionally required. The respondent agrees that 259,622 was the 8% number specified in Article II, §1(a) for Mr. Hankerson's initiative,[12] and that the

[12] *E.g., https://www.sos.wa.gov/elections/initiatives/initiatives.aspx?y=2020&t=l ("To be certified, petitions must contain the signatures of at least 259,622 registered voters"). By way of contrast, a referendum petition needs only*

Secretary warned initiative proponents like Mr. Hankerson that they needed to collect at least 325,000 signatures to account for duplicate signatures, non-registered voter signatures, unmatchable signatures, etc.. CP 309:1-310:1.[13]

Instead, the Secretary's dispute with Mr. Hankerson turns on what our Constitution considers to be a valid signature.

(b) Validity

Pursuant to the previously-noted facilitate-but-not-hamper command of Article II, §1(d), the legislature enacted RCW 29A.72.170 to facilitate the Secretary's application of our State Constitution's three initiative petitioning requirements (form, deadline, & signatures). And as the Secretary's prior court filings against Mr. Hankerson have admitted, RCW 29A.72.170 mandates that she "must accept" any timely submitted

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half as many signatures as a referendum – thus the number for referendum petitions filed this year is 129,811. https://www.sos.wa.gov/elections/initiatives/referendum.aspx?y=2020 .

[13] *Accord, e.g., https://www.sos.wa.gov/elections/initiatives/initiatives.aspx?y=2020&t=l ("It is recommended that sponsors submit at least 325,000 signatures to allow for invalid signatures.") (underline added); https://www.sos.wa.gov/elections/initiatives/faq.aspx ("Since a certain percentage of petition signatures are normally found to be invalid due to duplication and non-registration, it is recommended that sponsors file as many signatures as possible.") (underline added); https://www.sos.wa.gov/elections/initiatives/instructions.aspx at PETITIONS section ("The average rate of invalid signatures on petitions is 15 percent. We strongly suggest obtaining at least 20 percent more signatures than the minimum threshold requires") (underline added).*

initiative petition bearing the required initiative information unless it "clearly bears insufficient signatures." CP 108 (quoting RCW 29A.72.170, underline added); accord, CP 203:3-207:14 (quoting RCW 29A.72.170 & corresponding case law).

The Secretary's court filings against Mr. Hankerson also confirm that WAC 434-379-012 & -020 govern whether a petition signature is "valid". CP 109-110.

As the following pages detail, that is dispositive because WAC 434-379-012 (entitled "Acceptance of signatures") mandates that if a person's signature "Is handwritten and matches the signature in the voter registration record according to the standards in WAC 434-379-020, the signature must be accepted." WAC 434-379-012(3)(a).

And WAC 434-379-012 (entitled "Signature verification standard") specifies the five characteristics that "must be utilized" to evaluate the validity of a voter's initiative signature – five characteristics that the Secretary's sworn testimony confirmed can be equally applied to a wet ink signature collected *on paper* or a handwritten signature collected *on line* with the DocuSign system in this case. CP 263:20-23, 315:12-316:2, 345:13-346:7; see generally CP 204:20-206:2.

Starting with the statute cited by the Secretary, it states in full:

RCW 29A.72.170.

> Petitions--Acceptance or rejection by secretary of state
>
> The secretary of state 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.72.110, 29A.72.120, or 29A.72.130.
>
> (2) That the petition clearly bears insufficient signatures.
>
> (3) That the time within which the petition may be filed has expired.
>
> In case of such refusal, the secretary of state shall endorse on the petition the word "submitted" and the date, and retain the petition pending appeal.
>
> If none of the grounds for refusal exists, the secretary of state must accept and file the petition.

RCW 29A.72.170 (underline added).

This Court has accordingly held that the Secretary can refuse to accept an initiative petition for only

> three specified grounds, *i.e.*, its form, insufficiency of number of signatures, or timeliness. "If none of the grounds for refusal exists, the secretary of state *must* accept and file the petition."

Schrempp v. Munro, 116 Wn.2d 929, 934, 809 P.2d 1381 (1991) (italics in original) (note: RCW 29A.72.170 was previously codified as RCW 29.79.150); *accord*, *Ball v. Wyman*, 435 P.3d 842, 843-844 (2018) ("the statute governing certification of initiatives gives the secretary very limited authority to refuse to certify an initiative petition to the ballot:

(1) for failure to substantially follow certain form requirements not applicable here, (2) for 'clear[ ]' failure to collect sufficient signatures, or (3) for failure to file the initiative petition on time. RCW 29A.72.170. ... As the secretary readily admits ... her duty in certifying or declining to certify the petitions is limited by RCW 29A.72.170." (underline added).

Since the "form" and "time" elements are not the dispute in this case (*supra*, Parts IV.C.1 & C.2), the Secretary's rejection must be based on the "petition clearly bears insufficient signatures" element.

As noted earlier, however, the Secretary's own "Acceptance of signatures" WAC regulation is clear: if a person's signature "Is handwritten and matches the signature in the voter registration record according to the standards in WAC 434-379-020, the signature must be accepted." WAC 434-379-012(3)(a) (underline added) [this "WAC 012" is also at CP 535 (Wyman dep. Exhibit 15)].

The Secretary's corresponding "Signature verification standard" WAC regulation is also clear. It specifically states the five signature characteristics that determine a signature's validity:

> The following characteristics must be utilized to evaluate signatures to determine whether they are by the same writer:
>
> (1) The signature is handwritten.
>
> (2) Agreement in style and general appearance, including basic construction, skill, alignment, fluency, and a general uniformity and consistency between signatures;
>
> (3) Agreement in the proportions of individual letters, height to width, and heights of the upper to lower case letters;
>
> (4) Irregular spacing, slants, or sizes of letters that are duplicated in both signatures;
>
> (5) After considering the general traits, agreement of the most distinctive, unusual traits of the signatures.
>
> A single distinctive trait is insufficient to conclude that the signatures are by the same writer. There must be a combination or cluster of shared characteristics. Likewise, there must be a cluster of differences to conclude that the signatures are by different writers.

WAC 434-379-020 (underline added) [this "WAC 020" is also at CP 536 (Wyman dep. Exhibit 16)].

The above signature acceptance and signature verification standards do not say a physical wet ink signature on a physical piece of paper is required for a signature to be verified as a valid voter signature.

That of course makes sense since the general rule under Washington law is now that "If a law requires a signature, an electronic signature satisfies the law." *Supra*, Part III.C.5.)

The fact that signature validity standards do not require a physical wet ink signature *on paper* also makes sense because, as the Secretary's sworn testimony admitted, the above signature verification characteristics

can be equally applied to the handwritten signature a person transmits *on line* with the DocuSign system in this case. CP 263:20-23, 315:12-316:2, 345:13-346:7.

The Secretary's sworn testimony also admitted that her office usually does not even look at wet ink signatures on paper when matching signatures to verify their validity. Instead, initiative petition signatures are scanned to create electronic images of those signatures, and those electronic images are then displayed on a screen that a signature checker compares to the electronic image of that voter's signature in the State's voter registration file that is concurrently displayed on another screen. CP 260:8-21, 261:4-262:11, 340:7-342:5 This further confirms that a physical wet ink signature on a physical piece of paper is not required to verify whether a signature is the valid signature of a registered Washington voter.

The fact that the WAC signature validity standards do not require a wet ink signature on a physical piece of paper also makes sense because the handwritten signature a person transmits on line with the DocuSign system in this case is, in fact, a handwritten signature. *E.g.,* CP 228, 229, 231. This Court has recognized that a "presumption of validity" attaches to initiative signatures, and thus "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) (Initiative 322; footnote reference "3" in first quote omitted).

In short: the record does not support a conclusion that handwritten initiative petition signatures that the DocuSign system in this case enables a minority or low income citizen like Mr. Hankerson to collect are not "valid" signatures under Washington law.

4. Article II, §1(a) conclusion

The above pages confirm that the DocuSign on line signature system in this case allows disadvantaged Washington citizens like Mr. Hankerson to meet the three elements specified in Article II, §1(a) to exercise their first, foremost, and fundamental constitutional right to petition for legislation by initiative (text, deadline, & signatures). *Supra*, Parts IV.C.1-C.3. The respondent State Officer's summarily rejecting Mr. Hankerson's request to use that DocuSign system for his anti-discrimination initiative accordingly violated the constitutional petitioning right of minority and low income citizens like him that is promised by Article II, §1(a).

D. The Secretary's Article I, §4 Violation

The above pages also explained how the respondent State Officer's summarily rejecting the DocuSign on line signature system in this case in fact operated to diminish and curtail the constitutional right of

disadvantage citizens like Mr. Hankerson to petition for anti-discrimination legislation by initiative. The respondent State Officer's summarily rejecting his request to use that DocuSign system accordingly violated the never-abridge command that Article I, §4 promises to minority and low income citizens like him to protect their first, foremost, and fundamental constitutional right to petition for anti-discrimination legislation.

E. The Secretary's Article II, §1(d) Violation

Finally, the above pages similarly show that summarily rejecting the DocuSign on line signature system in this case in fact operated to hamper and frustrate the constitutional right of disadvantage citizens like Mr. Hankerson to petition for anti-discrimination legislation by initiative. The respondent State Officer's summarily rejecting his request to use that DocuSign system accordingly violated the facilitate-not-hamper command of Article II, §1(d) which protects the first, foremost, and fundamental constitutional right of minority and low income citizens like him to petition for anti-discrimination legislation.

F. Defenses Proposed Below Do Not Nullify The Constitution

1. Say "Discretion"

The superior court adopted the Secretary's defense that her blanket refusal to accept or examine any handwritten signature collected on line

could not violate petitioning rights under Article II, §1 & Article I, §4 because RCW 1.80.170 gave her the discretion to do that. RP 21:20-24, 44:13-16. But that defense lacks legal merit for several reasons:

First, RCW 1.80.170 does not say the Secretary of State has the discretion to violate a citizen's constitutional petitioning rights.

Second, even if it did, a statute cannot grant State Officials the discretion to violate constitutional rights. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 649, 100 S.Ct. 1398, 1414–1415, 63 L.Ed. 2d 673 (1980) (government "has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative"); *Louisiana v. Texas*, 176 U.S. 1, 25–26, 20 S.Ct. 251, 260, 44 L.Ed. 347 (1900) (Harlan, J., concurring) (a government official has "no immunity from judicial authority exerted for the protection of the constitutional rights of others against his illegal action. He cannot be invested by his state with any discretion or judgment to violate the Constitution"); *United States v. Cooks*, 52 F.3d 101, 105 (5th Cir. 1995) (even when a government official has great discretion, that does not include discretion to violate constitutional guarantees); *U.S. Fidelity & Guaranty v. U.S.*, 837 F.2d 116, 120 (3rd Cir. 1988) ("conduct cannot be discretionary if it violates the Constitution"; government officials "do not possess discretion to violate constitutional rights").

Third, even if a statute could and did grant the Secretary such discretion, she would have had to in fact exercise that discretion when she decided to refuse Mr. Hankerson's request to accept handwritten petition signatures collected on line with the DocuSign signature system in this case.

And to have done that, she had to have given due consideration to that DocuSign system in light of the attending facts or circumstances. *See, e.g., Rios v. Washington Dept. of Labor & Industries,* 145 Wn.2d 483, 501, 39 P.3d 961, 970 (2002) (quoting *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997); *Merritt School District No. 50 v. Kimm,* 22 Wn.2d 887, 891, 157 P.2d 989, 991 (1945) ("Discretion implies knowledge and prudence and that discernment which enables a person to judge critically of what is correct and proper. It is judgment directed by circumspection. The discretion given by law to certain individuals ... does not mean that they have a power of free decision or that they may pursue an undirected course. The discretion is one regulated by well known and established principles of law and equity.").

But the Secretary did not so exercise discretion when she decided to refuse Mr. Hankerson's request to accept handwritten petition signatures collected with the DocuSign on line system in this case. Her designee's sworn testimony admitted that her office did not even look at

the DocuSign on line signature system before rejecting Mr. Hankerson's request. CP 291:21-292:17, 318:6-326:9

2. <u>Be Bound By Tradition</u>

Another justification given to Mr. Hankerson when the Secretary rejected his request to accept handwritten signatures collected on line was that "For more than 100 years, sponsors have submitted petitions on which handwritten signatures have been applied to physical sheets of paper." CP 374 at 2nd paragraph; accord, CP 283:3-284:11 & 293:6-24 (wet ink signatures on physical pieces of paper is required because that's what's been done for 100 years).

Mr. Hankerson acknowledges this historical fact is true.

But on May 16, 1954, another historical fact was similarly true.

For more than 100 years, public schools in our country were racially segregated. The Supreme Court's May 17, 1954 *Brown v. Board of Education* decision proved, however, that the truth of that historical fact did not make racial segregation constitutional. *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873 (May 17, 1954).

Similarly here, the fact that initiative sponsors did not in the past collected signatures on line does not make State government's blanket rejecting of any and all signatures using the DocuSign on line signature

system in this case constitutional. Especially since, as a pure matter of law, the WAC acceptance and verification standards for determining if a handwritten signature is a valid signature of a legal voter can be applied to that signature regardless of whether it is electronically collected *on line* or physically collected *on paper*. This dispositive fact is even more significant now in 2021, as the ever-mutating, microscopic, and highly contagious COVID virus lingers to disproportionately threaten disadvantaged Washington citizens like Mr. Hankerson and their families with infection, hospitalization, and death.

Put bluntly: yesterday is not today. And as this Court recognized last summer:

> "Too often in the legal profession, we feel bound by tradition and the way things have 'always' been"
>
> "this is not how a *justice* system must operate"
>
> "we are capable of taking steps to address it, if only we have the courage and the will"

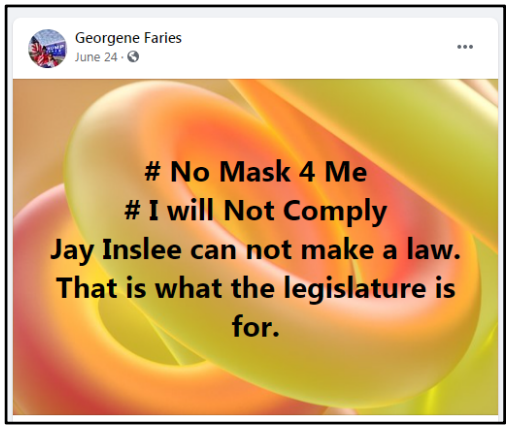
Washington Supreme Court's June 4, 2020 Open Letter regarding racial injustice at p.1 (italic font in original).

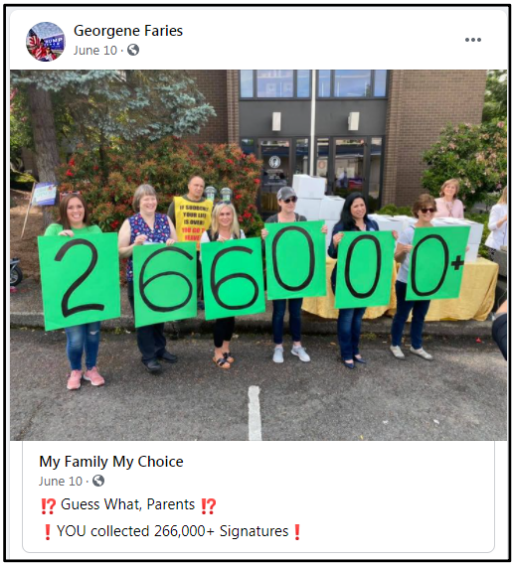
In short: "tradition" cannot override the suppression of initiative rights in this case.

3. Be Reckless

Another justification given to Mr. Hankerson was that racial minority citizens like him should have used the methods that the Referendum 90 sponsors had "proven to be successful" to collect 240,000 referendum signatures. See CP 622:18-23.[14] The record below shows the methods, health precautions, etc. that this argument insists anti-discrimination proponents like Mr. Hankerson should have used. CP 622-628.

Those "proven successful" measures can be summarized in two words: "be reckless".





CP 622-628 (photos & public health order violations, etc).

---

[14] *With respect to the actual 240,000 signature number stated above, the Secretary's website confirmed that while 264,637 signatures were submitted, only 7186 of the 7940 signatures she sampled were valid. https://www.sos.wa.gov/elections/initiatives/petition-status.aspx. The resulting math is: 7186/7940=.90503778.*
*264,637 x .90503778=**239,506**.*

The fact that "successful" R-90 supporters chose to recklessly endanger others does not make it constitutional for the State to require anti-discrimination supporters like Mr. Hankerson to do the same. Put bluntly, this "be reckless" defense is at best a claim that since R-90 supporters played Russian roulette, our Constitution requires Initiative 1234 supporters to play Russian roulette too. (But with the added disproportionality twist that while white citizens play with just one bullet in the cylinder, racial minority citizens are handed a gun loaded with three bullets.)

In short: a citizen's alternative option to be reckless is not a defense to a State Officer's constitutional violation.

4. Eat Cake

The response attributed to Marie Antoinette when told peasants had no bread to eat was: "so let them eat cake!"

One of the justifications offered with respect to the blocking of Mr. Hankerson's initiative petition request in this case is that his constitutional right to petition for legislation by initiative is not his only available alternative – for he can do something else instead like ask a legislator to introduce the kind of legislation he wants. *E.g.*, Respondent's Answer To Statement Of Grounds For Direct Review at 11; *see also*, RP 47:19-48:2.

But that disregards the underlying reason our Constitution makes the right to petition by initiative the first and foremost fundamental right of Washington citizens. The fact that lobbying ("cake") is a theoretical available side dish does not make it constitutional to push constitutionally mandated bread further out of reach for disadvantaged citizens in our State.

5. Time's Up

Another suggestion below was this case is now moot because the September/October/November/December court proceedings effectively ran out the clock. *E.g.,* RP 28:3.

Mr. Hankerson admits that his Initiative 1234 died once the December 31 deadline passed. But the constitutional issue in this case is not dead. Unless the Secretary's blanket refusal to look at any signature collected on line with this DocuSign system is reversed, this issue will continue to arise again and always be "moot" by the time it reaches this Court.

Courts have long recognized that even if a case becomes technically moot, it still remains justiciable when – as here – claims in the case are "capable of repetition yet evading review." *E.g., Gerstein v. Pugh*, 420 U.S. 103, 107 n.2, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (mootness does not defeat constitutional challenge to arrest law because

claim was capable of repetition yet evading review); *Roe v. Wade*, 410 U.S. 113, 125, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (mootness does not defeat constitutional challenge to abortion law because claim is capable of repetition yet evading review due to 9-month pregnancy being a temporary condition); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969) (mootness does not defeat former candidate's constitutional challenge to election law because the claim was capable of repetition and thus warranted review: "But while the 1968 election is over, the burden which [the decision below] allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935"); *Masters, Mates, & Pilots v. Brown*, 498 U.S. 466, 473, 112 L.Ed.2d 991, 111 S.Ct. 880 (1991) (mootness does not defeat candidate's challenge to the legality of union's conduct in the union election he lost because was capable of repetition); see also, *In re Marriage of Irwin*, 64 Wn.App. 38, 60, 822 P.2d 797 (1992) (Washington appellate courts review moot cases when the error at issue is "capable of repetition, yet evading review") (quoting *Roe v. Wade*); *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004) (review of moot child relocation case appropriate because claim likely to arise in other child relocation proceedings); *State*

v. Hale, 94 Wn.App. 46, 52, 971 P.2d 88 (1999) (review of moot drug treatment claim appropriate because the question would persist).

6. Voter Stupidity

Another rationalization offered in defense of the Secretary's blanket refusal to accept any handwritten initiative signature collected with the DocuSign on line system in this case is that a person using that system might not take enough care to submit a signature that matches that person's signature in their voter registration record. But as confirmed below, the DocuSign system in this case explicitly tells the person signing to practice and make sure the signature he or she writes on line matches their signature in the voter registration records. (Which is more than what wet ink/physical paper petitions tell a voter quickly scribbling his or her signature to stop being hounded by a pesky paid signature gatherer in public.)

For example, this DocuSign signature system for the Initiative 1776 petition (Wyman Exhibit 18) tells the voter signing the initiative petition the following on the very first screen:

> IMPORTANT! Your signature MUST be matchable to your voter registration signature. So practice signing as often as you like, to make sure your written signature on the I-1776 Petition matches your written signature in your voter registration records.

CP 537 (first screen in Wyman Exhibit 18); CP 221.

Given this explicit instruction, a State Officer's blanket refusal to accept any signature collected with the DocuSign on line signature system boils down to that Officer insisting that, as a matter of constitutional law, Washington voters are not intelligent enough to follow the above "IMPORTANT!" and "MUST" instruction.

Mr. Hankerson accepts that if a person fails to take the instructed care to make sure their on line signature matches their voter registration signature under Washington law's previously-noted signature verification standard (*supra* Part IV.C.4(b)), then the Secretary rejects that person's signature because it *does not* match.

But Article II, §1 & Article I, §4 do not allow her to categorically refuse to accept any and all signatures collected on line because she believes some of them *might not* match. The respondent State Officer must actually examine a petition signature to determine if it matches – not simply reject it without examination thinking that maybe it might not match.

7. Chant "Fraud"

Another rationalization offered on behalf of the Secretary is that her blanket refusal to accept any handwritten initiative signature collected with the DocuSign on line signature system in this case is constitutional because maybe it might prevent fraud. But the sworn testimony of the

Secretary's designee confirmed that the Secretary of State's office did not even look at how the DocuSign system in this case works before rejecting its use by Mr. Hankerson. CP 291:21-292:17; 318:6-326:9.

The record below accordingly confirms that the respondent's "prevent fraud" refrain about the DocuSign system in this case lacks the foundation and personal knowledge required to make those chants anything more than inadmissible speculation.

Anyone reading the news these days knows that chants of fraud are fueling voter suppression decisions in other States. But in the other Washington (that is, D.C.), speculative January 6 chants of fraud were not allowed to suppress or inhibit the confirmation of Mr. Biden and Ms. Harris as President and Vice President of our country. Here in this Washington, speculative chants of fraud likewise should not be allowed to suppress or inhibit the initiative petitioning rights of racial minority and low income citizens like Mr. Hankerson.

V. CONCLUSION
the precise relief sought

The above pages confirm that collecting initiative signatures on line using the DocuSign system that the Secretary rejected satisfies all three elements stated in our Constitution for Mr. Hankerson and other

disadvantaged Washington citizens like him to exercise their fundamental Constitutional right to petition for legislation by initiative.

The respondent State Officer's blanket refusal to accept any signature collected with that on line system accordingly abridges, hampers, and curtails the full and free exercise of this right that our State Constitution guarantees as being the first, foremost, and fundamental right of every citizen in our State.

This violation of constitutional rights promised and protected by Article II, §1 & Article I, §4 is made more acute by the mutating, highly contagious, and microscopic COVID virus that lingers on to disproportionately infect, hospitalize, and kill our State's more disadvantaged citizens.

In short: the law and facts in this case demonstrate that a court order consistent with the summary judgment order Mr. Hankerson requested below should, as a matter of law, be granted. Specifically:

> The Secretary of State must accept handwritten initiative petition signatures which are collected using the DocuSign on line signature system in this case.
>
> The Secretary of State must then assess whether the resulting initiative petitions satisfy the three requirements specified in Article II, section 1 for the exercise of a citizen's constitutional right to petition for legislation by initiative – namely:
>
> (1) full text: did the initiative petitions include the initiative's full text?

(2) number: did the total number of valid signatures reach the specified 8%?

(3) deadline: were the petitions filed by the time specified in Article II, §1?

This order does not mean the Secretary cannot reject a signature if her examination of that signature determines it does not match the corresponding voter's signature in the State's voter registration records under the previously-noted signature acceptance and verification standards. It simply means the Secretary cannot preemptively prejudge and reject all handwritten signatures collected on line with that DocuSign system instead of applying the signature acceptance and verification standards she applies to handwritten signatures collected on paper with wet ink.

RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

Foster Garvey PC

s/ Thomas F. Ahearne
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Christopher A. Rogers, WSBA No. 49634

Attorneys for Appellant Gerald Hankerson

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served in the manner noted copies of Appellant's Opening Brief *[corrected to be 12 point font instead of 14 point font]* upon the designated parties as shown below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on March 22, 2021 at Seattle, Washington.

/s/McKenna Filler
McKenna Filler

FOSTER GARVEY PC

March 22, 2021 - 2:10 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99424-2
Appellate Court Case Title:	Kim Wyman v. Gerald Hankerson et al.
Superior Court Case Number:	20-2-02054-8

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APPENDIX C
to Petition for Review

No. 99424-2

SUPREME COURT OF THE STATE OF WASHINGTON

KIM WYMAN, in her official capacity as Secretary of State of Washington,
Respondent (Plaintiff below),

v.

GERALD HANKERSON, co-sponsor of the Washington Anti-Discrimination Act Initiative (I-1234) and President of the Alaska Oregon Washington State Area Conference Of The National Association For The Advancement Of Colored People (NAACP),
Appellant (Defendant below),

and

JESSE WINEBERRY, SR.; DR. TERRYL ROSS; APRIL FEATHERKILE; LIVID 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 below),

APPELLANT'S REPLY BRIEF

[with Table Of Authorities inserted]

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TABLE OF AUTHORITIES

[This Table of Authorities inserted May 23 because was erroneously omitted in prior filing (May 21, 5:01pm); no change to prior filing's text]

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I. INTRODUCTION

"The initiative is a cherished constitutional power that allows the People to directly engage in the act of governance."

That's the very first sentence of the plaintiff Secretary's Response Brief.

But the Secretary's pre-emptive rejection of the DocuSign signature system here – without even looking at it –amended that sentence to add as a caveat that this cherished right to petition for State legislation by initiative is not protected for disadvantaged people like Mr. Hankerson.

The Secretary's Response Brief does not dispute that the cherished right of citizens like Mr. Hankerson to petition for State legislation by initiative is their first, foremost, and fundamental constitutional right under our Washington State Constitution. Appellant's Opening Brief [corrected] ("Opening Brief") at 1, 20-21.

And especially significant to citizens here, this cherished right to petition does not exist under the federal constitution.

This Reply outlines why the Secretary's Response Brief does not refute the showing in Mr. Hankerson's Opening Brief that the trial court erred when it ruled on summary judgment that the Secretary did not violate the cherished right of citizens like Mr. Hankerson to petition for State anti-discrimination legislation by initiative when Respondent categorically refused to accept any handwritten initiative signatures that would be collected with the DocuSign system at issue without even

looking at that system, and instead restricted his petitioning right to collecting the same type of physical wet ink signatures on physical pieces of paper first used when the right to petition by initiative was created over 100 years ago back in 1913.

II. UNDISPUTED FACTS

With respect to the facts, the Secretary's Response does not dispute the facts detailed in Mr Hankerson's Opening Brief at 4-19 (Statement Of The Case).

For example, the Response Brief does not dispute the racially disparate impact and suppression resulting from her preemptive rejection in this case – maintaining instead that this fact is legally irrelevant because racial discrimination was not the intent. Response Brief at 1-2, 13-14.

III. STANDARD OF REVIEW

Although the Response Brief repeatedly refers to wet ink signatures as being a "regulation" or "requirement" under existing law,[1] there is no wet ink requirement stated in any regulation, statute, or constitutional provision.

And while the Response Brief characterizes Mr. Hankerson's claim as being that a statute is unconstitutional, that characterization

[1] *E.g., Response Brief at 1, 10, 14, 16, 19, 24, 25, 25, 27, 27, 27, 29, 31, 36, 41, 44.*

misses his point. His claim is that Respondent's preemptive refusal to accept any handwritten initiative signature collected with the DocuSign signature system in this case (without even looking at that system) was not a constitutional exercise of discretion, but rather an unconstitutional curtailment of the right of citizens like Mr. Hankerson to petition by initiative for enactment of anti-discrimination legislation under our Washington State Constitution. And the standard of review for questions of constitutional law is de novo. Opening Brief at 20.

IV. UNDISPUTED LAW

The Response Brief accuses Mr. Hankerson of ignoring the constitutional framework underlying his claim.[2] But the Response Brief does not dispute the legal foundation his Opening Brief established:

First, the Response Brief does not dispute the Opening Brief's showing that Washington courts have long emphasized that a Washington citizen's constitutional right to petition for legislation by initiative is first, foremost and fundamental.[3]

---

[2] *Response Brief at 1,10.*

[3] *Opening Brief at 20-21 (citing & quoting Mullen v. Howell, 107 Wash. 167, 168-171, 181 P. 920 (1919); Schrempp v. Munro, 116 Wn.2d 929, 932 & 935, 809 P.2d 1381 (1991); Save Our State Park v. Board of Clallam County Commissioners, 74 Wn. App. 637, 643, 875 P.2d 673 (1994); Save Our State Park v. Hordyk, 71 Wn. App. 84, 90, 856 P.2d 734 (1993)).*

And the Response Brief does not (because it cannot) claim this first, foremost, and fundamental right to petition by initiative under our Washington State Constitution exists under other constitutions' provisions such as the federal constitution's first amendment.

Second, the Response Brief does not dispute that our Washington Constitution states only three requirements for citizens to exercise their first, foremost, and fundamental constitutional right to petition for State legislation by initiative:

> (1) full text: their petition must include the initiative's full text.
>
> (2) number: they must collect valid signatures of legal voters equal to 8% of the votes cast for governor in the last election.
>
> (3) deadline: for initiatives to the legislature, they must file their petitions with the Secretary of State no less than 10 days before the legislature's regular session.

Opening Brief at 21-22.

The Response Brief does not dispute that the DocuSign system's petition form satisfied the full text requirement. Opening Brief at 28-29. Nor does it claim that the DocuSign system would not satisfy the deadline requirement. *Id*. at 29. Instead, the plaintiff Secretary's lawsuit against Mr. Hankerson turns on what our Washington Constitution considers to be a valid signature under the number-of-valid-signatures requirement. *Id*. at 29-30.

Third, the Response Brief does not dispute Washington's legal standard for determining if an initiative signature is valid. Opening Brief at 30-36.

Specifically, the Response Brief does not dispute that the governing "Acceptance Of Signatures" regulation (WAC 434-379-012) mandates that if a person's signature "Is handwritten and matches the signature in the voter registration record according to the standards in WAC 434-379-020, the signature must be accepted." WAC 434-379-012(3)(a) (underline added); Opening Brief at 31. (The Response Brief's comment that Mr. Hankerson acknowledges that "s/" is not a handwritten signature[4] does not change the fact that a signature handwritten with the DocuSign system is a handwritten signature.)

The Response Brief does not dispute that Washington's governing "Signature Verification Standard" regulation (WAC 434-379-020) specifies that its signature verification standard "must be utilized" to evaluate the validity of a voter's initiative signature. WAC 434-379-020 (underline added). And the Response does not dispute that the Secretary's sworn testimony in this case confirmed this governing signature verification standard can be equally applied to a wet ink signature

[4] *Response Brief at 12, paragraph "Second".*

collected *on paper* or a handwritten signature collected *on line* with the DocuSign system in this case. Opening Brief at 31-36.

The Secretary's Response does not dispute that Washington's initiative signature acceptance and verification standards do not say a physical wet ink signature on a physical piece of paper is required for a signature to be verified as a valid voter signature. Nor does the Response Brief dispute that a wet ink signature is not required to apply Washington's signature acceptance and signature verification standards. Opening Brief at 34-36.

In short, the Response Brief does not dispute the above constitutional framework underlying Mr. Hankerson's claim.

V. LEGAL ARGUMENTS THE RESPONDENT NOW RAISES

The following pages briefly reply to the Response Brief's arguments (in no particular order of importance).

A. Theory that the "right to petition" in our State constitution means a *federal* right instead a *State* right.

The Response Brief does not dispute that the express wording of our Washington State Constitution explicitly states to every Washington citizen that "The right of petition ... shall never be abridged." Opening Brief at 22-24. And the U.S. Supreme Court's recent *Reclaim Idaho* case cited by the Respondent confirms that a State citizen's right to petition for State legislation by initiative presents a question of what that citizen's

petitioning rights are (and are not) under that citizen's State constitution – not what that citizen's petitioning rights are and are not under the federal constitution's first amendment. Response Brief at 45 (citing *Little v. Reclaim Idaho*, 140 S.Ct. 2616, 207 L.Ed.2d 1141 (July 30, 2020)).

The Response Brief nonetheless suggests that when our Washington State Constitution assures Washington citizens that "The right of petition ... shall never be abridged", Washington citizens believe it does not mean their right to petition for State legislation by initiative under the Washington State constitution, but instead means a petitioning right under the federal constitution that omits the cherished right to petition for legislation by initiative that every Washington citizen is guaranteed. Response Brief at 40-41. Respondent's Brief cites no legal authority, however, for its essential premise that the non-existent right to petition by initiative under the federal constitution is what the Washington State constitution's right to petition means.

The Response Brief's suggestion that Mr. Hankerson's claim fails for lack of a *Gunwall* analysis comparing freedom of speech under federal and State law[5] accordingly makes no sense – for his claim is not a freedom of speech claim. It's a right to petition by initiative claim that undeniably does not exist under the U.S. Constitution.

[5] *Response Brief at 39, 47.*

The Response Brief's suggestion that Mr. Hankerson's claim fails under an *Anderson-Burdick* analysis for first amendment freedom of speech and association claims[6] similarly makes no sense – for his claim is not a first amendment speech or association claim. (Moreover, even it were such a claim, inhibiting the collection of anti-discrimination initiative signatures (I-1776 & I-1234) shows the burden, and rejecting the DocuSign system out of hand without even looking at it does not advance the public interest.)

B. Theory that the word "abridge" does not mean "abridge"

Mr. Hankerson's lower court briefing explained that Washington law construes words used in our State Constitution to have their common English meaning – a meaning determined by referring to the dictionary.[7] And the Response Brief does not dispute that Respondent did not claim or argue otherwise below. Opening Brief at 22-23.

As Mr. Hankerson's lower court briefing explained, common English dictionaries define "abridge" to mean **diminish** or **curtail**: "to

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[6] *Response Brief at 42.*

[7] *CP 189; accord Opening Brief at 22-23 (reiterating the lower court briefing that cited & quoted Zachman v. Whirlpool Financial, 123 Wn.2d 667, 670-71, 869 P.2d 1078 (1994); State ex rel. O'Connell v. Slavin, 75 Wn.2d 554, 557, 452 P.2d 943 (1969); State ex rel. Albright v. City of Spokane, 64 Wn.2d 767, 770, 394 P.2d 231 (1964); Brower v. State, 137 Wn.2d 44, 58, 969 P.2d 42 (1998); State v. Superior Court for Thurston County, 97 Wash. 569, 577, 166 P. 1126 (1917)).*

reduce in scope DIMINISH"; "To reduce or diminish <abridge one's civil liberties>"; Curtail (a right or privilege)"; and "To limit; curtail".[8] And the Response Brief does not dispute that Respondent did not claim or argue otherwise below. Opening Brief at 23-24.

Instead, the Response Brief now maintains for the first time on appeal that it is improper to use definitions from current dictionaries instead of from dictionaries at the time of our Constitution's adoption.[9] But it does not cite any such definitions. Nor does it provide any authority for its speculation that maybe older dictionaries have a materially different definition.

C. Theory that the word "facilitate" does not mean "facilitate"

The Response Brief does not dispute that our Washington Constitution only allows a statute or regulation to facilitate a citizen's exercise of his or her constitutional right to petition for legislation, and that this Court has therefore repeatedly emphasized that a statute **cannot**

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[8] *E.g., CP 189-190 (citing & quoting Merriam Webster Dictionary (https://www.merriam-webster.com/dictionary/abridge); Black's Law Dictionary (11th ed. 2019) (on Westlaw); Oxford English Dictionary (https://www.lexico.com/en/definition/abridge); American Heritage Dictionary of the English Language (https://ahdictionary.com/word/search.html?q=abridge)). Reiterated in Opening Brief at 23-24.*

[9] *Response Brief at 1. 34,-36, 47.*

frustrate or hamper a Washington State citizen's exercise of their right to petition for State legislation by initiative.[10]

And consistent with the Washington law noted above, Mr. Hankerson's lower court briefing explained that common English dictionaries define "facilitate" to mean make easy, easier, or less difficult: "to make easier : help bring about"; "To make the occurrence of (something) easier; to render less difficult"; "Make (an action or process) easy or easier"; "To make easy or easier".[11]

The Response Brief does not dispute that Respondent did not claim or argue otherwise below. Opening Brief at 27.

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[10] *See Opening Brief at 25-27 (reiterating the lower court briefing that cited & quoted Coppernoll v. Reed, 155 Wn.2d 290, 297 & n.4, 119 P.3d 318 (2005); Sudduth v. Chapman, 88 Wn.2d 247, 251, 558 P.2d 806 (1977); Rousso v. Meyers, 64 Wn.2d 53, 390 P.2d 557 (1964); State ex rel. Howell v. Superior Court, 97 Wash. 569, 577-578, 166 P. 1126 (1917); State ex rel. Case v. Superior Court, 81 Wash. 623, 143 P. 461 (1914)); Community Care Coalition of Washington v. Reed, 165 Wn.2d 606, 612, 200 P.3d 701 (2009); Schrempp v. Munro, 116 Wn.2d 929, 932, 935, 809 P.2d 1381 (1991)).*

[11] *E.g., CP 190-192 (citing & quoting Merriam Webster Dictionary (https://www.merriam-webster.com/dictionary/facilitate); Black's Law Dictionary (11th ed. 2019) (on Westlaw); Oxford English Dictionary (https://www.lexico.com/en/definition/facilitate); American Heritage Dictionary of the English Language (https://ahdictionary.com/word/search.html?q=facilitate)). Reiterated in Opening Brief at 25-27.*

Instead, the Response Brief now argues it is improper to use definitions from current dictionaries – a new argument that must be rejected for the reasons noted above.

The Response Brief also argues that Mr. Hankerson construes "facilitate" as imposing a "rigid" and "absolute" rule that anything which does not make gathering signatures more convenient or easier is unconstitutional.[12] But that's not correct.

As the Response Brief acknowledges, our Constitution's "facilitate" requirement "prohibits laws that impermissibly restrict or hinder the initiative power."[13] Mr. Hankerson's is point is simply that to satisfy this facilitate requirement, the plaintiff Secretary must show that her categorical refusal to allow any handwritten signatures collected by the DocuSign system did in fact facilitate the exercise by Washington citizens like Mr. Hankerson of their first, foremost, and fundamental constitutional right to petition for the enactment of anti-discrimination legislation by initiative. But since Respondent admits her office never even looked at the DocuSign system before rejecting Mr. Hankerson's requests, the Respondent's speculation about what that DocuSign system might or might not do failed – especially on summary judgment – to establish that

[12] *Response Brief at 10, 34, 37.*

[13] *Response Brief at 20.*

the undisputedly disproportionate impact her preemptive rejection had on disadvantaged citizens like Mr. Hankerson did not impermissibly restrict or hinder the exercise of their constitutional right to petition by initiative.

D. Theory that the word "discretion" grants officers immunity

The Response Brief reiterates the Secretary's and lower court's theory that RCW 1.80.170 gives State officers like the Secretary the discretion to categorically refuse to accept or examine any handwritten signature collected with the DocuSign system if that's what she wanted to do.[14]

But the Response Brief does not refute the three independent reasons why this "discretion" theory does not grant State officers immunity from constitutional responsibility. Opening Brief at 37-40.

First, the Response Brief does not dispute that RCW 1.80.170 does not say the Secretary has the discretion to violate a citizen's constitutional petitioning rights. Opening Brief at 38.

Second, the Response Brief does not dispute the Opening Brief's showing that statutes cannot grant State officers the discretion to violate constitutional rights.[15]

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[14] *Response Brief at 15; accord, Opening Brief at 37-38.*

[15] *Opening Brief at 38 (citing and quoting Owen v. City of Independence, 445 U.S. 622, 649, 100 S.Ct. 1398, 1414–1415, 63 L.Ed. 2d 673 (1980); Louisiana v. Texas, 176 U.S. 1, 25–26, 20 S.Ct. 251, 260, 44*

Third, the Response Brief does not dispute that even if RCW 1.80.170 did grant the Secretary the discretion to violate constitutional rights, the Secretary would have had to in fact exercise that discretion when she decided to refuse Mr. Hankerson's request to accept handwritten petition signatures collected with the DocuSign system in this case – which as a matter of law would have required the Secretary to have in fact given due consideration to that DocuSign system in light of the attending facts or circumstances. Opening Brief at 39.[16]

But the Response Brief does not dispute the Secretary's sworn testimony that her office did not even look at the DocuSign system before the Secretary categorically rejected it. Opening Brief at 16, 39-40. Nor does the Response Brief claim the plaintiff Secretary made any effort to learn how the DocuSign system proposed by Mr. Hankerson actually works (e.g., by asking any of the DocuSign contacts Respondent works with other matters, or by deposing the DocuSign declarant in this

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L.Ed. 347 (1900) (Harlan, J., concurring); United States v. Cooks, 52 F.3d 101, 105 (5th Cir. 1995); U.S. Fidelity & Guaranty v. U.S., 837 F.2d 116, 120 (3rd Cir. 1988)).

[16] *Opening Brief at 39 (citing & quoting Rios v. Washington Dept. of Labor & Industries, 145 Wn.2d 483, 501, 39 P.3d 961, 970 (2002); Hillis v. Dept. of Ecology, 131 Wn.2d 373, 383, 932 P.2d 139 (1997); Merritt School District No. 50 v. Kimm, 22 Wn.2d 887, 891, 157 P.2d 989, 991 (1945)).*

litigation.[17]) And the Response Brief cites no legal authority for its essential premise that Washington law holds it is a lawful exercise of discretion for a State officer to speculate about what the request he or she is rejecting *might be* instead of looking at it to see what it *actually is*.

Issuing an edict based on speculation is not exercising discretion. It's just speculating.

E. Theory that a 100 year tradition is a safe harbor

The Response Brief repeatedly reiterates the plaintiff Secretary's theory that categorically rejecting Mr. Hankerson's request to accept any handwritten signature he would collect with the DocuSign system in this case is constitutional because wet ink signatures have been a tradition for over 100 years.[18] But it does not address or refute the Opening Brief's explanation of why "tradition" does not provide legal shelter or excuse for suppressing a constitutional right of minority or low income citizens like Mr. Hankerson. Opening Brief at 40-41.

F. "Not Impossible" defense (R-90 comparison)

The Response Brief argues that categorically rejecting Mr. Hankerson's request to accept any handwritten signature that he

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[17] *See CP 927 (noting the Respondent's DocuSign business dealings); CP 890 (noting the DocuSign declarants' sworn declaration that was Wyman Deposition Exhibit 17).*

[18] *E.g., Response Brief at 1, 10, 15, 34, 35, 37.*

would collect with the DocuSign system in this case was constitutional because that rejection did not make it "impossible" for racial minority or low income citizens like him to gather initiative signatures[19] – and that the Referendum 90 supporters' signature gathering tactics prove it was not impossible.[20]

But "impossible" is not what the Washington Constitutional provisions at issue say. For example, the "facilitate" provision in Article II, §1(d) does not say State officers can impose whatever restriction they want that curtails citizens' right to petition by initiative as long as that restriction doesn't make petitioning "impossible". Similarly, the "never be abridged" provision in Article 1, §4 does not say the State can issue any edict is wants that curtails citizens' right to petition by initiative as long as that restriction does not make petitioning "impossible".

And Respondent does not address – never mind dispute or refute – the fact that the Referendum 90 supporters gathering those signatures were not the racial minority members disproportionately infected, hospitalized, and killed by the highly contagious and invisible corona virus, or that they employed tactics that flaunted public safety rules. Opening Brief at 42-43

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[19] *Response Brief at 31, 32, 34; see also Opening Brief at 42-43.*

[20] *Response Brief at 32-33, 43-44.*

(citing, e.g., CP 622-628). (Although Respondent characterizes the Appellant's pointing out these facts as attacking the R-90 supporters' character (Response Brief at 33 n.13), the facts in the record are facts confirming the weakness of Respondent's "not impossible" justification – not character attacks.)

Nor does the Response Brief offer any support for the legal premise underlying its R-90 argument – i.e., that it's constitutional for a State officer to require a citizen to risk the lives of himself, his family, and his community if he wants to exercise his cherished constitutional right to petition by initiative.

G. Non-Initiative alternatives defense

The Response Brief reiterates Respondent's theory that categorically rejecting Mr. Hankerson's request to accept any handwritten signature collected with the DocuSign system was constitutional because Mr. Hankerson had alternatives other than invoking his Washington State Constitution right to petition by initiative.[21]

[21] *E.g., Response Brief at 2 (noting that he could in the future try to convince legislators to pass a law requiring the DocuSign system to be allowed, or try to commence rule-making to allow it, or file a lawsuit); at 43 n.15 (noting he could use the DocuSign system as a proxy for an unscientific poll to show legislators public interest); accord, Opening Brief at 43-44 (noting the Secretary's argument that Mr. Hankerson had alternatives like asking a legislator to introduce legislation for him).*

But the Response Brief does not address or refute the fact that this has-other-alternatives argument ignores the reason our State Constitution makes the right to petition by initiative the first and foremost fundamental right of every Washington State citizen. And the Response Brief cites no legal authority for its necessary premise that Washington law holds that a citizen's having a *theoretical* alternative excuses a State officer's hamstringing that citizen's *constitutional* alternative. Opening Brief at 43-44.

H. He should have tried harder defense

The Response Brief suggests that Mr. Hankerson's constitutional claim must be dismissed because, after his Initiative 1776 experience showed that gathering physical wet-ink signatures on physical pieces of paper was unworkable in light of the coronavirus' disproportionately infecting, hospitalizing, and killing racial minority citizens like himself, and then the Secretary of State rejected his request to use the DocuSign system and sued him to enforce that rejection, he should have used the DocuSign system anyway.[22]

That's akin to a City Building Official rejecting a person's building permit application for his house, then suing that person to enforce the building official's rejection, but then later insisting that the person should

[22] *Response Brief at 33, 44-45.*

have gone ahead and built his house anyway. The Response Brief cites no legal authority for such a demand.

I. Speculation about the DocuSign system

As noted earlier, the Response Brief does not dispute the Secretary's sworn testimony that her office did not look at the DocuSign system before categorically rejecting it, and does not claim to have made any effort to learn how that DocuSign system actually works by asking the DocuSign business contacts her office confers with on other matters or by deposing the DocuSign declarant in this litigation. Supra, at 13-14 & n.17.

Instead, the Response Brief bases its arguments upon speculation about what the DocuSign system the Respondent rejected *might be* (instead of basing those arguments on any knowledge of what it *actually is*):

Cut & Paste: The Response Brief now alleges that the DocuSign system allows the person using it to submit a handwritten signature to cut-and-paste a copy of someone else's signature instead of handwriting their own.[23] But that's speculation. And as the step-by-step screenshots of that system show, that is not how the DocuSign system works. Opening Brief at 15.

[23] *E.g., Response Brief at 1, 10-11, 20, 26, 27, 28.*

DocuSign Cost: The Response Brief now suggests the DocuSign system imposes a contracting cost that might make it inaccessible to economically disadvantaged citizens like Mr. Hankerson.[24] But that's speculation. And as his limited financing being enough to secure its use here confirms cost was not what prevented him from being able to use it here. See also CP 888.

Not actually see or sign: The Response Brief now alleges the DocuSign system might not allow the person using it to be "actually presented with the text and ballot title of the correct initiative before signing" or be the person who "actually signed it."[25] But that's speculation. And the Response Brief does not dispute that that's not how the DocuSign system works. Opening Brief at 14-15 (including the step-by-step, screen-by-screen demonstration of the DocuSign system in the record).

"Unwitting" disclosure by DocuSign signors: The Response Brief now alleges a person using the DocuSign system to sign will "unwittingly" disclose information to someone not accountable to voters.[26] But that's speculation. Indeed, the box that the person using the DocuSign

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[24] *Response Brief at 14.*

[25] *Response Brief at 27, 29.*

[26] *Response Brief at 25, 30*

system must check off in order to proceed with using that system assures the signor's use is not "unwitting". E.g., CP 223-224. Moreover, as the Response Brief itself admits, the personal information voters provide on physical paper petitions is a matter of public record that anyone can see under the Public Records Act (RCW 42.56). Response Brief at 26.

Unavailability of metadata: The Response Brief now defends the Respondent's rejection on the grounds that Respondent does not have access to the DocuSign system's metadata that could disprove her cut-and-paste speculation.[27] But the Response Brief does not (because it cannot) allege the Respondent ever asked for such access. It the Response Brief's metadata comments were really material, it would have been brought up long before this appellate proceeding.

J. Speculation about citizen sloppiness

The Response Brief reiterates Respondent's rationalization that categorically rejecting Mr. Hankerson's request to accept handwritten signatures collected with the DocuSign system is constitutional because some voters might not handwrite their signature carefully enough to match their voter registration record signature.[28]

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[27] *Response Brief at 12-13, 7-8.*

[28] *E.g., Response Brief at 29-30; cf. Opening Brief at 46-47.*

But the Response Brief does not address or refute the Opening Brief's explanation that the DocuSign system in this case explicitly tells the person signing to practice and make sure the signature he or she writes on line matches their signature in the voter registration records. Opening Brief at 46. For example, stating on the very first screen:

> IMPORTANT! Your signature MUST be matchable to your voter registration signature. So practice signing as often as you like, to make sure your written signature on the I-1776 Petition matches your written signature in your voter registration records.

Id. at 46.[29]

Nor does the Response Brief dispute that this justification for a blanket refusal to accept <u>any</u> signature collected with the DocuSign signature system boils down to insisting that, as a matter of constitutional law, Washington voters are not intelligent enough to follow the above "IMPORTANT!" and "MUST" instruction. Opening Brief at 46-47.

Mr. Hankerson accepts that if a person fails to take the instructed care to make sure their signature matches their voter registration signature under the previously noted WAC signature verification standard, then <u>that</u> person's signature is rejected because it *does not* match. But Article II, §1 and Article I, §4 do not allow Respondent to categorically refuse to accept <u>any and all</u> signatures collected with that system because she thinks some

[29] *Nor does the Response Brief dispute that this is more than what a wet ink/physical paper petition tells a voter quickly scribbling his or her signature that a pushy paid signature gatherer requests. <u>Id</u>. at 46.*

of them *might not* match. Respondent must actually examine a signature to determine if it matches – not simply reject it out of hand without examination on the grounds that maybe it might not match.

K. Speculation about fraud

The Response Brief reiterates Respondent's rationalization that categorically refusing to accept any handwritten initiative signature collected with the DocuSign system is "necessary to prevent fraud".[30]

But as noted earlier, the Secretary's sworn testimony admitted that her office did not even look at how the DocuSign system in this case works before rejecting its use by Mr. Hankerson. Opening Brief at 16, 39-40. And the Response Brief does not address or refute the fact that Respondent's "prevent fraud" allegation with respect to the DocuSign system at issue lacks the foundation and personal knowledge required to make that refrain anything other than inadmissible speculation. Opening Brief at 47-48. (Indeed, the record confirms that Mr. Hankerson took no fewer steps with respect to preventing fraud than the Respondent requires of others. CP 889.)

Moreover, if restricting a citizen's initiative rights could be constitutionally justified with speculation alleging a potential for fraud if a citizen's use of the DocuSign system is not prohibited, then it would be

[30] *Response Brief at 15, 44; cf. Opening Brief at 47-48.*

constitutionally justified to restrict initiative rights by prohibiting a citizen's use of paid signature gatherers, because the Response Brief acknowledges that "fraud by signature gatherers – especial paid signature gatherers – is troublingly common."[31] But as the Response Brief also acknowledges, this actual fraud does not constitutionally justify the Secretary's prohibiting citizens or special interest groups with a lot of money from hiring paid signature gatherers.[32]

L. Both sides disagree with the lower court's mootness suggestion

Mr. Hankerson admits that the Secretary's blanket refusal to accept any handwritten initiative signature collected with the DocuSign system prevented his anti-discrimination initiative measures from proceeding, and that the time clock for submitting those initiative measures expired before this case is over.

But for the reasons noted in Mr. Hankerson's Opening Brief and this Reply, this running out of the clock does not nullify the fact that Respondent's blanket rejection of the DocuSign system without even looking at it was not a constitutional exercise of discretion.

And while the Respondent's Brief does not agree with Mr. Hankerson's legal conclusion about the constitutionality of

[31] *Response Brief at 25 n.9, accord at 11 n.1.*

[32] *Response Brief at 4 (citing Meyer v. Grant, 486 U.S. 414, 428, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)).*

Respondent's preemptive rejection, both sides agree that the constitutional issues that this case presents with respect to Washington citizens' cherished right to petition for State legislation by initiative are not moot.[33]

VI. CONCLUSION

This appeal can and should be resolved based on what the plaintiff Secretary's Response Brief does not refute.

The Response Brief does not dispute any of the facts detailed in Mr. Hankerson's Opening Brief. *Supra* Part II of this Reply.

The Response does not dispute the basic legal foundations established by the language of Washington State Constitutional provisions at issue or the Secretary's own signature acceptance and verification regulations. *Supra* Part IV of this Reply.

And the Response Brief's arguments on appeal – some brand new, some retreads of old – do not refute the fact that Respondent's blanket rejection of the DocuSign system in this case was not a constitutional exercise of discretion. It instead, that rejection's reliance the pre-internet,

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[33] *Response Brief at 12 n.2.;, Opening Brief at 44-46 (citing & quoting Gerstein v. Pugh, 420 U.S. 103, 107 n.2, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); Moore v. Ogilvie, 394 U.S. 814, 816, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969); Masters, Mates, & Pilots v. Brown, 498 U.S. 466, 473, 112 L.Ed.2d 991, 111 S.Ct. 880 (1991); In re Marriage of Irwin, 64 Wn.App. 38, 60, 822 P.2d 797 (1992); In re Marriage of Horner, 151 Wn.2d 884, 893, 93 P.3d 124 (2004); State v. Hale, 94 Wn.App. 46, 52, 971 P.2d 88 (1999)).*

wet ink practice of 100 years ago, without ever even looking at the DocuSign system she categorically rejected, unconstitutionally curtailed the first, foremost, and fundamental constitutional right of Mr. Hankerson and other disadvantaged citizens like him to petition for State anti-discrimination legislation by State initiative. *Supra* Part V of this Reply.

Washington law accordingly entitles Mr. Hankerson to the justice he seeks in response to the plaintiff Secretary's lawsuit against him. Dissected into three pieces:

- the summary judgment order against him should be reversed – for the plaintiff Secretary's speculation about the DocuSign system she never looked at did not establish as a matter of law that her pre-emptive rejection of it was a constitutional exercise of discretion;

- the summary judgment order Mr. Hankerson requested should be granted – for the plaintiff Secretary's speculation about the DocuSign system she never looked at did not refute his entitlement to relief under Article II, §1 and Article I, §4; and

- if this Court were to conclude some genuinely disputed fact issues regarding the DocuSign system exist, it should remand to the trial court for a prompt resolution of such facts.

RESPECTFULLY SUBMITTED this 23rd day of May, 2021
(to include Table Of Authorities for the Reply dated May 21).

Foster Garvey PC

s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA No. 14844
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served in the manner noted copies of Appellant's Reply Brief [with Table of Authorities inserted] upon the designated parties as shown below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on May 23, 2021 at Seattle, Washington.

/s/McKenna Filler
McKenna Filler, Legal Practice Assistant

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May 23, 2021 - 9:14 PM

Transmittal Information

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