

FILED
SUPREME COURT
STATE OF WASHINGTON
4/12/2019 9:01 AM
BY SUSAN L. CARLSON
CLERK

No. 97020-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KAN QIU, ZHIMING YU, and GANG CHENG,

Plaintiffs-Petitioners

vs.

KIM WYMAN, in her official capacity as Secretary of State,

Defendant-Respondent

REPLY BRIEF OF PETITIONERS

| | |
|---|--|
| Joel B. Ard, WSBA #40104 Ard Law Group PLLC P.O. Box 11633 Bainbridge Island, WA 98110 206.701.9243 | Matthew C. Albrecht, WSBA #36801 David K. DeWolf, WSBA #10875 ALBRECHT LAW PLLC 421 W. Riverside Ave., STE 614 Spokane, WA 99201 (509) 495-1246 |
| Attorneys for Petitioners | |

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT 2

II. RESPONSE TO COUNTERSTATEMENT OF THE ISSUES 3

III. ARGUMENT 3

 A. The Secretary Seeks To Impose On Dissatisfied Citizens An Impossible Pleading and Proof Standard That The Secretary Herself Cannot Meet 3

 B. The Secretary Does Not Have Discretion To Sample In A Manner That Results In An Unreliable Projection..... 5

IV. The Secretary’s Arguments Have No Merit 7

 A. Qiu Waived None Of The Arguments Asserted In The Opening Brief 7

 B. The Statutory Remedy of Injunction is Available to This Court..... 8

 C. Qiu’s Expert Raised Sufficient Questions to Justify an Examination 10

 D. Qiu’s Complaint Adequately Set Forth the Requested Relief and the Grounds for Seeking Such Relief 11

 E. The trial court made no findings justifying a refusal to examine the petitions as required by RCW 29A.72.240 12

V. CONCLUSION..... 14

I. INTRODUCTION AND SUMMARY OF ARGUMENT

No one knows how many valid, non-duplicate signatures were actually submitted to the Secretary of State (“Secretary”) in support of Initiative No. 1000 (“I-1000”). The Secretary certainly does not, and neither does anyone else. Appellants Kan Qiu and his co-plaintiffs (“Qiu”) raised a genuine issue of material fact that the Secretary did not comply with the mandatory Washington Administrative Code, and that her error rendered her projection of likely valid signatures and ensuing certification unreliable and not in compliance with the law. Until such time as the judicial review authorized by RCW 29A.72.240 has been conducted, this Court should enjoin the Secretary’s certification.

The Secretary still does not contest the facts alleged and raised by Qiu in opposition to Summary Judgment. Instead, she denies that any fact dispute is materials, on the grounds that the fact disputes exclusively fall within unreviewable discretion of her office. The Secretary’s discretion on processing petitions does not extend to verifying fewer than all signatures, if she does so in a manner that does not result in confidence that the sample is an accurate substitute for the whole, as she did here. As Qiu demonstrated in the court below and in the Opening Brief, the results of those two samples of the petitions raise a genuine issue that the Secretary’s procedures did not take an unrestricted random sample of signatures, and that the flawed

sampling methodology means that the certification was not statistically reliable.

II. RESPONSE TO COUNTERSTATEMENT OF THE ISSUES

In the guise of restating the issues on appeal, the Secretary simply denies that any error was committed by the trial court. The assignments of error in the Opening Brief remain the issues on appeal: did the trial court err in granting summary judgment to the Secretary, and did the trial court err in failing to examine the petitions before arriving at a dispositive conclusion?

III. ARGUMENT

A. The Secretary Seeks To Impose On Dissatisfied Citizens An Impossible Pleading and Proof Standard That The Secretary Herself Cannot Meet

This Court could scour the record and never find a statement from the Secretary swearing to the actual number of valid, non-duplicate signatures that the sponsors submitted in support of I-1000. That statement is not in the record because the Secretary doesn't know the number. And yet she argues that Qiu cannot proceed with his challenge because he also does not know that number. This impossible-to-met standard has no support in RCW 29A.72.240 or any case law.

The Secretary argues that no citizen can challenge her certification unless he already knows significantly more than the Secretary herself

knows. Despite her not knowing, she claims that the dissatisfied citizen must plead that the petition actually, as a matter of already-known and provable fact, does not contain the requisite number of signatures. As discussed in detail in Plaintiffs' Opening Brief at IV.D, the whole of Chapter 29A.72 RCW and the three specific remedies authorized by RCW 29A.72.240 belie the Secretary's argument.

As Qiu's Opening Brief showed, the statutory standard under CRW 29A.72.240 is "dissatisfaction" with the Secretary's determination. It does not impose the standard of knowledge beyond that of any other person, including the Secretary herself, as to the actual number of valid signatures.

As Qiu showed in his Opening Brief, this conclusion also flows from the three forms of relief available in the trial court, one of which is a citation compelling examination of the petitions. The legislature has authorized the secretary to certify petitions even if she does not know the number of valid, non-duplicate signatures. For that, she must comply with the rules governing sampling. RCW 29A.72.230. In recognition of the concerns that can legitimately arise from the Secretary's substitution of a projection in place of an actual count, the legislature also authorized a dissatisfied citizen to secure judicial review of the certification, including by an examination of the petitions. RCW 29A.72.240.

The Secretary asks this Court to insulate her from the meaningful judicial review called for by the legislature. It should insulate her, she argues, by imposing on the dissatisfied citizen a pleading burden that even the Secretary herself cannot meet: knowledge of the actual number of valid and invalid, duplicate and non-duplicate signatures. This has no statutory basis. If the Court adopts her argument, it ignores the legislature's inclusion of a check and balance on the Secretary's certification, and diminishes the constitutional role assigned to this State's independent judiciary.

B. The Secretary Does Not Have Discretion To Sample In A Manner That Results In An Unreliable Projection

The record in the court below contains un rebutted evidence that the Secretary's certification is not based on a statistically reliable sample. In other words, while the Secretary claims that she has reason to believe that the petitions submitted in support of I-1000 contain more than the requisite number of valid, non-duplicate signatures, Qiu demonstrated that her assertion is no more than a guess. Furthermore, the Secretary does not offer proof that Qiu's dissatisfaction is unjustified. After all, to do so would demonstrate the existence of a genuine issue of material fact. Instead, she argues that her selection of one method or another for selecting signatures under step one of WAC 434-379-010 is entirely discretionary. Even though powerful evidence has been presented to show that her selection method

results in a projection that has no statistical relationship to the outcome of an actual count, she argues that no court may review the conclusion she has reached.

This claim, and its interpretation of the statute and code, is at odds with the text of the RCW and principles of statutory interpretation. “At the outset it must be recognized that the primary objective of statutory construction is to carry out the intent of the legislature. The intent must be determined primarily from the language of the statute itself. If, however, the intent is not clear from the language of the statute, the court may resort to statutory construction. Such statutory construction may involve a consideration of the legislative history; other statutes dealing with the same subject; and administrative interpretation of the statute. In any event the interpretation adopted should be the one that best advances the legislative purpose.” *State Dep’t of Transp. v. State Employees’ Ins. Bd.*, 97 Wash. 2d 454, 458–59, 645 P.2d 1076, 1078 (1982) (internal citations omitted). Here, the Secretary proffers an interpretation of WAC 434-379-010 that allows her to pick how to make an “unrestricted random sample” in an exercise of unreviewable discretion, even if review of that sample does not offer any predictive value for the contents of the entire petition set. That destroys, not advances, the legislative purpose. The purpose of the legislation is for the responsible state official to confirm that petition sponsors have satisfied the

constitutional requirement as to the number of valid, non-duplicate signatures. If sampling and verification of the sample has no demonstrable relationship to verification of the entire set, why sample at all?

The legislature authorized the Secretary to certify petitions as satisfying the constitutionally established minimum signature count after less than a full manual verification of all signatures submitted in support of initiatives. RCW 29A.72.230. It required her, however, to perform statistical sampling with an unrestricted random sample. Qiu's exhibits—the Secretary's own documents—analyzed by expert Dr. Huber showed that the method she uses to select signatures for verification results in a sample set that has no demonstrable relationship to the entire signature pool. The Secretary did not proffer any rebuttal evidence, instead arguing that this simply doesn't matter. But counting a sample for verification of the whole, where that sample does not reflect the whole, is not the legislatively authorized substitute for verifying each and every signature.

IV. THE SECRETARY'S ARGUMENTS HAVE NO MERIT

A. Qiu Waived None Of The Arguments Asserted In The Opening Brief

The Secretary argues that Qiu waived arguments by failing to raise them on appeal. For this proposition, the Secretary cites *In re Petition of Port of Seattle*, 80 Wn.2d 392, 399, 495 P.2d 327 (1972). In that case the

trial court considered evidence and made findings of fact. In their appeal, petitioners made an argument unrelated to any of the assignments of error, and they also made assignments of error that were not supported by argument. Here, by contrast, the trial court conducted no independent review of the Secretary of State's procedures, and simply stated that the summary judgment motion would be granted. In assigning error to the trial court's grant of summary judgment (Opening Brief at 7), and in presenting argument in support of that assignment of error, Qiu preserved every argument made in the Opening Brief. Although it is true that some arguments were either modified or not asserted in the Opening Brief, none of the arguments made in that brief were waived.

B. The Statutory Remedy of Injunction is Available to This Court

The Secretary correctly characterizes RCW 29A.72.240 as giving this Court three options: (1) issue a writ of mandate compelling certification; (2) issue an injunction against certification; or (3) dismiss the proceedings. However, the Secretary errs in assuming that the "dissatisfied citizen" must ask for such relief when applying to the Superior Court for a citation, or that the appeal to this Court must include a specific request for one of those three options. The statute contemplates that when the dissatisfied citizen asks the Superior Court to conduct an examination, the Superior Court will evaluate that request. The Superior Court may deny a

citation to examine the petitions if it finds (based on the record) that there is no legitimate basis for questioning the Secretary's signature count. But if, as here, the Secretary's methods raise legitimate questions, the Superior Court is directed to conduct an examination in preparation for affirming or reversing the Secretary's decision as to certification.

The provisions in RCW 29A.72.240 for appeal to this Court from the Superior Court are premised on the assumption that the Superior Court has either rejected the application for a citation, or has examined the petition and made a determination as to the request for a writ of mandate or injunction. The three choices given to this Court assume that the Superior Court has done its job of making an independent review of the Secretary's procedures, and this Court may either affirm the trial court's determination (by dismissing the proceedings) or substitute its own judgment (by mandating or enjoining certification).

Here, by contrast, the Superior Court did not perform its statutory duty to conduct an examination. This Court, by enjoining the certification of I-1000 until such time as the trial court has conducted an independent review of the Secretary's procedures, exactly as mandated by the statute, ensures that both the right to the initiative process and the right to obtain judicial review of the Secretary's compliance with the statute have been preserved. An injunction by this Court is authorized as a remedy separate

from dismissing the case, which necessarily means that the injunction would not be final, but instead an interim remedy designed to ensure that the Thurston County court has the opportunity to evaluate the genuine fact issue raised by Qiu.

C. Qiu’s Expert Raised Sufficient Questions to Justify an Examination

The Secretary argues that she is free to “choose any statistical sampling method consistent with implementing regulations.” Resp. Br. at 14. She characterized the Huber Report as being “speculative assertions by Petitioners’ expert that these variations [in signature verification] might show wrongdoing by the Secretary.” But Qiu did not ask for an order that the Secretary use a particular sampling method; rather, Qiu asked the trial court to make an independent determination of whether or not the sampling technique that was used resulted in a reliable projection of the actual signature count. Huber’s testimony was that it was highly probable that the Secretary’s method *did not* produce an accurate projection of the total signature count, and that the discrepancy was large enough to doubt the ultimate conclusion—that there were more than sufficient valid signatures to certify I-1000. The trial court therefore erred in concluding that there was no genuine issue of material fact and instead should have conducted the examination prescribed by the statute.

As demonstrated above, an interpretation of RCW 29A.72.240 that requires dispositive proof at the outset that the Secretary was wrong to certify (or decline to certify) an initiative would effectively eliminate the judicial review promised in the statute. Precisely because citizens dissatisfied with the Secretary's signature count will have suspicions—but not dispositive proof—that the Secretary did not properly project the number of valid signatures, the Superior Court must first determine whether to issue a citation for a further examination. Then, if the citation is issued, the Superior Court must “examine” the petitions to affirm or reverse the Secretary's certification. Because in this case the Superior Court did not even consider whether to issue a citation, the Superior Court's dismissal must be reversed.

D. Qiu's Complaint Adequately Set Forth the Requested Relief and the Grounds for Seeking Such Relief

The Secretary's brief characterizes the discussion of Qiu's complaint as “legally irrelevant.” Yet it was the Secretary who argued to the trial court that the Complaint was legally insufficient to support the relief requested. The discussion above and in the Opening Brief identify the Secretary's erroneous claims regarding the burden of proof on the “dissatisfied citizen” before obtaining judicial review of the Secretary's signature count.

E. The trial court made no findings justifying a refusal to examine the petitions as required by RCW 29A.72.240

The Secretary offers several arguments to justify the trial court’s refusal to issue a citation to the Secretary to require her to submit the petitions for examination.

First, the Secretary claims that this argument was not made to the trial court. It is hard to see how it could have been more emphatically made. It was the relief requested in the caption of the Complaint and in ¶ 2 of the complaint. App. at 4. It was urged as an alternative form of relief in the opposition to summary judgment. App. at 76-77. The Secretary cites to her own briefing to the trial court to suggest that there was no meaningful way for the trial court to conduct an examination. Resp. Br. at 18-19. But it cannot be said that Qiu “waived” this argument.

Second, the Secretary repeats her argument—refuted in Qiu’s opening brief—that the judiciary has no authority to “interfere[] with the secretary of state in the performance of the duties imposed upon [her] by the constitution and the statute” Resp. Br. at 20, quoting *State ex rel. Donohue*, 49 Wn.2d 410, 417 (1956). Prior to the adoption of RCW 29A.72.240, the Secretary had no authority to question the methods by which signatures were verified, because they were verified at the county level, and only after the adoption of RCW 29A.72.240 was the signature

verification process transferred to the Secretary of State. In addition, the Secretary gives no explanation of the inclusion of judicial review in RCW 29A.72.240 if the legislature intended no “interference” in the process of counting signatures. To be sure, the Secretary is given the initial responsibility to conduct the signature count, but as part of our constitutional system of checks and balances, the Secretary’s actions are subject to judicial review. The Secretary erroneously invites this Court to rely on case law that preceded the adoption of the current method of signature verification and sampling procedures.

Third, the Secretary attempts to justify the trial court’s failure to examine the petitions by characterizing it as an exercise of discretion, and challenges Qiu to demonstrate that it was an abuse of discretion. But it is clear from the trial court’s ruling that it was not exercising discretion. Instead, it found that “[t]he bases for challenging the conduct at issue here are exceptionally narrow and Plaintiffs have failed to establish a genuine issue of material fact as to their applicability in this case.” Had the trial court made findings of fact—or provided the equivalent in an oral ruling—as to why a citation was not warranted, it would have been an exercise of discretion. But in this case it clearly was not.

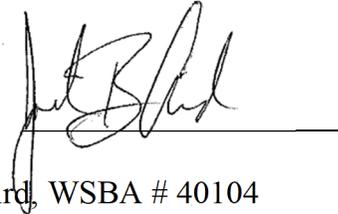
V. CONCLUSION

The court below should not have granted summary judgment to the Secretary because Qiu showed a genuine issue of material fact as to whether or not the Secretary performed the non-discretionary step of selecting an unrestricted random sample of signatures for validation. More importantly, Qiu also demonstrated a genuine issue of fact that the failure to properly select signatures for validation has resulted in a projection of the likely number of valid signatures with no statistical support, and not in accordance with law. This Court should issue an injunction against the certification of I-1000 and remand this case to the Thurston County Superior Court with instructions to engage in the examination required by RCW 29A.72.240.

RESPECTFULLY SUBMITTED this 12th day of April 2019.

ARD LAW GROUP PLLC

By



Joel B. Ard, WSBA # 40104
P.O. Box 11633
Bainbridge Island, WA 98104
(206) 701-9243
Joel@Ard.law
Attorneys for Appellants

ALBRECHT LAW PLLC

Attorneys for Plaintiff Intervenor

By:



Matthew C. Albrecht, WSBA #36801
David K. DeWolf, WSBA #10875
421 W. Riverside Ave., Ste. 614
Spokane, WA 99201
(509) 495-1246

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

Signed on April 12, 2018 at Spokane, Washington.


Melanie A. Evans

ALBRECHT LAW PLLC

April 12, 2019 - 9:01 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97020-3
Appellate Court Case Title: Kan Qiu, et al. v. Kim Wyman
Superior Court Case Number: 19-2-00829-3

The following documents have been uploaded:

- 970203_Briefs_20190412085852SC357656_6301.pdf
This File Contains:
Briefs - Plaintiffs Reply Brief
The Original File Name was 20190412 Reply SCt Brief.pdf

A copy of the uploaded files will be sent to:

- adrian.winder@foster.com
- ahearne@foster.com
- calliec@atg.wa.gov
- joel@ard.law
- litdocket@foster.com
- mevans@trialappeallaw.com
- tera.heintz@atg.wa.gov

Comments:

Sender Name: Melanie Evans - Email: melanie@albrechtlawfirm.com

Filing on Behalf of: David Knox Dewolf - Email: david@albrechtlawfirm.com (Alternate Email:)

Address:
421 W. Riverside Ave
Suite 614
Spokane, WA, 99201
Phone: (509) 495-1246

Note: The Filing Id is 20190412085852SC357656