NO. 100921-6

SUPREME COURT OF THE STATE OF WASHINGTON

GERALD HANKERSON,

Petitioner,

v.

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

Respondent.

v.

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; LARRY JENSEN; LYNN FRENCH; and CLINT RHOADS,

Interested Parties.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals reached the unremarkable conclusion that the Washington Constitution does not require that the Secretary of State give legal effect to electronic signatures or printed copies of electronic signatures submitted in support of an initiative petition. This result follows from the text of the Washington Constitution and applicable statutes and regulations. The Court of Appeals decision is also consistent with decisions from other states regarding the use of electronic signatures in the elections context.

The limits of the Court of Appeals decision also illustrate that review by this Court is not necessary. Under the Court of Appeals decision, the issue of whether and how to use electronic signatures in the initiative context remains alive for the political branches to decide. The Legislature and the People may adopt laws, and the Secretary may engage in notice-and-comment rulemaking to amend the existing original ink signature requirement. Further, initiative proponents remain free to bring

as-applied constitutional challenges in exceptional or emergent circumstances.

Mr. Hankerson does not satisfy any of the standards in RAP 13.4(b), and this Court should deny discretionary review.

II. ISSUE PRESENTED FOR REVIEW

Whether the Washington Constitution requires the Secretary of State to treat unverifiable copies as "valid signatures" when verifying signatures on initiative petitions.

III. STATEMENT OF THE CASE

In July 2020, Mr. Hankerson sent a letter to the Secretary of State taking the position that the Secretary was required to accept "online handwritten signatures." CP at 442-43. The Secretary responded and explained the reasons for the original ink signature requirement (including the absence of existing "procedures for verifying the authenticity of digital signature images"), the statutory provisions that contemplate original ink signatures, and the importance of leaving such an important decision to legislation, among other reasons. CP at 374-75.

In September 2020, Mr. Hankerson, through his counsel, sent a letter to the Secretary asserting that, in light of the COVID-19 pandemic, the Washington Constitution required the Secretary to accept petition signatures gathered online for I-1234, a proposed initiative to the 2021 Legislature. CP at 17-20. Understanding that Mr. Hankerson intended to gather electronic signatures online, the Secretary sought a prompt resolution of the question and filed a declaratory judgment action in Thurston County Superior Court three days later. CP at 1-7, 96-97.

After the Secretary filed this action, Mr. Hankerson and the regional chapter of the NAACP filed an original action in this Court. CP at 36. The Commissioner dismissed the original action on the basis that the petitioners had multiple plain, speedy, and adequate remedies at law, including the pending declaratory judgment action and the procedure set forth in RCW 29A.72 for challenging any rejection of electronic signatures. CP at 157-65.

On November 18, 2020, Mr. Hankerson filed a motion for summary judgment in this case. CP at 179-208. Another interested party, Julia Bobadilla-Melby, filed a motion for summary judgment the same day. CP at 674. The Secretary filed a cross-motion for summary judgment and supporting declarations. CP at 687-723. At no time did Mr. Hankerson file a motion for a preliminary injunction. Mr. Hankerson also did not collect signatures while the litigation was ongoing. CP at 887.

The superior court granted the Secretary's motion for summary judgment and entered an order declaring "that the Secretary of State is not required to accept electronic signatures on initiative petitions and that the Secretary of State is also not required to accept printed copies of electronic signatures on initiatives petitions." CP at 643-45. The superior court denied Mr. Hankerson's and Ms. Bobadilla-Melby's motions for summary judgment. CP at 644.

This Court denied Mr. Hankerson's request for direct review and transferred the case to the Court of Appeals. The

Court of Appeals affirmed the superior court, holding that "[t]he trial court did not err in concluding that the Secretary need not accept electronic signatures or printed copies of electronic signatures on initiative petitions." *Hobbs v. Hankerson*, __ Wn. App. 2d __, 507 P.3d 422, 426 (2022). Mr. Hankerson timely filed a petition for review.

IV. ARGUMENT

A. One of the Issues Addressed in the Petition is Moot

Mr. Hankerson's petition involves two separate issues, one of which is moot. Mr. Hankerson's challenge as-applied to I-1234 is moot and does not present a question of continuing and substantial public interest. The circumstances confronting initiative sponsors in 2020 are unlikely to recur. By contrast, Mr. Hankerson's broader challenge, as applied to any future initiative petitions using the specific system he proposed, is not moot.

The challenge as applied to I-1234 is moot. "A case is moot if a court can no longer provide effective relief." *State v.*

Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). This Court can no longer provide effective relief with respect to an initiative filed in 2020; the deadline for collecting signatures has passed. Mr. Hankerson acknowledges this. Pet. for Review at 15 ("Petitioner acknowledges that Initiative 1234 died once the December 31, 2020 signature deadline passed.").

Mr. Hankerson's argument relating to I-1234 does not satisfy the "continuing and substantial public interest" exception to the rule that this Court will not consider moot issues.[1] One of the key considerations related to this exception is "'the likelihood of future recurrence of the question.'" *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012) (quoting *In re Personal Restraint of Mattson*, 166 Wn.2d 730, 736, 214 P.3d 141 (2009)). The issue of whether the Secretary would have been

[1] Mr. Hankerson refers to the "capable of repetition [yet] evading review" formulation used in federal courts. Pet. for Review at 16. This Court has declined to adopt this exception. *Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 451, 759 P.2d 1206 (1988). But the argument is properly considered under the public interest exception.

required to accept electronic signatures for I-1234 (had the sponsors collected such signatures) is a fact-specific inquiry, considering such factors as the sponsors' diligence. *E.g.*, *Miller v. Thurston*, 967 F.3d 727, 740-41 (8th Cir. 2020) (considering COVID-19 circumstances); *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (considering diligence). The circumstances present in Washington in 2020—including the onset of a global pandemic and an associated stay-home order—are exceedingly unlikely to recur, and "an authoritative determination" of whether those circumstances required accepting electronic signatures would provide no useful "future guidance of public officers." *Hunley*, 175 Wn.2d at 907.

Any future as-applied challenges to the original ink signature requirement can be timely addressed on the merits. Mr. Hankerson suggests that the legal issue may "evad[e] review" as a result of "the running out of the clock." Pet. for Review at 16. But Mr. Hankerson could have brought a motion for preliminary injunction at any time and, if unsuccessful, a

motion for accelerated review. This Court frequently addresses time-sensitive election matters. *E.g.*, *Huff v. Wyman*, 184 Wn.2d 643, 645, 361 P.3d 727 (2015). There is no reason to think that the issue will evade review in the future.

The Secretary agrees that Mr. Hankerson's argument related to the application of the original ink signature requirement to future initiatives using his proposed signature-collection system is *not* moot. A decision in Mr. Hankerson's favor would allow him to use his proposed signature-collection system with respect to future initiatives (without bringing a new as-applied challenge) and would therefore provide effective relief. Though this issue is not moot, it still does not warrant this Court's review.

B. The Petition Does Not Present a Significant or Substantial Question

The petition for review overstates the significance of the issue presented. This case does not concern whether the Washington Constitution *allows* for electronic signatures; the parties agree that, with statutory and regulatory authorization,

such signatures would be permissible. This case does not even concern whether the Washington Constitution requires the Secretary to give legal effect to *all* electronic signatures (such as an "s/" or audio recording, *see* RCW 1.80.010(10) (defining "electronic signature")). In fact, this case is not about whether the Secretary must give legal effect to *electronic* signatures at all. Instead, the issue in this case is whether the Secretary must give legal effect to *printed copies* of signatures that were gathered electronically using a particular—and particularly flawed—system. CP at 547, 888.

Applying settled law and the plain language of the Washington Constitution, the Court of Appeals correctly concluded that the Secretary is not required to give legal effect to copies of electronic signatures submitted pursuant to Mr. Hankerson's proposed system. The Washington Constitution requires "valid signatures of legal voters." Const. art. II, § 1(a). In this context, "valid" means "genuine." *Sudduth v. Chapman*, 88 Wn.2d 247, 252-53, 558 P.2d 806 (1977). The

Washington Constitution does not otherwise define the term "valid signature." In the absence of specific legislation, the Washington Constitution directs the Secretary to follow "the general laws" with respect to initiative petitions. Const. art. II, § 1(d).

Two statutory schemes are relevant to the determination of what constitutes a "valid signature." First, chapter 29A.72 RCW establishes procedures and standards related to initiative petitions. Particularly relevant here, RCW 29A.72.230 assigns the responsibility for "[t]he verification and canvass of signatures" on initiative petitions to the Secretary. With certain exceptions not relevant here, RCW 29A.72.230 gives the Secretary discretion regarding how to verify and canvass signatures. *See also* RCW 43.07.310(1) ("The secretary of state . . . is responsible for . . . [t]he . . . verification of signatures, and certification of state initiative . . . petitions."). Other statutes in chapter 29A.72 RCW contemplate original ink signatures. *See*

RCW 29A.72.090, .100 (directing sponsors to print blank petitions and specifying paper requirements).

The second statutory scheme is the Uniform Electronic Transactions Act (UETA), ch. 1.80 RCW. The UETA expressly gives the Secretary discretion to "determine whether, and the extent to which," the Secretary will "accept . . . electronic signatures to and from other persons and otherwise . . . use[] and rely upon . . . electronic signatures." RCW 1.80.170(1). It expressly "does not require a governmental agency of this state to use or permit the use of . . . electronic signatures." RCW 1.80.170(3); *see also* RCW 1.80.040 (noting that chapter applies only "between parties each of which has agreed to conduct transactions by electronic means"). Other states have concluded that, under the language of the UETA, elections officials are not required to give effect to electronic signatures. *Meyer v. Jacobsen*, __ P.3d __, No. DA 21-0378, 2022 WL 1553142, at *7-9 (Mont. May 17, 2022); *Yoshimura v. Kaneshiro*, 149 Haw. 21, 39, 481 P.3d 28 (2021).

Together, chapter 29A.72 RCW and the UETA firmly establish that the Secretary has discretion regarding whether to give legal effect to electronic signatures on initiative petitions. The Secretary's regulations reflect that the Secretary has exercised that discretion to *not* give legal effect to electronic signatures on initiative petitions. The regulations require that signatures be "handwritten," WAC 434-379-020(1), a term the Secretary has long interpreted to mean an original ink signature, CP at 896-97. That interpretation is entitled to "a 'high level of deference.'" *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 581, 397 P.3d 120 (2017) (quoting *Silverstreak, Inc. v. Dep't of Lab. & Indus.* 159 Wn.2d 868, 885, 154 P.3d 891 (2007) (plurality opinion)). Deference is particularly appropriate in light of the Secretary's "expertise and insight gained from administering" the signature verification statutes since 1936. *Id*.; Laws of 1933, ch. 144, p. 490. The Secretary's interpretation is also confirmed by WAC 434-379-008(2)(e)(i), which requires lines for each voter to provide an "[o]riginal signature." *See also*

WAC 434-208-060(3) ("No initiative, referendum, recall, or other signature petitions may be filed electronically.").

Moreover, it is the Secretary's longstanding practice to not give legal effect to *copies* of signatures, even when the original was drawn on paper instead of electronically. CP at 896-97. Copies of initiative petitions lose all indicia of reliability; there is no way to verify that the copy received by the Secretary is genuine. Copies make it impossible for the Secretary to fulfill the statutory requirement to verify signatures. While the Secretary can determine whether the copied signature matches the voter's signature, it is not possible to verify whether the voter signed the petition (or if the voter's signature was fraudulently affixed by a third party).

Under a straightforward reading of the Washington Constitution, statutes, and regulations, the Secretary is not required to give legal effect to initiative petitions bearing copies of what a sponsor represents are signatures gathered online.

Mr. Hankerson's arguments do not raise a significant question of constitutional law for purposes of RAP 13.4(b)(3). To be sure, the issues touch on an important constitutional power. But the specific issue presented by Mr. Hankerson does not present a significant question. The parties agree that the Washington Constitution and United States Constitution protect the exercise of the initiative power. The Court of Appeals decision does not suggest otherwise.

Mr. Hankerson's assertion that the Court of Appeals held that there is no protection of the constitutional initiative power misreads the Court of Appeals decision. The Court of Appeals declined to address Mr. Hankerson's as-applied challenge because "in his reply brief, Hankerson expressly disavow[ed]" his as-applied challenge. *Hobbs*, 507 P.3d at 426 n.10. The Court of Appeals decision simply does not address the issue; it certainly did not hold that there are no constitutional protections.

It is undisputed that there are robust constitutional protections. Under the Washington Constitution, there is a

well-established legal framework ensuring that laws governing the initiative process do not restrict or hinder the exercise of the initiative power. *E.g.*, *Sudduth*, 88 Wn.2d at 250-51. Under this framework, laws that are reasonably necessary to prevent fraud or mistake are valid means of facilitating the initiative process. *E.g.*, *id*. at 252 (reflecting that courts should defer to legislative judgment where there is "some showing of facts upon which the legislature could reasonably" find a law necessary to "guard [the initiative process'] integrity"); *State ex rel. Evich v. Superior Court of Thurston County*, 188 Wash. 19, 28, 31, 61 P.2d 143 (1936) (holding that requirement to canvass signatures did not impermissibly hamper initiative process). Under the United States Constitution, there is also a well-established framework for determining whether laws governing the initiative process run afoul of the First Amendment's guarantee of the freedom of speech. *See Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992); *Anderson v. Celebrezze*, 460

U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983); *see also* Resp't's Br. at 42-43.

Even if Mr. Hankerson had preserved his as-applied constitutional challenge, it still would not present a significant constitutional question. Mr. Hankerson has chosen to simply ignore the existing legal frameworks in favor of a rigid rule that would invalidate regulations of the initiative process that do not make it "easy, easier, or less difficult" to adopt an initiative. Pet. for Review at 21. He does not address, much less meaningfully distinguish, cases that are inconsistent with his proposed rule. *See, e.g.*, *State ex rel. Evich*, 188 Wn.2d at 28, 31 (upholding canvassing requirement and removing initiative from ballot); *State ex rel. Kiehl v. Howell*, 77 Wash. 651, 652, 654-55, 138 P. 286 (1914) (upholding time limits on initiative signature gathering). Nor does Mr. Hankerson argue that these inconsistent cases are incorrect and harmful. Mr. Hankerson's arguments do not present a significant constitutional question.

Mr. Hankerson's arguments also do not identify "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). While issues relating to the initiative power will frequently be of substantial public interest, Mr. Hankerson raises only a narrow issue related to one specific system of submitting copies of electronic signatures. The Court of Appeals decision is narrow and leaves ample room for the political branches—including the people legislating by initiative—to address the issue of electronic signatures on initiative petitions. It also preserves the opportunity for initiative supporters to bring as-applied challenges to the original ink signature requirement under well-established constitutional frameworks.

C. The Court of Appeals Decision is Consistent With Precedent

The decision of the Court of Appeals does not conflict with any decision of this Court or the Court of Appeals. There are two problems with Mr. Hankerson's argument. First, he addresses the wrong standard, focusing on the Secretary's

arguments instead of the Courts of Appeals decision. Second, Mr. Hankerson misunderstands the nature of the discretion at issue.

Mr. Hankerson addresses the wrong standard in arguing that "the Secretary's 'discretion' claim conflicts with" precedent. Pet. for Review at 25. The question is not whether a party's *claim* conflicts with precedent; the question is whether "the *decision of the Court of Appeals*" conflicts with precedent. RAP 13.4(b)(1)-(2) (emphasis added). The Court of Appeals decision here did not address the Secretary's exercise of discretion with respect to the DocuSign signature system. *Hobbs*, 507 P.3d at 426 n.10 (declining to address the disavowed constitutional argument). As a result, the Court of Appeals decision cannot be said to be inconsistent with any other decision on the issue of the exercise of discretion.

In addition, Mr. Hankerson's allegation of a conflict is based on a misunderstanding of the discretion at issue. The Secretary had discretion to determine whether or not to accept

electronic signatures on initiative petitions. RCW 1.80.170(1), (3); RCW 29A.72.230. The Secretary exercised that discretion to not accept electronic signatures on initiative petitions, as reflected in WAC 434-379-020(1), WAC 434-379-008(2)(e)(i), and WAC 434-208-060(3). *See also* CP at 896-97. Having exercised discretion by adopting a generally-applicable rule, the Secretary is not required to individually exercise discretion anew every time someone seeks an exception to the rule.

The cases cited by Mr. Hankerson do not support his argument to the contrary. Pet. for Review at 25-26 (citing *Rios v. Dep't of Lab. & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002), and *Merritt Sch. Dist. No. 50 v. Kimm*, 22 Wn.2d 887, 891, 157 P.2d 989 (1945)). The *Rios* case addressed an agency's adoption of a rule and its later refusal to adopt a rule. *Rios*, 145 Wn.2d at 490. It also arose in the context of a statute setting specific rulemaking requirements. *Id*. at 508 (citing RCW 49.17.050(4)). By contrast, Mr. Hankerson has not brought a rulemaking challenge under the APA, nor has he petitioned for agency

rulemaking. There is no conflict with *Rios*. The *Kimm* case did not involve discretion exercised by the adoption of a generally-applicable rule. Instead, it involved a one-off decision by a school superintendent. *Kimm*, 22 Wn.2d at 888-89. This was a fundamentally different context, and there is no conflict.

Regardless, Mr. Hankerson is incorrect on the merits about what occurred here. The Secretary clearly *did* consider Mr. Hankerson's proposal and explained the reasons for adhering to the existing rule, including the position that such an important policy decision should be made by the Legislature. CP at 96-97, 374-75. While the Secretary did not review the specific website, the Secretary had sufficient information to determine that Mr. Hankerson's proposal was problematic. Discovery in this case only confirmed that conclusion. CP at 888 (reflecting intent to submit printed copies of electronic signatures).

In sum, Mr. Hankerson has not identified a conflict between the Court of Appeals decision in this case and any other

published decision. Review is not warranted under RAP 13.4(b)(1) or (2).[2]

V. CONCLUSION

This Court should deny the petition for review. The Court of Appeals decision is narrow and preserves robust protections for the exercise of the initiative power.

This document contains 3,305 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 10th day of June, 2022.

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[2] Mr. Hankerson's request for leave to file a reply, Pet. for Review at 27, should be denied. A reply is available "only if the answering party seeks review of issues not raised in the petition for review." RAP 13.4(d). The Secretary does not seek review of any issue.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served all parties, according to the Court's protocols for electronic filing and service.

DATED this 10th day of June, 2022, at Olympia, Washington.

s/ Leena R. Vanderwood
LEENA R. VANDERWOOD
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SOLICITOR GENERAL OFFICE

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