☐ EXPEDITE
☐ No hearing is set.
☐ Hearing is set:
Date: _____
Time: _____
Judge/Calendar: _____
_____

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

WASHINGTON FAMILIES STANDING TOGETHER and ANNE LEVINSON, Plaintiffs, v. SECRETARY OF STATE SAM REED, in his official capacity, and PROTECT MARRIAGE WASHINGTON, Defendants.	No. _____ DECLARATION OF AMANDA J. BEANE IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

I, Amanda J. Beane, declare:

1. I am an attorney with Perkins Coie LLP, and counsel for plaintiffs in the above-captioned matter. I have personal knowledge of the facts set forth in this declaration and am competent to testify thereto.

2. On August 27, 2009, Plaintiffs filed an action in King County Superior Court, Cause No. 09-2-31908-1 SEA.

3. Attached as Exhibit A is a true and correct copy of the King County Superior Court Order on Plaintiffs' Motion for Temporary Restraining Order, dated September 2, 2009.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

4. Attached as Exhibit B is a true and correct copy of the Declaration of Kevin J. Hamilton, which was filed in the King County Superior Court action.

5. Attached as Exhibit C is a true and correct copy of the Declaration of Anne Levinson, which was filed in the King County Superior Court action.

6. Attached as Exhibit D is a true and correct copy of the Declaration of Jonathan Macaranas, which was filed in the King County Superior Court action.

7. Attached as Exhibit E is a true and correct copy of the Declaration of William B. Stafford, which was filed in the King County Superior Court action.

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

SIGNED at Seattle, Washington, this 3rd day of September, 2009.

AMANDA J. BEANE

Perkins Coie LLP
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Seattle, WA 98101-3099
Phone: 206.359.8000
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EXHIBIT A

FILED

KING COUNTY, WASHINGTON

SEP 0 2 2009

SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

WASHINGTON FAMILIES STANDING TOGETHER and ANNE LEVINSON Plaintiffs, vs. SECRETARY OF STATE SAM REED, in his official capacity Defendants. vs. PROTECT MARRIAGE WASHINGTON, Intervenor.	No. 09-2-31908-1 SEA ORDER ON PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

This matter came before the court on the plaintiffs' Motion for a Temporary Restraining Order to prevent Referendum 71 (hereinafter "R-71") from being placed on the ballot for the November 2009 general election.

The court heard oral argument on August 31, 2009. David Burman and William B. Stafford, of Perkins Coie, appeared on behalf of Washington Families Standing Together and Anne Levinson, plaintiffs, (hereinafter "WFST"). Deputy Solicitor General Jeffrey Even

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appeared on behalf of Secretary of State Sam Reed. Stephen W. Pidgeon appeared on behalf of Intervenor Protect Marriage Washington, (hereinafter "PMW").

In considering the motion, the Court heard oral argument and reviewed the following documents.

Plaintiffs' Motion for Temporary Restraining Order;
Declaration of Kevin J. Hamilton (including all attachments and exhibits);
Declaration of Anne Levinson (including all attachments and exhibits);
Declaration of Mona Smith (including all attachments and exhibits);
Declaration of Jonathan Macaranas;
Secretary of State's Response to Motion for Temporary Restraining Order;
Appendix of Authorities;
Declaration of Nick Handy (including all attachments and exhibits);
Intervenor Protect Marriage Washington's Memorandum In Opposition to Plaintiffs' Motion for a Temporary Restraining Order;
Plaintiffs' Reply;
Declaration of William B. Stafford (including all attachments and exhibits).

The following facts are agreed to by the parties.

On July 25, 2009, Protect Marriage Washington submitted approximately 137,883 signatures in support of R-71 to the Secretary of State's office. Under RCW 29A.72.150, a referendum requires 4% of the electors from the last gubernatorial election to sign petitions to qualify for the ballot. The Secretary of State determined this number to be 120,577. As of August 31, 2009, the Secretary of State had approved 121,486 signatures in support of R-71.

On July 25, 2009, proponents of R-71 organized the boxes of petitions at the bottom of the Capitol stairs in Olympia. In doing so, they realized that many signature-gatherers had not filled out the declaration on the back of the petition. In response to the missing signatures, PMW members obtained a signature stamp from Lawrence Stickney, the campaign manager for PMW, and stamped his name and signature to many of the petitions with blank declarations. It is estimated that over 2,500 petitions lacked signature-gatherers' signatures.

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The Secretary of State accepted 33,966 signatures on 2,508 petitions where the declaration was stamped with Mr. Stickney's name after the fact. The Secretary of State also accepted 2,058 signatures on 162 petitions where the signature-gatherer declaration was left entirely blank.

PMW submitted so few signatures above the minimum required that the Secretary of State was not confident that a random statistical sample would accurately demonstrate whether there were sufficient valid signatures to certify the measure for the ballot. Handy Decl., ¶10. As a result, the Secretary of State determined that a 100% check of all signatures submitted on July 25, 2009 would be conducted. *Id.*

On July 31, 2009, the Secretary of State began to determine how many valid signatures had been submitted. During the check, SOS staff first compared the signatures on the petitions to signatures on file in the statewide voter registration database to determine if each signature was that of a registered voter. Signatures rejected in the initial check were then submitted to a "master checker," someone with more experience who reviewed whether they had been correctly rejected. Then, SOS staff checked the remaining rejected signatures an additional time against an updated list of voters who had registered after June 19, 2009, and throughout the verification process. Handy Decl., ¶ 28

The Secretary of State specifically instructed staff to accept signatures regardless of voter registration date. Hamilton Decl., ¶ 5. As a result, a number of signatures were accepted from voters who were not registered at the time they signed the petitions. Some had registered after the R-71 petitions were filed.

Washington Families Standing Together and Anne Levinson filed a motion for a Temporary Restraining Order (1) to prevent the Secretary of State from accepting signatures on petitions where the signature-gatherer's declaration was either blank or stamped *en masse* on

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the steps of the Capitol and (2) to prevent the Secretary of State from accepting signatures of voters who were not registered at the time they signed the petition.

To the above recitation of facts, the court makes the following findings of law.

To obtain a Temporary Restraining Order, a plaintiff must establish (1) a clear legal or equitable right; (2) a well-grounded fear of an immediate invasion of that right by the defendant; and (3) that the acts constituting such an invasion are resulting, or will result, in actual and substantial injury to the plaintiff. *Kucera v. Dept. of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). These elements must be reviewed as part of a balancing of the relative interests of the parties and, where appropriate, the interest of the public. *Id.*

The right to petition for referendum is rooted in Washington's State Constitution. Const. art. 2, § 1(b). The Constitution specifies that "all such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor." *Id.* The Constitution limits the right to sign a petition to "registered voters," and in order to make the ballot, a referendum petition must be signed by a number of registered voters equal to or greater than four percent of the votes cast for governor at the last election. Const. art. 2, § 1(c). Therefore, under Washington law, the main duty of the Secretary of State once the referendum petition has been filed is "to verify and canvass the names of the legal voters on the petition." RCW 29A.72.230.

Under RCW 29A.72.170, the Secretary of State can refuse to file any referendum petition for only the following reasons:

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; or
3. That the time within which the petition may be filed has expired.

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If none of these grounds for refusal exist, the Secretary of State must accept the petitions. RCW 29A.72.170. However, he has "discretionary authority" to accept petitions that do not meet these requirements. *Schrempp v. Munro*, 116 Wn.2d 929, 934, 809 P.2d 1381 (1991). Therefore, "judicial review of the administrative decision of the Secretary of State is authorized only if the Secretary *refuses* to file the petition." *Id.* at 934 (emphasis original).

As the Court explained in *Schrempp*:

> A reasonable basis is plainly evident to permit a challenge by the proponents of an initiative to the refusal to file a petition and to deny a challenge by the opponents to the decision to accept and file a petition. The proponents are exercising a constitutional right to petition. Const. art. 2, § 1(a). Legislation impacting that constitutional right can only be enacted "especially to facilitate its operation." Const. art. 2, § 1(d). By contrast, the opponents can claim no constitutional right to impede the exercise of the opponents' constitutional rights. The opponents do have constitutional rights which they can express to the Legislature in its consideration of the initiative, and, if it goes to a vote of the people, they can express their opposition and vote thereon. Const. art. 1, § 5; Const. art. 6. *Id.* at 935-36.

The Washington State Supreme Court reiterated this holding earlier this year, writing, "at the outset, petitioners acknowledge that they have no statutory right to challenge the secretary's decision to accept and file the petition ... the statute permits a challenge only to the secretary's refusal to file a petition, and that right of challenge extends only to the persons submitting the petition for filing. RCW 29A.72.180; *Schrempp*, 116 Wn.2d at 934-35, 809 P.2d 1381." *Community Care Coalition of Wash. v. Reed*, 165 Wn.2d 606, 614, 200 P.3d 701 (2009).

Only *after* the Secretary of State has certified the referendum petition, "any citizen dissatisfied with the determination" may apply to the Superior Court of Thurston County for an injunction to prevent the referendum from being placed on the ballot. RCW 29A.72.240. Therefore, the Secretary of State has invited plaintiffs to make this challenge in Thurston County

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Superior Court, *presumably after* certification occurs. Sec. of State's Response to Motion for TRO at 11.

The Court recognizes the concerns raised by the plaintiffs regarding the validity of a significant number of petitions and signatures in this case.

The Secretary of State concedes that he instructed his staff to accept signatures of voters who were not registered when they signed the petition. The court notes that the plain language of the Washington State Constitution and the Revised Code of Washington requires voters to be registered *before* signing. While it may be common practice for individuals to register simultaneously with signing referendum petitions, and it may even be good policy, that does not mean that the practice is in accordance with Washington law. No Washington court has ever considered this issue, but state supreme courts in other jurisdictions have decided resoundingly against the Secretary of State's position. *See Mays v. Cole*, 374 Ark. 532, *5 (2008); *State of Oregon ex rel. Sajo v. Paulus*, 297 Or. 646, 660, 688 P.2d 367 (1984); *In re Protest Filed with the Franklin County Board of Elections By Citizens for the Merit Selection of Judges, Inc.*, 49 Ohio St. 3d 102, 106, 551 N.E.2d 150 (1990); *Ahrens v. Kerby*, 44 Ariz. 337, 350, 37 P.2d 375 (1934); *In re Initiative Petition No. 365, State Question No. 687*, 55 P.3d 1048, 1051 (2002).

Protect Marriage Washington/Intervenor also admits that their members stamped the declarations on thousands of petitions with Mr. Stickney's signature before filing the referendum petitions with the Secretary of State. Likewise, the Secretary of State concedes that he has accepted more than 35,000 signatures where the signature-gatherer's declaration was either left blank or stamped *en masse* with Mr. Stickney's signature. In making this determination, the Secretary of State has relied on an opinion by the Attorney General issued in 2006. That opinion states that RCW 29A.72.130 requires not that the signature-gatherer actually sign the

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declaration, but only that the declaration be printed on the back of each petition. Op.Atty.Gen.2006, No. 13. Based on the statute's plain language and the legislative history, this essentially renders the declaration requirement meaningless. In adherence with the opinion of the Attorney General, the Secretary of State requires only a signature block to be printed on each petition, but does not require the same to be signed. Washington courts have yet to interpret the full requirements of this statute.

Further, neither the Secretary of State nor PMW/Intervenor has addressed the plaintiffs' allegations of fraud whereby individuals were allegedly deceived into signing the petitions. Specifically, there are allegations that signature-gatherers told some individuals that the referendum would protect domestic partnerships when in fact just the opposite was true. Hamilton Decl. Ex. B and C. In addition, the highlights at the top of the petitions contain apparent falsehoods, hyperbole, and unsubstantiated claims.[1]

The required signature-gatherer's declaration swears that the individuals who signed the petition did so "knowingly."[2] It is unclear whether a signature-gatherer can swear that an individual signer has signed the petition "knowingly" when the signature-gatherer has allegedly misrepresented the contents of the petition. Neither the Secretary of State nor PMW/Intervenor has answered this question.

Under RCW 29A.72.170, the Secretary of State undoubtedly has the power to refuse petitions with falsely signed declarations, petitions with blank declarations, and signatures of people who were not yet registered voters. It is conceded that the number of signatures

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[1] "If same-sex marriage becomes law, public schools K-12 will be forced to teach that same-sex marriage and homosexuality are normal...even over the objections of parents. Sign R-71 to protect children." Handy Decl., Exhibit A.

[2] "I, _____ *swear or affirm under penalty of law* that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition *knowingly* and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct." RCW 29A.72.130 (emphasis added).

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represented by these inadequate petitions is significant. Without them, the Secretary of State could not certify Referendum 71 for the ballot. RCW 29A.72.170, however, does not require the Secretary of State to refuse to accept petitions that do not meet statutory requirements. It only limits his ability to reject petitions. *Community Care Coalition of Wash.*, 165 Wn.2d at 614.

In summary, under Washington case law it is unclear whether there are any limits to the Secretary of State's discretion as long as he has chosen to accept petitions rather than reject them.[3]

Finally, under *Schrempp* and *Community Care Coalition, supra*, this court has no authority to prevent the Secretary of State from accepting these petitions in light of their questionable validity. Only *after* certification can opponents of a referendum challenge it in court, and then only in compliance with RCW 29A.72.240. Therefore, any challenge to the Secretary of State's certification of a referendum must be brought in Superior Court in Thurston County within five days.

The statute remains silent as to how the court should conduct an inquiry as to questioned conduct or validity of the certification process. While plaintiffs have argued for this court to exercise its inherent authority and grant injunctive relief to prevent the Secretary of State from placing Referendum 71 on the ballot, the Washington Constitution and RCW 29A.72.240 *et seq.* dictate a different result.

[3] *See Community Care Coalition,* 165 Wash. 2d at 621-23 (J. Fairhurst, J. Sanders, J. Owens dissenting) (questioning whether there is any limit to the Secretary of State's discretion).

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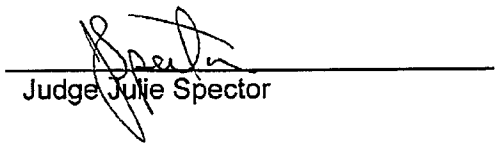
Based on the above, the court DENIES the plaintiffs' Motion for Temporary Restraining Order and Motion for a Writ for Mandamus.

Dated: September 2, 2009



Judge Julie Spector

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