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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2019 SEP -5 AM 8:37

Linda Myhre Enlow
Thurston County Clerk

1 EXPEDITE
2 No Hearing Set
3 Hearing is Set:
4 Date: September 5, 2019
5 Time: 1:30 p.m.

6 STATE OF WASHINGTON
7 THURSTON COUNTY SUPERIOR COURT

8 "APPROVE I-1000 CAMPAIGN
9 COMMITTEE," NATHANIEL
10 JACKSON, LORA-ELLEN
11 MCKINNEY, and LARRY DUGGER,

12 Plaintiffs,

13 v.

14 THOMAS G. JARRARD, KAN QIU,
15 JOHN CARLSON, JUDY WARNICK,
16 MARY A. RADCLIFFE, YVONNE
17 KINOSHITA WARD,

18 Defendants,

19 and

20 KIM WYMAN, Secretary of State

21 Nominal Party.

NO. 19-2-04414-34

OPPOSITION TO PETITION TO
CORRECT PUBLICATION OF THE
NOVEMBER 2019 VOTERS'
PAMPHLET PURSUANT TO RCW
29A.32.090

22 I. INTRODUCTION

23 Kim Wyman, Washington Secretary of State, opposes Plaintiffs' petition to correct the
24 publication of the voters' pamphlet under RCW 29A.32.090. Plaintiffs have not met their high
25 burden of proof under RCW 29A.32.090(3)(a), which requires them to show they have "a very
26 substantial likelihood of prevailing in a defamation action." Moreover, the printing of the voters'
pamphlets is already underway. Ordering substantive changes to the voters' pamphlets at this
late date would substantially disrupt the printing schedule and create a significant risk that

1 Washington voters will not timely receive a voters' pamphlet. Plaintiffs' petition should be
2 denied.

3 II. ARGUMENT

4 A. Plaintiffs Fails to Meet Their Burden of Proof Under RCW 29A.32.090

5 While the Secretary does not take a position on the ultimate merits of Plaintiffs'
6 defamation claim, Plaintiffs have nevertheless failed to meet the exceptionally high burden for
7 obtaining relief under RCW 29A.32.090. Plaintiffs bring this claim under RCW 29A.32.90(3),
8 which permits a petition for relief when an individual believes "he or she may be defamed by an
9 argument or statement" in the voters' pamphlet. A court may not order relief under the statute,
10 however, "unless it concludes that the statement is untrue and that the petitioner has a *very*
11 *substantial likelihood of prevailing in a defamation action.*" RCW 29A.32.090(3)(b) (emphasis
12 added). Plaintiffs do not meet this exceptionally high standard.

13 To start, Plaintiffs do not identify any allegedly defamatory statement *against them*. Both
14 RCW 29A.32.090(3) and common law defamation cases require, among other things, an untrue
15 statement concerning Plaintiffs that damage their reputations. *State ex rel. Pub. Disclosure*
16 *Comm'n v. 119 Vote No! Comm.*, 135 Wash. 2d 618, 629, 957 P.2d 691, 697 (1998) ("By its
17 nature defamation concerns statements made by one person against another and is designed to
18 protect the property of an individual in his or her good name."). Plaintiffs themselves
19 acknowledge that a defamation action will not ordinarily lie absent "convincingly clear proof of
20 his or her identity as a target of an allegedly libelous statement." *Camer v. Seattle Post-*
21 *Intelligencer*, 45 Wash. App. 29, 37 (1986)); Petition at ¶ 46. As explained in *Camer*:

22 The identification of one defamed must be certain and apparent from the words
23 themselves. One cannot by implication identify oneself as the target of an alleged libel if
24 the allegedly libelous statement does not point to him or her. It is not necessary that the
25 plaintiff be mentioned by name in order to recover damages, but it is sufficient if the
26 audience will conclude from a perusal of the article that the plaintiff is the one against
whom publication is aimed.

Id.

1 Here, Plaintiffs concede that the disputed statements in the voter pamphlets are not about
2 them. Petition at ¶¶ 21-23. Plaintiffs also implicitly concede that statements do not identify them
3 either directly or indirectly and that their connection to I-1000 would need to be gleaned from
4 some other source, such as in a search for the sponsors of I-1000 on the internet. Petition at ¶ 46.
5 Whether Plaintiffs can successfully argue for an extension of the law to cover such
6 circumstances, the absence of any reference to Plaintiffs in the disputed statements constitutes a
7 significant obstacle to their ability to successfully prove a defamation claim. It precludes a
8 determination that Plaintiffs have “a very substantial likelihood of prevailing in a defamation
9 action” as required to obtain the extraordinary relief they seek under RCW 29A.32.090(3).

10 In addition to this significant obstacle, Plaintiffs will also face difficulty in proving that
11 the challenged statements are actionable statements of fact, as opposed to nonactionable
12 expressions of opinion or ideas. Both Washington and federal courts have recognized that
13 “speech on public issues occupies the highest run of the hierarchy of First Amendment values.”
14 *Dunlap v. Wayne*, 105 Wn. 529, 846 (1986). Political statements, such as those at issue here, are
15 often recognized as nonactionable expressions of opinion. To determine whether a statement is
16 nonactionable, a court considers “(1) the medium and context in which the statement is
17 published, (2) the audience to whom it is published, and (3) whether the statement implies
18 undisclosed facts.” *Id.* “Statements of opinion are expected to be found more often in certain
19 contexts, such as editorial pages or political debates.” *Id.* Audience expectations are also
20 important in this analysis. *Id.* “In the context of going public debates, the audience is prepared
21 for mischaracterizations and exaggerations, and is likely to review such representations with an
22 awareness of the subjective biases of the speaker.” *Id.* (internal citations omitted); *see also*
23 *Rickert v. State, Pub. Disclosure Comm’n*, 129 Wash. App. 450, 459–60, 119 P.3d 379, 384
24 (2005), *aff’d*, 161 Wash. 2d 843, 168 P.3d 826 (2007) (“[E]rroneous statement is inevitable in
25 free debate, and [] it must be protected if the freedoms of expression are to have the ‘breathing
26 space’ that they ‘need ... to survive.’”) (internal citations omitted).

1 Given the context of the disputed statements—in a voter pamphlet, regarding a political
2 issue, presented in the nature of a political debate—Plaintiffs will face substantial difficulty in
3 proving that the statements are actionable statements of fact as opposed nonactionable ideas or
4 expressions of opinion. Combined with the fact that the challenged statements do not explicitly
5 or implicitly identify Plaintiffs, Plaintiffs have failed to meet their high burden of demonstrating
6 a “very substantial likelihood of prevailing in a defamation action.” RCW 29A.32.090(3)(b).

7 **B. Delaying Printing of the Voter Pamphlet Would Risk Voters Not Receiving**
8 **Voter Pamphlets**

9 In addition to Plaintiffs’ failure to meet their burden of proof, Plaintiffs’ requested relief
10 would also jeopardize the Secretary of State’s ability to ensure that all voters timely receive a
11 voters’ pamphlet. This case is unusual because the pro and con statements at issue arose from a
12 qualifying referendum, which creates a much more compressed timeframe to address statements
13 in the voters’ pamphlet than would apply to an initiative. Because of the unusually tight schedule,
14 the Office of the Secretary of State (“OSOS”) communicated with certain named Plaintiffs to
15 alert them of the need for prompt legal action if any changes were to be made to the voter
16 pamphlet. *See* Declaration of Lori Augino ¶ 8, Ex. A. Plaintiffs nevertheless waited until the
17 eleventh hour to file their petition.

18 As detailed in the declaration of Lori Augino, printing the voters’ pamphlets is a highly
19 coordinated, complex process involving many moving pieces and subject to numerous state and
20 federal laws. Augino Decl., ¶¶ 2-8. This year, the OSOS will print 21 editions of the voters’
21 pamphlet that will be mailed to over 3.4 million households. *Id.* ¶ 4. The 21 different editions of
22 the voters’ pamphlet ranges between 56 and 176-pages in length. *Id.* Five of the 21 editions must
23 be translated into three different languages: Spanish, Chinese, and Vietnamese. *Id.* 5. Because
24 few printers can accommodate such a large print job, the OSOS contracted with two different
25 printing vendors months in advance to reserve the time needed for printing to be completed. *Id.*
26 at ¶ 4. The voters’ pamphlet must be printed early in September to ensure that military and

1 overseas voters who must be mailed their ballots by September 21, 2019 under federal law, also
2 receive their voters' pamphlets by those counties who mail ballots and pamphlets in a single
3 packet. *Id.* at ¶¶ 2-4.

4 Any changes in the voters' pamphlet at this late date would wreak havoc on this carefully-
5 coordinated printing and distribution schedule. If any changes were made to the voters' pamphlet
6 such that printing would be delayed, the OSOS would lose its position for printing the voters'
7 pamphlet. *Id.* at 5(a). Any delays in rescheduling the print time alone would make it unlikely
8 that voters' pamphlets could be printed in time for the 15 counties to include the pamphlets with
9 ballots sent to overseas and military voters. *Id.* Delays in rescheduling the print time also creates
10 a risk that the voters' pamphlets would not be printed in time to send to all voters in Washington
11 by early October.

12 In addition to this delay, any amended text would have to be written, proofed and
13 formatted for 21 different editions. *Id.* at ¶ 5(b). The revised text for five of 21 the editions would
14 need to be translated and submitted for community review, a process that alone would take close
15 to a week to complete. *Id.* at 5(b). The printing process itself would also likely take at least one
16 week, not including any delays in preparing the texts or rescheduling the print jobs. *Id.* at 5(c).

17 In sum, any delay in printing the voters' pamphlet, which is already underway, would
18 have significant ripple effects and create a risk that voters would not timely receive their voters'
19 pamphlet.

20 **III. CONCLUSION**

21 Given Plaintiffs' failure to meet their burden for proving any entitlement to relief and the
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1 significant disruption that would be caused by delaying the printing of the voters' pamphlets,
2 Plaintiffs' Petition should be denied.

3 Dated: September 5, 2019
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5 Respectfully submitted,
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7 ROBERT W. FERGUSON
8 *Attorney General*

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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 foregoing document via electronic mail and hand service on the following:

“Approve I-1000 Campaign Committee,” Nathaniel Jackson
Lora-Ellen McKinney, and Larry Dugger
Plaintiffs
c/o Floyd Chapman
Law Office of Floyd Chapman, PLLC
1201 Pacific Avenue, Suite 600
Tacoma, WA 98402

DATED this 5th day of September 2019.

Tera M. Heintz
Deputy Solicitor General