

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COMMUNITY CARE COALITION OF
WASHINGTON; HOME CARE OF
WASHINGTON, INC.; THE
FREDRICKSON HOME; CYNTHIA
O'NEILL, a Washington Citizen and
Taxpayer; RON RALPH and LOIS
RALPH, husband and wife and
Washington Citizens and Taxpayers,

Petitioners,

v.

SAM REED, Secretary of State,

Respondent,

and

LINDA LEE and PEOPLE FOR SAFE
QUALITY CARE,

Intervenors/Respondents.

NO. 8 1 8 5 7 - 6

EN BANC

Filed February 5, 2009

ALEXANDER, C.J.—Several petitioners led by the Community Care Coalition of Washington filed an original action in this court seeking to compel Secretary of State Sam Reed to accept petitions submitted for Initiative Measure No. 1029 (I-1029) as petitions for an initiative to the legislature. Petitioners conversely ask us to prohibit the secretary of state from certifying I-1029 as an initiative to the people for placement on the November 2008 general election ballot. We heard the

matter en banc on September 4, 2008, and issued an order on September 5 dismissing the petition with an explanatory opinion to follow in due course. This is our opinion explaining our order.

FACTS

The pertinent facts are undisputed.¹ On March 12, 2008, Linda Lee filed with the secretary of state's office a proposed initiative dealing with background checks and training and certification of long-term care workers. On the accompanying form affidavit, Lee marked the box indicating that the measure was to be submitted to the "people." Agreed Statement of Facts, Ex. A. The secretary of state's office thereafter processed the proposed initiative in every respect as an initiative to the people, listing it as such on its website. The code reviser issued a certificate of review, and Lee filed the final version of the proposed initiative on March 28, 2008. On the same date, the secretary of state's office assigned the initiative the number 1029 (from a list of serial numbers reserved for initiatives to the people). *See* RCW 29A.72.040. The attorney general's office then drafted a ballot title and a ballot measure summary. Though given the opportunity to do so, Lee evidently did not have the secretary of state's office review the final petition form.

Lee and other proponents of I-1029 prepared and circulated petitions for voter signatures. Below the title graphics stating "YES" to "I-1029," the petition set forth the "BALLOT TITLE" as prepared by the attorney general's office. Agreed Statement of Facts, Ex. M. Then came the "BALLOT MEASURE SUMMARY." *Id.*

¹The parties submitted an agreed statement of facts. RAP 16.2(d). Petitioners' subsequent request to take judicial notice of additional records, and intervenors' corresponding request to submit additional evidence, were both denied.

Following that, the petition recited the required language addressed “*To the Honorable Sam Reed, Secretary of State of the State of Washington.*” *Id.* The language required differs depending on whether the initiative is directed to the people or to the legislature. *See* RCW 29A.72.120, .110. The petition here had a long paragraph directing that the initiative “*be transmitted to the legislature of the State of Washington at its next ensuing regular session, and [that] the legislature [] enact said proposed measure into law.*” Agreed Statement of Facts Ex. M (emphasis added).

On the reverse side of the petition, immediately above the text of the initiative, a subtitle stated, “BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON.” *Id.* The body of the initiative included expressions of “the intent of the people” in enacting the petition. *Id.* In numerous places the initiative would mandate the Department of Social and Health Services and the Department of Health to implement rules by August 1, 2009. It would also require innovative training methods until December 31, 2009, and certain sections of the initiative are contingent on proposed 2008 legislation taking or not taking effect. The act implemented by the initiative is to be called the “better background checks and improved training for long-term care workers for the elderly and persons with disabilities initiative of 2008.” *Id.* The petition also designated a final mailing deadline of June 25, 2008, which corresponded to the final date for mailing petitions for an initiative to the people.

Around June 25, 2008, a citizen brought a blank I-1029 petition to the secretary of state’s office and pointed out that language on the face of the petition indicated it was an initiative to the legislature. On July 2, petitioner Community Care Coalition of Washington urged the secretary of state to reject the I-1029 petitions. On

July 3, the last day petitions for initiatives to the people could be filed with the secretary of state, Lee submitted I-1029 petitions to that office for filing and certification.

On July 14, a deputy solicitor general responded to Community Care Coalition of Washington on behalf of the secretary of state, acknowledging its concerns but informing it that the secretary had decided to process the petitions as supporting an initiative to the people notwithstanding the erroneous language in the petitions. The deputy solicitor general wrote that there was “no doubt that those who filed and circulated the petitions on I-1029 intended to file and process an initiative to the people and built their petition campaign around the constitutional deadlines for this form of an initiative.” Agreed Statement of Facts Ex. O, at 3. The deputy solicitor general indicated, further, that he was not aware of any evidence that the proponents or the press ever described the initiative as one to the legislature or noted the potential ambiguity on the face of the petition. Nor was there any basis, he said, to believe that the form of the petition influenced the number of valid signatures gathered for the initiative. The deputy solicitor general further wrote that rejecting the petitions “would fail to afford Washington’s voters the opportunity to consider, and either approve or reject the measure, where a constitutionally requisite number of qualified voters express support for its enactment to be considered.” *Id.*

On July 18, petitioner Cynthia O’Neill asked the attorney general by letter to file an action against the secretary of state to prevent him from processing the I-1029 petitions as supporting an initiative to the people and to require him instead to process the measure as an initiative to the legislature. Petitioners then filed this

original action in this court on July 22. The solicitor general subsequently informed petitioners that the secretary of state had acted within his lawful discretion and that the attorney general's office would defend the secretary in this matter.

Lee and People for Safe Quality Care, the official committee supporting I-1029, have intervened in the action, and the Initiative and Referendum Institute has filed an amicus curiae brief supporting the petition. After we denied petitioners' motion for an emergency injunction, the secretary of state certified I-1029 as an initiative to the people on August 13, 2008. The voters approved I-1029 in the November 4, 2008, general election.

ANALYSIS

The initiative is “[t]he first power reserved by the people.” Const. art. II, § 1(a). This power is self-executing, and the legislature's authority to affect the initiative process is limited to facilitating its operation. Const. art. II, § 1(d). Similarly, the authority of the judiciary over the process is limited, since questions regarding the initiative process are political, not judicial, unless express statutory or constitutional laws make the question judicial. *Schrempp v. Munro*, 116 Wn.2d 929, 932, 809 P.2d 1381 (1991) (quoting *State ex rel. Donohue v. Coe*, 49 Wn.2d 410, 417, 302 P.2d 202 (1956)).

There are two types of initiatives, those to the legislature and those to the people. Const. art. II, § 1(a). Apart from a general requirement that every initiative petition set forth the full text of the proposed measure, the constitution is silent on the precise form of such petitions. *Id.* Consistent with its constitutional authority to facilitate the initiative process, the legislature enacted provisions relating to the initiative process and petition forms. *See* ch. 29A.72 RCW.

Whether the petition is for an initiative to the legislature or for an initiative to the people, the petition “must be substantially” in the form provided under RCW 29A.72.110 (initiative to the legislature) or RCW 29A.72.120 (initiative to the people). *See* RCW 29A.72.170. These provisions, in turn, specify the following headings: “INITIATIVE PETITION FOR SUBMISSION TO THE LEGISLATURE” or “INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE.” RCW 29A.72.110, .120. If the initiative is to be submitted to the legislature, it must state that the signers direct the secretary of state to transmit the measure to the “legislature” and that they “petition the legislature to enact” the proposed measure. RCW 29A.72.110. If the initiative is to be submitted to the people, it must state that the signers direct the proposed measure “be submitted to the legal voters of the State of Washington for their approval or rejection at the general election.” RCW 29A.72.120.

The I-1029 petition was flawed. To the extent it was meant to be a petition for an initiative to the people, it lacked the capitalized subtitle indicating that it was an “INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE.” RCW 29A.72.120. And the language of instruction directed to the secretary of state was in the form required for initiatives to the legislature. But to the extent the petition identified the initiative as one to the legislature, it failed to meet the requirements of RCW 29A.72.110 by not prominently announcing that it involved an “INITIATIVE PETITION FOR SUBMISSION TO THE LEGISLATURE.”

The issue now is whether this court should intervene in the secretary of state’s decision to treat the petition as one supporting an initiative to the people. Petitioners’ challenge to the secretary’s action is two-pronged, but both arguments focus on RCW

29A.72.170. That statute states in relevant part that the secretary “may refuse to file any initiative . . . petition being submitted” if “the petition does not contain the information required by RCW 29A.72.110 [or] 29A.72.120.” RCW 29A.72.170(1). But if no ground for refusal exists, the secretary “must accept and file the petition.” RCW 29A.72.170. Petitioners argue that because the petition did not contain the language required by RCW 29A.72.120, directing the secretary to submit the initiative to the people, the secretary erroneously certified the initiative for placement on the November 2008 ballot. Conversely, petitioners argue that because the petition *did* contain the instructional language required for initiatives to the legislature, the secretary had no choice but to accept and file the petition as one for an initiative to the legislature.

At the outset, petitioners acknowledge they have no statutory right to challenge the secretary’s decision to accept and file the petition as a petition for an initiative to the people. The statutes permit 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. Petitioners instead seek to invoke this court’s jurisdiction by seeking a writ of mandamus or a writ of certiorari requiring the secretary to certify I-1029 to the legislature. *See* Const. art. IV, § 4; *Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 54, 65 P.3d 1203 (2003).

Considering first mandamus, a writ of mandamus may be issued to compel a state official to perform an act the law clearly requires as part of the official’s duties. RCW 7.16.160; *Wash. State Council of County & City Employees, Council 2 v. Hahn*, 151 Wn.2d 163, 166-67, 86 P.3d 774 (2004); *Walker v. Munro*, 124 Wn.2d 402, 408,

879 P.2d 920 (1994). And mandamus may also be issued to prohibit an official from performing an otherwise mandatory act. *Wash. State Labor Council*, 149 Wn.2d at 55. Mandamus has been used to consider actions of the secretary of state in relation to initiatives and referenda. *Id.* at 54-55; *Wash. State Farm Bureau Fed'n v. Reed*, 154 Wn.2d 668, 672, 115 P.3d 301 (2005). But mandamus will not lie to compel a discretionary act. *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001). As indicated, the secretary “may” refuse to file an initiative petition if the petition omits the information for initiatives to the people required by RCW 29A.72.120. RCW 29A.72.170(1). The secretary therefore has “discretionary authority” to decide whether to reject a noncomplying petition. *Schrempp*, 116 Wn.2d at 934, 938. Thus, even accepting petitioners’ assertion that the petition here did not substantially comply with the statutory requirements for initiatives to the people, because the secretary had no clear mandatory duty to reject the petition on that basis, mandamus does not lie to compel him to do so.

But as discussed, petitioners also argue that because the secretary “must accept and file” a petition that contains the information required, RCW 29A.72.170, and because here the petition contained the required information for initiatives to the legislature, the secretary was required to accept the petition as a petition for an initiative to the legislature. As related above, however, the petition did not wholly conform to the requirements of RCW 29A.72.110 for initiatives to the legislature. And further, the numerical designation of the measure, its proposed legislative title, the language of the initiative measure itself, the proposed effective dates of some of its provisions, and the petition mailing deadline all suggested the initiative was intended

for submission to the people. In short, the petition was sufficiently ambiguous that the secretary was not duty-bound to accept it only as a petition for an initiative to the legislature. Moreover, RCW 29A.72.170 presupposes that a petition has been submitted by a proponent, hence the companion provision in RCW 29A.72.180 allowing a proponent to challenge the secretary's refusal to file a petition. In this case, no proponent seeks to advance an initiative to the legislature. Petitioners seek to use the writ of mandamus to pursue relief that would have been available only to proponents of an initiative to the legislature.²

As discussed, petitioners also seek a writ of certiorari. While this court has original jurisdiction in habeas corpus, quo warranto, and mandamus as to all state officers, it also has the power to issue writs of certiorari “and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.” Const. art. IV, § 4. Petitioners rely on *North Bend Stage Line v. Department of Public Works*, 170 Wash. 217, 16 P.2d 206 (1932), in urging us to exercise our constitutional jurisdiction to review

²The dissent acknowledges that mandamus will not lie to control a discretionary act but then essentially urges this court to do just that. While mandamus may remedy an official's total failure to exercise discretion, it does not lie to force the official to act in a particular manner. *Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 32, 978 P.2d 481 (1999); *see also Vangor v. Munro*, 115 Wn.2d 536, 543, 798 P.2d 1151 (1990). In this connection, RCW 29A.72.170(1) plainly states the secretary of state “may” refuse to file a noncomplying initiative petition, signaling his discretionary authority. *See Schrempp*, 116 Wn.2d at 934, 938. As discussed above, the factual record amply demonstrates that the secretary of state made a reasoned decision to not reject the petitions and to file them as supporting an initiative to the people, not inconsistent with ambiguities on the petitions and entirely consistent with the underlying history of the petitions as known to the secretary. Mandamus will not lie to direct the secretary of state to exercise his discretion differently.

directly the secretary of state's filing of the I-1029 petitions. In our view, petitioners read *North Bend* too broadly. In that case, we struck down a statute giving this court exclusive jurisdiction to review decisions of the Department of Public Works, holding that the court's appellate jurisdiction permits review of decisions of only a *purely judicial nature*. *Id.* at 221-22. The decision had the effect of reviving a former statute that properly lodged review authority in the superior court. *Id.* at 228. But meanwhile the time for seeking superior court review had lapsed through no fault of the party seeking review. *Id.* Under those highly unusual circumstances, a majority of the court said it would review the department's order pursuant to the court's discretionary certiorari jurisdiction. *Id.* at 229. Finding no reason for judicial interference with the department's order, the court denied relief and dismissed the proceedings. *Id.* at 232. Soon thereafter, this court relied on *North Bend* in considering and reversing an otherwise unreviewable public works order. *See generally Kitsap County Transp. Co. v. Dep't of Public Works*, 170 Wash. 396, 16 P.2d 828 (1932).

The highly unusual circumstances confronted in *North Bend* are not present here. Perhaps more importantly, *North Bend* did not meaningfully address whether this court had jurisdiction to issue a writ of certiorari under article IV, section 4 of our constitution. Rather, the court considered a statutory writ of review filed directly in this court pursuant to the statute ultimately held to be unconstitutional. *See North Bend*, 170 Wash. at 218, 222. The court then filled the resulting vacuum by exercising its "constitutional certiorari jurisdiction" to review an administrative decision that would have otherwise been challenged in superior court. *Id.* at 229. That narrow holding does not support the broader proposition that a writ of certiorari may issue for direct review of a

decision of the secretary of state. As we indicated in a later decision, *North Bend* generally clarified that under article IV, section 4, this court is the court of general appellate jurisdiction over judicial decisions, with limited original jurisdiction, while the superior court is the court of general original jurisdiction with primary power to review actions of administrative agencies. *Dep't of Highways v. King County Chapter, Wash. Env'tl. Council*, 82 Wn.2d 280, 284-85, 510 P.2d 216 (1973). Article IV, section 4 grants this court the power to issue writs of certiorari only as “necessary and proper to the complete exercise of its appellate and revisory jurisdiction.” While modern courts have searched in vain for what is encompassed by the term “revisory jurisdiction,” see *Morrison v. Superior Court*, 10 Ariz. App. 601, 461 P.2d 170 (1969), we reject the proposition that this court has the constitutional power to directly review and revise a decision of the secretary of state, as opposed to a decision of this court or a lower tribunal.

Our decision in *Schrempp* does not aid petitioners. The appellants there argued that this court should exercise its inherent equity power to intervene in cases of election fraud and wrongdoing. *Schrempp*, 116 Wn.2d at 936-37. We first responded that the appellants’ broad statement of principle excluded their own claim, since the case involved neither election fraud nor wrongdoing. *Id.* at 937. But we saw a more fundamental flaw in this argument. We found it necessary to more thoroughly explain this court’s power of review: “[d]espite the unavailability of either direct or discretionary review, we may, in unusual circumstances, exercise our inherent power . . . to determine if *the trial court’s* decision is arbitrary, capricious, or contrary to law.” *Id.* (emphasis added) (quoting *Kreidler v. Eikenberry*, 111 Wn.2d 828, 837, 766 P.2d 438 (1989)). We stated that the appellants had confused this simple standard for reviewing trial court decisions with the

constitutional question of the power and extent of judicial review. *Id.*

Thus, *Schrempp* does not stand for the proposition that this court can directly review a decision of the secretary of state to determine whether it is arbitrary or capricious or contrary to law.³ Even assuming that the appellants' arguments in that case raised the question of inherent power to review, we held that their contention of arbitrary and capricious conduct failed. *Id.* Likewise, petitioners' claims here that the secretary acted arbitrarily, capriciously, or contrary to law fail. We have already seen that the secretary's decision here was not clearly contrary to the law, since he acted within his discretionary authority. *See Schrempp*, 116 Wn.2d at 934, 937. The question then is whether his action was arbitrary and capricious, a "willful and unreasoning action, without consideration and in disregard of facts or circumstances'." *Id.* at 938 (internal quotation marks omitted) (quoting *Kreidler*, 111 Wn.2d at 837).

The agreed facts show Lee clearly intended an initiative to the people when she checked the corresponding box on the petition application form, and the secretary acknowledged that intent in processing and numbering the initiative as one to the people and in designating it as such on his office's website before the petition error came to light. Also, as discussed, the petition was ambiguous in that it could be interpreted as supporting either an initiative to the people or an initiative to the legislature. The face of the petition boldly proclaimed "YES" to "I-1029," followed by a "BALLOT TITLE" and a "BALLOT MEASURE SUMMARY." Agreed Statement of Facts, Ex. M. The four-digit number designating the initiative could only indicate an initiative to the people. The popular title

³The dissent does not address our court's lack of original jurisdiction under the constitution to directly review the secretary of state's action. *See* Const. art. IV, § 4.

and language of the measure itself was reflective of an initiative to the people. Moreover, several provisions of the measure indicated effective dates consistent only with a voter initiative to be voted upon in November 2008. Significantly, the petition indicated a mail return deadline of June 25, 2008, consistent with an initiative to the people. In light of these undisputed facts, the secretary's decision to file the petitions as supporting an initiative to the people, as the sponsor intended, was not arbitrary and capricious.

The ambiguities in the petition also undercut amicus's contention that the will of the voters who signed the petitions will be thwarted if the initiative is submitted to the people rather than the legislature. To the contrary, all voters will have an opportunity to cast their votes for or against the initiative. Requiring the secretary of state to file the initiative as one to the legislature, contrary to the undisputed intent of the initiative sponsor, would surely frustrate the initiative rights of voters who signed the initiative believing it was directed to the people, a scenario as likely as its opposite.

In any event, this case is fundamentally about the secretary of state's discretion in processing initiative petitions. The secretary had a reasoned basis to exercise his statutory discretion and accept the petitions as supporting an initiative to the people, notwithstanding the identified flaws. As in *Schrempp*, petitioners here fail to demonstrate grounds justifying the exercise of this court's narrow constitutional powers.⁴

⁴Petitioners rely on three foreign authorities. See *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889 (D.C. 1981) (plurality opinion); *Nist v. Herseth*, 270 N.W.2d 565 (S.D. 1978); *Thomson v. Wyo. In-Stream Flow Comm.*, 651 P.2d 778 (Wyo. 1982). But all three decisions are distinguishable. In the District of Columbia case, supporters of a substantively invalid initiative measure sought to amend the measure to render it valid while petitions were in circulation. *Convention Ctr. Referendum Comm.*, 441 A.2d at 900. The court held in a plurality decision that the initiative bill could not be materially revised after circulation. *Id.* at 901. The court also held the measure was barred because it fell outside the scope of the people's initiative power. *Id.* at 915. Here, the substantive validity of I-1029 is not at issue and there was no material alteration to the measure itself. *Nist* turned on

Accordingly, the petition is dismissed.

numerous signature verification problems resulting in an insufficient number of valid signatures to allow the proposed measure to go forward. *See Nist*, 270 N.W.2d at 568-72. The Wyoming decision that petitioners cite discussed similar verification problems and a lack of sufficient signatures. *Thomson*, 651 P.2d at 783-84. These fatal flaws are not involved here.

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Charles W. Johnson

Justice Barbara A. Madsen

Justice James M. Johnson

Justice Debra L. Stephens

Justice Tom Chambers
