No. 96191-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE: INITIATIVE NO. 1639

ROBIN BALL and NATIONAL RIFLE ASSOCIATION
Petitioners/Respondents,

v.

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

Respondent/Appellant

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. James Dixon)

Case No. 18-2-03747-34 (Consolidated)

BRIEF OF RESPONDENTS BALL AND NATIONAL RIFLE ASSOCIATION

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I. INTRODUCTION

The Washington Constitution specifies few requirements for the initiative process, but the first one is this: "Every such petition shall include the full text of the measure so proposed." Const. art. II, § 1(a). This rule protects the integrity of the initiative process and prevents fraud and mistake in the exercise of a constitutional right. The Washington legislature codified this constitutional requirement by requiring that the person proposing the measure "shall" follow certain requirements, including placing "**a readable, full, true, and correct copy of the proposed measure printed on the reverse side of the petition**." RCW 29A.72.100 (emphasis added).

This case of first impression presents the following essential issue: can the courts prohibit the Secretary of State from certifying an initiative petition that does not comply with those constitutional and statutory requirements? There is no dispute here that the signature petition for Initiative Measure No. 1639 ("I-1639") does not contain the actual, correct text of the initiative that would appear on the ballot in November if the Secretary of State is allowed to certify it. Intervenor-Appellant Safe Schools Safe Communities, on behalf of all of the I-1639 sponsors ("Sponsors"), appeal the trial court's ruling that I-1639 did not comply with the constitutional and statutory requirements, and issuance of a writ of mandamus to the Secretary of State.

The Secretary of State has not appealed. Before the trial court, the

Secretary of State agreed with Petitioners Robin Ball and the NRA ("Petitioners"), along with Respondents Alan Gottlieb and Julianne Hoy Versnel, that a writ of mandamus is an appropriate and necessary remedy to enforce the constitutional and statutory requirements. The Secretary of State also argued to the trial court that the I-1639 petition was not readable for most people and that it was not the same text that had been submitted by the Sponsors to appear on the ballot. The Secretary of State states that she has "serious concerns as to the text's readability and whether signers had an adequate opportunity to understand the full, true, correct text of the initiative." App. at 258. Ultimately, the trial court agreed with respondents and issued the writ.

Before this Court, Sponsors advance a smattering of arguments, both procedural and on the merits. At the heart of Sponsors' arguments, however, is their assertion that these constitutional and statutory requirements are not enforceable by any party, and enforcement of these requirements should not stand in the way of a party who is able to collect enough signatures. Because the trial court ruled that the Secretary of State has no authority or discretion here, judicial intervention is necessary and appropriate to adjudicate judicial issues based on "express statutory or written constitutional law." *Schrempp v. Munro*, 116 Wn.2d 929, 932, 809 P.2d 1381, 1382 (1991). And while Sponsors claim that it will hamper their initiative right, enforcing these requirements protects the integrity of the initiative process.

Procedurally, Sponsors complain that Petitioners did not explicitly

invoke the mandamus remedy in the initial pleading, and that Petitioners did not "emphasize" that the text was not readable. But Petitioners asked for a remedy of judicial intervention, and before the trial court pleaded and argued all of the facts and authority necessary for the trial court to issue the writ. The trial court did not abuse its discretion otherwise.

On the merits, the I-1639 petition contains no underlines to indicate additions to existing statutory law, and no strikethroughs to clearly mark deletions. Without the statutory underlines, the petition-signers had no way to distinguish between current law and changes. Without these visual cues, petition-signers could not determine the scope of the changes proposed in the initiative. Petition-signers could reasonably (and incorrectly) conclude, looking at the text, that there are no current laws regarding increased background checks for pistols, or no current regulation of firearms transfers. Whether subject to strict or substantial compliance, the I-1639 petition text violate the constitutional and statutory requirements.

Petitioners' argument is simple: initiatives cannot go onto the ballot if petition signers do not have ready access to a readable, full, true, and correct copy of the initiative text. If I-1639 passes this test, the courts and the Secretary of State will soon find it impossible to enforce any of these statutory and constitutional requirements.

As stated by the Secretary of State: "While it is important to protect the people's constitutional right to engage in lawmaking through the initiative process, it is equally important to ensure that the initiative process is not manipulated. The signature-gathering phase is a constitutionally

required first step in the process that must be protected." I-1639 should not appear on the November ballot this year. Instead, Sponsors should refile and recirculate a compliant petition for a future election.

II. STATEMENT OF THE CASE

On May 2, 2018, Paul Kramer filed I-1639 with the Secretary. The initiative text filed with the Secretary of State indicated changes to the existing statutory language in the traditional manner: by underlining the newly-added text and by striking-through and double bracketing deleted text, enabling voters to quickly and easily grasp changes to otherwise-dense statutory language. App. at 207, 214–243.

Intervenors, through their professional consultants, discussed their options for the petition format with the Secretary's office. This included discussions about what color paper could be used, whether signature boxes could be used to assist paid signature gatherers in tracking signatures, and whether the language on the petitions was correct. The language submitted to the Secretary of State for review contained underlines, strike-throughs, and double brackets. App. at 368–69, 372–380.

On June 7, 2018, Thurston County Superior Court Judge Carol Murphy issued an order establishing the ballot title and ballot measure summary for I-1639. Intervenor's paid consultants downloaded the PDF available online containing I-1639's final language and sent it to their designer, who copied and pasted the full text of the initiative from the PDF available from the Secretary of State's website onto the back of the draft

petition form. In the process of copying and pasting, the text formatting that involved lines—including strike-through and underline formatting—did not copy over and was omitted. App. at 369.

Using these erroneous petitions, professional signature gatherers, funded by a few wealthy individuals, began collecting signatures in support of I-1639. These I-1639 Sponsors spent more than $3,000,000 on the petition campaign, including over half a million dollars on a professional signature gathering company. Despite this sophisticated campaign, Washington citizens reported misleading signage and untruthful signature gatherers, as well as pointing out the issues with the petition forms. Not only was the text of the initiative not the "full, true, and correct" language of the initiative, but it was printed in a font many reported as being too small to read, or otherwise unreadable.

The Sponsors became aware of these issues during the signature-gathering process, but declined to fix the problems. On June 18, 2018, concerned parties notified the Secretary of State and Sponsors of the problems, objected to the misleading text, and insisted that the Sponsors provide the full, correct, and true text of I-1639 to the voters during signature-gathering. The Sponsors refused to act, and continued collecting signatures on the incorrect petition.

On June 29, 2018, the Second Amendment Foundation ("SAF") filed a petition for writ of mandamus and an emergency motion for declaratory and injunctive relief with this Court, seeking a ruling that the lack of a readable, full, true, and correct copy of the proposed initiative on

the petition meant the Secretary of State could not process the petitions. Supreme Court Commissioner Michael E. Johnston dismissed the petition on July 3, 2018. The Commissioner found that SAF lacked standing to challenge the filing of an initiative because that right was limited by RCW 29A.72.170 only to circumstances where the Secretary of State refused to file a petition. App. at 352–356. The Commissioner's ruling did not address RCW 29A.72.240, writs of mandamus, or other circumstances under which parties may challenge the certification of a petition. He merely found, correctly, that the statute does not permit a party to challenge the Secretary's filing of a petition.

On July 6, 2018, initiative sponsors submitted signed I-1639 petitions to the Secretary. On July 9, the Secretary of State issued a News Release. In that release she acknowledged "Significant concerns have been raised about whether the format of the I-1639 petition sheets complies fully with Washington's constitutional and statutory requirements" because "[t]he I-1639 petition sheets presented a text of the measure that lacked underlining and strikethroughs to explain its changes to existing law." She found, however, that "State law does not provide the Secretary of State authority to reject petition sheets based on the requirements in RCW 29A.72.100, which addressed what must be printed on the back of the petition." App. at 191. On July 25, Petitioner NRA sent a letter to the Secretary of State, putting her on notice that Petitioner NRA objected to the Secretary of State counting any of the unlawful signatures. App. at 194–95.

Even in the News Release announcing the certification of I-1639 on

July 27, 2018, the Secretary stated "concerns remain about whether the format of the I-1639 petition signature sheets complies with constitutional and statutory requirements, and whether it sets a precedent for future petitions." App. at 188. The Secretary, having concluded her legal authority did not include the ability to consider facial defects in the petition itself, certified that the Sponsors had submitted a sufficient number of valid signatures. The same day, Respondents Robin Ball, NRA, and others filed a petition in Thurston County Superior Court seeking a writ of mandamus estopping the Secretary's certification of I-1639 to the November 2018 ballot.

In their briefs, respondents presented distinct arguments to the Superior Court. Petitioners moved for a writ of mandate or an injunction pursuant to RCW 29A.72.240, arguing that the signatures on the invalid petitions were invalid and should not be counted. In the alternative, Petitioners argued that if the Secretary of State lacked the discretion to enforce RCW 29A.72.100, then the court must have the power to do so. Respondents agreed that, whether under the strict compliance or substantial compliance standard, the petitions violated RCW 29A.72.100 and should be invalidated.

In her response, the Secretary of State raised the concern that the petitions did not meet the statutory requirements. Declarations submitted by the Secretary of State pointed out the about font size, readability, and erroneous text of the initiative on the petitions, which was different from the text submitted to the Secretary. These issues raised "serious concerns

as to whether the signers had an adequate opportunity to understand the full and true text of the initiative." App. at 207–08. But the Secretary of State argued that she lack the authority to reject them on that basis. Instead, she argued it was within the authority of the court to craft an appropriate remedy, which she suggested was a writ of mandamus. App. at 253–54.

Intervenor was left as the lone party arguing in favor of the validity of the petitions. Among other arguments, Intervenor argued it had relied on statements from the Secretary—despite acknowledging the error occurred after the Secretary's initial review, App. at 369, and in the face of the Secretary's contention that her office did not review the petition's language or text, App. at 427. Intervenor argued the Secretary of State had exercised discretion in certifying the petitions—despite her express statement that she lacked such discretionary authority—and that the provisions governing a petition's format should be liberally construed. App. at 275. Intervenor rejected the substantial compliance standard, instead arguing the language on the back of the petition constituted the full text of the initiative petition as required by the statute, even if it lacked the standard font markers indicating deletions and insertions. App. at 283–84.

Superior Court Judge James Dixon heard oral argument on August 17. While Sponsor argued respondents had not brought the appropriate challenge, it conceded "in some cases a pre-election challenge based on the constitutional full text requirement may be brought." App. at 487. And, for the first time, Sponsor suggested a substantial compliance standard should apply. App. at 488.

Ruling from the bench, Judge Dixon first concluded "that petitioners have standing." App. at 501. He then proceeded to make a series of factual findings: that he could not read the petition language despite having 20/20 vision, id., that the language was "not a correct copy of the proposed measure," id. at 504, that intervenor used 11 by 17 inch sheets when other options were available, id., that the petition language was "not a replica of the text contained in the petition filed with the Secretary," id., that while the text contained some unexplained double parentheses, it did not contain strikethroughs or underlines, id., that parties were aware of these issues, id. at 505, and that there "was no way for a signer to know what words were ones that the initiative proposed to add in contract with what the existing law already said." Id. at 506.

Judge Dixon rejected Intervenor's contention that there was some requirement there be actual evidence of voter confusion. Judge Dixon explained:

> This court has the duty to ensure that the process complies with the law. Voters have a right to know. Sponsors have a corresponding obligation to provide what the initiative seeks to accomplish. A full, complete, and readable proposed initiative serves those rights and those obligations. Otherwise, there is no assurance that voters would know what the proposed changes were.

App. at 508.

Concluding "the text on the back of these petitions do not allow the voters to make informed decisions" Judge Dixon declared the appropriate remedy was a writ of mandamus, and issued a writ of mandamus to the

Secretary of State to estop certification of the initiative. *Id.*

Sponsors filed an appeal. Notably, the Secretary of State did not join Intervenor in appealing the trial court's subsequent issuance of a writ of mandamus.

Subsequent to Judge Dixon's decision to issue a writ of mandamus estopping certification, Greg Wong, attorney for the Sponsors, said in a television interview "that was a decision made" on the basis that the language "actually informed voters of the law."[1] No other reason was given for the failure to provide legally sufficient petitions, nor did Sponsors give any reason why they were unable to do so. Instead, they simply relied on their own determination that close enough was good enough.

III. ARGUMENT

A. Standard of Review

While many initiative-related issues are political questions, courts may adjudicate judicial issues based on "express statutory or written constitutional law." *Schrempp*, 116 Wn.2d at 932.

The trial court's judgment for a writ of mandamus is a final determination of the rights of the parties. RCW 7.16.020. Where factual issues are raised, the trial court may resolve those issues and issue an

[1] Mr. Wong's complete remarks available beginning at the 1:50 mark of the news story. (available at https://www.kiro7.com/news/local/judge-tosses-signatures-on-gun-initiative-1/815185648?utm_source=homestream&utm_medium=site_navigation&utm_campaign=homestream_click) (last visted August 22, 2018).

appropriate judgment pursuant to the trial court's findings. *See Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 311, 596 P.2d 285 (1979).

RCW 7.16.350, which governs appellate review of rulings on extraordinary writs, states: "From a final judgment in the superior court, in any such proceeding, appellate review by the supreme court or the court of appeals may be sought as in other actions." This Court reviews issues of law *de novo*.

In unique circumstances, such as here, factual findings may be discerned by the Court based on the trial court's oral ruling. *See Backlund v. Univ. of Washington*, 137 Wn.2d 651, 656 n.1, 975 P.2d 950, 953 (1999) ("The absence of formal findings and conclusions in a memorandum opinion is not invariably fatal if we can discern what questions the trial court decided and the theory for the decision. . . . In the absence of a written finding on a particular issue, [the] court may look to the oral opinion to determine the basis for the trial court's resolution of the issue.") (internal citation and quotation marks omitted). Where the trial court made findings of fact, this Court determines "if the trial court's findings of fact are supported by substantial evidence" and "whether those findings of fact support the trial court's conclusions of law." *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). "Findings of fact supported by substantial evidence are verities on appeal." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549, 558 (1992) (citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990)). "Substantial evidence is evidence in sufficient quantum to

persuade a fair-minded person of the truth of the declared premise." *Id.* (quoting *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 157, 776 P.2d 676 (1989)).

Contentions not made to the trial court during consideration of the merits need not be considered on appeal. *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243, 245 (1991).

This Court reviews a trial court's CR 15 ruling on pleadings and claims decided for manifest abuse of discretion. *Herron v. Tribune Publ'g. Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249, 252 (1987).

B. Sponsors' Procedural Objections Have No Merit

Sponsors attempt to evade the merits by making a series of unfounded procedural arguments. First, Sponsors suggest that Petitioners Ball and the NRA are not proper parties. Second, Sponsors assert that the statutory scheme does not permit anyone (aside from other initiative sponsors, presumably) from requesting mandamus or injunction to enforce RCW 29A.72.100. Third, Sponsors argue that the trial court erred in issuing the writ of mandamus requested by Petitioners because that relief was not raised the pleadings. Sponsors are wrong across the board; we address each argument in turn.

1. Petitioners Are Proper Parties With Standing

The trial court ruled that Petitioners have standing. App. at 501. Sponsors declined in their Opening Brief to argue that Petitioners Ball and the NRA lack standing in this proceeding, and thereby waived the issue.

See, e.g., *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266, 1268 (1990) (declining to consider an issue raised for the first time on reply); *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 741 n.5, 332 P.3d 1006, 1010 (2014) ("An issue not briefed is deemed waived"). And it is clear that voters and organizations have standing to bring an action for mandamus related to elections and petitions. *In re Recall of West*, 156 Wn.2d 244, 249, 126 P.3d 798, 800 (2006).

The NRA is a non-profit organization with thousands of members and supporters in Washington. Robin Ball is a resident of Spokane County, an NRA member, and a Refuse to be a Victim Regional Counselor. Ms. Ball, like many NRA members, is concerned about the availability of firearms and requirements related to firearms storage that may compromise their right of self-defense. Petitioners are "beneficially interested" parties for the purpose of mandamus relief, and Sponsors do not argue otherwise. *See, e.g.*, *Eugster v. City of Spokane*, 118 Wn. App. 383, 403, 76 P.3d 741, 753 (2003) (explaining the "beneficially interested" standard).

Sponsors complain that Petitioners are political opponents and should not be allowed to resort to the judiciary to enforce election-related laws. Brief of Respondent-Appellant at 24. Left unstated in that logic is the reality that political opponents are almost always the parties requesting judicial relief when there are irregularities and violations of law in the initiative process. *See, e.g.*, *League of Educ. Voters v. State*, 176 Wn.2d 808, 814, 295 P.3d 743, 746 (2013); *Amalgamated Transit Union Local 587 v. State*, No. 00-2-00048-1 SEA, 2000 WL 276126 (2000). Here, the

Secretary of State disclaims the ability to enforce the applicable constitutional and statutory standards and the parties who are "beneficially interested" in the underlying matter are proper parties. The actual issues at stake in this case have nothing to do with firearms and politics, however. The issue for this Court is whether the trial court erred in ruling that Sponsors did not fully and lawfully comply with "express statutory or written constitutional law." *Schrempp*, 116 Wn.2d at 932.

Last, Sponsors insinuate that the NRA, as a "long-time ally" to Alan Gottlieb and the SAF, is not a proper party and is barred by claim preclusion because the SAF previously filed a petition related to I-1639 with this Court. Brief of Respondent-Appellant at 8, 11, 19; *see also* App. at 274. Sponsors are well-aware that Petitioners Ball and the NRA are in no way precluded based on the prior proceeding. First, Sponsors conspicuously fail to reference Ms. Ball or the NRA when arguing extensively for res judicata in its footnote 10. Petitioners were not parties, were not involved, and had no privity with any party in that prior proceeding. Second, Commissioner Johnston never reached the merits regarding whether or not the I-1639 petitions contained legally-sufficient text. Rather, the Court Commissioner dismissed the claims on jurisdictional grounds, partially based on non-cognizable claims against private citizens, and partially based on standing under RCW 29A.72.170. But even if there could be preclusion based on this non-merits determination, the parties in this case are not raising claims under RCW 29A.72.170. The Court Commissioner's brief letter ruling is not precedential, it is not the law of this case, and it has no bearing on

Petitioners' mandamus claim here.

2. Mandamus is an Appropriate Remedy Under the Statutory Scheme

Sponsors also argue that political opponents should have no right to mandamus or injunction because non-sponsors have no standing to raise statutory challenges to the Secretary's acceptance and filing of petitions under RCW 29A.72.170. Brief of Respondent-Appellant at 41–42. In light of the agreement between the trial court, the Secretary, and the Sponsors that the Secretary of State does not have the authority to enforce RCW 29A.72.100, Sponsors' construction of the statute would leave no one at all able to enforce these requirements. Such a result is absurd, untenable, and contrary to case law regarding the judiciary's mandamus power.

Enforcing the constitutional and statutory requirements is vital. The Secretary of State argued below that:

> [T]he signature-gathering phase is an essential part of the initiative process that must be protected. The constitutional and statutory requirements that the petitions be readable and contain a full, true, and correct copy of the text of the initiative are important to protect the integrity of the initiative process. These requirements ensure that potential signers have notice of what the initiative will achieve if ultimately adopted. Otherwise, potential signers cannot tell what the proposed initiative will accomplish or discern how the initiative will change the law. Initiative 1639 sponsors could have easily provided a readable copy of the initiative, as other initiative sponsors have done, by purchasing larger petition sheets and by including strikethroughs and underlines to show amendments to existing law. If the courts cannot address a failure to comply with these requirements, then future sponsors could just ignore them, or worse, actively seek to mislead

> potential signers by manipulating the text appearing on the back of the petition sheets.

App. at 252. Further, because the ballot title contains only a limited number of words, immediate access to the full text of the initiative provides potential signers with an opportunity to evaluate it for themselves and assess whether signature gatherers are misleading them with overzealous or dishonest advocacy. App. at 261.

Petitioners agree with the Secretary's construction of the law, whereby mandamus is the only currently-available avenue to enforce these constitutional and statutory requirements. App. at 262. Because the Secretary of State has no authority or discretion, and there are no other avenues for these claims to be heard, mandamus is appropriate to reach the merits and enjoin the Secretary of State. *Eugster*, 118 Wn. App. at 402 (writ of mandamus can be issued if there is not a plain, speedy, and adequate remedy in the ordinary course of law); *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 55–56, 65 P.3d 1203 (2003) ("Mandamus is an appropriate remedy where a petitioner seeks to prohibit a mandatory duty.").

The Sponsors' self-serving arguments that Petitioners lack standing under RCW 29A.72.170 or a cognizable claim under RCW 29A.72.240 underscores the importance of the mandamus remedy. If the Secretary of State has a duty to certify otherwise-unlawful petitions, an interested party must be allowed to petition the Court for the mandamus remedy to prohibit certification.

The parties and procedure in *Community Care Coalition of*

Washington v. Reed illustrate these principles and demonstrates that mandamus is an appropriate remedy for Petitioners to assert. In that case, an individuals and organizations, including the Community Care Coalition of Washington (the "Coalition"), had previously urged the Secretary of State to reject Initiative Measure No. 1029 ("I-1029") based on erroneous language in the petitions. 165 Wn.2d 606, 610–12, 200 P.3d 701 (2009). A deputy solicitor general, on behalf of the Secretary of State, responded to the Coalition and informed them that the Secretary of State had decided to exercise discretion under RCW 29A.72.170, and accept the petitions for counting and certification. *Id.* at 611–12. The Coalition filed an action challenging the Secretary of State's certification. The Coalition acknowledged that they had no right or standing to challenge the Secretary of State's decision under RCW 29A.72.170. *Id.* at 614. Instead, the Coalition asked for a writ of mandamus or certiorari.

This Court recognized that a mandamus remedy would be appropriate for the Coalition to bring to prohibit the Secretary of State from performing an otherwise mandatory act, even in cases relating to initiatives. *Id.* The Court rejected this claim on the merits. While the Coalition had standing and were proper parties to seek mandamus, "mandamus will not lie to compel a discretionary act." *Id.* at 615. Further, "[w]hile 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." *Id.* at 616 n.2.

Under *Community Care*, Petitioners Ball and the NRA have standing for all of the claims asserted. There is no dispute that the Secretary

of State exercised no discretion with respect to I-1639. App. at 258; Brief of Respondent-Appellant at 41–42. If the Secretary of State did not have authority to act, Petitioners have standing to bring a claim for mandamus to prohibit the Secretary of State from performing a mandatory act. If the Secretary of State actually had the authority to enforce RCW 29A.72.100 during the count of petition signatures, Petitioners have standing to request mandamus to remedy her total failure to exercise discretion, or to bring a statutory claim.[2]

3. The Trial Court Properly Considered the Mandamus Claim

Sponsors argue that the trial court erred in issuing the writ of mandamus requested by Petitioners because that relief was not raised the pleadings. But Petitioners did raise the issue, Sponsors demonstrate no prejudice, and the trial court did not abuse its discretion in reaching the merits of the mandamus remedy.

[2] Sponsors may argue that Petitioners would not have had standing to challenge the Secretary of State if she had the authority to enforce the law. Sponsors have waived this argument by failing to argue at any point in this matter that the Secretary of State had this authority. Further, even if Petitioners would not have standing in a future hypothetical where the Secretary of State lawfully considered whether to enforce the constitution and exercised discretion, that hypothetical does not apply here. The Secretary of State here did not exercise any discretion, and mandamus is appropriate. *Community Care*, 165 Wn.2d at 616 n.2; *see infra* Section III.B.3.

a. Petitioners Argued From the Beginning That the Court Must Intervene

Petitioners consistently argued—from the initial pleading on July 27 to oral argument on August 17—that the trial court must exercise its authority to estop the Secretary of State from certifying I-1639.

In the complaint, Petitioners brought an action "for writ of mandate, declaratory judgment, and injunctive relief, and respectfully ask the Court for an order barring the unlawful signed petitions from being counted and preventing the Secretary of State from certifying I-1639." App. at 15. Additionally, because the claims in this case involved judicial supervision of the Secretary of State, Petitioners' jurisdictional allegation invoked the constitutional provision providing for judicial supervision through writ of mandamus. App. at 16 (citing Article IV, Sections 4 and 6 of the Washington State Constitution). Each cause of action specifically requested that the court should enforce RCW 29A.72.100 and the constitution "if the Secretary of State does not have the authority to reject these petitions." App. at 21–22. Further, Petitioners explicitly requested that the trial court "[a]ward[] any additional or further relief which the Court finds appropriate, equitable, or just." App. at 23. The ultimate remedy requested by Petitioners was to have the trial court enforce the constitutional and statutory requirements related to initiative text. The Secretary and the Sponsors had clear notice of this requested remedy, whether titled writ of mandate, declaratory relief, or injunction. *See* RCW 7.16.150 ("The writ of mandamus may be denominated a writ of mandate.").

Moreover, Petitioners expanded upon these claims in the opening brief. First, Petitioners argued that counting invalid petitions violated RCW 29A.72.100 and the constitution. App. at 174–75. Second, Petitioners argued that the Secretary's failure to exert authority entitled Petitioners to a judicial remedy, citing footnote 2 in *Community Care*. App. at 178–79. That case describes the availability of a mandamus remedy when an administrative official totally fails to execute discretion. *Community Care*, 165 Wn.2d at 616 n.2. Third, Petitioners argued that the trial court should exercise its judicial authority over the Secretary of State to prohibit her from certifying I-1639.

> Alternatively, if the Court rules that the Secretary has neither the authority nor the discretion to enforce the petition requirements, the Court must still apply the constitutional and legal requirements and enjoin certification. If the Secretary lacks any authority to enforce these Constitutional and statutory provisions, the judicial branch is the only entity in the State who can.

App. at 179.

Sponsors' entire argument is predicated on the lack of the precise term "constitutional writ of mandamus" in the opening pleadings. But there is no real distinction in this case between that specific remedy and the remedy repeatedly requested by Petitioners. This is a case of first impression in Washington, and under the statutory framework it appears that there is no "plain, speedy[,] and adequate remedy in the ordinary course of law." *Eugster*, 118 Wn. App. at 402. The operative facts supporting the writ of mandamus, the constitutional and statutory arguments supporting

the writ of mandamus, and the requested remedy are all in Petitioners' opening pleading and brief.

Sponsors had manifest fair notice of the mandamus remedy and the grounds upon which it rests. In fact, Sponsors **admit** that they had fair notice of this claim **by describing Petitioners' claim as a forthright claim for mandamus in the response brief**. Sponsors, in characterizing Petitioners' arguments and claims, stated: "[T]he NRA is more frank in acknowledging that what Petitioners really seek is mandamus." App. at 279. Sponsors understandably wish to retract this admission in the aftermath of the Secretary of State agreeing with Petitioners that a judicial remedy is appropriate and necessary to enforce the constitutional and statutory requirements at issue—but they cannot. Sponsors had an opportunity to meet these arguments on the merits at oral argument, or at minimum to establish some evidence of prejudice.[3]

b. The Trial Court Did Not Procedurally Err By Reaching the Merits on the Writ of Mandamus

Sponsors essentially argue that the trial court manifestly abused its discretion by ruling on the merits on the writ of mandamus. *Herron*, 108

[3] Additionally, Sponsors severely undercut their argument of procedural unfairness by arguing on appeal that the substantial compliance standard should apply at the merits stage. Sponsors argued below that the substantial compliance standard did not apply to these constitutional and statutory requirements. App. at 284. Perhaps sensing that they would not prevail, Sponsors belatedly asserted at oral argument that substantial compliance may actually apply. App. at 487–88; Brief of Respondent-Appellant at 25, 25 n.11. Surely, if Sponsors are permitted to disavow a legal argument below and then belatedly adopt it, Sponsors cannot claim any real prejudice by Petitioners obtaining a mandamus remedy after requesting judicial intervention.

Wn.2d at 165 (reviewing the trial court's rulings on pleadings and amended claims for manifest abuse of discretion). The superior courts have the power to issue the extraordinary writs of mandamus, quo warranto, review, certiorari, prohibition, and habeas corpus. Const. art. IV, § 6; RCW 7.16 (granting the superior court jurisdiction to issue same).

This case proceeded before the trial court at a breakneck pace. The original complaints were filed immediately upon the Secretary's certification of I-1639 on July 27, 2018. Immediately, Sponsors intervened with the consent of both Petitioners, and the parties cooperated in consolidating the cases. App. at 108–109. On July 31, the parties entered into an expedited briefing schedule and requested oral argument before the trial court as soon as possible. That same day, the Director of Elections submitted a declaration in support of the stipulated briefing schedule, noting an expedited schedule was necessary to permit the Secretary sufficient time to comply with election requirements. App. At 132–36. Petitioners submitted opening briefs on August 1 and briefing was closed by August 10. There have been no answers filed, no opportunities to amend the pleadings, and several rounds of briefing by multiple parties.

In light of this expedited procedure, the trial court did not abuse its discretion by reaching the merits on the mandamus claim. Petitioners raised the requested relief in the original complaint through supporting facts and reliance on the constitutional and statutory law on which the trial court ruled. *See supra* Section III.B.3. Sponsors had notice of the mandamus claim, which Sponsors acknowledged was raised in Petitioner NRA's

opening brief, and which both Petitioners and Sponsors addressed during oral argument. App. at 279, 467, 477, 486–87.

Even if the mandamus claim was not sufficiently raised in the pleadings, it was argued and ruled upon at the trial court level and is now deemed part of the pleadings. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766–68, 733 P.2d 530, 533–34 (1987). In *Reichelt*, the plaintiff did not directly allege a negligence claim in a manner that was sufficient to give defendants notice of the claim. But the court held that because there were references to the claim in the record, including arguments and facts raised during summary judgment proceedings, the pleadings were deemed amended to conform to the judgment. *Id.* Significantly, "[b]oth sides address the negligence claim in oral argument." *Id.* at 767. In a similar case, the Court of Appeals held that appellate review of the merits is proper even if the claim is absent from the pleadings, where "the trial judge spoke directly to the issue . . . in the judgment of dismissal." *Shaffer v. Victoria Station*, 18 Wn. App. 816, 821, 572 P.2d 737 (1977), *rev'd on other grounds*, 91 Wn.2d 295, 588 P.2d 233 (1978).

Deeming the mandamus claim part of the pleadings in this case is especially appropriate, where the original claims arguably raised mandamus claims and undisputedly raised claims for judicial supervision of the Secretary of State. Appellate courts permitting claims to be added to the pleadings emphasize the importance that the new claims "were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original pleading." *Herron*, 108 Wn.2d at 166–67; *see, e.g.*,

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) ("[T]he amendment would have done no more than state an alternative theory for recovery. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 350–51, 670 P.2d 240 (1983) ("[P]etitioner had notice of a possible issue of defamation at the time of the original complaint," and thus was not prejudiced by a subsequent amendment to the complaint).

Sponsors make no showing that they were meaningfully prejudiced or that the trial court abused its discretion. Petitioners raised the pivotal constitutional and statutory arguments in a fast-moving case, the parties had an opportunity to address the trial court, and the trial court exercised discretion and heard this case on the merits.

C. The Trial Court Made Several Factual Findings

The trial court issued an extensive oral ruling at the end of oral argument. App. at 43–51. Further, the trial court's order "incorporates the findings made on the record." App. at 454. When issuing the writ of mandamus, the trial court resolved several determinations regarding factual issues raised by the parties. Substantial evidence in the record supports each of these findings.

1. The I-1639 Petition Text is Not Readable

The trial court made several findings regarding the readability of the

text on the I-1639 petitions. The trial court, during the oral ruling, found that the sponsors used 11x17 paper, that they could have used other options that would have permitted larger font size, and that he could not read the petition text; ultimately, the trial court found that the petitions are not readable. The trial court stated:

> The petitions at issue do not contain, first, a readable copy. Ladies and gentlemen in the courtroom, I'm showing you what the petition looks like. I have 20/20 vision. I can't read it. And I don't mean that to be facetious. I simply cannot read it. . . . For whatever reason or reasons, the sponsors, or whomever they entrusted to put this process together on their behalf, chose to use 11 by 17 inch sheets. And that was not the only option available to them.
>
> . . .
>
> It's not readable to me. I don't know whether I'm most people. I can't read it.

App. at 503–04, 506.

These findings are supported by substantial evidence. First, it appears that the text size here is—at most—size 7 in Calibri font. Second, these findings comport with the testimony of the Director of Elections. The trial court found that the declarations submitted by the Director of Elections were compelling, instructive, and very helpful to the court. App. at 505. The Director of Election stated that other options were available to the Sponsors regarding printing, and that "the font of the initiative text [was] so small that it was doubtful that the text was readable for most people." App. at 208. This is sufficient evidence to persuade a fair-minded person. *Cowiche Canyon*, 118 Wn.2d at 819.

Sponsors' arguments regarding readability does not disturb the trial court's findings. In fact, Sponsors reinforce the conclusion that these determinations are factual findings. The Sponsors assert that "[a]t most, reasonable minds can differ about whether the font size makes the petitions unreadable." Brief of Respondent-Appellant at 39. But the trial court did not rule on summary judgment; instead, the trial court resolved contested factual issues and made a final determination. *See Peterson*, 92 Wn.2d at 311.

Sponsors' arguments to the contrary are not persuasive. Sponsors claim that font size was not an issue raised by Petitioners. Brief of Respondent-Appellant at 8 n.2. Not so. Petitioners raised this argument in its pleadings. App. at 19. A few pages later, Sponsors concede that Petitioners raised this argument in its pleadings and opening brief, and now complain that readability was not Petitioners' primary argument. Brief of Respondent-Appellant at 12, 12 n.6. None of this changes the fact that there is substantial evidence in the record, or the fact that both parties had notice of the issue and made arguments to the trial court about font size during the hearing. *See generally* App. at 459–501. In fact, Sponsors have been on notice regarding font size since at least June. App. at 358; Brief of Respondent-Appellant at 9 (conceding that SAF raised the issue of "microscopic print" before the Supreme Court Commissioner).

Next, Sponsors argue that because there is no statutorily-defined minimum font size, the petition cannot be deemed unreadable. Brief of Respondent-Appellant at 36–37. Likewise, Sponsors complain that the trial

court erred in making a "subjective observation" about the readability. *Id.* at 38. But the trial court had the authority—and duty—to rule on the issue of readability. The statute requires readability. RCW 29A.72.100. Petitioners raised the issue, and the Secretary of State expressed serious concerns about readability. *See, e.g.*, App. at 176, 207–08, 258. The trial court was the finder of fact in this expedited proceeding, and has the discretionary authority to find these facts.

Sponsors claim that the Director of Elections made an "unsupported observation" about readability (while at the same time touting the self-serving declarations of its supporters). Brief of Respondent-Appellant at 38. Sponsors' attack on the Director of Elections' testimony is unfounded. Additionally, Sponsors completely ignore the Secretary's concurrent "serious concerns as the text's readability and whether the signers had an adequate opportunity to understand the full, true, and correct text of the initiative." App. at 207–08. The Director of Elections and the Secretary of State have obvious expertise and authoritative views in this matter. As the trial court remarked, their assessments regarding the initiative and election procedure should carry considerable weight with the judiciary. App. at 505. In contrast, the self-serving and conclusory declarations submitted by Sponsors carry little weight on this subject.

2. Other Factual Findings

The trial court made a limited number of additional factual findings that are relevant to the issues on appeal.

The trial court found that the Sponsors had notice of the deficient petition text during the signature-gathering phase, and yet did nothing. The trial court stated that "[t]hose concerns were raised to the [Sponsors]." App. at 505. Substantial evidence in the record supports this finding. First, SAF provided a letter to sponsors that put them on notice regarding the problems with the initiative text on or about, at the very latest, June 18, 2018. App. at 358. Next, SAF brought a legal challenge on June 29, 2018, further putting Sponsors on notice. Sponsors do not contest in their recitation of the case that they had no notice, and they admit that they were aware of the problem and consciously decided not to fix it. *See supra* n.1.

Next, the trial court found that the petition text does not match the I-1639 text filed with the Secretary of State. The trial court ruled:

> The text of the initiative as filed by the sponsor included proposed deletions via strikethroughs, double bracketed parentheses so as to indicate offsets and underlines. The text on the reverse side of the petition does not include deletions and underlines. It is not a replica of the text contained in the petition filed with the Secretary of State.

App. at 504. Substantial evidence supports this finding of fact. The Director of Elections submitted a declaration that supports the fact that the text does not have strikethroughs, underlines, and that it is not a replica of the text contained in the petition filed with the Secretary of State. App. at 207–08. Even subject to de novo review, no party seriously contests these facts; the text on the back of the petition does not match the text filed with the Secretary of State, and that will appear on the ballot if I-1639 is certified.

D. The I-1639 Petitions Violate the Constitutional & Statutory Requirements

The trial court ruled that the text on the back of the I-1639 petitions were not readable, were "not a replica of the text contained in the petition filed with the Secretary of State," and that the text was not "true, accurate, correct, and readable." App. at 503–04, 506–07. The trial court concluded that it should apply a "strict compliance" standard. App. at 506. The trial court also addressed arguments directed at substantial compliance, however, and concluded that "[t]he text on the back of these petitions do not allow the voters to make informed decision." App. at 508.

The trial court's ruling is correct: the standard for these constitutional and statutory requirements is actual, full compliance, and the I-1639 petition fails this test. But even if this Court holds that the substantial compliance test applies, these petitions do not comply with the requirement to provide the full, true, correct text of the petitions in a form that is readable and that allow potential signers to refer to the text to make informed decisions.

1. The "Strict" Compliance Standard Applies Because the Requirement Is Constitutional.

The Washington Constitution provides that "[t]he first power reserved by the people is the initiative." Const. art II, § 1(a). The Constitution provides few explicit rules regarding the initiative process—but of those rules, the Constitution conspicuously requires the full text of the initiative to be provided to signers and voters. The Constitution provides, in pertinent part:

> The first power reserved by the people is the initiative. **Every such petition shall include the full text of the measure so proposed**. In the case of initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state**. Initiative petitions shall be filed with the secretary of state** not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature.

Const. art. II, § 1(a) (emphasis added). This constitutional provision provides that signature petitions "shall" include the full text of the initiative.

The Constitutional initiative rules require actual (or "strict") compliance.[4] For example, the constitutional provision also requires a certain number of legal signatures in order for an initiative to be certified to the ballot. In *State ex rel. Evich v. Superior Court*, this Court weighed the laudatory goal of promoting the initiative process against the constitutional requirement: "we are not to hamper the processes of initiative legislation by restrictive interpretations, but we are, also, to see that the essential requirements of the law are complied with." 188 Wash. 19, 28, 61 P.2d 143, 147 (1936). This Court and held that constitutional initiative rules require actual compliance. "In the Constitution as well as in the statute, the fundamental requirement for a valid petition is that it have the required number of signatures of legal voters. **Without compliance with this first**

[4] Although the trial court below held that "strict" compliance is required, Washington courts and courts from other jurisdictions use a wide variety of terms to describe this standard: "actual", "legal", "full", etc.

requisite, there can be no submission of a measure, and it is the duty of the secretary of state to determine and certify to the fact." *Id.* (emphasis added).

Cases from other jurisdictions apply a strict compliance rule when dealing with constitutional provisions, too. Oregon courts have required strict compliance on the basis of Oregon's constitutional requirement, which is substantially similar to the Constitutional language present in Washington Constitution Article 2, Section 1. For example, in *Kerr v. Bradbury*, 193 Or. App. 304, 325–26, 89 P.3d 1227, 1238 (2004), the Oregon court of appeals found an initiative should not be certified because "the initiative petition does not publish the "full text of the proposed law[s]," as Article IV, section 1(2)(d), requires."

Other states with similar constitutional language have reached similar results. In Michigan, for example, their Supreme Court concluded that constitutional requirements are mandatory prerequisites and are subject to "full" compliance. The court held:

> The suggestion overlooks the requirements of article 5, § 1, that each section of the petition, when filed, shall contain a copy of the title of the proposed measure, and that the petition shall set forth the proposed measure in full. These requirements are mandatory. **Full compliance is a prerequisite to transmittal of the measure to the legislature and submission thereof to the people**."

Leininger v. Alger, 316 Mich. 644, 650, 26 N.W.2d 348, 351 (1947) (emphasis added). Likewise, in Nevada, their Supreme Court adopted an "actual" compliance or "strict adherence" standard for clear, easily-

attainable constitutional requirements. *Nevadans for Nevada v. Beers*, 122 Nev. 930, 949, 142 P.3d 339, 351–52 (2006). The court justified requiring actual compliance based on the need to protect the initiative process. The court reasoned that "the constitutional requirements for engaging in the initiative process provide important safeguards that protect the people's right to initiate laws and, when coupled with the ease of complying with these requirements, the result is that a **strict adherence standard must apply**." *Id.* (emphasis added).

Sponsors attempts to apply non-analogous cases to the instant circumstances, citing to cases from Arizona, Oklahoma, and Oregon. But each of these cases is factually distinguishable and carve-out the circumstances in this case. For example, in *Feldmeier v. Watson*, the Arizona Supreme Court explained "if the initiative petition, as a whole, substantially complies, the challenge will fail, unless the Constitution expressly and explicitly makes any departure [from a specific requirement] fatal." 211 Ariz. 444, 448, 123 P.3d 180, 184 (2005) (citation and internal quotation marks omitted) (alteration in original).

State ex rel. McPherson v. Snell, 168 Or. 153, 121 P.2d 930 (1942), and *Barnes v. Paulus*, 36 Or. App. 327, 588 P.2d 1120 (1978), both Oregon Supreme Court cases, deal with minor errors not related to the "full text" requirement of the Oregon Constitution, which was addressed in detail in *Kerr* and led to the application of the strict compliance standard. 193 Or. App. 304, 325–26. And *In re Initiative Petition No. 347 State Question No. 639* did not address the question of whether the petition does not actually

contain the entire language of the proposed measure, as the trial court found in this case. 1991 OK 55, 813 P.2d 1019, 1031 (1991).

When dealing with straightforward, explicit constitutional rules, a strict compliance test is justified by the need to ensure that the initiative process is not manipulated. The clearest, most straightforward legal test to apply is a bright line rule: the text on the petition must match the text on the ballot. This, after all, is the check that the Secretary actually performs when verifying petition sheets. App. at 253–54 (describing how election staff compares the final full text of the measure as submitted against the full text on the back of each petition).

Likewise, the requirements in RCW 29A.72.100 should be subject to a strict compliance test. The statutory text here is mandatory, stating that initiative sponsors "shall" comply with a number of procedural rules. Like the constitutional text, the requirements are clear, and amendable to a strict compliance standard. The same logic for applying strict compliance to constitutional rules also applies to statutes which enforce constitutional rules. *Evich*, 188 Wash. at 28 (describing the level of compliance for rules found "[i]n the Constitution **as well as in the statute**") (emphasis added). Initially, Sponsors agreed with this interpretation of the statute, but Sponsors abandoned that position during oral argument below.[5]

Sponsors heavily rely upon *Murphy v. City of Spokane* to argue that

[5] Contrary to Sponsors' assertion, Petitioners never argued for a substantial compliance standard below; we merely anticipated that Sponsors may make that argument, and explained why substantial compliance would not rescue I-1639.

Washington courts apply a substantial compliance (or directory) standard to initiative-related statutes. But unlike in *Evich*, the statutes at issue in *Murphy* **did not pertain to constitutional initiative requirements**. Instead, that case pertained to alleged rules violations regarding (1) the judges and inspectors appointed by the city council failed to qualify and (2) the private citizen who suggested the officials was an interested party. 64 Wash. 681, 682–83, 117 P. 476, 477 (1911). Neither of these rules implement a constitutional rule analogous to the "full text requirement."

The California cases cited by Sponsors do not hold otherwise. *Assembly of State of Cal. v. Deukmejian*, 30 Cal.3d 638, 639 P.2d 939, 180 Cal. Rptr. 297 (1982), addresses statutory language rather than constitutional requirements, and notes the "typographical errors in the listing of census tract numbers . . . were so minor as to pose no danger of misleading the signers of the petitions." Likewise, *People v. Scott*, 98 Cal.App.4th 514, 119 Cal.Rptr.2d 797 (2002), relates to a post-election challenge, a materially different challenge and procedural posture than the one before this Court. And other California courts have come to different conclusions. In *Mervyn's v. Reyes*, 69 Cal. App. 4th 93, 104, 81 Cal. Rptr. 2d 148, 154 (1998), the court explained that "it is imperative that persons evaluating whether to sign the petition be advised which laws are being challenged and which will remain the same."

Applying the strict compliance standard here does not frustrate the will of the people or the signers of the petition. Instead, the purpose of the applicable rules are procedural protection. This Court can, and should, find

that the procedural protections put in place in the Constitution and in the statute should be strictly enforced unless the Legislature has specifically noted otherwise. As the *Beers* court notes, Intervenors, or other interested parties, are free to circulate a new petition which complies with these requirements, and will be in no way precluded from doing so by this Court enforcing a strict compliance standard. *Beers,* 122 Nev. at 949.

2. The I-1639 Petition Does Not Strictly or Actually Comply With Constitutional and Statutory Requirements

a. Washington Constitution Article II, Section 1(a)

The Washington Constitution requires that "every such [initiative] petition **shall include the full text of the measure so proposed**." Const. art. II, § 1(a) (emphasis added). I-1639 fails this test. The trial court found that the petitions did not contain "a replica of the text contained in the petition filed with the Secretary of State." App. at 506. The Secretary of State agrees. App. at 257.

Sponsors argued below that the petitions met the "full text" requirement of the Constitution, and continue to maintain that "every single word of I-1639 appears on the back of the petition." Brief of Respondent-Appellant at 7. But Sponsors continue to ignore the flaws in their argument. First, no one disputes that the petition text does not contain the underline and strikethrough formatting. Even Sponsors believed that the exact text on file with the Secretary must be put on the petitions, as their signature-gathering consultant admits. App. at 368 (stating that Sponsor copied the text from the Secretary of State's website, including the strikethrough and

underline formatting). Second, the text on the back of the petition contains extraneous words that add to the actual text of I-1639 because the initiative proposes deletion of those letters, words, and sections. Those words do not have strikethroughs and appear to be part of the text. "[W]hile those words are contained in double parentheses, there was no direction to the signers about what the double parentheses might mean." App. at 258. Third, this case is easily distinguishable from *Schrempp* and *Community Care*, where the errors were only in the petition "titles," and not in the full text of the petition itself.

Simply put, the I-1639 petitions do not comply with the simple constitutional mandate to provide the full text of the petition.

b. RCW 29A.72.100

RCW 29A.72.100 requires that a full, true, correct, and readable copy of the initiative be printed on the back of the petition sheet.[6] The I-1639 petition fails to actually comply with the statute.

First, the text is not readable. The trial court made factual findings regarding readability that are supported by substantial evidence. The Director of Elections states that the font size is so small that she doubts most voters would be able to read the petition. And if the petition text here

[6] RCW 29A.72.100 also requires initiative sponsors to, among other requirements, use paper that is at least 11x14 and contain 20 or fewer signature lines per page. Sponsors, by their words and actions, acknowledge that these are "requirements." For example, Sponsors were concerned enough about compliance that they inquired with the Secretary of State regarding paper color. App. at 368. Further, Sponsors describe the "statutory and constitutional requirements" in their briefing. App. at 271.

actually complies, and Sponsors are correct that no one can violate this provision because there is no explicit font-size rule, then other petitions with microscopic font sizes will also actually comply. Inevitably, smaller and smaller text will be the new standard for initiative petitions.[7]

Second, the text is not full, true, and correct. The trial court made factual findings that the text was not an exact replica. No one disputes that I-1639 has underlined text and strikethroughs, but the petition does not. As described by the Secretary, "[w]here Initiative 1639 amended an existing statutory section, there was no way for a signer to tell what words were ones that the initiative proposed to add, in contrast with what the existing law already says." App. at 256. Further, while the petition has words, sentences and sections to be deleted "contained in double parentheses, there was no direction to the signers about what the double parentheses might mean." App. at 257.

3. The I-1639 Petition Does Not Substantially Comply With Constitutional and Statutory Requirements

Even if the substantial compliance standard applies, I-1639 still violates the constitutional and statutory requirements.

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[7] Petitioners object to Sponsors' submission of additional petitions that were not in the record below. Brief of Respondent-Appellant at 8, 8 n.2. Sponsors did not raise the argument at any point—including oral argument—that I-1639 fully complied with the law because other petitions used font size that was smaller. They make this argument, relying on new evidence, for the first time on appeal. In any event, if the Court considers this new evidence, Petitioners assert that it is evidence that the law regarding readability is not being enforced. Just because these petitions exist does not mean that they would survive legal challenge. Further, more petitions such as these will be circulated in the future if I-1639 passes muster.

a. Substantial Compliance Standard

Even if the Court applies a substantial compliance standard, there is no substantial compliance here. "Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute." *Weiss v. Glemp*, 127 Wn.2d 726, 731, 903 P.2d 455 (1995) (citation omitted).

The essential objectives in the constructional "full text" requirement and RCW 29A.72.100 are necessary in order to provide meaningful notice to petition-signers and to avoid fraud, deception, or mistake in the initiative process. As the Secretary of State persuasively argues:

> In order to protect the integrity of the signature gathering process, voters signing initiative petitions must have access to correct information about what the initiative would accomplish if adopted. While the front of the petition must have an accurate copy of the ballot title, by statute, ballot titles can contain only a limited number of words. RCW 29A.72.050. Immediate access to the full text of the initiative provides potential signers with an opportunity to read the complete text of the measure and evaluate for themselves whether they support or oppose a proposed initiative, regardless of how abbreviated the title is. This immediate access to the text also provides potential signers with a way to check the accuracy of what signature gatherers may be telling them.
>
> That is why the Legislature created the standards set forth in RCW 29A.72.100, including the requirement that a full, true, correct, and readable copy of the initiative be printed on the back of the petition sheet. If text is too small for signers to be able to read, or if a potential signer cannot tell what the proposed initiative will accomplish because he or she cannot discern how the initiative will change the law, then signers could be easily misled about the content of the initiative.

App. at 261.

Simply put, the purpose of these requirement is not to make it easier to obtain many signatures, or to forgive all noncompliance with the law in favor of letting the voters sort it out on their own. Rather, the protection of the integrity of the signature-gathering process, and public confidence in the initiative process, is paramount.

b. The I-1639 Petition Does Not Allow Voters to Make an Informed Decision

Applying the substantial compliance standard, the petition text here frustrates the purpose of the constitutional "full text" requirement and the statutory requirements.

The facts in this case show that the I-1639 petitions are not readable. The font size is very small, and is almost definitely smaller than the minimum size permitted in other states. The trial court stated on the record that he could not read the petition. The Director of Elections stated that she doubted that most petition-signers could read the text.

The facts in this case also show that without underlines and strikethroughs, a reasonable voter would have no way to independently look at the text and discern what is the current law that I-1639 proposes to change, and what law will be in force if I-1639 goes into effect. Looking at the text, the I-1639 petition does not inform voters that the initiative adds firearm safety training requirements, and does not identify which statutory language is a new addition to existing law. The text does not inform voters that current law already mandates increased background checks for pistols, and that the

initiative merely adds a new category of firearm rather than an entire background check regime. The text does not inform voters about which details of the administrative purchase fee are new, or which part of the age limitation is new. In fact, a reasonable voter reading the misleading text could assume that there are no current laws regulating waiting periods for pistol purchases or background checks. Those provisions are most certainly part of current statutory law. This confusion creates a likelihood of mistake or fraud.

Together, with unreadable text combined with confusing, incorrect formatting, the I-1639 petition text is incomprehensible. Even lawyers and judges cannot reasonably refer to the text alone to describe the changes in the law. App. at 508 (indicating that voters have a right to know how an initiative changes the law, and that this petition does not allow voters to make that determination). Moreover, if this petition text substantially complies, it will be impossible to police future initiative petitions to protect the purpose of these requirements.

c. Sponsors Arguments For Substantial Compliance Fail

Sponsors make several arguments that the I-1639 petition substantially comply. Petitioners address each of them in turn.

First, Sponsors argue that the underline/strikethrough formatting is not required, so that they substantially comply with the requirements even when failing to include the formatting in the petition. Brief of Respondent-Appellant at 34-35. Although Sponsors argue that these specific formatting

effects—which everyone includes in order to provide notice regarding how the initiative changes the law—are not mandated, even Sponsors acknowledge that it is **necessary to indicate to the public the amendments to existing law**. *Id.* at 35 ("[A] citizen could indicate amendments to existing law in any form he or she wishes as the legislature has not required otherwise."). There is no dispute that the I-1639 petitions do not indicate to the public this information. The Secretary of State describes how as follows:

> On the back of the petition sheets, no text was underlined to indicate any addition to existing sections of law. Where Initiative 1639 amended an existing statutory section, there was **no way for a signer to tell what words were ones that the initiative proposed to add, in contrast with what the existing law already says**. In addition, Initiative 1639 proposed to delete some words from existing law, and while those words are contained in double parentheses, **there was no direction to the signers about what the double parentheses might mean**.

App. at 257–58 (citations omitted & emphasis added). I-1639 proposes to amend numerous statutory provisions: RCW 9.41.090, 9.41.092, 9.41.094, 9.41.097, 9.41.0975, 9.41.110, 9.41.113, 9.41.124, 9.41.240, 9.41.129, and 9.41.010. I-1639 adds new statutory sections to chapter 9.41 RCW; creates new sections; prescribes penalties; and provides effective dates. Although there may be cases where failure to include strikethrough/underline formatting is still able to substantially comply, the failure to include the full text here is fatal.

Second, Sponsors analogize to this Court's substantial compliance

rulings in *Shrempp* and *Community Care*. But the omission of strikethroughs and underlines here is much more substantial than the missing (or incorrect) legislative titles in those cases. The legislative title, unlike the strikethroughs and underlines, was not necessary for voters to understand the scope of the initiative. Further, the plaintiffs in *Schrempp* cited no authority stating that a legislative title is a required part of the required text. *Schrempp*, 116 Wn.2d at 938; *see also Community Care*, 165 Wn.2d 606. Here, the underlines and strikethroughs (or some mechanism to indicate amendment to current law) are required to provide notice to the public. Initiative text that does not indicate how the initiative changes the law cannot substantially comply with the constitutional and statutory requirements.

Third, Sponsors rely on the existence of the ballot title on the front to try to cure the incorrect initiative text on the back. But the statutorily-required ballot title summary is no substitute for the actual initiative text. App. at 261 (describing limitation of ballot title). "Immediate access to the full text of the initiative provides potential signers with an opportunity to read the complete text of the measure and evaluate for themselves whether they support or oppose a proposed initiative, regardless of how abbreviated the title is." *Id.* This is especially true here, where the Sponsors, Attorney General, and Petitioners (among others) litigated the content of the ballot title and identified many provisions that would simply not fit within the limited ballot title.

As stated by the Secretary of State, one purpose of the initiative text

is to provide answers and information if a potential signer is confused by the ballot title, or by the signature-gatherer. Sponsors argued below that if potential signers were confused, they would simply decline to sign. But that is not true: Confusion easily runs in the other direction, and unreadable or indecipherable initiative text may cause people to mistakenly sign based on arguments made by signature-gatherers. App. at 261 ("This immediate access to the text also provides potential signers with a way to check the accuracy of what signature gatherers may be telling them."). The Sponsors must include both the ballot title and the full, correct, readable text of the initiative to comply with procedural requirements in order to protect against fraud and mistake.

Fourth, Sponsors argue that the voter declarations they submitted below constitutes conclusive evidence that no one was misled and that voters fulsomely understood the petition text. But the issue before the trial court, and this Court, is not a question of how many conclusory, self-serving declarations each party submits to the court, or even a fact question as to how many people have been misled. App. at 502 ("[T]he court is confident that if the Petitioners in this action had intended or sought to, they could have and would have submitted declarations and affidavits from voters of this community who have other opinions . . . [I]t is this court's responsibility to make certain that the process is accurate, that the law is being followed."). The issue is whether the petition text complies with legal requirements. And there is no dispute that none of the petition-signers had a copy of the actual text of I-1639 on the petition that they signed, and there is no proof that any

of the petition-signers had an opportunity to review the correct text of the initiative to be placed on the ballot.

Fifth, Sponsors argue that the petition misprint was an accident in good faith, and therefore certification should not be prevented based on an inadvertent technical error. Even assuming that the initial mistake (printing the petitions without the full, correct text of the initiative) was not intentional, Sponsors cannot claim here that I-1639 should be certified because they made a good faith attempt to comply with the law. The Sponsors do not admit that they made a good faith mistake in using a microscopic font size in order to fit all of the text on 11x17 paper, rather than using other available means. Further, Sponsors had notice of the problems with the initiative text **during the signature-collection phase**. Sponsors could have printed new petitions to try to comply with the requirements, but they did not.

Although the incorrect text may have been a mistake at the outset, Sponsors could have fixed the text at the beginning or the middle of the process, but made no attempt at compliance. Sponsors rely upon *Costa v. Superior Court*, 37 Cal. 4th 986, 128 P.3d 675, (2006), to argue that substantial compliance should apply and that "inadvertent, good faith human error" should not disqualify an initiative from the ballot. But here the Sponsors were aware of the issue. Sponsors had the opportunity to cure the issue. And Sponsors chose not to act. Moreover, as the dissent in *Costa* noted, "[the substantial compliance doctrine] does allow insignificant differences, minor departures from legal requirements, and inadvertent

mistakes, as long as they do not affect the meaning of the proposed initiative. When two versions of a proposed initiative differ in ways that change its meaning, however, as occurred here, the doctrine of substantial compliance should not apply, in light of the significant risk of confusing or misleading the public." *Id.* at 1036 (dissenting).

IV. CONCLUSION

The trial court correctly ruled that I-1639 violates the constitutional and statutory requirements, and correctly issued the writ of mandamus to the Secretary of State. This decision protects the integrity of the initiative process. This Court should affirm.

DATED: August 22, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys for Petitioners/Respondents herein.

2. On this date, I caused the document to which this Certificate is attached to be filed with the Clerk of the Supreme Court of the State of Washington, and served upon counsel of record in the manner indicated below:

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

DATED this 22nd day of August, 2018 at Seattle, Washington.

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