IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

In re: ORDINANCE SETTING MINIMUM EMPLOYMENT STANDARDS FOR HOSPITALITY AND TRANSPORTATION INDUSTRY EMPLOYERS	No. **PETITION AND AFFIDAVIT FOR PREVENTION OF ELECTION ERROR (RCW 29A.68.011)**

Petitioners hereby allege and petition as follows:

STATEMENT OF THE CASE

The City of SeaTac Proposition One ("Prop One") qualified for the November ballot when King County found it had sufficient signatures under RCW 35A.01.040 and granted its certificate of sufficiency on June 20, 2013. Under State Law, the King County Auditor is given the exclusive "duty to determine the sufficiency of the petition." RCW 35A.01.040(4). To date, no party has brought an action against King County to challenge its finding that Prop One is sufficient under RCW 35A.01.040. On these facts alone the Court must require King County and the City of SeaTac to place Prop One, the so-called "Good Jobs Initiative" on the ballot.

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

After King County exercised its statutory role in validating the Prop One petition, the City of SeaTac facilitated a wholly illegal process by which opponents continued to challenge the sufficiency of the measure administratively. First a "Review Board" of the Mayor, City Manager and Police Chief took on the role of judges to throw out 201 County-validated signatures. Then through a municipally created appeal process, Judge Darvas overturned one decision of the Review Board and subtracted 61 votes from the Review Board's tally of valid signatures. The combined loss of these 262 County-validated signatures rendered the petition insufficient.

This circuitous attack on King County's finding of sufficiency was wholly illegal. Moreover, they deprived voters, including Plaintiffs, of their State and Federal Constitutional rights. When Washington granted its citizens the right to enact laws by initiative, the initiative right became a fundamental one under the State and Federal Constitutions. The procedures of SeaTac and the decision of Judge Darvas directly disenfranchise 262 voters, but indirectly disenfranchise all of the voters who signed to qualify Prop One for the ballot. Its actions cannot withstand any constitutional scrutiny. The removal of Prop One here would treat SeaTac voters differently than other voters in the County and retroactively alter long-standing process for determining whether a petition can be placed on the ballot. Such an act violates Petitioners' equal protection and due process rights.

In keeping with federal constitutional law and this State's statutory requirements, this Court should order King County to place Prop One on the ballot.

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

IDENTITY OF THE PARTIES

1. Petitioner Patricia Seidenstricker is a Washington resident registered to vote in the City of SeaTac. She is one of the individuals who signed the petition in support of the SeaTac Good Jobs Initiative, seeking to have Prop One put on the ballot in November.

2. Petitioner Brian White is a Washington resident registered to vote in the City of SeaTac. He is one of the individuals who signed the petition in support of the SeaTac Good Jobs Initiative, seeking to have Prop One put on the ballot in November. His signature was thrown out by the SeaTac Petition Review Board for the lack of a date next to his signature.

3. In addition, the Petition is supported by declarations of other voters who are disenfranchised by the proceedings before SeaTac and Judge Darvas, submitted herewith.

4. Respondent King County (the "County") is responsible for determining the sufficiency of initiative petitions submitted by municipalities within the County, and for placing such propositions on the ballot. Thus, King County is involved in the alleged error that is about to occur.

5. Respondent the City of SeaTac is responsible for issuing a final certificate of sufficiency of initiative petitions submitted within the City, and for sending such propositions to King County Elections to be placed on the ballot. Thus, the City of SeaTac is involved in the alleged error that is about to occur.

6. Respondent SeaTac Committee for Good Jobs is the sponsor of Prop One.

JURISDICTION AND VENUE

1. This action involves respondent King County and its compliance with its statutory duty to put Prop One on the November ballot.

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

2. This Court has personal jurisdiction over all necessary parties.

3. This Court has subject matter jurisdiction over this action pursuant to RCW 29A.68.011.

4. King County is a proper venue for this action.

STATEMENT OF FACTS

This underlying action arises out of an effort by certain parties (Alaska Airlines, the Washington Restaurant Association, and others, hereinafter "Prop One Opponents") to prevent City of SeaTac Proposition One ("Prop One") from being submitted to the voters.

State Law and the SeaTac Municipal Code ("SMC") provide an initiative process for SeaTac voters. SMC 1.10.110 requires that a petition in support of a ballot initiative be supported by at least fifteen (15) percent of registered voters within the City as of the day of the last preceding general election. It is not disputed that with respect to the Good Jobs Initiative, this means that the proposed initiative needed to have been supported by at least 1,536 valid signatures in order to meet the fifteen percent threshold

The SeaTac Committee for Good Jobs collected 2,506 signatures in support of the Good Jobs Initiative. The City sent these signatures to King County Division of Elections ("King County Elections") for review, as required under SMC 1.10.140.[1]

King County Elections reviewed the signatures for validity, and on June 20, 2013, issued a finding of sufficiency for the signatures reviewed.[2] King County Elections found 1,780 signatures to be valid.[3]

---

[1] *Declaration of Knoll Lowney ("Lowney Decl.")* ***Ex. 3.***
[2] ***Ex. 1.***
[3] *Id.* The City Clerk's office issued its own certificate of sufficiency in response to King County's findings on June 28. ***Ex. 2.***

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

The City Council, following the provisions of SMC 1.10.220, set the issue of sending the Initiative to the November ballot on the City Council agenda for July 23, 2013. Prop One Opponents requested the City Council to empanel a Petition Review Board, on the basis, inter alia, that the City had counted invalid signatures in support of the initiative. The Petition Review Board was formed, held a hearing, and rejected 201 County-validated signatures based upon their legal conclusion that these signatures failed to meet legal requirements. Even with these three categories of signatures stricken, the Board determined that the petition was supported by sufficient signatures and the City therefore filed its own "Certificate of Sufficiency."

The Board issued a final certificate of sufficiency, finding that 1,579 signatures were valid. *Id.* The Initiative was placed on the City Council agenda for consideration on July 23, 2013, at which time the Council passed the formal resolution instructing King County to place the Initiative on the November ballot. Prop One Opponents then filed an application for a writ from the Superior Court challenging the City's Certification of Sufficiency. The matter was heard by Judge Andrea Darvas, who rejected an additional 61 County-validated signatures.[4] The petitioners in that case did not join any of the plaintiffs, other voters, or King County. *Id.*

Petitioners herein seek relief from this Court because their interest in Prop One placed on the ballot is being impaired by the City of SeaTac's illegal proceedings and by Judge Andrea Darvas' improper issuance of a writ of prohibition and mandate. Petitioners

[4] ***Ex. 6.***

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

therefore seek this Court's intervention to require King County and the City of SeaTac to place Prop One on the ballot.

ARGUMENT

I. <u>To prevent election error, the Court must order SeaTac Proposition One placed on the ballot. It has met every legal requirement to earn its place there.</u>

This case may be decided on the simplest set of facts, which are all set forth in the small handful of exhibits submitted herewith. Prop One qualified for the ballot when the King County Auditor found that it had sufficient signatures and granted its notice of sufficiency on June 20, 2013, and King County's decision has never been challenged. Under State Law, it is the King County Auditor – and only the King County Auditor – who is given the "duty … to determine the sufficiency of the petition." RCW 35A.01.040.

The determinative facts are clear: On June 10, 2013, the proponents of Prop One submitted the petition, which was thereafter sent to King County to determine its sufficiency. King County issued Prop One a Certificate of Sufficiency on June 20, 2013. King County's certificate states that Prop One "has been examined and the signatures thereon carefully compared with the registration records of the Kind County Elections Department, and as a result of such examination, found the signatures to be sufficient under the provisions of Revised Code of Washington 35A.01.040."

To qualify for the ballot, only 1,536 signatures were necessary. King County found there to be 1,780 valid signatures.[5] This included 61 original signatures from voters who signed twice.[6] In other words, King County found that the initiative had more than enough

---

[5] ***Ex. 3.***
[6] *Id.* ¶ 14.

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

signatures to qualify for the ballot even if it had rejected both the original and duplicate signatures of voters. Specifically, had the County used that procedure there would have been 1,719 valid signatures.

King County found Prop One valid using the same methodology that it has used throughout the county for ten years. Consistent with its practice, when the County came upon a duplicate signature, it followed the Supreme Court's decision in *Sudduth v. Chapman*, 88 Wn.2d 247 (1977), counting the first signature but not the duplicate. When an address was missing, the King County Auditor's office looked it up. Also, King County does not reject a signature simply for the voter's failing to write in the date of signature.

To this date – about one week before the deadline by which King County must begin printing ballots – no party has brought an action against King County to challenge its certificate of sufficiency or specifically its finding that Prop One is sufficient under RCW 35A.01.040. On those facts alone the Court must require King County and the City of SeaTac to place Prop One on the ballot.

II. <u>The charade that preceded this present lawsuit was wholly illegal</u>.

The Initiative Opponents will require this Court to wade through a series of events occurring after King County issued its certificate of sufficiency on June 20th. In that time Prop One and its proponents were dragged through a series of "proceedings" including a "review board" and a municipally-authorized appeal. A closer examination reveals both of these proceedings to be mere charade – wholly illegal and without any legal import on the sufficiency of Prop One or the question of whether Prop One must now be placed on the ballot. In any event, as discussed below, those proceedings clearly deprived plaintiffs here and other SeaTac voters of their State and Federal Constitutional Rights.

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

As stated, the opponents of the Good Jobs Initiative did not challenge King County's finding of sufficiency. Instead, they attacked through extra-legal procedures set up under the City of SeaTac municipal code.

First, the City of SeaTac empanelled a "review board," composed of its Mayor, City Manager, and Police Chief. Without any legal training, and even acknowledging that "This Board is not a judiciary,"[7] the board went on to ***throw out 201 signatures that had been validated by King County*** based upon legal conclusions as to their legality. For example, the Board threw out 145 signatures of voters simply for failing to write the date after their signature.[8] It threw out another 14 signatures where the voters did not write in their address.[9] Finally, it struck 42 signatures that it found were not "firmly affixed" to the petition.[10] The justification for each of these actions was that, in the opinion of the Mayor, City Manager and Police Chief, the signatures did not meet the requirements of RCW 35A.01.040, which governs the sufficiency of petitions. The Review Board rejected the opponents' other signature challenges, including the claim that when a voter accidentally signed twice, both the original and duplicate signatures must be rejected. Having rejected 201 signatures, the Review Board found that Prop One still had 1,579 valid signatures and was sufficient – but just barely.[11]

But the assault on Prop One did not end there. The opponents then took advantage of an appeal mechanism created in the SeaTac municipal code to appeal the Review Board's

---

[7] Review Board Findings. ¶ 27.
[8] *Id.* ¶¶ 15-17. To show its irrationality, it allowed a different 41 signatures even though the challengers alleged the date had been written by a third party. The Board found that "RCW 35A.01.040 does not require the date of the signing to be written only by the signer.") *Id.* ¶ 19.
[9] *Id.* ¶¶ 21-23.
[10] *Id.* ¶¶ 24-26.
[11] Final Initiative Petition Certificate of Sufficiency.

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

decision on the duplicate signatures issue. Judge Darvas of the King County Superior Court decided only that narrow issue. She overturned the Review Board's decision to allow the original signature of voters who signed twice, thereby removing 61 votes ***from the total votes validated by the Review Board,*** which in her view rendered the petition insufficient.

A closer examination shows these proceedings to be patently illegal and unconstitutional.

A. The "Review Panel" had no authority to reject 201 signatures.

This Court can give no validity that the Review Panel's rejection of 201 signatures from the petition because its actions were illegal and ultra vires.

i. Only King County is authorized to determine petition sufficiency.

First, State Law grants the power to determine the sufficiency of petitions only to the King County Auditor, and local governments are not free to create subsequent appellate procedures. The Washington state legislature has enacted tight regulations for determining the sufficiency of petition signatures, identifying a clear decision-maker and specific time-lines. RCW 35A.01.040[12] provides that

> (4) To be sufficient a petition must contain valid signatures of qualified registered voters or property owners, as the case may be, in the number required by the applicable statute or ordinance. **Within three working days after the filing of a petition, the officer with whom the petition is filed shall transmit the petition to the county auditor for petitions signed by registered voters, or to the county assessor for petitions signed by property owners for determination of sufficiency**. **The officer or officers whose duty it is to determine the sufficiency of the petition shall proceed to make such a determination with reasonable promptness** and shall file with the officer receiving the petition for filing a certificate stating the date upon which such determination was begun, which date shall be referred to as the terminal date.

[12] *See also*, RCW 35.21.005(4)

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

…

(5) **Petitions containing the required number of signatures shall be accepted as prima facie valid until their invalidity has been proved.**

…

(10) **The officer or officers responsible for determining the sufficiency of the petition shall do so in writing and transmit the written certificate to the officer with whom the petition was originally filed.** (emphasis added).

The Court of Appeals in *Eyman v. McGee,* 173 Wn.App. 684, 686 (2013) interpreted RCW 35A.01.040(4) to mean that "A city clerk has a mandatory duty under the statutes governing the filing of initiative petitions to transmit such petitions to the county auditor for determination of sufficiency."). In *King County Water Dist. No. 90 v. City of Renton*, 88 Wn.App. 214, 225 (1997), the Court noted that the "sufficiency" statute, RCW 35A.01.040, has been amended…. As amended, it appears that the county auditor and assessor are the officers whose duty it is to determine the sufficiency of a petition." The Court of Appeals noted that prior to 1997 the local government may have shared this right. *Id.*

The Revised Code of Washington (RCW) clearly delegates the authority to determine sufficiency exclusively to the County Auditor, and leaves no room for municipal officials to adopt subsequent proceedings to allow their elected officials to review and/or overturn King County's decision. Any such municipal efforts are preempted by conflicting state law under Article XI, section 11 of the Washington Constitution. *See Lawson v. City of Pasco*, 168 Wn.2d 675, 682 (2010); *Clallam County Deputy Sheriff's Guild v. Bd. Of Clallam County Comm'n.,* 92 Wn.2d 844 (1979).

The tight election calendar and associated deadlines clarifies why the Legislature chose not to allow the petition sufficiency process to be held hostage to local laws which provide no assurance of expeditiousness. Here, for example, King County timely issued its certificate of sufficiency on June 20, 2013, which should have ended the process, leaving

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

plenty of time to have this matter referred to the ballot in time for printing. Instead, the City then began its own illegal and plodding process and did not issue its own "Final Certificate of Sufficiency" until over a month later. It then authorized a further right to appeal which was not resolved until August 26th – right before the printing deadline.

In addition, the State has made the correct decision that the County Auditors, who work closely with and are trained by the Secretary of State, are in the best position to adopt uniform and consistent procedures for determining petition sufficiency. The arbitrary decisions of the City's Review Board show why the Legislature wisely took this process out of the hands of local elected officials, who are subject to the pressures of the electorate and have no training or expertise.

ii. <u>The Review Board's rejection of "illegal" signatures was ultra vires</u>.

Under the SeaTac municipal code, the Review Board has no authority to take on the role of the court and conduct a *de novo* review of King County's determination of sufficiency. It was never authorized to conduct a two day fact finding hearing on the legality of signatures that King County had validated.

SMC 1.10.200 only authorizes the board to conduct fact finding hearings and invalidate signatures "in event of any temporary alterations" or "permanent alterations" of a petition. The term "alteration" is defined as changes to an initiative or referendum petition, but specifically excludes "the signatures and other information required of the petition signers." SMC 1.10.160(B)(1).

In other words, the Review Board's authority is narrowly tailored to exclude sufficiency issues which State Law exclusively delegates to the County Auditor – the

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

signatures and other information required of petition signers. The Review Board's rejection of 201 signatures was solely about the signatures and information required of petition signers and therefore was ultra vires and illegal.

SMC 1.10.180 and .190 further show that the Review Board exceeded its authority. For example, SMC 1.10.080 says in the case of "permanent alteration" the signatures are to be withheld when the petition is sent to King County to determine sufficiency. It does not authorize review after sufficiency is determined by King County. SMC 1.10.090 similarly grants no authority to justify their actions here.

The code is clear that only alteration of petitions justifies the Review Board to reject signatures. SMC 1.10.200(C)("The Board shall determine whether alteration took place as alleged and, if so, shall determine whether the number of signatures invalidated by alteration reduces the number of signatures below the requisite fifteen percent (15%) minimum"), (D) ("The members of the Petition Review Board must agree unanimously in order to invalidate signatures on temporarily or permanently altered petitions").

Finally, the Code only authorizes the City to issue a certificate of sufficiency or insufficiency only in these rare cases involving claims of alteration – which by definition do not involve the sufficiency of signatures or voter-supplied information. SMC 1.10.200(F). The City has no authority to issue a certificate of sufficiency or insufficiency simply because its Mayor, City Manager and Police Chief disagree with the King County Auditor's legal conclusions.

"Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed." *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123 (Wash. 2010). The ultra vires

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

doctrine applies to local governments. "[L]ocal governments posses only those powers expressly delegated or found by necessary implication. Where there is doubt as to the existence of a state power arguably conferred to a local government, [the Supreme Court of Washington] will construe the question against local government and against the claimed power." *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699 (Wash. 2007) (finding a city's development moratorium to be ultra vires) (internal citations omitted). Thus, SeaTac's actions were void.

iii. Only a court of law has the authority and can exercise the legal judgment to reject signatures that have been validated by the County Auditor.

The Board should have heeded its own correct statement that "legal review of the initiative is a judicial function. This Board is not a judiciary."[13] Indeed, in *Philadelphia II v. Gregoire*, 128 Wn.2d 707 (Wash. 1996), the Supreme Court held that determining the validity of a proposed ballot initiative "is exclusively a judicial function" provided to the courts and no other governmental actor. *Philadelphia II*, 128 Wn.23 at 714. *Eyman v. McGehee*, 173 Wn. App. 684 (Wash. Ct. App. Div. 1, 2013), expanded on the holding in *Philadelphia II*, clarifying that "A city clerk has a mandatory duty under the statutes governing the filing of initiative petitions to transmit such petitions to the county auditor for determination of sufficiency. But, a court may review the substance of an initiative petition to determine whether it is valid. **Such a determination is 'exclusively a judicial function.'**" *Eyman*, 173 Wn. App. At 686-87 (internal citations omitted) (emphasis added).

[13] Review Board Findings. ¶ 27.

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

Following the county's determination, the city clerk has no role to determine a petition's validity, only the courts did.

Here, like in *Eyman*, a city clerk made an improper judgment about the validity of an initiative petition. When the SeaTac clerk reviewed the determination of sufficiency already completed by the King County Auditor, she performed a judicial function in violation of separation of powers.[14] SeaTac's unconstitutional determination must therefore be invalidated. *See*, *Tacoma v. O'Brien*, 85 Wn.2d 266, 272 (Wash. 1975) (attempt by non-judicial branch of government to make "an adjudication violates the separation of powers doctrine and is void.").

B. <u>The writ to Superior Court was equally illegal</u>.

The opponents took the third bite of the apple by challenging the sufficiency of the petition through the procedure set up by the SeaTac Municipal Code,[15] as well as a petition for other writs. This process cannot justify withholding Prop One from the ballot.

1. <u>The writ proceeding flyspecked an illegal and legally irrelevant document</u>.

Judge Darvas' decision is fatally flawed because it rests upon the Review Board's and City's illegal actions. The entire action was a challenge to the City of SeaTac's "certificate

[14] "The Washington State Constitution does not contain a formal separation of powers clause, but "'the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.' " *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)) . . . If the activity of one branch threatens the independence or integrity or invades the prerogatives of another, it violates the separation of powers." *Waples v. Yi*, 169 Wn.2d 152, 158 (Wash. 2010) (internal quotation marks and citations omitted).

[15] SMC 1.10.210 provides "A certificate of insufficiency may be appealed by the sponsor or sponsors of any petition, or by any signer, and any final certificate of sufficiency or insufficiency, following review by the Petition Review Board, may be appealed by any aggrieved party to the King County Superior Court. Such appeal shall be by writ filed with the Superior Court within ten (10) calendar days following the filing of the certificate of insufficiency, or of the final certificate of sufficiency or insufficiency, and a copy thereof shall be served upon the City Clerk within three (3) days following such filing in the Superior Court."

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

of sufficiency," which was issued after the Board of Review rejected 201 County-validated signatures. Judge Darvas conducted the review as requested – evaluating whether the Review Board or City made a legal error in its determination of the sufficiency of the petition – and ultimately ruled that "The City Clerk's issuance of the Final Certificate of Sufficiency is hereby reversed".[16] However, Judge Darvas never considered the fundamental question of whether the City and Review Board were even authorized to conduct a de novo review of King County's certificate of sufficiency and issue their own certificate of sufficiency – which they were not.

Moreover, because the case was brought under SMC 1.10.210 (authorizing appeal from the City's certificate of sufficiency issued after Review Board hearing), the initiative opponents only sued the City and City Clerk. The case effectively sought to overturn the judgment of the King County Auditor to issue the certificate of sufficiency on June 20, 2013, but the opponents did not bring King County into the case. Nor were plaintiffs or other voters ever notified that they were in danger of being disenfranchised.

In summary, Judge Darvas' decision is irrelevant because it flyspecked an illegal and ultra vires decision by the City of SeaTac. Judge Darvas did not evaluate the operative certificate of sufficiency – issued by King County – and did not even have jurisdiction over the Auditor, who has the exclusive authority to determine the sufficiency of the petition.

2. Even Judge Darvas' order does not invalidate the petition.

Even if all of the procedural errors in the writ proceeding had been cured, Judge Darvas' decision would not render the Prop One petition insufficient. Judge Darvas made a

[16] Order on Plaintiff's Second Motion and Application for Writs of Review, Mandate and Prohibition, p. 9

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

single legal decision in the case, deciding to throw out 61 original signatures of those voters who signed more than once. Even if she were correct on this constitutional question – which she was not – this would not invalidate the petition.

King County certified 1,780 valid signatures. Removing 61 signatures from that total leaves 1,719 signatures, which is more than the 1,536 votes that Prop One requires to earn its place on the ballot. She erroneously assumed that the Review Board and City had authority to conduct a de novo review and reject 201 County-validated signatures.

III. The procedures and decisions of the Review Board and Judge Darvas deprive SeaTac voters of State and Federal Constitutional Rights.

Judge Darvas distinguished *Sudduth*, throwing out original signatures, because that case was decided under the State's constitutional protections for the initiative process, which she determined does not protect the local initiative process at issue here. Plaintiffs disagree. In any event, the constitutional rights that have been infringed upon involve the equal protection, due process, and free speech protections of the State and Federal Constitutions.

These constitutional issues were not briefed before Judge Darvas. She only considered the scope of the State constitutional protection for initiatives. The larger constitutional issues were fully briefed before the Cowlitz County Superior Court, which found that the statutes mandating the rejection of original and duplicate signatures of voters who signed twice is unconstitutional for violating the State Constitution. Rather than repeating that briefing, the motion and order granting the motion are attached to the Declaration of Knoll Lowney and incorporated herein.[17]

[17] *Lowney Decl.* ***Ex. 9, 10.***

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

Federal rights are also at issue. Washington State's grant of that right to its citizens elevated the initiative process to a fundament right under the Federal Constitution, protected under the Equal Protection and Due Process clauses. "[W]hen a state chooses to give its citizens the right to enact laws by initiative, 'it subjects itself to the requirements of the Equal Protection Clause.'" *Angle v. Miller*, 673 F.3d 1122, 1128 (9th Cir. 2012) (quoting *Idaho Coal. United for Bears v. Cenarrusa*, 343 F.3d 1073, 1077 n.7 (9th Cir. 2003)). This federal protection arises from the fundamental right to vote, where "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." *Moore v. Ogilvie*, 394 U.S. 814, 815 (1969). "The ballot initiative, like the election of public officials, is a 'basic instrument of democratic government,' and is therefore subject to equal protection guarantees. Those guarantees furthermore apply to ballot access restrictions just as they do to elections themselves." *Idaho Coalition*, 342 F.3d at 1076 (9th Cir. 2003) (quoting *Cuyahoga Falls v. Buckeye Comm. Hope Found.*, 123 S. Ct. 1389, 1395 (2003) (internal citation omitted); citing *Illinois State Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)). "Nominating petitions for candidates and for initiatives both implicate the fundamental right to vote, for the same reasons and in the same manner, and the burdens on both are subject to the same analysis under the Equal Protection Clause." *Id.* at 1077.

The "rigorousness" of the "inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. . . . When those rights are subjected to severe restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi,* 504 U.S. 428, 434 (1992)(quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992).

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

Where the restriction is so severe that it eliminates a person's vote entirely, it must pass strict scrutiny. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 899-900 (9th Cir. Cal. 2003). The government bears the burden of proof under strict scrutiny. *See e.g., Minority Television Project, Inc. v. FCC*, 676 F. 3d 869 (9th Cir. 2012).

The actions and decisions of the City and Judge Darvis violate these Federal Constitutional guarantees.

A. <u>Original signatures of voters cannot be rejected simply because they mistakenly sign the initiative more than once</u>.

As discussed, the only court to look at this issue has found that the State Constitution prohibits rejecting the original signature. The government's interest in preserving the integrity of the initiative process is undisputedly important. *See John Doe No. 1 v. Reed*, ___ U.S. ___, 130 S.Ct. 2811, 2819 (2010). However, when a voter accidentally signs an initiative twice, eliminating the original signature along with duplicates does nothing to preserve or even enhance the integrity of the process, much less that the process is narrowly tailored to that aim. It is certainly not necessary "to protect the integrity of the initiative process." *See Sudduth v. Chapman*, 88 Wn.2d 247, 251 (Wash. 1977); *see also Whitman v. Moore*, 59 Ariz. 211, 125 P.2d 445 (1942).

The lack of necessity of rejecting original signatures is beyond question. For the past 35 years since the *Sudduth* decision, the State of Washington has consistently counted the original signature and only rejected the duplicates in this situation. This has been the practice throughout King County for at least the last ten years.

In light of the State and County's example --which apparently is consistent across the state – the decision to reject original signatures now cannot meet strict scrutiny.

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Even if the Court were to examine SeaTac's rejection of every duplicate signature under a less onerous standard, it would fail Constitutional standards. No matter how small the burden on the access to the ballot, it "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed,* 502 U.S. 279, 288-289 (1992)). The State and United States Supreme Courts have recognized that duplicate signatures are the result of simple mistake. *Sudduth v. Chapman*, 88 Wn.2d 247, 251 (Wash. 1977); *John Doe No. 1 v. Reed*, 130 S.Ct. at 2819. Therefore, rejecting the original signature is not going to eliminate the problem. Instead, the State and King County have eliminated the problem by adopting a system that rejects the duplicates only, but does not disenfranchise the voters. There is no justification for rejecting the original signatures, and any state or local law which purports to require this is unconstitutional.

B. <u>Treating SeaTac voters differently violates Equal Protection</u>.

Fundamental to federal equal protection for voters is that "[e]very voter's vote is entitled to be counted once. It must be correctly counted and reported." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). This formulation of the basic "one man, one vote" guarantee is particularly apt here. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-105 (U.S. 2000). "[O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." *Gray v. Sanders*, 372 U.S. at 381.

SeaTac's illegal petition review process and its rejection of signatures already accepted by King County further violates the Equal Protection Clause by creating disparate

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

burdens for advancing an initiative. Anywhere in King County other than SeaTac, King County's certificate of sufficiency would have been binding, subject only to judicial review. A voter who leaves off their address or inadvertently signs twice would not be disenfranchised. In SeaTac, an initiative sponsor must undergo two levels of de novo review *after the Statutory process for determining sufficiency.* Voters making simple mistakes are disenfranchised, with the result being that Prop One would be on the ballot if it were in any other City, but has been rejected through the City's illegal and ultra vires procedures. The Ninth Circuit recognized that an analogous disparity - "the use of defective voting systems in some counties and the employment of far more accurate voting systems in other counties" - is a classic voting rights equal protection claim. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894-895 (9th Cir. 2003). Here, the citizens of SeaTac are being deprived of an equal shot at exercising the fundamental right of initiative.

C. <u>Changing the rules without notice violates Due Process</u>.

"[A]n election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). After-the-fact disenfranchisement and surprise disenfranchisement pose particularly significant due process problems. Two elements are indicative of a due process violation: "(1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Id.* at 1227 (noting that the two elements were not exhaustive). In this case, duplicate signatories are always allowed based upon well-established procedure and voters had no notice that signing twice would all of a sudden lead to their disenfranchisement. The Washington Supreme Court's

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

1977 pronouncement that rejecting every duplicate signature is unconstitutional makes it even more likely that voters expect their signatures to count even if they inadvertently signed more than once. *See Sudduth v. Chapman*, 88 Wn.2d 247, 251 (Wash. 1977). King County has adhered to this procedure for ten years. SeaTac's unanticipated deviation from these initiative procedures resulted in total disenfranchisement of enough petitioners to prevent certification of the initiative for the ballot. This is easily satisfies the "significant disenfranchisement" element of *Bennett.* Rejecting the original signatures and signatures without addresses and the like now, without any notice, thus violates the voters' substantive due process guarantees afforded by the federal Constitution.

IV. <u>The presumption of validity that attaches to petition signatures supports this petition</u>.

The Washington Supreme Court adopted the majority rule that a "presumption of validity … attaches to a signature upon a petition." *Sudduth v. Chapman*, 88 Wn.2d 247, 255-256, 558 P. 2d 806 (1977) (citing 42 Am. Jur. 2d *Initiative and Referendum* § 54 (1969)). This presumption arises from the required verification of the signatures under oath, from the criminal sanctions for improper signatures, and from the federal Constitutional protections afforded to the fundamental right to petition. 42 Am. Jur. 2d § 54; *Pena v. Nelson*, 400 F. Supp. 493, 495 (D. Ariz. 1975) ("[I]f any presumption is to arise, it should be one that the signatures of registered voters are presumed valid until otherwise proven, and not that a certain class of signatures are presumed invalid.") Administrative officers generally lack authority to challenge signatures on a properly verified petition. 42 Am. Jur. 2d § 54. Such challenges are within the prevue of the courts, where the challenger has the burden to produce evidence sufficient to overcome the presumption. *Id.* Even when a challenger

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883

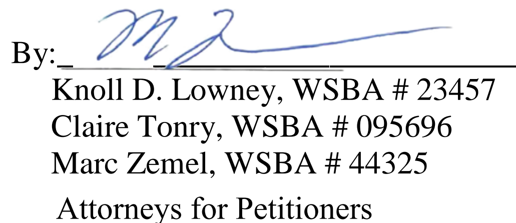
overcomes the presumption of validity, the courts will uphold each and every valid signature. *See, e.g., State ex rel. Carson v. Kozer,* 105 Or. 486, 210 P. 179, 183 (1922) ("Genuine signatures of legal voters constitute the vitalizing element of a petition, and all else is mere form and evidence… if the petition is in truth signed by a sufficient number of legal voters, it is a legally sufficient petition.") No one has challenged the validity of appellants' original signatures, much less proven that any of the rejected signatures are invalid. The presumption of validity therefore applies to appellants' original signatures and those genuine signatures must be counted.

CONCLUSION

Prop One has earned its place on the ballot and this Court should order it to appear there.

DATED this 28th day of August 2013.

SMITH & LOWNEY, P.L.L.C.

By:
Knoll D. Lowney, WSBA # 23457
Claire Tonry, WSBA # 095696
Marc Zemel, WSBA # 44325
Attorneys for Petitioners

Smith & Lowney
2317 E. John
Seattle, WA 98112
(206) 860-2883