

1 EXPEDITE
Hearing is Set:

2 Date: Sept. 11, 2009

3 Time: 9:00 a.m.

4 Judge

5
6
7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

9
10 VOTERS WANT MORE CHOICES, Tim D.
11 Eyman, M. (Mike) J. Fagan, and Leo J. (Jack),
Fagan,

12 Plaintiffs,

13 v.

14 VICTOR MOORE, in his official capacity as
15 Director of the Office of Financial Management;
16 SAM REED, in his official capacity as Secretary
of State of the State of Washington,

17 Defendants.

NO. 09-2-02122-5

DEFENDANTS' RESPONSE
OPPOSING ISSUANCE
OF WRITS

18
19 **I. INTRODUCTION**

20 Based upon their preferred interpretation of the provisions of Initiative 1033 (I-1033),
21 Plaintiffs seek extraordinary writs from this court. Plaintiffs seek a writ of mandamus to
22 compel the Director of the Office of Financial Management (OFM) to prepare a new fiscal
23 impact statement for I-1033 that would employ assumptions reflecting the Plaintiffs' preferred
24 construction of the initiative. Petition for Writ of Mandate and Writ of Prohibition (Petition),
25 at 7-8. Plaintiffs also seek a writ of prohibition directed to the Secretary of State, prohibiting
26 the Secretary from including the fiscal impact statement that has been prepared by the Director

1 of OFM for Initiative 1033 in the voters' pamphlet for the election to be held on November 3,
2 2009. Pet., at 8.¹

3 Plaintiffs' motion should be denied for two reasons. First, Plaintiffs' action is barred
4 by laches. Second, Plaintiffs' action does not satisfy fundamental criteria for mandamus or
5 prohibition.

6 II. STATEMENT OF THE CASE

7 A. Statutory And Constitutional Background

8 Under RCW 29A.72.025, "[t]he office of financial management, in consultation with
9 the secretary of state, the attorney general, and any other appropriate state or local agency,
10 shall prepare a fiscal impact statement for each of the following state ballot measures: (1) An
11 initiative to the people that is certified to the ballot[.]" Initiative 1033 is a state measure that
12 has been certified to the ballot. Hamlin Decl., ¶ 3.

13 RCW 29A.72.025 addresses how and when OFM is to prepare fiscal impact statements
14 and the content of such statements, and directs that such statements must be included in the
15 voters' pamphlet. The statute provides:

16
17 *Fiscal impact statements must be written in clear and concise language, avoid*
18 *legal and technical terms when possible, and be filed with the secretary of state*
19 *no later than the tenth day of August. Fiscal impact statements may include*
20 *easily understood graphics.*

21 A fiscal impact statement must describe any *projected* increase or decrease in
22 revenues, costs, expenditures, or indebtedness that the state or local
23 governments will experience if the ballot measure were approved by state
24 voters. Where appropriate, a fiscal impact statement may include both
25 *estimated* dollar amounts and a description placing the *estimated* dollar amounts
26 into context. *A fiscal impact statement must include both a summary of not to*

24 ¹ Although not requested in their Petition, Plaintiffs' Proposed Order provides that the Secretary of State
25 "must include the revised Fiscal Impact Statement prepared as ordered above" (that is, prepared so that it no
26 longer assumes matters with which Plaintiffs disagree.) Pls' Mtn, Ex. F at 2. Defendants assume that Plaintiffs
seek to require both acts by the Secretary.

1 exceed one hundred words and a more detailed statement that includes *the*
2 *assumptions that were made to develop the fiscal impacts.*

3 *Fiscal impact statements must be available online from the secretary of state's*
4 *web site and included in the state voters' pamphlet. Additional information*
5 *may be posted on the web site of the office of financial management.*

6 (Emphasis added.)

7 Washington's voters' pamphlet derives from article II, section 1(e) of the Washington
8 Constitution, which requires the legislature to provide methods for publicizing all laws or parts
9 of laws referred to the people. "The secretary of state shall send one copy of the publication to
10 each individual place of residence in the state and shall make such additional distribution as he
11 shall determine necessary to reasonably assure that each voter will have an opportunity to
12 study the measures prior to election." Const. art. II, § 1(e). RCW 29A.32.070(5), in turn,
13 requires that:

14 The voters' pamphlet must provide the following information for each statewide
15 issue on the ballot:

16 ...

17 (5) The fiscal impact statement prepared under RCW 29A.72.025[.]

18 Additional state and federal laws address the content and distribution of ballots and
19 related voter information materials. Under Section 203 of the Voting Rights Act,
20 42 U.S.C. § 1973aa-1a(c), when a specified threshold of the population of a jurisdiction has
21 limited proficiency in English, the covered State or political subdivision is required to provide
22 "any . . . materials or information relating to the electoral process" "in the language of the
23 applicable minority group as well as in the English language[.]" Pursuant to this requirement,
24 Washington publishes and distributes the voters' pamphlet in Chinese for parts of King
25 County, and in Spanish for all of Adams, Franklin, and Yakima counties. Hamlin Decl., ¶ 6.
26

1 As to timing, RCW 29A.40.070(2) provides that “[a]t least thirty days before
2 any . . . general election . . . the county auditor shall mail ballots to all overseas and service
3 voters.” To ensure that military servicepersons and other overseas voters have the ability to
4 inform themselves with respect to measures on the ballot, many counties include the voters’
5 pamphlet in that mailing. Hamlin Decl., ¶ 10. County auditors must mail ballots to all other
6 voters at least 18 days before the election. RCW 29A.40.070(1). Again, to ensure that voters
7 may inform themselves with respect to matters on the ballot at the time they may begin voting,
8 the schedule for publishing and distributing the voters’ pamphlet is designed to ensure that the
9 pamphlet arrives within a day or two of the ballot. Hamlin Decl., ¶ 11.

10 **B. Factual Background**

11 In keeping with RCW 29A.72.025, the Office of Financial Management consulted with
12 the Attorney General’s Office and other state and local government offices to prepare the fiscal
13 impact statement for Initiative 1033, and filed it with the Secretary of State on August 10,
14 2009. Murray Decl., ¶¶ 5, 6(g). Also consistent with RCW 29A.72.025, the fiscal impact
15 statement for Initiative 1033 has been posted on OFM’s since August 10, 2009. Murray Decl.,
16 ¶ 6(h).

17 As RCW 29A.72.025 further provides, the fiscal impact statement for I-1033 is
18 predicated on OFM’s assumptions concerning the measure and concerning fiscal conditions in
19 the state, and its assumptions are identified in the fiscal impact statement. Murray Decl., ¶¶ 7,
20 9. Based upon these assumptions, the statement estimates dollar amounts and projects fiscal
21 impact of the measure, if approved by the voters, as RCW 29A.72.025 directs.

22 Washington will hold its general election on November 3, 2009. Hamlin Decl., ¶ 3. As
23 one would expect, many critical administrative tasks must be timely accomplished in advance
24 of the election for the election to go forward in the manner required by law. In Washington,
25 this includes proofing, formatting, translating into Spanish and Chinese, printing, and
26

1 distributing the voters' pamphlet. Hamlin Decl., ¶6. For the voters' pamphlet to be timely
2 distributed to voters, including overseas military personnel, the Secretary of State must receive
3 the final text of materials for inclusion in the pamphlet by September 15, 2009. Hamlin Decl.,
4 ¶ 14. Even that date leaves little time to proof, translate, format and print the pamphlet so that
5 it may be timely distributed. *Id.*

6 As the Declaration of Julie Murray reflects, preparing a fiscal impact statement is a
7 deliberative, complex and time-consuming undertaking. If the court were to issue a writ of
8 mandamus as requested by Plaintiffs, it would require several days, and perhaps weeks, for
9 OFM to determine new projections. Murray Decl., ¶ 10. The final text of new fiscal impact
10 statement for Initiative 1033 thus could not be provided to the Secretary of State by September
11 15, 2009, the last day that such materials could be received and processed by that office and
12 still ensure that voters' pamphlets are timely distributed.

13 **C. Procedural Background**

14 Plaintiffs filed this action on September 1, 2009. Counsel for the State have been
15 advised that a copy of the pleadings was delivered to the Office of the Secretary of State, and
16 to the Office of Financial Management, on September 2, 2009. The action has not been served
17 on the Attorney General as required by RCW 4.92.020 to commence an action against the
18 state. *See, State v. Johns*, 170 Wash. 125, 128, 15 P.2d 693 (1932) (action against state
19 officers is action against the state if a judgment must affect a right or interest of the state.)²
20
21
22

23 ² The Attorney General's Office received a "courtesy copy" of the initial pleadings, by email attachment,
24 on September 2, 2009, after requesting a copy from Plaintiffs' counsel. Plaintiffs have also failed to provide the
25 minimum 10 day notice required by RCW 7.16.190 to respond to an application for a writ of mandamus or
26 prohibition. Because it is critical to the integrity of the election process that this belatedly filed case be resolved
promptly, Defendants do not separately seek dismissal based upon these deficiencies, but note them as they
additionally demonstrate Plaintiffs' unreasonable delay in commencing this action.

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

III. ARGUMENT

A. Plaintiffs' Action Is Barred By Laches

Laches is an equitable doctrine that “protects the parties from prejudicial delay[.]” *Clark Cy. PUD 1 v. Wilkinson*, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000). It has two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay. *Id.* An example of the application of laches in a mandamus action is *Lopp v. Peninsula Sch. Dist.* 401, 90 Wn.2d 754, 758, 585 P.2d 801 (1978). There, an action in mandamus was brought to challenge the sale of school district bonds. The action was brought a month after the election where the bond sale was approved. The court held that the action was barred by laches as the delay of one month after the special election before instituting suit was unreasonable, and due to change in conditions, the district would be damaged by allowing the suit to proceed. *See also, LaVergne v. Boysen*, 82 Wn.2d 718, 513 P.2d 547 (1973) (action challenging special levy election causing prejudice to and disadvantage of district barred by laches).

In determining whether delay is unreasonable, “a court may look to a variety of factors including similar statutory and rule limitation periods.” *Clark Cy. PUD*, 139 Wn.2d at 848-49. Numerous factors demonstrate Plaintiffs’ unreasonable delay. As previously noted, RCW 29A.72.025 requires that fiscal impact statements must “be filed with the secretary of state no later than the tenth day of August.” In and of itself, this statutory filing period indicates that time is of the essence in providing a fiscal impact statement to the Secretary of State, so that there is adequate time for the Secretary to include it in the voters’ pamphlet that is distributed to Washington voters.

In considering the period in which a statutory writ of certiorari under RCW 7.16 must be sought, the court in *Clark County PUD* explained that “[a] reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period because chapter 7.16 RCW does not prescribe a limitation period.” *Id.* at 847. The same should hold true with

1 respect to the time within which a party must apply for a statutory writ of mandamus or
2 prohibition because as, is the case with writs of certiorari, “chapter 7.16 does not prescribe a
3 limitation period.” *Id.* The August 10th filing requirement for fiscal impact statements under
4 RCW 29A.72.025 is identical to the filing deadline for explanatory statements prepared by the
5 Attorney General for ballot measures, under RCW 29A.32.040(1). RCW 29A.32.040(1)
6 provides that “[e]xplanatory statements prepared by the attorney general under RCW
7 29A.32.070(3) and (4) must be . . . filed with the secretary of state no later than the tenth day
8 of August.” Notably, this analogous statutory provision limits the period to appeal an
9 explanatory statement to *five days*. “A person dissatisfied with the explanatory statement may
10 appeal to the superior court of Thurston County within five days of the filing date.” RCW
11 29A.32.040(3). The statute also provides for expedited (and final) superior court review in
12 such cases. In these additional respects, the analogous statutory provision makes it plain that a
13 challenge to material filed with the Secretary of State for inclusion in the voters’ pamphlet
14 must be filed very quickly. Under *Clark County PUD*, this is a “similar statutory . . . limitation
15 period[]” and provides “a reasonable time within which to apply for a statutory writ.” *Clark*
16 *Cy. PUD*, 139 Wn.2d at 849, 847. However, whether the court applies this limitation period
17 directly to this case, or considers it as a factor demonstrating the Plaintiffs’ unreasonable delay,
18 the outcome is the same. Plaintiffs’ delay is unreasonable.

19 As of August 10, 2009, Plaintiffs were aware of the fiscal impact statement that was
20 filed by OFM with the Secretary of State for I-1033. The statement was posted on OFM’s
21 website as RCW 29A.72. 025 authorizes. Yet Plaintiffs delayed filing this action for 22
22 days—more than four times longer than the analogous statutory appeal period.

23 Moreover, Plaintiffs well understood that litigation of its claims would delay
24 preparation of the voters’ pamphlet. On August 13, 2009, Plaintiffs sent a six-page single-
25 spaced letter to Victor Moore, the Director of OFM, detailing their disagreement with
26

1 assumptions for the I-1033 fiscal impact statement that OFM filed with the Secretary of State
2 on August 10th. Mot. to Issue Writs, Ex. D, ¶ 1. Plaintiffs also knew that Director Moore was
3 not in the office and would not return until August 20, 2009. Murray Decl., ¶ 11, Ex A.—Yet
4 Plaintiffs delayed filing this action for an additional 19 days. Even after being advised by the
5 Director of OFM on August 21, 2009, by regular and email, that OFM disagreed with
6 Plaintiffs’ assertions (Murray Decl., ¶ 11, Ex. B), Plaintiffs delayed another 12 days before
7 filing this action, still more than twice as long as the analogous statutory appeal period. In
8 sum, Plaintiffs were well aware of the time sensitive nature of the election process and
9 nonetheless delayed the filing of this action for nearly a month. Plaintiffs’ delay is
10 unreasonable and satisfies the first element of laches.

11 The second element of laches, prejudice to the other party resulting from the delay, has
12 been termed the primary focus of the laches inquiry, and also is met in this case. *Clark Cy.*
13 *PUD*, 139 Wn.2d at 849 (“[T]he main component of the doctrine is not so much the period of
14 delay in bringing the action, but the resulting prejudice and damage to others.”)

15 As the Washington Constitution reflects, the voters’ pamphlet is an important means of
16 providing information to voters about proposed laws. Const. art. II, § 1(e). State law
17 specifically requires that the voters’ pamphlet contain a fiscal impact statement for state ballot
18 measures. RCW 29A.32.070(5); RCW 29A.72.025. If Plaintiffs were to prevail in this action
19 (and for reasons expressed here and in Sections B and C of the Argument below, they should
20 not) their delay would interfere with timely distribution of the voters’ pamphlet. It would
21 require several days, if not weeks, to prepare a fiscal impact statement for I-1033 that is based
22 on the assumptions Plaintiffs seek to have the court impose. Murray Decl., ¶10. As the
23 Hamlin Declaration explains, the final day by which the text of the voters’ pamphlet must be
24 submitted to the Secretary of State to ensure timely distribution is September 15, 2009.
25 Hamlin Decl., ¶ 14. A new fiscal impact statement cannot be prepared in that limited period.
26

1 Murray Decl., ¶10. The time to address Plaintiffs' dilatory assertions has expired. The result
2 of Plaintiffs' delay would be severe prejudice to the State and to Washington voters.

3 For these reasons, the Court should deny Plaintiffs' Motion for Writs on the grounds
4 that this action is barred by laches.

5 **B. Plaintiffs' Action Does Not Satisfy The Most Basic Criteria For A Writ of**
6 **Mandamus**

7 Because Plaintiffs' action is barred by laches, the court need not reach the merits of
8 their action. If the court does, however, Plaintiffs' action fails as Plaintiffs cannot satisfy the
9 basic criteria for the writs that they seek.

10 Mandamus is an extraordinary writ and should be granted only in a clear case. It is not,
11 as Plaintiffs see to assume, an avenue to second guess the exercise of discretion by a state
12 officer or agency. It is a fundamental rule that a writ of mandamus does not lie to compel the
13 manner in which an official exercises discretion. *Mower v. King Cy.*, 130 Wn. App. 707, 719,
14 125 P.3d 148, (2005) (“[M]andamus can direct an officer or body to exercise a mandatory
15 discretionary duty, but not the manner of exercising that discretion.”)

16
17 Mandamus lies to compel discretionary acts of public officials when they have
18 totally failed to exercise their discretion to act, and therefore it can be said they
19 have acted in an arbitrary and capricious manner. Once officials have exercised
20 their discretion, mandamus does not lie to force them to act in a *particular*
21 *manner*.

22 (Emphasis in original.)

23 *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 140-41, 588 P.2d 185, 188-89 (1978),
24 overruled on other grounds, *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999). Only
25 purely ministerial acts may be compelled by mandamus, and preparing a fiscal impact
26 statement is far removed from a purely ministerial act. *Burg v. City of Seattle*, 32 Wn. App.
286, 291, 647 P.2d 517, 520 (1982) (“Mandamus as authorized by RCW 7.16.160 will issue

