

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
27

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, Thomas Canterbury, Tom
Huff, Margie Ferris, Paul Elvig, Edward
Monaghan, and Christopher Vance, Washington
residents and electors, and the Rossi for
Governor Campaign, a candidate committee,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,

Respondents.

No. 05-2-00027-3

DECLARATION OF ROBERT J.
MAGUIRE IN OPPOSITION TO
DEMOCRATIC PARTY'S
MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER
JURISDICTION

I, ROBERT J. MAGUIRE, declare as follows:

1. I am one of the attorneys for the Petitioners above-named.

2. Attached to this Declaration as Exhibit A is a true and correct copy of
Petitioners' Amended Response Brief in Opposition to Respondent Franklin County
Auditor's Motion to Dismiss Petition by Electors and Petition for Writ of Mandamus and
Other Relief filed with the Supreme Court by the Washington State Democratic Central
Committee and dated December 9, 2004.

3. Attached to this Declaration as Exhibit B is a true and correct copy of the
Petition by Electors and Petition for Writ of Mandamus and Other Relief filed with the
Supreme Court by the Washington State Democratic Central Committee and dated
December 3, 2004.

DECLARATION OF ROBERT J. MAGUIRE IN OPPOSITION TO
DEMOCRATIC PARTY'S MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION - 1

SEA 1601933v1 55441-4

EXHIBIT

A

No. 76321-6

**SUPREME COURT
OF THE STATE OF WASHINGTON**

**DAVID McDONALD, RONALD TARO SUYEMATSU
et al.,
Petitioners**

v.

**SECRETARY OF STATE SAM REED, et al.,
Respondents**

**PETITIONERS' AMENDED RESPONSE BRIEF IN
OPPOSITION TO RESPONDENT FRANKLIN
COUNTY AUDITOR'S MOTION TO DISMISS
PETITION BY ELECTORS AND PETITION FOR
WRIT OF MANDAMUS AND OTHER RELIEF**

David J. Burman, WSBA # 10611
Kevin J. Hamilton, WSBA # 15648
Ryan J. McBrayer, WSBA # 28338
William C. Rava, WSBA # 29948
Beth A. Colgan, WSBA # 30520
Charles C. Sipos, WSBA # 32825
Breena M. Roos, WSBA # 34501
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-9000
Attorneys for Petitioners

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....2

 A. RESPONDENT FRANKLIN COUNTY AUDITOR HAS SHOWN NO GROUNDS FOR DISMISSAL PURSUANT TO CR 12(b)(6).....2

 1. Standards Applicable to a Rule 12(b)(6) Motion.....2

 2. Petitioners Have a Cause of Action Against Franklin County.....2

 B. PETITIONERS' ALLEGATIONS SURVIVE SUMMARY JUDGMENT.....3

 C. ENSURING A FULL AND FAIR ELECTION IS NOT DISCRETIONARY AND MANDAMUS IS APPROPRIATE.....5

 D. PETITIONERS SENT RESPONDENT FRANKLIN COUNTY AUDITOR PROPER NOTICE.....6

III. CONCLUSION.....7

TABLE OF AUTHORITIES

Cases

<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000)	2
<i>Reid v. Pierce County.</i> , 136 Wn.2d 195, 961 P.2d 333 (1998).....	2
<i>Schillberg v. Williams</i> , 115 Wn.2d 809 (1990).....	6
<i>Walker v. Munro</i> , 124 Wn.2d 402 (1994).....	6
<i>Wright v. Jeckle</i> , 104 Wn. App. 478, 16 P.3d 1268 (2001).....	2

Statutes

RCW 29A.64.021(1).....	3
RCW 29A.64.050	3
RCW 29A.68.011	6
RCW 29A.68.011(4).....	6
RCW 29A.68.011(5).....	6
WAC 434-262-030	3
WAC 434-262-040	3
WAC 434-262-070	3

Regulations and Rules

CR 12(b)(6)	2
CR 56	2

I. INTRODUCTION

Petitioners seek emergency relief from this Court to ensure that every legitimate vote for Washington's next governor will be counted under uniform standards in the impending hand recount. Under Washington law, county auditors must consider every vote cast—meaning every ballot submitted by a Washington elector—and the Secretary of State must promulgate rules to guarantee that the county auditors are employing uniform standards during such consideration.¹

Rather than respond to the Petition for a Writ of Mandamus, one of the respondents (the Franklin County Auditor), filed a motion to dismiss, seeking the dismissal of all or part of the petition. Motion to Dismiss Petition by Electors and Petition for Writ of Mandamus and Other Relief (“Motion”). With all due respect, that Motion should be denied.

First, Petitioners have plainly alleged a cause of action against the respondents. Taking the allegations as true, as this Court must on such a motion, the respondents (including Franklin County) failed to certify an abstract of the election that is a “full, true and correct representation of all votes cast,” and failed to perform a recount of all “votes cast,” in both cases in violation of settled Washington law. Second, the Petitioners have

¹ Petitioners have fully set forth the reasons why emergency relief is necessary and appropriate in their original petition, the supporting papers, and in their reply papers filed this afternoon, encaptioned: “Petitioners’ Reply Brief in Support of Petition by Electors and Petition for Writ of Mandamus and Other Relief.”

specifically alleged—and supported with evidence—that the abstract certified by Franklin County is simply inaccurate as a matter of fact. Finally, and as a result, mandamus relief is plainly appropriate.

For all of these reasons, Petitioners respectfully submit that the motion should be denied.

II. ARGUMENT

A. RESPONDENT FRANKLIN COUNTY AUDITOR HAS SHOWN NO GROUNDS FOR DISMISSAL PURSUANT TO CR 12(b)(6).

1. Standards Applicable to a Rule 12(b)(6) Motion

Dismissal of a claim under CR 12(b)(6) is appropriate only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). In ruling on a motion under CR 12(b)(6), the court accepts as true the allegations in a plaintiff's complaint and any reasonable inferences therein. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 122-23, 11 P.3d 726 (2000); *Reid*, 136 Wn.2d at 201. If materials outside the pleadings are considered, the motion will be treated as a motion for summary judgment under CR 56. CR 12(b)(6). CR 12(b)(6) motions are granted sparingly and with care. *See Wright v. Jeckle*, 104 Wn. App. 478, 481, 16 P.3d 1268, 1269 (2001).

2. Petitioners Have a Cause of Action Against Franklin County.

Petitioners allege that the county auditors and canvassing boards, in addition to the Secretary of State, have duty to perform a recount that

tallies all “votes cast.” *See* RCW 29A.64.021(1); RCW 29A.64.050.

Similarly, the canvassing boards have a duty to present to the Secretary of State a certification of an abstract that is a “full, true, and correct representation of the votes cast” and therefore correct the errors made in earlier counts. WAC 434-262-070; *see also* WAC 434-262-030 (county auditor’s abstract of votes shall contain “a count of *all ballots cast* in the election”) (emphasis added); WAC 434-262-040 (county canvassing board shall ensure that all ballot totals included in abstract of vote). Petitioners allege that the Franklin County Auditor neglected her duties. Therefore, Petitioners have alleged a cause of action against Respondent.

Moreover, the fact that the Secretary of State has certified Franklin County’s recount results is immaterial to whether the Franklin County Auditor performed her duties under Washington law. Regardless of the Secretary’s action, the Franklin County Auditor prepared, and the Franklin County canvassing board certified, an abstract that did not reflect accurate number of tabulated ballots with sufficient certainty. *See* Grantham Decl. ¶ 5. The Secretary’s actions do not excuse the failure of Franklin County’s Auditor and canvassing board to fulfill their duties.

B. PETITIONERS’ ALLEGATIONS SURVIVE SUMMARY JUDGMENT.

Petitioners allege that inaccuracies exist in a number of abstracts from the machine recount, including the abstract for Franklin County. *See* Petition ¶ 19. In Franklin County, the tabulating machine did not produce a count of ballots tabulated that equals the number of the votes cast in the

Governor's race. Grantham Decl. ¶ 5. Thus, the abstract is inaccurate on its face. Respondent's own affidavit demonstrates this inaccuracy. *See* Affidavit of Zona Lenhart. In the Statement of Votes, the vote totals for blank votes/overvotes (685), Christine Gregoire (4,967), Dino Rossi (10,619), Ruth Bennett (227), and write-in candidates (11) together total 16,509. *Id.*, Attachment A. However—the total in the “turnout” column totals 16,425. *Id.* This reflects a difference between the votes cast and the votes tabulated of 84 votes.

Respondent attempts to explain the inaccuracy by attributing it to the “multi card system.” *Id.* She argues that the difference in the number of “Card C” punch cards (16,521) and the number of votes counted (16,509) to an error that resulted in 12 overvotes that were not included in the Statement of Votes. *Id.*, Attachment B. But this explanation does nothing to explain the differential of 84 votes on the Statement of Votes itself. Moreover, even the inaccuracy allegedly caused by the multi card system that Respondent acknowledges exists was not corrected on the Statement of Votes. *Id.*, Attachment A.

The Petition and Motion for Emergency Relief also contain other allegations that apply to Franklin County. For example, Franklin County must allow a genuine observation of the hand recount. Respondent's Motion does not address this issue. Moreover, despite Respondent's assertions to the contrary, where Petitioners allege errors by “counties”

those allegations include Franklin County.² Accordingly, because the Petition contains a variety of allegations that are not even addressed by the Franklin County Motion, it must be dismissed.

C. ENSURING A FULL AND FAIR ELECTION IS NOT DISCRETIONARY AND MANDAMUS IS APPROPRIATE.

Respondents argue that mandamus is not appropriate because the actions at issue are “discretionary.” With all due respect, this action challenges decisions that indisputably effect real voters—citizens of this state who are qualified to vote, who properly registered to vote and who in fact voted. In numerous cases, their ballots were not counted because of a patent error by the county in wrongfully and erroneously questioning the voter’s signature on an absentee or provisional ballot. None of the respondents have the “discretionary” power to disenfranchise in this manner a voter. In fact, they have precisely the opposite duty: to ensure that qualified voters who in fact vote have their ballots counted. Even the Secretary of State in his papers concedes that the county canvassing boards have the authority—even at this date—to consider and correct errors that are brought to their attention.

There is nothing discretionary about counting ballots cast by qualified, registered voters who in fact voted in this election. Election officials are not allowed to engage in wrongful acts or neglect their duties;

² Paragraphs 32 and 37, addressed in Respondent’s Motion, only contain allegations regarding King County.

if they do, this Court has not only the authority but the duty to act to provide a remedy. RCW 29A.68.011. Mandamus is an appropriate action to compel a state official to comply with a law when a duty to act exists. *Walker v. Munro*, 124 Wn.2d 402, 408 (1994). In the election context, relief is appropriate where there the official has neglected the duty or acted in a wrongful manner. RCW 29A.68.011(4)-(5). This Court has established that mandamus is the appropriate remedy in election cases. *Schillberg v. Williams*, 115 Wn.2d 809 (1990)

Petitioners' Reply Brief in Support of Petition by Electors and Petition for Writ of Mandamus and Other Relief discusses each claim in detail. Mandamus is appropriate in this case because of the clear duties involved. *Id.* Here the Franklin County Auditor had and currently has *mandatory* duties. Because the duty to count and our state's affirmative duty of uniformity, mandamus will be the appropriate remedy. *Schillberg*, 115 Wn.2d at 811.

D. PETITIONERS SENT RESPONDENT FRANKLIN COUNTY AUDITOR PROPER NOTICE.


Respondent's argument that the Petition and Motion should be dismissed due to lack of notice is wholly without merit. Respondent asserts that she did not receive notice until Monday, December 6, 2004, but does not provide any support for this assertion. In fact, Petitioners sent Respondent notice via email on Friday, December 3, 2004 at 4:53 p.m. *See* Burman Declaration ¶¶ 2-3, Exh. A. Petitioners sent proper notice under RAP 17.4(b), and therefore Respondent's Motion should be denied.

III. CONCLUSION

For the reasons set forth above, Petitioners respectfully requests that the deny Respondent Franklin County Auditor's Motion to Dismiss.

RESPECTFULLY SUBMITTED this 9th day of December, 2004.

By



David J. Burman, WSBA # 10611
Kevin J. Hamilton, WSBA # 15648
Ryan J. McBrayer, WSBA # 28338
William C. Rava, WSBA # 29948
Beth A. Colgan, WSBA # 30520
Charles C. Sipos, WSBA # 32825
Brena M. Roos WSBA # 34501
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-9000
Attorneys for Petitioners

EXHIBIT

B

No. _____

**SUPREME COURT
OF THE STATE OF WASHINGTON**

**DAVID T. MCDONALD and RONALD TARO
SUYEMATSU; SANFORD SIDELL; BRENT
CAMPBELL; and HILLARY DENDY, Petitioner-
Electors, and WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,
Petitioners,**

v.

**SECRETARY OF STATE SAM REED; KING
COUNTY RECORDS, ELECTIONS AND
LICENSING SERVICES DIVISION and DEAN
LOGAN, ITS DIRECTOR; FRANKLIN COUNTY
AUDITOR; PEND OREILLE COUNTY AUDITOR;
and PIERCE COUNTY AUDITOR as representatives
of WASHINGTON STATE COUNTY AUDITORS
AND COUNTY CANVASSING BOARDS,
Respondents.**

**PETITION BY ELECTORS AND PETITION FOR
WRIT OF MANDAMUS AND OTHER RELIEF**

David J. Burman, WSBA # 10611
Kevin J. Hamilton, WSBA # 15648
Ryan J. McBrayer, WSBA # 28338
William C. Rava, WSBA # 29948
Beth A. Colgan, WSBA # 30520
Charles C. Sipos, WSBA # 32825
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000
Attorneys for Petitioners

INTRODUCTION

1. Every voter has a fundamental and equal right to have his or her ballot fairly and accurately counted. This action seeks to protect that fundamental right by requiring that the rules for the upcoming hand recount of the 2004 gubernatorial election apply consistent statewide standards and procedures. Prior errors and inconsistencies in the initial canvassing and machine recount of ballots must be reviewed and corrected. The requested relief will assure that all lawful votes are counted, that consistent standards are applied statewide, and that all voters are treated fairly, equally, and consistently under Washington election law and the constitutional right of Washington's citizens to participate fully in the election process.

2. Pursuant to RCW 29A.04.205, "[i]t is the policy of the state of Washington to encourage every eligible person to register to vote and to participate fully in all elections, and to protect the integrity of the electoral process by providing equal access to the process while guarding against discrimination and fraud." This policy is required by Article I, Sections 12 and 19, of the Washington Constitution, which require that elections be free and equal and that prohibit infringements on the right of suffrage and the creation of special privileges and immunities.

3. The Secretary of State is the chief election officer. RCW 29A.04.230. The Secretary of State is required to "make reasonable rules . . . not inconsistent with the federal and state election laws" to assure that those laws are executed "in an orderly, timely, and uniform manner."

RCW 29A.04.610. County auditors are responsible for the conduct of elections in their counties. RCW 29A.04.025 and .216. Petitioners allege that these election officers have not complied with the law or state constitution with respect to the 2004 gubernatorial election.

4. Petitioners bring this action pursuant to RCW 29A.68.011, through this petition and the accompanying declarations and affidavits, and also seek a writ of mandamus and other relief. Pursuant to RCW 29A.68.011, the action may be addressed by a single Justice, but in light of the importance of the matter and the need for expedited treatment, petitioners ask that it be reviewed by the entire Court or so many of the Justices as are available.

PARTIES

5. Petitioner-elect David T. McDonald is a qualified elector and registered voter in King County. He is the Recount Director for the Washington State Democratic Central Committee.

6. Petitioner-elect Ronald Taro Suyematsu is a qualified elector and registered voter residing in King County. After he did not receive the absentee ballot he requested prior to the election, he went to his assigned polling place on Election Day and voted using a provisional ballot. He later checked the King County elections website to determine the status of his vote and the website indicated that he was not a registered voter. Because this was incorrect, Mr. Suyematsu called King County many times prior to the end of the original count in an attempt to have his vote counted. His vote was never counted, and he was finally informed

that his ballot had not been counted due to human error in incorrectly coding his ballot as unregistered.

7. Petitioner-electors Sanford Sidell is a qualified elector and registered voter in King County. After he did not receive the absentee ballot he requested prior to the election, he went to his assigned polling place on Election Day and voted using a provisional ballot. On November 16, 2004, a volunteer from the Gregoire campaign contacted him and told him that his ballot was not being counted. He signed a document to verify his vote. However, since then he has followed up with King County and has learned that his vote was never counted.

8. Petitioner-electors Brent Campbell is a qualified elector and a registered voter in King County. He requested an absentee ballot but chose not to use it, and instead went to his assigned polling place on Election Day to vote. As instructed, he voted using a provisional ballot. After Election Day, he checked the King County website regularly to determine if his vote had been counted and followed up by phone twice. He finally learned that King County has no record of his provisional ballot.

9. Petitioner-electors Hillary Dendy is a qualified elector and a registered voter in King County. She is a 19-year-old college student and she was excited to vote in the 2004 elections, which were going to be the first time she had voted. She voted by absentee ballot in both the primary and general elections. After the general election, she received a notice from King County that she had failed to sign her ballot. She signed

documentation for her ballot on November 16, 2004. She has since learned that nonetheless, her vote was not counted.

10. Petitioner Washington State Democratic Central Committee ("WSDCC") is a major political party under RCW 29A.04.086. The WSDCC represents Democratic Party voters and candidates in Washington.

11. Respondent Sam Reed, Washington Secretary of State, is Washington's chief election officer and is responsible for administering elections in Washington. Respondent Reed is responsible for setting policies for and administering elections in Washington.

12. Respondents King County Records, Elections and Licensing Services Division and its Director Dean Logan are responsible for elections in King County. Respondents Franklin County Auditor, Pend Oreille County Auditor and Pierce County Auditor are responsible for elections in their respective counties. Respondent Logan is sued in his official capacity and as a representative of all other county election officials in Washington. Petitioners are not required to name as parties all such election officers under RCW 29A.68.011, and due to the exigent circumstances are not able to name and serve each responsible election officer as a party at this time.

JURISDICTION

13. Jurisdiction is proper under RCW 29A.68.011, RCW 7.16.160, and RAP 16.2(a).

ENTITLEMENT TO RELIEF

14. Because the initial results of the 2004 gubernatorial election reflected a differential between candidates Chris Gregoire and Dino Rossi of less than 2,000 votes, the Secretary of State ordered a mandatory recount by all Washington counties pursuant to RCW 29A.64.021(1)(a). The Secretary of State elected to conduct a machine recount.

15. The machine recount was completed on November 24. The reported margin was 42 votes out of nearly three million. Although there were numerous errors in the reported county canvass reports or that arose during the counting or recounting process that were identified by Petitioners, the Secretary of State refused to investigate and signed a "canvass" of the reported county recount results on November 30.

16. On December 3, WSDCC made a timely request for a hand recount of all ballots in all Washington counties. The Secretary of State plans to direct that the recount commence on December 8.

17. During the initial canvassing of ballots and throughout the course of the machine recount, significant problems have become evident. As described below, those problems indicate that ballots from properly registered voters were inappropriately rejected, voters were inappropriately challenged and then denied a meaningful opportunity to prove the validity of the ballots they cast, and that the election results recently announced by the Secretary of State are inaccurate. In some respects, the problems might not be more frequent than in a typical election, but the narrow margin between the candidates means that, unlike the typical election, they are not

harmless. That makes it necessary to correct the problems where possible. Some problems, such as those with provisional ballots, are not typical, however, perhaps due to the increased usage of such ballots and recent changes to governing law. The examples below are both worthy of correction in their own right and are indicative of the errors that would and should be corrected by a proper hand recount process.

18. Further, due to the limited time and delays in receiving records and other information from election officials, petitioners have not been able to completely document many problems that have been reported. For example, Petitioner WSDCC requested certain public records from Respondent Reed on November 18 and from Respondent Logan on December 1, and the records have not yet been made available. Proper rules would largely assure that any problems that would be discovered through review of those documents, and other unknown problems, are corrected during the hand recount.

1. The Secretary of State Failed to Canvass and Address Facial Errors in the County Abstracts Recording Vote Counts

19. Each county is required to provide an abstract detailing the form and resolution of votes cast to the Secretary of State. RCW 29A.60.230. A number of the abstracts from the machine recount are inaccurate on their face. The total number of ballots cast does not equal the total of the numbers of ballots indicated as having been voted for a gubernatorial candidate and those excluded on some basis. In other words, there are more votes ascribed to the race than there were ballots cast.

Petitioners have not had the opportunity to review all county returns, but there are inaccuracies in at least those for Franklin, Pend Oreille and Pierce Counties. The Secretary of State refused to delay his acceptance of the county results to allow investigation of these discrepancies, and accepted some results even when on notice from the involved county that they were not correct.

20. Additionally, a number of counties discovered after the initial canvass and in undertaking the machine recount that they had not initially counted groups of ballots that had been misplaced. No documentation of the chain of custody for these newly-found ballots has been provided.

21. Further, many counties had significant changes in the machine vote counts based on errors due to votes being counted twice or not at all.

22. Pursuant to RCW 29A.60.250, the Secretary of State was obligated by December 2 (thirty days from the election) to complete only "a canvass of such of the returns as are not required to be canvassed by the legislature." Pursuant to Article III, Section 4, of the Constitution, returns for the office of Governor are to be canvassed by the Legislature and not by the Secretary of State.

23. The Legislature has specified that in the event of a recount, "the secretary of state shall canvass the amended abstracts and shall file an amended abstract with the original results of that election." RCW 29A.64.061. No deadline is specified for the Secretary of State to

complete its recount canvass, and under the Constitution the Secretary of State need not "deliver the same to the speaker of the house of representatives" until "the first meeting of the house thereafter," in January 2005. In short, sufficient time was available for the Secretary of State to investigate problems and in fact verify the reports provided by the counties.

24. RCW 29A.04.013 defines "canvassing" as "the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns . . . and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election." The Secretary of State has issued a regulation that defines canvassing as "the process of examining *in detail* a ballot, groups of ballots, election subtotals, or grand totals, in order to determine the official results . . . and *to safeguard the integrity of the election process.*" WAC 434-262-010(1) (emphasis supplied). Prior to an official canvass, the abstracts must be inspected, and errors, discrepancies, or anomalies must be investigated and corrected. WAC 434-262-020, -040, & -050.

25. In addition, RCW 29A.04.570 requires the Secretary of State to "conduct a review of election-related policies, procedures, and practices" when "a mandatory recount is likely in a statewide election" and to do so "in as many selected counties as time and staffing permit" and before "the time the recount is to take place, if possible."

26. Despite these statutes and regulations, and despite the facial errors on the abstracts and wide array of problems set forth below, the Secretary of State declined to examine the accuracy of abstracts provided by the counties or the consistency of practices among the counties that might have resulted in failure to tabulate valid votes. On November 30, the Secretary of State nonetheless erroneously declared that he had caused the recount returns "to be canvassed and verified" and that "the full, true and correct total of votes cast for each candidate is" 1,372,442 for Gregoire, 1,372,484 for Rossi, and 63,415 for Bennett.

2. County Errors and Subjective Determinations Regarding Signature Matching for Absentee and Provisional Ballot Voters Disenfranchised Many of Those Lawful Voters

27. Absentee ballots are requested by registered voters and provided to them by counties after verifying their status. The ballot is placed in a security/secrecy envelope, which in turn is placed in an external envelope signed by the voter.

28. Provisional ballots are issued to those who attempt to vote at a polling place but are turned away, most often because they are not included on the list of voters registered in the precinct or because they are shown as having requested an absentee ballot. WAC 434-253-043 (amended August 24, 2004). Such voters are required to be provided a ballot and a secrecy envelope and an external envelope similar to those for absentee ballots, and must sign an oath on the external envelope or the poll

book. WAC 434-253-045. The disposition of their vote is determined later.

29. Counties, and particularly King County, rejected numerous absentee and provisional ballots on the basis that the signature on the ballot did not sufficiently match the signature on the voter's registration card on file with the respective county auditor. These voters were lawfully registered, had either appeared at the polls or been verified by the county when the absentee ballot was issued, and had in fact signed the oaths as to their entitlement to vote. Denial of their right to vote violates the Washington Constitution and statutes.

30. A person's signature at different times is seldom exactly the same. Some people have more than one form of signature, depending on their mood, the formality of the moment, or other factors. Signatures, moreover, change over time, or as the result of aging or certain medical conditions. None of these factors are valid bases for disenfranchisement under the Washington Constitution or our state electoral system.

31. The determination as to signature mismatches is subjective, and there is no uniform statewide standard. WAC 434-240-240. Some counties do not even engage in signature verification as to provisional ballots, including Whitman, Walla Walla, and Whakiakum Counties. Some do not allow any election official other than the canvassing board to reject a signature match.

32. King County rejected provisional and absentee ballots on the basis of signature mismatch with significantly greater frequency than

was true in the state as a whole or in the counties in which candidate Rossi prevailed. Many of these decisions were made by staff with no review by the canvassing board. When King County had supervisors review the initially rejected provisional ballot signatures, it was determined that a number had been erroneously rejected. No such review has taken place with absentee ballots. Lawful absentee and provisional ballot voters in King County were much less likely to have their valid votes counted than voters in other counties.

33. In attempting to assist absentee and provisional ballot voters whose signatures were initially rejected, petitioner WSDCC observed that some of the signature rejections were clearly erroneous.

3. Many Lawful Voters Were Denied Meaningful Notice and an Opportunity to Contest Their Disenfranchisement

34. Due to the subjectivity and significant opportunity for erroneous rejection of signatures, the Secretary of State's regulations require absentee ballot voters to be notified and given an opportunity to validate their signature if it does not, in the county's view, match that on the voter's registration. WAC 434-240-235, -245. The regulation for situations in which the voter failed to sign at all requires that such correction or clarification occur by the day before the county is to certify the results. WAC 434-240-235. The regulation for signature mismatches, however, does not specify a deadline. WAC 434-240-245.

35. When provisional ballots were rejected on the basis of mismatched signatures, some counties treated them the same as absentee

ballot voters and contacted the provisional ballot voter, even though no regulation expressly requires that. All or most of the counties allowed them to validate their provisional ballot after Election Day by providing the required signature or updating their registration in the event of an apparent mismatch.

36. RCW 29A.60.190(1) requires that absentee ballots "received on or before the date on which the . . . election is certified . . . must be included in the canvas report." For this election, that date was November 17. Nothing in the statute allows the rejection of absentee ballot correction or clarification efforts on the date on which the election is certified. Nothing in the Secretary of State's regulations allows the rejection of absentee ballot correction or clarification of signature mismatches on the date on which the election is certified. Nothing in the statute or regulations allows the rejection of correction or clarification efforts as to provisional ballots on the date on which the election is certified. Absentee ballots are "received" by the day of certification if the voter validates her signature on that day.

37. King County rejected validation efforts as to absentee and provisional ballots on November 17 but before certification later that day. At least one county accepted such a validation effort on November 17.

38. Unfortunately, for many voters, they learned that their ballots had been rejected without sufficient time to provide verification of their signatures. King County did not provide the same notification by mail to provisional ballot voters that it did to absentee ballot voters. Even

those absentee ballot voters who received timely notice did not receive notice consistent with due process under the Washington Constitution. The King County notice, for example, does not identify the gravity of the situation. It did not specifically inform the voter that their vote would not be counted if they did not respond; it could reasonably be read to indicate that the new signature was being requested as a precaution for future elections.

39. Petitioner-electors Brent Campbell also was denied due process. Mr. Campbell is a registered voter in King County. He requested an absentee ballot but chose not to use it, and instead went to his assigned polling place on Election Day to vote. As instructed, he voted using a provisional ballot. After Election Day, he checked the King County website regularly to determine if his vote had been counted and followed up by phone twice. He finally learned that King County has no record of his provisional ballot.

40. Petitioner-electors Hillary Dendy also was denied her right to vote without due process. Ms. Dendy is a registered voter in King County. She is a 19-year-old college student and she was excited to vote in the 2004 elections, which were going to be the first time she had voted. She voted by absentee ballot in both the primary and general elections. After the general election, she received a notice from King County that she had failed to sign her ballot. She signed documentation for her ballot on November 16, 2004. She has since learned that nonetheless, her vote was not counted.

41. Gregory V. Roeben is another example of a voter who received no notice and no due process before being deprived of his right to vote. Dr. Roeben has first registered to vote in Washington in 1995. Although his signature has become shorter since he first registered, it has remained constant for at least the last three years. During that time he changed his registered address and voted by absentee ballot in several elections prior to the 2004 general election. He never was given any notice of any problem with his signature, and he is confident that his signature on those absentee ballots was the same as that on this year's general election ballot and his current driver's license. King County provided no notice of any problem with his signature in this year's general election. When he returned home from work on November 16, however, he found a note, probably from the Democratic Party, telling him that his ballot had been rejected and that he needed to address the issue with the County prior to the end of that day. The day had already ended, but he promptly undertook such efforts the next morning, November 17, but King County refused to allow him the opportunity to be heard and to avoid disenfranchisement even though the canvassing board did not meet until many hours later to certify the election.

42. The right to vote is a fundamental constitutional right. Denial by government of that right must be subject to reasonable due process safeguards. Respondents failed to provide meaningful notice and a real opportunity to be heard before disenfranchisement.

4. County Errors Forced Registered Voters to Vote Provisional Ballots and Eventually Deprived Them of Their Right to Vote

43. Some of those voters who were not shown as registered voters on the poll book at the polling place or as having already received an absentee ballot should have been allowed to vote in person but were denied the right to do so because of errors or delays by some counties in updating registration and absentee ballot records.

44. For example, Petitioner-electron Ronald Taro Suyematsu is a registered voter residing in King County. After he did not receive the absentee ballot he requested prior to the election, he went to his assigned polling place on Election Day and voted using a provisional ballot. He later checked the King County elections website to determine the status of his vote and the website indicated that he was not a registered voter. Because this was incorrect, Mr. Suyematsu called King County many times prior to the end of the original count in an attempt to have his vote counted. His vote was never counted, and he was finally informed that his ballot had not been counted due to human error in incorrectly coding his ballot as unregistered.

45. As another example, Petitioner-electron Sanford Sidell is a registered voter in King County. After he did not receive the absentee ballot he requested prior to the election, he went to his assigned polling place on Election Day and voted using a provisional ballot. On November 16, 2004, a volunteer from the Gregoire campaign contacted him and told him that his ballot was not being counted. He signed a document to verify

