APPENDIX A

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February 12, 1993

Mr. Carl Maxey
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RE: Nina Becker, Former Candidate for State Auditor

Dear Mr. Maxey:

Your letter of February 2, 1993, to Secretary of State Ralph Munro has been referred to me for a response. Your letter concerned allegations of impropriety on the part of former Pierce County Auditor Brian Sonntag in the certification of the September, 1992, primary election for State Auditor. Both Mr. Sonntag and your client were candidates for the Democratic nomination for State Auditor at that election.

After reviewing your letter, and without expressing any opinion as to the merits of matter, we have found no appropriate further action on behalf of the Secretary of State. We appreciate the fact that you have called this question to our attention.

Sincerely,

JEFFREY T. EVEN
Assistant Attorney General
(206) 586-0728

JTE:js

cc: John Pearson

CERTIFICATE OF SERVICE

I certify that I served the Respondents, PIERCE COUNTY, BRIAN SONNTAG, PAUL CYR, and ROGER MIENER, and amicus curiae, SECRETARY OF STATE, with Appellant's Reply Brief and Appellant's Answer to Amicus Brief, by depositing true copies in the United States Mails addressed to their attorneys of record as follows:

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DATED this 14th day of November, 1994.

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Brief of Amicus Curiae

No. 61553-5

SUPREME COURT
OF THE STATE OF WASHINGTON

NINA M. BECKER,

Appellant,

v.

COUNTY OF PIERCE; BRIAN SONNTAG, former Pierce County Auditor; ROGER MIENER, Pierce County Deputy Prosecuting Attorney; and PAUL CYR, Pierce County Councilman,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

BRIEF OF AMICUS CURIAE, RALPH MUNRO, SECRETARY OF STATE FOR THE STATE OF WASHINGTON

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Statutes & Regulations

I. STATEMENT OF THE CASE

By this action, Appellant Nina Becker seeks to invalidate the state primary election for the office of state auditor, conducted two years ago, in September 1992. Ms. Becker argues that this Court should invalidate the election because the successful candidate for the Democratic nomination for state auditor participated in the canvass of the results for Pierce County in the course of his duties at the time as Pierce County Auditor. She argues that RCW 29.62.030 required that the Pierce County results be determined by the other two members of the canvassing board.

Ms. Becker urges that therefore the election should be invalidated, even though the board unanimously approved the canvass. She does not argue that the voters of Pierce County cast their ballots differently than the canvass report states, but merely that a person participated in the canvass whom she believes should not have.

Ms. Becker now appeals from a judgment dismissing this action. By order entered July 28, 1994, this Court granted the request of the

Secretary of State (hereinafter Secretary) for leave to file this brief as amicus curiae, in support of respondents Pierce County, et. al. The Secretary adopts by reference the county's statement of issues presented, and statement of the case. The Secretary urges that this Court affirm the judgment of the Superior Court.

II. ARGUMENT

A. The County Auditor Properly Participated in the Canvass of the Primary

Ms. Becker alleges no act or omission by any elections officials calling into question the integrity of the results of the 1992 primary. She instead argues that RCW 29.62.030 invalidates the results of any election in which the county auditor participates in the canvass, where he or she is a candidate for a different office. The statute provides:

> If the primary or election is one at which the county auditor is to be nominated or elected, canvass of the returns for that office shall be made by the other two members of the board; if the two disagree, the returns for that office shall be canvassed by the presiding judge of the superior court of the county.

RCW 29.62.030.

This statute applies only to elections, "at which the county auditor is to be nominated or elected." Id. Even then, it applies only to "that office." Id. This phrasing clearly applies to the position of county auditor. Had the Legislature intended it to address the individual who occupies the office, the statute would have been so worded.

If the Legislature had enacted RCW 29.62.030 to remedy a perceived impropriety in having a candidate for office serve on the canvassing board, it would have covered the other members of the board as well. The canvassing board includes two other elected officials, the county prosecutor and the chair of the county legislative authority. RCW 29.62.020. The statute, however, only relates to the situation in which the position of county auditor is on the ballot, without regard to whether the incumbent is running for re-election. This reflects the prominent role that the auditor's office plays in conducting the election and tabulating the results. See, e.g., RCW 29.04.020. Only the role of the county auditor's office as an

institution can distinguish one member of the canvassing board from the others.

The application of RCW 29.62.030 to this case can be further enlightened by examining the larger context of the September 1992 primary. In a statewide election, the county auditor is the ex officio election supervisor for the county, and physically conducts the election. RCW 29.04.020. The Secretary of State is the chief elections officer for the state.[1] RCW 29.04.070. In the case of a primary for a statewide elected official, the actions of the local canvassing board therefore fit within a larger process.

The county canvassing board certifies the county's results. RCW 29.62.020. The certified county canvass report constitutes the official returns of the election for the county. RCW 29.62.040; WAC 434-62-070.

[1] In addition to duties after the election, several days before the election the Secretary tests the programming of electronic voting systems used in every county (except those few still using paper ballots), to insure that votes will be tabulated accurately. RCW 29.33.350; WAC 434-34-065 et. seq. The Secretary can also provide assistance to the counties pursuant to chapter 29.60 RCW.

The various counties submit their canvass reports to the Secretary, who conducts a statewide canvass. RCW 29.62.100. The Secretary does so by "adding the certified returns from each completed county abstract of votes in order to determine the final results for those offices . . . ." WAC 434-62-100. The Secretary uses the certified county results as the basis for the statewide canvass, and compiles a single statewide composite. Id.

The statewide results are then certified by the Secretary, rather than by the individual counties. RCW 29.62.100; WAC 434-62-110. In a statewide primary, the Secretary certifies to each of the 39 county auditors the names of the nominees entitled to appear on the general election ballot. RCW 29.27.050. Following the general election, the governor issues the certificate of election for a statewide officer, RCW 29.27.110, based upon the Secretary's canvass of the final returns. RCW 29.62.120. Invalidation of the primary in Pierce County therefore would trigger a "chain reaction" with sweeping consequences. Even though Ms. Becker does not allege that the vote totals from Pierce

County are incorrect, she urges this Court to strike down the entire process by which the voters statewide chose their state auditor in 1992.

No set of facts consistent with her complaint could be proven that would challenge the actual votes tabulated for each candidate. Orwick v. Seattle, 103 Wn.2d 249, 254, 692 P.2d 792 (1984). Ms. Becker acknowledges that both of the other two members of the board signed the canvass. CP 3. If RCW 29.62.030 applied, it would direct that those other two members conduct the canvass, which in fact they did. Their determination as to how the voters cast their ballots must be accepted by this Court unless impeached by direct attack. Carey v. Port of Seattle, 27 Wn.2d 685, 692, 179 P.2d 501 (1947).

The county auditor acted properly in participating in the canvass of the September 15, 1992, primary. The statute applies only where "the county auditor is to be nominated or elected," and then only as to "that office." RCW 29.62.030. The

statute did not instruct the county auditor to stand aside when he sought a different office.[7]

B. The Public Policy Supporting the Finality of Elections Precludes Invalidation of the 1992 Primary

This Court should affirm the judgment of the trial court, because RCW 29.62.030 does not apply when a county auditor becomes a candidate for state auditor. More fundamental concerns also dictate the same result. By this action, an unsuccessful primary election candidate seeks to overturn the election results, even though the certified nominee has not only proceeded to victory in the general election, but has served in office continuously since January 1993. The substantial public policy in favor of finality of elections mandates dismissal of actions such as this.

Courts universally recognize the strong public policy favoring stability and finality of election

[7] The nature of the relief Ms. Becker requests also discloses another deficiency. The Secretary, and not the county, certified the final results and the names of nominees to appear on the general election ballot. Certainly the county is a necessary party to this action, but the Secretary is indispensable as to the relief requested. Orwick v. Fox, 65 Wn. App. 71, 79, 828 P.2d 12 (1992).

results. "Courts should be reluctant to upset an election absent some compelling reason to do so." Buonanno v. DiStefano, 430 A.2d 765, 770 (R.I. 1981). "The expression of the will of the voters . . . will not be overturned lightly." Schmitt v. McLaughlin, 275 N.W.2d 587, 592 (Minn. 1979). "[T]he primary purpose of the election contest provisions is to ascertain the will of the people . . . ." Hardeman v. Thomas, 256 Cal. Rptr. 158, 171 (Cal. App. 1989). Ms. Becker therefore bears a heavy burden in seeking to invalidate the expressed will of the voters. Billings v. Hollingsworth, 517 So.2d 568, 569 (Miss. 1987); Miller v. Hill, 698 S.W.2d 372, 375 (Tex. Ct. App. 1985); Saefke v. Vande Walle, 279 N.W.2d 415, 417 (N.D. 1979).

1. The Results of An Election May Not Be Overturned Unless the Challenger Proves that Errors Occurred that Actually Affect the Result

Ms. Becker bases her challenge solely on the county auditor's participation on the canvassing board. Her complaint may be distilled to the simple proposition that the county auditor should not have signed the canvass report, as to the primary for state auditor.

As Ms. Becker acknowledges, a threshold requirement for contesting an election is that the claimed error must change the result. RCW 29.65.060; RCW 29.65.070. Ms. Becker asserts that this requirement is satisfied because, if Pierce County's votes are excluded from the statewide totals, she would have received the plurality in the other 38 counties. Appellant's Opening Brief at 4. Pierce County voters, however, are entitled to vote for state officers.

Noting that Pierce County provided the margin of victory is not the same as alleging that any Pierce County votes were cast or tabulated incorrectly.[3] Ms. Becker must demonstrate that the certified results were not the true expression of the voters' will. She must establish that, but for the auditor's participation in the canvass, she would have won. Stewart v. Livingston Parish

[3] Ms. Becker argues in her opening brief that the hypothetical possibility that some elections might be canvassed inaccurately is a substitute for evidence that the election at issue actually was inaccurately tabulated. Just as Washington courts do not issue advisory opinions, Walker v. Munro, 124 Wn.2d 402, 414 (1994), they do not order remedies for hypothetical errors.

Police Jury, 340 So.2d 1045, 1050 (La. Ct. App. 1976). The mere mathematical possibility is not sufficient. Henry v. Mahoney, 482 N.Y.S.2d 158, 158 (N.Y. App. Div. 1984). Ms. Becker therefore does not allege facts sufficient to satisfy this threshold requirement.

Decisions from other states confirm this conclusion. The Kentucky court in Sims v. Atwell, 556 S.W.2d 929 (Ky. Ct. App. 1977), considered an election challenge based on irregularities in the vote of a single precinct. If the votes cast in that precinct were excluded, the results of the election would change. Id. at 931. The court stated that mere irregularities, however, "should not disenfranchise all of the voters in the . . . precinct." Id. at 932. Although the court invalidated specific challenged votes due to fraud, it did not disregard the entire precinct tally. "Because a substantial majority of the votes cast in the . . . precinct were untainted by any fraud or illegality . . ., we would be extremely reluctant to throw out the vote of the entire precinct." Id. at 937. The court therefore

declined to disenfranchise the legal voters because of illegal acts connected with specific ballots. Id. Accord, In Re Moffat, 361 A.2d 74, 77 (N.J. Super. Ct. App. Div. 1976) (holding that the rejection of some legal votes is not sufficient, unless it can be shown that the number was sufficient to change the result).

Courts should "employ every reasonable presumption in favor of sustaining a contested election and . . . mere technical irregularities or illegalities are insufficient to set aside an election unless the errors actually appear to have affected the result of the election." Knight v. State Bd. of Canvassers, 374 S.E.2d 685, 686 (S.C. 1988).[4] As a Texas court explained:

> As a matter of policy, declared election results should be upheld unless there is clear and convincing evidence of an erroneous result . . . . There is a presumption that election officials have done their duty in conducting an election, and the contestant has a heavy

[4] Accord, In Re Concerned Citizens, 468 N.E.2d 791, 792 (Ohio Comm. Pl. 1984); Bradley v. D'Apice, 457 N.Y.S.2d 139, 139 (N.Y. App. Div. 1982); Mickels v. Henderson, 642 S.W.2d 661, 663 (Mo. Ct. App. 1982); Goodman v. Wise, 620 S.W.2d 857, 859 (Tex. App. 1981).

> burden of overcoming the presumption
> . . . .

Chumney v. Craig, 805 S.W.2d 864, 865 (Tex. App. 1991).[5]

In the present action, Ms. Becker's reliance on Pierce County as the source of the margin of victory is insufficient to demonstrate that the voters of Pierce County should be disenfranchised. Nothing about the action of the county auditor calls into question the reliability of the votes

[5] This does not mean that courts should ignore outright fraud or severe abuses of the electoral process. The public interest demands honest, as well as reliable, election results. Under extreme circumstances, a proven demonstration of major fraud can justify a new election. See, e.g., Marks v. Stinson, 19 F.3d 873 (3rd Cir. 1994) (candidate and elections officials conspired to generate illegal absentee votes); Stebbins v. White, 235 Cal. Rptr. 656 (Cal. App. 1987) (candidate dispatched thugs to the homes of absentee voters to coerce votes). Justice Kennedy, while serving on the Ninth Circuit, explained that in the absence of proof that the conduct affected the result, invalidation "has been reserved for instances of willful or severe violations of established constitutional norms." McMichael v. County of Napa, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J., concurring). An election can be invalidated only for "a pervasive error which undermines the organic processes of the ballot . . . ." Soules v. Kauians for Nukolii Comm., 849 F.2d 1179, 1184 (9th Cir. 1988). It is not an appropriate remedy for a garden variety error. Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978).

cast by the voters or of the tabulation of those votes. Sims, 556 S.W.2d at 932.[6]

2. The Public Interest Demands that Election Results be Determined Promptly. This Challenge Comes Far Too Late.

Ms. Becker did not commence this action until 16 months after the primary, and over a year after the successful candidate assumed office. This Court has previously recognized that delay in contesting elections can be barred by the doctrine of laches. Foulkes v. Hays, 85 Wn.2d 629, 635, 537 P.2d 777 (1975).[7] As the Ninth Circuit has noted,

[6] The Court should reject Ms. Becker's novel theory that the state constitution forbids a member of the canvassing board from serving when he or she is a candidate. Ms. Becker acknowledges that the generally accepted principle is to the contrary, Appellant's Opening Brief at p. 9, n.3, and her argument merely extrapolates an unorthodox conclusion from exceedingly general constitutional language. Id. at 16-19. Since votes for all offices are on the same ballot, it would be unfeasible for separate officers to duplicate the tabulation as to different offices. Generalized language can not be understood to command such a result.

[7] The Legislature has required by way of statutes of limitation that election challenges be brought within days, not months or years. RCW 29.04.030 (some subdivisions only); RCW 29.55.020. Ms. Becker's lack of specificity makes application of these statutes awkward, because it is difficult to discern the purported source of her cause of action. See Foulkes, 85 Wn.2d at 635. The

"the voiding of a state election is a 'drastic if not staggering' remedy." Soules, 849 F.2d at 1180 quoting Bell v. Southwell, 376 F.2d 659, 662 (5th Cir. 1967). Courts should balance the severity of the alleged infraction against "such countervailing equitable factors as the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." Id.

Given the harsh consequences of invalidating an election, Ms. Becker could and should have pressed her claims prior to the general election. Strict timeliness is essential, given "the strong public policy favoring stability and finality of election results." Donaghey v. Attorney General, 584 P.2d 557, 559 (Ariz. 1978). Belated challenges could seriously harm the public interest by interfering with the effective performance of the duties of office, and "seriously erode the stability of state and local governments . . . ." Id. "[I]f aggrieved parties, without explanation,

Legislature has nevertheless recognized the need for rapidity in filing actions such as this.

do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." Soules, 849 F.2d at 1180.[1]

Laches will bar an action where a change in conditions makes it inequitable to consider the matter following plaintiff's delay. Waldrip v. Olympia Oyster Co., 40 Wn.2d 469, 477, 244 P.2d 273 (1952). The completion of the general election, to which the primary at issue was preliminary, and the inauguration of the winner certainly changes circumstances in reliance upon the results of the primary. For the reasons more fully articulated by Pierce County, the elements of laches are therefore

[1] The Secretary must also note the profound public interest in the confidence that our elections are run honestly. See Donohue v. Board of Elections, 435 F. Supp. 957, 967 (E.D.N.Y. 1976) ("It is difficult to imagine a more damaging blow to public confidence in the electoral process than the election of a President whose margin of victory was provided by fraudulent registration or voting, ballot-stuffing or other illegal means."). Ms. Becker's delay certainly precludes invalidation of the election, but this Court's opinion should not overlook the public interest in confidence in the result. The complaint does not allege that the tabulated results were incorrect in any way. The Secretary respectfully recommends that this Court should so note, whatever the basis for its ruling.

established. Numerous decisions from other states regarding elections contests support this conclusion. See, e.g., Evans v. State Election Bd., 804 P.2d 1125, 1127 (Okla. 1990); White v. Board of Elections & Ethics, 537 A.2d 1133, 1135 (D.C. App. 1988); Martin v. Soucie, 441 N.E.2d 131, 133 (Ill. App. 1982); Buonanno, 430 A.2d at 770.

3. The Statute At Issue is Directory, and Not Mandatory

RCW 29.62.030 requires the other two members of the canvassing board to conduct the canvass if the position of county auditor is on the ballot. Even if one were to assume, solely for the sake of argument, that this statute applied to the primary for state auditor (and it does not), that statute cannot justify the disenfranchisement of all Pierce County voters.

This Court has recognized that statutes that are directory, rather than mandatory, in nature do not justify the harsh consequence of invalidating the governmental task conducted pursuant to them. Nichel v. Lancaster, 97 Wn.2d 620, 623, 647 P.2d 1021 (1982). Legislative intent as to whether a statute is directory or mandatory depends upon "all

the terms and provisions of the act in relation to the subject of the legislation, and . . . consideration of the nature of the act, the general object to be accomplished, and the consequences that would result from construing the particular statute in one way or another." Faunce v. Carter, 26 Wn.2d 211, 215, 173 P.2d 526 (1946); Nichel, 97 Wn.2d at 625-26.

This Court has previously indicated that statutes governing election procedures, in the absence of any actual error in the vote count, are directory only. State ex rel. Doyle v. Superior Court, 138 Wash. 488, 492, 244 P. 702 (1926). Failure of the county auditor to affirmatively stand aside, where the other two members of the board agree as to the canvass and there is no allegation of fraud, can hardly be thought to support a legislative intent that the election be invalidated. See id. The harsh consequence of disenfranchising voters who cast valid ballots that were counted correctly does not follow from the nature of what Ms. Becker claims to be a procedural irregularity.

Courts of other states have so held. The Illinois court reasoned:

> Since every error does not warrant the invalidation of an election, it must be determined on appeal whether the statutory provisions that were violated are mandatory or directory. The reason for the distinction is to obtain fair elections without invalidating the will of the people, for although legal safeguards must be faithfully observed, literal compliance with formal steps should not be required if the spirit and intent of the law is not violated.

Mensgen v. Eureka Unit District, 388 N.E.2d 273, 275 (Ill. Ct. App. 1979).

Similarly, the Oklahoma court has held that only the most serious election irregularities will support invalidation.

> Further, we have recognized provisions of our election laws are mandatory if sought to be enforced before an election, but after an election they normally should be held to be directory only, unless of a character to effect an obstruction to the free and intelligent casting of the vote or the ascertainment of the result . . ..

Jackson v. Maley, 806 P.2d 610, 616 (Okla. 1991) (emphasis by the court). The court reasoned that, based upon the public interest in having votes counted, elections will not be invalidated unless irregularities are "of such a character in either

quality or quantity to prove the outcome of an election cannot be determined." Id. at 620.

None of Ms. Becker's allegations challenge the basic integrity of the vote count. "Ordinarily an election should not be declared void unless it is shown that the result is not in accordance with the will of the electorate or that such will cannot be ascertained because of uncertainties." In Re Levens, 702 P.2d 320, 326 (Kan. 1985).

The county auditor acted properly by participating on the canvassing board pursuant to his duties of office. Even if that conclusion were incorrect, this Court should uphold the canvass based on the directory nature of the statute.

III. CONCLUSION

This Court should affirm the judgment of the superior court. RCW 29.62.030 does not require the county auditor to stand aside from the canvass for an office other than county auditor. Candidacy by a member of the canvassing board for another office does not alter this result.

Even if this Court were to somehow conclude that the Pierce County Auditor should not have

participated in the canvass for state auditor, this Court should affirm the dismissal. To allow this action to continue would violate the compelling public policy in favor of the finality of elections. The doctrine of laches bars this action because Ms. Becker waited to file until 16 months had elapsed since the primary at issue. When the matter was finally brought to court, Ms. Becker failed to allege that so much as a single vote was tabulated incorrectly. Finally, the public policy in favor of finality of elections dictates that RCW 29.62.030 must be regarded as directory, rather than mandatory.

Respectfully submitted this 5th day of October, 1994.

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Reply to Brief of Amicus Curiae

No. 61553-5

IN THE SUPREME COURT OF THE
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NINA M. BECKER,

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ON APPEAL FROM THE SUPERIOR COURT FOR
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The Honorable Donald H. Thompson, Judge

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