

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 CONSOLIDATED
REPLY BRIEF IN SUPPORT OF EMERGENCY
PARTIAL RELIEF**

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I. INTRODUCTION

In this election, millions of voters across the state and across the country turned out to vote. Many deemed it to be the most important election in their lifetime. The election was so important to Donald Henning and his wife that they drove over 300 miles roundtrip from Clallam County to Goldendale in order to vote. They had been informed by the Clallam County auditor that the State Department of Motor Vehicles had not transferred their registration to Clallam County and that, if they wanted to cast a ballot, they had to vote at their address in Goldendale. They drove the distance and did so, but were required to vote by provisional ballot. As they explain in their declaration filed with this Court, they have now learned their votes did not count because Klickitat County incorrectly claims they asked to be stricken from the voter rolls.

They were not alone. The election was so important to Ronald Suyematsu that when King County Elections failed to send him an absentee ballot as requested, he went to his polling place and voted by provisional ballot. Well before the original count was certified, he determined from the King County website that his vote had not been counted. He called King County repeatedly for an explanation. Finally, after weeks of calling and talking to various King County staff, Bill Huennekens called him to tell him his vote was not counted because a clerical worker accidentally coded his ballot as being unregistered.

The election was so important to Rick Leavitt that he made sure he voted, despite being confined to a nursing home with advanced Multiple

Sclerosis. Unbeknownst to him, because he did not receive any notice, his vote was not counted because a clerical worker decided his signature did not match his registration. Using a public list, the Gregoire campaign was able to locate him and complete the required records in the presence of a nurse. Because of his degenerative nerve disease he can only mark an "x" for his signature. His corrected forms were returned to King County elections officials, but not in time to meet the November 16 deadline King County imposed. Election officials refused to count his vote, apparently because it felt it would be an "administrative burden" to do so.

Intervenor candidate Dino Rossi, Respondents and Intervenor the Washington State Republican Party ("WSRP") take the position that this Court lacks the authority to grant these voters and others similarly situated a remedy. They assert that this Court cannot act to ensure that these voters are not stripped of their right to vote by governmental errors and inconsistent application of the law. Worse, they take the position that the "administrative burden" on the government to get it right outweighs the fundamental right to vote. In essence, Intervenor Rossi argues that "it is close enough for government work." Intervenor Rossi is wrong. This Court not only has the power, but the duty to protect the fundamental right to vote.

In this action, 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. Washington voters, many of whom would be disenfranchised by the disparate application of rules by certain counties, deserve nothing less than this. And Washington law requires it. Mandamus should therefore issue.

To the extent Respondents address Petitioners' substantive claims, they appear to agree with Petitioners' goal. They, too, claim to want only an orderly administration of the hand recount according to the law. Intervenor Rossi's Answer ¶ 1. But each also denies or ignores many of the obligations imposed by the very laws they say should govern the hand recount. The Secretary of State, for example, argues that he has no right to tell counties how to review signatures on absentee and provisional ballot envelopes. Reed Br. at 8. King County contends that its restrictive observation plans conform with state law. King County Br. At 6-12. Intervenors claim that canvassing boards have no power to revisit past decisions.

None of these arguments can withstand scrutiny. Each contradicts well-established Washington law and strong public policy considerations. The Secretary of State in fact has an obligation to ensure uniformity across counties; the counties must allow sufficient observer access to the process to promote public confidence in the recount; and canvassing boards have the inherent power to correct their past errors. RCW 29A.60.210; RCW 29A.64.041. Respondents and Intervenors offer no reason for

ignoring these and other plain statutory and administrative commandments. And none exists. There is no right more fundamental than the right of a qualified citizen to cast his or her ballot – and to have that ballot count. For the reasons fully articulated below and in Petitioners’ Motion, mandamus should issue.¹

¹ This reply is supported by the Affidavit of David J. Burman in Support of Emergency Hearing (“Burman Decl.”); Affidavit of Hillary Dendy in Support of Petition for Writ of Mandamus (“Dendy Aff.”); Affidavit of David T. McDonald in Support of Petition for Writ of Mandamus (“McDonald Aff.”); Affidavit of Sanford Sidell in Support of Petition for Writ of Mandamus (“Sidell Aff.”); Affidavit of Ronald Taro Suyematsu in Support of Petition for Writ of Mandamus (“Suyematsu Aff.”); Declaration of Brent Campbell in Support of Petition for Writ of Mandamus (“Campbell Decl.”); Declaration of Chris Grantham in Support of Petition for Writ of Mandamus (“Grantham Decl.”); Declaration of Christopher Hayler in Support of Petition for Writ of Mandamus (“Hayler Decl.”); Declaration of Donald Henning in Support of Petition for Writ of Mandamus (“D. Henning Decl.”); Declaration of Joshua C. Jungman in Support of Petition for Writ of Mandamus (“Jungman Decl.”); Declaration of Keith B. Leffler in Support of Petition for Writ of Mandamus (“Leffler Decl.”); Declaration of Ryan J. McBrayer (“McBrayer Decl.”); Declaration of Gregory V. Roeben, M.D. (“Roeben Decl.”), all of which were previously submitted. In addition, this reply is supported by the Declaration of Paul Berry in Support of Petition for Writ of Mandamus (“Berry Decl.”); Declaration of Beth A. Colgan in Support of Petition for Writ of Mandamus (“Colgan Decl.”); Declaration of Ana Maria Crapsey in Support of Petition for Writ of Mandamus (“Crapsey Decl.”); Declaration of Arleen Eby in Support of Petition for Writ of Mandamus (“Eby Decl.”); Declaration of Jared Eglinton in Support of Petition for Writ of Mandamus (“Eglinton Decl.”); Declaration of Miles Erickson in Support of Petition for Writ of Mandamus (“Erickson Decl.”); Declaration of Steven Frymire in Support of Petition for Writ of Mandamus (“Frymire Decl.”); Declaration of Cheryl Henning in Support of Petition for Writ of Mandamus (“C. Henning Decl.”); Declaration of Erin Kolkenmeyer in Support of

II. FAILURE TO ACT WILL DISENFRANCHISE VOTERS

All but one of the Petitioners are Washington voters whose votes in the 2004 general election have not been counted because of either misdeed or neglect by a state or county official. To remedy these wrongs, and similar harms to countless other Washington voters, 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.

The question of whether voters were disenfranchised due to the failure to provide a meaningful opportunity to verify the signatures on their ballots is not merely a theoretical exercise. For registered voters Gregory V. Roeben, M.D., Jared Eglinton, Nicholas Smith, Rick Leavitt, Sanford Sidell, Hillary Dendy, and other voters unknown at this time, it meant that their ballots were not counted.

Dr. Roeben learned that his absentee ballot would not be counted unless he verified his signature by 4:00 p.m. on November 16. Unfortunately, he received that notice from King County when he returned to his home on the evening of November 16, after the deadline imposed by King County. This occurred despite the fact that Dr. Roeben had

Petition for Writ of Mandamus ("Kolkenmeyer Decl."); Declaration of Terri Rook in Support of Petition for Writ of Mandamus ("Rook Decl."); Declaration of Jeremy Wall in Support of Writ of Mandamus ("J. Wall Decl."); Declaration of Norma Wall in Support of Petition for Writ of Mandamus ("N. Wall Decl."); and Declaration of Arthur Warner in Support of Petition for Writ of Mandamus ("Warner Decl.").

identically signed absentee ballots in elections as recently as the September primary. *See* Roeben Decl.

Jared Eglinton encountered similar problems. He also voted by absentee ballot, and his ballot was also rejected as a result of signature verification problems. However, King County has never informed Mr. Eglinton of the status of his ballot. The Gregoire campaign attempted to do so, but Mr. Eglinton was traveling until November 22 and therefore did not receive any notice until after the original count was completed. Ironically, at the request of King County, Mr. Eglinton had verified his signature in the summer of 2004. His vote has not been counted. *See* Eglinton Decl.

Nicholas Smith's absentee ballot also was not counted. King County sent Mr. Smith a letter on or about November 8 asking him to update the signature on file at the election's office. Mr. Smith, however, was traveling in a remote Brazilian village and was not scheduled to return until January. On Mr. Smith's behalf, his mother, Ana Crapsey, contacted King County and explained his circumstances, and offered to supply tax returns and other legal documents bearing his signature in order to validate the signature on the absentee ballot. The election worker declined to review any documents and informed Ms. Crapsey that there was no other method to send a verification form to Mr. Smith other than the postal system. When Ms. Crapsey insisted on speaking to a supervisor, she was informed that King County could review "other sources" to validate Mr. Smith's signature, but the supervisor did not know what those sources

were. Approximately a week later, Ms. Crapsey called King County again and was informed that King County could email verification information to Mr. Smith and have him send an electronic copy of the letter back to King County. King County emailed the form to Mr. Smith on November 15, and he did not see the emailed form in time to send it back before the deadline passed. Had King County initially informed Ms. Smith that the forms could be completed electronically, Mr. Smith's ballot could have been counted. *See Crapsey Decl.*

Provisional ballot voters were also disenfranchised as the result of signature verification decisions. One such voter is Rick Leavitt who has advanced Multiple Sclerosis, a degenerative nerve disease that renders him unable to sign a ballot. King County chose not to inform provisional ballot voters of signature verification problems and therefore, Mr. Leavitt was never informed by King County that his ballot had been rejected on that basis. After being informed by the Gregorie campaign of the need to verify his signature, campaign staff visited him in the nursing home where he lives to assist him in preparing the necessary documents. With limited assistance by his nurse, he was able to place an "x" on the affidavit forms which his nurse subsequently signed as a witness. Unfortunately, due to Mr. Leavitt's condition and the length of time it took for him to make an "x," the documentation was not completed until 4:30 p.m. on Tuesday, November 16, too late to meet the arbitrary deadline imposed by King County. *See Hayler Decl. ¶ 6.*

Like Mr. Leavitt, King County did not affirmatively inform Sanford Sidell that there was a signature verification problem with his ballot. Mr. Sidell was forced to vote by provisional ballot because the absentee ballot he requested from King County never arrived. He only learned that his ballot would not be counted when the Gregoire campaign contacted him on November 16. He immediately signed documents to verify his signature, but has since learned that his provisional ballot was not counted. *See Sidell Aff.* In fact, King County refused to accept documents submitted to validate signatures on provisional ballots that were received by King County on November 17. *See Hayler Decl.* ¶ 7. The problem was not limited to provisional ballots, however. Ms. Dendy, a first time voter, attempted to submit documentation to complete her unsigned absentee ballot on or about November 16, but her ballot also was rejected. *See Dendy Aff.*

Mistakes in the signature verification process, however, were not the only means by which Washington voters have been disenfranchised. Errors in the processing and maintenance of voter registration records and ballots were also to blame for disenfranchising voters like Ronald Suyematsu, Brent Campbell, Miles Erickson, Arthur Warner, Jeremy Wall, Cheryl and Donald Henning, Erin Kolkenmeyer, Arlene Eby and other voters unknown at this time.

Petitioner-electror Suyematsu is one such voter. Mr. Suyematsu requested, but never received an absentee ballot. As a result, he voted a provisional ballot at his polling place. Later, when he checked the King

County website, he learned that his ballot was not counted because King County had determined he was not a registered voter. On November 11, Mr. Suyematsu contacted King County in an attempt to remedy the error and was told that his call would be returned. Having had no response, he contacted King County again on November 12 and Monday, November 15. He was informed that the certification deadline would not apply to his situation and that someone would return his call. Again, no one did. Mr. Suyematsu called again on November 18. Finally, he received a call back and was informed that King County regretted that a human error had been made in coding his ballot as unregistered. That call occurred after the King County results had been certified. *See Suyematsu Aff.*

Human error also resulted in the disenfranchisement of Brent Campbell. Although Mr. Campbell watched as his vote was inserted into a ballot box, he later learned that King County had no record of his provisional ballot. Mr. Campbell's ballot was not counted. *See Campbell Decl.* Likewise, Miles Erickson has been informed by the Whatcom County Auditor that his provisional ballot was not counted because there was no record of the ballot. Although Mr. Erickson is registered in Whatcom County, election officials for Whatcom County suggested that he contact King County, where he had previously been registered. King County informed him that it had received his ballot from Whatcom County, but that King County did not count it because King had previously received a notice of cancellation of his registration from Whatcom County. Whatcom County has stated it will request the ballot be returned, but that it

would only be counted if Petitioners were successful in this action. *See* Erickson Decl. Similarly, Arthur Warner, who is registered in Whatcom County, voted by provisional ballot in Skagit County because of the proximity of a Skagit County polling place to his work. Mr. Warner informed the Skagit County poll workers that he was registered in Whatcom County. Mr. Warner filled out the information requested on the provisional ballot as instructed by the poll workers. Mr. Warner has since received a letter from Skagit County dated December 2 informing him that his ballot would not count because he was not registered to vote in Skagit County. He contacted the Skagit County Election's Office to ascertain why they did not forward his ballot to Whatcom County and was told that he should have indicated on his provisional ballot that he was registered in Whatcom County. The provisional ballot did not call for that information, and at no time did the poll workers who instructed him on how to fill out the provisional ballot indicate that he needed to include that information. Mr. Warner's ballot was not counted. *See* Warner Decl.

Other voters were disenfranchised as the result of the removal of their registration information from county voter registration files or failure to timely process voter registration materials due to human error. For example, Jeremy Wall was a properly registered voter. Mr. Wall voted without incident in the November 2000 election, but was deleted from the Snohomish County registration rolls some time prior to the November 2004 election without explanation. As a result, he was denied the opportunity to vote as a poll voter. He went back to his polling place a

second time and voted by provisional ballot. Through no fault of his own, his vote has not been counted. *See* Frymire Decl.; J. Wall Decl.; N. Wall Decl.

Like Mr. Wall, Cheryl and Donald Henning, were properly registered voters. After moving from Klickitat County to Clallum County, Cheryl and Donald Henning sought to change their registration at the Clallum County Department of Motor Vehicles (“DMV”). They were told by personnel at the Clallum DMV that they could properly re-register and sign up for absentee ballots at that time. When their absentee ballots did not arrive in time for the September primary, they contacted the Clallum County Auditor’s office and were informed that they were not able to re-register at the Clallum DMV, and that it was too late to register to vote in Clallum County for the November 2 election. As the registration change had not been processed and the Hennings had not requested to be removed from the registration records of Klickitat County, the Hennings drove 360 miles back to Klickitat County to their designated polling place. Once there, they were informed that their names were not in the poll book and that they would be required to vote by provisional ballot. It was not until they received a letter dated November 19 from the Klickitat County Auditor’s Office that they learned that their provisional ballots were not counted. The Hennings were disenfranchised. *See* C. Henning Decl.; D. Henning Decl.

Erin Kolkenmeyer’s registration was incorrectly processed, also as a result of problems with the DMV. Ms. Kolkenmeyer registered to vote

at Whitman County's Department of Licensing ("DOL"). She voted a provisional ballot on November 2. It was not until the week of November 29 that she received a letter from the Whitman County Auditor stating that she was not properly registered. She called the Auditor who informed her that she was not registered due to problems at the DOL, and that many other voters experienced the same problem. Ms. Kolkenmeyer contacted the DOL's District Manager, who informed her that either the DOL had not sent her registration materials to the Secretary of State or that the Secretary of State did not send the materials on to the proper county for registration. Ms. Kolkenmeyer also spoke with Pam Floyd at the Secretary of State's Office who informed her that she was a "victim of the system," and that due to the large quantity of voter registration papers received by the Secretary of State, her registration must have been lost. *See Kolkenmeyer Decl.*

Arlene Eby's ballot also has not been counted. Ms. Eby was scheduled to be out of the country beginning on October 10, prior to the date absentee ballots were to be issued. Ms. Eby went to the King County Elections Office to vote by "submarine ballot," which is a ballot issued to a voter who is unable to receive a regular ballot during an election cycle. Upon returning home on or about November 18, she opened a letter from King County stating that her ballot had been rejected due to signature verification problems and that she could verify her signature by November 16, two days before she returned from overseas. It is unclear why there was a question as to Ms. Eby's signature in this election, as she

has voted by absentee ballot many times without incident. Like Dr. Roeben, the Henning family, Jared Eglinton, Nicholas Smith, Rick Leavitt, Sanford Sidell, Hillary Dendy, Ronald Suyematsu, Brent Campbell, Miles Erickson, Arthur Warner, Jeremy Wall, Erin Kolkenmeyer, and other voters unknown at this time Ms. Eby's ballot has not been counted in either the original count or the manual recount. *See Eby Decl.*

III. ANALYSIS

A. ENSURING A FULL AND FAIR ELECTION IS NOT DISCRETIONARY AND MANDAMUS IS WARRANTED

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 a voter in this manner. 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; 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)

The duties at issue are detailed below. Mandamus is appropriate in this case because of those clear duties. *Id.* Here Secretary Reed had and currently has *mandatory* duties to recount "all votes cast," RCW 29A.64.050, and to ensure the execution of the election laws in a uniform manner. RCW 29A.04.610. While Respondents and Intervenor Rossi encourage a different interpretation of "all votes cast," it should be clear that the duty to count the ballots falling within the Court's interpretation of that phrase is not a discretionary duty. Accordingly, Petitioners respectfully submit, mandamus is the appropriate remedy. *Schillberg*, 115 Wn.2d at 811.

B. THERE IS NO RATIONALE IN EITHER WASHINGTON LAW OR POLICY TO JUSTIFY A REFUSAL TO CONSIDER PREVIOUSLY REJECTED BALLOTS DURING THE HAND RECOUNT

1. A Recount Requires Consideration of All Votes Cast

The statutory definition of the word "recount" does not act to preempt the remaining provisions of the election code that state that when a recount is conducted it shall include "all votes cast." RCW 29A.64.021; RCW 29A.04.139. Respondents argue, in effect, that the choice of the word "retabulation" was an implicit authorization by the Washington legislature that some votes could and should be disregarded during a recount. Reed Br. at 12-14; Rossi Br. at 24-26. This reading is incorrect.

First, the general provisions in the recount statute at RCW 29A.64.021 requiring that "all votes cast" be recounted, cannot be preempted by a specific definitional provision, even if there were a true conflict between the two. *Gold Bar Citizens for Good Gov't v. Whalen*, 99 Wn.2d 724, 728 (1983) ("[The lower court's] holding presumes that whenever two statutes govern the same area, the more specific statute preempts the general. This is not the law."); *Pearce v. G.R. Kirk Co.*, 92 Wn.2d 869, 872 (1979) ("The rule is that legislative enactments which relate to the same subject and are not actually in conflict should be interpreted so as to give meaning and effect to both...").

The definition of "recount" simply requires the production of an amended election return, "even if the vote totals have not changed." RCW

29A.04.139. This definition is most logically interpreted as a provision that defines a recount so that the result it produces preempts the initial election return, even if the vote totals are identical, giving full legal effect and legitimacy to the recounted result. *Id.* It defies the host of Washington precedents requiring election laws to be interpreted liberally, to assume that the definition of "recount" was intended to set substantive limits on the universe of votes to be considered during a recount without any explicit directive to do so. *See Gold Bar*, 99 Wn.2d at 728 (citing "general rule that election statutes are considered remedial and should be liberally construed."); *Knowles v. Holy*, 82 Wn.2d 694, 699 (1973) ("[A]ll statutes tending to limit the citizen in the exercise of the right of suffrage should be liberally construed in his favor.") (quoting *State ex rel. Orr v. Fawcett*, 17 Wn. 188, 199 (1897)).

Second, contrary to Respondents assertions, other provisions in the election code are consistent with the idea that the phrase "conduct a recount of *all votes cast*," means what it says. RCW 29A.64.021(1) (emphasis added). The act of "casting" a vote is simply the act of tendering voting documents to an election official; a "cast vote" is not one that has been already canvassed or had its validity determined. RCW 29A.44.221, titled "Casting vote," describes the act of casting a vote:

On signing the precinct list of registered voters or being issued a ballot, the voter shall, without leaving the polling place or disability access location, proceed to one of the voting booths or voting devices *to cast his or her vote.*

Id. (emphasis added). Similarly, RCW 29A.44.231 regarding the keeping of poll books at precincts states:

As each voter *casts his or her vote*, the precinct election official shall insert in the poll books or precinct list of registered voters opposite that voter's name, a notation to credit the voter with having participated in that primary or election.

Id. (emphasis added). Washington law, therefore, contemplates that the act of casting the vote occurs by tendering a ballot, before any determination of that vote's validity has been made. *See also* RCW 29A.60.180 ("Each registered voter *casting* an absentee ballot...") (emphasis added); AMERICAN HERITAGE COLLEGE DICTIONARY 218 (3d ed. 2000) ("*cast*. v. ... 4. To deposit or indicate (a ballot or vote).").

Washington common law is also in accord with the dictates of the statutes defining "votes cast" as the act of tendering ballots, by recognizing in two successive election contest cases that "votes cast" are not limited to votes previously declared lawful. In *Gold Bar*, 99 Wn.2d at 397, and *Foulkes v. Hays*, 85 Wn.2d 629, 634 (1975) this Court has assumed without questioning that "votes cast" include some votes that may or may not be valid. In both *Gold Bar* and *Foulkes*, the Supreme Court observed that illegal votes are "votes 'cast by persons not privileged to vote....'" *Gold Bar*, 99 Wn.2d at 397, *Foulkes*, 85 Wn.2d at 634 (both cases quoting *Bush v. Head*, 154 Cal. 277 (1908)).² This Court's acceptance of "votes

² This Court has long recognized the plain language distinction between ballots cast and ballots counted. *Cf. Fawcett*, 17 Wn. at 189

cast” as embracing all ballots tendered, regardless of the substantive determination made on their validity, cannot be squared with Respondents insistence that “votes cast” means only those votes previously validated by canvassing boards. Reed’s Br. At 10-12. To be clear, Petitioner-electors obviously do not seek to include invalid votes in the final tally, only that all votes cast are properly assessed by canvassing boards using uniform standards so that the result reached is an accurate, full, and complete reflection of the votes of Washington electors.

Intervenor Rossi argues that this Court made a contrary determination of the meaning of "votes cast" in *State ex rel. Short v. Clausen*, 72 Wn. 409, 410 (1913), such that "votes cast" are only votes previously determined lawful by a canvassing board. Rossi Br. at 21-22. That is not the holding of *Clausen*, which stands only for the unremarkable proposition that where a state measure requires a certain percentage of votes for the measure to pass, that only the votes that are ultimately determined lawful are considered in deciding whether that percentage has been reached. 72 Wash. at 410. Indeed, in *Gold Bar*, a much more recent case touching on the same issue, a case that did not cite to or rely on *Clausen*, the Supreme Court contemplated that the term "votes cast" included reference to votes whose validity was yet to be determined. 99 Wn.2d at 729. Intervenor Rossi does not cite any statutory authority to support the definition advanced for "vote cast," and the voting credit

(“[C]ertain of the *ballots which had been cast* should have been *counted* for him...” (emphasis added).

statutes that address "casting votes" head on clearly compel the opposite conclusion. RCW 29A.44.221; RCW 29A.44.231.

Respondent Reed similarly overlooks the meaning of "votes cast" in Washington statutes. Respondent Reed places great weight on the argument that recounts are derived from statutory law, Reed Br. at 12-13, but that acknowledgment only strengthens the statutory basis found in Washington election code advanced by Petitioner. RCW 29A.44.221; RCW 29A.44.231. And it is, of course, the rule in Washington as well as other jurisdictions that election statutes are liberally construed to favor the voter. *Gold Bar*, 99 Wn.2d at 728; *Knowles*, 82 Wn.2d at 699 (1973).³

The reading of "votes cast" compelled by the statutory language permits the remedy sought here, to correct actual disenfranchisement of Washington voters. The Petitioner-electors in this action cast their votes (as the numerous declarations in support of the Petition demonstrate), and under the provisions of the recount statutes they have a right to have that vote assessed during the manual recount. *See, e.g.*, Campbell Decl. ¶5 ("I

³ Petitioners cited to the election law of other jurisdictions in their opening brief merely to emphasize that it is common place to reconsider canvassing board decisions in recount situations. Pet. Br. at 14. As Respondents know, Washington's election code does not give specific and detailed instructions on the procedures for a recount, beyond the clear directive that it include "all votes cast." RCW 29A.04.021. The remaining provisions of the Washington code and the directive to interpret election law in favor of voters, however, fill that gap by making clear that "votes cast" is a term that includes in its meaning votes that may have been previously determined to be invalid by canvassing boards. RCW 29A.44.221; RCW 29A.44.231.

then watched the poll workers place my ballot into the side of the voting machine."); Dendy Aff. ¶ 5 ("I received and voted an absentee ballot for the 2004 general election."); Henning Decl. ¶ 6 ("My wife and I signed our names in the poll book and filled out the sealed envelopes as instructed by the poll workers."); Roeben Decl. ¶ 6 ("I signed the ballot using my current signature, the one I have used for at least the past three years."); Sidell Aff. ¶ 6 ("I signed the poll book in a place that I was told was for provisional ballot voters."); Suyematsu Aff. ¶ ("I signed the usual voter ledger and a poll book for provisional ballot voters."). Under the established meaning of casting a vote in the Washington code, there is no question that the previously disregarded votes of these voters, along with all other voters similarly disenfranchised, should be reassessed if the recount is to comport with the requirement that it include "all votes cast." RCW 29A.44.221; RCW 29A.64.021.

Petitioners accept at face value Intervenors' admission that "every legal voter should have his or her valid ballot accurately counted," and that their concern for a full and fair election extends to the Electors in this action who are legal voters and deserve under Washington law to have their vote counted. Intervenor Rossi's Answer ¶ 1. The exclusion of these ballots, based on errors by the canvassing boards in signature matching, can and should be remedied in the recount and RCW 29A.68.011 empowers this Court to correct those errors. In recounting all votes "cast," the canvassing board needs to perform its duty to evaluate these ballots, and the ballots of Washington voters similarly disenfranchised in light of all of

the evidence available to the canvassing board to ensure maximum enfranchisement of all Washington citizens who properly registered and voted. RCW 29A.60.210.

2. There Is No Basis In Law or Policy Forbidding Previously Rejected Votes to be Reassessed During the Manual Recount

Respondents and Intervenors argue that the definitions of "recount" and "canvass" dictate that no recanvassing of votes can occur during the manual recount. Reed Br. at 8; Rossi Br. at 24-26. The allowance for "recanvassing" *whenever* there is an apparent error or discrepancy, which by the Secretary of State's admission extends to recounts, contradicts the notion that the definition of "canvass" limits the requirement to assess all votes cast during a recount. RCW 29A.60.210; Colgan Decl. ¶ 3, Ex. B.

Much like the definition of "recount," the definition of "canvass" is a directory provision that describes the general procedure, not timing, for a canvass. RCW 29A.04.013. The provision is concerned with process, not with a substantive determination of what votes can or should be counted during a recount. *See Intent--1990 c 59* ("By this act the legislature intends to unify and simplify the laws and procedures governing filing for elective office, ballot layout, ballot format, voting equipment, and canvassing." [1990 c 59 § 1.]) (intent provision for RCW 29A.04.013). When directory provisions of the election code are drawn into conflict with the right of Washingtonians to have their votes counted, it is those directory provisions, not the voters' rights, which must yield. *Murphy v. Spokane*, 64 Wn. 681, 683-84 (1911) ("[I]f, as in most cases, the statute

simply provides that certain acts or things shall be done within a particular time, or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.”); *State ex rel. Pemberton v. Superior Court*, 196 Wn. 468, 480 (1938) (“As we have heretofore held, courts should not be too ready to reject ballots or votes on account of the violation of technical requirements, especially in the absence of a charge of fraud, lest, in doing so, they disenfranchise persons who have voted in entire good faith.”).

Here, the definition of RCW 29A.04.013 simply sets forth the process for canvassing, whenever it takes place. Moreover, Petitioners have indeed shown that there are discrepancies and errors meriting a recanvassing under RCW 29A.60.210. As the declarations and affidavits of Washington voters in this case show, there are still votes that were wrongly rejected and in the absence of any deadline grounded in law preventing the opportunity to correct the error, those documents should be considered and the votes recanvassed up and until the completion of the manual recount. *See supra* § II.

The purported administrative burden on Respondents in recanvassing is an insufficient basis upon which to justify rejection of an entire body of votes. RCW 29A.60.210 (“*Whenever* the canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any precincts of the county.”) (emphasis added). The simple

statement of Respondents' position – that those counties where the greatest number of votes might be rehabilitated are those counties with the least obligation to do so – reveals its inequity. King County Br. at 18.

Finally, the reliance by both Respondent Reed and Intervenor Rossi on the statutory meaning of "canvassing" does not supersede the directive to count all votes cast. Reed Br. at 13-14; Rossi Br. at 24-26. The Secretary of State acknowledges, as it must, that recanvassing can and will take place during the recount to address "a discrepancy or inconsistency" in the ballots. Colgan Decl ¶ 3, Ex. B. The WAC relied on by Intervenor Rossi, WAC 434-262-170, in fact, confirms that tabulating votes anticipates assessment of votes whose validity is not yet determined.

Whenever a precinct election officer in a precinct *where ballots are being tabulated*, or counting center personnel in a county where ballots are being centrally tabulated, *have a question about the validity of a ballot or the votes contained on the ballot that they are unable to resolve*, the ballot shall be placed in a special envelope marked 'for canvassing board.'

Id. (emphasis added); Rossi Br. at 27.

3. Respondents' Interpretation Would Result in the Unlawful Rejection of Votes Cast

Not only is there infirmity in the statutory argument advanced by respondents, the result that the Respondents' reading compels would result in the disenfranchisement of Washington voters based simply on technical failures and / or county error. In *Pemberton*, 196 Wash. at 478, the Washington Supreme Court, invoking the policy rationale in Washington

that so strongly favors the free exercise of the vote to defeat a challenge to ballots based on purported non-compliance with delivery statutes, held:

As we have heretofore held, courts should not be too ready to reject ballots or votes on account of the violation of technical requirements, especially in the absence of a charge of fraud, lest, in so doing, they disenfranchise persons who voted in entire good faith.

Id. at 480. Similarly, errors by election officials should not lead to the disqualification of ballots. *See Loop v. McCracken*, 151 Wn. 19, 28 (1929) ("The error of election authorities should not disfranchise the voter."); *McArtor v. State ex rel. Lewis*, 148 N.W.477, 480 (Ind. 1925) (failure of election officials to follow the statute "will not invalidate the ballot or affect the right of the voter to have it cast and counted"); *Goodell v. Judith Basin County*, 224 P. 1110 (Mont. 1924) (failure of election officials to follow procedures regarding signature cards would not invalidate ballots).

Here, respondents' interpretation of Washington election law would allow the rejection of ballots due to technical errors and mistakes by election officials. Election officials sent notices regarding rehabilitation that arrived on the deadline for rehabilitation. Roeben Decl. ¶ 8. Similarly, requested absentee ballots never arrived, and then provisional ballot voters did not have enough time to rehabilitate those ballots. *See, e.g., Sidell Aff.* ¶ 7; Hayler Decl. ¶ 7; Suyematsu Aff. ¶¶ 6-7. Voters had their registrations wrongfully cancelled or deleted from registration files and were not allowed to correct the cancellation. *See, e.g., Suyematsu Aff.* ¶¶ 6-7; Frymire Decl. ¶¶ 4-6; J. Wall Decl. ¶¶ 4-6; N. Wall Decl. ¶¶ 4-6. Election

officials failed to process registrations or incorrectly processed registrations. *See, e.g.*, C. Henning Decl. ¶¶ 4-6; Kolkenmeyer Decl. ¶¶ 2-6. Moreover, election officials lost provisional ballots. *See, e.g.*, Campbell Decl. ¶ 7. Such errors by election officials should not result in the disenfranchisement of voters who voted in good faith. *See Pemberton*, 196 Wash. at 480; *Loop*, 151 Wash. at 28. Respondents repeated invocation of the word "tabulate" does not supersede these longstanding rules favoring the franchise, nor do they ameliorate this Court's power to order a recount that requires election officers to comply with their duties to fully and properly count all votes cast and correct prior canvassing errors, including those of the improperly disenfranchised Petitioner-electors. RCW 29.64.011; RCW 29A.60.210.

4. Petitioners Ask Only that Respondents Comply with Existing Law, Not that New Rules Issue

Petitioners are asking the Court to require Respondents to follow the election rules already in place. Respondents' claim that the rules are being changed midstream is inaccurate, and reflects a failure to acknowledge their statutory duties. In particular, the Court should order the counties to review their prior decisions in light of the substantial evidence of discrepancies and inconsistencies in the treatment of ballots because Washington election law specifically addresses these circumstances and allows recanvassing *whenever* problems in processing ballots are uncovered:

Whenever the canvassing board finds that there is an apparent discrepancy or inconsistency in the returns of a primary or election,

the board may recanvass the ballots or voting devices in any precinct of the county. The canvassing board shall conduct any necessary recanvass activity on or before the last day to certify the primary or election and correct any error and document the correction of any error that it finds.

RCW 29A.60.210 (emphasis supplied). The hand recount need not be certified until January 10, 2005, and therefore canvassing boards have the authority to recanvass ballots where problems have been identified. For example, the rejection of ballots due to signature verification problems has been shown to be faulty; in King County hundreds of citizens were able to validate their ballots which had been rejected due to signature verification problems, and others attempting to validate their ballots were turned away only because King County determined it had insufficient time to recanvass those votes prior to the November 17 certification. *See supra* § II. In light of those identified problems, the expanded time in which counties have the authority to recanvass votes, and the strong protection of the franchise under Washington law, allowing voters a meaningful opportunity to rehabilitate their votes is appropriate. Likewise, several of the citizens testifying today were disenfranchised by human errors in processing their registrations or ballots. *See id.* Again, those citizens should be afforded an opportunity to have those errors remedied as part of the recanvassing effort. This is simply an application of existing law -- RCW 29A.60.210-- not a midcourse change of direction.

Respondent Reed's directives acknowledge the counties' obligations under the law. Although Respondent Reed asserts that "prior decisions of the canvassing boards will be the basis for the manual

recount,” he also acknowledges that canvassing boards may recanvass votes if problems are identified. *See* Colgan Decl. Ex. B (noting any canvassing board may recanvass a ballot during the hand recount); *Id.* Ex. C (stating that “in our rules we point out that the canvassing boards have the prerogative to take up and re-examine any problem ballots that have come to their attention...”). Indeed, as Respondent Reed has explained, decisions regarding signature verification and voter intent were made during the original count and the machine recount. *See id.* Ex. B. Far from changing the rules midstream, Petitioners are only requesting that this Court order the canvassing boards to *continue* recanvassing ballots, including under those circumstances where errors have already been revealed.

Petitioners’ request that Respondent Reed also issue uniform rules regarding the process of canvassing ballots, particularly those with signature verification issues, is also a request to enforce the rules already in existence. Respondent Reed is required by law to promulgate rules that result in *uniform* processing of ballots. RCW 29A.04.610. Facts have come to light that show that the rules issued by Respondent Reed in the original count and machine recount did not result in uniformity of processing ballots. *See infra* § III.C. Again, Petitioners merely request that this Court enter an order enforcing the rules that already exist; in this case, requiring uniformity of rules in a manner which protects the franchise.

C. WASHINGTON LAW REQUIRES EQUAL TREATMENT OF SIMILARLY SITUATED VOTERS

All response briefs seem to ignore that the Washington Constitution guarantees that “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.” Wash. Const. art. 1 § 12. Under this clause, “persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.”⁴ *State v. Coria*, 120 Wn.2d 156, 169 (1992) (citing *State v. Schaaf*, 109 Wn.2d 1, 17 (1987)). Even in cases where the law itself is valid, if it is administered in a manner that discriminates between similarly situated persons that administration violates equal protection. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 811 (1988).⁵

In analyzing a state equal protection claim, strict scrutiny must be applied where the alleged unconstitutional act implicates a fundamental

⁴ *Tunstall v. Bergeson*, 141 Wn.2d 201, 225 n.20 (2000) (“it is well established that the federal and state equal protection clauses are construed identically”); see also *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 476 (1980).

⁵ Petitioners are not making a federal equal protection claim, however because the federal and state equal protection clauses are “construed identically” *Tunstall*, 141 Wn.2d at 225 n.20, this Court should find that the state equal protection clause is violated by administrative actions that result in the disparate treatment of voters and their votes. *C.f.* *Bush v. Gore*, 531 U.S. 98, 104 (2000).

right. *Coria*, 120 Wn.2d at 169. There should be no dispute that voting is such a fundamental right. Wash. Const. art. 1 § 19. Therefore, the strict scrutiny test must be applied in this case. It requires that “the State’s purpose must be compelling and the law must be necessary to accomplish that purpose.” *Coria*, 120 Wn.2d at 169. Additionally, where strict scrutiny applies the burden shifts to the government “to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government’s objective. If no compelling state interest exists, the restrictions are unconstitutional.” *First United Methodist Church v. Hearing Examiner*, 129 Wn.2d 238, 246 (1996).

Here the administration of the canvassing has resulted in significantly disparate treatment of votes cast in all counties except Whitman, Walla Walla, and Whakiakum. Even without reference to absentee ballots, there are over *11,000 voters in this state* whose provisional ballots were not counted for the sole reason that signature verification was “administered in a manner that discriminat[ed] between similarly situated persons.” *Stone*, 110 Wn.2d at 811. Even after being subjected to a significantly different signature verification process and standard, urban King County voters were again subjected to unequal opportunity. Their rights to validate their signatures were reduced by inadequate notice and then truncated a full day early.⁶

⁶ Again, given the parallel construction of the federal and state equal protection clauses, even without a federal claim in this suit this Court should be mindful of disparate treatment of urban and rural votes. *Gray v.*

In response the Secretary maintains that "different counties having different systems that result in a different rejection rate," does not implicate equal protection concerns. Reed Resp. Br. at 19. But even the Republican Intervenors believed that when King County's procedures for determining voter intent were not consistent with the procedures of other counties, suit was warranted in Federal Court for the Western District of Washington on a claim that there *was* an equal protection problem. Compare Reed Resp. Br. at 19 ("Case law after *Bush v. Gore* has thus confirmed that different counties having different systems that result in a different rejection rate for ballots does not raise a sufficient equal protection claim for court intervention.") with Washington State Republican Party's Motion for Temporary Restraining Order and Memorandum in Support Thereof ("The very same equal protection violations present in *Bush v. Gore* exist – and are currently ongoing in King County. Defendants have failed to establish, apply and implement uniform ballot counting procedures.") (attached to Colgan Decl. ¶ 8, Ex. F.

Respondent Reed maintains that accidents of geography can justify disparate results and that a showing of intentional discrimination is required under Washington's equal protection clause. These assertions are diversions. Respondent Reed mischaracterizes the nature of the disparities at issue with the argument that signature verification disparities in this case

Sanders, 372 U.S. 368 (1963) (county's vote counting system which resulted in rural votes being weighted more heavily than urban votes violated equal protection); *Moore v. Ogilvie*, 394 U.S. 814 (1969) (same).

are nothing more than disparate results. Nothing could be farther from the truth. While the disparate results are statistically significant, the equal protection shadow over this case is due to government officials who knowingly ignored our election statutes and to Respondent Reed's certification of election results in spite of his knowledge of those significant errors. This is not a mere disparate impact claim, rather election officials charged with affirmative duties failed to carry them out and later knowingly disregarded those previous failures. Whether the Respondents intended the results is irrelevant to a mandamus claim. The failure to carry out clear duties gives rise to mandamus - equal protection merely highlights the significance of the fundamental rights at stake. Combined with the disparate results, equal protection merely urges the remedy being sought - a mandamus order to correct the denial of a fundamental right. RCW 29A.68.011.

D. THE COURT MUST ENSURE THAT THE PARTIES HAVE A MEANINGFUL OPPORTUNITY TO OBSERVE THE HAND RECOUNT

Meaningful observation rights are necessary to ensure public confidence in the hand recount and must include certain elements. Washington statute, case law and strong public policy support this point, and Respondents' arguments to the contrary, based predominantly on administrative burdens, are meritless and do not trump the general principle that elections must be conducted in an open and transparent fashion. The right to observation embodied in RCW 29A.64.041(1), which states that witnesses "shall be permitted to observe the ballots and the process of

tabulating the votes," has four core elements. *See also* WAC 434-261-020 (observers are to see "*all aspects* of the counting center proceedings...") (emphasis added).

First, every counting station needs to be under constant observation so that the counting of each ballot is observed. RCW 29A.64.041(1); WAC 434-261-020. This comports with a plain language reading of the statute and code, and is of heightened importance during a recount when the object is to have the tally performed as accurately as possible, and observers can aid in that process by notifying workers of perceived errors in the count if they are able to actually see the ballots. It is also consistent with the statutory definition of ballot, "the physical document on which the voter's choices are to be recorded," to conclude that "observe the ballots" means an opportunity to see them all. RCW 29A.04.008(1)(d). While there need not be observers at every single counting table, and counties have discretion in determining the most feasible solution, the observation rules cannot be so narrow as to prohibit actual witnessing of the ballots.

Second, the observers need to be able to see what the election board workers see. Again, this right is derived directly from the language of the statute that permits the actual physical documents to be observed. RCW 29A.04.008(1)(d); RCW 29A.64.041(1). The process of tallying the ballots is not, and cannot be, a task that is shrouded from public view. *See Washington State Republican Party v. Washington State Democratic Central Committee*, No. 04-2-36048-0 SEA (Sup. Ct. 2004) ("This Court was guided by two concepts central to the democratic process: the right of

every lawfully registered voter to have his or her vote counted, *and the public's right to an open an transparent electoral process*, including access to public voting records." (emphasis added) (attached to Colgan Decl. ¶ 6, Ex. D).

Third, the observer needs to be able to indicate in some non-threatening, non-abusive, non-disruptive manner that he or she believes an error has been made. Petitioners have no interest in disrupting election officers or needlessly slowing the count. But the object of the recount is to produce the most accurate tally possible, and identification of errors is central to that process. *Cf. State ex rel. Robinson v. Clark*, 28 Wn.2d 276, 287 (1947) ("had this particular ballot been called to the attention of the election board, some ruling could have been made thereon and such ruling would now be known"). A deliberate and methodical count, even if it is slightly slower, is preferable to a fast but unreliable one if the recount's goal of tally "all votes cast" is to be achieved. RCW 29A.64.021(1).

Fourth, the observers need to be able to make a record of any error they believe has been made. Although RCW 29A.64.041(3) places some limitations on what information an observer may record regarding information on the ballots, it does not forbid making some record of tabulation error for later review. As Respondent King County acknowledges, accuracy is as much a purpose of recounts as is expediency. King County Br. at 11-12. There is no prohibition in Washington law on recording errors and bringing those errors to the attention of the election board to ensure an accurate recount. The purpose of observation is

significantly undermined if there is no channel for identification of errors. Despite Respondent King County's protestations regarding the burden of witness observation for the hand recount, King County has historically permitted observers to voice notify election workers of perceived errors in counting. *See Berry Decl.* ¶ 5-6. If, as Respondent King County suggests, the ability to recanvass under RCW 29A.60.210 acts as a "safety valve" for the identification of errors, it is difficult to reconcile that position with the desire to stifle any identification of those errors made by observers. King County Br. at 22.

D. NO PROCEDURAL ISSUES REQUIRE THE COURT TO DELAY ITS RULING

1. Intervenor Rossi's Request to Delay this Matter for Further Discovery Is Not Warranted

Intervenor Rossi also suggests that a decision by this Court should be delayed because he contends that Respondents have not had an opportunity to do adequate discovery in this matter. In doing so, Intervenor Rossi implies first that the testimony provided by electors through affidavit and declaration may be untrue,⁷ and second, that Respondents need an opportunity to depose Petitioners' statistical expert.⁸

⁷ This position is particularly ironic, given that Mr. Rossi has claimed: "I have faith in voters; Christine Gregoire has faith in lawyers." Colgan Decl. ¶ 7, Ex. E.

⁸ Intervenor Rossi does not contend that other facts at issue in this matter are incorrect. For example, at issue is the fact that the counties treated similar voters differently in conducting (or failing to conduct) signature verification. Again, no county has denied that fact.

See Rossi Br. at 17-19 (“Respondents should have the time and opportunity to depose the declarants to test the completeness and veracity of their statements.”).

As to Intervenor Rossi’s contention that the voters may be untruthful, the counties and the Secretary are in the best position to know whether there are any questions as to the veracity of the testimony of these voters. Yet not a single county has disputed the testimony of the electors. *See generally* King County Br.; Franklin County Br.; Pend Oreille Br. In fact, King County affirmatively supported that testimony by admitting that attempts by voters to validate their signatures on November 17 were rejected. *See* King County Br. at 18. The Secretary also does not deny that these voters were disenfranchised. *See generally* Reed Br. Put simply, there is no indication that any further discovery would substantiate Intervenor Rossi’s distrust of the voters who have submitted testimony on this matter.

Intervenor Rossi’s concerns regarding the statistical expert, Dr. Keith B. Leffler, are also unfounded. In so arguing, Intervenor Rossi relied on *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342 (1974) for the proposition that the Court may not rely on Dr. Leffler’s expert opinion without discovery. Immediately prior to the quotation relied upon by Intervenor Rossi, however, the court noted “*Exclusion [of a witness] is proper only where a party deliberately withholds the names of his witnesses.*” *Id.* at 350 (emphasis in original). Even if it this were not the case, the concerns expressed in the portion of the quotation Intervenor

Rossi shared with the Court are satisfied. *Id.* at 350-51. In formulating his opinion, Dr. Leffler relied on publicly available information regarding the results of the original count, and those facts are made evident in the record. Leffler Decl. ¶ 3; Jungman Decl. Ex. 2. Neither Respondents nor Intervenor Rossi have been precluded from checking those facts and, if a problem had arisen from doing so, they were not precluded from securing rebuttal evidence or expert testimony to impeach his findings.

Delaying a decision on these issues to conduct discovery on uncontested facts and to allow an opportunity to analyze facts which have been publicly available is inappropriate under these circumstances. Ironically, the need for the Court to proceed on the merits of this issue on mandamus is set forth in the very case relied on by Intervenor Rossi, *Washington State Labor Council v. Reed*, 149 Wn.2d 48 (2003). Intervenor Rossi quotes from the procedural history detailed in the opinion, which states that the Court declined to hear an issue involving the constitutionality of a referendum before an election, because there would be opportunity to correct the error of placing the referendum on the ballot, if such error were found, after the election. *Id.* at 53. Immediately following the election, however, the Court enjoined the certification of the election on the referendum and proceeded to hear the merits of the case on a writ of mandamus. *Id.* It is equally appropriate for the Court to proceed to the merits on this case under these circumstances.

3. The Doctrine of Laches Does Not Prevent the Court From Issuing a Writ of Mandamus

Intervenor Rossi's laches claim is at best only relevant to one of three issues before the Court – the request for uniform statewide signature verification standards. The claim should be denied because the Petitioners have diligently pursued this matter and have never acquiesced to the actions *during the machine recount* of auditors and canvassing boards who failed to comply with clear statutory mandates regarding signatures. Petitioners have never acquiesced to the Secretary's certification of results at a time when he knew there was *significant and outcome-determinative* disenfranchisement resulting directly from signature verification irregularity. McBrayer Decl. Ex. I at 3-4. The laches claim must fail for this reason alone.

The interpretation of laches urged on this Court should also be rejected because it would require preemptive lawsuits regarding rules when no election problem had yet matured. The Intervenor's own cases reject such an approach. "At this time, it is merely a speculative possibility, however, that [the disputed action] will influence the result of the election." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919-20 (9th Cir. 2003) (denying relief). This approach would require lawsuits early and often – a solution for our State not desired by any party to this current lawsuit.

This approach also ignores the clear allowance in RCW 29A.68.011(4) and (5) of claims regarding wrongful or neglectful acts that

"have occurred" and urges this Court to allow claims only when wrongful or neglectful acts have yet to occur. Moreover, that same election challenge statute authorizes court challenges to the results of an election, *including vote-by-vote determinations or allegations of any error or omission*, until 10 days after the issuance of a certificate of election.⁹ RCW 29A.68.011. That deadline has not yet arrived and it is incongruous to suggest that laches prohibits one of the allowed claims before the express statutory deadline.

V. CONCLUSION

For the reasons set forth above, Petitioners respectfully requests that the Court grant immediate partial relief as specified above.

⁹ The Secretary of State has certified only the *results* of previous counts. The Certificate of Election is issued for the election for Governor only by the Legislature. Wash. Const. art. 3 § 4 (Secretary of State delivers "returns" to the Speaker of the House "who shall open, publish and declare the result thereof in the presence of a majority of the members of both houses. The person having the highest number of votes shall be declared duly elected, and a certificate thereof shall be given to such person, signed by the presiding officers of both houses."). This is the Certificate that starts the election contest clock applicable to RCW 29A.68.011(6).

RESPECTFULLY SUBMITTED this 9th day of December, 2004.

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