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 MOTION AND BRIEF IN SUPPORT OF EMERGENCY PARTIAL 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) 359-9000
Attorneys for Petitioners

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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.

Petitioners seek correction of unconstitutional and other unlawful acts by election officials in the 2004 gubernatorial election and creation of rules by which county canvassing boards would conduct a hand recount of *all votes cast* in a manner that comports with Washington election law and complies with the duties imposed on the election officers of this State. Respondents, placing expediency over accuracy and equality, have conducted and intend to continue to conduct recounts that fail to consider and tally every ballot of lawful voters. The relief sought in this Court, a Court the Washington legislature has charged with "the protection and orderly conduct" of elections, is needed to ensure that the highest elected office in this State is chosen with a full and fair vote.

I. STATEMENT OF THE CASE

This case is brought pursuant to RCW 29A.68.011 and this Court's original jurisdiction to hear actions in mandamus related to elections and

duties of election officers; there is no record below. RAP 16.2(a). The Petition and all Affidavits and Declarations in support therof have been filed contemporaneously with this Court.

On November 2, 2004, the general election was held to select Washington's next Governor. On November 17, counties completed their initial tabulation of votes, and out of the over 2.8 million votes counted, only 261 votes separated the two leading candidates, democrat Christine Gregoire and republican Dino Rossi. Declaration of Ryan J. McBrayer. ¶ 2, Exh. A. Because the margin separating the two candidates was less than two-thousand votes and also less than one-half of one percent of the total votes cast, a mandatory machine recount was ordered by the Secretary of State pursuant to RCW 29A.64.021. *Id.* ¶ 4, Exh. C. The machine recount was completed on November 24, and the results announced by the Secretary on November 30, over objections by Petitioners that the county reports were facially flawed and did not support the inclusion of newly-found ballots, indicated a 42 vote separation between the candidates, a difference of .0014 percent. *Id.* ¶¶ 4-5, Exh. D, E.

Prior to the November 30 acceptance of county results, the Secretary of State failed to require the correction of results that were inaccurate on their face or to investigate the alleged lack of uniformity and erroneous practices among Washington counties. Declaration of Chris Grantham ("Grantham Decl.") ¶¶ 2-7. Some of the county returns were inaccurate on their face; the total number of ballots cast does not equal the

total number of ballots counted and ballots disregarded. *Id.* These facial inaccuracies are present in the returns for at least Franklin and Pend Oreille Counties. *Id.*

Given the results of the mandatory machine recount, Petitioner WSDCC has requested a hand recount of all ballots submitted by qualified electors for Washington governor, so that the hand recount is comprised of all votes cast. Affidavit of David McDonald ("McDonald Aff.") ¶ 5. The Secretary of State is to issue final rules to regulate the hand recount later today. He has, however, already made certain decisions as to the content of the rules that will render them unlawful.

First, he has indicated that ballots excluded in the prior counts, would also not be considered in the hand count. McBrayer Decl. ¶ 7, Exh. F ("Rechecking signatures on provisional or absentee ballots are not part of the recount."). These ballots include votes that were rejected based on purported signature mismatches for absentee and provisional ballots, where a particular county had determined that the signature on file did not match the signature on the ballot envelope. Declaration of Joshua C. Jungman ("Jungman Decl.") ¶¶ 3-4, Exh. 1. The Secretary of State has never issued uniform standards for county auditors to use in determining whether signatures are sufficiently different to justify rejection of a vote. *Id.* Petitioners observed that in King and other counties, many of these rejections were erroneous. Reflecting the lack of uniform statewide standards, the rejection rates in King County compared to other counties in the State are greater by many orders of magnitude, precluding any

argument that the disparity is due to chance. Declaration of Dr. Keith B. Leffler ("Leffler Decl.") ¶¶ 3-5.

Although King County, for example, knew of signature mismatching issues with provisional ballots, it failed to provide notice to voters whose votes might not be counted for that reason. *See* Affidavit of Brent Campbell ("Campbell Aff."), ¶ 7; Affidavit of Ronald Taro Suyematsu ("Suyematsu Aff.") ¶ 6; Affidavit of Sanford Sidell ("Sidell Aff.") ¶ 7. Despite this lack of notice, some ballots were not considered based on counties refusal to accept signature validation documents submitted on the day of certification, November 17. Hayler Decl. ¶ 7. On that day, Petitioner WSDCC, for example, attempted to deliver to county canvassing boards newly executed signature documents from voters to validate their votes. *Id.*. In King County, at least 24 of these validation efforts were rejected. *Id.*.

The need for carefully considering previously rejected ballots in the hand recount is evidenced by the difficulties and problems experienced by the representative Petitioner Electors. Petitioner Elector Brent Campbell voted with a provisional ballot. Affidavit of Campbell Aff. ¶ 5. Mr. Campbell is registered to vote, and signed the poll book and the provisional ballot oath when he tendered his provisional ballot at the polling location. *Id.* ¶¶ 2-5, 8. Mr. Campbell frequently checked with King County's website, which reflected that his vote had not been counted. *Id.* ¶ 6. While the poll book contained his signature, his vote was nevertheless not counted. *Id.* ¶¶ 7, 8. Petitioner Elector Ronald Taro Suyematsu, who had

requested but not received an absentee ballot, also voted provisionally and signed both the poll book and the provisional ballot oath envelope. Suyematsu Aff. ¶¶ 3-4. Mr. Suyematsu diligently checked the status of his ballot, only to discover that it had not been counted due to a clerical error. *Id.* ¶¶ 6-7. Petitioner Elector Sanford Sidell, a resident of King County for the past forty years and a regular voter, also requested but never received an absentee ballot. Sidell Aff. ¶¶ 3-4. After voting provisionally, Mr. Sidell was unaware and was never notified by King County that there were any problems with his ballot, until being notified by volunteers from the Gregoire campaign. *Id.* ¶ 7. Although Mr. Sidell tendered documents to rehabilitate his vote, it ultimately was not counted. *Id.* ¶¶ 7-8. Other Washington voters had similar problems with absentee and provisional ballots. *See generally* Declaration of Hillary Dendy; Declaration of Gregory V. Roeben; Declaration of Donald Henning.

In addition to the failure to consider every ballot cast during the recount, Respondents have decided to adopt rules that will prevent meaningful participation by party "witnesses" in the hand recount. The Secretary has indicated that counties will be authorized to exclude such witnesses if they add as temporary counting staff paired representatives of the major parties. Respondent Logan, for example, has indicated that, instead of observers at every recount board table, each party will be required to submit 80 representatives by Monday, December 6, who will be employed by King County for the recount. McBrayer Decl. ¶ 12, Exh. K (December 2, 2004 letter from Dean Logan to democratic and republican

party chairs). These representatives will have to take an oath attesting to their role in the recount process, and will be required to work six-day, 10-hour a day weeks. *Id.* The parties have just three days to attempt to locate all 80 representatives. *Id.*

But party members will have conflicting obligations once they become county staff and will not be able to perform the role of witness/observer. Even if the parties are able to assist the counties in staffing in this fashion, their rights to have witness/observers must be protected.

The Secretary has further decided that neither the witness nor the election staff need keep any record of a witness's challenge to the decision made by counting staff. Although Petitioners agree that witnesses must not be allowed to interfere in the process, the purpose of allowing them to "witness" and to "observe the ballots," RCW 29A.64.041(1), is obviously to provide an opportunity to object before a voter is finally disenfranchised by exclusion or miscounting of her vote, and to allow for an open and transparent election.

II. REQUEST FOR EMERGENCY HEARING

Pursuant to RAP 16.2(b) and RAP 17.4(b), Petitioners seek this Court's emergency review of their Petition. The hand recount is scheduled to begin on Wednesday, November 8. Under Respondents' decisions to date, and for the reasons described below, the recount will be conducted in a manner that fails to comport with the letter and purpose of Washington election law that seeks to have all votes counted and maximize the

franchise. It will also fail to take advantage of the opportunity to correct prior unlawful deprivations of the right to vote and to create increased uniformity in the treatment of voters in different counties. Petitioners' request for emergency consideration is supported by the attached Affidavit of David J. Burman in Support of Emergency Hearing.

Petitioners request that this Court order responsive briefing be filed and served electronically by 9:00 a.m. on December 7; that any reply briefing be filed and served electronically by December 7, 2004 at 4:30 p.m.; and that oral argument be held as early as possible on December 8.

III. SUMMARY OF ANALYSIS

Petitioners, invoking this Court's duty under RCW 29A.68.011 to ensure the protection and orderly conduct of elections, seek an Order from this Court requiring that the pending hand recount include a consideration of all votes cast, including those rejected by canvassing boards or their subordinates during the initial count. Petitioners also ask that this Court Order the Secretary of State to issue uniform statewide rules for the conduct and procedure of the hand recount, consistent with the rights of observation and challenge and sufficient to ensure that all votes are counted.

The following uniform standards are needed to ensure the orderly, accurate, and lawful conduct of the hand recount: (1) standards that ensure that all ballots rejected in previous counts are fully canvassed so that the hand recount produces as complete and accurate a tabulation as possible; (2) standards for evaluating previously-rejected signatures according to the

more liberal standards applied in most counties; and (3) standards that allow party representatives to meaningfully witness the hand recount, by observing all actual ballots being counted.

IV. ARGUMENT

A. RCW 29A.68.011 REQUIRES THE COURT TO PREVENT WRONGFUL ACTION OR NEGLECT OF DUTY BY ELECTION OFFICIALS

As the Court has recognized, RCW 29A.68.011 "provides a procedure for bringing an action to correct an error which has been or is about to be made in connection with an election." *Schillberg v. Williams*, 115 Wn.2d 809, 812 (1990).[1] RCW 29A.68.011 provides that

> Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

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[1] *Schillberg* was decided under RCW 29.04.030, the predecessor statute to RCW 29A.68.011. *Schillberg*, 115 Wn.2d at 812. The texts of prior RCW 29.04.030 and current RCW 29A.68.011 are identical, and the Washington legislature has made clear that the same legal principles that governed the predecessor statutes continue to govern the election code recodified in Title 29A. *See* RCW 29A.04.900 ("The provisions of this title insofar as they are substantially the same as statutory provisions repealed by this chapter, and relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments.").

> (4) A wrongful act...has been performed or is about to be performed by any election officer; or
>
> (5) Any neglect of duty on the part of an election officer...has occurred or is about to occur.

Thus, RCW 29A.68.011 gives this Court express jurisdiction to require election officers to perform duties and desist from wrongful acts. *Id.* Although not explicit in the statute, an action under RCW 29A.68.011 may be brought as a mandamus action. *Schillberg*, 115 Wn.2d at 814 (granting a writ of mandamus pursuant to RCW 29A.68.011's identical predecessor statute). As recognized by the rules of this Court, a writ for mandamus may be properly brought as an original action in this Court as an exercise of its concurrent jurisdiction. RAP 16.2(a) ("The Supreme Court and the superior court have *concurrent original jurisdiction* of a petition against a state officer in the nature of quo warranto, prohibition, or mandamus.") (emphasis added).[2]

As this Court has previously held in interpreting the law codified in RCW 29A.68.011, the Court not only has the discretion to prevent neglect

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[2] A writ of mandamus "may be issued by any court...to any inferior tribunal, corporation, board or person, to compel performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station...." RCW 7.16.160. Thus, "[w]here there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance." *Walker v. Munro*, 124 Wn.2d 402, 408 (1994). A writ of mandamus may "prohibit the doing of a thing as well as command it to be done." *State ex rel. LaFollette v. Hinkle*, 131 Wn. 86, 92 (1924). Because an action under RCW 29A.68.011 seeks an order requiring a state elections official either to take or refrain from certain acts, it is in the nature of a mandamus action.

of duty or wrongful acts in elections – it has the duty to do so. In *State ex rel. Kurtz v. Pratt*, 45 Wn.2d 151, 157 (1954), an action brought under RCW 29A.68.011's predecessor statute, this Court said

> If we should refuse to act in the instant matter, we would be remiss in our duty as members of the court of last resort of this state, in that we would disregard the responsibility relative to the protection and orderly conduct of elections tendered to us by the legislature in its enactment of [the predecessor of RCW 29A.68.011].

Here, as in *Kurtz*, this Court is needed to exercise its duty to ensure that the election for the highest office of this state is orderly and protected, requiring the Secretary of State to issue uniform guidelines that require the consideration of all ballots cast in the election.

B. THE CLEAR POLICY OF WASHINGTON ELECTION LAW IS MAXIMUM ENFRANCHISEMENT

There is no right more fundamental to the sanctity and preservation of a democracy than the right to vote. On the primacy of voting rights in a free democracy, the United States Supreme Court has said:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("the right to vote as the legislature has prescribed is fundamental"); *Reynolds v. Sims*, 377 U.S. 553, 562 (1964)

("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").

Washington has long recognized the importance of voting, and the protection of voters' rights, as a core state policy and a basic right. Washington law unequivocally supports and encourages voting.

> It 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.

RCW 29A.04.205 (emphasis added). *See also* WASH. CONST. art. 1, § 19 (2004) ("All elections shall be free and equal, and no power, civil or military, *shall at any time interfere to prevent the free exercise of the right of suffrage*.") (emphasis added); *Gold Bar Citizens for Good Gov't v. Whalen*, 99 Wn.2d 724, 730 (1983) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

Indeed, the protection of voting rights under the Washington Constitution is broader than that afforded under the United States Constitution. *See Brower v. State*, 137 Wn.2d 44, 68 (1998) ("The right to vote is fundamental, and art. I, § 19 provides greater protection for a free and equal vote than does the federal constitution's one person-one vote equal protection right."). The relief sought by Petitioners, above all else, seeks for the recount to be conducted in a manner that includes a full and fair tally of all lawfully cast ballots.

C. THIS COURT SHOULD ORDER RESPONDENTS TO CONDUCT A RECOUNT THAT INCLUDES "ALL VOTES CAST" AND THAT PROVIDES FOR MEANINGFUL PUBLIC AND PARTY OBSERVATION AND OPPORTUNITY TO BE HEARD

The Court has the duty to intervene because the anticipated hand recount will be conducted in a manner that fails to comport with Washington election law.

First, the Office of the Secretary of State has indicated that it will supervise the pending hand recount by having "the same ballots counted in the original count [] simply [] retabulated." McBrayer Decl. ¶ 3, Exh. B (Secretary of State FAQ regarding General Election Recount Procedures). In the Secretary's view, "the recount does not allow a review of decisions by the county canvassing board [or even staff] of what constitutes a vote." *Id.* The preliminary guidelines issued by the Secretary of State indicate that this standard will continue to govern the hand recount. *Id.* ¶ 7, Exh. F ("Rechecking signatures on provisional or absentee ballots are not part of the recount."). The State's adherence to its position that all previous decisions to disregard votes must be carried over into the hand recount, a position that is not authorized by State statute or the administrative code, is a wrongful act and permits canvassing boards to neglect their duties in the tabulation of *all votes* cast. Every ballot submitted by a qualified elector that may have been previously rejected or not considered by a canvassing board– whether for the Republican or for the Democratic candidate – should be canvassed and, if valid, counted.

Second, the plans by Respondents for the role of witness/observers is contrary to the level of public scrutiny required by statute and by the Washington Constitution. Observers must have a meaningful opportunity to see each ballot and to preserve objections to the disposition of the ballot.

1. Canvassing boards are required to consider all votes cast, and the Court must ensure that election officials perform their duty to perform a hand recount that tallies all votes cast.

Common sense suggests that a hand recount should include the areas where a mistake in earlier counts is most likely to have occurred. Human, usually subjective, decisions not to count certain "ballots cast" at all are even more likely to be infected by error than the inherent error rate in machine processing of those ballots that were counted. Accordingly, Washington law is unambiguous on which ballots must be considered during a recount – all of them. During a mandatory recount,

> [T]he county canvassing board *shall* conduct a recount of *all votes cast* on that position.

RCW 29A.64.021(1) (emphasis added); *see also* RCW 29A.64.050 (during a partial recount that may change the result of an election, the Secretary of State "*shall* order a complete recount of *all ballots cast*.")(emphasis added). The recount statutes concerning hand recounts also do not permit the canvassing board or the Secretary of State to limit the votes assessed during the recount, requiring a bond for "*each ballot cast*" in a particular jurisdiction that will be recounted. RCW 29A.64.030 (emphasis added). Recounting of all ballots is not discretionary – it is a task that canvassing boards "shall" do. RCW 29A.64.021(1).

Aside from being wholly congruent with the language of the statutes, requiring canvassing boards to consider *all* votes cast during the recount comports with the Court's canon of construction that "election statutes are considered remedial and should be liberally construed." *Whalen*, 99 Wn.2d at 728 (1983); *see also Dumas v. Gagner*, 137 Wn.2d 268, 284 (1999) (adopting canon of construction for liberal interpretation of election laws). Other states with the same canon of construction requiring the liberal interpretation of election laws have recognized that recount provisions should be construed liberally. *See Dowden v. Benham*, 234 Ind. 103, 109 (1955) ("It has long been the policy of this court to give a liberal construction to a statutory provision on recounting votes."); *State ex rel. Thomas v. District Court*, 154 P.2d 980, 982 (Mont. 1945) ("[recount statute is a] remedial statute, enacted to supplement election laws and *to provide for a more careful counting* of the ballots.")(emphasis added). *See also* C.J.S. *Elections* § 289 (2004) ("Recount statutes should be liberally construed, to accomplish their purpose of determining the results of an election as evidenced by legal ballots."). If the Court harbors some doubt about what is required by the statutory language, plain though it might be, these canons require the interpretation that will result in the greatest number of lawful votes being considered and counted.

It is common that all ballots, including those previously rejected by canvassing boards or for other reasons, are reconsidered during the manual recount process, so that the most complete and accurate tally of the votes can be performed. *See, e.g.,* Ill. Comp. Stat. § 5/24A-15/1 (West 2004)

(during recount "the ballots marked 'rejected,' 'defective,' 'objected to,' and 'absentee ballot' shall be examined to determine the propriety of such labels"); Nev. Rev. Stat. § 293.404 (West 2004) (in precincts with no mechanical voting equipment, recount board examines "any duplicate or rejected ballots, [and] shall determine whether the ballots have been voted in accordance with this Title and shall count the valid ballots by hand"); Va. Code § 24.2-802 (West 2003) (recount procedure permits court to "rule on the validity of all questioned ballots and votes"); W.Va. Code § 3-4A-28(3) (West 2004) ("the ballots and ballot cards shall be reexamined during such recount for the purpose of reascertaining the total number of votes cast for any candidate in the same manner and according to the same rules as are utilized in the original vote count"); Wis. Stat. § 5.90 (West 2004) (during recount, board of canvassers "shall examine the ballots marked 'rejected', 'defective', and 'objected to' to determine the propriety of such labels").

The State has insisted that canvassing boards need not recount all ballots – only those that were included in the initial count – and this decision permits canvassing boards to neglect their duty to consider all votes during a recount and to assure an accurate final tabulation. McBrayer Decl. ¶¶ 5,7, Exhs. D, F. The duty to recount all ballots is one that the legislature has clearly imposed on canvassing boards, a duty that the State admits canvassing boards – acting pursuant to the Secretary of State's guidelines – are about to neglect. *Id.*; RCW 29A.68.011(5) (court may issue order if a neglect of a duty has occurred, "or is about to occur"). The Secretary of State, designated by law as Washington's "chief election

officer," has stated its approval for canvassing boards to shirk their duty to recount "all votes." RCW 29A.04.230; RCW 29A.64.021(1).

Permitting the hand recount to go forward in this manner creates a standard different than the one used during the mandatory recount when thousands of ballots not previously considered were counted. Petitioners are not asking this Court to direct canvassing boards to reach a particular determination on any ballots; only that canvassing boards assess all ballots during the manual recount. Any ballot that a canvassing board determines from a proper canvass to be a lawfully cast vote – for either candidate – should be included in the final tally.

2. The Secretary of State and county auditors have a duty to ensure correction during the hand recount of errors made in the earlier counts, and disparate treatment of voters by county.

Among the duties that the canvassing board is charged with is the presentation to the Secretary of State of a certification that the abstract of votes for that county is "a *full, true, and correct representation* of the votes cast for the issues and offices listed thereon." *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). County canvassing boards and auditors, under the Secretary of State's direction, intend to conduct a hand recount excluding all ballots that were previously rejected by canvassing boards (or their office staff), including absentee or provisional ballots rejected based on signature

problems, for which the county was provided validating documents on November 17, 2004. Hayler Decl. ¶¶ 5-7.

For the looming hand recount, these are wrongful acts and neglect of duties that "are about to occur," and for the hand recount to be certified properly this Court must order the Secretary of State and county election officials to consider in the hand recount all votes cast, including those previously rejected on grounds that were improper or are now moot. RCW 29A.68.011(4), (5). *See also Braxton v. Holmes County Election Canvassing Board*, 870 So.2d 958, 961 (Fla. Dist. Ct. App. 2004) (during election contest, reconsideration permitted for absentee votes rejected by canvassing board because of signature issues).

The absence of standards for signature comparison in the first canvass and subsequent recount was the result of neglectful act by the Secretary of State and caused some of the errors asserted herein. Hundreds of voters in King County were unlawfully disenfranchised. Leffler Decl. ¶¶ 3-5 & Table 1; Jungman Decl. ¶¶ 3-4, Exh. 1. In Whitman, Walla Walla, and Whakiakum Counties *no signature verification whatsoever* was done for provisional ballots. *Id.* Exhibit 1. It remains unclear what if any standards were used by the remaining counties for the absentee and provisional ballot signature comparison.[3] The outcome of the

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[3] A provisional ballot must be canvassed for a signature that "matches a voter registration record," WAC 434-253-047, and an absentee ballot must be examined to "verify that the voter's signature on the return envelope is the same as the signature of that on the voter registration."

Secretary's neglectful failure to promulgate any rule for signature comparison is, however, quite clear.

Given the Secretary of State's duty to ensure a complete and accurate tally of all lawfully cast votes, RCW 29A.04.230, these prior errors should not be ignored. This state's election officers had an affirmative duty to ensure that the final count was a "full, true, and correct representation of the votes cast." WAC 434-262-070. Yet there are thousands of voters subjected to widely varying signature comparison standards whose ballots represent outcome-determinative inaccuracy. The Secretary of State's failure to promulgate uniform rules before the first two election counts was neglectful. RCW 29A.04.610 ("The secretary of state as chief election officer *shall* make reasonable rules...to effectuate any provision of this title and to facilitate the execution of its provisions in an orderly, timely, *and uniform manner*.")(emphasis added).

Moreover, the Court is empowered to correct wrongful or neglectful election errors that are about to occur in the future. RCW 29A.68.011(4) and (5). The Secretary of State has a current and continuing duty to ensure an accurate hand recount. RCW 29A.64.050. This duty extends to rule-making that ensures a uniform hand recount, RCW 29A.04.610, of those absentee and provisional ballots rejected in King County due to their signatures. RCW 29A.40.110. Rather than allow the prior denial of equal treatment to continue to taint the results of

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RCW 29A.40.110. Neither Washington statutes nor the administrative rules specify a standard by which those signatures are evaluated.

the hand recount, the Secretary of State should be ordered to address the problem. By taking advantage of the hand recount in this way, the Court can minimize its role in directly remedying the prior errors by assuring that the previously-rejected ballots in King County are recounted using the same liberal standards for signature match that prevailed elsewhere in the State. The Court should order that the Secretary of State promulgate uniform standards for signature comparisons in the hand recount.

3. Uniform standards for witnessing of the recount are needed to ensure an orderly election and preserve the party and public rights to scrutinize the process and have a meaningful opportunity to be heard.

RCW 29A.64.041(1) states that witnesses "*shall be permitted to observe the ballots* and the process of tabulating the votes," during a hand recount. *Id.* (emphasis added). The administrative code makes clear that the statute permits a genuine right of observation to party representatives while votes are being counted, and contemplates multiple observers where needed. WAC 434-261-020 states

> Prior to the primary or election, the county auditor shall determine the number of observers required in order *to observe all aspects of the counting center proceedings*, and shall request, in writing, that each major political party appoint representatives to fill the requirements. Where *more than one observer is to be appointed*, the political party shall designate one of their observers as supervisor.

Id. (emphasis added). The object of witnesses is, quite logically, to "observe the ballots," which is by statutory definition "the physical

document on which the voter's choices are to be recorded." RCW 29A.64.041(1); RCW 29A.04.008(1)(d).

As described above, Respondents intend to commence the hand recount using procedures that will deny meaningful observation by party and public witnesses and will further deny a meaningful opportunity to be heard before erroneous government action finally disenfranchises a voter. During a hand recount, the ability to observe "the physical document on which the voter's choices are to be recorded," is meaningless unless there is genuine observation of the actual ballots. RCW 29A.64.041(1). Genuine observation of the ballots and how they are being tallied and a meaningful opportunity to be heard are needed to ensure consistency in counting methods and accuracy statewide and to guarantee that any ballots that are questioned are preserved for further review by the canvassing board. The right of observation is not needed to satisfy any particular party's interest in the election; it is meant for the public to be assured of an open and transparent election.

The alternative plan, co-opting party observers as employees of the county for purposes of the hand recount, is unlawful. As discussed above, it denies the public and parties their rights to observe, and in light of the plans announced by the Republican party, McBrayer Decl. ¶ 17, it likely will turn the recount into a circus.

Although Respondents have been aware of the potential for a hand recount since at least November 24, the request that parties provide, for King County alone, 80 available full time employees was only sent on

December 2. McBrayer Decl. ¶ 12, Exh. K. The county appears concerned with completion of the recount by December 22 (apparently necessitating the 80 counting stations). *Id.* But December 22 is not any deadline imposed by statute or otherwise for completion of the hand recount; a slower more accurate count staffed by existing county employees and permitting room for observers, could be completed well before January 10, 2005.

V. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court hear this matter on an emergency basis and grant immediate partial relief as specified above.

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
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-9000
Attorneys for Petitioners