

No. 76321-6

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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

v.

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

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

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

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## I. INTRODUCTION

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

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

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

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

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

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

## II. ARGUMENT

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

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

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

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

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

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

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

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

**B. PETITIONERS’ ALLEGATIONS SURVIVE SUMMARY JUDGMENT.**

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

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

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

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

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

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

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

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

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

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

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

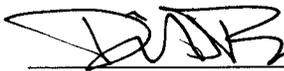
**D. PETITIONERS SENT RESPONDENT FRANKLIN COUNTY AUDITOR PROPER NOTICE.**

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

### III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 9th day of December, 2004.

By 

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