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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

WASHINGTON STATE REPUBLICAN PARTY,)
an unincorporated association; and)
CHRISTOPHER VANCE, a citizen of Washington)
State, and JANE MILHANS, a citizen of Pierce)
County.)

No. 04-2-14599-1

Plaintiffs,

DEFENDANTS' RESPONSE TO
MOTION FOR TEMPORARY
RESTRAINING ORDER

vs.

KING COUNTY DIVISION OF RECORDS,)
ELECTIONS AND LICENSING SERVICES; and)
KING COUNTY CANVASSING BOARD.)

Defendants,

I. INTRODUCTION

Plaintiffs request a temporary restraining order that would in essence require the King County Canvassing Board to stop the recanvassing of 573 absentee ballots cast in the 2004 gubernatorial race because they believe that:

(1) the statute that sets forth the board's authority and discretion to recanvass ballots, RCW 29A.60.210, does not apply to a hand recount--even though the State Supreme Court concluded otherwise just this past Tuesday;

(2) this court needs to overrule the board's discretionary decision to recanvass the ballots, insert itself into the ongoing recount process, and direct the canvassing board to order further investigation--even though the Legislature provides plaintiffs

1 with a perfectly adequate remedy under the election contest statute, Chapter 29A.68
2 RCW, for challenging the results after the recount has concluded; and

- 3 (3) the absentee ballots in question, which the County has always intended to keep
4 separate from all other ballots, must be further compartmentalized into subgroups
5 that raise serious voter secrecy concerns.

6 Defendants respectfully request that this Court deny the plaintiffs' motion, and allow the
7 upcoming hand recount in King County to promptly proceed without further delays so that the
8 canvassing board may continue to perform its statutory responsibilities and the citizens of this
9 State can have closure to the ongoing recount proceeding.

10 II. STATEMENT OF FACTS

11 At issue in this case is a discretionary decision made by the King County Canvassing
12 Board pursuant to RCW 29A.60.210. Less than one week ago, the Elections Division learned
13 that the "no signature on file" ballots at issue in this case had not been properly canvassed and
14 that Elections Division practices with respect to these ballots had not been followed. Declaration
15 of Bill Huennekens at 4. The King County Canvassing Board found that the returns for both the
16 original count and the machine recount for the office of governor had an apparent discrepancy or
17 inconsistency and as they likely did not reflect the true number of valid absentee ballots that had
18 been submitted for the November 2, 2004 General Election. Just as was argued by the
19 Washington Secretary of State's Office and as held by the Washington State Supreme Court this
20 past Tuesday, the King County Canvassing Board had the authority, granted to it by the
21 Legislature, to re-examine or recanvass the ballots involved in the apparent discrepancy or
22 inconsistency. RCW 29A.60.210; Declaration of Janine Joly, Exhibits A and B. On Wednesday,
23 December 15, the King County Canvassing Board voted to recanvass the 573 "no signature on
file" ballots. Declaration of Dean Logan at 2. The process of recanvassing involves several

DEFENDANTS' RESPONSE TO MOTION FOR
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1 different steps that are now taking place pursuant to the Canvassing Board's decision and in
2 anticipation of a meeting on Monday, December 20, where the results of that recanvass will be
3 presented to the Canvassing Board. Declaration of Dean Logan at 2. At that meeting, the
4 Canvassing Board is expected to decide whether the recanvass of the "no signature on file"
5 ballots evidences error that must be corrected pursuant to RCW 29A.60.210. Declaration of
6 Dean Logan at 2.

7 III. ARGUMENT

8 A. PLAINTIFFS FAIL TO MEET THE CRITERIA AND STANDARDS FOR 9 OBTAINING A TRO.

10 Preliminary injunctive relief is an extraordinary remedy that courts rarely grant.

11 An injunction is distinctly an equitable remedy and is frequently termed
12 the 'strong arm of equity' or a 'transcendent or extraordinary remedy,' and
is a remedy which should not be lightly indulged in, but should be used
sparingly and only in a clear and plain case.

13 *Kucera v. State Dept. of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000)

14 (citations omitted). Preliminary injunctive relief is not appropriate in a doubtful case.

15 *Tyler Pipe Industries, Inc. v. Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213

16 (1982). Preliminary injunctive relief may only be granted where a plaintiff shows:

- 17 (1) That it has a clear legal or equitable right;
- 18 (2) That it has a well-grounded fear of immediate invasion of that right; and
- (3) That the acts complained of are or could cause immediate injury.

19 *Tyler Pipe*, 96 Wn.2d at 792.

20 Although the failure to establish any one of these criteria requires denial of the requested
21 relief, *Kucera*, 140 Wn.2d at 210, in this case the Plaintiffs fail to establish all three. First,
22 Plaintiffs' do not have a clear legal or equitable right. In order to make such a showing,
23 Plaintiffs must demonstrate "a likelihood of success on the merits." *Tyler Pipe*, 96 Wn.2d at

1 793-794. Last Tuesday the Supreme Court specifically held that “under Washington’s statutory
2 scheme, ballots are to be ‘retabulated’ only if they have been previously counted or tallied,
3 subject to the provisions of RCW 29A.60.210.” (Emphasis added). RCW 29A.64.210 permits
4 the canvassing board to recanvass ballots whenever the board finds an apparent discrepancy or
5 inconsistency in the returns of an election. In this instance, the canvassing board listened to a
6 presentation from elections staff about the discovery and treatment of the previously rejected 573
7 ballots and concluded that an apparent discrepancy or inconsistency in the returns existed. This
8 Court should dismiss the plaintiffs’ invitation to substitute its judgment for the board’s and direct
9 the members to do more investigation surrounding the discovery and treatment of the ballots.

10 Second, plaintiffs lack a well-grounded fear of immediate invasion of any right to
11 challenge the board’s determination because the Legislature has provided them with a perfectly
12 adequate remedy under the election contest statute, Chapter 29A.68 RCW, for challenging the
13 results of the recount after it has been concluded.

14 Third, the board’s actions will cause plaintiffs no immediate injury because the “no
15 signature on file” ballots will be segregated from all other ballots. Declaration of Dean Logan at
16 2. Plaintiffs’ assertions to the contrary, i.e., that the ballots will be cast “irretrievably into the sea
17 of ballots already tabulated,” is simply incorrect. Additionally, plaintiffs’ unsupported
18 suggestion that there are an unlimited number of subclasses by which the ballots must also be
19 sorted should be rejected. Plaintiffs offer only one such subclass for sorting – voters who
20 received a letter from King County. They provide no evidence or even allegation of why this
21 subclass would have any relevance or bearing on an election contest. To the contrary, any
22 further segregation of the ballots has the potential to violate voter secrecy.

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DEFENDANTS’ RESPONSE TO MOTION FOR
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1 Finally, in considering a motion for a temporary restraining order, a court must also
2 balance the relative interests of the parties and the public. *Tyler Pipe*, 96 Wn.2d at 792; *Kucera*,
3 140 Wn.2d at 224 (finding that court abused its discretion by failing to balance interests of
4 parties and public). In this instance, the public interest in permitting the correction of apparent
5 discrepancies and inconsistencies in returns overwhelmingly supports denying Plaintiff's motion.
6 It is hard to imagine how the Washington Supreme Court Washington could have been more
7 clear. RCW 29A.60.210 does apply to this manual recount and county canvassing boards have
8 the discretion to recanvass ballots pursuant to this clear grant of authority. Indeed, other counties
9 in this state have already invoked the statute to recanvass ballots for the governor's race. This
10 court should reject plaintiffs' attempts to impose a standard in King County that not only violates
11 the statute, but would impose a standard in King County that is different from that in all other
12 counties of the state.

13 **1. Plaintiffs do not have a Clear Legal or Equitable Right to a TRO because the**
14 **current hand recount is "subject to the provisions of RCW 29A.60.210" and the**
15 **Canvassing Board has Found under that Statute that an Apparent Discrepancy**
or Inconsistency in the Returns Exists to Warrant Recanvassing the Ballots in
Question.

16 The canvassing board's authority to recanvass is set forth in RCW 29A.60.210, which
17 provides as follows:

18 **Recanvass—Generally.** Whenever the canvassing board finds that there is an apparent
19 discrepancy or inconsistency in the returns of a primary or election, the board may
20 recanvass the ballots or voting devices in any precincts of the county. The canvassing
21 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.

22 As a threshold matter, there can be no question that this statute may be invoked in the
23 ongoing hand recount. The Supreme Court specifically said so in the Opinion issued on

1 Tuesday in *McDonald et al., v. Reed, et al.* In rejecting Petitioners' request for a full recanvass
2 of all rejected ballots, the Court stated, "[U]nder Washington's statutory scheme, ballots are to
3 be "retabulated" only if they have been previously counted or tallied, subject to the provisions of
4 RCW 29A.60.210." (Emphasis added.) *McDonald*, slip op. at page 3.

5 Similarly, the Secretary of State has concluded that RCW 29A.60.210 may be invoked by
6 a canvassing board in the current hand recount. In its brief to the Court in *McDonald*, the
7 Secretary stated as follows:

8 If someone believes that there is an inconsistency or discrepancy in the way the county
9 canvassing board is tabulating any particular ballot in the performance of that function,
10 that person must timely bring the alleged inconsistency or discrepancy to the county
11 canvassing board's attention so it can, pursuant to the safety valve provided by RCW
12 29A.60.210, correct any error the canvassing board finds with respect to the particular
13 ballot before the canvassing board certifies the results of its tabulation of its county's
14 election results.

15 (Emphasis added.) Secretary of State's Response, at page 11.

16 On its face, RCW 29A.60.210 contemplates a two step process. First, if the canvassing
17 board determines that there is "an apparent discrepancy or inconsistency in the returns" it has the
18 authority and discretion to recanvass a portion or even all of the ballots. Then, if the recanvass
19 reveals that errors were made, the canvassing board has a duty to correct the errors and document
20 those corrections.

21 In this case, the canvassing board has satisfied the first step. At its December 15
22 meeting, the board listened to the presentation made by elections staff regarding the discovery
23 and treatment of the absentee ballots in question. That presentation included information
describing the security surrounding the ballots and an explanation regarding the reason why the
ballots were not counted during the initial canvass and subsequent machine count and why the
failure to do so resulted in an apparent discrepancy or inconsistency in the returns. In short, by

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1 not cross-checking the information from the computerized registration records with the hard
2 copy information on file, elections staff missed a step that should have been taken had they
3 followed existing procedures. At the conclusion of this presentation, the board determined that it
4 had sufficient information to make the initial finding of apparent discrepancy or inconsistency
5 and directed the Elections Division to recanvass the ballots. It is important to note that the board
6 has not determined whether an error has occurred that obligates them to count the ballots.
7 Instead, the board simply directed that the ballots be recanvassed. The results of that recanvass
8 will be presented to the board on Monday, December 20, and the board is expected to vote on
9 whether or not an error has occurred that must be corrected under RCW 29A.60.210.

10 This is exactly the process that has been used in other counties, such as Snohomish.
11 Declaration of Dean Logan at 2-3. This Court should dismiss the plaintiffs' invitation to treat
12 King County differently from the other counties that have relied on RCW 29A.60.210 to
13 recanvass ballots. The court should similarly decline the invitation to substitute its judgment for
14 the board's and direct the members to delay certification of the election in order to do more
15 investigation surrounding the discovery and treatment of the ballots. As set forth below, if the
16 plaintiffs wish to challenge the decision of the canvassing board with respect to these ballots,
17 they can bring a later challenge.

18 **2. Plaintiffs lack a well-grounded fear of immediate invasion of any right to**
19 **challenge the board's determination because the Legislature has provided them**
20 **with a perfectly adequate remedy under the election contest statute, Chapter**
21 **29A.68 RCW, for challenging the results of the recount after it has been**
22 **concluded.**

23 RCW 29A.68.110 is the election contest statute. It allows any elector to challenge the
results of an election and the issuance of a certificate of election. This statute provides plaintiffs

1 with a remedy for challenging a decision of the canvassing board at the appropriate time, if they
2 believe it is in error.

3 Plaintiffs' asserted right is that they believe the canvassing board's decision will affect
4 the determination of whether or not their candidate will receive the certificate of election when
5 the manual recount is finished. There is no evidence before this court that plaintiffs' candidate
6 will not in fact be issued the certificate of election. There is no well-grounded fear of an
7 *immediate* invasion of the right. Plaintiffs have a statutory remedy for challenging the decisions
8 of the canvassing board. That remedy is not to seek a TRO for every discretionary decision the
9 board makes that might possibly affect the outcome of the election. The remedy granted by the
10 Legislature is to contest the results of the election under RCW 29A.68.110 when the manual
11 recount is done.

12 **3. Plaintiffs fail to show that the acts complained of are causing immediate injury.**

13 As stated above, the canvassing board voted only to recanvass the "no signature on file"
14 ballots that were presented to them on Wednesday, December 15. There is no evidence before
15 the court that this action is causing, or could cause *immediate* injury to plaintiffs. If the board's
16 action affects the outcome of the election and plaintiffs believe the action was in error, they have
17 a remedy under the election contest statute. But that injury is speculative. It is certainly not
18 immediate.

19 This court should allow the manual recount to proceed as directed by the Legislature, the
20 Secretary of State's Office and the Washington State Supreme Court. Plaintiffs fail to show that
21 any immediate injury has been caused by a decision of the canvassing board that is clearly
22 authorized by the Legislature and the Washington Supreme Court.

1 **B. PLAINTIFFS ATTEMPTS TO CONFUSE THE ISSUE BEFORE THIS**
2 **COURT BY MAKING UNSUPPORTED AND FALSE ACCUSATIONS**
3 **REGARDING SECURITY SHOULD BE REJECTED.**

4 In its motion, plaintiffs make general allegations that the Elections Division's facilities
5 are other than secure. These accusations are supported by no direct testimony, misconstrue the
6 true facts, and misrepresent the practices of the Elections Division. The accusation that the
7 ballots are not secure is false and it does not support any of plaintiffs' requests for relief.
8 Instead, as the record does show, King County has gone beyond the requirements of state law to
9 protect the security of its ballots, both counted and rejected.

10 As explained in the Declaration of Bill Huennekens, King County has instituted strict
11 security requirements for each of its elections facilities. If ballots are not being worked on by
12 elections staff, they are stored in a vault at one of the facilities. If the ballots are being worked
13 on or if they are being transferred from one facility to another, at least two staff members must
14 be present with and accompany the ballots. Additionally, at its Mail Ballot Operation Site
15 ("MBOS"), a sheriff's deputy has been present during hours of operation since the canvass of the
16 November 2, 2004 General Election began. And since November 24, there has been at least one
17 sheriff's deputy inside the facility, guarding it and the ballots seven days a week, 24 hours a
18 day.¹

19 There is no requirement in state law that ballots be accompanied by two staff members at
20 all times. Nor is there any requirement in state law that law enforcement be hired to guard the

21
22 ¹ In Dan Brady's declaration, he makes the statement that on one occasion, a group of
23 ballots were out of the locked cage overnight. This is true. However, as Mr. Huennekens
 testifies, the ballots were under constant guard by a King County Sheriff's Officer.

1 ballots and the facilities in which they are held. Regardless, King County has taken these steps
2 to ensure the security of its ballots.

3 Plaintiffs' allegations regarding security are based only on hearsay. Indeed, they barely
4 even rise to that level and instead are akin to an assertion that the declarants remembering
5 hearing "something, sometime, from someone." For the majority of the statements, there is no
6 evidence of who made the statements or what the statements actually were. For example,
7 plaintiffs are asking this court to make a ruling that is directly contrary to state law and an
8 opinion issued by the Washington Supreme Court this week, based on Mr. Seal's incorrect
9 understanding of the "normal procedure" for transferring ballots. The court should reject
10 plaintiffs' unsupported allegations that the ballots in King County are anything other than secure.

11 IV. CONCLUSION

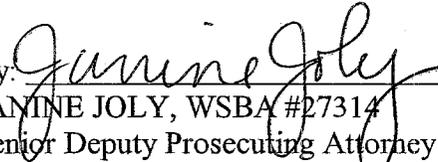
12 This court should reject plaintiffs' invitation that it insert itself into the decision making
13 process that the State Legislature and the Washington Supreme Court have vested with the
14 canvassing boards of each individual county of this state. The Legislature has provided plaintiffs
15 with a remedy for challenging an action of the board it affects the outcome of an election. This
16 court should decline to insert itself into the ongoing recount process in King County and instead
17 allow King County to proceed without further delay so the citizens of this state may have closure
18 to the recount proceedings. The "no signature on file" ballots will be segregated and plaintiffs'
19 ability to file an election challenge will not be compromised. Plaintiffs have failed to meet the
20 requirements for a temporary restraining order and their relief should be denied and this case

1 should be dismissed.²

2 DATED this 17th day of December, 2004.

3 Respectfully submitted,

4 NORM MALENG
5 King County Prosecuting Attorney

6 By: 
7 JANINE JOLY, WSBA #27314
8 Senior Deputy Prosecuting Attorney
9 Attorneys for the King County Records,
10 Elections and Licensing Services Division
11 and the King County Canvassing Board

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22 ² In their complaint, plaintiffs also seek attorneys fees. Defendants were served with plaintiffs'
23 pleadings at 4:30 p.m. the day before the hearing. Defendants object to any award of attorney
fees to plaintiffs and will provide briefing on this issue if requested by the court.

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

WASHINGTON STATE REPUBLICAN PARTY,)
an unincorporated association; and)
CHRISTOPHER VANCE, a citizen of Washington)
State, and JANE MILHANS, a citizen of Pierce)
County.)

No. 04-2-14599-1

Plaintiffs,)

DECLARATION OF DEAN LOGAN

vs.)

KING COUNTY DIVISION OF RECORDS,)
ELECTIONS AND LICENSING SERVICES; and)
KING COUNTY CANVASSING BOARD.)

Defendants.)

I, Dean Logan, declare as follows:

1. I am the Director of the King County Records, Elections and Licensing Services Division ("Elections Division"). I am over eighteen years old and competent to testify. I have personal knowledge of the facts stated below.

2. Under the King County Charter, my position is equivalent to the position of County Auditor for purposes of administering elections. In this capacity, I am the *ex officio* supervisor of all primaries and elections, general or special, held in King County. I have held this position since August 2003. Prior to that time I was the State Elections Director for the

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1 Office of the Secretary of State and held that position for two years. I have worked in election
2 administration in Washington for the last fifteen years.

3 3. I have reviewed the pleadings submitted by plaintiffs in this lawsuit.

4 4. On Wednesday, December 15, 2004, pursuant to RCW 29A.60.210, the King
5 County Canvassing Board, by majority vote, directed me and my elections staff to recanvass
6 ballots that were coded by elections staff as "no signature on file." The King County Canvassing
7 Board did not vote on whether the ballots should be counted, only that they should be
8 recanvassed. I expect that the Canvassing Board will vote on whether or not any of the "no
9 signature on file" ballots should be counted pursuant to RCW 29A.60.210 at its meeting on
10 Monday, December 20.

11 5. After hard copies or electronic copies of the voters' registration signatures are
12 collected for the "no signature on file" ballots, there are a few steps involved in recanvassing the
13 ballots. Pursuant to RCW 29A.40.110(3), the two signatures must be compared to determine if
14 the signature on the absentee ballot is the "same as" the voter's signature in the registration files.
15 If the signatures are not the same, pursuant to state law the ballot should be rejected and not
16 counted. Elections staff will also be directed to check the database to ensure that the voter did
17 not vote another ballot, either at the polls or by absentee. If he/she did, pursuant to state law, the
18 absentee ballot should be rejected and not counted. The ballot will then be removed from the
19 return envelope and the security envelope and placed in the group of "no signature on file"
20 ballots that may later be counted if so directed by the Canvassing Board.

21 6. I am aware that similar to the action taken by the King County Canvassing Board,
22 other county canvassing boards around the state have made the discretionary decision to
23 recanvass ballots pursuant to RCW 29A.60.210. For instance, during the machine recount that

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1 was just conducted for the governor's race, it is my understanding that the Snohomish County
2 Canvassing Board made the decision to recanvass a certain number of ballots that were
3 inadvertently not counted in the original canvass of the election, but found during or prior to the
4 machine recount.

5 7. I declare under penalty of perjury under the laws of the state of Washington that
6 the foregoing in true and correct and of my own knowledge, and that I executed this declaration
7 at Seattle in the County of King, this 17th day of December, 2004.

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9 DEAN C. LOGAN

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

WASHINGTON STATE REPUBLICAN PARTY,)
an unincorporated association; and)
CHRISTOPHER VANCE, a citizen of Washington)
State, and JANE MILHANS, a citizen of Pierce)
County.)

Plaintiffs,)

vs.)

KING COUNTY DIVISION OF RECORDS,)
ELECTIONS AND LICENSING SERVICES; and)
KING COUNTY CANVASSING BOARD.)

Defendants.)

No. 04-2-14599-1

DECLARATION OF BILL
HUENNEKENS

I, Bill Huennekens, declare as follows:

1. I am the Superintendent of Elections for the King County Records, Elections and Licensing Services Division ("Elections Division"). I am over eighteen years old and competent to testify. I have personal knowledge of the facts stated below.

THE "NO SIGNATURE ON FILE" BALLOTS

2. Early in the summer of 2004, the Elections Division converted to a new voter registration system. When the system was converted, there were approximately 30,000 registration records where there was no image of the voter's signature in the Sequel Server

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1 database of our Election Management and Voter Registration System. This means that the table
2 in the database is empty and no signature appears in the Election Management and Voter
3 Registration System. An effort was made to find the signatures for these registration records in
4 the hard copy registration records. The majority of the signatures were found and scanned into
5 the new registration system.

6 3. Though the Elections Division could have continued to search its hard copy
7 registration records and archives of images from the old registration system, it was determined
8 that it would save time to instead ask the voters to provide a new signature for our files. In
9 August 2004, the Elections Division mailed letters to the approximately 1,146 voters for whom
10 the Sequel Server database of our Election Management and Voter Registration System still
11 showed that there was no image in the signature field. We asked the voters to assist us in
12 updating our records by signing the letter we sent them and returning it to the Elections Division.
13 Some voters did return the letter with their signature.

14 4. As absentee ballots were received by the Elections Division for the November 2,
15 2004 General Election, elections staff was directed to process the ballots according to the
16 Elections Division's procedures which are based on state law and rule. RCW 29A.40.110(3)
17 requires that the canvassing board, or its designated representatives verify that the voter's
18 signature on the returned absentee envelope be the "same as the signature of that voter in the
19 registration files of the county." Pursuant to this statute, one of the first steps to be taken by
20 elections staff in processing absentee ballots is to pull up the voter's registration record in our
21 electronic system to compare the signatures. If the signatures are the same, the ballots are to
22 continue through the process. As the attached Mail Ballot Report shows, 564,222 absentee
23 ballots were accepted as valid and counted for the November 2, 2004 General Election.

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1 5. In some cases when elections staff pulled up an absentee voter's electronic
2 registration file, there was no image of a signature on file. These absentee ballots were to then
3 be set aside and coded in the Election Management and Voter Registration System as "no
4 signature on file." This category included some ballots for voters who were sent a letter similar
5 to that described in paragraph 3 above in August 2004, but they did not respond with a signature.
6 This group also included ballots for voters who were not sent a letter in August 2004 because
7 the signature image in the Election Management and Voter Registration System was not blank,
8 but instead had an unreadable mark that was not a signature or was not the voter's signature.
9 This latter group of voters did not receive a letter in August 2004 because the Sequel Server
10 Database of the Election Management and Voter Registration System did not read their signature
11 as missing since some other mark was in the signature field.

12 6. The ballots described in paragraph 5 were then grouped with the ballots where the
13 signature was checked, but did not match ("signature mismatch"). Elections staff was then
14 directed to review each of these absentee ballots in the combined group a second time to ensure
15 that they belonged in the category of ballots for which they were coded ("no signature on file").

16 7. During the canvass of the November 2, 2004 General Election, it was the
17 Elections Division's practice to send letters to the voters whose ballots had been coded as
18 "signature mismatch" or "no signature on file." Depending on when the absentee ballot was
19 received by the Elections Division, the letter would have been sent in October or November
20 2004. The voter was asked to sign the letter and return it to the Elections Division so the
21 registration files could be updated and the signature on the ballot could be compared to the
22 signature on the letter to ensure that they were the same. The letter informed the voters that the
23 deadline for providing the signature was November 16, 2004, the day prior to certification. If the

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1 voter sent back the completed letter prior to the deadline, which many did, the ballot should have
2 been accepted and the votes counted as long as the signature matched and the ballot met other
3 legal requirements. If the voter did not return the completed letter, the ballots were not further
4 processed and the votes were therefore not reflected in the election returns.

5 8. In the attached Mail Ballot Report for the November 2, 2004 General Election,
6 the ballots coded as "no signature on file" were included in the category of "not voter's
7 signature." This category also included all ballots coded as "signature mismatch."

8 9. The above-described handling of the ballots coded as "signature mismatch" is in
9 compliance with our practices that are based on state law and rule. However, ballots that were
10 coded as "no signature on file" and that were processed only to the point described above, were
11 not properly canvassed because our practices require additional canvassing steps to determine if
12 the ballots should or should not have been counted.

13 10. On Sunday, December 12, 2004, I learned that some ballots coded as "no
14 signature on file" had only been canvassed to the point described in paragraph 9 above. The
15 Elections Division failed to follow its practices and complete the additional steps required for
16 canvassing these ballots.

17 11. The next step that *should* have been taken with respect to the "no signature on
18 file" ballots is that elections staff should have searched the King County registration records that
19 are maintained in paper form and the archive of images from the previous electronic registration
20 system, and the registration records maintained by the Secretary of State's Office. If a voter's
21 signature was found in any of these sets of registration records, the signature should have been
22 compared to the signature on the absentee ballot envelope. If the signatures matched, the votes
23

DECLARATION OF BILL
HUENNEKENS - 4

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1 on the ballot should have been counted assuming the ballot was otherwise legally valid (i.e., the
2 voter did not vote another ballot).

3 12. The Elections Division's records confirm that at least 423 of the voters whose
4 ballots are included in the group of "no signature on file" ballots, were sent letters asking for
5 signatures as described in paragraph 7 above, during the canvass of the November 2, 2004
6 General Election. These voters apparently did not return the letter with the requested signature.
7 Had they, their ballot should have been further canvassed and the "no signature on file" code
8 should have been removed. Though it is likely that additional voters in this group were also sent
9 a letter during the canvass, elections records regarding the additional letters do not definitively
10 answer this question.

11 13. Additionally, of the "no signature on file" ballot voters, elections records indicate
12 that 101 were sent a letter as described in paragraph 3 above in August 2004. These 101 voters
13 apparently did not return the letter with an updated signature. Had they, the signature should
14 have been scanned into the electronic registration system and elections staff should have seen it
15 when they canvassed the ballot.

16 14. Currently, elections staff is searching the electronic and paper records described
17 in paragraph 11 for signatures of the voters whose ballots are in the group of "no signature on
18 file" ballots.

19 BALLOT SECURITY

20 15. As with all absentee ballots, the Elections Division's practice since the "no
21 signature on file" ballots at issue were received by the Elections Division from the post office or
22 at the Elections Office or a polling place on Election Day, has been to securely maintain the
23 ballots. When they were not being worked on, our practice is to secure the ballots in a vault or

1 cage at one of the Elections Division's facilities. Pursuant to the Elections Division's practice, if
2 the ballots are outside the vault being worked on, at least two staff members must be present at
3 all times. Similarly, pursuant to Elections Division practice, if the ballots are transferred from
4 one location to another, no less than two staff members should accompany the ballots. Further,
5 the ballots remain in sealed envelopes with a signature and oath.

6 16. I have reviewed the declaration submitted in this lawsuit by Kenneth Seal. At
7 paragraph 3 of Mr. Seal's declaration, he states that he observed mail trays containing ballots in
8 envelopes being taken out of the vault at the Mail Ballot Operation Site ("MBOS") on December
9 13, 2004. As Mr. Seal acknowledges by testifying to his own presence there, observers were
10 present when these ballots were removed from the vault. The ballots that were removed were
11 those ballots that had been rejected due to "signature mismatch" and "no signature on file." In
12 the presence of observers, a sheriff's deputy, and other elections staff, I went through these
13 ballots and separated the "signature mismatch" ballots from the "no signature on file" ballots.
14 The "signature mismatch" ballots were placed back in the vault at MBOS. Two members of the
15 elections staff counted the "no signature on file" ballots into stacks of fifty and placed rubber
16 bands around the stacks. The ballots were then transferred to the vault at the King County
17 Administration Building according to procedure, by two elections staff members. Mr. Seal is
18 incorrect in his declaration where he asserts that the "normal procedure" for transferring ballots
19 from one facility to another involves a sheriff's deputy. As stated above, the practice is for the
20 ballots to be accompanied by no less than two elections staff members.

21 17. I have reviewed the declaration submitted in this lawsuit by Dan Brady. At
22 paragraph 8 of Mr. Brady's declaration, he states that rejected ballots were not placed in sealed
23 containers, but were kept in open trays. This is correct, but as stated above, if the ballots were

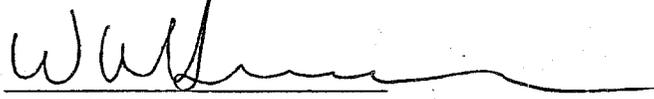
DECLARATION OF BILL
HUENNEKENS - 6

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1 not being worked on in the presence of at least two elections staff members, it is our practice that
 2 the ballots would be kept in the vault at one of Elections Division's facilities. However, as Mr.
 3 Brady states in his declaration, I did tell him and it is true that the ballots at issue were in a group
 4 of ballots that were removed from the cage area because they were being used to prepare a list
 5 that was requested pursuant to public disclosure. The ballots were kept outside the cage
 6 overnight. However, a sheriff's deputy was on duty guarding the security of the ballots at all
 7 times until they were transferred back to the cage.

8 18. As stated above, there has been a sheriff's deputy at MBOS during operating
 9 hours since canvassing for the November 2, 2004 General Election began. Additionally, since
 10 November 24, there has been at least one sheriff's deputy present at the facility seven days a
 11 week, 24 hours a day. I am aware of no requirement in state law or rule that mandates the
 12 presence of law enforcement officers during the canvass or recount of an election. However, in
 13 King County, we take this extra step to ensure the security of all ballots, those that have been
 14 counted and those that have been rejected.

15 19. I declare under penalty of perjury under the laws of the state of Washington that
 16 the foregoing in true and correct and of my own knowledge, and that I executed this declaration
 17 at Seattle in the County of King, this 17th day of December, 2004.

18 
 19 BILL HUENNEKENS

20
 21
 22
 23
 DECLARATION OF BILL
 HUENNEKENS - 7

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EXHIBIT A

KING COUNTY CANVASSING BOARD

November 2, 2004 - GENERAL ELECTION

Mail Ballot Report

1. Total number of ballots issued	646,537
2. Total number of ballots returned	568,333
3. Total number accepted as valid and counted	564,222
4. Total number of ballots rejected:	4,111
*PRIOR TO VALIDATION	
a. Postmarked after election date	1,700
b. No signature on envelope	502
c. Not voter's signature	1,561
d. Mailed marked voter "deceased" or "moved"	56
*AFTER VALIDATION	
e. Wrong Election	89
f. Returned multiple ballots	203
5. # of Ballots returned by USPS as Undeliverable	6,959

Percentage of ballots returned:	87.90%
Percentage of valid ballots returned:	87.27%
Percentage returned undeliverable	1.08%
Percentage of ballots received "Too Late"	0.30%

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

WASHINGTON STATE REPUBLICAN PARTY,)
an unincorporated association; and)
CHRISTOPHER VANCE, a citizen of Washington)
State, and JANE MILHANS, a citizen of Pierce)
County.)

No. 04-2-14599-1

Plaintiffs,)

DECLARATION OF JANINE JOLY

vs.)

KING COUNTY DIVISION OF RECORDS,)
ELECTIONS AND LICENSING SERVICES; and)
KING COUNTY CANVASSING BOARD.)

Defendants.)

I, Janine Joly, declare as follows:

1. I am a Senior Deputy Prosecuting Attorney with the King County Prosecuting Attorney's Office. I am assigned to represent the Defendants in this matter. I have personal knowledge of the facts stated below.

2. Attached to this declaration as Exhibit A is a true and correct copy of the response brief served on me and filed by attorneys for the Washington State Secretary of State's Office in *McDonald et al., v. Reed, et al.*, Washington State Supreme Court Docket No. 76321-6.

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3. Attached to this declaration as Exhibit B is a true and correct copy of the Washington State Supreme Court's Opinion Order in *McDonald, et al., v. Reed, et al.*, No. 76321-6, issued this past Tuesday, December 14, 2004.

4. I declare under penalty of perjury under the laws of the state of Washington that the foregoing in true and correct and of my own knowledge, and that I executed this declaration at Seattle in the County of King, this 17th day of December, 2004.

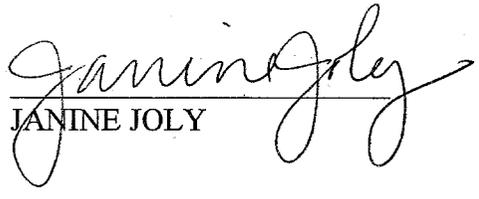

JANINE JOLY

EXHIBIT A

COPY RECEIVED
PROSECUTOR ATTORNEY

04 DEC -7 AM 10:33

No. 76321-6 MAIL DIVISION

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID T. McDONALD, et al.,

Petitioners,

v.

SECRETARY OF STATE SAM REED, et al.,

Respondents

**WASHINGTON SECRETARY OF STATE'S
RESPONSE TO
PETITIONERS' MOTION FOR
EMERGENCY PARTIAL RELIEF**

Thomas F. Ahearne, WSBA No. 14844
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Attorneys for Respondent Secretary of State Sam Reed

**Since the current Attorney General is one of the candidates in the election being recounted, the above private counsel (instead of the Attorney General's office) is representing the Secretary of State in this matter.*

COPY

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I. SUMMARY

Petitioners request “emergency partial relief” that would in essence order the Secretary of State to require the 39 County Auditors conducting the upcoming hand recount to (1) re-examine every ballot accepted and rejected in earlier counts, and (2) allow each party to have an observer see each ballot as it is being counted and assert objections while each such ballot is being counted.

This is the Washington Secretary of State’s Response.

1. New or different rules cannot now be issued to govern the November 2 election.

As Part IV.A of this Response explains, petitioners fail to establish that Washington law grants the Secretary of State the legal authority to require the 39 counties to do what petitioners demand.

Washington law authorizes the Secretary of State to promulgate statewide rules before an election is held to facilitate the County Auditors’ conduct of that election. In this case, the Secretary of State did that. And as the *Bush v. Gore* case cited by petitioners makes clear, a State’s pre-election rules cannot be changed or supplemented with new rules after the election occurs. This point is fatal to petitioners’ demand that the Secretary of State (or this Court) now create new rules to govern the hand recount of last month’s November 2 election.

After an election is held, Washington law provides for each county’s canvassing board to examine that county’s ballots, tabulate that county’s votes, and certify that county’s results. The Secretary of State

cannot usurp or overrule the county canvassing board's decisions with new post-election mandates.

2. A "recount" is not a re-examination of every ballot.

As Part IV.B of this Response explains, petitioners' demand for a blanket re-examination of all ballots during the upcoming recount does not have a valid *statutory* basis.

Washington's election statute provides that the examination of ballots and tabulation of votes is part of the "canvassing" of an election.

The upcoming hand recount, however, is not a recanvass.

It's a recount.

And the Washington statute's definition of a "recount" expressly provides only for the retabulation of ballots – not a re-examination of them. Washington's election statute simply is not the same as the statutes of other States noted in petitioners' brief which provide for a re-examination or recanvass of the ballots instead of a recount.

Nor is a blanket re-examination of every ballot required as a *constitutional* matter. Despite petitioners' implications to the contrary, Washington had uniform statewide standards in place for the examination of ballots as part of the county canvassing boards' canvassing of the November 2 election. For example, petitioners' own motion acknowledges that Washington law provided the following "match" and "same as" requirements for signatures:

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."
RCW 29A.40.110.

Petitioners' Motion at 17 n.3 (footnote runs on to p. 18) (emphasis added).

Petitioners' real complaint is that they disagree with the decisions of some county canvassing boards under those statewide standards. For example, they complain that some counties effectively employed a laxer signature verification system than others when applying the statewide requirement that the signature on a voter's ballot must "match" or be "the same as" the voter's signature on file.

To the extent petitioners timely brought forward evidence of an unlawful inconsistency or error that resulted in a valid ballot not being counted, RCW 29A.60.210 in the Washington elections statute provides a safety valve for each county's canvassing board to correct such a timely raised and identified error. That limited safety valve for a particularly identified error, however, is not a floodgate requiring the wholesale recanvass of all ballots to see if perhaps any errors with respect to any of the ballots might possibly have occurred. There simply is no constitutional or statutory bases for petitioners' demand that the "recount" prescribed by the Washington legislature now be expanded to include, for example, a wholesale re-examination of signature verification issues previously submitted to and ruled upon by the county canvassing boards.

3. The elections statute does not grant observers the right assert objections during their observation.

The Washington elections statute allows witnesses in a recount to "observe the ballots and the process of tabulating the votes".

RCW 29A.64.041(1). Like the Washington Open Public Meetings Act, however, that statutory right does not include a right to also “be heard” or otherwise participate in the process being observed. As Part IV.C of this Response explains, petitioners’ Motion does not provide any valid legal authority for this Court to now re-write the Washington elections statute to add such privileges beyond the statutory right to observe a recount as prescribed by the legislature.

4. Petitioners’ motion must be denied.

Petitioners’ own quotation from *Bush v. Gore* accurately acknowledges that “the right to vote as the legislature has prescribed is fundamental.” Petitioners’ Motion at 10 (emphasis added). The elections law treatise petitioners cite at page 14 of their Motion further explains with respect to recounts that “The right to a recount ... did not exist at common law, and the grant of the right lies within the discretion of the legislature” (emphasis added).

In this case, our legislature has prescribed those rights in Title 29A RCW. The provisions enacted by the Washington legislature provide for a “recount” (not a “re canvass”) of the ballots, and provide for the political parties’ witnesses to observe (not lodge objections to) the ballots as they are being recounted. Neither the Washington elections statute nor the constitutional arguments petitioners raise justify petitioners’ demand that this Court issue an Order that effectively re-writes the Washington elections statute to provide for more than what the legislature has prescribed.

The Washington Secretary of State accordingly requests that this Court deny the petitioners' motion, and allow the upcoming hand recount to promptly proceed without litigation uncertainty or delays so the People of our State can have a closure to this statutory recount process.

II. ISSUES ADDRESSED

The "Summary Of Analysis" section of petitioners' motion specifies the emergency relief petitioners seek – namely:

- (1) "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", and that this Court's Order include "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, [and] standards for evaluating previously-rejected signatures according to the more liberal standards applied in most counties"; and
- (2) "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", with "standards that allow party representatives to meaningfully witness the hand recount, by observing all actual ballots being counted."

Petitioners' Motion at pages 7 – 8.

As the rest of this Response explains, the legal authority petitioners invoke does not support the above relief they request.

III. STATEMENT OF THE CASE

A. Washington Law In Place Before The November 2, 2004 Election.

1. Statewide Standards are Set Forth in the Washington Elections Statute and Washington Administrative Code.

As Part IV of this Response sets forth in more detail, the Washington elections statute (Title 29A RCW) prescribes statewide standards and rules with respect to the conduct of elections in our State.

The Washington elections statute also provides for the Secretary of State to make “reasonable rules in accordance with chapter 34.05 RCW [the Administrative Procedures Act] ... to effectuate any provision of this title and to facilitate the execution of its provisions in an orderly, timely, and uniform manner”. RCW 29A.04.610, .611. Pursuant to that authority, the Secretary of State has promulgated a large volume of statewide standards and rules concerning the conduct of elections in our State (see Title 434 WAC). As Part IV of this Response also explains, the WAC provisions at issue in this case were so promulgated before the November 2, 2004 election.

The recount guidelines that the petitioners’ motion refers to as “final rules” issued or adopted by the Secretary of State, however, were not rules promulgated, issued, or adopted as the petitioners’ suggest. Indeed, those guidelines expressly stated that they were not new law, that they did not in any way change the statewide standards established before

the election, and that they were merely a recitation of current law to assist the County Auditors.¹

2. Election “Canvassing” and County Canvassing Boards.

The Washington elections statute defines “canvassing” as follows:

“Canvassing” means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election.

RCW 29A.04.013.

The Washington elections statute assigns to county canvassing boards the duties of so canvassing election results and, in the event of a recount, retabulating ballots and producing amended election returns based on that retabulation. RCW 29A.60.140, 29A.64.041. Each county’s canvassing board consists of the following three persons (or their designees): the County Auditor, the County Prosecuting Attorney, and the chair of the County’s legislative body. RCW 29A.60.140.

A court can compel a canvassing board to make a canvass of the returns or conduct a recount, but can go no further in directing how the canvassing board shall act as long as it proceeds according to the directions of the statute. *Morris v. Board of County Commissioners of Asotin County*, 195 Wash. 173, 177-178, 80 P.2d 414 (1938) (“The court is without power to inquire into the [canvassing] boards’ manner in arriving at the result”).

¹ Declaration Of Jeffery Richard, Exhibit A.

Although the Secretary of State certifies the results of the election to the Governor, Legislature, and the public (RCW 29A.60.250), the Secretary of State does not intervene, approve, or disapprove the decisions of the county canvassing boards.

3. Election "Recounts".

The Washington elections statute defines a "recount" as follows:

"Recount" means the process of retabulating ballots and producing amended election returns based on that retabulation, even if the vote totals have not changed.

RCW 29A.04.139.

Since "recount" is prescribed by statute to be narrower than "canvassing", the recounts conducted in prior years under the Washington elections statute have not entailed a re-canvassing of the election.² Thus, as the declaration submissions filed with this Response explain, the historical recount practice under our State's elections statute has been to not conduct canvassing activities such as a wholesale re-examination of ballot signatures previously submitted to and ruled upon by the county canvassing boards.³

B. The November 2, 2004 Election.

The general election in our State was held on November 2, 2004. The Secretary of State certified the results of that election on November 17.

² Declaration Of Jeffery Richard, Exhibit B.

³ Declaration Of Jeffery Richard, Exhibit B.

The margin separating the two top candidates for Governor triggered an automatic machine recount under chapter 29A.64 RCW, and the Secretary of State certified the results of that machine recount on November 30.

On December 3 one of the petitioners in this action requested a hand recount, and pursuant to the schedule that the Secretary of State had been previously announced to the political parties and all County Auditors, the Secretary of State issued the recount directive on December 6.⁴

The Secretary of State advised the County Auditors of the petitioners' Motion and the initial indication in the email this Court sent with its December 3 briefing Order that indicated a hearing might be held on petitioners' Motion December 8 or 9, and requested that the counties not commence the actual process of recounting the ballots until December 9 (the end of the 3-day delay allowed by statute for the counties to commence the recount). As of the time this Response is being typed, the Secretary of State has been informed by some counties that they will be commencing on December 8, and others that they will delay until December 9.⁵

⁴ Declaration Of Jeffery Richard, Exhibit A.

⁵ Declaration Of Jeffery Richard, Exhibit A.

IV. LEGAL DISCUSSION

A. **Petitioners' Claims Must Be Dismissed Because New Or Different Rules Cannot Now Be Issued To Govern The November 2 Election.**

Washington law authorizes the Secretary of State to promulgate statewide rules before an election is held to facilitate the County Auditors' conduct of that election. See *O'Connell v. Meyers*, 51 Wn.2d 454, 460, 319 P.2d 828 (1957) (Secretary of State's statutory duties must be performed prior to the election).

And in this case, that is precisely what the Secretary of State did. For example, promulgating WAC provisions requiring the signature on a provisional ballot to "match" the signature on file with the County Auditor.⁶ Such rules promulgated in accordance with the Washington Administrative Procedures Act supplemented the election requirements prescribed by the legislature in Title 29A RCW.

The *Bush v. Gore* case petitioners invoke for their constitutional argument confirms that a State Supreme Court cannot now change those rules or impose new rules to govern the counting of the previously cast November 2 ballots. As Chief Justice Rehnquist's opinion in support of the Court's ruling explained when discussing the new "undervote" counting practice which the Florida Supreme Court had added to supplement the Florida Secretary of State's pre-election practices:

For the [Florida Supreme] court to step away from this established practice, prescribed by the Secretary, the state official charged by the legislature with "responsibility to ...

⁶ WAC 434-253-047 (as amended by emergency rule WRS 04-18-028, effective August 24, 2004).

obtain and maintain uniformity in the application, operation, and interpretation of the election laws," ... was to depart from the legislative scheme.

531 U.S. at 120.

Petitioners' demand that this Court now create new or different rules to govern the tabulation of last November's election similarly depart improperly from the Washington election statute's legislative scheme.

Indeed, the Court's injection of such new rules at this point would not only depart from the Washington election statute's legislative scheme – it would violate it. That is because Washington's election statute provides that after the ballots are cast in an election, it is the county canvassing board's role to examine the ballots and tabulate the votes under the law existing at the time those ballots were cast. See Part III.A.2 of this Response above.

If someone believes that there is an inconsistency or discrepancy in the way the county canvassing board is tabulating any particular ballot in the performance of that function, that person must timely bring the alleged inconsistency or discrepancy to the county canvassing board's attention so it can, pursuant to the safety valve provided by RCW 29A.60.210, correct any error the canvassing board finds with respect to that particular ballot before the county canvassing board certifies the results of its tabulation of its county's election results. Under our State's elections laws, that person cannot instead run to this Court demanding that every county canvassing

board undertake a wholesale recanvassing of all ballots cast in the election.⁷

B. Petitioners' Claims Must Be Dismissed Because A "Recount" Is Not A Re-examination Of Every Ballot.

1. Petitioners have no statutory basis for their wholesale re-evaluation demand.

The legal authority upon which petitioners rely confirms that the right to vote as the legislature has prescribed is fundamental,⁸ and that since the right to a recount did not exist at common law, the grant of the right lies within the discretion of the legislature.⁹ In short, the upcoming hand recount at issue in this case is purely statutory. See also, e.g., *State v. Superior Court of King County*, 113 Wn. 54, 57, 193 p. 226 (1920) (right to vote is constitutional right, but manner in which franchise is to be exercised is purely statutory); *Quigley v. Phelps*, 74 Wash. 73, 85, 132 P. 738 (1913) (in the absence of statutory authority, where election officers have performed their duty in counting the ballots and have certified their return indicating the result of the election, they are without authority thereafter to do any act that would operate to change the result originally announced by them).

⁷ Respondent further notes that petitioners' claim that this Court has proper mandamus jurisdiction in this case (Petitioners' Motion at 9 & n.2) is misplaced, for the mandamus "order" petitioners demand is not ministerial in nature.

⁸ Petitioners' Motion at 10 (quoting from *Bush v. Gore*, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), that "the right to vote as the legislature has prescribed is fundamental") (emphasis added).

⁹ Petitioners' Motion at 14 cites §289 of the CJS Elections treatise. That §289 confirms that "The right to a recount and contest of the ballots cast at an election did not exist at common law, and the grant of the right lies within the discretion of the legislature." CJS Elections, §289 (emphasis added).

The statutory basis for recounts is fatal to petitioners' demand that the upcoming hand recount include a re-examination of every ballot – for the Washington election statute provides that a “recount” is merely a re-tabulation of the ballots, not a re-evaluation of them.

Our election statute defines “canvassing” relatively broadly to encompass both the examination of ballots *and* the tabulation of their votes:

“Canvassing” means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election.

RCW 29A.04.013.

In contrast, our election statute defines a “recount” much more narrowly, specifying that a recount is merely the retabulation of ballots:

“Recount” means the process of retabulating ballots and producing amended election returns based on that retabulation, even if the vote totals have not changed.

RCW 29A.04.139.

The fact that “canvassing” and “counting” are not the same is further recognized throughout the Washington elections statute. E.g., RCW 29A.04.019 (describing county counting centers as the facility designated to “*count and canvass*” ballots); RCW 29A.64.070 (“After the original *count, canvass*, and certification of results, the votes cast in any single precinct may not be *recounted* and their results recertified more than twice”).

Washington's election statute simply is not the same as the statutes of other States noted in petitioners' brief which provide for a re canvass or re-evaluation of the ballots instead of a just a recount. For example:

- ◆ the West Virginia recount statute cited by petitioners states that "the ballots and ballot cards shall be reexamined during such recount";¹⁰
- ◆ the Illinois recount statute they cite requires not just a retabulation, but also that ballots previously marked as rejected "shall be examined to determine the propriety of such labels";¹¹ and
- ◆ the Wisconsin recount statute they cite requires not just a retabulation of votes, but that "In addition, the board of canvassers ... shall examine the ballots marked 'rejected', 'defective' and 'objected to' to determine the propriety of such labels".¹²

Petitioners' invocation of out-of-State cases to argue that Washington's recount statute should be "liberally" construed simply cannot change the fundamental fact that the Washington recount statute does not include a re-examination of ballots as part of a recount, and this Court cannot re-write the Washington statute to add the ballot re-examination provisions that petitioners like in other State's statutes.¹³

¹⁰ *W. Va. Code §3-4A-28(3) (2004), as cited at page 15 of Petitioners' Motion.*

¹¹ *Ill. Comp Stat. §5/24A-15/1 (2004), as cited at pages 14-15 of Petitioners' Motion.*

¹² *Wis. Stat. §5.90 (2004), cited at page 15 of Petitioners' Motion.*

¹³ *Petitioners' cases from other States are also inapplicable to this situation for other reasons as well.*

For example, petitioners cite Braxton v. Holmes County Election Canvassing Board, 870 So.2d 958 (Fla. Dist. Ct. App. 2004), for the proposition that reconsideration of ballots rejected by the canvassing board because of signature issues is permitted in a recount. However, Braxton was not a recount case. It was an election challenge case, and under Florida law, "rejection of a number of legal votes sufficient to change or place in doubt the result of the election, is grounds for contesting the results of an election. Fla. Stat. Section 102.168(3)(c) (2000).

As another example, petitioners cite to two out of state cases for their assertion that recount procedures must be construed liberally. But neither case pertained to the scope

2. **Petitioners' *constitutional* argument does not provide a basis for their wholesale re-evaluation demand.**

Petitioners allege they have identified what they believe are instances of inconsistencies, discrepancies, and errors, and then argue those inconsistencies, discrepancies, and errors prove there is not a uniform standard for the evaluation of ballots in Washington. Invoking the equal protection theme of *Bush v. Gore*, petitioners argue that a blanket re-examination of every ballot is therefore required as a *constitutional* matter because the federal and Washington State constitutions require a uniform standard for the evaluation of ballots.

As an initial matter, this Respondent notes that petitioners' citation of *Brower v. State*, 137 Wn.2d 44, 969 P.2d 45 (1998), at page 11 of their brief does not support their suggestion that the Washington Constitution grants greater equal protection rights in this context than the federal constitution's equal protection rights recognized in *Bush v. Gore*. And as explained below, petitioners' constitutional argument under that case's equal protection ruling fails.

Petitioners' essential equal protection premise is that Washington did not have uniform statewide standards for the examination of ballots as part of the county canvassing boards' canvassing of the November 2 election. But that premise is not accurate.

of counting or canvassing under which a recount would operate. State ex rel. Thomas v. District Court, 154 P.2d 980, 981 (Mont. 1945), pertained simply to whether the court should grant or deny the application for recount. And Dowden v. Benham, 234 Ind. 103 (1955), was an election contest challenging the results of an election.

For example, the Washington election statute provided a single, uniform statewide standard for accepting the signature on an absentee ballot – i.e., the ballot signature must be the “same as” the one on file:

Before opening a returned absentee ballot, the canvassing board or its designated representatives ... shall verify that the voter’s signature on the return envelop is the same as the signature of that voter in the registration files of the county.

RCW 29A.40.110.

And the Washington Administrative Code provided a single, uniform statewide standard for accepting the signature on a provisional ballot – i.e., the ballot signature must “match” the one on file:

A provisional ballot cannot be counted unless the voter’s ... signature ... matches a voter registration record.

WAC 434-253-047 (as amended by emergency rule WRS 04-18-028, effective August 24, 2004).

Petitioners argue that the “match” requirement for provisional ballot signatures could not have constituted a uniform standard because different counties had different rejection rates under that “match” standard. And petitioners suggest a similar argument against the “same as” requirement for absentee ballot signatures based on different counties’ differing rejection rates.

But different county canvassing boards’ reaching different conclusions does not prove that the Washington elections law provided the canvassing boards with no statewide standard. It simply means they reached different conclusions. And despite petitioners’ complaints about King County employing a signature verification system that they assert is

not as lax other counties, petitioners do not identify instances where King County's signature verification system caused a valid ballot to be rejected.

(a) *Uniform rule does not require identical results.*

Having a sufficiently uniform rule to comply with constitutional equal protection concerns does not require identical results.

For example, the fact that a trial court in one county imposes a different sentence under the Washington Sentencing Reform Act than the sentence imposed by the trial court in another county does not mean that Washington lacks a uniform standard compliant with constitutional equal protection concerns. See *State v. Oksotaruk*, 70 Wn. App. 768, 776-77, 856 P.2d 1099 (1993) (there is no constitutional requirement that defendants with the exact same "offender score" convicted under similar circumstances must also receive the same sentence, for sentencing disparities between similar crimes do not implicate equal protection).

The "accident of geography" cases in the citizenship/naturalization context provides another example of how different results do not establish the lack of a uniform rule compliant with equal protection. Although the law requires a uniform federal standard for naturalization must apply with equal force in every state, that uniformity rule only requires the same general standard be applied – it does not require the same result. *Nehme v. Immigration and Naturalization Service*, 252 F.3d 415, 429 (5th Cir. 2001). Therefore, a person living in one State may be entitled to naturalization whereas that same person living in another State would not be entitled to naturalization simply because that accident of geography –

for “the Constitution simply requires Congress to enact rules of naturalization that apply uniformly throughout the United States, even though those uniform federal rules may produce results that differ by state.” 252 F.3d at 429. See also *In re Lee Wee*, 143 F. Supp. 736, 737-38 (S.D. Cal. 1956) (discussing the “good moral character” requirement for citizenship, and holding that the law was uniform even though a person who lived in a city where gambling was permitted might be entitled to naturalization, whereas in another city in the same State, gambling could result in a criminal conviction and a denial of citizenship).

In short, petitioners’ contention that they believe different counties arrive at different results in similar situations does not refute the dispositive fact that Title 29A RCW and Title 434 WAC provide sufficiently uniform elections standards as far as the equal protection clause is concerned.

(b) *Petitioners’ signature rejection rate argument does not implicate equal protection clause.*

Petitioners’ complaint that different counties have a different verification system for “matching” signatures does not rise to an equal protection violation under petitioners’ own case precedent of *Bush v. Gore* – for in that case the U.S. Supreme Court specifically noted that its ruling was not addressing the question of “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” 531 U.S. at 109. See also 531 U.S. at 147 (Justice Breyer’s discussion noting that punch-card systems failed to read a vote on the

ballot 1.53% of the time, while optical scan systems failed to read a vote on the ballot only 0.3% of the time – and noting those differing results did not rise to the level of an equal protection violation even though “the ballots of voters in counties that use punchcard systems are more likely to be disqualified than those in counties using optical-scanning systems”).

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.

Much like the petitioners in this case, the plaintiffs in the Gray Davis Recall case complained that different counties had different systems which resulted in some counties rejecting far more votes than other counties. Specifically, plaintiffs noted that California counties using a punch-card system rejected 2.23% of ballots cast, which was twice the rejection rate experienced by areas using other systems. *Southwest Voter Registration Education Project v Secretary of State Shelley*, 344 F.3d 914, 917 (9th Cir. 2003).

Plaintiffs claimed an equal protection violation because voters in counties that used one system (punch-cards) had a clearly lower chance of having their votes counted than voters in counties that used other systems. *Id.* But the Ninth Circuit explained that *Bush v. Gore* did not prohibit local entities from developing different systems for implementing elections, and thus rejected plaintiffs’ demand that the court intercede on equal protection grounds. *Id.* Cf. *Graham v. Reid*, 779 N.E.2d 391, 395,

334 Ill. App.3d 1017 (2002) (ballots in one precinct not being counted because they were missing did not violate the equal protection rights of that precinct's voters).

The same conclusion applies here. Even if petitioners established that the difference in rejection rates they complain about was caused by Washington counties' using different systems for verifying a signature "match" (instead of being caused by other likely variables¹⁴), such a difference in rejection rates due to the local jurisdictions' developing different systems for signature verification still would not implicate the equal protection ruling in *Bush v. Gore*.

(c) ***Washington law holds that different results do not implicate equal protection absent an improper intent to discriminate***

Washington law further confirms that even if petitioners had proven that the counties having different signature verification systems caused the different rejection rates they complain about, that different result would not rise to the level of an equal protection violation unless petitioners also proved some improper intent to discriminate between the "accepted" and "rejected" voters.

For example, the taxpayers in *Carkonen v. Williams*, 76 Wn.2d 617, 458 P.2d 280 (1969), alleged that the cyclical property tax assessment system used by King and Snohomish counties lacked uniformity within and between the two counties, thereby giving rise to unequal and

¹⁴ Such other variables are noted at Declaration Of Jeffery Richard, Exhibit C.

nonuniform tax exactions in violation of the equal protection clauses of the federal and state constitutions.

The unequal and nonuniform result inherent in such cyclical systems was not disputable. This Court nonetheless rejected the taxpayers' equal protection claim, concluding that "state courts which have considered cyclical revaluation programs have generally found them to be compatible with constitutional equal protection and uniformity provisions, provided that they be carried out systematically and without intentional discrimination." 76 Wn.2d at 633.

As this Court further explained that "the assessors involved were honestly endeavoring to pursue a systematic nondiscriminatory cyclical approach to revaluation", and that the "sheer physical problem of annually inspecting the units of property involved, coupled with the staff and budgetary allocations required to accomplish such, lend wisdom to the legislative act authorizing and directing a cyclical approach, and virtually lays to rest any viable claim to intentional discrimination inhering in the system." 76 Wn.2d at 632.

Here, petitioners do not even allege – never mind establish – any such intentional discrimination inhering in the differing signature verification systems they complain about. Their equal protection argument accordingly does not justify the extraordinary Court intervention that petitioners demand.

(d) *Canvassing boards can address particular, timely raised errors*

To the extent petitioners timely brought forward evidence of an unlawful inconsistency or error with respect to any particular ballot, the Washington elections statute provided a safety valve for the appropriate county's canvassing board to correct such an error, expressly providing that:

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. 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.

RCA 29A.60.210.

Especially in light of that additional safeguard, petitioners cannot in this case establish the constitutional basis they claim for this Court to step in and rewrite the Washington elections statute to change its provision for a "recount" to instead provide for a wholesale "reevaluation" and "recanvassing" of all ballots instead.

C. Petitioners' Claims Must Be Dismissed Because Washington Law Does Not Allow Each Party's Observers To Lodge Objections During Their Observation Of The Ballots And Tabulation.

The Washington elections statute allows witnesses in a recount to "observe the ballots and the process of tabulating the votes".
RCW 29A.64.041(1).

Like the Washington Open Public Meetings Act, however, that statutory right does not also include a right to "be heard" or participate in

the process being observed. See chapter 42.30 RCW (the Open Public Meetings Act).¹⁵

The petitioners, moreover, have not identified any county that plans to refuse to allow the petitioners' observers to communicate with or "be heard" by the county's supervisory personnel involved in the upcoming recount.

In short, petitioners' motion does not provide any statutory or constitutional authority for this Court to now re-write the Washington elections statute to add provisions or privileges beyond the parties' statutory right to observe as prescribed in RCW 29A.64.041.

V. CONCLUSION

The right to a recount is prescribed by the statute creating that right. And Washington's statute limits recounts to a recount – not the reexamination or re canvassing of all ballots as petitioners demand.

Washington's recount statute is thus narrower than the recount statutes of other States. And as the Washington legislature has confirmed, our recount statute's more limited process is designed to strike what the legislature determined to be the appropriate balance for a proper and expeditious closure to close election contests:

¹⁵ *The Open Public Meetings Act does not guarantee the right of the public to participate at the meeting attended – it only guarantees that the public can attend. See 4 E. McQuillin, The Law of Municipal Corporations §13.07 (3rd Ed. 2002); Lysogorski v. Charter Township of Bridgeport, 662 N.W.2d 108, 110, 256 Mich.App. 297 (2003) ("The public's right to attend a meeting of a public body is limited to the right to observe and hear the proceedings so that they may be informed of the manner in which decisions affecting them as citizens are made").*

The legislature finds that it is in the public interest to determine the winner of close contests for elective offices as expeditiously and as accurately as possible. It is the purpose of this act to provide procedures which promote the prompt and accurate recounting of votes for elective offices and which provide closure to the recount process.

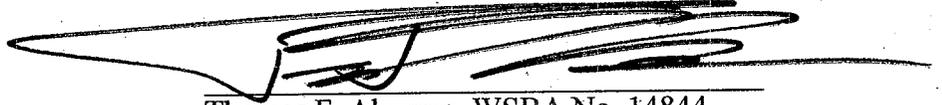
Laws of 1991, chapter 90, §1.

The provisions accordingly enacted by the Washington legislature provide for a "recount" (not a "recanvass" or "reexamination") of the ballots, and provide for the political parties' witnesses to observe (not lodge objections to) the ballots as they are being recounted. Neither the Washington elections statute nor the *Bush v. Gore* equal protection argument petitioners raise justify petitioners' demand that this Court issue an Order that effectively re-writes the Washington elections statute to provide for something other than what the Washington legislature has deliberately prescribed.

The Washington Secretary of State accordingly requests that this Court deny petitioners' motion, dismiss petitioners' suit, and allow the upcoming hand recount to promptly proceed without litigation uncertainties and delays so the People of our State can have closure to this recount process.

RESPECTFULLY SUBMITTED this 7th day of December, 2004.

Foster Pepper & Shefelman PLLC
SPECIAL ASSISTANT ATTORNEYS GENERAL*

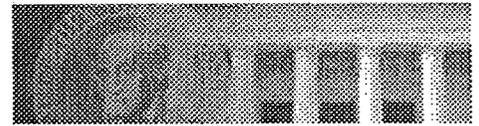


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Hugh D. Spitzer, WSBA No. 5827
Marco J. Magnano, WSBA No. 1293

Attorneys for Respondent Secretary of State
Sam Reed

**Since the current Attorney General is one of the candidates in the election being recounted, the above private counsel (instead of the Attorney General's office) is representing the Secretary of State in this matter*

EXHIBIT B



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THE SUPREME COURT OF WASHINGTON

DAVID T. McDONALD and RONALD)
TARO SUYEMATSU; SANFORD)
SIDELL; BRENT CAMPBELL; and) NO. 7 6 3 2 1 - 6
HILLARY DENDY, Petitioner-Electors,)
and WASHINGTON STATE) OPINION ORDER
DEMOCRATIC CENTRAL)
COMMITTEE,)
))
Petitioners,)
))
v.)
))
SECRETARY OF STATE SAM REED;)
KING COUNTY RECORDS,)
ELECTIONS AND LICENSING)
SERVICES DIVISION and DEAN)
LOGAN, ITS DIRECTOR; FRANKLIN)
COUNTY AUDITOR; PEND OREILLE)
COUNTY AUDITOR; and PIERCE)
COUNTY AUDITOR as representatives)
of WASHINGTON STATE COUNTY)
AUDITOR CANVASSING BOARDS,)
))
Respondents,)
and DINO ROSSI, a Washington Citizen)
and Elector,)
WASHINGTON STATE REPUBLICAN)
PARTY,)
an unincorporated association,)
Intervenor-Respondents.)

By a petition invoking this court's mandamus jurisdiction and a statute entitled "Prevention and correction of election frauds and errors," RCW 29A.68.011, various electors and the Washington State Democratic Central Committee seek an order directing Secretary of State Sam Reed to promulgate "uniform standards" for the manual recount now taking place in the Washington State election for Governor. Their Motion and Brief in Support of Emergency Partial Relief specifies that three such sets of standards are being sought:

- (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.

Petitioners thus argue that, contrary to current practice, in a manual recount election workers and canvassing boards must consider anew all ballots previously left uncounted, in keeping with their statutory duty to count all votes cast on each ballot cast, though their argument mainly focuses on rejections made on the basis that absentee and provisional ballot signatures do not match with signatures on file. They seem to suggest that this is necessary in part because King County improperly refused to permit voters to protest the decision not to count their ballots on November 17, 2004, the date the election results were certified. Petitioners further suggest that, contrary to the election statutes, including a statute that requires the Secretary to promulgate uniform election rules, the various counties now employ disparate tests and procedures for comparing signatures, with King County having a greater rejection rate than other counties that is statistically significant. And they suggest that the procedures in place for witnessing the recount are contrary to law, and that such witnesses must be given "a meaningful opportunity to be heard before erroneous government action finally disenfranchises a voter."

This court is mindful that 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." RCW 29A.04.205. "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, 84 S.Ct. 526, 11 L. Ed. 2d 481 (1964). Nonetheless, we must reject petitioners' arguments.

In this context, a "ballot" is a physical or electronic record of the choices of an individual voter, or the physical document on which the voter's choices are to be recorded. RCW 29A.04.008(1)(c),(d). "Recount" means the process of *retabulating* ballots and producing amended election returns...." RCW 29A.04.139 (emphasis added). The procedure for recounts is set forth in RCW 29A.64.041, and starts with the county canvassing board opening "the sealed containers containing the ballots to be recounted." See RCW 29A.60.110. Thus, under Washington's statutory scheme, ballots are to be "retabulated" only if they have been previously counted or tallied, subject to the provisions of RCW 29A.60.210.

It follows that this court cannot order the Secretary to establish standards for the recanvassing of ballots previously rejected in this election. And petitioners' call for uniform signature-checking standards (seemingly beyond the statutory requirement that the signature on an absentee ballot be the same as the signature in voter registration files) is beyond the relief that can be afforded in this action.¹ Petitioners suggest in their reply brief that a claimed disparity in signature-checking standards implicates equal protection concerns under the privileges and immunities clause of our state constitution, Const. art. I, § 19, but they claim no discriminatory intent. We are mindful that King County rejected a higher percentage of signatures than did other counties, but the record before us does not establish the reason for this disparity, and it could be for factors other than the standard employed.² We do not take petitioners' argument to suggest that a claimed disparity in rejection rates of voter signatures triggers some independent right, constitutional or otherwise, to a recanvassing of rejected ballots under a newly developed standard, nor does such an argument come to mind.

Petitioners also seem to suggest that recanvassing of rejected ballots is necessary because the methods employed by King County to allow voters to rehabilitate rejected absentee and provisional ballots run afoul of Washington's statutory and regulatory scheme. But we find no support for this notion. We note that the county gave absentee voters who failed to sign their ballot affidavits until 4:30 p.m. on November 16, 2004, the day before certification, to sign and return the affidavits, in accordance with WAC 434-240-235. And although this regulation does not require as much, the county likewise permitted absentee voters with problem signatures until 4:30 p.m. on November 16 to provide an updated signature. The county's procedure for handling signature problems with respect to provisional ballots, which also specified a deadline of 4:30 p.m. on November 16, appears to comport with pertinent regulations and federal law, and petitioners do not persuasively

suggest otherwise. Although, as petitioners point out, RCW 29A.60.190(1) provides that the election results should include absentee ballots postmarked on or before the date of the election and received on or before the date of certification, this statute does not address how ballots rejected for missing or invalid signatures are to be handled.

As for petitioners' request that we order the Secretary to promulgate "standards that allow party representatives to meaningfully witness the hand recount," we are not convinced that such standards are presently lacking. RCW 29A.64.041 provides that the recount may be observed by persons representing the candidates, that these witnesses may make no record of the names, addresses, or information on the ballots, poll books, or applications for absentee ballots unless authorized by the superior court, and that the Secretary or county auditor may limit the number of observers to not less than two on each side if, in his or her opinion, a greater number would cause undue delay or disruption of the recount process. Petitioners provide no support for their suggestion that witnesses or observers are participants who have a right to be heard and influence this manual recount process.

For the foregoing reasons, we reject petitioners' arguments and deny their petition for mandamus and request for relief under RCW 29A.68.011.

CHIEF JUSTICE

¹ RCW 29A.40.110(3) requires that the signature on an absentee ballot return envelope be "the same" as the signature in the voter registration files, as determined by the canvassing board or its designated representative, whereas WAC 434-253-047 requires a signature for a provisional ballot that "matches a voter registration record."

² We note in passing that the declaration of Dean C. Logan, Director of King County Records, Elections and Licensing Division, says that King County, like many other counties, looks for three points of similarity between the signatures on absentee and provisional ballot envelopes and the signatures on file. If staff finds less than three points of similarity, a supervisor looks at the signatures using the same three-point system. "If the supervisor also believes there is a question as to the validity of the signature, it is referred to the canvassing board for a determination." Petitioners have submitted the declaration of Joshua C. Jungman, who says that he and other Democratic staff members contacted county auditors to investigate the methods and procedures used to compare and verify signatures. Several auditor offices reported using the same three point method, with canvassing boards having the final say. Mr. Jungman suggests that in King County the decision "doesn't go to the canvassing board," but does not say who provided this information. Significantly, petitioners do not suggest that any particular method of signature verification is faulty, or what uniform method should be mandated by the Secretary.

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

WASHINGTON STATE REPUBLICAN PARTY,)
an unincorporated association; and)
CHRISTOPHER VANCE, a citizen of Washington)
State, and JANE MILHANS, a citizen of Pierce)
County.)

Plaintiffs,)

No. 04-2-14599-1

vs.)

CERTIFICATE OF SERVICE

KING COUNTY DIVISION OF RECORDS,)
ELECTIONS AND LICENSING SERVICES; and)
KING COUNTY CANVASSING BOARD.)

Defendants,)

I, LuAnna Yellow Robe-Wilson, hereby certify and declare under penalty of perjury
under the laws of the state of Washington as follows:

1. I am a legal assistant employed by King County Prosecutor's Office, am over the age
of 18, am not a party to this action and am competent to testify herein.

2. On December 17th, 2004, I did cause to be delivered true copies of Defendants'
Response To Motion For Temporary Restraining Order, Declaration of Janine Joly, Declaration
of Dean Logan, Declaration of Bill Huennekens and this Certificate of Service to the following:

1 Harry Korrell & Robert J. Maguire
2 Davis Wright Tremaine LLP
3 2600 Century Square – 1501 Fourth Avenue
4 Seattle, WA 98101- 1688

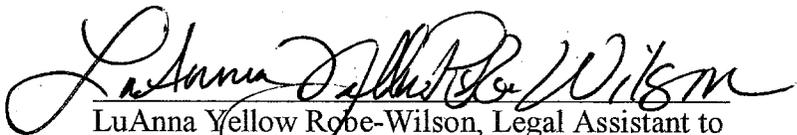
5 ABC Legal Messenger
6 U.S. Mail
7 Hand delivery
8 Facsimile

9 David Berman
10 Perkins Coie
11 1201 Third Avenue, Suite 4800
12 Seattle, WA 98101-3099

13 ABC Legal Messenger
14 U.S. Mail
15 Hand delivery
16 Facsimile

17 I declare under penalty of perjury under the laws of Washington that the foregoing is true
18 and correct.

19 DATED this 17th day of December, 2004 at Seattle, Washington.

20 

21 LuAnna Yellow Robe-Wilson, Legal Assistant to
22 JANINE JOLY, WSBA# 27314
23 Senior Deputy Prosecuting Attorney
Attorneys for King County