

NO.

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

vs.

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

Petitioners,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE;  
SECRETARY OF STATE SAM REED,

Intervenor-Defendants.

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**STATEMENT OF GROUNDS FOR DISCRETIONARY REVIEW**

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**A. IDENTITY OF PETITIONERS**

Petitioners King County Records, Elections and Licensing Services Division and King County Canvassing Board ask this Court to review the decision designated in Part B of this Motion.

**B. DECISION**

On December 17, 2004, the Honorable Stephanie A. Arend of the Pierce County Superior Court entered a Temporary Restraining Order preventing the King County Canvassing Board from canvassing the approximately 573 “no signature on file” absentee ballots at issue in the case. The ballots were partially canvassed during the original count for the November 2, 2004 General Election, but they were not counted or reflected in the original returns or the returns for the machine recount. Because the Pierce County Superior Court committed obvious and/or probably error under RAP 2.3(b)(1) and (2) in entering the TRO, the Court should grant Petitioner’s request for discretionary review.

**C. ISSUES PRESENTED FOR REVIEW**

1. **DID THE SUPERIOR COURT INCORRECTLY INTERPRET THE OPINION ORDER ISSUED BY THIS COURT ON DECEMBER 14, 2004?**
2. **DID THE SUPERIOR COURT IMPROPERLY INSERT ITSELF INTO THE RECOUNT PROCESS BY OVERTURNING A DISCRETIONARY DECISION THAT THE LEGISLATURE GRANTED TO COUNTY CANVASSING BOARDS?**
3. **DID THE SUPERIOR COURT INCORRECTLY CONCLUDE THAT RCW 29A.60.210 IS NOT APPLICABLE TO THE “NO SIGNATURE ON FILE” BALLOTS?**

**D. STATEMENT OF THE CASE**

On December 17, 2004, Respondents filed a Motion for Temporary Restraining Order in Pierce County Superior Court naming the King County Records, Elections and Licensing Services Division (“Elections Division”) and the King County Canvassing Board (“Canvassing Board”) as defendants. Respondents sought to stop the Canvassing Board from implementing a decision that it voted on and approved at its meeting on December 15, 2004. *See* Declaration of Dean Logan at 2.<sup>1</sup> The decision involved a group of ballots that had been coded by elections staff during the canvass of the November 2, 2004 General Election as “no signature on file” ballots. *Id.*

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<sup>1</sup> Attachment A to this Statement of Grounds for Direct Review is a true and correct copy of the Declaration of Dean Logan that was filed with the Pierce County Superior Court in this matter.

Ballots are coded as “no signature on file” when elections staff members look up a voter’s electronic registration record to compare the registration signature in the computer with the signature on the absentee ballot, and find no electronic registration signature. *See* Declaration of Bill Huennekens at 3.<sup>2</sup> Since there is no registration signature to compare with the signature on the ballot, the ballot is set aside. *Id.* What should happen next is that elections staff would then turn to their paper registration files and their previous electronic registration system to find the voter’s registration signature so that the required comparison can be made and the canvassing of the ballots completed. *Id.* at 4-5. For the “no signature on file” ballots issue in this case, that was not done. *Id.* at 4. Instead, when elections staff found no registration signature for these voters, they set the ballots aside and did not further canvass them. *Id.* The “no signature on file” ballots were then grouped with the “signature mismatch” ballots<sup>3</sup> in the elections returns and were not counted. *Id.*

On December 12, 2004, the superintendent of elections learned that the “no signature on file” ballots had only been canvassed to the point described above and therefore, even though the ballots may have been

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<sup>2</sup> Attachment B to this Statement of Grounds for Direct Review is a true and correct copy of the Declaration of Bill Huennekens that was filed with the Pierce County Superior Court in this matter.

valid, they were not counted. *See* Declaration of Bill Huennekens at 4. Elections staff began searching its paper registration files and the previous electronic registration system for the signatures. *Id.* at 5.

Three days later, the superintendent of elections presented a report regarding the incomplete canvass of the “no signature on file” ballots to the King County Canvassing Board at one of its open public meetings. A motion was made pursuant to RCW 29A.60.210, to recanvass the ballots based on a finding of an apparent discrepancy or inconsistency in the returns of the election. *See* Declaration of Dean Logan at 2. The motion passed. *Id.* The Canvassing Board did not vote on whether the ballots should or should not be counted, only that they should be recanvassed. *Id.* The Canvassing Board was expected to vote on whether the ballots should be counted at its meeting on December 20, 2004. *Id.*

At the December 15 Canvassing Board meeting, Respondents’ attorney informed counsel to the Canvassing Board that it would be seeking a temporary restraining order as a result of the Canvassing Board’s decision. Respondents filed their Motion for Temporary Restraining Order two days later and scheduled a hearing for 1:30 p.m. the same day. Attorneys for the Petitioners and the Intervenor-Defendants

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<sup>3</sup> As the term implies, “signature mismatch” ballots are those where the registration signature and the ballot signature were compared but were not the “same as” or did not “match.” RCW 29A.40.110; WAC 434-253-047.

were served with the Respondents pleadings at approximately 4:30 p.m. the day before the hearing. Petitioners and Intervenor-Defendant Washington State Democratic Central Committee filed responses opposing the Motion for Temporary Restraining Order early the next day, the day of the hearing. At the hearing, the motions to intervene made by the Washington Secretary of State and the Washington State Democratic Central Committee were both granted without objection. After hearing argument from the four parties, the Honorable Stephanie A. Arend granted Respondents' Motion for Temporary Restraining Order and Order to Show Cause finding in part, that the Washington State Supreme Court stated in its December 14, 2004 Opinion Order that that no recanvassing should occur in the hand recount, and that RCW 29A.60.210 does not apply to the "no signature on file" ballots at issue.<sup>4</sup>

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**1. THE SUPERIOR COURT INCORRECTLY INTERPRETED THE OPINION ORDER ISSUED BY THIS COURT ON DECEMBER 14, 2004.**

As indicated in the attached Temporary Restraining Order at page 4, the Superior Court interpreted this Court's December 14 Opinion Order to preclude any recanvassing during the hand count. The Superior Court

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<sup>4</sup> Attachment C to this Statement of Grounds for Direct Review is a true and correct copy of Judge Arend's December 17, 2004 Order.

made this erroneous interpretation despite this Court's clear statement at paragraph four of the Opinion Order.

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."

Emphasis added. The Superior Court ignored the underlined portion of this sentence and instead concluded that this Court ordered that no recanvassing can occur in the manual recount regardless of RCW 29A.60.210.

The Superior Court's interpretation of this Court's Opinion Order is incorrect and removes the clear discretionary authority the Washington Legislature granted to county canvassing boards to recanvass ballots pursuant to RCW 29A.60.210, which provides as follows:

**Recanvass – Generally.** Whenever the canvassing board finds that there is an apparent discrepancy or inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any 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 and document the correction of any error that it finds.

The Superior Court's interpretation of this Court's Opinion Order prevents the King County Canvassing Board alone from exercising the discretionary authority granted to all county canvassing boards in this state. As a result, the Superior Court's order directs unequal application of the election laws in King County as compared to the rest of the state.

The Superior Court incorrectly interpreted this Court's Opinion Order to essentially invalidate a statute that allows the county canvassing boards of this state to recanvass ballots when an apparent discrepancy or inconsistency in the returns is found. This Court should grant review of the Superior Court's order and should reverse it. The Superior Court's order is contrary to state election law, the opinion of this Court, and it denies the King County Canvassing Board its statutorily-granted authority to correct errors where an apparent discrepancy or inconsistency in the returns is found.

**2. THE SUPERIOR COURT IMPROPERLY INSERTED ITSELF INTO THE RECOUNT PROCESS BY OVERTURNING A DISCRETIONARY DECISION THAT THE LEGISLATURE VESTED WITH THE CANVASSING BOARD.**

The legislature has vested the duty and authority to canvass and recanvass ballots with the county canvassing boards of this state. One part of that granted authority is to determine whether apparent discrepancies or inconsistencies appear in the returns of an election. RCW 29A.60.210. The Superior Court took this authority from the body to which it was granted and inserted itself, the Pierce County Superior Court, into the King County recount process. This was improper and violates the statutory scheme for conducting recounts and contesting elections.

The county canvassing boards are responsible for conducting the canvass and any recounts for the elections in this state. Title 29A RCW sets out the statutory scheme by which the canvassing boards perform the duties required and authorized by law. There is no provision in title 29A RCW that allows the superior courts of this state to review each and every of the thousands of discretionary decisions the canvassing boards in this state make. Instead, the legislature provided for election contests. Pursuant to RCW 29A.68.011, Respondents can contest the results of an election and the issuance of a certificate of election. In the present case, the King County Canvassing Board agreed to segregate the ballots at issue in order to preserve Respondents' ability to bring an election contest after the results of the manual recount were certified. Instead, of allowing the recount to continue and preserving the opportunity for an election contest, the Superior Court inserted itself into the recount process and overturned a discretionary decision of the county canvassing board.

The Pierce County Superior Court committed error when it inserted itself into the King County recount process. This Court should grant review of the Superior Court's order and should reverse it in order to allow the manual recount to continue in accordance with the discretionary decisions made by the Canvassing Board.

**3. THE SUPERIOR COURT INCORRECTLY CONCLUDED THAT RCW 29A.60.210 IS NOT APPLICABLE TO THE “NO SIGNATURE ON FILE” BALLOTS.**

In addition to finding that no canvassing at all can occur during the manual recount, the Superior Court further found that RCW 29A.60.210 does not apply to the “no signature on file” ballots. This finding is incorrect. The Canvassing Board had the discretion to make the decision that it did and the Superior Court committed error when it overturned that decision.

As stated above, RCW 29A.60.210 allows county canvassing boards to canvass when an apparent discrepancy or inconsistency in the returns is found. As Petitioners’ attorney and the Secretary of State’s attorney argued to the Superior Court, the Canvassing Board had the discretion to find that the “no signature on file” ballots fit within the statutory scheme for canvassing.

It was not for the Superior Court to decide whether or not the Canvassing Board was correct that there was an apparent discrepancy or inconsistency in the returns. But regardless, the decision was supported by the report of the superintendent of elections and the apparent fact that the “no signature on file” ballots were not completely canvassed and may have been improperly not counted. The Canvassing Board had the

discretion to make this decision and the he Superior Court erred in overturning it. This Court should therefore grant review of the Superior Court's order and should reverse it.

**F. CONCLUSION**

The Pierce County Superior Court committed error when it issued the December 17, 2004 Temporary Restraining Order based on an incorrect interpretation of this Court's December 14, 2004 Opinion Order. Additionally, the Pierce County Superior Court erred by inserting itself into the King County recount process and overturning a discretionary decision that the King County Canvassing Board had the authority to make. This case presents this Court with the opportunity to correct the Superior Court's errors and allow the manual recount to continue under the established statutory scheme.

DATED this \_\_\_\_\_ day of December, 2004.

RESPECTFULLY submitted,

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