

No. \_\_\_\_\_

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**WASHINGTON STATE DEMOCRATIC  
COMMITTEE, Petitioners**

v.

**WASHINGTON STATE REPUBLICAN PARTY, et al.,  
Respondents**

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**STATEMENT OF GROUNDS FOR DIRECT  
REVIEW**

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David J. Burman, WSBA #10611  
Kevin J. Hamilton, WSBA #15648  
William C. Rava, WSBA # 29948  
Beth A. Colgan, WSBA # 30520  
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Democratic Central Committee and David  
McDonald

Petitioners Washington State Democratic Central Committee were intervenors in the trial court and seek direct review of the Temporary Restraining Order and Order to Show Cause ("Pierce County Order") entered on December 17, 2004, by the Superior Court of the State of Washington for Pierce County, the Honorable Stephanie A. Arend, presiding. A copy of the Pierce County Order is attached hereto as Appendix A.

### **I. NATURE OF CASE AND DECISION**

This case arises out of the Pierce County Order in which the Pierce County Superior Court interpreted this Court's order in the matter *McDonald v. Reed*, No. 76321-6, dated December 14, 2004 ("Supreme Court Order") and RCW 29A.60.210 to forbid canvassing boards from considering ballots that were not previously fully canvassed but were mistakenly set aside. Petitioners seek an order overturning the Pierce County Order so that King County's canvassing board may continue to consider those ballots pursuant to the authority granted to the canvassing board by RCW 29A.60.210. The Court's immediate intervention is required due to the short time remaining in the recount process.

On December 17, 2004 Respondents filed a Motion for a Temporary Restraining Order ("Motion") in the Superior Court of the State of Washington, Pierce County. Judge Arend of the Superior Court granted Respondents' Motion, thereby forbidding King County from proceeding with the consideration of votes cast in the November 2, 2004 election for Washington Governor under the authority granted to them

pursuant to RCW 29A.60.210. The hand recount of votes for the gubernatorial election is ongoing and drawing to a close. The Pierce County Order suspends the completion of the recount. Because of the vital need for judicial relief so that the hand recount may be completed, Petitioners have also filed a Motion for Accelerated Review requesting that the Court grant the relief requested by Petitioners. Given the urgency of the matter, Petitioners respectfully request that this Court accept review and set a briefing and hearing schedule so that the parties may be heard.

## **II. ISSUES PRESENTED FOR REVIEW**

Whether the Superior Court erred in granting Respondents' TRO, where RCW 29A.60.210 and the Supreme Court Order clearly authorize canvassing boards to consider ballots that had not previously been fully canvassed in the original count or machine recount.

## **III. GROUNDS FOR DIRECT REVIEW**

Pursuant to RAP 4.2(a)(4), direct review is permitted in

[a] case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.

For the reasons discussed below, this is such a case. In addition, this Court has previously accepted direct review in cases such as this one that involve issues of voters' rights and election law. *See Becker v. County of Pierce*, 126 Wn.2d 11, 15 (1995) (granting direct review pursuant to RAP 4.2(a)(4) and (5) in case involving statutory limits on procedures for vote counting and canvassing); *Fakkema v. Island County Public Transp. Benefit Area*, 106 Wn.2d 347, 350 (1986) (granting direct review pursuant

to RAP 4.2(a)(4) in case concerning equal protection challenge to denial of voting right).

**A. This Case Involves Fundamental and Urgent Issues of Broad Public Import Requiring Prompt and Ultimate Determination**

This case presents important and pressing issues of voters' constitutional rights under the provisional balloting system. Put simply, King County's canvassing board has the authority pursuant to RCW 29A.60.210 to consider ballots that were not fully canvassed in either the original count or machine recount due to King County's administrative errors. Unless the relief that was granted by the Superior Court below is reversed by this Court, King County will be unable to correct the apparent discrepancies and inconsistencies that their errors made, and voters will be disenfranchised through no fault of their own. *See* Declaration of William Rava ¶¶ 18, 19 Ex. O.

Because of the extraordinarily close initial results in the gubernatorial election, a mandatory machine recount was ordered pursuant to RCW 29A.64.021. During the course of that recount, numerous errors were identified – and corrected – by county canvassing boards across the state. Many of those corrections benefited Respondents' candidate, but the margin narrowed further, leaving a 42 vote difference. Petitioners then timely requested the current hand recount.

As during the hand recount, a number of counties have identified additional errors, including previously uncounted ballots and errors in disqualifying validly cast ballots by lawfully registered voters. Exercising

their authority under a state law, RCW 29A.60.210, that goes unmentioned until late in the TRO motion, county canvassing boards have addressed and corrected such errors during the hand recount, as they did during the machine recount. Some of those corrections have resulted in additional votes for candidate Dino Rossi; others have resulted in additional votes for candidate Christine Gregoire. Neither the candidates nor Respondents have – until now – questioned the authority or, indeed, the duty, of the county canvassing boards to correct such errors. Indeed, in the recent Supreme Court action, Respondents and the Rossi campaign joined with the Secretary of State in relying upon that "safety valve" authority in obtaining a narrow construction of the recount statute.

Despite the dictates of RCW 29A.60.210, the Pierce County Superior Court has interpreted the Supreme Court Order to require it to enjoin King County's canvassing board from engaging in reconsideration of the ballots at issue. Given the importance of the issues at stake, direct review is appropriate.

Direct review is supported not just by the facts of this case, it is also contained in Congress' express policy for the administration of elections. Washington has in fact recognized, and expressed a strong preference for, the right to vote as a matter of important state policy.

It is the policy of the state of Washington to encourage every eligible person to register to vote and to *participate fully in all elections and to protect the integrity of the electoral process by providing equal access to the process while guarding against discrimination and fraud.*

RCW 29A.04.205 (emphasis added). Unless Petitioners' relief is granted, this public policy will be thwarted.

The disenfranchisement of Washington voters presents a compelling issue of broad public import and merit this Court's immediate and direct review. RAP 4.2(a)(4). Moreover, the need for this review is tremendously "urgent." *Id.*; Petitioners Motion for Accelerated Review.

**B. This Case Presents Issues Similar to Those This Court Has Previously Reviewed Directly**

This Court has previously found cases involving election law and the scope of voters' rights worthy of direct review. In both *Becker*, 126 Wn.2d at 15, and *Fakkema*, 106 Wn.2d at 350, the Court considered issues related to voters and the voting process of sufficient public import under RAP 4.2(a)(4) to grant direct review.

In *Becker*, petitioners sought a determination of whether a county auditor could be disqualified from participating in the canvass of returns for any election in which he or she was a candidate. 126 Wn.2d at 15. The appeal was brought "directly from a superior court order" dismissing the plaintiff's claim. *Id.* The Court granted direct review under RAP 4.2(a)(4), noting that the direct appeal presented "issues of broad public importance involving a state officer." *Id.* Similarly, in *Fakkema*, the petitioner sought by direct review a denial of his right to vote for a public transportation measure, claiming on equal protection grounds he had been denied the right to vote. 106 Wn.2d at 352-53. Again, the Supreme Court granted direct review under RAP 4.2(a)(4). *Id.* at 350.

Here, the issues presented to the Court are even more pressing than those presented in *Becker* and *Fakkema*. Unless this Court accepts direct review for consideration of the relief that Petitioners' request, hundreds of Washington voters may be disenfranchised in an election that could well be determined by those votes. The need for direct review is of considerably greater urgency here than in the election law cases where the Supreme Court has accepted direct review. *Becker*, 126 Wn.2d at 14 (direct review granted where plaintiff's action commenced two years after election had taken place).

**C. Without this Court's Direct Review Petitioners Will be Denied Effective Relief**

The hand recount is nearing a close; without this Court's direct intervention King County voters will be disenfranchised and left with no adequate remedy. Petitioners seek to vindicate the right to vote, a right whose "free and unimpaired" exercise is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *see also Illinois Bd. of Elections*, 440 U.S. at 184 ("voting is of the most fundamental significance under our constitutional structure"); *ACLU v. Kiffmeyer*, 2004 WL 2428690, \*2 (a threat to the right to vote constitutes an irreparable harm). If the Pierce County Order is not reversed, it is certain that several hundred lawful voters will be denied the right to vote. Moreover, there will be no "do over" of the hand recount election, whatever illegalities are found.

Petitioners do not ask the Court to review the determinations of validity or invalidity as to individual voters; they instead seek to ensure that the King County canvassing board is not wrongly denied the authority the legislature gave to it under RCW 29A.60.210 to correct errors during the recount process. Petitioners will suffer irreparable harm unless this Court grants immediate injunctive relief, and given the urgency of the issue direct review by this Court is warranted.

Moreover, the relief Petitioners request will also further the public's interests, substantiating this request for direct review. *See Kiffmeyer*, 2004 WL 2428690 at \*2 (balance of harm to potential voters is greatly outweighed any harm to government regarding issuance of provisional ballots and granting a temporary restraining order is in the public interest); *Hood*, 2004 WL 2414419 at \*7 ("It is in the public interest that each voter's right to vote be protected against administrative errors."). It is in the public interest that the votes of all eligible voters are counted, and direct review is necessary to ensure that this interest is served.

#### **IV. CONCLUSION**

For the reasons set forth above, Petitioners respectfully requests that the Court accept its petition for direct review as soon as practicable the expedited basis requested in Petitioners' Motion for Accelerated Review.

RESPECTFULLY SUBMITTED this 17th day of December, 2004.

By 

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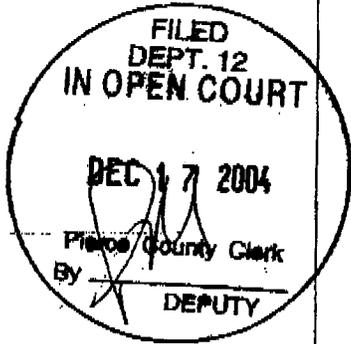
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Democratic Central Committee and

David McDonald

# APPENDIX A



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

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

Plaintiffs,

v.

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

Defendants.

No. 04-2-14599-1

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

~~[PROPOSED]~~

[CLERK'S ACTION REQUIRED]

The Court has reviewed the pleadings and declarations filed in support of Plaintiffs' motion for a temporary restraining order and Defendants' opposition to said motion. It clearly appears to the Court from the facts as shown by the declarations that unless the below Temporary Restraining Order is entered, Plaintiffs will suffer immediate harm and denial of rights that cannot be compensated in damages. There is a significant and continuing risk to Plaintiffs from the harm that may result from Defendants' failure to comply with Washington law as described in the declarations and pleadings on file. The Court is of the view that an order must be issued immediately and that any delay would unduly increase the risk of harm and loss.

ORIGINAL

1 Plaintiffs' counsel has certified to the Court in writing that notice to the defendant was  
2 provided.

3 The Court makes the following findings of fact:

4 1. On November 17, 2004 Secretary of State Sam Reed ("Secretary of State")  
5 announced the official results of the November 2, 2004 general election. Dino Rossi won  
6 the Governor's race by a margin of 261 votes. Because the margin of victory was fewer  
7 than 2000 votes, the Secretary of State ordered a machine recount of the votes in the race  
8 for governor. RCW 29A.64.021.  
9

10 2. The votes were retabulated, and Governor-Elect Rossi again prevailed. The  
11 Secretary of State certified the results and confirmed on November 30, 2004 that Rossi was  
12 the Governor-Elect. RCW 29A.60.250.

13 3. On December 3, 2004, the Washington State Democratic Central  
14 Committee ("WSDCC") requested a state-wide manual recount. RCW 29A.04.139.  
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16 4. On December 3, 2004, the WSDCC filed a Petition in the Washington State  
17 Supreme Court seeking an emergency relief and an order directing the Secretary of State to  
18 promulgate "uniform standards" for the manual recount. The WSDCC sought an order  
19 from the Supreme Court requiring that the canvassing boards of all 39 counties in the State  
20 of Washington recanvass all ballots previously canvassed and rejected.

21 5. On December 14, 2004, the Supreme Court denied the relief holding that  
22 the word "recount" means the process of retabulating ballots and producing amended  
23 election returns under RCW 29A.04.139. No. 76321-6. The Supreme Court further held  
24 that under Washington law, ballots are to be "retabulated" **only if they have been**  
25 **previously counted or tallied.** The Supreme Court rejected the position of the WSDCC  
26  
27

1 that recanvassing of rejected ballots was required under any applicable Washington state  
2 statute.

3 6. On or about December 13, 2004, King County Elections Division disclosed  
4 that there were at least an additional 520 ballots which had previously been canvassed and  
5 rejected and which should now be counted.

6 7. On December 15, 2004, at the Canvassing Board meeting, Dean Logan,  
7 Director of King County Elections Division, stated that instead of 520 ballots, there were  
8 573 absentee ballots that had previously been canvassed and rejected prior to November  
9 17, 2004 because King County could not match the signatures on the absentee ballots with  
10 any digital voter registration signatures.

11 ~~8. Logan and Bill Huennokins, King County Elections Supervisor, both stated~~  
12 ~~that the King County Elections Division has already checked the signatures on the absentee~~  
13 ~~ballots twice against the database of digital signatures – first by an election worker and~~  
14 ~~then by a supervisor.~~

15 ~~9. Prior to the November 17, 2004 certification, King County Elections~~  
16 ~~Division had also sent a letter to more than 1000 absentee voters giving them an~~  
17 ~~opportunity to update their registration signatures. The 573 voters who submitted the~~  
18 ~~rejected ballots at issue did not respond to that letter and as a result, their signatures were~~  
19 ~~never updated in the digital signature files for King County Elections Division.~~

20 ~~10. The 573 absentee ballots have not been kept secured since they were~~  
21 ~~rejected in November 2004. While counted ballots were placed in sealed containers and~~  
22 ~~kept in a fenced, locked area as required by statute, rejected ballots were not placed in~~  
23 ~~sealed containers but were kept in open trays. On at least one occasion, the rejected ballots~~  
24 ~~were removed from the fenced, locked area and kept overnight in an open area in open~~  
25 ~~trays.~~

\* Based on the foregoing, and the materials filed in support of and in opposition to the motion, the Court concludes that RCW 29A.60.210 does not apply in this context.

1 ~~11. On or about December 13, 2004 the ballots were transferred from the Mail~~  
2 ~~Ballot Operations Satellite office ("MBOS") for the King County Elections Division to the~~  
3 ~~King County Administration Building. The trays of ballots were not accompanied by any~~  
4 ~~observers or a Deputy Sheriff from the King County Sheriff's Office as was the normal~~  
5 ~~procedure.~~

6 12. Although the Washington State Supreme Court on December 14, 2004 had  
7 stated that no recanvassing should occur in the hand recount, the three member King  
8 County Canvassing Board on December 15, 2004 voted (2 to 1) to recanvass the  
9 previously rejected 573 absentee ballots.

10 \*  
11 **For these reasons,**

12 IT IS HEREBY ORDERED that a temporary restraining order is issued against the  
13 King County Elections Division and the King County Canvassing Board to segregate the  
14 573 previously rejected absentee ballots;

15 ~~ORDERED that Defendants must now retain these previously rejected ballots~~  
16 ~~subject to the same exact security as counted ballots; and~~

17 ~~ORDERED that Defendants must retain the absentee envelope with each absentee~~  
18 ~~ballot; and~~

19 ~~ORDERED that Defendants are restrained from canvassing the 573 previously~~  
20 ~~rejected and canvassed ballots until the validity of ballots can be determined.~~

21 This order is immediately binding upon the parties to this action, their agents,  
22 servants, employees and attorneys, and upon those in active participation with them who  
23 receive notice of the order by personal service or otherwise.

24 ~~Bond shall be posted in the amount of [\$ \_\_\_\_\_] as security for the payment of~~  
25 ~~such costs and damages defendant may incur or suffer if he is found to have been~~  
26 ~~wrongfully enjoined or restrained by the issuance of this order.~~

27 IT IS FURTHER ORDERED that this order shall remain in full force and effect for

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fourteen (14) days after entry, unless within that time, for good cause shown, it is extended or unless it is superseded by a preliminary or permanent injunction.

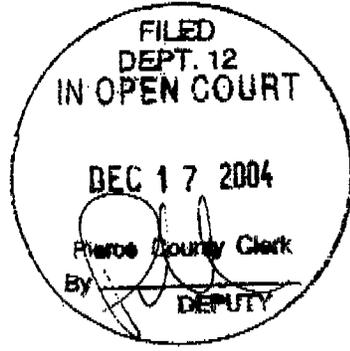
Issued at 4 p.m., this 17<sup>th</sup> day of December, 2004, at ~~Seattle~~ <sup>Tacoma</sup>, Washington.

Stephen A. Arend  
Judge/Commissioner

Presented by:

DAVIS WRIGHT TREMAINE  
Attorneys for Washington Republican Party

By [Signature]  
Harry Korrell, WSBA No. 23173  
Robert J. Maguire, WSBA No. 29909



By [Signature]  
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