

EXHIBIT K

Transcription of Oral Argument

David McDonald, et al. v. Secretary of State Sam Reed, et al. and Governor-Elect
Dino Rossi, a citizen and elector of Washington and the Washington
State Republican Party, an unincorporated association

No. 76321-6

December 13, 2004

Court: Good afternoon ladies and gentlemen. The case before us today is David McDonald et al., petitioners, vs. Secretary of State Sam Reed, et al., respondents, and Dino Rossi, et al., intervenor respondents. Mr. Burman, you have reserved 20 minutes for opening, and then Mr. Ahearne will take 18 minutes of the response, Ms. Joly will have 5 minutes of it, and Mr. Braden 7 minutes, and then Mr. Burman, you will have 10 minutes for rebuttal. I might indicate that Justice Sanders is not available to sit on this case, so we will proceed with 8 justices.

Mr. Burman, you may present your argument.

Mr. Burman: May it please the Court, your Honor, to represent to voters today, petition you to protect their right to vote in the 2004 gubernatorial elections. The state Democratic party that seeks to enforce the right of hundreds, perhaps thousands of other voters, perhaps who do not even know that their vote is on the verge of being erroneously invalidated by respondents. We are particularly proud to be part of the process by which Washington will show the Nation its commitment to counting every vote, to protecting the rights of voters and to conducting a hand recount --

Court: Mr. Burman, what about absentee or provisional ballots that were counted as a vote, but perhaps shouldn't have been? Shouldn't they be recanvassed? If -- it's your position, as I understand it, that you think a recount means that you count all the votes that were counted and that you recanvass all provisional and absentee ballots that were not -- that were rejected. So why not do the whole -- all of them,

even the ones that were counted? Maybe some of them shouldn't have been counted.

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Court: Weren't there challenges made or wasn't there an opportunity – let me ask it two ways: Weren't there challenges made or wasn't there at least an opportunity to make challenges at the local level to those ballots?

Mr. Burman: There were not before certification in the vast bulk of these situations. I think you will find from looking at the declarations that, in most cases, no notice was given to the voters. No notice was given to the party because of difficulties in getting the lists and checking those lists. In fact, I think you will find that today King County is acknowledging that at least 500 ballots, envelopes, absentee and provisional ballot envelopes, probably were rejected without ever being compared for the signature match due to an error by staff. I think they are going to correct that error as part of the hand recount and that's exactly what should happen.

Court: But there was an opportunity by virtue of the action that occurred in King County, was there not? There was an opportunity for the Democratic party, at least, to go out and – or both parties, for that matter, but the Democratic party was the moving – to go out and get those voters and provide them with an opportunity to rectify the --

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Court: Counselor, the votes that you are referring to now that went back to the canvassing board and the 500 plus that you talked about today, were those reconsidered by the canvassing board under 29A.60.210? Is that the authority for that?

Mr. Burman: We believe that that is King County's intent and, of course, the Secretary of State has represented in the pleadings to you that the Secretary of State believes that that statute is available as a safety valve. Our position is that if that statute is available as a safety valve, and we agree it should be right up until the time of final certification of the current hand recount, that all errors ought to be reviewed under that. It cannot be consistent with what this Court has said about equal protection and due process as they apply to the

franchise, to the right of voters to say that some counties will discretionarily correct errors, and other counties will simply ignore them. There has to be a more consistent standard.

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Court: You may proceed.

Mr. Ahearne: Good afternoon, my name is Tom A. Ahearne with the law firm of Foster Pepper and Scheffelman. We've been appointed as special attorney generals to represent the Secretary of State in this action. We are in the middle of a statutory recount. At this point, 19 of State's 39 counties have already completed this part of their recount. The statutory recount that's being done is being done in compliance with the recount statute that the Washington legislature wrote. Out of the 2.8 million voters that voted on November 2, the lawyers for the petitioners have identified several instances where they believe the recount statute produces an unfair or will produce an unfair result. But the place to change the recount statute is the legislature, not this court. And the time to change the recount statute is before the election, not in the middle of the ongoing recount. The Washington Secretary of State respectfully requests that this Court dismiss the petitioner's demand to change the recount law on the merits, so voters of our state can be assured that regardless of who wins this recount, this recount was not conducted in violation of the Washington law.

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Court: So if that's what's to go on during a recount, then is what we were just hearing that King County is prepared to do with these 500 and some odd absentee ballots inappropriate, unlawful, under, while the recount's going on.

Mr. Ahearne: No, Your Honor, because counsel referred to it as a safety valve. There is a provision, 29A.60.210, which people are referring to as the safety valve, which states that, and it is on page 22 of our brief, Whenever the canvassing board finds that there is an apparent discrepancy or inconsistency in the returns, it may recanvass the ballots, and that is precisely what.

Court: So they have the discretion to do it, even in the midst of a recount.

Mr. Ahearne: Yes, if they're aware of a discrepancy or inconsistency in the returns.

Court: But don't they have to do that before the day, the last day for certification that goes on.

Mr. Ahearne: It says the canvassing board shall conduct any necessary recanvass activity on or before the last day to certify the primary or election. . . .

Court: So can they do that after November 17?

Mr. Ahearne: They have not certified the hand recount yet, Your Honor.

Court: Okay.

. . . .

Court: I didn't think I understood you, you said there is no definition of recanvass?

Mr. Ahearne: There's a definition of canvass.

Court: Well, they talk about recanvass and .210.

Mr. Ahearne: In .210 it says you may recanvass, meaning you may canvass again. The canvassing board may, if it determines there is a discrepancy in the returns, that you may recanvass, which is reexamining the ballots. In Washington it's a discretionary function that the canvassing board, it isn't an automatic, like it is in the states the petitioners rely on, in Wisconsin, Illinois and West Virginia. If I might just briefly talk about with respect to equal protection issue that petitioners raise, refusing to rewrite our state's recount statute does not violate equal protection. This recount is being conducted under neutral rules that were in place before the November 2 elections, and those rules do not unlawfully discriminate against any particular class of voters. Again, there is no common law or even constitutional right to a recount. Recounts are purely statutory and it doesn't create an equal protection violation, based on petitioners' arguments.

Court: I don't get the sense that the opponents are saying so much that we should change the rules as they're saying the counties are not applying the rules consistently, and wouldn't that be an equal protection violation?

Mr. Ahearne: No, Your Honor, because there is a rule, there is a clear uniform standard, with respect to, for example, provisional ballot signatures, WAC 434.253.047 says, A provisional ballot cannot be counted unless the voter's signature matches a voter registration record. There is the standard that's applied uniformly throughout the state. Different counties have different systems in how they're going to apply that uniform standard.

Court: Well, that's the rub. Exactly. Because you've got some counties that are saying, we're not—we don't even need to check 'em at all because we know everybody in this county and they wouldn't do that. And then you've got King County where they're applying a large number of ballots, 500 or so, to a database that's just completely wrong, so none of them match.

Mr. Ahearne: Well, with respect to your comment about the database, it's completely wrong and none of them match on the 500, that is my understanding of what King County is going to be correcting pursuant to .210, that's where the safety valve applies, and it shows the system works. With respect to the different systems, *Bush v. Gore*, Justice Breyer's decision, and the *Southwest Voter* case that we cite, those are examples of where the courts recognize that, for example, punch card systems have a much higher rejection rate of ballots, than optical scan systems. Is there an equal protection violation that one county has an optical scan system and another has a punch card system. No. The courts have said that's not a protection violation, we had the same uniform standard that applies. Here in our state we have the same uniform standard that applies, the signatures must match, and the fact that one county uses a different system, make that subject to determination that another is not an equal protection violation, any more than we have uniform rules of evidence. And if I say I've got this one piece of evidence here, but, you know, Gull Varnet, Grand County Superior Court Judge wouldn't let it in, but Grays Harbor Superior Court Judge did let it in, does that mean there's an equal protection violation because we don't have a uniform standard? No. Different people applying that uniform standard may come to different results, but as the case is, as we point out in our brief point out, difference in results isn't an equal protection violation. If there's no other questions, we would just like to conclude that the legislature as we note on page 24 of our brief, the Washington legislature has struck the balance that they consider

appropriate between the competing interests in recounts, when they make the legislative finding that the legislature finds it is in the public interest to determine the winner of close contests for elective office, 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 the elective offices, which provide closure to the recount process. Our legislature chose to have recounts, recanvassing, the Secretary of State respectfully requests that this Court dismiss the petitioner's claims, because the recount is being conducted pursuant to Washington law. Thank you.

Court: Thank you Mr. Ahearne. Ms. Jolly.

Ms. Joly: Thank you. May it please the Court, my name is Jeanine Joly, I represent King County and King County Records Election Licensing Service Division and its director Dean Logan here today. I would first like to address a couple of issues that have already been discussed by the Court, on this afternoon, and I was here primarily to spend my time talking with you about observer issues, which are specific to King County and also Snohomish and Pierce Counties, with respect to the objections that petitioners have made for our observer guidelines.

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Court: Counsel, if it's correct that King County is going to recount the 560 votes that weren't compared, how is that different from all of these affidavits that we've received people who were raising objections about some process that King County did in the earlier tally and electronic or machine recount.

Ms. Joly: Well, with respect to this category of approximately 500 ballots that have been brought up today, that is a determination for the canvassing board to make under the recanvass statute. As Mr. Ahearne indicated, it's a discretionary decision. They need to look at it and decide whether, what they're going to do with those ballots, so that will be before the King County canvassing board, they will make that decision. And as Justice Madson said, there is a remedy for petitioners or any other voter or party who doesn't agree with that decision and that's the contest statutes. So the canvassing board should be allowed to do its work and make its decision and then the

petitioners have a remedy after that. And, with respect to the affidavits that were presented, Mr. Burman stated that the respondents don't necessarily contest what they are saying in those affidavits and that there are errors in those affidavits, and that's simply not true. With respect to all the affidavits that are based on mismatch signature issues, we do contest that there's an error with respect to those. Those absentee envelopes and provisional ballot envelopes did go through our system for complying with the state law for signature verification, and those, the affidavits that we're providing indicate that those voters tried to provide an updated signature, or a signature because they forgot to sign in some cases, after the deadline that was set for presenting that information. So we don't believe that there are errors in those cases. Specifically, with respect to Ms. Dendee, who forgot to sign her absentee ballot, she indicated that she tried to provide a signature on November 17, and the WAC specifically states that when an absentee ballot voter fails to sign their ballot, that the signature must be submitted, the date prior to certification, and the deadline for the other groups of voters is based on that exact same deadline that's in the WAC.

Court: Thank you Ms. Joly. Mr. Braden?

Mr. Braden: May it please this Court, Mark Braden, I represent Dino Rossi and the Washington Republican party. . . .

. . .

Court: Would you agree that during the process of a recount the locals have the discretion to recanvass?

Mr. Braden: Sure, if there are obvious [unintelligible] the statutory requirement in the WAC or regulatory requirement if there are discrepancies in the returns, they have a requirement to go back. And also in the process of retabulating the ballots in a hand retabulation, there is a role for the canvassing board.

Court: So you don't disagree that they do have that discretion.

Mr. Braden: They have the discretion if it's on the face of the materials before them. We do not want to get in the process which is what we're talking about potentially here if we're going to do a recanvass every time of lines of people standing outside of every county courthouse

in the state with an affidavit asking for my vote to be verified. That's not our process. It might be part of an election contest, but it's not part of the recount process. The recount process is looking, retabulating, looking at the result, not going back and recanvassing, by its very nature two different words, why would we rechange what the particular state has established in this regulatory scheme simply for the convenience of a particular party at this time. Thank you.

Court: Thank you Mr. Braden. Mr. Burman, you have four minutes remaining.

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Court: Thank you Mr. Mr. Burman. The court will be in recess.

BAC:dmb