

1 the 573 absentee ballots from their security envelopes until after this Court ruled on the
2 motion for temporary restraining order.

3 I declare under penalty of perjury of the laws of the State of Washington that the
4 foregoing is true and correct.

5 Executed at Seattle, Washington, this 16th day of December, 2004.

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7 Robert J. Maguire
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EXHIBIT 1

THE SUPREME COURT OF WASHINGTON

DAVID T. McDONALD and RONALD
TARO SUYEMATSU; SANFORD SIDELL;
BRENT CAMPBELL; and HILLARY
DENDY, Petitioner-Electors, and
WASHINGTON STATE 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 AUDITORS AND
CANVASSING BOARDS,

Respondents,

and

DINO ROSSI, a Washington Citizen and
Elector, WASHINGTON STATE
REPUBLICAN PARTY, an unincorporated
association,

Intervenor-
Respondents.

NO. 7 6 3 2 1 - 6

OPINION ORDER

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

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.”

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

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.

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

EXHIBIT 2



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December 15, 2004

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Re: Recently Discovered Errors

Dear Members of the King County Canvassing Board:

We understand that King County discovered this week purported errors regarding the handling of more than 560 previously canvassed and rejected ballots. The recent discovery raises serious questions regarding the processing of ballots in King County and the integrity of the election process. The Washington State Republican Party has several concerns about this discovery, and we write both to inform you of those concerns and to make some specific requests regarding the handling of these ballots.

First, until the disposition of these ballots has been fully investigated to resolve all questions of impropriety, these ballots should not be counted. As we understand the facts, these ballots have already been considered and rejected by designees of the canvassing board. As the Supreme



Court made clear yesterday, the manual recount is a retabulation of ballots that come from the sealed containers which contain ballots that have been previously counted or tallied. As we understand it, these ballots were not in sealed containers and were not previously counted or tallied. In fact, we understand that they were affirmatively considered and rejected previously. The Court yesterday rejected the assertion that canvassing boards should revisit decisions with respect to previously rejected ballots. Such second guessing is not a part of the manual recount process rather, at this stage of the process, is more properly reserved for an election contest proceeding. In accordance with the Supreme Court's Order, the validity of these ballots cannot be reviewed a second time as part of the recount.

Second, if the canvassing board interprets the Supreme Court's Order differently and believes that it has the authority and discretion to revisit decisions regarding previously rejected ballots, the circumstances of these new ballots must be investigated prior to making any decisions as to whether they should be counted. Because the seemingly continual discovery of errors and additional ballots in King County threatens public confidence in the integrity of the election process, the canvassing board should fully investigate and create a detailed written report for the public of the circumstances surrounding this incident. We believe that such an investigation and report should address at least the following issues:

1. A Clear Explanation of the Situation: How did this happen? Who reviewed these ballots during the first count? What record is there regarding the decisions made during that count? Why was the purported problem with this set of ballots not identified during the first count? And again, why was it overlooked during the second count? Why did the County discover that this category of ballots existed only in the middle of the third count?
2. A Detailed Description of Security Measures: How and where have these ballots been stored since Election Day? What security measures were used to protect the integrity of these ballots? Were they placed in sealed containers or boxes? Are there logs of the ballot numbers? Who had custody of and access to these ballots? Were these ballots kept as a set or were they mixed in with other ballots? If they were separated, when were they separated and by whom? What records are there of the security measures actually taken by those responsible for these ballots? What individuals have knowledge of these issues?
3. A Detailed Description of the Categories of Ballots at Issue: What categories of ballots are at issue and how many ballots are in each category? How many are provisional ballots and how many are absentee ballots? How many ballots are from persons who did not sign their registration cards and who, therefore, are not properly registered voters? How many ballots are from individuals who were apparently registered but for whom the County could not locate a digital signature for comparison purposes? How many ballots are from persons for whom the County could not find any signature at all (either digital or paper) for comparison purposes? How many of the persons submitting these ballots were contacted by the County in an effort to secure a signature for comparison purposes? What records exist with respect to those contacts and



any responses received by the County? Are there other registration issues linked to these ballots? Are records available from other sources regarding these ballots?

Because the hand recount in King County is likely to take at least another week to complete, judgments regarding these ballots should not be made in haste. The canvassing board should take the time to fully investigate the issues and create a written report of its investigation and findings.

Because the election is so close, it is conceivable that these ballots could become part of election contest proceedings. If King County ultimately decides to count all of the ballots, it would be irresponsible to cast them irretrievably into the sea of ballots already tabulated. Instead, in case it is later determined that a particular class or subclass of the ballots should not have been counted, the County should preserve the ability to retrieve these ballots by class. For example, if the ballots are counted, they should be placed in their own sealed container and labeled separately from other tabulated ballots. Furthermore, if there are clear distinctions between and among these ballots, they should be organized according to those distinctions. For example, ballots from voters who received letters from the County asking them to correct signature deficiencies should be kept separate from those who did not receive such letters. Because there are likely several ballots in each category, segregating the ballots will not undermine the secrecy of each ballot. Organizing the ballots by class will help reduce the risk that the entire election is declared void if a contest proceeding later determines that certain classes of the ballots should not have been counted but cannot be retrieved.

It is sensible to minimize that risk by taking reasonable steps now to investigate and protect these ballots. The canvassing board should have a complete written explanation – available to the public – from the appropriate elections officials and staff before taking any action. There is good reason to develop a complete factual record before acting. Public confidence in the election process requires it.

In addition to those more than 560 ballots, we now understand that King County has what has been described to us as 22 “absentee ballots” that were “recently found” in the pockets of voting machines that were already put into storage. This recent discovery raises further very troubling issues. First, how were they found, by whom, and why were they not found sooner? Second, the questions regarding their chain of custody and their security are plain to anyone and must be investigated. Furthermore, before the canvassing board can even consider these “items” (we can not be assured at this time that they are ballots), the board must contact each alleged individual absentee voter in person to directly determine issues of authentication. Only on receipt of a written report based on in-person interviews will the board be in a position to address even some of the issues posed by this “discovery.”

The names of these individuals identified as “absentee voters” should be made public immediately. While there may be legitimate explanations regarding these ballots, public trust can only begin to be restored if detailed information regarding these events is publicly disclosed prior to any action by the board. Judicial action and the formal discovery process are not the

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preferred method for ensuring public disclosure. It would certainly be better to investigate these issues now in a thorough and complete manner rather while the opportunity is available to do so.

Very truly yours,

Davis Wright Tremaine LLP


Robert J. Maguire

cc Tom Ahearne, Esq.
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