No. 76321-6

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID T. McDONALD, et al.,

Petitioners,

v.

SECRETARY OF STATE SAM REED, et al.,

Respondents.

RESPONSE OF RESPONDENTS DEAN LOGAN AND KING COUNTY RECORDS, ELECTIONS AND LICENSING SERVICES DIVISION TO PETITIONERS' MOTION FOR EMERGENCY PARTIAL RELIEF

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A. ISSUES PRESENTED

1. **SHOULD PETITIONERS' REQUEST FOR RELIEF BE DENIED WHERE THEY HAVE FAILED TO DEMONSTRATE THAT THEIR RIGHTS AS RECOUNT OBSERVERS ARE BEING DENIED?**

2. **SHOULD PETITIONERS' REQUEST FOR RELIEF BE DENIED AS STATE LAW PROVIDES FOR A RECOUNT, NOT A RECANVASS?**

3. **SHOULD RESPONDENTS BE AWARDED THEIR COSTS IN DEFENDING THIS MATTER?**

B. STATEMENT OF FACTS REGARDING MANUAL RECOUNTS IN KING COUNTY

King County has conducted numerous manual recounts over the years. *See* Declaration of Dean C. Logan ("Logan Declaration") at 2. In setting its procedures for each of these manual recounts, King County has looked to three sources for guidance: the legal requirements prescribed by state statute and administrative rule; the local recount procedures in the King County Canvassing Board's Administrative Rules; and any practical considerations involved in conducting the specific recount. *Id.*

The relevant statutory requirements are found in Title 29A RCW, which sets forth the election laws of this state, and Chapter 29A.64 RCW, which specifically governs recounts. These requirements, along with existing statewide administrative rules of potential application, are summarized in the manual recount guidelines issued by the Secretary of State on December 4, 2004. *See*

http://www.secstate.wa.gov/elections/pdf/Governor%20Manual%20Recount%20Guidelines2.pdf. The requirements include, but are not limited, to the following:

- Witnesses shall be permitted to observe the ballots and process of tabulating the votes, but they shall not be permitted to handle the ballots. RCW 29A.64.041(1).
- Persons representing the candidates affected by the recount may observe the recount. RCW 29A.64.041(3).
- The observers may not make a record of the names, addresses, or other information on the ballots, poll books, or applications for absentee ballots unless authorized by the superior court. RCW 29A.64.041(3).
- The 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. RCW 29A.64.041(3).

In addition to these legal requirements, the King County Canvassing Board has adopted local procedures for conducting a manual recount. A copy of these procedures is attached to the Logan Declaration as Exhibit A. In the context of the recount to be conducted in this case, the following procedures apply:

- Teams of two members each plus a single recorder will perform counting.
- The ballots will be distributed by precinct among teams.
- The ballots of each precinct will be divided approximately evenly between the team members who shall separate the ballots into piles: one pile for each candidate receiving a vote; one pile for "no counts", or undervotes; one pile for overvotes (i.e., where a selection is made for more than one candidate); and, a separate pile for write-ins.
- The first team member will then proceed to check and count all ballots marked for a candidate.

- The second team member will do likewise for ballots marked for a candidate.
- On the completion of the count, each team member will record the count on a tally sheet identifying both the precinct and the position number.
- When completed, each team member will turn the tally sheet upside down and pass it and the ballots to the other team member. Each will in turn recount the other ballots, writing the count on their tally sheet.
- The tally sheet is given to the recorder who shall check to see that the counts are the same. If not, the recorder shall direct the members to recount again until each gets the same count. If the counts are the same, the recorder shall record the count on the summary tally sheet, advising the observers of a completed precinct count.
- When the count of all precincts is completed, the recorder shall add up the precinct count for a total count for each position. The summary tally sheet data will be entered on to redundant spreadsheets which shall include a column for the mandatory machine recount numbers for each precinct, and a "difference" column to indicate by positive or negative numbers the difference from the original to the recount. The completed summary tally sheet shall be given to the elections Superintendent or designee.

Logan Declaration at 3-4.

A third source of guidance to the County for establishing final procedures for a manual recount are any practical considerations that may exist. Logan Declaration at 4-5. These involve addressing such issues as the physical layout of the recount facilities, security requirements, and the need to balance the sincere desire for elections staff to be responsive to the numerous issues raised by party observers with the need to ensure that workers are able to perform their duties. *Id.* at 5.

Based on all of the foregoing sources, King County expects to conduct the manual recount directed by the Secretary of State as set forth in the letter attached to the Logan Declaration as Exhibit B. As the letter describes, the manual recount will occur in a facility located in Tukwila that the County has leased from the King County Airport. Logan Declaration at 5-6. The facility has approximately 16,000 square feet of space. *Id.* at 6. The majority of this space is in one large room on the main floor, which is where the recount will be performed. *Id.* An upper floor in the building has space for a break room and a coat check area. *Id.* No jackets, bags or writing instruments may be brought into the recount area. *Id.*

Employee training is scheduled for Tuesday, December 7, 2004. Logan Declaration at 6. The recount will be continuous on a daily basis with completion expected by December 22, 2004. *Id.* Three person recount boards will be hired to do the sorting and counting of ballots. *Id.* The boards will record their counts on tally sheets with the data entered into redundant spreadsheets for accumulating the results. *Id.*

To address concerns about who is selected to help conduct the recount, and understanding that for space and security reasons it is not possible to have observers from each party—Republican, Democrat and Libertarian—at each of the recount board tables, King County is planning

to comprise each recount board of a member referred by the Democratic Party, a member referred by the Republican Party, and a recorder recruited by King County Elections. Logan Declaration at 6. All three members of the recount boards will be employed by King County and subject to Elections Division workplace rules and guidelines. *Id.* The Elections staffing plan contemplates 80 of these boards, or 240 workers in total. *Id.* To this end, the County asked for and received on Monday December 6, lists from each party containing their proposed representatives. *Id.* at 6-7.

Members of the recount boards will be asked to subscribe to an oath attesting to their role in the recount process. Logan Declaration at 7. The work schedule will be a six-day workweek with ten-hour work shifts daily. *Id.* Party designees will be asked to complete a King County employment application and they must be available to work the entire recount period. *Id.* These short-term temporary positions will be compensated at $12.70 per hour under the classification of Administrative Office Assistant. *Id.*

In addition to the recount boards, the entire recount process will be open to observation by political party observers and the public. King County election coordinators will be asking for five official political party observers who will be scheduled and paid by King County Elections. Logan Declaration at 7. As it did for the General Election canvass and

machine recount, Elections will conduct observer training prior to the recount. *Id.*

The County does not intend to limit the number of additional party and campaign observers, but those observers will not be employed or paid by King County Elections. Logan Declaration at 7. Elections will restrict observers to certain areas during the recount to ensure that the recount is continuous and that there is no undue delay or disruption to the process. *Id.* at 7-8. Elections will provide seventeen different observer stations in addition to a large observer congregating area, which will allow observers to rotate and observe throughout the room. *Id.* at 8. Each candidate or party will be permitted up to two observers at each observer station at any given time. *Id.* A floor plan is attached to the Logan Declaration as Exhibit D. Observer areas and stations are indicated on the floor plan with rectangles and cross hash marks. *Id.* Witnesses will be able to "observe the ballots and the process of tabulating votes" as prescribed by RCW 29A.64.041(3) at these designated observer stations.

C. ARGUMENT

1. KING COUNTY'S OBSERVER GUIDELINES COMPLY WITH STATE LAW AND ENSURE AN OPEN AND TRANSPARENT RECOUNT.

Pursuant to RCW 29A.64.030, proceedings of the canvassing board and its duly authorized representatives during a recount are open to

the public in accordance with the Open Public Meetings Act (Ch. 42.30 RCW). RCW 29A.64.030 states in part, "Subject to reasonable and equitable guidelines adopted by the canvassing board, all interested persons may attend and witness a recount." Specifically with respect to recounts, RCW 29A.64.041(3) states, "The secretary of state 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."

As with the canvass of the General Election and the machine recount, King County does not intend to limit the number of observers who may attend and witness the manual recount. However reasonable and equitable guidelines will be imposed in order to prevent delay and disruption of the process. These guidelines are based on the legal standards as well as the practical considerations that arise in conducting a manual recount in a large county. The guidelines ensure that observers can observe the ballots and the process of tabulating votes, while also addressing issues such as the physical layout of the recount facility, security requirements, and the numerous issues raised by the political parties.

Attached to the Logan Declaration as Exhibit D is a floor plan for King County's recount facility. This facility was identified and leased

specifically for the manual recount. The manual recount will be conducted in one large room on the main floor of the facility. The clusters of tables with three chairs each, show the locations of the 80 recount boards which King County has proposed to staff with one individual referred by the Republican Party, one by the Democratic Party, and one recruited by the Elections Division. The rectangles with cross hash marks that surround each of the clusters of recount boards are the observer areas. There are two large rectangles with cross hash marks that represent a larger observer congregation area. Two observers from each party will be allowed to observe from the seventeen observer stations that surround the recount board clusters at all times during the manual recount. King County does not intend, at this time, to limit the number of observers in the larger observer congregation area. Parties may rotate observers from the congregation area through the observer stations that surround the recount boards.

This floor plan and the corresponding guidelines allow the parties to "observe the ballots and the process of tabulating the votes" as required by RCW 29A.64.041(1), while also protecting the integrity of the recount and avoiding undue delay and disruption of the process.

Petitioners argue that King County's recount plan denies them their right to observe the process. They seem to demand that each

observer should be allowed to see not only the ballots, but the actual votes on each of the more than 898,000 ballots in King County alone. There is no legal support for this argument.

The statutes are clear are the role of an observer is limited to just that – an observer. Observers may not handle the ballots and they may not make a record of information on the ballots unless authorized by the superior court. RCW 29A.64.041. Observers are not active participants in the manual recount, they are there to observe the process.

The implausibility of Petitioners' interpretation of their role in the manual recount is demonstrated when considered in the context of a machine recount. If the Legislature intended for observers to be able to examine each vote on a ballot before it was tabulated, it would have directed that county canvassing boards hold up each side of every ballot for observer examination before it was run through the tabulation machine. Instead, during a machine recount such as the one just completed, ballots can be run through the tabulating machines in stacks of 250. Petitioners observed the machine recount in King County and did not indicate that they needed to view the votes on each ballot before they were tabulated.

The practical effect of Petitioners' assertions regarding their role as observers would be to double the number of people at each of the recount

tables. There are currently three recount board members who would have to make room for observers from the Republican, Democratic, and Libertarian Parties. Not even counting other observers and Elections staff, this would increase the number of people on this floor of the recount facility from 240 to almost 500. There simply is not room. As a result, the number of recount boards would have to be reduced causing undue delay in the recount process.

Additionally, based on experience with the machine recount, it is the opinion of the King County Elections Director that allowing observers from each of the three major parties to stand or sit at each of the recount board tables would cause disruption to the recount process. Logan Declaration at 5. During the machine recount, observers were stationed throughout the tabulating area as they will be for the manual recount. As the floor plan shows, some observer stations are very close to particular recount board tables. During the machine recount, observer noise was a problem. Elections staff noted that observers who were attempting to talk to elections staff and to each other, were disruptive. Supervisors had to remind observers on many occasions that there was no talking in the recount areas. *Id.* While observer noise was disruptive during the machine recount, the potential disruption during the manual is greatly amplified. Recount board members will be manually counting large

stacks of ballots. Any disruption in concentration could easily cause a person to lose count and have to begin again. *Id.* For this reason, it is critical that disruptions that occurred during the machine recount be minimized for the manual recount.

King County's guidelines for observers during the manual recount comply with statutory requirements and provide the most access for observers considering the need to complete the recount in an expeditious and accurate manner. This is the intent of the recount statutes as specifically stated in the Legislature's statement of finding and purpose for RCW 29A.64.070.[1] As with the canvass and the machine recount, King County will conduct the manual recount in an open and transparent manner and will allow observers to witness the recount subject to the reasonable and equitable guidelines discussed above and in Exhibit C to the Logan Declaration.

2. OBSERVERS DO NOT HAVE THE RIGHT TO LODGE OBJECTIONS WITH THE RECOUNT BOARD DURING THE MANUAL RECOUNT.

As discussed above, state law limits the role of an observer to observing. Without any legal support, Petitioners ask this Court to order

[1] Finding, purpose – 1991 c 90: "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." [1991 c 90 §1].

the Secretary of State's Office to issue rules providing observers with an opportunity to lodge an official objection to any decision of the canvassing board and its delegates with respect any individual ballot. The Legislature stated its clear intent that the recount statutes were enacted for the purpose of promoting prompt and accurate recounting of votes to provide closure to the recount process.[2] Petitioners proposal is contrary to this policy and as a legal matter, this request is contrary to state election law. As a practical matter, it has the potential of creating a chaotic environment where board members are unable to concentrate on the important task at hand.

King County joins with the Secretary of State's Office in its response to Petitioners' request for relief on the issue of observers having the right to lodge objections to any and all decisions of the canvassing boards and their delegates. State law allows observers to "observe the ballots and the process of tabulating the votes." RCW 29A.64.041(1). Observers are not permitted to handle ballots and they are not even allowed to make a record of any information on the ballots. RCW 29A.64.041(1) and (3). If the Legislature intended to allow observers the opportunity to lodge objections to the disposition of a particular ballot, it would have certainly given the observer the ability to make a personal

[2] *See footnote 1 supra.*

note of his or her own objection and a process for resolving the objection. It did not and this Court should not allow Petitioners to expand their role beyond what the state law provides.

As a practical matter, allowing observers to lodge objections during the manual recount will not only disrupt the process, but it is a recipe for chaos. If a Democratic observer calls out an objection during the manual recount, there is a good chance that a Republican observer will counter the objection. It is not difficult to anticipate the debates that could ensue given the closeness of the race. As the floor plan attached to the Logan Declaration as Exhibit D shows, the recount board tables are close together. Disruptions in one area will not be limited to a certain table.

It is undisputed that the manual recount will require the uninterrupted concentration of the recount board members. Even during the machine recount, elections staff noted that talking by observers was disruptive to their work. While these disruptions during the machine recount undoubtedly caused some degree of delay and frustration for elections staff, that delay and frustration will be amplified during the manual recount. Any statements, including verbal objections, have the potential to disrupt the concentration of recount board members, including those who may be near the end of a stack of 250 ballots. The interruption

would likely force the counting to begin again from the first ballot in the stack.

Petitioners' request that the Court order the Secretary of State to issue rules allowing for observers to lodge objections during the manual recount should be denied. There is no legal support for Petitioners' request and the significant risk of undue delay and disruption weighs heavily against the granting of such a request.

3. STATE LAW PROVIDES FOR A RECOUNT, NOT A RECANVASS.

Petitioners ask this Court to order the Secretary of State's Office to issue new rules directing the county auditors to conduct not only a recount, but a recanvass. However, state statute specifically defines "recount" as:

> [T]he 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. Conversely, "canvassing" is defined as follows:

> [T]he 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 general election.

RCW 29A.04.013. These statutes make clear that there is a difference between recounting and canvassing. Had the legislature intended to

require county auditors to tabulate and re-examine previously rejected ballots during a recount, for example, ballots where there was no evidence of voter registration, it would have so stated. Instead, state law directs county auditors to retabulate the ballots, not recanvass the election.

For the above reason alone, the Court should deny Petitioners' request to have the counties conduct a recanvass rather than a recount. In addition, King County joins in the Secretary of State's Office response to this request for relief.

4. PETITIONERS' ALLEGED "ERRORS" DO NOT SUPPORT THEIR REQUEST FOR A RECANVASS.

Though Petitioners argue that they are not asking the Court to direct county canvassing boards to reach a determination on any particular ballots, they do try to support their argument for a recanvass by alleging that "errors" have occurred that would be "corrected" during a recanvass. Petitioners' Motion at 16. Though not all of Petitioners' factual assertions can be investigated and addressed in the short response time allowed, one of Petitioners' primary allegations regarding ballots in King County does not evidence any "error" and should not provide any basis on which to order a recanvass of the election.

This alleged category of "error" that Petitioners raise in support of their request for relief involves the verification of signatures on absentee

and provisional ballots. Petitioners' Motion at 3. In particular, Petitioners make the sweeping assertion that they "observed that in King County and other counties, many . . . [signature] rejections were erroneous." Petitioners' Motion at 3. Without specifics, it is impossible to respond to such a blanket assertion; nevertheless, the system in King County under which all signature determinations were made complies with state law.

Signature verification is required by state statute and rule. RCW 29A.40.110(3) states that the canvassing board or its designated representatives "shall verify that the voter's signature on the return envelope [for the absentee ballot] is the same as the signature of that voter in the registration files of the county." WAC 434-240-240 is also related to absentee ballots and directs that "the canvassing board must compare the signature on the return envelope, or on a copy of the return envelope, with the signature as it appears on the voter's voter registration card." For provisional ballots, WAC 434-253-047 states that a "provisional ballot cannot be counted unless the voter's name, signature and the date of birth, if available, matches a voter registration record."

Pursuant to WAC 434-240-240 and prior to the election, King County Elections staff was trained on King County's system for implementing the state election laws for signature matching. Logan Declaration at 10. King County's system is to look for at least three points

of similarity between the signature on absentee and provisional ballot envelopes and the signature of that voter in the voter registration files. *Id.* If at least three points of similarity are found, the signature is verified. *Id.* If less than three points are found, the signature is rejected. *Id.* If elections staff has any question as to whether a signature does or does not match, they are instructed to refer the signature to a supervisor. *Id.* If the supervisor also believes there is a question as to the validity of the signature, it is referred to the Canvassing Board for determination. *Id.*

The King County Canvassing Board includes Dean Logan, the Director of Elections as the Chair, Dan Satterberg, Chief of Staff for the King County Prosecuting Attorney's Office, and Metropolitan King County Councilmember, Dwight Pelz. Logan Declaration at 10. These three board members (or in some cases a quorum of two due to a board member's absence from a particular meeting) examine all ballots referred to them by King County Elections Staff, including those referred due to a question on the validity of a signature. *Id.* at 10-11. This examination of ballots (or ballot envelopes) pursuant to King County's three points system occurs at an open public meeting where the Canvassing Board takes a vote on the record as to the disposition of a referred ballot. *Id.* After the Canvassing Board votes, elections staff is given specific instructions by the Canvassing Board as to whether and how the ballot

should be processed. *Id.* Throughout the 2004 General Election, observers, including those from the three major political parties, attended Canvassing Board meetings and witnessed this process. *Id.*

In canvassing the November 2, 2004 General Election, there were some provisional ballots out of the over 31,700 provisional ballots received, where signatures were rejected either because the signatures did not match or because a signature was missing. Logan Declaration at 11. To ensure that no ballots were being improperly rejected, each of those ballots went though a <u>second</u> review by elections staff using the same three point system used in the first review. *Id.* If there was any doubt or question in the elections staff member's mind as to the validity of the signature on this second review, it was referred directly to the Canvassing Board for determination. In the end, the 415 provisional ballots that were ultimately rejected with respect to this issue, were rejected because they did not meet state law requirements that there be a signature match.

For the foregoing reasons, Petitioners' broad claims of "error" regarding signature verification in King County do not justify granting

them the emergency partial relief they seek.[3]

5. RESPONDENTS ARE ENTITLED TO THEIR COSTS.

RCW 29A.68.060 provides that if proceedings brought under Chapter 29A.68 RCW are dismissed for insufficiency, judgment shall be rendered against the contesting party, in favor of the party charged with error or omission. Petitioners have failed to meet their burden to show that Respondents Dean Logan and the King County Records, Elections and Licensing Services Division committed an error or omission in violation of state election law. Respondents are therefore entitled to an award of the costs incurred in defending this action.

D. CONCLUSION

King County's manual recount will be conducted in an open and transparent manner that allows Petitioners to observe the ballots and the process of tabulating the votes. King County's recount guidelines are reasonable and equitable and Petitioners fail to demonstrate that they are being denied any rights granted to election observers under state law. Additionally, Petitioners fail to provide any legal basis to support their

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[3] Petitioners also make a passing reference in their Statement of the Case that several counties, including King, refused to count provisional ballots where signature validation documents was submitted on the day of certification, November 17. In King County, the well-publicized deadline for submitting signature validation documents was the day before certification, the same deadline set in state rule for submitting signatures for absentee ballots where the voter failed to sign the return absentee envelope. WAC 434-240-235; *see* Logan Declaration at 11-18.

request for a recanvass. The law provides for a recount and this Court should deny Petitioners' extraordinary requests for relief and allow the counties to proceed with the manual recount as provided by law.

DATED this 7th day of December, 2004.

RESPECTFULLY submitted,

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