NO. 76321 - 6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID McDONALD, ET AL.,

Petitioners,

v.

SECRETARY OF STATE SAM REED, ET AL.,

Respondents,

and

GOVERNOR-ELECT DINO ROSSI, a citizen and elector of Washington, and the WASHINGTON STATE REPUBLICAN PARTY, an unincorporated association,

Applicants-Intervenors.

INTERVENORS' OPPOSITION TO PETITION BY ELECTORS AND PETITION FOR WRIT OF MANDAMUS AND OTHER RELIEF and MOTION IN SUPPORT OF EMERGENCY PARTIAL RELIEF

Harry J. F. Korrell
Robert J. Maguire
Davis Wright Tremaine LLP
Attorneys for Applicants-Intervenors.
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150 Phone
(206) 628-7699 Fax

TABLE OF CONTENTS

INTRODUCTION

The votes have been counted and recounted. Dino Rossi is the Governor-Elect of the State of Washington. The Washington State Democratic Central Committee and other petitioners have refused to accept the result. Now, while simultaneously requesting a second recount – this time by hand – Petitioners bring this suit under the election law contest statute, seeking to change the recount rules so the results might this time favor their candidate. To accomplish this goal, Petitioners make allegations of wrongdoing against various county auditors and the Secretary of State and criticize manual recount guidelines that are in substance the same as the previous machine recount guidelines to which they did not object. Since Christine Gregoire did not win the machine recount, apparently "new ballots" are necessary so she might win the final hand recount.

The result the supporters of Christine Gregoire now seek is unprecedented in the history of Washington and disregards the statutory recount process and the manner in which previous Washington recounts have been conducted. Adopting such a radical and ad hoc change of the rules after the canvass, the initial count, and the first recount is bad law and bad policy. It will undermine public confidence in the election process, jeopardize passage of future school levies, and throw

Washington's election system into pure chaos for this election and every close election to come. Petitioners' demands for relief must be denied.

STATEMENT OF ISSUES

(1) Should the Court deny mandamus because the Secretary of State has discretion regarding the content of guidelines for conducting a manual recount and mandamus may not issue for discretionary actions?

(2) Should the Court decline to address Petitioners' election contest until the manual recount is completed because the issues may become moot and because Respondents must be given adequate time to conduct discovery and develop a factual record regarding Petitioners' allegations of misconduct?

(3) If considered now, should the Court reject Petitioners' demand that counties revisit previous determinations as to the validity of rejected ballots because:

(a) Washington's statutes plainly define recount as a "re-tabulation" of *votes cast* (which according to Washington statutes and cases include only valid ballots that were actually counted) rather than a recanvass of rejected ballots;

(b) the doctrine of laches bars Petitioners from claiming that a recount requires revisiting prior validity

determinations when they did not make such a claims before the election or in response to the initial machine recount;

(c) to ensure that any new signature standard is applied evenly to all ballots, canvassing boards would need to revisit not only those ballots previously rejected but also the signatures for all absentee ballots that were previously accepted as valid, thereby throwing the process into chaos and likely resulting in the need for a new election; and

(d) Petitioners' demands will frustrate the public's interest in the expeditious resolution of the election and disrupt the orderly transition of government.

(4) Are the Secretary of State's guidelines regarding observers consistent with the statutory requirements for observers and does King County's plan of ensuring one Republican and one Democrat at each recount table violate those statutory requirements?

THE PARTIES AND THEIR CONTENTIONS

I. Petitioners.

Petitioners include the Washington State Democratic Central Committee (WSDCC); David McDonald (described as a qualified elector

and the Recount Director for the WSDCC); and four other individuals described as electors.

Petitioners seek a writ of mandamus from this Court to compel the Secretary of State to change his instructions to counties regarding the conduct of the recount. They seek to force changes in the way recounts are conducted in Washington. Specifically, they want this Court to require that canvassing boards not just to "retabulate" the votes that were initially counted in the gubernatorial election but to increase the universe of ballots that might be counted by revisiting determinations (made prior to the initial count) about which ballots were valid and could be counted and which were illegal, invalid, and not to be counted. They also seek changes to the way the political parties and candidates are allowed to observe the recount.

II. Respondents.

Respondents include Sam Reed, Washington's Secretary of State; King County's Records, Elections and Licensing Services Division and its Director Dean Logan; and the auditors from three counties: Franklin, Pend Oreille, and Pierce. These auditors have been named as "representatives" of the Washington State County Auditors. The petition also names as respondents "County Canvassing Boards" without specific reference to any of the 39 counties in Washington State.

III. Intervenor-Respondents.

Applicants for intervention as respondents are Governor-Elect Dino Rossi (a Washington citizen and elector as well as the certified winner of the election) and the Washington State Republican Party (WSRP). Intervenors contend that a writ of mandamus should not be issued (1) because the acts sought to be compelled are discretionary acts of a high level member of the executive branch that are consistent with statutory law; (2) because there is no legal basis for allowing canvassing boards, at this late stage in a recount, to add to the universe of ballots to be counted by recanvassing ballots that have been determined to be illegal or invalid; (3) because to do so would wreak havoc on this and other elections; and (4) because it may prove unnecessary to reach the issue petitioners raise if the hand recount is allowed to proceed in the manner of other recounts.

FACTS

On November 17, 2004, Secretary of State Sam Reed announced the official results of the November 2, 2004, general election. Dino Rossi won the Governor's race by a margin of 261 votes. *See* http://www.secstate.wa.gov/office/news_releases.aspx. Because the margin of victory was fewer than 2000 votes, the Secretary of State ordered a machine recount of the votes in the race for governor. *See* RCW

29A.64.021. When the votes were retabulated, Governor-Elect Rossi again prevailed and, pursuant to RCW 29A.60.250, the Secretary of State certified the results and confirmed on November 30, 2004 that Rossi was the Governor-Elect. http://vote.wa.gov/general/recount.aspx.

Not satisfied with the results of the previous two tabulations of the votes, on December 3, 2004, petitioner Democratic Central Committee requested a state-wide manual recount under RCW 29A.04.139 and deposited $730,000 with the Secretary of State's Office. Under long-standing Washington election procedures and according to the guidance on the Secretary of State's website, the manual recount was to be simply a retabulation of the same votes counted in the original canvass and retabulated in the machine recount; it would not include review of any signature check or other validity determinations. Secretary of State FAQ regarding General Election Recount Procedures, McBrayer Decl.,¶ 3, Ex. B; RCW 29A.04.139 (recount is merely a "retabulation").

Obviously not impressed with their chances of prevailing in another tabulation of the twice-counted ballots, Petitioners filed this action immediately after paying the deposit for the manual recount. As mentioned briefly above, by their petition and motion, Petitioners primarily seek to require the Secretary of State to change the recount procedures in Washington. Contrary to Washington statutes, regulations,

and long-standing practice, Petitioners ask this court to require that the Secretary of State direct county canvassing boards not just to "retabulate" the ballots previously counted (as provided in RCW 29A.04.139) but also to revisit the thousands of decisions regarding the validity of absentee and provisional ballots. Petitioner's goal, of course, is to expand the universe of ballots to be examined in the recount, as it is unlikely they will prevail on a third count, having already lost the first two, if they cannot put more ballots into the mix. This would be an unprecedented change in Washington election procedures and would wreak havoc on Washington's election system.

To appreciate the significance of the damage Petitioners' request would cause, it is important to understand some of the key aspects of Washington's election procedures.

There three categories of ballots used in the general election: (a) normal poll ballots used by registered voters who have not requested an absentee ballot and who seek to vote in the precinct in which their name appears in the poll book; (b) absentee ballots which are sent by mail to and returned by those registered voters who request absentee ballots; and (c)

provisional ballots (previously known as "special ballots" in Washington). *See* Declaration of Norma Brummett.[1]

Poll ballots, absentee ballots, and provisional ballots are processed and handled differently from one another. *See* Brummett Decl. Poll ballots are tabulated beginning almost immediately after the polls close. However, as part of the initial processing of absentee and provisional ballots, auditors must determine, among other things, whether the person submitting the ballot is a registered voter and whether the signature submitted with the ballot matches the signature on the original voter registration record. If it is determined that the ballot is not from a lawful registered voter, the ballot is rejected and is not tabulated.[2] Brummett Decl.

---

[1] A provisional ballot is given to a person who appears at a precinct to vote but whose name does not appear on the poll book; a person who appears at a precinct to vote but who has already been issued an absentee ballot; or a person who failed to provide identification when required, such as when registering to vote for the first time. WAC 434-253-043. Because people are provided with and allowed to vote a provisional ballot if they are not on the rolls at a polling place, it would be a simple matter for someone to vote many times in a day, simply by driving from polling place to polling place. Provisional ballots are presumed to be invalid, and they cannot be counted unless the county auditor determines that the voter's name, signature, and date of birth (if available) matches a voter registration record and the voter was not issued an absentee ballot and did not vote at another polling place. *See* WAC 434-253-047.

[2] Rejected ballots are treated differently after processing as well. They are kept physically separate from the ballots that are tabulated. *See* Declaration of Norma Brummett. The process for securing and maintaining valid ballots which are tabulated is required by statute and is controlled and rigorous. RCW 29A.60.110 requires auditors to secure the tabulated ballots in sealed container, which may only be opened under certain circumstances, such as a recount. *See* Declaration of Norma Brummett.

Petitioners accuse some of the Respondents of misconduct and argue the allegedly high rate of signature mismatches in King County is evidence of unfair treatment. However, reports of voter-registration fraud have been widespread in the past few years.[3] Washington counties experienced huge spikes in voter registration numbers this year. And the process of verifying signatures and voter registration information on election day and during the initial canvass (before the results or voting trends are known in a particular county) is one of the few protections against fraud built into Washington's system.

Nearly 3 million people voted in the November 2, 2004, general election. http://vote.wa.gov/general/statewide_results.aspx. Approximately 1.7 million people used absentee ballots and about 88,000 people used provisional ballots.

---

[3] Paula Woodward, "I-Team: Talks With Groups That Submitted Fraudulent Forms," http://www.9news.com, Accessed 10/13/04. "Investigation Reveals Potentially Fraudulent Voter Forms," *The Associated Press*, 10/12/04. John Sanko, "3 Prosecutors Join Voter Fraud Probe," *Rocky Mountain News*, 8/7/04. Tom Zucco, "Activist Group Blamed For Voter Roll Goofs," *St. Petersburg Times*, 10/4/04. Paige St. John, "Rumors Of Vote Fraud Rampant," *Florida Today*, 10/2/04. Dawson Bell, "Campaign Workers Suspected Of Fraud," *Detroit Free Press*, 9/23/04. Patrick Sweeney, "Voter Registration Cards Bring Felony Charge," *Saint Paul Pioneer Press*, 10/16/04. Greg Reeves, "Prosecutor Urged To Examine Reports Of Double Voting," *The Kansas City Star*, 9/9/04. "Clark County Election Official Sees Increase In Fake Voter Sign-Ups," *The Associated Press*, 7/9/04. Kirsten Searer, "Extent Of Voter Fraud In County Unknown," *Las Vegas Sun*, 7/21/04. Andy Lenderman and Dan McKay, "Police Find Voter Registration Forms During Drug Search," *Albuquerque Journal*, 10/19/04. "Thousands Of Suspicious Voter Registrations Found In Bernalillo County," KRQE News 13 Website, www.krqe.com, 8/16/04. Dan McKay, "Kids Find Themselves Registered To Vote In Bernalillo County," *Albuquerque Journal*, 8/20/04. Ryan Teague Beckwith, "Voter Drive Submits Faulty Data," *The* [Raleigh] *News & Observer*, 8/17/04. "Man Arrested After Voter Forms Turned In For Mary Poppins, Michael Jordan, Ohio Officials Say," *The Associated Press*, 10/19/04. Cindi Andrews, "Alleged Fraudulent Voter Cards Scrutinized," *Cincinnati Enquirer*, 10/8/04. Lisa A. Abraham, "Suspicious Voter Cards Are Piling Up," *Akron Beacon Journal*, 9/29/04. Michael Scott, "Dead Man On Voter Rolls Sparks Inquiry," [Cleveland] *Plain Dealer*, 9/23/04. "Warrant Issued For False Registration," *The Associated Press*, 9/7/04. Sharon Spohn, "Voter Fraud Suspected In Registration Deluge," *The Mercury*, 10/8/04. Tom Kertscher, "Registration Fraud Takes Advantage Of Security Rules," *Milwaukee Journal Sentinel*, 10/3/04. Reid J. Epstein, "Faulty Voter Forms Irk Clerks," *Milwaukee Journal Sentinel*, 8/31/04.

If, as part of a recount, counties had to revisit even a fraction of the decisions regarding the validity of nearly 2 million ballots, along with recounting the ballots by hand, the recanvass (for it would no longer be a "recount") could drag on for weeks or months. King County has already announced that just to retabulate the already twice-counted ballots by hand will take it until December 22. No one knows exactly how long it would take to do what Petitioners want (revisiting all the decisions to reject ballots as invalid or illegal), much less how long it would take to revisit all the validity determinations, which would be required for a fair review of those decisions.

ARGUMENT AND AUTHORITY

Petitioners seek to set a dangerous precedent in Washington by asking the Judicial Branch to change the rules for an election after it has occurred: they want to change the recount rules halfway through the process. In the past, this Court has prudently resisted interjecting itself into the electoral process. *See Washington State Labor Council v. Reed*, 149 Wn.2d 48, 55 (2003) (the Court is "generally reluctant to interfere in the electoral process . . ."). "[E]lection contests are governed by several general principles [and] [c]hief among them is the principle, long followed by this Court, that the judiciary 'should exercise restraint in interfering

with the elective process which is reserved to the people..." *Dumas v. Gagner*, 137 Wn.2d 268, 283 (1999).

I. A Writ of Mandamus Cannot Issue Because the Secretary of State has Discretion to Create Guidelines Regarding Election Procedures in Accordance with Election Law.

A writ of mandamus is extraordinary relief. *See Staples v. Benton County*, 151 Wn.2d 460, 464 (2004). Mandamus may not be used "to compel a general course of official conduct" and "may not be used to compel the performance of acts or duties which involve discretion on the part of the public official." *Walker v. Munro*, 124 Wn.2d 402, 408-10 (1994). This Court has long refrained from issuing a writ of mandamus that would "interfer[e] with the executive branch of the state government in a matter involving the exercise of discretion of one of the high officers of the state." *State v. Schively*, 63 Wn. 103, 109-10 (1911). "Before the judiciary will interfere in such a case it must clearly appear that such officer has so far departed from the line of his duty under the law that it can be said he has in fact so far abused such discretion that he has neglected or refused to exercise any discretion." *Id.*; *accord State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 26-28 (1963) ("We agree with respondents that mandamus does not lie to compel the performance of discretionary acts unless the discretion so exercised has been arbitrary and capricious.").

Here, the duties of the Secretary of State are set forth in the election code:

> the secretary of state as chief election officer shall make reasonable rules in accordance with chapter 34.05 RCW not inconsistent with the federal and state election laws to effectuate any provision of this title and to facilitate the execution of its provisions in an orderly, timely, and uniform manner relating to any federal, state, county, city, town, and district elections . . . .
>
> In addition to the rule-making authority granted otherwise by this section, the secretary of state shall make rules governing the following provisions:
>
> . . .
>
> (40) Procedures for conducting a statutory recount.
>
> . . .

RCW 29A.04.610

Plainly, the statute vests discretion in the Secretary of State to establish procedures associated with the election and recount so long as those procedures are in accordance with election law. Under such circumstances, a writ of mandamus could only issue if the Secretary of State acted so arbitrarily and capriciously "as to amount to a failure to exercise discretion." *Vangor v. Munro*, 115 Wn.2d 536, 537 (1990). Here, however, the Secretary of State's rules appear to be consistent with RCW 29A.04.139, in as much as they limit the manual recount to a "retabulation" of valid ballots and make clear that rechecking signatures

on provisional or absentee ballots, about which determinations have previously been made, is not a part of the recount.

Petitioners do not merely ask the Court to direct the Secretary of State to perform a discretionary act in a particular way, they ask the Court to require the Secretary of State to exercise his discretion in a manner that is contrary to statute, contrary to practice, contrary to good public policy and contrary to longstanding precedents of this Court. The Court's decisions in *State v. C.W. Clausen* and *Gottstein v. Lister* (discussion infra) are unequivocal and reject arguments like Petitioners' here that "votes cast" includes anything other than valid votes.[4]

Petitioners' request for a writ of mandamus also fails because it seeks only to compel a general mandate – to comply with Petitioners' strained interpretation of election law. In *Walker*, petitioners sought a writ prohibiting state officials from implementing and enforcing Initiative 601, an initiative limiting "expenditures, taxation, and fees." *Id.* at 405-06. Petitioners asserted that Initiative 601 was unconstitutional and requested the Court issue a writ directing state officials "to adhere to the requirements of the Washington State Constitution and to prohibit them

[4] Even if the Secretary were to adopt Petitioners' contention that "votes cast" includes votes rejected as invalid or illegal, the interpretation would be contrary to the clear statutory terms, and beyond his authority. To alter the term "votes cast" for purposes of a recount to include both "votes cast" and "votes not cast" would amend the statute by regulation. The Secretary is powerless to amend the statute's language. *Edelman v. PDC*, 99 P.3d 386 (Wash., 2004).

from implementing and enforcing Initiative 601." *Id.* at 407. Noting that mandamus is inappropriate to compel a general course of conduct, this Court stated: "[i]t is hard to conceive of a more general mandate than to order a state officer to adhere to the constitution." *Id.* at 408. As a result, this Court refused to issue the writ. *Id.*

Even more on point, this Court denied a writ of mandamus in which petitioners sought to require the Secretary of State to compel certification of an initiative as having a sufficient number of signatures to appear on the ballot. *Vangor v. Munro*, 115 Wn.2d 536, 537 (1990). This Court held that "the Secretary's acts in verifying signatures are discretionary and that, for mandamus to lie, a clear abuse of discretion must be found." *Id.* at 537, 543. Here, Petitioners seek an order directing the Secretary's acts with respect to verifying signatures on only a select portion of the total provisional and absentee ballots. The reasoning and holding of *Vangor* control. The verification of signatures is a discretionary act and, unless there is a clear abuse of discretion, mandamus will not lie.

II. This Court Need Not and Should Not Reach Petitioners' Claims without a More Complete Factual Record.

This Court is being asked to stop Washington's standard recount process. Petitioners seek to begin an election contest before the hand

recount – by definition a hand "retabulation" of counted ballots – can even commence. Although neither the Petitioners nor Ms. Gregoire alleged any wrongdoing or neglect when the ballots were first counted, or even when they were recounted by machines, now that the results have been determined adverse to their interests they seek to deviate from the standard statutory recount process. There is neither a good practical nor legal reason why Washington should not continue using its standard statutory recount process to determine, yet again, the votes cast for each Gubernatorial candidate.

If the legislature intended the recount process to be a recanvass process, it would be called "recanvass," rather than "recount." Recounts are not new or exceptionally rare in Washington. Yet, the Petitioners have failed to provide this Court with a single example in Washington of a recount process being expanded and transformed into a recanvass process of rejected ballots. Petitioners do not provide this Court with a single example of a County Auditor or Washington Secretary of State being ordered as part of a hand or machine recount to revisit canvassing board decisions on absentee or provisional ballots rejected.

Petitioners ask this Court to take an unprecedented action and order the chief election officer of the state to change what ballots will be recounted in the closest Governor's race in Washington's history.

Petitioners ask for a review of the canvassing board actions on rejected ballots, not a retabulation of ballots cast and counted. Any court order for a change in the recount rules in the middle of the recount process is unlikely to instill voter trust in the Washington election process and should be resisted.

A. Judicial Efficiency and Prudence Counsel in Favor of Waiting to Determine whether the Issues may be Moot after the Manual Recount.

Neither the commencement nor completion of the hand recount will impair the ability of the Petitioners or Christine Gregoire to contest the election for Governor. Petitioners and Ms. Gregoire may still seek from the legislature[5] or this Court a review of election day decisions rejecting absentee and provisional ballots in an election contest, but that is different from a simple recount. Rejected absentee and provisional ballots are physically separate from the valid, cast ballots that have already been counted (twice). The hand recount set forth in Washington statutes and the Secretary of State's guidelines will not impair or prevent any fact-finder from separately reviewing the many factual assertions of the Petitioners or Ms. Gregoire.

---

[5] Petitioners' counsel indicated in a letter to the Secretary of State last week their apparent belief that a contest action could or would be decided by the legislature. The Intervenors are not expressing any view at this time on this issue. (*See* Petitioners Exhibit I Dec. 1, 2004 letter to Secretary of State Reed from David J. Burman.)

Importantly, the results of the hand recount, accomplished under existing rules, may render moot most if not all of the issues raised by Petitioners. The hand count may change the vote totals to a degree that Ms. Gregoire would not seek to continue a contest action. In other words, there is no good reason to address the issues now, and the Court may not have to reach these issues at all if it waits until the statutory recount process ends.

B. The Factual Record is Incomplete and Must be Developed Prior to Considering Such Extraordinary Relief.

As this Court initially did in *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 55 (2003), it should again "decline[] to issue a writ of mandamus" because there is "'insufficient time to engage in the deliberations that a case of this magnitude demands' . . and because an immediate decision [is] not required" under the circumstances.

Petitioners have made allegations and presented declarations accusing the Secretary of State and many county auditors of misconduct or error. Respondents must have a meaningful opportunity to conduct discovery regarding the allegations. Petitioners offer testimony by declaration from electors and two experts. Fairness requires that Intervenors and Respondents be given an opportunity to conduct discovery to probe and test the testimony and to offer their own. In particular,

Intervenor-Respondents and Respondents should have the time and opportunity to depose the declarants to test the completeness and veracity of their statements.

Particularly troubling is Petitioners' request—in an emergency motion on just a few days' notice—that the Court accept and make a decision based in part on the testimony of supposed experts regarding signature rejections. Intervenors and Respondents obviously have had no opportunity to conduct the kind of discovery regarding this testimony provided for by the Civil Rules. *See, e.g.*, CR 26(b)(5) (providing for discovery of bases of expert opinion and of purported experts qualifications by interrogatories and depositions). Before the Court can accept the proffered testimony, it must determine that the witness is qualified to provide expert opinion testimony and that the expert's knowledge or method is generally accepted in the relevant scientific or specialized community. Where this is reasonably disputed, the determination must be based on a "preponderance of the evidence at a hearing held under ER 104(a)." *State v. Kunze*, 97 Wn. App. 832, 852-53 (1999), *rev. den.*, 140 Wn. 2d 1022 (2000); ER 104(a).

It would be improper for the Court to base its decision on such testimony without giving Respondents a chance to test it. Courts typically exclude proffered expert testimony where the offering party has failed to

give adequate notice and a reasonable opportunity to depose the expert. *See, e.g., Hendrickson v. King County*, 101 Wn. App. 258 (2000). Where witnesses have been disclosed at the last minute, at a minimum the Court should provide the other party a reasonably opportunity to "interview them, check the facts to which they would testify and, if indicated, arrange to secure rebuttal evidence or to impeach them," *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 349-51 (1974), and it would be "an abuse of discretion" to refuse such opportunity. *Id.*

If this Court decides to hear this petition against a state officer, "the commissioner or clerk will refer questions of fact to a master or to the superior court unless an agreed and adequate written statement of facts is approved by the parties prior to or at the hearing." RAP 16(d)(2). Here, the parties have not agreed upon the facts, therefore, the matter must be referred to a master or to the superior court for fact finding. Due process requires that those accused of wrongdoing are given a meaningful opportunity to explore the allegations made against them. And the extraordinary relief sought by Petitioners cannot seriously be considered in the absence of a more complete evidentiary record.

III. A Recount Is a Retabulation of Valid Votes, Not a Recanvass of Rejected Ballots.

Recounts are not new or exceptionally rare in Washington, yet Petitioners do not cite a single example in Washington's history of a recount that included a recanvass of rejected ballots. Nor do Petitioners cite a single Washington case, statute, or regulation setting forth the proposition that a recount includes a recanvass of ballots that were previously rejected. That is simply not the law. The law is quite clear that a recount is a "retabulation" of valid votes and does not include those ballots that the canvassing boards rejected.

A recount is explicitly defined in the election statutes. According to RCW 29A.04.139, a "'recount' means the process of ***retabulating*** ballots and producing amended election returns based on that ***retabulation***, even if the vote totals have not changed." (emphasis added). What is retabulated? A recount in Washington is a recount or retabulation "of all votes cast" in that election. RCW 29A.64.021(1) (mandatory recounts); RCW 29A.64.011 (recount based on application).

Contrary to Petitioners' unsupported assertions, Washington law makes clear that rejected ballots ***are not*** included in the retabulation. This Court has expressly held that rejected votes should not be included in ascertaining the total number of votes cast for a proposition. In *State of*

Washington v. C.W. Clausen, 72 Wn. 409 (1913), this Court held that "[A] careful examination convinces us that the decided weight of authority is to the effect that ballots improperly cast, or rejected because of illegality or unintelligibility, cannot be counted in determining total votes cast." *Id.* at 410. Thus, only valid votes are considered "votes cast" and could be included in the vote totals. Including invalidated ballots within the scope of "votes cast" would necessitate including three types of ballots, "[o]ne affirmative, one negative, and the other neither affirmative nor negative, but forming a new class into which all ballots for any reason void must go. Nothing of this kind was ever contemplated by the legislature." *Id.* at 414. *See also Gottstein v. Lister*, 88 Wn. 462, 503, 509 (1915) (rejecting expansive interpretation of the term "votes cast" in the Seventh Amendment to the Washington Constitution, preferring a "resort to common sense rather than to redefined distinctions as to the meanings of words viewed apart from the connection in which they may be used.").

One of the documents submitted by Petitioners demonstrates that the accepted understanding of "votes cast" is limited to valid votes actually counted for a candidate or for or against a measure. Exhibit E to the McBrayer Declaration is the Secretary of State's canvass of the returns of the mandatory machine recount. In it he certifies the "total of votes cast for each candidate as follows: . . ." And of course in reporting the total

"votes cast" he lists only the number of the valid votes actually counted for each of the candidates.

Ms. Gregoire herself, in her capacity as Attorney General, issued an opinion adopting this common sense understanding of "votes cast" which her supporters now as the Court to reject. Her Opinion determined that the votes cast for a candidate who later dies should nonetheless count as valid for determining the outcome of an election. 1999 Op. Atty Gen. Wash. No. 5 (June 21, 1999). The opinion says, "[i]n our opinion, votes cast for a deceased candidate should be treated as legal votes." *Id.* at 16. The fact that "votes cast" are treated as legal votes necessarily means that they have previously been screened and validated—the understanding argued for by Intervenors in this brief and apparently adopted by Ms. Gregoire.[6]

Changing the meaning of "votes cast" as suggested by Petitioners would have a significant impact on elections far beyond the race between Governor-Elect Rossi and Ms. Gregoire. A change in the common and accepted understanding of "votes cast" to include ballots that were rejected by canvassing boards as invalid would, for instance, make it harder for schools and other public agencies to raise funds through special

[6] For further evidence of the common usage of "votes cast" by other state officials, *see, e.g.*, Florida Division of Elections Legal Advisory Opinion DE90-46 (defining "votes cast" as the "votes actually counted for a race, office, or measure appearing on the ballot.").

elections by increasing the number of votes needed to secure a levy approval. *See* WASH. CONST., Art. 7, Section 2 LIMITATION ON LEVIES (allowing citizens to approve special tax increase if "the number of persons voting 'yes' on the proposition shall constitute three-fifths of a number equal to forty per centum *of the total votes cast* in such taxing district at the last preceding general election.") (emphasis added). Currently these votes cast include only those votes validated and accepted; adopting Petitioner's definition would require a levy to be approved by forty percent of all ballots approved *and rejected* by canvassing officials.

In fact, "votes cast" is mentioned more than 200 times in Washington's statutes, and 22 times in the Washington Constitution. Often the provisions indicate that an action occurs when some percentage of the "votes cast" exists. It would be nonsensical to suggest that invalid ballots must be considered in such determinations. If this Court changed the definition of "votes cast" – in use at least since the 1913 *Claussen* decision – for this case, the change would have a cascading and potentially chaotic effect on hundreds of other statutory provisions and numerous Constitutional provisions.

A. Washington's Election Code Demonstrates that a Recount is a Retabulation, Which Is Different from a Recanvass.

Nothing in Washington statutes or regulations contemplates expanding the universe of ballots counted by revisiting the hundreds of thousands of ballot validity decisions by county canvassing boards in Washington's 39 counties. Limiting a recount to a retabulation is not only required by Washington's Supreme Court precedent, election statutes, and regulations, it is required by common sense. Particularly in a situation in which everyone knows how close the margin of victory was, to allow canvassing boards to reopen and presumably change some of their prior decisions about whether particular ballots are valid is to invite mischief.

In addition to RCW 29A.04.139, that specifically limits a recount to a "retabulation," numerous other election statutes and regulations indicate that the retabulation of ballots already counted once is distinct from—and does not include—the decisions by canvassing boards about whether a provisional or absentee ballot is valid. Some examples:

- **RCW 29A.04.013** defines "canvassing" as "the 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 a precinct or in a counting center on the day of the primary or election." (emphasis

added). Thus, a tabulation is a part of a canvass, but a canvass involves additional tasks beyond a tabulation. In contrast, the definition of "recount" is limited to "retabulating ballots." RCW 29A.04.139.

- **RCW 29A.60.210** provides that a canvassing board may "recanvass" ballots if there is "an apparent discrepancy or an inconsistency in the ***returns***," but must conduct such activity on or before the last day to certify the election. (emphasis added.) A recount, by contrast, takes place after the certification of the election and is governed by entirely different statutory provisions.

Furthermore, the discrepancies and inconsistencies that allow a recanvass are limited to those "in the returns" and are not so broad as to include revisiting previous discretionary decisions made by canvassing boards as to whether a signature on an absentee or provisional ballot matched the original voter registration signature. RCW 29A.64.210. The "returns" are referred to in a number of sections of Washington's election code. The references demonstrate that the words "the returns" are unquestionably a reference to the number of valid votes cast in the various races and nothing more. As an example, RCW 29A.60.120(3) provides that "[t]he ***returns*** produced by the vote tallying systems, to which have been added the counts of questioned ballots, write-in votes, and absentee votes, constitute the official returns of the primary or election in that

county." (emphasis added.) These "returns" do not include rejected absentee or provisional ballots – they are only the numbers of reported ballots and votes.

Apparent discrepancies or inconsistencies in the returns from this election – the number of ballots cast and votes counted for specific candidates – do not provide a basis for the relief asked for by the Petitioners – a review of all absentee and provisional ballots that were previously rejected by canvassing boards. These rejected ballots are not part of "the returns." Additionally, Petitioners have made no showing of any discrepancy or inconsistency in the returns – which is a necessary precursor to a recanvass under RCW 29A.64.210. Finally, even if the boards are sent back to recanvass the ballots or voting devices in certain precincts so as to address numerical discrepancies, the boards do not revisit rejected ballot decisions.

What Petitioners seek is not a recount, but a total recanvass that even goes beyond what the statute authorizes for a recanvass. They seek to revisit issues such as prior canvassing board decisions regarding the validity of ballots rather than simply discrepancies with the returns. The "returns" are not the absentee and provisional ballots rejected in prior decisions of the canvassing board. "Returns" are the numbers, the number of votes for candidates. Therefore, a recanvass is not a re-review of the

canvassing board decision on the validity of signatures, because such decisions are not "in the returns."

- **WAC 434-262-170** distinguishes between a "tabulation" and the decisions made by canvassing boards regarding the validity of a ballot: "[o]nce the issue of validity has been determined, the ballots will be tabulated if applicable, stored, and retained the same as regular voted ballots." Under this provision, as with the others, the process of ***tabulation*** of votes is distinct from the prior process of determining the validity of ballots by the canvassing board.

Statutory provisions governing the physical custody of the ballots also demonstrate that a recount involves only those ballots previously determined to be valid and counted in a prior tabulation:

- **RCW ch. 29A.64** governs "Recounts," and **RCW 29A.64.041** specifically details the procedures for a recount. That section states, in no uncertain terms, that at the time set for the recount, the authorities shall open the "sealed containers *containing the ballots to be recounted.*" (emphasis added). Thus, the only ballots to be counted during the recount are those contained in those sealed containers.

- **RCW 29A.60.110** provides rules detailing how to seal these ballot containers. That provision clearly states that only counted ballots may be placed in the containers: "Immediately after their

tabulation, *all ballots counted at a ballot counting center* must be sealed in containers that identify the primary or election." (emphasis added). The plain language of these rules does not allow for inclusion in the sealed containers of any contested ballots or unverified ballots not previously tabulated. The regulations therefore make clear that the only ballots that can be included in the sealed containers are those counted at some point at a balloting center, and only those ballots included in the sealed containers can be considered in a recount.[7]

IV. Petitioners' Proposed Relief Is Impossible to Implement.

Apart from the fact that their request is plainly contrary to Washington law, there are serious practical problems that would be created by the changes in the election procedures Petitioners seek to impose now, after the election.

First, while Petitioners complain about subjectivity and error in the signature verification process, they offer no meaningful remedy because there is none. All of the signature verifications that want to see re-done will still be done by people making determinations. Another review of the thousands of signatures will not eliminate subjectivity or the possibility for error.

[7] The only exception would be valid ballots mistakenly placed in the wrong physical location and only ballots which a canvassing board had not decided previously to reject.

Second, when the initial validity determinations were made, the decision-makers did not know (a) how close the election was going to be, (b) how the two candidates would actually fare in their counties, and (c) the odds that any given ballot in a particular county would be for one candidate or the other. With all that information now in mind, there is a real risk that someone might be more willing to accept problematic ballots or to reject valid ballots depending on how well their preferred candidate did in their county. While the vast majority of election workers are undoubtedly honest, they are human, and in a very close election, temptation need only get the better of a very few people (and only on a very few decisions) to affect the results. And even if everyone resists temptation, the appearance of bias damages the integrity of the process.

Second, if canvassing boards are directed to revisit validity determinations for those ballots already rejected as invalid, there is no principled reason not to require them to revisit their determinations of ballots initially determined to be valid. Fairness requires that if the standards for evaluating validity change in mid-stream, the validity of all ballots must be reconsidered, not just those that were previously rejected.

Petitioners posit that mistakes may have been made in deciding that signatures on absentee or provisional ballots did not match signatures on original voter registration records. It is just as likely, of course, that

errors were made in the other direction. That is, it is just as likely that poll workers erroneously accepted as valid ballots some illegal ballots that should not have been accepted. The practical implication of such reconsideration is staggering. More than an estimated 1.7 million absentee ballots and 88,000 provisional ballots would have to be checked again under the new standard. It could take many weeks or even months and would cost the taxpayers a fortune. Furthermore, the absentee ballots that were previously accepted as valid are no longer tied to the envelopes containing the signatures. As a result, if enough previously validated ballots were subsequently found to have incorrect signatures, a new election could be necessary. *See Foulkes v. Hays*, 85 Wn.2d 629 (1975).

Furthermore and of immediate consequence, Petitioners proposal will substantially delay the process of finalizing this election. As it is, King County has announced that it will take until December 22 simply to retabulate those votes that have already been counted. If the statutory recount is converted into a recanvass of the whole election, the process will be delayed even further. As uncertainty continues, the Governor-Elect's efforts to ensure an orderly transition will be further frustrated. He cannot safely hire staff and undertake the steps necessary to assume office when the results of the election are held up indefinitely. Such delays would clearly be contrary to the intent of the legislature in providing

closure to an election as soon as possible after the votes are cast. *See, e.g.*, RCW 29A.64.070, Notes, 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.").

In addition to the consequences for this particular election, if Petitioners are allowed to scramble the recount process as they have requested, the consequences for future elections in Washington would be dire. Any time an election is close, the losing candidate could use Petitioners' tactics to go hunting for more votes and delay for weeks or months the "closure" the legislature intended to be "prompt" and "expeditious." *Id.*

V. The Doctrine of Laches Bars Petitioners' Attempt to Demand New Standards for Provisional and Absentee Ballots After Two Statewide Counts Have Already Been Completed.

After Washington has conducted an election, a statewide count, and a full statewide recount, Petitioners now, in the last stage of the recount process, ask this Court to issue a writ of mandamus compelling the Secretary of State to issue brand new standards controlling the conduct of the third and final count. Laches prevents Petitioners from raising these

claims now when they should have been raised before the *original* count and the *first* recount.

Petitioners complain that "[t]he Secretary of State has never issued uniform standards for county auditors to use in determining whether signatures are sufficiently different to justify rejection of a vote." Brief of Petitioners at 3. Petitioners further seek the issuance of three new types of standards never issued before by the Secretary of State. *Id.* at 7-8. Petitioners should have brought a complaint regarding the purported lack of statewide standards prior to the original canvass. *See Southwest Voter Registration Educ. Project v. Shelley*, 278 F.3d 2d 1131, 1138 (9th Cir. 2003) (equal protection claim challenging voting machinery raised laches issue because plaintiffs had "full knowledge" that other elections would take place and the claim should therefore have been brought before it would interfere with election).

The doctrine of laches requires that a plaintiff diligently assert a claim for relief. "Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them." *Lopp v. Peninsula School Dist.*, 90 Wn.2d 754, 759 (1978) (applying doctrine of laches to prohibit election challenge because "appellant's suit has more potential for harm to the public interest than good." *Id.* at 761.). The elements of laches include (1) knowledge or reasonable opportunity to discover on the part of

a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; and (3) damage to defendant resulting from the unreasonable delay. *Lopp.*, 90 Wn. 2d at 759.

Considering the intense scrutiny and numerous lawsuits filed during this election, Petitioners certainly had knowledge of the procedures they now challenge. Indeed, the guidelines for all recounts, including the inclusion of new ballots, were detailed on the Secretary of State's Website. *See* http://www.secstate.wa.gov/office/osos_news.aspx?i=SPlmpeBt1xLxpksVqw%2Ft9w%3D%3D. Petitioners further demonstrated their awareness of the issue by filing a previous lawsuit contesting the procedures in King County, but excluding from their lawsuit every other county in Washington. Petitioners therefore acquiesced in the procedures used to conduct the statewide count and recount.

Laches is even a more compelling argument in this case because Christine Gregoire has been the legal counsel to the Secretary of State's office for twelve years. As Attorney General of Washington it appears she never once advised the Secretary of State or any County Auditor to take the actions now demanded by on her behalf the Petitioners. The proper time for bringing these claims has passed, and laches bars Petitioners' last

ditch effort to raise these new arguments at this final stage in this prolonged election. Respondents, along with every voter, will suffer damage as the election process is thrown into further turmoil and the determinacy of every subsequent election is brought into doubt. *See La Vergne v. Boysen*, 82 Wn.2d 718 (1973) ("There exists a substantial public interest in the finality of elections, necessitating prompt challenges.").

Washington has already conducted a mandatory statewide machine recount for the Governor's Office pursuant to RCW 29A.64.021. The conduct of this mandatory recount conformed to the set of provisions established in RCW 29A.64.021(2) and did not require counties to revisit previous determinations as to the validity of signatures or votes. Petitioners did not object then; why should this Court entertain the objections now?

VI. King County's Proposed Observer Procedures Provide a Fair and Meaningful Opportunity for Observers.

WAC 443-261-020 provides that the recount should provide for an observation of all aspects of the counting center proceedings and that each major political party should be allowed to appoint representatives to fill the requirements. In response to WAC requirements, on December 2, 2004, King County Records issued a letter to both major political parties stating that the Division would hire one Republican and one Democrat

along with a recorder recruited by the Division to observe at each recount board table.

Petitioners' argument is simply without merit. Intervenors-Respondents have not objected to the procedure because it provides an opportunity for each party to observe at a close range the ballots and to participate in determining the candidate for whom each elector voted. It is hard to imagine a fairer and more meaningful opportunity to observe. The procedure proposed by King County Records complies with the WAC requirements. This Court should not order any changes to that procedure

CONCLUSION

For the foregoing reasons, Respondents Governor-Elect Rossi and the Washington State Republican Party request that this Court deny Petitioners' Motion for Emergency Relief and dismiss with prejudice their Petition by Electors and Petition for Writ of Mandamus and Other Relief.

RESPECTFULLY SUBMITTED this 7th day of December, 2004.

Davis Wright Tremaine LLP
Attorneys for Applicants-Intervenors

By _____
Harry J. F. Korrell
WSBA #23173
Robert J. Maguire
WSBA #29909

E. Mark Braden
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5304
(Pro Hac Vice Application Pending)