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NO. 96381-9

SUPREME COURT OF THE STATE OF WASHINGTON

TIMOTHY WHITE, ALLAN ROSATO, LINDA ORGEL, ARTHUR
GRUNBAUM, and GREEN PARTY OF SAN JUAN COUNTY,

Petitioners,

v.

KIM WYMAN, individually and in her capacity as Secretary of State for
the State of Washington, MILENE HENLEY, in her capacity as San Juan
County Auditor, and SAN JUAN COUNTY,

Respondents.

**JOINT ANSWER TO PETITION FOR REVIEW OF
RESPONDENTS SECRETARY OF STATE, SAN JUAN COUNTY
AUDITOR, AND SAN JUAN COUNTY**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....1

 A. Facts1

 B. Procedural History3

III. ISSUES.....4

IV. ARGUMENT5

 A. This Case Does Not Raise Significant Constitutional Questions Because Using Barcodes to Improve Election Accuracy Fully Protects the Constitutional Guarantee of a Secret Ballot.....5

 1. Mr. White Dismissed Any Claim That Ballot Barcodes in Fact Reveal Voter Identity.....5

 2. Washington Constitution Article VI, § 6 Is Not a Per Se Prohibition on Barcodes That Do Not Identify Voters6

 3. That This Court Has Not Decided the Precise Issue Raised Is Not Grounds for Review, Particularly Because the Court of Appeals Correctly Rejected Mr. White’s Per Se Claim9

 4. There Is No Uniform Rule Prohibiting Numbers on Ballots and, Instead, Numbering Improves Election Accuracy.....10

 5. Alleged Voter Misconceptions About Barcodes are Not a Basis for a Categorical Bar on Their Use13

 6. Because Barcodes Do Not Violate Ballot Secrecy, the Use of Barcodes in Some Counties but Not Others Does Not Violate Equal Protection.....15

B.	This Case Does Not Raise Issues of Substantial Public Importance Because the Use of Barcodes Comports with Statutory Requirements.....	16
1.	RCW 29A.08.161 Only Prohibits Records That Identify Voters with Information Marked on Their Ballots.....	16
2.	RCW 29A.36.111(1)'s Uniformity Requirement Does Not Categorically Prohibit Use of Barcodes	17
3.	The Court of Appeals' Use of the Term "Linkage" Did Not Announce a New Test	20
V.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Brisbin v. Clearly</i> , 26 Minn. 107, 1 N.W. 825 (1879)	12
<i>Burson v. Freeman</i> , 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992).....	11, 12, 16, 20
<i>Chelan County Deputy Sheriffs’ Ass’n v. Chelan County</i> , 109 Wn.2d 282, 745 P.2d 1 (1987).....	15
<i>Corn v. Blackwell</i> , 191 S.C. 183, 4 S.E.2d 254 (1939)	12
<i>Ellensburg Cement Products, Inc. v. Kittitas County</i> , 179 Wn.2d 737, 317 P.3d 1037 (2014).....	18
<i>Ex parte Oppenstein</i> , 289 Mo. 421, 233 S.W. 440 (1921)	12
<i>In re Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	9
<i>In re Dependency of P.H.V.S.</i> , 184 Wn.2d 1017, 389 P.3d 460 (2015).....	9
<i>John Doe No. 1 v. Reed</i> , 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010).....	13
<i>Killingsworth v. State Exec. Comm. of Democratic Party</i> , 125 S.C. 487, 118 S.E. 822 (1921)	13
<i>McGrane v. County of Nez Perce</i> , 18 Idaho 714, 112 P. 312, 313-14 (1910)	10, 11
<i>Moyer v. Van De Vanter</i> , 12 Wash. 377, 41 P. 60 (1895)	7

<i>People ex rel. Nichols v. Bd. of Canvassers of Onondaga County</i> , 129 N.Y. 395, 29 N.E. 327 (1891).....	19
<i>Polygon Northwest Co. v. American Nat’l Fire Ins. Co.</i> , 143 Wn. App. 753, 189 P.3d 777 (2008).....	6
<i>Pullen v. Mulligan</i> , 138 Ill. 2d 21, 561 N.E.2d 585 (1990).....	13
<i>Ralph v. State Dep’t of Nat. Res.</i> , 182 Wn.2d 242, 343 P.3d 342 (2014).....	18
<i>Ritchie v. Richards</i> , 14 Utah 345, 47 P. 670 (1896).....	12
<i>State ex rel. Empire Voting Mach. Co. v. Carroll</i> , 78 Wash. 83, 138 P. 306 (1914)	7, 8, 10
<i>State v. Connor</i> , 86 Tex. 133, 23 S.W. 1103 (1893).....	13
<i>State v. Eddings</i> , 86 Wash. 233, 149 P. 945 (1915)	14
<i>State v. Elgin</i> , 118 Wn.2d 551, 825 P.2d 314 (1992).....	19
<i>State v. Superior Court of King County</i> , 60 Wash. 370, 111 P. 233 (1910)	7, 10
<i>West v. Ross</i> , 53 Mo. 350, 1873 WL 7982 (1873)	13
<i>White v. Clark County</i> , 188 Wn. App. 622, 354 P.3d 38 (2015).....	8, 10
<i>White v. Skagit County</i> , 188 Wn. App. 886, 355 P.3d 1178 (2015).....	8

<i>White v. Wyman</i> , No. 77156-6-I, 2018 WL 3738404 (Wash. Ct. App. Aug. 6, 2018)	4, 6, 10, 15-18
--	-----------------

Constitutional Provisions

Const. art. II, § 24	7
Const. art. VI, § 6.....	1, 5-7, 9, 10
Tex. Const. art. VI, § 4	13

Statutes

RCW 29A.....	18
RCW 29A.04.008(1).....	19
RCW 29A.08.161.....	8, 16, 17
RCW 29A.12.080(1).....	8
RCW 29A.36.111(1).....	8, 16-19
Former RCW 29A.36.111(1)	19
RCW 29A.36.121.....	19
RCW 29A.36.131.....	19
RCW 29A.36.161.....	19
Former RCW 29A.36.161(6)	13
RCW 29A.40.130.....	9
RCW 29A.60.....	2
RCW 29A.60.235.....	2
RCW 29A.84.420.....	8

Regulations

Former WAC 434-230-180..... 13

Rules

RAP 2.2..... 6

RAP 3.1..... 5

RAP 10.3(a)(6)..... 15

RAP 13.4..... 10

RAP 13.4(b)(3) 5

RAP 13.4(e) 15

Other Authorities

26 Am. Jur. 2d *Elections* § 328 (2018)13

I. INTRODUCTION

This case does not warrant the Court's review because ballot secrecy is protected when there is no linkage between the barcodes on the ballot and the voter's identity. Relying on this Court's prior construction of Washington Constitution Article VI, § 6 as permitting any form of ballot that maintains the secrecy of the vote, the Court of Appeals correctly rejected Mr. White's per se challenge to San Juan County's use of ballot barcodes based on uncontroverted evidence that the barcodes do not identify voters, nor can they be used to link a ballot with an individual voter. After eight years of litigation and extensive discovery, Mr. White chose to abandon his claim that barcodes on ballots could be linked to voters and now claims that a unique barcode on a ballot is unlawful whether or not it can link a voter's identity to a ballot. But as the Court of Appeals sensibly held, because a voter's identity remains secret, ballot barcodes safeguard the voter's constitutional and statutory right to ballot secrecy. Likewise, Mr. White's equal protection claim is meritless because the right to secrecy is uniformly protected in counties that use barcodes and in counties that do not.

II. STATEMENT OF THE CASE

A. Facts

Counties use barcodes to keep track of voted ballots. During a recount in the 2004 governor's election, six counties found misplaced ballots. CP 247. In some precincts, the numbers of ballots exceeded the number of voters, and vice versa in other precincts. *Id.* In response to this

problem, counties are now required to reconcile the number of ballots received, rejected, and counted, with the number of voters (RCW 29A.60.235) and some counties rely on unique ballot barcodes (or UBIs) to do so. CP 244. For example, barcodes are used to avoid scanning duplicate ballots or double counting of ballots, but barcodes do not identify the voter, and are not assigned sequentially to voters. CP 236-38, CP 249.

Today, the serial barcode is scanned when ballots are returned to ensure that ballots are not counted twice. CP 240-41, CP 244. This is part of a careful process to ensure the secrecy of voted ballots. *See generally* RCW 29A.60; CP 249-254. The voting systems that rely on serial barcodes do not create a table or other database which can be used to link the barcodes to a voter. CP 239, CP 250. Although it might be possible to manually connect information on a voted ballot (including the barcode) with the voter if a voter incorrectly marks a ballot in an identifying way, or if someone improperly opens an outer return envelope and a security envelope (containing the ballot) at the same time, these actions are contrary to mandated procedures and in no way dependent on the presence of a barcode.

It is not possible to otherwise use elections databases to link a barcode with a voter because voting systems do not store any information that identifies the voter who received, mailed, or cast a particular ballot. CP 237, CP 248-50, CP 254. In other words, ballot barcodes do not themselves identify voters, and cannot be used to determine voter identity because there is no record linking barcode numbers to individual voters.

B. Procedural History

This case involves two consolidated cases challenging San Juan County's use of unique barcodes on ballots, and its previous use of a system called the Mail-in-Ballot-Tracking (MiBT) system that is no longer in use.

The trial court denied Mr. White's motion for summary judgment regarding the use of barcodes on ballots. The court recognized that marks allowing voter identification are constitutionally and statutorily prohibited. CP 459. But in the absence of any evidence of a link between the voter and the barcode, there is no per se legal prohibition on barcodes. *Id.*

Mr. White originally included as part of his lawsuit that ballot barcodes in fact disclosed the identity of the voters, but after discovery he abandoned that claim and moved to voluntarily dismiss it. CP 1197. The trial court granted voluntary dismissal and entered judgment. CP 1170-72. Because Mr. White abandoned his as applied claim, the court also never ruled on the equal protection claim which was premised on the unproven allegation that using barcodes in fact "permits the identification of the voter who cast a particular ballot." CP 461.

San Juan County's use of the MiBT program was raised in an original action in this Court, but transferred to the trial court. CP 43. MiBT previously could link a ballot barcode to the voter's name on the outer envelope, but in July 2008 counties were required to apply a programming "patch" to render the system incapable of making this link. CP 243-44, CP 250. Although there was no evidence MiBT revealed how voters voted, the court found that MiBT must be certified by the Secretary of State.

CP 926. Because the State does not certify MiBT systems, MiBT is no longer used and this issue is moot. CP 1194-96 (agreed order enjoining use of MiBT).

Thus, the sole issue on appeal is whether barcodes are a per se violation of ballot secrecy. *White v. Wyman*, No. 77156-6-I, 2018 WL 3738404, at *3 (Wash. Ct. App. Aug. 6, 2018). Like the superior court, the Court of Appeals found “uncontroverted evidence in the record” that barcodes “cannot be used to link a particular ballot with an individual voter.” *Id.* at *5. In particular, “the secretary of state and the County provided evidence that a [barcode] is not linked to a voter and cannot be used to identify individual voters or their ballots.” *Id.* So, for example, the County is unable to use a barcode to identify a voter for any purpose—even to correct a ballot error. *Id.*

The court concluded that “[w]ithout evidence that UBIs allow for the identification of individual voters and their ballots, there is no violation of the right to ballot secrecy.” *Id.* Thus, the Court of Appeals affirmed “the trial court’s ruling that UBIs are not a per se violation of Washington’s constitutional and statutory rights to ballot secrecy.” *Id.* at *3. In September 2018, Mr. White petitioned for this Court’s review.

III. ISSUES

1. The Washington Constitution and state law require ballot secrecy. Does placement of a unique barcode on a ballot maintain secrecy, if the barcode cannot be used to determine a voter’s identity?

2. Is it consistent with equal protection if voters in some counties use ballots that have unique barcodes while voters in other counties do not, where there is no evidence that the barcodes can be used to identify the voter?

IV. ARGUMENT

A. This Case Does Not Raise Significant Constitutional Questions Because Using Barcodes to Improve Election Accuracy Fully Protects the Constitutional Guarantee of a Secret Ballot

This case does not present a significant constitutional question because the ballot secrecy guarantee in Article VI, § 6 is not a per se prohibition on ballot barcodes that do not reveal voter identity. *See* RAP 13.4(b)(3). As this Court has held, ballot form alone is not sufficient to implicate the secrecy provision. Rather, Mr. White must prove impairment to ballot secrecy by showing that it is in fact possible to use barcodes to identify how a particular voter voted. In over eight years of litigation, Mr. White has never offered such evidence, and instead dismissed his as applied claim. Because the uncontroverted evidence in the record demonstrates the contrary—that barcodes cannot be used to identify how voters voted—barcodes safeguard voters’ fundamental right to ballot secrecy as required by Article VI, § 6 of the Washington Constitution.

1. Mr. White Dismissed Any Claim That Ballot Barcodes in Fact Reveal Voter Identity

At the outset, this Court should reject a number of Mr. White’s arguments that restate his abandoned claim that ballot barcodes in fact disclose the identity of the person who voted. Under RAP 3.1, a party who

voluntarily dismisses a claim is not an “aggrieved party” entitled to “review by the appellate courts.” See *Polygon Northwest Co. v. American Nat’l Fire Ins. Co.*, 143 Wn. App. 753, 768, 189 P.3d 777 (2008). Further, because he voluntarily dismissed this claim, the trial court never ruled on the merits thus triggering the right of appeal under RAP 2.2.

Thus, for example, this Court should reject Mr. White’s contention that review is warranted because “none of our State’s voting systems have been specifically evaluated for their ability to protect the secrecy of a uniquely numbered ballot.” Pet. at 7. Likewise, Mr. White’s unproven claim that MiBTs previously violated voter secrecy was dismissed upon his own motion. Pet. at 6-7, 15-16, 19; see CP 1199-1200.

As the Court of Appeals noted, the only issue on appeal is whether use of ballot barcodes are “a per se violation of Washington’s constitutional and statutory rights to ballot secrecy” (*White*, 2018 WL 3738404, at *3)—as explained below, it is not.

2. Washington Constitution Article VI, § 6 Is Not a Per Se Prohibition on Barcodes That Do Not Identify Voters

Secrecy of the ballot is a fundamental constitutional right, but the mere presence of a barcode on a ballot does not implicate—much less violate—this right. Washington Constitution Article VI, § 6 provides:

All elections shall be by ballot. The legislature shall provide for such method of voting as to secure to every elector absolute secrecy in preparing and depositing his ballot.
Const. art. VI, § 6.¹

¹ There is no equivalent language in the U.S. Constitution.

“[A]bsolute secrecy” is not a per se prohibition on barcodes that do not identify voters.² Contrary to Mr. White’s argument, this Court has rejected per se rules governing the form of ballots, and has construed Article VI, § 6 to afford the Legislature flexibility in developing particular methods of voting, as long as electors cannot be linked to their votes. *See* Pet. at 13, 14-15. This Court has explained that in enacting Article VI, § 6, “the people have purposely . . . left details to the Legislature[.]” *State v. Superior Court of King County*, 60 Wash. 370, 373, 111 P. 233 (1910). “So long . . . as the elector has a right to vote by ballot, and the secrecy of that ballot is preserved, he cannot, nor can the candidate, complain.” *Id.* In particular, legislation passed pursuant to Article VI, § 6 must adhere to “the general policy of the law [] that the ballot shall be a secret one” meaning “that it may not be known for which candidate any particular voter voted, in order that bribery may be prevented.” *Moyer v. Van De Vanter*, 12 Wash. 377, 382, 41 P. 60 (1895).

In *Carroll*, this Court specifically rejected a strict construction of Article VI, § 6 to uphold Seattle’s proposed use of mechanical voting machines that did not literally involve the marking of paper “ballots,” as required by the Constitution. *State ex rel. Empire Voting Mach. Co. v. Carroll*, 78 Wash. 83, 138 P. 306 (1914). The Court reasoned that “[t]he object of all constitutional provisions and laws providing for a vote by ballot is primarily to procure secrecy” and “[a]ny ballot, therefore, however cast,

² For an example of a per se prohibition, compare the words of Washington Constitution Article II, § 24: “The legislature shall never grant any divorce.”

that will guard and protect the secrecy . . . is a secret vote by ballot within the ordinary and accepted meaning of those words when used in our election laws.” *Id.* at 85. The focus is on the “substance rather than the form of the ballot.” *Id.*

Relying on *Carroll*, Division II recently agreed that “nothing in article VI, section 6 expressly provides that the ballot itself must remain ‘secret’ as long as the voter who cast that ballot cannot be identified.” *White v. Clark County*, 188 Wn. App. 622, 632, 354 P.3d 38 (2015). Instead, “[t]he plain meaning of this provision is that the legislature must ensure that every person’s vote—i.e., how the person voted—remains secret.” *Id.*³

The Legislature has heeded its “constitutional mandate for a secret ballot [by] implement[ing] statutes codified in Title 29A RCW” that protect against revealing how individuals voted. *White v. Skagit County*, 188 Wn. App. 886, 892, 895, 355 P.3d 1178 (2015). RCW 29A.36.111(1) prohibits election officials from marking a ballot “in any way that would permit the identification of the person who voted that ballot.” And RCW 29A.08.161 prohibits governmental records that “identif[y] a voter with the information marked on the voter’s ballot[.]” In addition, it is a crime to examine ballots or voter records to determine how an individual voted (RCW 29A.84.420) and the secretary of state may approve a “voting system” only if it “[s]ecures to the voter secrecy in the act of voting[.]” RCW 29A.12.080(1).

³ However, the court rejected Mr. White’s requests for scanned images of pre-tabulated election ballots, finding that the legislature had provided for an express statutory exemption from the Public Records Act for ballots and ballot images. *White v. Clark County*, 188 Wn. App. at 632-34.

None of these statutes are a per se prohibition on ballot barcodes and, instead, the laws implementing Article VI, § 6 recognize that unique markings only violate ballot secrecy if they would permit the identification of the voter. Thus, it is undisputed that the constitutional guarantee of a secret ballot is fundamental and necessary to our democracy, but placing bar codes on ballots that cannot in any way reveal the identity of the voter does not violate that guarantee.⁴

3. That This Court Has Not Decided the Precise Issue Raised Is Not Grounds for Review, Particularly Because the Court of Appeals Correctly Rejected Mr. White’s Per Se Claim

The fact that this Court has not issued an opinion on the exact issue raised here does not make this case exceptional, nor is it a reason for granting review. Pet. at 14-15; *In re Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011) (“this court will only take review if we are satisfied that review is warranted under RAP 13.4(b)”). Applying well-settled law to new facts does not constitute raising a significant constitutional question. *See, e.g., In re Dependency of P.H.V.S.*, 184 Wn.2d 1017, 389 P.3d 460 (2015) (applying settled due process law to new facts does not warrant review).

Here, the Court of Appeals properly relied on precedent from this

⁴ Nor would it even be practical to require the legislature to guarantee complete anonymity or privacy at every stage of the voting process. Election officials keep records of all registered voters. *See, e.g.,* RCW 29A.40.130. Some voters may vote in public, or in the presence of a family member or friend. CP 239. Or an elector may incorrectly mark the ballot in some way that would reveal the person’s identity. And there is “[t]he always-present risk that an election worker will link a particular voter with a particular ballot by violating the law[.]” CP 459. Accordingly, this Court has never construed the constitutional mandate in Article VI, § 6 to literally require absolute anonymity or privacy.

Court and Division II favoring substance over form to reject Mr. White’s per se challenge, on grounds that the “central concern of ballot secrecy . . . is whether the individual voter can be identified.” *White*, 2018 WL 3738404, at *4 (citing *White*, 188 Wn. App. at 632 and *Carroll*, 78 Wash. at 85). The court concluded that without evidence that barcodes “allow for the identification of individual voters and their ballots, there is no violation of the right to ballot secrecy.” *Id.* at *5. This conclusion adheres to this Court’s prior construction of Article VI, § 6 as permitting any form of ballot that maintains the secrecy of the vote. *Carroll*, 78 Wash. at 85; *Superior Court of King County*, 60 Wash. at 373; *White*, 188 Wn. App. at 632.

4. There Is No Uniform Rule Prohibiting Numbers on Ballots and, Instead, Numbering Improves Election Accuracy

Mr. White relies on several distinguishable, out-of-state cases to argue that courts have “uniformly held that the secret ballot prohibits the numbering of ballots.” Pet. 9-11. First, conflict with an out-of-state opinion is not a ground for this Court’s review. *See* RAP 13.4. Second, the cases Mr. White relies on are easily distinguishable.

For example, *McGrane v. County of Nez Perce*, 18 Idaho 714, 112 P. 312, 313-14 (1910), does not support a rule that ballot numbering is a per se violation of secrecy (Pet. at 9-10), and instead held that ballot secrecy was compromised when election officials printed sequential numbers on ballots and allegedly distributed them in consecutive order so that it was possible to determine who voted a ballot. By contrast, here the barcodes are not sequentially assigned, nor is it possible to determine who voted a

particular ballot using barcodes.⁵

Next, Mr. White cites *Burson v. Freeman*, 504 U.S. 191, 206, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) to argue that he need not show linkage to prove a violation of ballot secrecy because this Court should assume that bad actors will someday hack the system and “uncover the linkage between the voter and his or her ballot.” Pet. at 10-11, 13-14. But Mr. White cannot resurrect his as applied claim by arguing that smart phones can be used to read a barcode or that hackers may access election databases to link voters with their ballots. Pet. at 13-14. And even if government computers were hacked, there is nothing that would allow a link to be made because barcodes do not indicate who voted a ballot, and counties do not create or maintain a list, a table, or database showing which ballot was mailed to each voter. *See* CP 237, CP 243-44, CP 249-54.

Further, *Burson* does not hold that proof of linkage is never necessary, and instead upheld a restriction on politicking within 100 feet of polling places after noting that “the *only* way to preserve secrecy of the ballot is to limit access to the area around the voter” because otherwise it would be easy to see how a voter voted—in other words, linkage would be inevitable. 504 U.S. at 207-08 (emphasis added). The Court was also

⁵ In fact, *McGrane* recognized that “absolute” secrecy is impossible because handwriting on a ballot could identify a voter, as could any unique markings left from a “man fresh from the field, the forge, the carpenter shop, or the mason’s trade.” 112 P. at 317. Nevertheless, “[t]he purpose of the constitutional guaranty of ‘an absolutely secret ballot’ and the statutory provisions against ‘distinguishing’ marks on ballots is not so much to prevent marks and characters on ballots . . . as it is the aim to prevent fraud, corruption, intimidation, and oppression in elections[.]” *Id.* at 313.

concerned that without a buffer, “acts of interference would go undetected” because law officers are generally barred from the vicinity of polls. *Id.* at 207. None of these concerns are at issue here because a per se ban on barcodes does not address barriers to detecting election misconduct, nor is it necessary to ensure ballot secrecy where there is no evidence that barcodes can be used to see how a voter voted.

Mr. White’s remaining authorities involve challenges to voting systems that allow voters to be linked to their votes (*see* Pet. at 10, n.5), and are thus inapposite. *See Brisbin v. Clearly*, 26 Minn. 107, 1 N.W. 825 (1879) (election procedure that required officials to place number on voted ballots and to record the number and the name of each elector created a link that eliminated ballot secrecy); *Ritchie v. Richards*, 14 Utah 345, 47 P. 670 (1896) (no voter can be compelled “to have his ballot so marked that it may be ascertained therefrom how he voted”); *Corn v. Blackwell*, 191 S.C. 183, 4 S.E.2d 254 (1939) (voters were identifiable because numbers on ballot corresponded to the numbers recorded with voters’ names); *Ex parte Oppenstein*, 289 Mo. 421, 233 S.W. 440, 443 (1921) (mere numbering does not reveal the voter, but allowing comparison with a list of voters would violate secrecy). Indeed, these cases demonstrate that proof of linkage is possible, and therefore further refute Mr. White’s assertion that the Court of Appeals imposed an impossible burden on plaintiffs. *See* Pet. at 16-17.

Not only do Mr. White’s authorities fail to support a per se prohibition on ballot numbering, in fact ballot numbering has widely been used to inventory ballots and protect against “stuffing the ballot box” or

other fraud.⁶ Indeed, Washington has historically and recently permitted ballot numbering as a useful tallying tool.⁷

Thus, courts have not uniformly held that numbered ballots are a per se violation of ballot secrecy. Rather, secrecy of a ballot is impaired only when a number or barcode on the ballot permits identification of the voter—a showing Mr. White has not made and indeed has abandoned. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 227, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (Scalia, J., concurring in judgment) (noting that state constitutional ballot secrecy requirements “prohibit[] the numbering of ballots for voter identification purposes”).

5. Alleged Voter Misconceptions About Barcodes are Not a Basis for a Categorical Bar on Their Use

White appears to argue that voter confidence may be undermined if there is a misconception that barcodes could reveal how voters voted or if

⁶ *See, e.g., State v. Connor*, 86 Tex. 133, 139, 23 S.W. 1103 (1893) (“numbering of ballots was not calculated to intimidate voters, but was a means necessary to detect and punish fraud and to preserve the purity of the ballot box”) (internal quotation marks omitted); Tex. Const. art. VI, § 4 (“In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets”); *Pullen v. Mulligan*, 138 Ill. 2d 21, 69-71, 561 N.E.2d 585 (1990) (numbering of ballots by election officials to assist with tally okay because no evidence “suggests that the numbered ballots were actually traced to particular voters”); *Killingsworth v. State Exec. Comm. of Democratic Party*, 125 S.C. 487, 118 S.E. 822, 824 (1921) (numbered ballots permitted because not issued sequentially and cannot be linked to voters); *West v. Ross*, 53 Mo. 350, 353, 1873 WL 7982 (1873) (statute provided that “no ballot not numbered shall be counted”); *see also* 26 Am. Jur. 2d *Elections* § 328 (2018) (“the numbering of ballots before giving them to voter, affording thereby a ready means for identification, does not necessarily require their rejection”).

⁷ *See* CP 375-76, 379 (1895, Session Laws of Washington Territory, pp 388-89, 392, numbers printed on ballots are read out loud as voters turn in ballots); CP 394 (Remington’s Revised Statutes of Washington, Volume VI, 1932, p. 562, same); Former RCW 29A.36.161(6) (repealed 2011) (all ballots used at polling places “must be sequentially numbered”); Former WAC 434-230-180 (repealed 2007) (same).

illegal conduct could establish the link. Pet. at 11-12. But the legality of a voting system does not turn on alleged voter misconceptions. *Cf. State v. Eddings*, 86 Wash. 233, 238, 149 P. 945 (1915) (voter misconception of the law prohibiting distinguishing marks is not a basis for invalidating a vote unless there is evidence of fraud).⁸

And invalidating a voting system based on illegal conduct (like hacking) would have far-reaching consequences as “[a]ll voting systems are subject to criminal manipulation by corrupt or negligent voting officials.” CP 459. But this risk is not increased by placing bar codes on ballots and therefore is “not a proper basis for the Court to conclude that bar codes are a per se violation of the right to a secret vote.” *Id.*

Further, none of the public reports or statements cited by Mr. White support a per se prohibition on barcodes that do that not reveal voter identity. *See* Pet. at 7. Unlike Washington, Colorado prohibited ballot barcodes that could be “used to trace the ballot to the voter who cast it.” Pet. at 7 (citing CP 481). King County merely noted some voters’ fear that certain “ballot tracking equipment” could be used to link voters with ballots, but did not find that barcodes in fact compromised secrecy. *Id.* (citing CP 175). And all election procedures are dependent on human action to

⁸ It is not clear why any alleged concerns with voter misconceptions could not be addressed through voter education, as opposed to a per se rule against ballot barcodes. *See, e.g.*, CP 245 (sample ballot explains that “there is no way to trace from bar code data back to an individual voter”); CP 257 (poster of sample ballot explains that bar codes are “NEVER traceable to individual voters”) (emphasis in original); CP 72-73 (Secretary of State website explains that barcodes “do not identify to whom the ballot was issued” and “ballot is not linked to the voter in any way” nor can they “be used to identify a voter”).

some extent and “shuffling” ballots to ensure that they will not be in sequential order when assembled for mailing is no different, nor is there any evidence that shuffling compromises ballot secrecy. CP 238. Thus, these do not support a per se prohibition on ballot barcodes.

6. Because Barcodes Do Not Violate Ballot Secrecy, the Use of Barcodes in Some Counties but Not Others Does Not Violate Equal Protection

Mr. White also raises an equal protection claim (Pet. at 5), but provides no authority or explanation of how this issue meets the criteria for review. For this reason alone, the Court should decline review. *See* RAP 13.4(e), RAP 10.3(a)(6); *see also Chelan County Deputy Sheriffs’ Ass’n v. Chelan County*, 109 Wn.2d 282, 290 n.2, 745 P.2d 1 (1987) (declining to address issues unsupported by argument or citation).

In any case, as conceded by Mr. White’s voluntary dismissal, there is no link between barcodes and voters. Therefore, the right to secrecy is uniformly protected in counties that use barcodes and those that do not. Without a showing that rights are being afforded by some counties and denied by others, there is no basis for an equal protection claim. Thus, the Court of Appeals properly rejected this claim because barcodes “do not violate the constitutional and statutory right to absolute secrecy in voting” and “[t]herefore, the use of [barcodes] in various counties did not result in disparate treatment.” *White*, 2018 WL 3738404, at *6.⁹

⁹ Indeed, to require all counties to adhere to a single rule on ballot barcodes—which can play an important role in ensuring a fair and accurate election—fails to recognize that counties face different challenges in counting and tracking votes. *See* CP 247 (six counties in 2004 found misplaced ballots); CP 244 (elections can be decided on a small margin in smaller counties). The secrecy provision was never intended to preclude

B. This Case Does Not Raise Issues of Substantial Public Importance Because the Use of Barcodes Comports with Statutory Requirements

This case does not raise an issue of substantial public importance because the Court of Appeals properly found that the plain language in RCW 29A.08.161 and RCW 29A.36.111(1) prohibits only markings on ballots that would reveal the identity of the voter. And the court’s use of the term “linkage” did not announce a new standard nor was it improper—it was merely a shorthand used by the parties and adopted by the court.

1. RCW 29A.08.161 Only Prohibits Records That Identify Voters with Information Marked on Their Ballots

RCW 29A.08.161 provides that “[n]o record may be created or maintained by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter’s ballot.” The Court of Appeals noted that “[t]he plain language of this statute prohibits a record that links an individual voter to his or her ballot” and therefore “a violation of that statute only occurs when a voter can be connected to the information marked on a ballot.” *White*, 2018 WL 3738404, at *5. Because barcodes “do not result in a record that identifies voters with the information marked on the voters’ ballots” the Court of Appeals properly affirmed the trial court’s determination that use of barcodes “was not a per se violation of RCW 29A.08.161.” *Id.*

reasonable measures to facilitate tallying and increase election accuracy. *See Burson*, 504 U.S. at 202-204 (explaining that secret ballot was adopted by the states to address fraud and intimidation at polling places).

Mr. White argues that the court erred in interpreting RCW 29A.08.161 to apply only when a record is “created and maintained,” and that San Juan County violated the statute when it “created” a record that could link voters with ballots prior to applying the patch to the MiBT. Pet. at 19-20. At the outset, the Court of Appeals opinion undertakes no such analysis because this is not the issue on appeal. *See White*, 2018 WL 3738404, at *3. This is yet another attempt to revive Mr. White’s already dismissed *as applied* challenge based on a system that is no longer in use. *See CP 1999-1200* (arguing in motion for voluntarily dismissal that “Plaintiffs’ *as applied* challenge is moot because the uncertified software is no longer in use, rendering inconsequential whether or not the software undermined ballot secrecy”).

More importantly, nothing in the record shows that the MiBT software “created or maintained” records that could “identif[y] a voter with the information marked on the voter’s ballot.” RCW 29A.08.161. Instead, prior to applying a patch in 2008, the MiBT used in some counties could link a voter to a ballot to allow counties to report on which voters’ ballots had been counted, but MiBT never revealed “how the voter had voted.” CP 252. Thus, this argument—not addressed by the Court of Appeals—is completely unsupported by the record.

2. RCW 29A.36.111(1)’s Uniformity Requirement Does Not Categorically Prohibit Use of Barcodes

RCW 29A.36.111(1) provides that “[e]very ballot for a single combination of issues, offices, and candidates shall be uniform within a

precinct.” And “[n]o paper ballot or ballot card may be marked by or at the direction of an election official in any way that would permit the identification of the person who voted that ballot.” *Id.*

Reading these two sentences together, the Court of Appeals properly found that the uniformity requirement precludes unique ballot markings that reveal the identity of the voter. Indeed, the last sentence—which explicitly prohibits marking that “permit the identification of the person who voted that ballot”—would be superfluous if “uniform” meant that every ballot must be identical. RCW 29A.36.111(1); *see Ralph v. State Dep’t of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (court must interpret statute to avoid rendering any clause superfluous). Moreover, this specific prohibition suggests that marks made by election officers that do *not* allow identification of voters are permitted. *See Ellensburg Cement Products, Inc. v. Kittitas County*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) (a specific designation infers that the law does not operate on anything omitted).

Thus, the Court of Appeals properly concluded that because “[t]he statute makes no mention of and therefore does not apply to marks that do not permit identification of the vote . . . the plain language of the statute requires linkage between a mark and identification of the individual voter’s ballot.” *White*, 2018 WL 3738404, at *6. Since barcodes “do not permit identification of the person who voted the ballot . . . the use of [barcodes] is not a per se violation of RCW 29A.36.111(1).” *Id.*

The rest of RCW 29A indicates that the uniformity requirement sets forth general layout rules for ballots, but nothing in the chapter suggests that

“uniformity” requires every ballot in a precinct to be identical in every respect. *See, e.g.*, RCW 29A.36.121 (order of positions), RCW 29A.36.131 (order of candidates), RCW 29A.36.161 (arrangement of instructions).¹⁰ Instead, RCW 29A.04.008(1) recognizes that “ballot,” as used in the chapter, includes voted ballots and provisional ballots—which obviously cannot be identical. *See State v. Elgin*, 118 Wn.2d 551, 556, 825 P.2d 314 (1992) (context of entire statute informs legislative intent).

Mr. White’s sole authority does not support his argument that “uniform” must mean identical in RCW 29A.36.111(1). Pet. at 18 (citing *People ex rel. Nichols v. Bd. of Canvassers of Onondaga County*, 129 N.Y. 395, 428-19, 29 N.E. 327 (1891) (Gray, J. concurring)). In *Nichols*, a divided court held that ballots bearing nonconforming indorsements that revealed how voters voted should not be counted because the “primary aim” of laws requiring a uniform ballot is “to enable the voter to cast a ballot for the candidates of his choice without the possibility of revealing” the vote. 129 N.Y. at 403. Thus, as Mr. White concedes, the purpose of uniformity is “to protect the secrecy of the ballot,” (Pet. at 18) which is why RCW 29A.36.111(1) specifically only precludes markings that identify a voter.

¹⁰ Indeed, a former version of RCW 29A.36.111(1) provided greater detail on ballot formatting—for example, by requiring every ballot to be “uniform in color and size [and] be white and printed in black ink[.]” CP 404 (1990 Washington Laws Ch. 59 § 10). Amendments implementing the current language in the statute were intended to “unify and simplify the laws and procedures governing . . . ballot layout [and] ballot format” and thus removed categorical rules on formatting, replacing them with a general requirement that ballots be “uniform” and not marked in any way that would allow for identification of the voter. *See* CP 403-404 (1990 Washington Laws Ch. 59 §§ 1, 10).

3. The Court of Appeals’ Use of the Term “Linkage” Did Not Announce a New Test

Mr. White argues that the Court of Appeals imposes an “insurmountable” burden on Plaintiff by requiring him to show that barcodes can be used to link ballots to voters. Pet. at 16-17. In particular, Mr. White argues that by using the term “linkage,” the Court of Appeals devised a new and onerous standard at odds with *Burson*, 504 U.S. 191.

But in using the term “linkage,” the Court was merely borrowing a term used by both parties at oral argument in the trial court as a shorthand for referring to the potential that placement of barcodes on a ballot would allow someone to identify the particular person who voted that ballot. *See* CP 458. And as discussed above, requiring linkage is completely consistent with *Burson*. *See supra* at 11-12. Moreover, proving or disproving “linkage” is not impossible—the Secretary of State has put forth ample evidence showing that ballot barcodes do not identify voters, and that there is no information in the barcode or voting systems that could be used to link a ballot to the person who voted the ballot. *See* CP 235-245, CP 246-263; *see also supra* at 12 (discussing cases where linkage was shown). Mr. White does not contest this evidence nor has he presented contrary evidence that ballot secrecy is in fact compromised by barcodes on ballots.

V. CONCLUSION

Because this case does not raise an issue of constitutional significance or public importance, the petition for review should be denied.

RESPECTFULLY SUBMITTED this 19th day of December 2018.

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