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SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL CARLSON, JERROLD R. GONCE, JEFFREY BOSSLER,
RICHARD PETERSON, MARC FORLENZA, and GREG AYERS,

Appellants,

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,
and THE STATE OF WASHINGTON,

Respondents,

and

ELISABETH BYERS, ROBERT JARMAN, BRIAN McCLERREN,
JAMIE STEPHENS, and LOVEL PRATT

Necessary Parties.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

The heart of the one person, one vote rule is that *voting* districts must be substantially equal in population. *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Plaintiffs, Michael Carlson et al., contend that a system used to elect members of the San Juan County Council violates one person, one vote principles, even though the system makes no use of separate districts for voting purposes. Every member of the San Juan County Council is nominated and elected at large by all of the voters throughout the county. Districts are used only as a residence requirement for candidates for the limited purpose of ensuring geographic diversity of council members. Districts are therefore used as a candidate qualification mechanism, not for voting purposes. Plaintiffs have cited no case anywhere in the country ever finding such a system inconsistent with one person, one vote principles. Plaintiffs' challenge similarly has no merit, and this Court should affirm the trial court's grant of summary judgment for the County and the State.

This Court should affirm summary judgment in favor of the State for an even more fundamental reason. San Juan County elects its county council members in compliance with the terms of its county home rule charter. Plaintiffs challenge the constitutionality of RCW 36.32.020 and .040(2), but because San Juan County has adopted a home rule charter,

those two statutes do not apply to the county and thus are not properly at issue here.

II. ISSUES

1. Is the constitutionality of RCW 36.32.020 and .040(2) properly at issue in this case, given that the election of members to the San Juan County Council is governed by the San Juan County Charter and not by the challenged statutes?
2. If RCW 36.32.020 and .040(2) are properly at issue in this case, are they constitutional when the “districts” they call for are merely residence districts used for candidate qualification and not for voting?
3. Do the “single subject” and “subject in title” rules of article II, section 19, of the Washington Constitution apply to local ballot measures?

III. STATEMENT OF THE CASE

The San Juan County Charter controls most aspects of county government, including the composition of the county council, elections, initiatives, and financial administration. Skagit CP 538-59.¹ From its enactment in 2005 until the voters amended it in 2012, the charter

¹ The State cites to record materials originally filed with the Skagit County Superior Court as “Skagit CP” and to record materials originally filed with the San Juan County Superior Court as “San Juan CP.” The necessity to distinguish the clerk’s papers in this manner arises because Plaintiffs originally filed this case in Skagit County, and the court transferred the case to San Juan County. Skagit CP 15-16. The record, as certified to this Court, consists of materials originally filed with Skagit County, numbered as pages 1-1041, as well as additional materials originally filed with San Juan County, numbered as pages 1-186. Page numbers 1-186 are therefore used twice, identifying different documents.

provided for a county council composed of six members nominated and elected from separate voting districts. Skagit CP 627 (voting procedure adopted at the same election at which the voters approved the original county charter). The charter required that those voting districts consist of nearly equal populations. Skagit CP 628.

This case arises because in 2012 San Juan County voters approved three propositions to amend the county charter. Skagit CP 908-09. Plaintiffs initially challenged all three propositions. Skagit CP 1032-37. On appeal they pursue their challenge only to the validity of one of those propositions, identified on the ballot as Proposition 1. Appellants' Opening Br. at 1 n.1. Proposition 1 amended the charter by reducing the size of the county council from six to three members and providing that those three members will be nominated and elected at large by all the voters of San Juan County. Skagit CP 731-33, 862. Under Proposition 1, candidates for county council are qualified by living in one of three residency districts: (1) San Juan Island; (2) Orcas Island; and (3) Lopez/Shaw Islands. Skagit CP 732, 862. Those residency districts are not used for voting, but simply as a means of achieving geographical diversity among council members nominated and elected at large, within the unusual circumstance of a county composed entirely of islands. Skagit CP 732, 862.

Plaintiffs Carlson, Gonce, and Bossler filed a superior court challenge in Skagit County to the 2012 charter amendments coupled with a challenge to two state statutes, RCW 36.32.020 and .040(2). Skagit CP 1025-39. They named as defendants both San Juan County and the State of Washington. Skagit CP 1026. Plaintiffs challenged Proposition 1 and RCW 36.32.020 and .040(2) on the theory that they violated one person, one vote principles, even though the districts in this case are not used for voting purposes. Skagit CP 1032-35. Plaintiffs additionally challenged the local charter amendments on single subject grounds. Skagit CP 1035-37.

Following initial motion practice, the court ordered the joinder of several additional necessary parties. These included the six then-current members of the county council and the candidates contesting the April 2013 special election to fill council positions pursuant to Proposition 1. Skagit CP 13.² At the same time, the court transferred venue over this action from Skagit County to San Juan County. Skagit CP 5.

The case then proceeded to summary judgment, with the original Skagit County judge sitting as a visiting judge in San Juan County. San

² Among the necessary parties joined at that stage, Peterson, Forlenza, and Ayers elected to participate as additional plaintiffs. San Juan CP 169. Necessary parties Stephens and Pratt aligned with the defendants. San Juan CP 169. Additional parties Hughes and Miller were dismissed at their request. San Juan CP 120-21. The other parties added at that point are simply identified as additional parties. San Juan CP 169.

Juan CP 120-23. The superior court granted summary judgment to San Juan County and the State on all issues. San Juan CP 163-86; Notice of Appeal (with attached Summary Judgment Order and trial court's letter ruling). This appeal follows.

IV. SUMMARY OF ARGUMENT

The Court should affirm the grant of summary judgment in favor of the State for the straightforward reason that the constitutionality of the two statutes Plaintiffs challenge is not properly presented in this case. Plaintiffs challenge the constitutionality of RCW 36.32.020 and .040(2) based upon the notion that those statutes somehow govern the way in which members of the San Juan County Council are elected. But San Juan County Council elections are governed by the San Juan County Charter, not by general statute. Const. art. XI, § 4. Charter counties do not need state statutes to "authorize" their provisions, as Plaintiffs maintain, but rather may provide in their own way for the election of most county officers. *Id.*

Even if the constitutionality of RCW 36.32.020 and .040(2) were properly at issue in this case, they would satisfy the constitutional challenges Plaintiffs raise. The challenged statutes provide for both nominating and electing candidates at large, among all of the county's voters. Every vote in the county accordingly receives an exactly equal

weight. The use of residency districts as a candidate qualification—and not for purposes of voting—cannot change this outcome because all candidates depend equally upon the support of all voters in the county. These principles resolve Plaintiffs’ challenges to the statutes, whether those challenges are cast in terms of equal protection, substantive due process, or privileges and immunities.

Plaintiffs’ claim based upon article I, section 19 of the Washington Constitution fares no better. Article I, section 19 does not address a claim that a voting system dilutes the voting rights of some voters, but rather, merely prohibits the complete denial of a voter’s right to vote.

Finally, Plaintiffs’ challenge to the validity of San Juan County’s local measure amending its county charter cannot proceed based on article II, section 19 of the Washington Constitution. That provision applies only to statewide legislation, not to local ballot measures. This Court has previously so observed, and that conclusion is made clear by the text of the constitution, and by the context in which the provision appears.

V. ARGUMENT

A. Standard Of Review

When reviewing a grant of summary judgment, this Court reviews issues of law de novo, engaging in the same analysis as the trial court. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Summary

judgment is appropriate when there are no disputes of material fact and the moving party is entitled to judgment as a matter of law. CR 56. Summary judgment can be granted to the nonmoving party when, as in this case, the facts are not in dispute. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

Statutes are presumed constitutional, and any party alleging that a statute is unconstitutional “‘must demonstrate . . . unconstitutionality beyond a reasonable doubt.’”³ *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999) (quoting *Belas v. Kiga*, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998)). Furthermore, because the Plaintiffs bring a facial challenge to RCW 36.32.020 and .040(2), they must demonstrate that there are *no* circumstances under which the statutes can be constitutionally applied. *See, e.g., Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000).

B. RCW 36.32.020 And RCW 36.32.040(2) Are Not Properly At Issue Because They Do Not Govern The Election Process Under The San Juan County Charter

Voters approved a constitutional amendment authorizing county home rule charters in order to permit local variance in governmental

³ This standard is not an evidentiary one; rather, it reflects that because statutes establish the will of the people, courts are “hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.” *Island Cnty. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

structure, taking into account differing local needs or preferences. *See* Const. Amend. 21 (amending Const. art XI, § 4, to permit county home rule charters); *see also* Voters' Pamphlet 32 (1948) (argument in favor of Amendment 21, expressing the need for local variation in form of government); *State ex rel. Carroll v. King Cnty.*, 78 Wn.2d 452, 457-58, 474 P.2d 877 (1970). The constitution expressly permits counties, by charter, to "provide for such county officers as may be deemed necessary to carry out and perform all county functions as provided by charter or by general law." Const. art. XI, § 4. Indeed, if county charters could not vary from the form of government established in general state laws, there would be no obvious reason for even contemplating the adoption of one.

As the *Carroll* court explained, the constitutional grant of authority for counties to frame their own charters is conferred in broad terms, without restriction as to the election and duties of "those officers which [the county] deems necessary to handle its purely local concerns." *Carroll*, 78 Wn.2d at 456. The court there held that King County could, by local charter, hold local elections at a different time than otherwise specified in state statute. *Id.* at 456-58. The constitution thus confers broad authority, equivalent to that of the legislature itself, upon counties in adopting their own charters, particularly as to the manner of electing local officials. *Id.* at 456; *see also Henry v. Thorne*, 92 Wn.2d 878, 880-81, 602

P.2d 354 (1979) (upholding a county charter provision under which the timing of elections to fill vacancies in local offices differed from state statute).

The San Juan County Charter governs the composition of the San Juan County Council and the process for electing its members. Const. art. XI, § 4; Skagit CP 564, 571-73. Plaintiffs nonetheless challenge the constitutionality of two state statutes that apply only in the absence of a home rule charter. The challenged statutes do not apply to this case, and that conclusion by itself provides a sufficient basis for this Court to affirm summary judgment in favor of the State.

Plaintiffs challenge the language in RCW 36.32.020 which reads:

[T]he commissioners of any county composed entirely of islands and with a population of less than thirty-five thousand may divide their county into three commissioner districts without regard to population, except that if any single island is included in more than one district, the districts on such island shall comprise, as nearly as possible, equal populations.

Plaintiffs also challenge subsection (2) of RCW 36.32.040, which states:

Where the commissioners of a county composed entirely of islands with a population of less than thirty-five thousand have chosen to divide the county into unequal-sized commissioner districts pursuant to the exception provided in RCW 36.32.020, the qualified electors of the entire county shall nominate from among their own number who reside within a commissioner district, candidates for the office of county commissioner of such commissioner

district to be voted for at the following general election. Such candidates shall be nominated in the same manner as candidates for other county offices are nominated in all other respects.

RCW 36.32.020 allows for the establishment of island-based residency districts without regard to population and RCW 36.32.040(2) requires that candidates of such island-based districts be nominated by “the qualified electors of the entire county,” through an at-large primary election. Also, the ultimate election of commissioners must be through an at-large election. RCW 36.32.050 (requiring that county commissioners “be elected by the qualified voters of the county”).

RCW 36.32.020 and .040(2) would apply to San Juan County if the county did not have its own home rule charter. Const. art. XI, § 4 (directing the legislature to “establish a system of county government”). San Juan County elected its county commissioners pursuant to this statutory option before adopting its home rule charter in 2005. *See* Skagit CP 603 (resolution describing 2005 charter proposal). San Juan County currently elects its county council members in the same way that RCW 36.32.020 and .040(2) describe, but does so because *this is what the county charter provides*, not because the statutes hypothetically would offer the same option if the county did not have a charter. Skagit CP 731-33.

Plaintiffs' challenge to RCW 36.32.020 and .040(2) depends upon the notion that the county charter could not provide for at-large nominations and elections based on residency districts unless the statutes "authorized" this. Opening Br. at 18. Plaintiffs' position ignores the nature of a county charter. The constitution allows counties to adopt home rule charters for the very purpose of providing for their own system of local government. *In re Recall of Hurley*, 120 Wn.2d 378, 381-82, 841 P.2d 756 (1992).

If Plaintiffs' restrictive vision of county charters was correct, all counties would be required to vest authority in three-member boards of county commissioners, and the state constitution's grant of authority to design unique local governmental structures would effectively be read out of the constitution. Const. art. XI, § 4. Those counties choosing to adopt local home rule charters frequently use them to create county councils that differ substantially from general state laws governing county commissioners. *See, e.g.*, King County Charter § 220.10 (establishing nine-member metropolitan county council); Snohomish County Charter § 2.30 (establishing five-member county council); Pierce County Charter § 2.15 (establishing seven-member county council).⁴ Under its county

⁴ The three county charters cited can all be found online. King County: http://www.kingcounty.gov/council/legislation/kc_code.aspx; Snohomish County:

charter prior to 2012, San Juan County had a six-member county council—itsself the kind of departure from general law in which Plaintiffs claim counties cannot engage. Skagit CP 731; *see also* RCW 36.32.010.

The authority of San Juan County to adopt provisions of its charter that govern the election of county council members does not depend upon RCW 36.32.020 and .040(2). Plaintiffs' dispute with the provisions of the local charter does not suggest any basis upon which they could challenge state law, and for that reason this Court should affirm summary judgment in favor of the State without regard to any ruling regarding the charter itself. If the Court affirms on this basis, there is no need to reach the question of whether RCW 36.32.020 and .040(2) are valid.

C. Even If The Statutes Did Apply To San Juan County, Which They Do Not, They Are Constitutional And Provide No Basis For The Plaintiffs' Challenge

The Plaintiffs argue that RCW 36.32.020 and .040(2) violate equal protection and substantive due process principles. They also argue that Proposition 1' violates the Washington Constitution's privileges and immunities clause and article I, section 19 ("all elections shall be free and equal"). They are wrong on all counts. The United States Supreme Court has thrice upheld the constitutionality of candidate residency districts similar to the residency districts at issue in the present case. The relevant

<http://www.codepublishing.com/wa/snohomishcounty/>; and Pierce County: <http://www.co.pierce.wa.us/DocumentCenter/View/1132>.

state constitutional provisions lead to the same result. Thus, the Plaintiffs' constitutional challenges necessarily fail.

1. RCW 36.32.020 And .040(2) Do Not Violate The Equal Protection Clause

First, Plaintiffs argue that RCW 36.32.020 and .040(2) violate equal protection principles. Opening Br. at 19-22. This argument rests on Plaintiffs' erroneous position that the statutes authorize unequal *voting* districts. To the contrary, the statutes establish a single mathematically perfect voting district in that all county voters nominate and elect all county council members. All that the statutes authorize are island-based *candidate residency* districts. Such candidate residency districts have repeatedly and unequivocally been upheld against equal protection challenges.

The United States Supreme Court first addressed the issue of candidate residency districts in *Fortson v. Dorsey*, 379 U.S. 433, 85 S. Ct. 498, 13 L. Ed. d 401 (1965). *Fortson* involved a facial challenge to a Georgia statute that governed the election of state senators. Under the statute, senators in some districts were elected county-wide rather than by district, but districts were used for candidate residency purposes. *Id.* at 434-35. Voters that participated in county-wide voting challenged the system, arguing that their votes were not equal in weight to those of voters

that participated in district-wide voting. *Fortson*, 379 U.S. at 437. Like the Plaintiffs in the present case, the *Fortson* plaintiffs assumed that a candidate elected from a particular residency district would only serve the interests of the district rather than the interests of the entire county electorate eligible to vote for their position.

The Court rejected the plaintiffs' challenge because "[t]he statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation." *Id.* at 438. The Court was not persuaded by the notion, repeated by the Plaintiffs here, that an elected official would serve only the members in his district and not the entire electorate:

It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides . . . Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.

Id. Thus, the statute on its face did not violate equal protection, although a scheme that was shown to cancel out the voting strength of certain racial or political elements could face a different fate. *Id.* at 439. Plaintiffs in the present case attempted no such showing.⁵

⁵ Plaintiffs assert in one solitary sentence that the "geographical idiosyncrasies [of San Juan County] [limit] the rights of certain voters (the County's more conservative

The United States Supreme Court again addressed the issue of candidate residency districts in *Dusch v. Davis*, 387 U.S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656 (1967). *Dusch* involved a facial challenge to the City of Virginia Beach's charter that governed the election of eleven members to the city council. Four council members were elected at large without regard to residence. The remaining seven members were also elected at large but were required to reside in one of seven boroughs. *Id.* at 114. The population of the smallest borough was 733 and the population of the largest borough was 29,048. *Id.* at 117 n.5. In contrast, the present Plaintiffs complain about residency districts where the population of the smallest district is 2,720 and the population of the largest district is 7,662. Opening Br. at 7.

minority)." Opening Br. at 24. This sentence appears not in Plaintiffs' discussion of equal protection, but under the heading of substantive due process, and they do not explain their basis for the statement. Vote dilution concepts—even when they are actually presented and supported by evidence—cannot be used to challenge at-large voting based upon the notion that it affects the interests of ideological minorities, as opposed to racial or other insular minorities. See *Vieth v. Jubelirer*, 541 U.S. 267, 305, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) (finding a lack of judicially manageable standards for assessing whether a districting plan discriminates on a partisan basis); for contrast, see *Thornburg v. Gingles*, 478 U.S. 30, 46-51, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986) (applying vote dilution concepts under the Voting Rights Act to the use of at-large voting regarding alleged racial discrimination). This Court need not consider the ideological-discrimination argument in any event, because it is not supported by any argument or citation to authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). To the extent that Plaintiffs may be relying for this proposition upon speculative passages contained within their own declarations, they do so improperly because the trial court properly struck all of their declarations "to the extent they set forth speculation, irrelevant testimony, hearsay, statements of legislative intent, or opinion of lay witnesses not helpful to the Court." San Juan CP 170-71. Such declarations do not set forth facts for the court's consideration. *Snohomish Cnty. v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2003).

Despite the nearly 1:40 disparity in population among the City of Virginia Beach's boroughs, the Court applied the reasoning in *Fortson* and upheld the charter. *Dusch*, 387 U.S. at 115-16. The Court repeated that a council member elected at large must serve the interest of the entire electorate, not merely the interests of voters in the borough within which she resides. *Id.* The Court also noted that the boroughs were drawn to reflect the rural, urban, and tourist aspects of the City. *Id.* at 113. As such, the plan "seems to reflect a détente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside." *Id.* at 117.

In the last of the three United States Supreme Court cases, the Court upheld a state statute that established residency districts for county commission candidates in Dallas County, Alabama. *Dallas Cnty. v. Reese*, 421 U.S. 477, 95 S. Ct. 1706, 44 L. Ed. 2d 312 (1975). Although commission candidates were elected county-wide, voters challenged the statute on the basis that the districts varied in population and that only one resident of the City of Selma could be elected even though Selma constituted half of the population.⁶ *Id.* at 477-78. Citing *Fortson* and

⁶ The smallest district in Dallas County had a population of 7,505 and the largest district (the City of Selma) had a population of 27,379. *Id.* at 478 n.3. Thus, there was an approximately 3.6:1 disparity in population between the smallest and largest districts.

Dusch, the Court rejected the challenge, again repeating “the basic teaching that elected officials represent all of those who elect them, and not merely those who are their neighbors.” *Dallas Cnty.*, 421 U.S. at 480. The Court held that the only way a plan could successfully be challenged is “based on findings in a particular case that a plan *in fact* operates impermissibly to dilute the voting strength of an identifiable element of the voting population.” *Id.* (emphasis added). Since the *Dallas County* plaintiffs did not meet that burden, the statute was upheld.

In 1990, the Attorney General’s Office analyzed these three cases and concluded that San Juan County’s prior system of island-based residency districts was not invalid on its face.⁷ 1990 Op. Att’y Gen. No. 6.⁸ The formal Attorney General Opinion noted that there were no facts demonstrating vote dilution of an identifiable racial or political minority. Therefore, “the commissioners may retain the current election system without violating the state and federal constitutions.” *Id.* at 9.⁹ As

In contrast, the population disparity between San Juan County’s largest and smallest districts is approximately 2.8:1.

⁷ Before adopting its charter in 2005, San Juan County used island-based residency districts for election of county council members. The 2012 amendments to the charter reflect a return to this prior system, but under the authority of the charter, not state statutes. Skagit CP 731-32.

⁸ Available online at <http://atg.wa.gov/AGOOpinions/opinion.aspx?section=archive&id=6052>.

⁹ Although not binding on courts, formal Attorney General opinions are persuasive authority and are “entitled to great weight.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011) (citation omitted).

noted *supra*, Plaintiffs in the present case also have put forward no facts demonstrating vote dilution of an identifiable minority.

The present Plaintiffs cannot overcome the indomitable rule of law that arises from *Fortson* and its progeny. Instead, they argue that a “fascinating” Washington Supreme Court case suggests a different result. Opening Br. at 20-21 (citing *Story v. Anderson*, 93 Wn.2d 546, 611 P.2d 764 (1980)). But *Story* undercuts their argument rather than supports it.

In *Story*, this Court reviewed an Island County voting system established pursuant to former RCW 36.32.020 (Laws of 1970, 1st Ex. Sess., ch. 58, § 1). *Story*, 93 Wn.2d at 547. The system allowed for county-wide *general* elections of county commissioners but provided for *primary* elections in which commissioners were nominated from unequal sized island-based residency districts. This Court struck the system down as impermissibly diluting the primary votes of voters in more populous districts. *Id.* at 551.

In striking down Island County’s system, the *Story* court acknowledged the rule of law articulated in *Dusch* and *Dallas County*. *Id.* at 552-53. However, this Court distinguished those cases because they did not involve a primary election system in which districts were used for voting purposes. “It is this primary election system, *and not the residency*

requirement, which causes unequal representation under the Island County scheme.” *Story*, 93 Wn.2d at 552-53 (emphasis added).

The Plaintiffs claim that “the Washington State Supreme Court has questioned the local applicability of [the United States Supreme Court] cases.” Opening Br. at 32. This is a strange and puzzling notion, given that state courts have no authority to annul the local application of federal court rulings. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 696, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) (noting the general application of federal court rulings). In support of their notion, they cite the earlier *Story* opinion that was subsequently vacated. However, even if the earlier opinion had not been vacated, a cursory review of that opinion demonstrates that the Court relied almost exclusively on *Dallas County* in upholding Island County’s system. *Story v. Anderson*, 91 Wn.2d 667, 670-72, 588 P.2d 1179 (1979). Thus, the Plaintiffs’ claim that this Court “questioned its local applicability” is doubly puzzling, as well as unsupported.

After the *Story* opinion, the legislature amended RCW 36.32.040 to require island counties with island-based residency districts to both nominate and elect their county commissioners through a county-wide election. Laws of 1982, ch. 226, § 5. Thus, the legislature cured the problem identified in *Story*.

Next, the Plaintiffs cite Amendment 74 in support of their equal protection argument. Opening Br. at 21-22 (citing to Const. art. II, § 43). Amendment 74 governs redistricting of state and congressional districts. As the Plaintiffs note, Amendment 74 requires that each *voting* district should contain a population “as nearly equal as practicable to the population of any other district.” However, since the present case involves neither voting districts nor state legislative and congressional districts, Amendment 74 is irrelevant.

The United States Supreme Court has conclusively determined that candidate residency districts, including those that vary widely in population, do not violate the equal protection clause absent a factual showing that the votes of an identifiable segment of the voting population have been diluted. The Plaintiffs have not argued nor have they presented facts demonstrating vote dilution of an identifiable voting segment. Thus, they have failed to demonstrate that RCW 36.32.020 and .40(2) violate the equal protection clause.

2. RCW 36.32.020 And .040(2) Do Not Violate Substantive Due Process

Next, the Plaintiffs argue that RCW 36.32.020 and .040(2) violate the substantive due process clauses of the state and federal constitutions. Opening Br. at 22-24 (citing to U.S. Const. amend. XIV; Const. art. I,

§ 3). The state and federal constitutions provide equivalent due process protection. *See, e.g., Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216 n.2, 143 P.3d 571 (2006) (“the Washington Constitution provides equal, but not greater, due process protection”). As a result, the analysis under the state and federal constitutions is the same. *Hardee v. Dep’t of Soc. & Health Servs.*, 172 Wn.2d 1, 7 n.7, 256 P.3d 339 (2011).

In a substantive due process challenge, a court must first determine the “nature of the right involved.” *Amunrud*, 158 Wn.2d at 219. “State interference with a fundamental right is subject to strict scrutiny.” *Id.* at 220. However, when a non-fundamental right is involved, rational basis review applies. *Id.* at 222. “The rational basis test is the most relaxed form of judicial scrutiny.” *Id.* at 223. Under the rational basis test, the court determines whether the challenged statute is rationally related to a legitimate state interest. *Id.* at 222.

As explained below, federal courts apply a flexible balancing test when analyzing due process challenges to election regulations. The Plaintiffs erroneously urge application of a different test that applies only in land use cases. According to the Plaintiffs, this Court must consider (1) whether the regulation being challenged serves a legitimate public purpose; (2) whether it uses means reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive. Opening Br. at 22-23

(citing *Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 787 P.2d 907 (1990)). However, this Court has already rejected the notion that this test applies outside of the land use context. *Amunrud*, 158 Wn.2d at 226. In fact, this Court recognized that the test has limited applicability even when applied to land use cases. *Id.* at 226 n.5. Instead, “the appropriate test for the court to apply under a rational basis inquiry is whether the law bears a reasonable relationship to a legitimate state interest.” *Id.* at 226.

a. The Challenged Statutes Are Not Subject To Strict Scrutiny Because They Do Not Impact A Fundamental Right

The first step in any substantive due process challenge is to determine the nature of the right at stake. In that regard, the Plaintiffs confidently declare, without citation, that “[s]ince the right to vote is a fundamental right, the appropriate level of review for any infringement of that right is strict scrutiny.” Opening Br. at 25. This is based on the Plaintiffs’ erroneous and simplistic assumption that any election regulation directly impacts voting rights and, therefore, automatically qualifies for strict scrutiny. The courts have not so held.

In reality, “voting regulations are rarely subjected to strict scrutiny.” *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011). That is because, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather

than chaos, is to accompany the democratic processes.” *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)). “Consequently, to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure elections are operated equitably and efficiently.” *Burdick*, 504 U.S. at 433.

It is only when voting rights are severely restricted that the challenged regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* at 434 (citation omitted). “But when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* (citation omitted). Moreover, when the election law at issue relates to the process for candidates to qualify to the ballot, the court finds a severe burden only when a reasonably diligent candidate would only rarely gain a place on the ballot. *Washington State Republican Party v. Washington State Grange*, 676 F.3d 784, 794 (9th Cir. 2012).

Here, the Plaintiffs’ voting rights are not infringed at all, let alone “severely.” Every San Juan County council member is both nominated and elected through an at-large election. Thus, every San Juan County

voter gets to vote in both the primary and general elections for the candidates of his or her choice. There is no infringement of voting rights whatsoever.

Although the Plaintiffs primarily allege infringement of their voting rights, they occasionally hint that the real problem might be that residents from the more populated residency districts have a lesser chance of serving on the county council than candidates from the least populated district, as if the selection of candidates for office was reduced to a lottery. Opening Br. at 29-30. But even if this represented a decreased opportunity for candidates to access the ballot, this would not, standing alone, subject an election law to strict scrutiny. *E.g.*, *Burdick*, 504 U.S. at 433 (upholding Hawaii's ban on write-in candidates); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) (upholding Minnesota law that prohibited candidates from appearing on the ballot as candidates for more than one political party); *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) (upholding California law that required independent candidates to be disaffiliated from a political party at least one year prior to the primary election).

RCW 36.32.020 and .040(2) are not subject to strict scrutiny because the Plaintiffs' voting rights are not severely impaired. Therefore,

as long as the State's important regulatory interests justify the statutes, they must be upheld.

b. The Statutes' Legitimate Public Purposes Outweigh The Non-Existent Burdens On The Plaintiffs' Voting Rights

In applying the *Burdick* flexible balancing test, a court "must weigh 'the character and magnitude of the asserted injury to the rights protected . . . ' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)). Under this flexible standard, there is no need to demonstrate that the challenged law is "narrowly tailored" to achieve its purpose. *Dudum*, 640 F.3d at 1114. And the State need not show that the law "is the only or the best way to further the proffered interests." *Id.* This is similar to rational basis review which simply requires a showing that the challenged law is rationally related to a legitimate governmental purpose. *Amunrud*, 158 Wn.2d at 222. "In determining whether a rational relationship exists, a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." *Id.*

In the case of counties comprised entirely of islands, it is reasonable to assume that each island may have its own unique character, culture, land use patterns, geography, and/or economic base. Indeed, the differences among San Juan County's three island-based districts appear to be a reason why the Plaintiffs are now challenging the County's election process. *See, e.g.*, Skagit CP at 472 (Plaintiff Carlson stating that candidates from Lopez island are "extremely left-wing"; Lopez and Orcas citizens "have no idea what our [San Juan Island citizens'] needs are"); Skagit CP at 456 (Plaintiff Bossler stating that "the populations on the various islands have distinct and separate characteristics . . . the Lopez Island community is a wholly different group of folks than the individuals on San Juan Island"). Some islands may be primarily rural whereas others may be more urbanized or suburbanized. Some may attract numerous tourists whereas others may be virtually tourist-free. Because of this diversity across islands, a county may reasonably choose to establish island-based residency districts for council candidates to help ensure that the council is well-equipped to recognize and address issues that arise on each of the islands. By allowing for island-based residency districts, RCW 36.32.020 and .040(2) further this legitimate purpose. *See Dusch*, 387 U.S. at 116-17 (citing diversity reasons in support of the residency districts for city council members).

RCW 36.32.020 and .040(2) also serve the purpose of an orderly and efficient election process in island counties. In fact, one sponsor of RCW 36.32.040(2) noted the administrative hardship associated with slicing up island counties into population-based districts. Skagit CP at 246. The dual purposes of ensuring diversity of viewpoints and allowing for an orderly and efficient election process are more than enough to outweigh the minimal (or non-existent) impact to the Plaintiffs' voting rights. If this Court reaches the question of whether the statutes are valid, both statutes should be upheld.

3. Proposition 1 Does Not Violate The Requirement That Elections Be Free And Equal

The Plaintiffs also challenge Proposition 1 under article I, section 19, which requires that elections be free and equal. Opening Br. at 25-29. Although this challenge is not aimed at the state statutes, the State nevertheless briefly responds due to the relationship between article I, section 19 and equal protection principles.

The Plaintiffs do not cogently explain how the County's candidate residency districts implicate the right to a free and equal election. Giving them the benefit of the doubt, it appears that Plaintiffs might simply be repeating the argument that the residency districts dilute their votes. However, as explained *supra*, the residency districts do not dilute their

votes because each voter has an equal opportunity to vote in primary and general elections for all of the candidates.

Furthermore, even if voting districts were at issue in this case, article I, section 19 would be inapplicable because “Washington cases have never held that article I, section 19 requires substantial numerical equality between voting districts.” *Eugster v. State*, 171 Wn.2d 839, 845, 259 P.3d 146 (2011). Rather, this Court has “historically interpreted article I, section 19 as prohibiting the *complete denial* of the right to vote to a group of affected citizens.” *Id.* (emphasis added). Since the Plaintiffs are not denied the right to vote in county council elections, article I, section 19 does not apply.

In arguing that it does apply, the Plaintiffs rely on *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 405-11, 687 P.2d 841 (1984). But as this Court recognized in *Eugster*, *Foster* involved a situation where owners of subdivided land were completely denied the right to vote in irrigation board elections even though their lands were subject to assessments for irrigation water. *Eugster*, 171 Wn.2d at 845; *Foster*, 102 Wn.2d at 410-11. Thus, *Foster* likewise stands for the proposition that article I, section 19 applies to the complete denial of the right to vote. Since Plaintiffs do not allege that they are denied the right to vote, article I, section 19 is inapplicable.

4. Proposition 1 Does Not Violate The State Constitution's Privileges And Immunities Clause

Plaintiffs next argue that Proposition 1 violates the privileges and immunities clause of the Washington Constitution. Opening Br. at 29-33 (citing Const. art. I, § 12). Although the Plaintiffs do not challenge the statutes on the same grounds, the State nevertheless briefly addresses this argument because of its potentially wider implications.

Article I, section 12 of the Washington Constitution prohibits the granting of special privileges and immunities: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” The privileges and immunities clause requires separate constitutional analysis from the equal protection clause of the United States Constitution. *Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 805-812, 83 P.3d 419 (2004) (applying the six *Gunwall* factors in determining that a separate analysis is warranted).

In order for the privileges and immunities clause to apply, it must first be determined that a “privilege” (i.e., a fundamental right) is at stake. *Id.* at 812-13. If so, a violation of the clause occurs only if the privilege is conferred to a specific class of citizens and not to others. *Id.* at 812. The

privileges and immunities clause is fundamentally concerned with favoritism to an identifiable class. *Grant Cnty.*, 150 Wn.2d at 808-09.

Since *Grant County Fire* already analyzed the privileges and immunities clause under the *Gunwall* factors, a plurality of this Court concluded that the *Gunwall* factors do not need to be re-analyzed in order to justify a separate state constitutional analysis. *Madison v. State*, 161 Wn.2d 85, 94-95, 163 P.3d 757 (2007); *see also id.* at 118 (J.M. Johnson, J., concurring).¹⁰ However, the *Gunwall* analysis is only the first step in determining whether a provision of the Washington Constitution provides greater protection than its federal counterpart. *Id.* at 93 (citing *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). The second step in the analysis “focuses on whether our state constitution provision is more protective of the claimed right in the particular context than is the federal constitution provision[.]” *Id.* at 93-94.

The right to vote is a fundamental right that implicates the privileges and immunities clause. *Id.* at 95. The Plaintiffs here allege infringement of their right to vote. However, as noted *supra*, they have

¹⁰ However, in a concurring opinion, Justice Madsen disagreed that a separate analysis is automatically required, noting that *Grant County Fire* required such an analysis only if the challenged legislation grants a privilege or immunity to a minority class (*i.e.*, a grant of “positive favoritism”). *Madison*, 161 Wn.2d at 111-12 (Madsen, J., concurring); *see also lead opinion in Andersen v. King Cnty.*, 158 Wn.2d 1, 14-16, 138 P.3d 963 (2006) (privileges and immunities clause applies only when the challenged legislation grants a special privilege or immunity to a minority class of citizens).

not demonstrated how a county-wide primary and general election system has any impact on their right to vote. Thus, it is not clear that the right to vote is even implicated in the present case. Rather, the “right” that Plaintiffs assert is actually a “right” to have candidate residency districts be roughly equal in population. But there is no such right, much less a fundamental right. Thus, the privileges and immunities analysis could end right here.

If we accept for the sake of argument that the Plaintiffs have a claim that implicates their voting rights, that claim still must fail. The privileges and immunities clause focuses on favoritism and whether a particular class of citizens is granted a right that is denied to others. Here, each San Juan County citizen may vote in common with all other San Juan County citizens for all positions on the county council. No one is accorded a special right that is denied to others.

In trying to make out a case for unequal treatment, the Plaintiffs cite two apportionment cases for the false proposition that the population disparity among the County’s candidate residency districts is grounds for striking them down. Opening Br. at 34 (citing *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 84 S. Ct. 1418, 12 L. Ed. 2d 568 (1964)). However, both cases involved the reapportionment of seats for

the state legislature and the establishment of unequal *voting* districts. Again, the present case involves candidate residency districts, not voting districts. Therefore, the cases cited by the Plaintiffs are inapplicable.

The Plaintiffs argue that the recent lack of a primary for the Lopez Island candidates somehow implicates the privileges and immunities clause. Opening Br. at 30-31. Plaintiffs cite no authority in support of their theory that voters have a right to vote in a primary election even if no more than two candidates have declared their candidacy for that election. Again, all of the County's citizens had an equal opportunity to vote in the general election for all three council positions, and all County citizens had an equal opportunity to vote in the primary election for those candidates that were subject to the primary. The privileges and immunities clause does not come into play under this set of facts.

Last, the Plaintiffs argue in one lonely paragraph that the citizens of San Juan County are being treated differently than all other state citizens. Opening Br. at 32-33. As a factual matter, that is incorrect. Other charter counties are free to develop their own election regulations for their county commissioner elections, and those regulations may mirror San Juan County's charter, may mirror state law, or may create an entirely different election system. *See supra* pp. 7-12 (discussing counties' authority under article XI, section 4 to frame their own charters

irrespective of state statutes). Other counties could do so as well. Const. art. XI, § 4. However, even if it were factually true that San Juan County voters are treated differently than the rest of the state, the hallmark of privileges and immunities analysis is *preferential* treatment, not merely different treatment. Plaintiffs do not contend that by adopting a charter amendment that calls for at-large elections San Juan County has somehow granted preferential treatment to the voters of the remainder of the state. Therefore, this argument fails as well.

The Plaintiffs' constitutional challenges are contrary to well-established case law. RCW 36.32.020 and .40(2) should be upheld and the constitutional challenges to Proposition 1 should be rejected. The trial court properly granted summary judgment to the State and County on these issues.

D. Article II, Section 19 Of The Washington Constitution Does Not Apply To County Enactments

The Plaintiffs additionally argue that Proposition 1 violates article II, section 19 of the Washington Constitution. Opening Br. at 8-16. Although this argument does not implicate the two state statutes, the application of the state constitution to local measures is an issue of statewide concern, and the State accordingly addresses it. Article II, section 19 of the Washington Constitution states: "No bill shall embrace

more than one subject, and that shall be expressed in the title.” Article II, section 19 encompasses two distinct aspects: (1) the single subject rule; and (2) the subject-in-title rule. *Washington Ass’n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 655, 278 P.3d 632 (2012).

Article II, section 19 applies to the legislature’s enactments and the *statewide* enactments of the people. *See Washington Fed’n of State Employees v. State*, 127 Wn.2d 544, 551-52, 901 P.2d 1028 (1995) (*Washington Fed’n*) (citing *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974) (article II, section 19 applies to both the legislative and initiative processes)). But in the context of a challenge to a City of Seattle ordinance, this court stated simply and succinctly: “Constitutional article II, section 19 applies only to the legislature, and it is not contended otherwise.” *City of Seattle v. Buchanan*, 90 Wn.2d 584, 607, 584 P.2d 918 (1978).

The Court’s statement in *Buchanan* is well supported by the text and context of the constitutional provision. The use of the word “bill” in article II, section 19, demonstrates this point. Words in the constitution must be given their common and ordinary meaning. *See, e.g., Automotive United Trades Ass’n v. State*, 175 Wn.2d 537, 545, 286 P.3d 377 (2012) (*AUTO*). When determining the plain meaning of a term, it is appropriate to consider the context in which it is used, including consideration of

related provisions. *Cf. Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (when determining the meaning of a statutory term, court should consider the context in which the term is used, related provisions, and the statutory scheme as a whole).

Simply put, “[a] bill is a draft of a law to be enacted by the legislature or by the electors via the initiative process.” *Washington Fed’n*, 127 Wn.2d at 552 (citation omitted). The word “bill” is used throughout article II to refer to a single piece of state legislation passed at a discrete point in time. For example, article II, section 20 explains how bills originate: “Any *bill* may originate in either house of the legislature, and a *bill* passed by one house may be amended in the other.” (Emphasis added). Article II, section 22 explains how bills become law: “No *bill* shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be recorded thereon as voting in its favor.” (Emphasis added). Article II, section 32 provides that no *bill* shall become law “until the same shall have been signed by the presiding officer of each of the two houses in open session, and under such rules as the legislature shall prescribe.” And there are other examples of the word “bill” being used in article II to describe enactments of the legislature. In contrast, the

word “bill” appears nowhere in article XI, which pertains to county and city governments.

The context in which the provision appears in the constitution further supports the conclusion that it addresses only statewide legislation. Article II, section 19 arises in the article of the state constitution that pertains exclusively to the state legislature and statewide legislation.¹¹ In contrast, county and city governments are addressed in article XI of the constitution. Consequently, when faced with constitutional questions related to county governance, courts should resolve those questions under article XI, not article II. *See, e.g., Washam v. Sonntag*, 74 Wn. App. 504, 511, 874 P.2d 188 (1994) (referendum power in article II, section 1 applies to enactments of the legislature, not county ordinances).

The Plaintiffs ignore the text and context of article II, section 19 and argue as a matter of policy that this constitutional provision should apply to local measures. Opening Br. at 8-13. However, this Court’s “constitutional jurisprudence is grounded in an inquiry into the text’s common and ordinary meaning.” *AUTO*, 175 Wn.2d at 545. Thus:

Where the words of a constitution are unambiguous and in their commonly received sense lead to a reasonable

¹¹ *See, e.g.,* Const. art. II, § 1 (vesting state legislative powers in the legislature and reserving right of initiative and referendum to the people on statewide legislation); Const. art. II, § 4 (election of state representatives and term of office); Const. art. II, § 6 (election of state senators and term of office); Const. art. II, § 7 (qualifications of legislators).

conclusion, it should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.

Id. (citation omitted). The plain language of article II, section 19 does not support an interpretation that extends to local measures. As a result, article II, section 19 does not apply to Proposition 1.

The Plaintiffs also cite article XI, section 4, pointing to the language that states: “Any county may frame a ‘Home Rule’ charter for its own government *subject to the Constitution* and laws of this state[.]” Opening Br. at 11 (emphasis added). However, the reference to the state constitution in article XI, section 4 does not answer the question of *which* constitutional provisions apply to home rule charters. To answer that question, it is necessary to consider the text of individual provisions. As noted *supra*, the plain language of article II, section 19 does not extend to local ballot measures. Therefore, article II section 19 does not provide a basis for invalidating Proposition 1.¹² The superior court properly granted summary judgment to the County and State on this issue.

¹² Even if article II, section 19 did apply to the County’s enactments, the State doubts that the Plaintiffs could show that Proposition 1 violates the single subject or subject-in-title rules. However, the State defers to the County on those arguments since it is the County that drafted the ballot titles and it is ultimately the County’s charter that is at issue.

VI. CONCLUSION

For these reasons, this Court should affirm the decision of the superior court.

RESPECTFULLY SUBMITTED this 5th day of July, 2013.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the foregoing document to be served, via electronic mail, on the following:

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Sent on behalf of Jeffrey T. Even, Deputy Solicitor General, WSBA #20367 and Laura Watson, Deputy Solicitor General, WSBA #28452; Office ID #91087

Attached for filing with the court, please find Brief of Respondent State of Washington and Certificate of Service in: Carlson v. San Juan County; No. 88574-5.

<<88574-5 Brief of Respondent State of WA.pdf>>

Thank you,

Kristin

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