

COA Cause No. 351742
Grant County Superior Court No. 17-2-00228-0

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FRED MEISE, DOUG BIERMAN, PAT HOCHSTATTER, MIKE
COUNSELL, JASON MELCHER, AND JARED POPE,

Petitioners,

vs.

MICHELE JADERLUND, GRANT COUNTY AUDITOR

Respondent,

and

KATIE PHIPPS, MICHELE KITTRELL, KRISTA HAMILTON, SUSAN
MOBERG, CRAIG HARDER, DENNIS KEARNS, and BARBARA
KEARNS,

Intervenors

BRIEF OF INTERVENORS

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I. INTRODUCTION

Elections are part of the political process and the Court should be wary of intervening in that process unless absolutely necessary. Petitioners complain that the Moses Lake voters' supermajority approval of a school bond measure should be set aside because it was a close election. They contend that because a handful of voters who were notified in writing that their votes could not be counted unless they contacted the Auditor's office to clear up the discrepancies on their ballots, and who did not respond to this written notice, should be able to override the will of the supermajority because they did not receive a second telephonic notice to correct their ballots. They argue that these thirty-one voters have been disenfranchised. They have not. They voted. However, because of discrepancies in their ballots the votes were not counted. They were given an opportunity to correct the discrepancies but failed to do so. This case does not implicate the right to vote. It only involves procedural issues regarding the counting of votes. The trial judge correctly denied their petition to set aside the election results ruling that the failure to follow up the written notice with a telephone call was an insufficient basis to set aside an otherwise properly conducted election. The Intervenors, voters of the Moses Lake School District, are asking this Court to uphold the

election results because the claimed irregularity in the voting process is legally insufficient to invalidate the election.

II. STATEMENT OF THE CASE

The public voted in a special election on February 14, 2017 on the question of whether the Moses Lake School District should be entitled to tax landowners of the District to raise funds for the purpose of construction of a new high school and elementary school. (CP 1-13) The special election obtained a supermajority of 60.03%. In the election there were approximately 126 ballots that were determined questionable because of discrepancies in the signatures on the ballots. CP 90, 103, Ex. C. The Auditor determined that the signatures did not match or that there was another discrepancy in the ballot that caused her to question the ballots. Id. The Auditor sent a letter to each voter of the questionable ballots, asking the voter to contact the auditor and correct the discrepancy. CP 31. The notice advised the respective voters that they had until February 23, 2017 to correct their ballot. CP 106 All but 31 of the voters contacted the Auditor's office and corrected the discrepancy. CP 103-04 Thirty-one of the voters that were contacted by mail did not respond.

The February 14 election ballots were canvassed by the canvassing board on February 24, 2016. The canvassing board approved of the vote

count including the rejection of 31 ballots that were not properly signed or otherwise defective. CP 100 The election results were certified by the Canvassing Board on February 24, 2017. CP 90, 100, Ex. B The Petitioners did not file any objection to the certification of the original election within 10 days of the certification of the election.

The bond measured passed by a supermajority of 60.03%. Petitioners sought a recount of the original election results. On March 8, 2017 the Petitioners filed their Petition challenging the results of the election. CP 1. This was 12 days after the election had been certified and the 31 votes had been rejected. A recount was done on March 9, 2017. The recount showed no discrepancies. The 31 challenged but uncorrected ballots were not counted in the initial election or the recount. The record is devoid of any evidence that counting the 31 rejected ballots would have made any difference in the outcome of the election. Petitioners stipulated that the 31 rejected ballots could not now be counted or even opened. CP 32-33.

III. ARGUMENT

It has been a longstanding principle in Washington that the judiciary should exercise restraint in interfering with the elective process which is reserved to the people in the state constitution. Unless an election

is clearly invalid, “**when the people have spoken, their verdict should not be disturbed by the courts....**” Murphy v. City of Spokane, 64 Wash. 681, 684, 117 P. 476 (1911); See also, State ex rel. Sampson v. Superior Court for King Cty., 71 Wash. 484, 488, 128 P. 1054, 1056 (1913) In adhering to this principle of judicial restraint, our Courts have adopted the rule that an “informality or irregularity” in an election is not sufficient to invalidate the election. Statutory provisions relating to conduct of an election, such as requirements for notice, have been held to be directory only, and even though not followed, will not render an election void. Dumas v. Gagner, 137 Wash. 2d 268, 283–84, 971 P.2d 17, 25 (1999) Shaw v. Shumway, 3 Wash. 2d 112, 118–19, 99 P.2d 938, 941 (1940) makes it clear that unless the statute which prescribes the form and manner of the election process expressly provides that non-compliance with the statute will render the election void, nullification is not a proper remedy. Petitioners argue extensively that the Auditor did not strictly comply with the notice provisions but they fail to acknowledge that invalidation of the election is not warranted. The notice provisions were directory and cannot be the basis for the invalidation of the election.

A. Overview of RCW 29A.60.165.

RCW 29A.60.165 provides a process to notify voters if their ballot contains discrepancies related to signatures. The Auditor is directed to

contact the voters in writing to notify them of the discrepancies. If the voter does not respond then the Auditor is directed to “attempt” to notify them with a telephone call. The primary notice is by mail. The telephonic contact is simply a secondary process. More importantly, the statute does not provide that the failure to give telephonic notice requires the invalidation of the election. The notice requirement is then a directive only and cannot be the basis of invalidation of the election. The use of the word “shall” in the statute is irrelevant in this argument.¹ Even if attempted telephonic contact was mandatory, invalidation of the election is not the proper remedy.

B. Failure To Make a Secondary Attempt at Telephone Contact Does Not Require an Invalidation of the Election.

Admittedly, Petitioners have the standing to allege “misconduct” in the election process pursuant to RCW 29A.68.020(1). RCW 29A.68.050 does give the court the authority to pronounce judgment in an election contest either “confirming or annulling and setting aside the election, **according to the law and right of the case.**” The statutory scheme does not require invalidation for every alleged act of misconduct.

Invalidation is only required where the statute in question specifically

¹ The legislative history is not helpful. It does not address the important issue of whether failure to comply with this notice requirement should result in an invalidation of the election.

states that the violation requires invalidation. The dual notice provisions here do not required invalidation if there is non-compliance.

Petitioners argue that the Auditor's failure to attempt a follow-up telephone contact constitutes "misconduct" under the statute. This argument begs the question. The question is not whether the failure to make a follow-up phone call constitutes misconduct; the question is whether the statute in question specifically provides that the failure to comply will result in the invalidation of the election.

Having constructed an argument that the failure to make the follow-up telephone call was misconduct, Petitioners boldly state that the statutory remedy is "annulling and setting aside the election" citing RCW 29A.68.050. Petitioners only quote a portion of the statute. This provision of the statute actually provides:

The court shall meet at the time and place designated to determine such contested election by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable, and may dismiss the proceedings if the statement of the cause or causes of contest is insufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court shall pronounce judgment in the premises, either confirming or annulling and setting aside such election, **according to the law and right of the case.** [Emphasis added]

Petitioners then conclude without any citation of authority that the only remedy available to the court would be nullification. They suggest that all misconduct, except misconduct related to members of the canvassing board

or illegal votes, requires invalidation. The long standing case law in Washington provides otherwise.

C. The Auditor substantially complied with the overall notice requirement by providing written mailed notice to the voters with questionable ballots.

Petitioners attempt to split the notice requirement in to two separate schemes; one requiring written notice and a second requiring telephonic notice. The statute is not so constructed. The primary purpose of the statute is to provide written notice to voters with questionable ballots. It adds a secondary process to “attempt” to contact non-responding voters by telephone. In this case providing written notice to the 126 voters with questionable ballots resulted in substantial compliance. Petitioners acknowledged that our “courts have applied the doctrine of substantial compliance to overlook technical violations of the laws governing elections,” citing Sudduth v. Chapman, 88 Wash. 2d 247, 558 P.2d 806 (1977) This is an understatement of the holding of Sudduth and similar cases. Sudduth noted an 80 year history of the rule that where there has been substantial compliance with the requirements of the laws governing elections, the actions will be upheld, citing Seymour v. City of Tacoma, 6 Wash. 427, 33 P. 1059 (1893); Loop v. McCracken, 151 Wash. 19, 274 P. 793 (1929); and Vickers v. Schultz, 195 Wash. 651, 81 P.2d 808 (1938). Sudduth v. Chapman, 88 Wash. 2d 247, 558 P.2d 806 (1977).

Those cases in turn held that notice requirements are directory and will not result in the invalidating of the election unless the notice statute so provides. Seymour, 6 Wash. at 431 (Certain rules as to notice of elections have become well settled, and none of them are better settled than that the formalities of giving notice, although prescribed by statute, are directory merely, unless there is a declaration that, unless the formalities are observed, the election shall be void); Loop v. McCracken, 151 Wash. 19, 24, 274 P. 793, 795 (1929) (Where there is nothing in applicable election law providing that, unless such elections are held strictly as prescribed by the statute, such elections shall be void, the Court refused to invalidate an election where the election officials failed to give any notice of the place of election to one entire precinct citing Murphy v. City of Spokane, 64 Wash. 681, 117 P. 476 (1911)); Vickers, 195 Wash. at 654–55 (Citing Rands v. Clarke Cty., 79 Wash. 152, 139 P. 1090 (1914), holding that the failure of the election board to post notice of a special county bond election did not render the election invalid and that the provision for notice was directory, not mandatory, “unless the statute itself declares that the election shall be void if the statutory requirements are not strictly observed, or the court can see from the record that the result of the election might have been different had there been a strict compliance with the statutory requirements); In accord, Seymour, 6 Wash. 427; Richards v.

Klickitat Cty., 13 Wash. 509, 43 P. 647 (1896); State v. Doherty, 16 Wash. 382, 47 P. 958 (1897); Hesseltine v. Town of Wilbur, 29 Wash. 407, 69 P. 1094 (1902); Murphy v. City of Spokane, 64 Wash. 681, 117 P. 476 (1911); Hill v. Howell, 70 Wash. 603, 127 P. 211 (1912).

Petitioners argue that failure to attempt to telephone voters who have already been contacted by mail constitutes “no compliance” with the statute citing Davis v. Gibbs, 39 Wash. 2d 481, 236 P.2d 545 (1951) and Sch. Dist. No. 81 of Spokane Cty. v. Taxpayers of, & Within, Sch. Dist. No. 81 of Spokane Cty., 37 Wash. 2d 669, 225 P.2d 1063 (1950). Neither case supports Petitioners’ argument. “No compliance” would be the failure to provide notice by mail. The notice by mail was substantial compliance. Again, Petitioners continue to ignore the fact that written notice was sent to all of the 126 voters, so clearly “some attempt” was made to comply with the notice statute.

Davis offers little support to the Petitioners. In Davis v. Gibbs, 39 Wash. 2d 481, 236 P.2d 545 (1951) the statute in question required publication of the notice of annexation in a newspaper published in the annexation area (Lake City). The notice was instead published in a newspaper in Ballard even though there was a newspaper in the Lake City

area, *The Lake City Citizen*. The Davis Court noted the established doctrine of substantial compliance and wrote:

This court is firmly committed to the doctrine of 'substantial compliance.' No purpose would be served by an analysis of all of our former decisions in which the doctrine is discussed and applied. Most of them are cited in School Dist. No. 81 of Spokane County, 225 P.2d at 1064, where we said: 'Through a long line of cases, this court has held that statutes * * * calling for the publication of election notices, are not mandatory and will be considered to have been substantially complied with when an attempt has been made to comply with the statute, and when wide publicity has been given the matter and the great body of the electors have had actual notice of the time and place of the holding of the election and of the question submitted, unless the statute provides that failure to observe the formalities shall render the election void.

Davis, 39 Wash. 2d 481.

The Davis court went on to note:

In all cases where we have approved the doctrine of substantial compliance, that which was done, although irregular or deficient, tended to accomplish that which would have been accomplished had the statute been followed specifically. For example, in the School District No. 81 case, *supra*, where notice had been published in the proper medium, but not for the proper length of time, we held, in the light of the unofficial publicity, that the election was valid. But before there can be substantial compliance, there must be some attempt to comply with the statute. Here, we have no attempt to publish in compliance with the statute. The paper in which it was published was not even circulated in the annexation area. Hence, there was no official printed publication of the election. Posting of notice cannot be a substitute for publication. . . .

Id. at 485-86.

At bar, the written notice to the voters certainly "tended to accomplish" the purpose of the statute which is to provide notice to the

voters of questionable ballots. The notice requirements are directory and cannot be the basis for an invalidation of the special election. School Dist. No. 81 of Spokane County, 37 Wash. 2d at 671–72 noted that:

Through a long line of cases, this court has held that statutes like Rem.Rev.Stat. § 5148–3, calling for the publication of election notices, are not mandatory and will be considered to have been substantially complied with when an attempt has been made to comply with the statute, and when wide publicity has been given the matter and the great body of the electors have had actual notice of the time and place of the holding of the election and of the question submitted, unless the statute provides that failure to observe the formalities shall render the election void. Seymour v. City of Tacoma, 6 Wash. 427, 431, 33 P. 1059; State v. Doherty, 16 Wash. 382, 47 P. 958 (1897); Hesseltine v. Town of Wilbur, 29 Wash. 407, 69 P. 1094 (1902); Rands v. Clarke Cty., 79 Wash. 152, 139 P. 1090 (1914); Groom v. Port of Bellingham, 189 Wash. 445, 65 P.2d 1060 (1937); Vickers v. Schultz, 195 Wash. 651, 81 P.2d 808 (1938); Shaw v. Shumway, 3 Wash.2d 112, 99 P.2d 938.

In this case the Auditor substantially complied with RCW 29A.60.165(2)(a) when she issued out written notice to the targeted voters. The statute does not provide that the failure to attempt to make a subsequent contact by telephone will invalidate the election. Invalidation of this special election is not the proper remedy. See generally, Seymour, 6 Wash. 427; Williams v. Shoudy, 12 Wash. 362, 41 P. 169 (1895); Murphy v. City of Spokane, 64 Wash. 681, 117 P. 476 (1911); State v. Superior Court of King Cty., 138 Wash. 488, 494, 244 P. 702, 704 (1926)

Shaw v. Shumway, 3 Wash. 2d 112, 99 P.2d 938, 941 (1940) is helpful. There a citizen attempted to invalidate an election establishing a

public utility district because the auditor did not publish certain notices to the public **that were required by statute**. The Court reviewed a number of election cases where the statutory notice requirements were not followed, including Seymour, 33 P. at 1060, Doherty, 16 Wash. 382, Rands v. Clarke Cty., 79 Wash. 152, 139 P. 1090 (1914), Lee v. Bellingham Sch. Dist. No. 301 of Whatcom Cty., 107 Wash. 482, 182 P. 580 (1919), and Groom v. Port of Bellingham, 189 Wash. 445, 65 P.2d 1060 (1937). The *Shumway* court then adopted the rule set forth in Vickers v. Schultz, 195 Wash. 651, 81 P.2d 808 (1938), that:

We have consistently held that unless the statute, which prescribes the form and manner of publishing election notices, **expressly provides that noncompliance with the statute will render the election void**, it is regarded as declaratory rather than mandatory. The election will be held valid even if there is a variance from the terms of the statute if the election was a fair one; that is, if information concerning the election was communicated to the electors by means other than the official notices and if the electors generally participated in the election so that the election as held constituted a reliable expression of popular opinion. [Emphasis added]

Id. at 657.

RCW 29A.60.165(2)(a) does not state that failure to comply with the telephonic notices would invalidate the election. The election was a fair one. Petitioner argues that the Auditor did not substantially comply with the statute because she failed to make any phone calls, ignoring the fact that these same voters received written notice. This myopic view of

Petitioners ignores the entire statute as written. The central purpose of the statute is to provide notice to voters of questionable ballots. The primary notice set forth in the statute is written mailed notice which makes sense in a mail-in ballot vote. If the voter does not respond to the written mailed notice the statute indicates that the auditor should “attempt” to contact the voters by phone. The auditor substantially complied with the notice requirement when she mailed out notice to the 126 voters with questionable ballots. The notice was effective and resulted in all but 31 voters contacting the auditor and correcting the discrepancies. The trial judge was correct in determining that issuance of the written notice substantially complied with the notice requirement of the statute and the failure to utilize follow-up phone calls would not justify the invalidation of the election results.

D. The Superior Court Correctly Decided that Contacting Voters by Mail Constituted Substantial Compliance.

Petitioners again argue that mailing notice to the voters is not substantial compliance. They argue that the notice requirements of RCW 29A.60.165(2)(a) are not accomplished unless both written notice by mail and telephonic notice are done. This argument ignores the import of (2)(a) which is a notice statute. The primary and most effective notice proscribed in the statute is written notice by first class mail. That notice

was given. The failure to attempt to call the 31 remaining voters a second time is directory and cannot be the basis of annulling the election results.

Petitioners argue that the cases relied on by the Auditor and Intervenors involve **pre-election** statutory notice requirements and therefore do not apply to **post-election** notices. They premise this novel argument on language in the Vickers case which (a) does not support the argument that the pre-election cases do not apply to post-election notice requirements, and (b) holds just the opposite from what Petitioners are arguing. These voters with invalid ballots have not been disenfranchised. They were aware of the election and cast their ballots. Their ballots were rejected because of certified errors in identification of the voter. The Auditor substantially complied with the statutory notice requirement when she sent all 131 voters with questionable ballots written notice by First Class mail. There is no reason to apply a different substantial compliance rule to notices required after the ballot is cast. Petitioners suggest that because a voter can wait to challenge a pre-election notice requirement after the votes are counted this somehow creates a special circumstance when a rejected ballot voter challenge is involved. In fact, these rejected ballot voters had the same opportunity to wait until after the vote count to challenge their rejected ballots. They, like the potential pre-election challengers, had 10 days from the certification of the count to challenge

the results. There is no reason to provide post-election challenges with any more rights than pre-election challenges. In fact, Vickers specifically noted that “the courts are more liberal in permitting a deviation from the statute where an attack is made after the election is held than where the attack is made prior to the election.” Here the Petitioners are making the attack after the election is held and are entitled to less deference than those challenges made prior to the election. This rule is sensible. Pre-election challenges allow the election official to correct any deficiency before the election is held. However, post-election challenges cannot be corrected and the remedy often sought is to invalidate the election. Therefore, courts are more deferential to pre-election challenges than post-election challenges. Vickers, 195 Wash. 651.

E. The Superior Court Properly Applied the Substantial Compliance Rule in This Case.

Petitioners argue that the substantial compliance rule should not apply to this case because it may result in a denial of the right to vote. They cite the following language in State ex rel. Pemberton v. Superior Court of Whatcom Cty., 196 Wash. 468, 480, 83 P.2d 345, 350 (1938) in support of their argument:

As we have heretofore held, courts should not be too ready to reject ballots or votes on account of the violation of technical requirements, especially in the absence of a charge of fraud, lest, in so doing, they disfranchise persons who voted in entire good faith. State ex rel. Doyle

v. Superior Court, 138 Wash. 488, 244 P. 702; Loop v. McCracken, 151 Wash. 19, 274 P. 793; McArtor v. State ex rel. Lewis, 196 Ind. 460, 148 N.E. 477; Goodell v. Judith Basin County, 70 Mont. 222, 224 P. 1110.

This comment by the court was in reference to a challenge to 10 absentee ballots because the ballots were not mailed as required by the statute but were hand delivered by the secretary of one of the candidates. The *Pemberton* case did not deal with rejected ballots and this out-of-context quote offers little support to the Petitioners argument. In fact, one of the cases cited by *Pemberton* was State v. Superior Court of King Cty., 138 Wash. 488, 494, 244 P. 702, 704 (1926)[sub. nom. State v. Superior Court of King Cty., 138 Wash. 488, 244 P. 702 (1926) where the court noted in a post-election challenge to absentee ballots;

Courts long ago adopted the rule that elections cannot be held invalid nor the returns impeached for mere irregularities. The officials in charge are chosen by law, and their actions and their returns are prima facie correct, except upon a showing of fraud or mistake. Thus it was held in *Seymour v. Tacoma*, 33 P. 1059, 6 Wash. 427, that the failure to publish notice of election for the required time was a mere irregularity; in *Williams v. Shoudy*, 41 P. 169, 12 Wash. 362, that the election notice which specified the wrong hour for closing was an irregularity; in *Murphy v. Spokane*, 117 P. 476, 64 Wash. 681, that the failure to observe statutory requirements that the officers be selected in a certain manner be present at all times, take an oath of office, or that the polls should be opened on time and kept open during the time required by law were merely directory provisions.

Id. at 494.

Petitioners also argue that disenfranchisement precludes substantial compliance based on language in *Rand*, 79 Wash. At 159 stating that

substantial compliance with pre-election notices is sufficient unless the court can see from the record that the results of the election might have been different. They also cite Groom v. Port of Bellingham, 189 Wash. 445, 447, 65 P.2d 1060, 1061 (1937) and Vickers for this proposition. They then argue without any evidence to support the argument that the 31 rejected ballots if counted would have made a difference.

The Petitioners cannot establish that the rejected ballots would have made a difference in the outcome of the election. Even if the Petitioners were timely in their challenge of the 31 rejected ballots, they still could not prove that the rejected ballots would have made a difference.² State ex rel. Morgan v. Aalgaard, 194 Wash. 574, 583, 78 P.2d 596, 600 (1938) is helpful. There the canvass board rejected three ballots because they were not in proper form in a contest for a school board position. After the vote count Mr. Aalgaard won the election by two votes. In an effort to win a challenge to the election Mr. Morgan put on evidence of the three voters whose ballots were rejected. They testified that they cast ballots in favor of Mr. Morgan. At the trial, three witnesses were called by respondent, each of whom testified that he had received

² In fact, Petitioners stipulated that “it would not be appropriate to speculate or attempt to determine how the results of the election would have been different if the Grant County auditor had attempted to notify [the 31] voters by telephone in this case. . . .” CP 32

one of the ballots upon which Mr. Morgan's name appeared twice, and that, as the witness had intended to vote for Mr. Morgan. The Morgan Court ruled that the testimony of the electors could not be considered in a secret ballot election. The Court wrote:

The principle underlying the question now under discussion is of great importance, and we are clearly of the opinion that it must be held that the trial court erred in holding that the three defective ballots should be counted for respondent, even though three witnesses testified that they had cast these identical ballots and intended to vote for candidate Morgan. These ballots cannot be counted.

Id. at 583 The Petitioners are in the same electoral boat. They cannot prove that the uncounted ballots would have made a difference in the outcome of the election. The votes are secret; they are sealed and cannot be opened by the Court. It is merely speculation on the Petitioners' part that the uncounted votes would have made a difference in the outcome.

F. Petitioners Challenge Of The 31 Uncounted Ballots Was Untimely And Is Barred By The 10 Day Statutory Limitation.

The Petitioners are challenging the results of the February 14, 2017 election. Specifically, they claim that the 31 ballots rejected in that election should have been counted. The result of the February 14, 2017 election was certified on February 24. In the certification, the 31 uncorrected ballots were specifically rejected. The Election Contest Petition specifically seeks to annul and set aside the February 14, 2017

special election because of the 31 rejected ballots. (CP 1 at 4). The Election Contest Petition does not challenge the recount as being faulty; it only claims that the 31 rejected ballots should not have been rejected.³ The Petition was filed on March 8, 2016, 12 days after the certification of the election. The record does not contain any evidence of a separate certification for the recount. The fact that the challenge was filed the day before the recount is undisputable proof that the challenge was directed at the rejected ballots, not the recount.

RCW 29A.68.013 provides that the trial court can order the correction of any error in the election process and require an election official to do as the Court orders if an error or omission has occurred as a result of a wrongful act, neglect of duty or in the official certification of any measure. The wrongful act, neglect of duty or error in certification all relate to the failure to count 31 rejected ballots. However, the statute requires that:

An affidavit of an elector under this subsection shall be filed with the appropriate court no later than ten days following the official certification of the * * * election as provided in RCW 29A.60.190, . . . or, in the case of a recount, ten days after the official certification of the amended abstract as provided in RCW 29A.64.061.

³ The recount resulted in the identical count as the original count.

The County complied with this requirement by providing a certification of the February 14th election on February 24th.

The 10-day statute of limitations is a bright line rule. Reid v. Dalton, 124 Wash. App. 113, 122, 100 P.3d 349, 354 (2004) As the Court so cogently noted in Reid, 124 Wash. App. 113:

Statutes of limitation assume particular importance when swift resolution of potential legal uncertainties is in the public interest. Brutsche v. City of Kent, 78 Wash. App. 370, 377, 898 P.2d 319 (1995); Summit-Waller Citizens Ass'n v. Pierce Cty., 77 Wash. App. 384, 397, 895 P.2d 405 (1995). Here, the limitation period for challenging the results of an election is clear. And the public interest demands that any challenge to the validity of the election be speedily filed and resolved. **The trial court acted correctly in upholding the bright-line time limitation of elections challenges.** Brutsche v. City of Kent, 78 Wash. App. 370, 377, 898 P.2d 319 (1995). (Emphasis added)

Petitioners argue that they were justified in waiting until after the recount before challenging the 31 rejected ballots. They are mistaken. The recount is only provided to re-tabulate **the same votes that were counted in the original election.** The recount does not count or consider ballots that were rejected in the initial certification. The correction that the Petitioners sought was to overturn the rejection of the 31 ballots, a matter unrelated to the recount. A timely challenge of that matter should have been made within 10 days of the original certification.

The case law is clear that the only ballots that can be tabulated in the recount are the ballots that were counted in the original

election. See McDonald v. Sec'y of State, 153 Wash. 2d 201, 103 P.3d 722 (2004); In accord, In re Coday, 156 Wash. 2d 485, 489, 130 P.3d 809, 811 (2006) Therefore, the error that must be challenged in the rejection of the 31 ballots in the February 14, 2017 election.

The *McDonald* court wrote:

‘Recount’ means the process of *retabulating* ballots and producing amended election returns....” RCW 29A.04.139 (emphasis added). The procedure for recounts is set forth in RCW 29A.64.041, and starts with the county canvassing board opening “the sealed containers containing the ballots to be recounted.” See RCW 29A.60.110. Thus, under Washington's statutory scheme, ballots are to be “retabulated” only if they have been previously counted or tallied, subject to the provisions of RCW 29A.60.210. (Emphasis in original)

McDonald, 153 Wash. 2d 201. The Court went on to hold that “It follows that this court cannot order the Secretary to establish standards for the re-canvassing of ballots previously rejected in this election.” Id. After the election recount another suit was filed challenging the results. In re Coday, 156 Wash. 2d 485, 489, 130 P.3d 809 (2006) The Supreme Court noted is prior holding in *McDonald* regarding rejected ballots stating:

We rejected the Democrats' request to order the re-canvassing of previously rejected ballots, reasoning that Washington law requires a recount of only those ballots actually tabulated in the initial count. Id.

The Petitioners are seeking to re-canvass rejected ballots that were intentionally rejected because of signature discrepancies and properly canvassed by the canvassing board. These ballots are not subject to

recanvassing in the recount election. RCW § 29A.60.165(3) makes it clear that “A voter may not cure a missing or mismatched signature for purposes of counting the ballot in a recount.” Petitioners challenge had to be filed within 10 days of the certification that rejected these ballots. They failed to do so and have no standing to object now. For that reason alone the Petition should be dismissed.

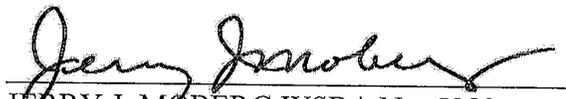
IV. CONCLUSION

The Petitioners are seeking an invalidation of the bond election. Obviously, invalidation would have a profound effect on the school district and the electorate of the school district. It is because so much is riding on these elections that our courts have made invalidation a remedy of last resort. Unless the statute specifically provides that the failure to comply with a statutory election mandate would result in invalidation, the courts are reluctant to impose such a draconian remedy. In this case, the notice statute is directory. It provides written notice by mail to voters of questionable ballots. The Auditor complied with this requirement. The statute also provides that a second attempt at notice should be made by telephone. The failure to follow up the mailed notice with an attempt to call the thirty-one voters cannot be the basis for invalidating an election that was approved by over 60% of the voters. This is especially true since

the record is devoid of any evidence that calling the thirty-one voters or even counting the thirty-one votes would have made a difference. The election was fair

RESPECTFULLY SUBMITTED this 31st day of July, 2017.

JERRY MOBERG & ASSOCIATES

A handwritten signature in cursive script, appearing to read "Jerry J. Moberg", is written over a horizontal line.

JERRY J. MOBERG WSBA No. 5282
Attorney for Intervenors

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the document to which this is affixed by first class U.S. mail, postage prepaid, to:

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DATED this 31st day of July, 2017, at Ephrata, Washington.

JERRY MOBERG & ASSOCIATES, P.S.


MOLLY SCHULTZ, Legal Assistant

JERRY MOBERG & ASSOCIATES, P.S.

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