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No. 77156-6-I

THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

It should be beyond question that the secrecy of the ballot is a critical constitutional issue of substantial public interest. Indeed, even the United States Supreme Court has taken the opportunity to analyze the historical underpinnings and importance of the right to a secret ballot, having granted *certiorari* for what could be considered a minor dispute about non-political buffer zones around polling locations. *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed. 2d 5 (1992). Here, the public interest in this case is even more profound because Washington voters experience glaring inequality from county to county regarding their constitutional right to voter secrecy. Only this Court can remedy the disparate protections that exist to ensure that each voter is equally afforded their constitutional right to a secret ballot.

The Washington State Constitution guarantees the right to an "absolutely secret ballot" and numerous statutes provide detailed protections of the secret ballot. *See* Wash. Const. Art. VI, Sec. 6; RCW 29A.08.161 and RCW 29A.36.111.

Yet, the Washington Supreme Court has ***never*** issued an opinion that explains the substance of that Constitutional right or whether and how it can be enforced. That is worth repeating: In the almost 130-year history of the Washington State Constitution, this Court has never issued a

substantive opinion on the protections and enforceability of Article VI, Section 6.

This is the right moment for this Court to end its silence on this important constitutional issue. While unpublished, the Court of Appeals' decision is the sole voice in the silence on this constitutional issue[1] and as such will have the effect of undermining the constitutional right to a secret ballot as well as the several statutes that detail and protect that right.

It is up to this Court to decide whether the right to a secret ballot is compromised when Counties add unique numbers to ballots. It is up to this Court to decide whether it is okay for a County to then track the ballots back to the voters who cast them. While respondents argue that such ballot numbering and ballot tracking increases election security, the voters whose ballots are numbered and tracked have reason to question the *secrecy* of their ballots. The result is that voters in counties without numbered ballots *know* that their ballots are secret, while informed voters in counties with numbered and tracked ballots suspect their votes can be traced back to them, and are therefore vulnerable to the ills that the secret ballot was designed to combat.

[1]*White v. Clark County*, 188 Wn.App. 622 (2015) confirmed that a ballot could not be released as a public record if it could be traced to a voter, but did not involve a dispute over ballot numbering or UBIs.

The profound concerns that this case exposes are widely shared. When this case was originally filed, then Secretary of State Sam Reed stated, "Ever since Florida nationally and the gubernatorial recount in this state, the trust and confidence of the voters is a very serious concern. This [case] would resolve some of those concerns."[2] Kim Wyman, then a County Auditor, said she would not allow "individual tracking marks on ballots out of concern that the public would object."[3] *The Olympian*'s Editorial Board agreed that this case would resolve an important controversy:

> Let's get this question settled once and for all so voters can have faith that Washington has a fair and honest election system where voter privacy is paramount.
> …
> With these sharply conflicting views of ballot bar codes and how they are used to track voters, ***it's imperative that Supreme Court justices do a thorough review and determine whether ballot secrecy has been violated***.[4]

This Court declined to review this case before the Court of Appeals had issued an opinion. It has now done so. Without review of

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[2] Brad Shannon, *Reed Says Ballot Ruling is Needed*, THE OLYMPIAN, Sunday Editorial, July 18, 2009, http://www.theolympian.com/news/politics-government/election/article25236520.html.
[3] Brad Shannon, *Secret Ballot Threatened, Suit Alleges*, THE OLYMPIAN, July 15, 2009, http://www.theolympian.com/news/politics-government/election/article25236361.html.
[4] Editorial, *Let's Get Vote Suspicions Settled for Peace of Mind*, THE OLYMPIAN, July 19, 2009, http://www.theolympian.com/opinion/editorials/article25236577.html (emphasis added).

that opinion, ballot numbering and tracking will gradually become the norm throughout the State of Washington and the Court of Appeals' test for secret ballot cases will be the only precedent, effectively precluding every future secret ballot challenge and rendering the secret ballot statutes meaningless. This case warrants Supreme Court review.

II. IDENTITY OF PETITIONERS

Petitioners are Timothy White, Allan Rosato, Linda Orgel, Arthur Grunbaum, and the Green Party of San Juan County.

III. CITATION TO COURT OF APPEALS DECISION

Division One of the Court of Appeals issued its unpublished opinion on August 6, 2018. *Appendix A.* It denied Petitioners' motion for reconsideration on August 30, 2018. *Appendix B.*

IV. ISSUES PRESENTED FOR REVIEW

1. Does the practice of numbering ballots, through Unique Ballot Identifiers ("UBIs") or otherwise, violate the constitutional and/or statutory right to absolute secrecy of the ballot?

2. Did the Court of Appeals err in holding that a voter cannot maintain an action to enforce the right of the secret ballot unless he or she can meet the impossible burden of proving that the his or her votes were actually revealed?

3. Did the Court of Appeals err in its interpretation of the statutes protecting the secret ballot, given such interpretations' inconsistency with the plain statutory language?

4. Is equal protection violated when voters in some counties cast ballots without UBIs – and therefore can be absolutely confident in the secrecy of their ballot – whereas the voters in other counties are forced to cast ballots with UBIs and, therefore, have reasonable doubts about whether their own *and* their compatriots' votes are absolutely secret?

V. STATEMENT OF THE CASE

When states first adopted the secret ballot, over a century ago, state supreme courts across the nation determined that the right of absolute ballot secrecy prohibited the numbering of ballots. In 1910, the Idaho Supreme Court surveyed cases from around the nation to determine that "it is perfectly safe to say that the legislature would have no authority under this constitutional guarantee to require the numbering of the ballots. The authorities to that effect are quite uniform." *McGrane v. County of Nez Pierce,* 18 Idaho 714, 112 P. 312 (1910). Cases from across the nation "all hold that numbering or other distinguishing marks on a ballot is contrary to both the letter and the spirit of the law guaranteeing a secret ballot." 112 P. at 316.

Washington, like other states, implemented the right of absolute secrecy by requiring uniform ballots marked in secrecy, thereby eliminating the possibility of tracing ballots to their voters. WASH. CONST. art. VI, § 6; *see also* RCW 29A.08.161. Through this *absolute* secrecy, states virtually eliminated voter coercion and vote-buying, which was seen as a ubiquitous and serious threat to our democracy.

For over a century the prohibition on numbering ballots went unquestioned, until vendors recently began pushing electronic voting systems that rely on unique ballot identifiers, or "UBIs," which print a unique number or unique bar code on each ballot.

In 2005, San Juan and several other counties in Washington State began imprinting a UBI on the face of each ballot, raising significant privacy concerns for voters. Some of these counties used an uncertified (illegal) ballot tracking system to link the UBI to a voter, destroying voter privacy. *See* CP459.

Voters are reasonably concerned that their votes cannot really be secret when their ballot is imprinted with a UBI and voting systems track both the UBIs and the identity of the voter.

This lawsuit achieved a permanent statewide injunction against the use of the particular ballot tracking voting system that previously allowed the UBI to be "linked" to the voter, CP1167-1169. But voters continue to

be concerned since it appears that none of our State's voting systems have been specifically evaluated for their ability to protect the secrecy of a uniquely numbered ballot.

The most significant investigation into UBIs was conducted by the Colorado Secretary of State, who concluded that:

> The Secretary has received credible evidence that a unique number or bar code containing a unique serial number, printed on the face of a ballot can be used to trace the ballot to the voter who cast it. … While there may be technological means of randomizing the numbers, it is essential that all Colorado voters have confidence in the processes and procedures for the upcoming Presidential election.

CP 481. The Colorado Secretary of State adopted a rule prohibiting UBIs, *see* CP 481-483, following the lead of California. *See* CP 1202, ¶ 23.

The State's largest county also prohibited UBIs, based upon its findings that UBIs are not necessary to ensure the integrity of elections and "the public has expressed significant concerns that ballot-tracking equipment could identify the ballots of individual voters." CP 175. Based upon focus groups, King County found that UBIs are "viewed by some as compromising the voter's right to a secret ballot" and in particular "voters over the age of 50 felt strongly that their vote needs to be 100 percent private – no bar codes." CP 135.

Each voter in the State should have equal protection of her constitutional guarantee that every method of voting secures absolute secrecy of every elector's ballot. It is not acceptable that voters in King County can cast their ballot with confidence that their votes are secret, whereas voters in certain other counties have reasonable doubt.

A. The Absolutely Secret Ballot is a Legal Imperative.

1. Washington's Constitution mandates a voting method securing absolute secrecy of the ballot.

The Washington State Constitution, Article VI, Section 6, provides that "The legislature shall provide for such method of voting as will secure to every elector ***absolute secrecy*** in preparing and depositing his ballot" (emphasis added).

2. Washington Voters have a fundamental right to absolute secrecy of their ballots.

The State Legislature has confirmed that "The rights of Washington voters are protected by its constitution and laws and include the ***following fundamental rights*** … (2) ***The right of absolute secrecy of the vote.***" RCW 29A.04.206 (emphasis added).

The fundamental right to an absolutely secret ballot has been further defined by statute to include the right to have one's ballot uniform with others in the precinct. RCW 29A.36.111 provides**: *"Every ballot for***

a single combination of issues, offices, and candidates shall be uniform within a precinct …" (emphasis added).

The Legislature also provides that: "No record may be ***created or maintained*** by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter's ballot…" RCW 29A.08.161 (emphasis added).

3. For over a century, Courts have uniformly held that the secret ballot prohibits the numbering of ballots.

The "Australian system" of voting, which includes the use of secret ballots and voting booths, was largely put into place in the late 1800s. *Burson v. Freeman*, 504 U.S. at 204. "By 1896, almost 90 percent of the States had adopted the Australian system." *Id.*

Over the next decade, the courts came to a consensus that the guarantee of a secret ballot prohibited the numbering of ballots. In 1910, the Idaho Supreme Court decided *McGrane v. County of Nez Pierce*, 18 Idaho 714, 112 P. 312 (1910). In reviewing an election that accidentally used numbered ballots, the court reviewed the decisions of other state supreme courts to determine that "it is perfectly safe to say that the legislature would have no authority under this constitutional guarantee to require the numbering of the ballots. The authorities to that effect are

quite uniform." *McGrane*, 112 P. at 314.[5] The Court canvassed those other cases and found that "they ***all*** hold that numbering or other distinguishing marks on a ballot is contrary to both the letter and the spirit of the law guaranteeing a secret ballot." 112 P. at 316 (emphasis added).[6]

The U.S. Supreme Court has held that the right to a secret ballot must be strictly enforced. In *Burson*, the U.S. Supreme Court was confronted with a challenge to a statute that prevented electioneering near the polling place. The Court upheld a 100-foot ban on electioneering around the polling place as part of the secret ballot, noting that "[a] long history, a substantial consensus, and simple common sense show that some restricted zone around a polling place is necessary to protect that fundamental right." *Id.* at 211. In evaluating the need for protections such as the secret ballot, we must assume that bad actors will probe and

[5] *See also Brisbin v. Cleary*, 26 Minn. 107, 1 N.W. 825 (1879) (numbering of ballot "clearly interferes with and violates the voter's constitutional privilege of secrecy."); *Williams v. Stein*, 38 Ind. 89 (1871) (numbering of ballots "is in palpable conflict not only with the spirit, but with the substance of the constitutional provisions."); *Ritchie v. Morgan Richards et al*, 14 Utah 345, 47 P. 670 (1896) (J. Bartch, concurring) (majority of justices concurring that a numbered ballot "is not secret, within the meaning and intent of the constitution."); *Corn v. Blackwell*, 191 S.C. 183, 4 S.E.2d 254 (1939) (accidental numbering of ballots destroyed their secrecy); *In re Oppenstein*, 289 Mo. 421, 233 S.W. 440 (1921) (where the constitution requires voting by ballot or secret ballot, "number and listing of ballots may not be constitutionally required.")

[6] While courts have not addressed this issue for some time in the constitutional context, modern labor law cases have recognized the inherent lack of secrecy in a numbered ballot. *See*; *Chao v. Allied Pilots Ass'n*, 2007 WL 11562, 181 LRRM (BNA) 2578 (N.D. Tex. 2007) (computer voting system violated secret ballot requirement of LMRDA where staff could conceivably have vie wed how members cast vote, even though there was no evidence that this ever occurred).

someday penetrate if allowed, so the traditional secret ballot practices (including uniform ballots, without distinguishing marks) are designed to provide absolute assurances of ballot secrecy. We must not discard the umbrella merely because we cannot predict the timing of the storm.

B. Voters with numbered ballots lack confidence in the secrecy of the ballot.

The guarantee of ballot secrecy is about more than preventing others from *actually* learning how a person voted, it is also about ensuring confidence in voter secrecy to avoid disenfranchisement. Uniform ballots make it *impossible* to learn how a person voted, so voters can cast their ballot with complete confidence in the secrecy of their ballot, and therefore free from the threat of intimidation and coercion. Separately, and of equal importance, untraceable uniform ballots assure that every *other* voter must likewise be voting in absolute secrecy, with no way to prove his choice to a vote buyer or intimidator.

The use of ballot identifiers undermines *voters' confidence* in the absolute secrecy of their ballots. Research conducted by King County Elections established that "The use of a unique identifier on a ballot for the purpose of tracking voted ballots is viewed by some as compromising the voter's right to a secret ballot." CP 137. Then State Director of Elections acknowledged these

privacy concerns in testimony to the Legislature's elections committees: CP 1205, ¶ 32 ("there is an increasing amount of distrust by voters in the state about the fact that that linkage occurs.")

Former Secretary of State Reed also acknowledged that the use of UBIs gives "people … a perception they possibly could have their secrecy of the ballot violated."[7] Reed acknowledged that voters may be "alarmed" about unique numbering of ballots.[8] When asked whether the ballot tracking he advocates is a system that can link a ballot to the specific voter, Reed answered "*For most counties, it is not,*"[9] acknowledging that some counties did have linkage when this suit was filed.

Respondents acknowledge that in counties using numbered ballots, the secrecy of the ballot is not absolute, but contingent, relying upon the actions of the election staff. A report issued by former Secretary Reed admits that the secrecy of the ballot may rely upon "county procedures such as 'shuffling' the ballots and/or 'shuffling' the envelopes at the time of assembling absentee mailers." CP 1202-1203, ¶ 24. San Juan's Answer admitted that "illegal conduct, a voter not following instructions

[7] TVW, *Seattle P-I Editorial Board Candidate Interviews – Secretary of State*, Oct. 6, 2008, http://www.tvw.org/watch/?eventID=2008101101 (last visited July 7, 2016); CP 1205, ¶ 33 (acknowledging quote).
[8] TVW, *Yakima Herald-Republic Editorial Board Candidate interviews - Secretary of State*, Sept. 30, 2008, http://www.tvw.org/watch/?eventID=2008091001 (last visited July 7, 2016); CP 1205, ¶ 33 (acknowledging quote).
[9] *See* CP 1205, ¶ 33 (acknowledging quote) (italics added).

or an inadvertent mistake by election workers will allow a person to determine who voted a specific ballot." *Appendix C*, ¶ 8.

VI. ARGUMENT

A. This Case Involves a Significant Question of Law under the Washington State Constitution.

1. The Constitution guarantees the fundamental right to an absolutely secret ballot.

Our democratic system of free and fair elections hinges on enforcement and equal protection of the absolutely secret method of voting. The constitutional requirement of an absolutely secret ballot, independently and as implemented by statute, is fundamental. "The terms of the statute are absolute, explicit and peremptory; no discretion is given. They are designed to secure the secrecy and purity of the ballot, are mandatory in their character and binding upon the electors." *State ex rel. Hanson v. Wilson*, 113 Wash. 49, 52 (1920).

As the United States Supreme Court acknowledged in *Burson*, we have taken the right to the secret ballot for granted for so long that we do not understand the harm that may come if we were to compromise it.

Defendants take the position that the constitutional prohibition on numbering of ballots is anachronistic because now the numbers can be written in bar codes and "protected" by complex computer programming. Yet, technological advances undermine these arguments. Now, for

example, every smart phone has the capability to instantaneously read a bar code, and we have seen that hackers can overcome computer security features as quickly as they are developed. Voters know that hackers have gained access to the highly protected governmental and corporate computer systems, so they know that a motivated hacker could likely uncover the linkage between the voter and his or her ballot.

2. This Court's enunciation of the secret ballot right is needed, since it has never issued a substantive opinion on that right.

"Voting is one of the most fundamental and cherished liberties in our democratic system of government." *Burson,* 504 U.S. at 213 (Kennedy, J., concurring). Yet, this Court has never evaluated the substance of our right to a secret ballot, jeopardizing this right.

This Court's silence on this important constitutional right left the Court of Appeals no guidance on determining what that right protects and whether and how it can be enforced. Despite the importance of the issues in the case, Division One did not even feel confident enough in its analysis to publish its opinion.

In interpreting the State Constitution's right to a secret ballot, Division One could not point to a single Supreme Court decision on what that right protects or whether it provides any protection at all. The only Supreme Court case cited, *State v. Carroll,* 78 Wash. 83, 85, 138 P. 306

(1914), is a hundred year old case about whether voting machines were permissible. The lack of Supreme Court precedent left the trial court and Division One to make up a set of rules that effectively nullifies the right.

3. Without any other opinions, the Court of Appeals' indefensible opinion, although unpublished, will have the effect of undermining the constitution.

Normally an unpublished opinion is less worthy of review, but the absence of ***any*** Supreme Court precedent on Article VI, Sec. 6 will give Division One's opinion an unwarranted impact on the constitutional jurisprudence. Division One apparently recognized that its opinion was so untethered from precedent that it left it unpublished, but this unpublished opinion will serve as the only modern guidance for the meaning and enforceability of Article VI, Sec. 6. *See* GR 14.1 (unpublished opinions may be cited as nonbinding authority).

Meanwhile, it is hard to imagine a better vehicle for this Court to consider this constitutional right: (1) Division One allows the numbering of ballots, which for well over a century has been recognized to violate the right to ballot secrecy, according to a national consensus; (2) the practice of numbering and tracking ballots is happening in only some counties, whereas other counties have outlawed ballot numbering, resulting in disparate treatment among voters in the state; (3) the record shows that San Juan County used software that linked the numbered ballots and the

voter; and (4) Division One issued a decision that adopts an insurmountable standard for enforcing the secret ballot and an indefensible interpretation of the statutes protecting the secret ballot.

B. The Petition Involves an Issue of Substantial Public Interest.

1. Division One adopts an insurmountable standard for enforcing the secret ballot.

Division One uses the term "link" or "linkage" approximately twenty times and adopts a "linkage" based litmus test for enforcing the right to a secret ballot. Division One adopts an insurmountable burden of proof by holding that Petitioners can only enforce Art. VI, Sec. 6 if they prove that the numbered ballots is "linked" to the voter. A voter is never going to be able to meet that burden of proof.

There is no legal support for Division One's "linkage" test. Neither the State Constitution nor any statutes uses the term "linkage," and the United States Supreme Court has adopted a different standard for bringing a case to enforce the secret ballot. In *Burson*, the United States Supreme Court allowed citizens to enforce the secret ballot to require a buffer zone around polling places. The Supreme Court did not require citizens to prove a specific impact from the denial of that protection.

In fact, the Supreme Court rejected the notion that citizens must or could prove what would result from the abandonment of traditional secret

ballot protections. The Court allowed the secret ballot to be enforced even while acknowledging that the plaintiffs could ***not*** prove harm or linkage:

> … The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them. Finally, it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud. Voter intimidation and election fraud are successful precisely because they are difficult to detect.

Burson, 504 U.S. at 208. This analysis effectively rejects the "linkage" standard adopted by Division One.

2. Division One adopted an indefensible interpretation of statutes protecting the secret ballot.

Our State Constitution places upon the Legislature a duty to enact statutes that protect the absolute secrecy of the ballot. Wa. Cons. Art. VI, Sec. 6. These statutes are thereby elevated to constitutional importance. Division One's opinion is the first appellate decision to proclaim the meaning of RCW 29A.08.161 and RCW 29A.36.111. This Court should review the decision because they are of substantial public interest.

a. Division One's interpretation of RCW 29A.36.111 undermines the public interest.

The Court's interpretation of RCW 29A.36.111(1) was flawed. That statute states that "[e]very ballot for a single combination of issues, offices, and candidates shall be uniform within a precinct." The Court ruled that this statute simply requires that "all ballots within a precinct must contain

the same content for voting." Opinion, at 11. However, the plain language of the statutes states otherwise. This statutory requirement only applies to "ballot[s] for a single combination of issues, offices, and candidates," so the uniformity requirement must be more than just restating that criteria.

Division One's interpretation would make the statute meaningless, mandating only that "ballot[s] for a single combination of issues, offices, and candidates" must have "a single combination of issues, offices, and candidates." Essentially: "If A, then A." But the statute says that all ballots meeting that criteria must be "uniform." Or: "If A, then must be uniform."

Division One's interpretation is contrary to the plain language of the statute and ignores the history of the uniformity requirement as a means to protect the secrecy of the ballot. For example, in an early case on the subject, a court described the uniform ballot requirement as follows:

> The plan embodied in the law was to have a uniform ballot. That essential feature was secured by provisions *requiring all ballots to be … exactly alike in every possible respect* … and differing internally only in the names of the candidates for office… It is perfectly evident that, by strict compliance with these provisions of the law, the contents of a ballot cast by a voter are absolutely secret to all but himself, and thus the object of the statute is readily effected.

People ex rel. Nichols v. Board of Canvassers, 129 N.Y. 395 *, 29 N.E. 327, 1891 N.Y. LEXIS 1176 (1891) (emphasis added). The Court of Appeals ignored that history and nullified the statute's meaning.

b. Division One's interpretation of RCW 29A.08.161 undermines the public interest and is clearly inconsistent with the statutory language.

RCW 29A.08.161 states that "[n]o record may be ***created or maintained*** by a state or local governmental agency … that identifies a voter with the information marked on the voter's ballot." (emphasis added). However, Division One erroneously interpreted that statute to apply only when the record is "created and maintained."

It was not disputed that San Juan County had "created" such a record through its ballot numbering and ballot tracking software, but San Juan County argued that it had applied a "patch" so that this linkage was not maintained or accessible. Respondent acknowledged that "Prior to 2008, some counties used a ballot bar code that could be linked to a vote, in order to allow counties to report which voters' ballots had been counted." Defendant Reed's Response in Opposition to Motion for Summary Judgement (CP 274).[10] This lawsuit was commenced in 2006, CP 2, and led San Juan County to apply a "patch" to supposedly obscure the computer's linkage between the numbered ballot and voter. Thus, it was unquestionable that in the first two years of this lawsuit, San Juan County "created and maintained" a record that connected voters to their

[10] *See also* CP 455 (Letter from Superior Court, p. 5 (May 15, 2012), incorporated into judgment) ("Respondents argue that linkage is no longer possible because of a 2008 modification to the MiBT [Mail In Ballot Tracker] software, referred to as a 'patch'").

ballots. After 2008, that record was "created," but there was a dispute about whether it was "maintained."

The statute prohibits "creating" the record because just that act undermines voter confidence in ballot secrecy, opening voters to intimidation based upon their belief that their votes are not secret. The Court must correct Division One's interpretation.

VII. CONCLUSION

This Court should determine the scope of our State's fundamental right to absolute secrecy of the ballot – guidance never given in our State's history. Without this Court's review, an erroneous and unpublished opinion will dominate the jurisprudence and will greenlight a practice that courts throughout this county have declared to violate the secret ballot and endanger the rights of voters. The Supreme Court should decide this issue.

Respectfully submitted this 28th day of September 2018

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TIMOTHY WHITE, ALLAN ROSATO, LINDA ORGEL, ARTHUR GRUNBAUM, and GREEN PARTY OF SAN JUAN COUNTY, Appellants, v. KIM WYMAN†, individually and in her capacity as the Secretary of State for the State of Washington, MILENE HENLEY, in her capacity as San Juan County Auditor, and SAN JUAN COUNTY, Respondents.	No. 77156-6-I DIVISION ONE UNPUBLISHED OPINION FILED: August 6, 2018

TRICKEY, J. — Timothy White and other residents (collectively White) of San Juan County (the County) challenged the County's use of the Mail in Ballot Tracker (MiBT) computer system and unique ballot identifier (UBI) on election ballots.[1] White argued that the use of UBIs violates the constitutional and statutory rights to ballot secrecy. The trial court found that the use of UBIs was not a per se violation of article VI, section 6 of the Washington Constitution or state statute. We agree

† At the time of filing, the secretary of state was Sam Reed. Kim Wyman was elected as secretary of state in November 2012 and currently occupies this office. The San Juan County Superior Court entered an order substituting parties pursuant to CR 25(c) on February 7, 2013.

[1] There are three bar codes on each ballot. Only one bar code is at issue in this case, the unique ballot identifier. The unique ballot identifier is a serial bar code located at the bottom left corner of a ballot and is related to the Hart tabulation system. White correctly notes that the Hart tabulation system does not require a UBI for proper functionality.

and affirm the decision of the trial court.

FACTS

During the highly contested 2004 election for Washington State Governor, election officials in six counties discovered hundreds of misplaced mail in ballots.[2] Additional election issues arose as some counties tallied more mail in ballots than the number of voters recorded as voting by mail, while other precincts recorded more voters than ballots. These problems revealed a need for improvement in the tracking and accounting of ballots. In response, the County implemented two separate systems, the MiBT system and UBIs, to increase the reliability and security of elections.

The County implemented the MiBT as part of a pilot program for the 2005 general election. A unique bar code that identified the voter was printed on the exterior of each ballot's mailing envelope. A scan of this bar code allowed the County to determine the appropriate outgoing ballot to mail to a particular voter and then record that the ballot was mailed to that voter. This system allowed the County to ensure that voters received ballots with the correct offices and propositions for their precinct.

The use of the bar code on the envelopes also improved accountability by maintaining a record of which voters returned their ballots. On incoming voted ballots, the bar code on the outer mailing envelope was scanned to record that the ballot had been returned. Additionally, the MiBT enabled the County to efficiently identify ballot voters for verification of their signatures and registration.

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[2] See In re Coday, 156 Wn.2d 485, 489, 130 P.3d 809 (2006).

Prior to July 2008, the MiBT program used encryption to store a voter's identity and linked the voter's identity to the bar code printed on his or her ballot. This gave individual voters the ability to track their own ballots through the voting process. Due to concerns about ballot secrecy, the secretary of state directed all counties to discontinue this practice after July 2008. Counties using the MiBT computer program were required to install a programing patch to prevent any linkage between a voter and a particular ballot. After installation of this patch, the MiBT no longer stored voter identification with the ballot record, thereby eliminating the ability to link a specific ballot to an individual voter.

In addition to the MiBT bar code on the exterior envelope, the County employed a separate UBI on each ballot. The UBI was a serial bar code printed on each ballot at the time of issuance. During ballot assembly, the MiBT bar code on the exterior envelope and the UBI were both scanned to confirm that the voter would receive the correct ballot.

Upon a ballot's return, the County scanned its UBI to register that the ballot had been received and was ready for the tally. A final scan of the UBI registered the ballot's delivery for tabulation and entry into the separate tally system. The UBIs prevented multiple tabulations of the same ballot and allowed for efficient reconciling of the number of ballots tabulated with the number of voters credited with returning a ballot.

Unlike the MiBT system, UBIs were never stored in a way that could link the bar codes to identifying information about individual voters. No record of the UBI or name or registration number of the voter was retained at any step in the process.

Because the UBI was not linked to a voter, it could not be used to identify a voter.

In July 2009, Timothy White, Allan Rosato, Linda Orgel, Arthur Grunbaum, and the Green Party of San Juan County (collectively White) petitioned directly to the Washington State Supreme Court for a writ of mandamus against the Washington secretary of state and San Juan County. This petition challenged the use of UBIs as a violation of the constitutional and statutory rights to a secret ballot. The petition also alleged that the secretary of state had failed to properly test and certify the MiBT system as required by law. A commissioner of the Supreme Court determined that the original action was not properly before the court and transferred the case to San Juan County Superior Court for a decision on the merits.[3]

In November 2011, White moved for partial summary judgment on several issues, including whether UBIs violated the constitutional and statutory guarantees of an absolutely secret ballot and whether the secretary of state had failed to properly certify the MiBT system.[4] In their responses to this motion, the secretary of state and the County both requested summary judgment in their favor.

The trial court issued a letter ruling denying summary judgment for all parties in May 2012. The trial court found that UBIs were not a per se violation of Washington's constitutional or statutory provisions pertaining to secret ballots.

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[3] After the transfer to San Juan County Superior Court, White requested consolidation with a separate lawsuit filed by Timothy White, Allan Rosato, and the Green Party of San Juan County against San Juan County in 2006. That suit also challenged the use of UBIs on election ballots as a violation of the constitutional and statutory rights to a secret ballot. The trial court granted the motion to consolidate.

[4] White also requested summary judgment on the issue of the secretary of state's failure to certify the MiBT system.

According to the trial court, ballot secrecy was preserved unless a UBI disclosed the identity of the person who voted the ballot. As a result, White had the burden of establishing this "linkage" between a UBI and a voter's identity in order to demonstrate a violation of the right to ballot secrecy.

The trial court concluded that White had not demonstrated that the UBIs permitted the identification of voters and denied his motion for summary judgment. The trial court also concluded it could not rule on the MiBT system certification issue without evidence of linkage. Finally, the trial court denied the secretary of state and the County's request for summary judgment as to whether the factual issue of linkage could be decided as a matter of law.

White moved for reconsideration of the decision concerning the certification of the MiBT system. On reconsideration, the trial court determined that the UBI and MiBT certifications were two distinct issues, and that the MiBT was part of the voting system that required certification. Because the parties all agreed that the MiBT system had not been certified, the trial court granted White's reconsideration. The trial court entered a stipulated order granting a permanent injunction against the use of MiBT unless the secretary of state certified the system. The trial court also determined that this use of an uncertified program in some counties resulted in disparate treatment and a violation of equal protection.

White did not pursue further litigation to prove the linkage necessary for the as applied challenge that the UBIs in fact disclosed the identity of the voters.[5] In

[5] In an as applied challenge, a party alleges that application of the statute in a specific context is unconstitutional. City of Redmond v. Moore, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). A per se or facial challenge, "is one where no set of circumstances exists in which

March 2016, White filed a motion to voluntarily dismiss the as applied challenge to UBIs. The trial court affirmed the ruling that the UBIs did not constitute a per se violation of the constitutional or statutory rights to ballot secrecy, granted the voluntary dismissal, and entered judgment.[6]

White appeals the trial court's ruling that UBIs are not a per se violation of Washington's constitutional and statutory rights to ballot secrecy.

ANALYSIS

Right to a Secret Ballot

White claims that the County's use of UBIs violated voters' rights to ballot secrecy under article VI, section 6 of the Washington Constitution, RCW 29A.08.161, and RCW 29A.36.111. The secretary of state and the County argue that UBIs are only prohibited if they lead to the identification of individual voters.

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the statute, as currently written, can be constitutionally applied." Moore, 151 Wn.2d at 669.

[6] The order was written as a denial of White's motion for partial summary judgment. Generally, a denial of summary judgment is not appealable as a final judgment under RAP 2.2(a); see DGHI Enters. v. Pacific Cities, Inc., 137 Wn.2d 933, 949, 977 P.2d 1231 (1999). In this case, the denial of partial summary judgment was effectively a grant of summary judgment for the secretary of state and the County on the per se claim. White moved for voluntary dismissal of the remaining as applied challenge and the order and judgment terminated all issues and controversies. As a result, the denial of summary judgment "settle[s] all issues in the case" and is a final judgment for the purposes of appeal. See In re Det. of Turay, 139 Wn.2d 379, 392, 986 P.2d 790 (1999).

The record shows that the trial court and the parties intended for the issue to be immediately appealable. In considering whether to grant a motion for findings under RAP 2.2(d), the trial court noted that "[i]t does strike the Court that judicial economy would be best served if Plaintiffs' arguments (and this Court's rulings) on the per se violation issue . . . were reviewed by the appellate court before an expensive and time consuming trial is conducted." Clerk's Papers (CP) at 1192. The trial court reserved ruling on the motion until entry of proper orders.

Although a denial of partial summary judgment requires a motion for discretionary review or findings under RAP 2.2(d), this case presents an unusual situation in which the denial of partial summary judgment is essentially a final judgment for the purposes of appeal. As a result, we reach the merits of the case.

We agree that secrecy is only compromised when individual voters can be linked to their votes. We conclude that the use of UBIs does not violate the right to ballot secrecy.

The right of absolute secrecy of the vote is considered a fundamental right of Washington voters. RCW 29A.04.206(2). The Washington Constitution protects this right. WASH. CONST. art. VI, § 6.

The determination of whether the use of UBIs violates the right to ballot secrecy requires interpretation of both the Washington Constitution and state statutes. "When interpreting constitutional provisions, we look first to the plain language of the text and will accord it its reasonable interpretation." Wash. Water Jet Workers Ass'n v. Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). In statutory interpretation, the purpose is to determine and give effect to the intent of the legislature. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). "When possible, we derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." Evans, 177 Wn.2d at 192. If a statute is subject to more than one reasonable interpretation, then the statute is ambiguous. Evans, 177 Wn.2d at 192-93. Where a statute is ambiguous, we engage in statutory construction, which includes consideration of legislative history to discern legislative intent. Evans, 177 Wn.2d at 192-93. "[A] statute is not ambiguous merely because more than one interpretation is conceivable." City of Seattle v. Winebrenner, 167 Wn.2d 451, 456, 219 P.3d 686 (2009).

Questions of law are reviewed de novo. State v. MacDonald, 183 Wn.2d 1, 8, 346 P.3d 748 (2015). This includes constitutional issues and questions of statutory interpretation. MacDonald, 183 Wn.2d at 8 (constitutional issues are reviewed de novo); Winebrenner, 167 Wn.2d at 456 (questions of statutory interpretation are reviewed de novo). Decisions on summary judgment are also reviewed de novo. Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Owen, 153 Wn.2d at 787; CR 56(c).

The Washington Constitution

Under the Washington Constitution, "[t]he legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot." WASH. CONST. art. VI, § 6. Article VI, section 6 requires that a person's individual vote remain secret. White v. Clark County, 188 Wn. App. 622, 632, 354 P.3d 38 (2015), review denied, 185 Wn.2d 1009, 366 P.3d 1245 (2016). But "nothing in article VI, section 6 expressly provides that the ballot itself must remain 'secret' as long as the voter who cast that ballot cannot be identified." White, 188 Wn. App. at 632. The central concern of ballot secrecy, therefore, is whether the individual voter can be identified. White, 188 Wn. App. at 632.

The content of the ballot, rather than any particular form of the ballot, is subject to the protection of article VI, section 6. State v. Carroll, 78 Wash. 83, 85, 138 P. 306 (1914). "Any ballot, therefore, however cast, that will guard and protect this secrecy and guard against intimidation and secure freedom in the exercise of

the elective franchise, is a secret vote by ballot." Carroll, 78 Wash. at 85. Thus, the form of the ballot is unimportant as long as the voter's identity remains secret.

Here, the secretary of state and the County provided evidence that a UBI is not linked to a voter and cannot be used to identify individual voters or their ballots. The elections supervisor for the County submitted a declaration stating, "Before, during, and after an election there is no cross reference, linkage or table . . . that would allow a person to correspond or link the bar code with the name, registration number or other identification of a voter. Votes cast are not associated in any way with a voter."[7]

Additionally, a voting systems specialist declared that the computers used for ballot tracking and vote tabulation are not linked and do not share data. The separate computer systems are not capable of sharing information. In fact, the County is unable to identify a voter in order to correct a ballot error because the UBI does not permit identification of the person who voted a ballot.

Based on this uncontroverted evidence in the record, UBIs cannot be used to link a particular ballot with an individual voter.[8] Because the identities of voters remain secret, UBIs safeguard voters' fundamental right to ballot secrecy as

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[7] CP at 237.

[8] White claims that he has proven linkage between a UBI and a voter because he was able to determine which numbered ballot was assigned to a particular voter in his precinct. White declared that he compared his numbered ballot to his neighbors in the same precinct and determined that the ballots had been mailed in numerical order to an alphabetical list. Based on this, he determined which numbered ballot was sent to which individual voters. But this declaration does not provide adequate evidence of linkage. "In opposing summary judgment, a party may not rely merely upon allegations or self-serving statements, but must set forth specific facts showing that genuine issues of material fact exist." Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc., 114 Wn. App. 151, 157, 52 P.3d 30 (2002).

required by article VI, section 6 of the Washington Constitution. Without evidence that UBIs allow for the identification of individual voters and their ballots, there is no violation of the right to ballot secrecy. We conclude that the trial court did not err when it found that the use UBIs was not a per se violation of article VI, section 6.

RCW 29A.08.161

Under Washington law, "[n]o record may be created or maintained by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter's ballot." RCW 29A.08.161. The plain language of this statute prohibits a record that links an individual voter to his or her ballot. Thus, a violation of that statute only occurs when a voter can be connected to the information marked on a ballot. This prohibition against linkage between a voter and his or her ballot addresses the same concerns for secrecy found in article VI, section 6 of the Washington Constitution. The identity of the voter must remain secret.

White has not shown that the UBI resulted in any linkage between voter's identifying information and his or her marked ballot that would violate RCW 29A.08.161. In contrast, the previously discussed evidence presented by the secretary of state and the County amply demonstrates that UBIs do not lead to the identification of individual voters and their ballots.[9] Because UBIs do not result in a record that identifies voters with the information marked on the voters' ballots,

[9] As a self-serving statement without supporting evidence, White's declaration does not set forth genuine issues of material fact as needed to prevent summary judgment.

we conclude that the trial court did not err in its determination that the County's use of UBIs was not a per se violation of RCW 29A.08.161.

RCW 29A.36.111

In Washington, "[e]very ballot for a single combination of issues, offices, and candidates shall be uniform within a precinct." RCW 29A.36.111(1). RCW 29A.36.111 requires uniformity but does not define "uniform." The dictionary defines "uniform" as "marked by lack of variation, diversity, change in form, manner, worth, or degree" and "showing a single form, degree, or character in all occurrences or manifestations." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2498 (1993). Thus, ballots may not vary within a precinct.

The plain language of the statute provides that "a single combination of issues, offices, and candidates" cannot vary within a precinct. RCW 29A.36.111(1). Based on this list, all ballots within a precinct must contain the same content for voting. This suggests that the content of the ballot, rather than the form, is the central concern of the uniformity requirement.

The statute further specifies that "[n]o paper ballot or ballot card may be marked by or at the direction of an election official in any way that would permit the identification of the person who voted that ballot." RCW 29A.36.111(2). This prohibits the marking of ballots in ways that allow for the identification of the voter. The statute makes no mention of and therefore does not apply to marks that do not permit identification of the voter. Thus, the plain language of the statute requires linkage between a mark and identification of the individual voter's ballot.

Reading RCW 29A.36.111(1) in its entirety, the uniformity requirement ensures that voters within a precinct vote on the same content and that their individual ballots cannot be identified. Differences unrelated to voting content do not violate the requirement of uniformity where a voter's identity remains secret.

The UBIs are ballot card markings, but do not violate RCW 29A.36.111. UBIs result only in non-content related variations that do not permit identification of the person who voted the ballot. Therefore, the trial court did not err in its determination that the use of UBIs is not a per se violation of RCW 29A.36.111(1).

Equal Protection Claim

In ruling that the secretary of state had failed to properly certify the MiBT, the trial court found that "similarly situated persons in Washington are treated differently with respect to their fundamental right to vote because some vote by a fully certified system and some vote by a system that is only partly certified."[10] White requests extension of this equal protection ruling to voters denied the right of a secret ballot due to the use of UBIs. But UBIs do not violate the constitutional and statutory right to absolute secrecy in voting. Therefore, the use of UBIs in various counties did not result in disparate treatment. We conclude that White's equal protection claim fails as to ballot secrecy.

Fees on Appeal

The trial court found that White was the prevailing party under 42 U.S.C. § 1983 on the equal protection claim pertaining to MiBT certification. As a result, White was potentially entitled to recover reasonable attorney fees below. White

[10] CP at 1172.

requests an award of fees on appeal based on the extension of the equal protection holding to the use of UBIs.

A court has discretion to award reasonable attorney fees to the prevailing party in an enforcement action under 42 U.S.C. § 1983. See 42 U.S.C. § 1988(b) (attorney fees). Because the use of UBIs did not violate ballot secrecy, White's equal protection claim fails and he is not the prevailing party. We decline the request for attorney fees on appeal.

Affirmed.

Trickey, J

WE CONCUR:

Spearman, J.

Dwyer, J.

Appendix B

FILED
8/30/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TIMOTHY WHITE, ALLAN ROSATO, LINDA ORGEL, ARTHUR GRUNBAUM, and GREEN PARTY OF SAN JUAN COUNTY, Appellants, v. KIM WYMAN, individually and in her capacity as the Secretary of State for the State of Washington, MILENE HENLEY, in her capacity as San Juan County Auditor, and SAN JUAN COUNTY, Respondents.	No. 77156-6-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Timothy White, Allan Rosato, Linda Orgel, Arthur Grunbaum, and the Green Party of San Juan County, have filed a motion for reconsideration. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Trickey, J

Whenever the commission adopts a recommendation that a judge or justice be removed, the judge or justice shall be suspended immediately, with salary, from his or her judicial position until a final determination is made by the supreme court.

The legislature shall provide for commissioners' terms of office and compensation. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [AMENDMENT 77, 1986 Senate Joint Resolution No. 136, p 1532. Approved November 4, 1986.]

Amendment 71 (1980) — Art. 4 Section 31 JUDICIAL QUALIFICATIONS COMMISSION — REMOVAL, CENSURE, SUSPENSION, OR RETIREMENT OF JUDGES OR JUSTICES — *There shall be a judicial qualifications commission consisting of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the district court judges, two persons admitted to the practice of law in this state selected by the state bar association, and two persons who are not attorneys appointed by the governor and confirmed by the senate.*

The supreme court may censure, suspend, or remove a judge or justice for violating a rule of judicial conduct and may retire a judge or justice for disability which is permanent or is likely to become permanent and which seriously interferes with the performance of judicial duties. The office of a judge or justice retired or removed by the supreme court becomes vacant, and that person is ineligible for judicial office until eligibility is reinstated by the supreme court. The salary of a removed judge or justice shall cease.

The supreme court shall specify the effect upon salary when disciplinary action other than removal is taken. The supreme court may not discipline or retire a judge or justice until the judicial qualifications commission recommends after notice and hearing that action be taken and the supreme court conducts a hearing, after notice, to review commission proceedings and findings against a judge or justice.

The legislature shall provide for commissioners' terms of office and compensation. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [AMENDMENT 71, 1980 Substitute House Joint Resolution No. 37, p 652. Approved November 4, 1980.]

ARTICLE V
IMPEACHMENT

SECTION 1 IMPEACHMENT - POWER OF AND PROCEDURE. The house of representatives shall have the sole power of impeachment. The concurrence of a majority of all the members shall be necessary to an impeachment. All impeachments shall be tried by the senate, and, when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

SECTION 2 OFFICERS LIABLE TO. The governor and other state and judicial officers, except judges and justices of courts not of record, shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office, but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust or profit, in the state. The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law.

SECTION 3 REMOVAL FROM OFFICE. All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.

ARTICLE VI
ELECTIONS AND ELECTIVE RIGHTS

SECTION 1 QUALIFICATIONS OF ELECTORS. All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, shall be entitled to vote at all elections. [**AMENDMENT 63,** 1974 Senate Joint Resolution No. 143, p 807. Approved November 5, 1974.]

Amendment 5 (1910) — Art. 6 Section 1 QUALIFICATIONS OF ELECTORS — *All persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language:* Provided, *That Indians not taxed shall never be allowed the elective franchise:* And further provided, *That this amendment shall not affect the rights of franchise of any person who is now a qualified elector of this state. The legislative authority shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provision of this section. There shall be no denial of the elective franchise at any election on account of sex.* [AMENDMENT 5, 1909 p 26 Section 1. Approved November, 1910.]

Amendment 2 (1896) — Art. 6 Section 1 QUALIFICATIONS OF VOTERS — *All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language:* Provided, *That Indians not taxed shall never be allowed the elective franchise:* And further provided, *That this amendment shall not effect [affect] the right of franchise of any person who is now a qualified elector of this state. The legislature shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provisions of this section.* [AMENDMENT 2, 1895 p 60 Section 1. Approved November, 1896.]

Original text — Art. 6 Section 1 QUALIFICATIONS OF ELECTORS — *All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; They shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote;* Provided, *that Indians not taxed shall never be allowed the elective franchise;* Provided, further; *that all male persons who at the time of the adoption of this Constitution are qualified electors of the Territory, shall be electors.*

SECTION 1A VOTER QUALIFICATIONS FOR PRESIDENTIAL ELECTIONS. [Repealed by **AMENDMENT 105,** 2011 Senate Joint Resolution No. 8205, p 4281. Approved November 8, 2011.]

Original text — Art. 6 Section 1A VOTER QUALIFICATIONS FOR PRESIDENTIAL ELECTIONS — *In consideration of those citizens of the United States who become residents of the state of Washington during the year of a presidential election with the intention of making this state their permanent residence, this section is for the purpose of authorizing such persons who can meet all qualifications for voting as set forth in section 1 of this article, except for residence, to vote for presidential electors or for the office of President and Vice-President of the United States, as the case may be, but no other: Provided, That such persons have resided in the state at least sixty days immediately preceding the presidential election concerned.*

The legislature shall establish the time, manner and place for such persons to cast such presidential ballots.

SECTION 2 SCHOOL ELECTIONS — FRANCHISE, HOW EXTENDED. [This section stricken by **AMENDMENT 5,** see Art. 6 Section 1.]

Original text — Art. 6 Section 2 SCHOOL ELECTIONS — FRANCHISE, HOW EXTENDED — *The legislature may provide that there shall be no denial of the elective franchise at any school election on account of sex.*

SECTION 3 WHO DISQUALIFIED. All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise. [**AMENDMENT 83,** 1988 House Joint Resolution No. 4231, p 1553. Approved November 8, 1988.]

Original text — Art. 6 Section 3 WHO DISQUALIFIED — *All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights are excluded from the elective franchise.*

SECTION 4 RESIDENCE, CONTINGENCIES AFFECTING. For the purpose of voting and eligibility to office no person shall be deemed to have gained a residence by reason of his presence or lost it by reason of his absence, while in the civil or military service of the state or of the United States, nor while a student at any institution of learning, nor while kept at public expense at any poor-house or other asylum, nor while confined in public prison, nor while engaged in the navigation of the waters of this state or of the United States, or of the high seas.

SECTION 5 VOTER — WHEN PRIVILEGED FROM ARREST. Voters shall in all cases except treason, felony, and breach of the peace be privileged from arrest during their attendance at elections and in going to, and returning therefrom. No elector shall be required to do military duty on the day of any election except in time of war or public danger.

SECTION 6 BALLOT. All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

SECTION 7 REGISTRATION. The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote; *Provided,* that this provision is not compulsory upon the legislature except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as a pre-requisite to the right to vote, and the same system of registration need not be adopted for both classes.

SECTION 8 ELECTIONS, TIME OF HOLDING. The first election of county and district officers not otherwise provided for in this Constitution shall be on the Tuesday next after the first Monday in November 1890, and thereafter all elections for such officers shall be held bi-ennially on the Tuesday next succeeding the first Monday in November. The first election of all state officers not otherwise provided for in this Constitution, after the election held for the adoption of this Constitution, shall be on the Tuesday next after the first Monday in November, 1892, and the elections for such state officers shall be held in every fourth year thereafter on the Tuesday succeeding the first Monday in November.

Cf. Art. 27 Section 14.

ARTICLE VII
REVENUE AND TAXATION

SECTION 1 TAXATION. The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class: *Provided,* That the legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an ad valorem tax at such rate as it may fix, or by both. Such property as the legislature may by general laws provide shall be exempt from taxation. Property of the United States and of the state, counties, school districts and other municipal corporations, and credits secured by property actually taxed in this state, not exceeding in value the value of such property, shall be exempt from taxation. The legislature shall have power, by appropriate legislation, to exempt personal property to the amount of fifteen thousand ($15,000.00) dollars for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual bona fide owner. [**AMENDMENT 98**, 2006 House Joint Resolution No. 4223, p 2117. Approved November 7, 2006.]

Amendment 81 (1988) — Art. 7 Section 1 TAXATION —*The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class: Provided, That the legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an ad valorem tax at such rate as it may fix, or by both. Such property as the legislature may by general laws provide shall be exempt from taxation. Property of the United States and of the state, counties, school districts and other municipal corporations, and credits secured by property actually taxed in this state, not exceeding in value the value of such property, shall be exempt from taxation. The legislature shall have power, by appropriate legislation, to exempt personal property to the amount of three thousand ($3,000.00) dollars for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual bona fide owner.* [AMENDMENT 81, 1988 House Joint Resolution No. 4222, p 1551. Approved November 8, 1988.]

Amendment 14 (1930) — Art. 7 Section 1 TAXATION — *The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class:* Provided, *That the legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an ad valorem tax at such rate as it may fix, or by both. Such property as the legislature may by general laws provide shall be*

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RCW 29A.08.161

No link between voter and ballot choice.

No record may be created or maintained by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter's ballot, including the choice that a voter makes on a partisan primary ballot regarding political party affiliation.

[2004 c 271 § 107.]

Appendix E

RCW 29A.36.111

Uniformity, arrangement, contents required—Contracts with vendors.

(1) Every ballot for a single combination of issues, offices, and candidates shall be uniform within a precinct and shall identify the type of primary or election, the county, and the date of the primary or election, and the ballot or voting device shall contain instructions on the proper method of recording a vote, including write-in votes. Each position, together with the names of the candidates for that office, shall be clearly separated from other offices or positions in the same jurisdiction. The offices in each jurisdiction shall be clearly separated from each other. No paper ballot or ballot card may be marked by or at the direction of an election official in any way that would permit the identification of the person who voted that ballot.

(2) An elections [election] official may not enter into or extend any contract with a vendor if such contract may allow the vendor to acquire an ownership interest in any data pertaining to any voter, any voter's address, registration number, or history, or any ballot.

[2009 c 414 § 1; 2004 c 271 § 128.]

Appendix F

NO. 83342-7

SUPREME COURT OF THE STATE OF WASHINGTON

TIMOTHY WHITE, ALLAN ROSATO, LINDA ORGEL, ARTHUR GRUNBAUM, AND GREEN PARTY OF SAN JUAN COUNTY, Petitioners, v. SAM REED, individually and in his capacity as the Secretary of State for the State of Washington, MILENE HENLEY, in her capacity as San Juan County Auditor, and SAN JUAN COUNTY, Respondents.	ANSWER OF RESPONDENTS SAN JUAN COUNTYAND MILENE HENLEY, AUDITOR OF SAN JUAN COUNTY TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION AGAINST STATE OFFICIAL

Respondents San Juan County and Milene Henley, Auditor of San Juan County, answer the Petition as follows:

I. PRELIMINARY STATEMENT

1. Paragraph 1 of the Petition is a preliminary statement setting out the Petitioners' characterization of this action. To the extent that this paragraph is construed to state allegations of fact or conclusions of law, these answering respondents deny them.

2. Paragraph 2 of the Petition states a legal conclusion, as to which no factual pleading is required. To the extent that it may be

construed as stating allegations of fact, these answering respondents deny them.

3. Paragraph 3 is a statement of law to which no response is necessary. These answering respondents admit that the quotation in Paragraph 3 is contained in *Charfauros v. Board of Elections,* 249 F.3d 941 (9th Cir. 2001).

4. These answering respondents admit that the quoted language is contained in *Charfauros v. Board of Elections,* 249 F.3d 941 (9th Cir. 2001) and deny that quoted language is binding or applicable in this proceeding.

5. These answering respondents admit that the quoted language is from the state constitution, that the Washington State Legislature requires properly certified voting systems, deny that the Washington State Legislature has prohibited the placement of unique identifiers such as serial number or bar codes on individual ballots; the remaining allegations, being conclusions of law are denied.

6. Denied.

7. The allegations in paragraph 7 are conclusions of law or speculative statements of future fact and, therefore, are denied by these answering respondents.

II. PARTIES

8. These answering respondents admit Timothy White and Allan Rosato are registered voters residing in San Juan County, Washington. The remaining allegations are denied.

9. These answering respondents are without sufficient information to form a belief as to the status of Petitioners Orgel and Grunbaum, therefore the allegations of this paragraph 9 are denied.

10. These answering respondents admit Green Party of San Juan County is an unincorporated association and a political organization, and without knowledge as to the remainder of the allegations they are denied.

11. These answering respondents admit that Sam Reed is the Secretary of State of the state of Washington, in which capacity he serves as the state's chief election officer; and without knowledge as to Secretary Reed's individual capacity in this suit, it is hereby denied.

12. These answering respondents admit that Milene Henley, who is sued in her official capacity, is the duly elected Auditor of San Juan County and, in that capacity, serves as the supervisor of elections and, in that capacity, has used the Mail in Ballot Tracker system in elections in San Juan County; deny that San Juan County is a "municipal corporation" or that is proper to refer to the County and the County

auditor collectively as they each have separate and distinct responsibilities in an election; the remaining allegations are denied.

III. JURISDICTION

13. Paragraph 13 states a conclusion of law to which no answer is required.

14. Paragraph 14 states a conclusion of law to which no answer is required. These answering respondents deny that they are state officials as that term is used in RAP 16.2 but admit that it would be helpful for the San Juan County auditor to participate in this action because of her knowledge of the MiBT system and because a similar lawsuit has been filed by Petitioners White, Rosato and Green Party of San Juan County, in San Juan County Superior Court, Case No. 06-2-05166-02.

IV. FACTUAL ALLEGATIONS

15. Admit.

16. With regard to paragraph 16 of the Petition, these answering respondents admit that the state legislature has enacted various statutes over the years, and those statutes speak for themselves and must be read together and not by reference to isolated portions. Paragraph 16 consists entirely of legal conclusions, which do not require response by way of factual pleading.

17. With regard to paragraph 17, these answering respondents admit that the state legislature has enacted various statutes over the years, and those statutes speak for themselves and are correctly quoted, but those statutes must be read together and not by reference to isolated portions; and further admit that WAC 4354-230-180 was properly amended to remove the italicized reference which were inconsistent with state statutes; the remaining allegations are hereby denied.

18. Paragraph 18 consists entirely of legal conclusions, which do not require response by way of factual pleading.

19. Denied.

20. These answering respondents admit that Auditor Milene Henley has used MiBT with the support of the Office of the Secretary of State, but without knowledge as to the specifics stated in paragraph 20, it is denied.

21. These answering respondents admit that the way in which MiBT is used in San Juan County, it scans a bar code on every ballot without corresponding number and admit that a bar code is on individual ballots; the remaining allegations are hereby denied.

22. These answering respondents admit that the Hart Voting System is used to place bar codes on ballots printed for elections occurring in San Juan County; and acknowledge the action of the Secretary of State in certifying the Hart System was influential in using that system; the remaining allegation are denied.

23. These answering respondents are without knowledge as to the use of the Hart voting system in the state of California, such allegations are hereby denied.

24. These answering respondents admit that in San Juan County, the Hart system is used to print three bar codes, one without corresponding numbers on every ballot; but without knowledge as to the remaining averments, they are denied.

25. These answering respondents deny that the fact of a bar code on the ballot or its use in accordance with the procedures required of all election workers in San Juan County result in the threatened or actual compromise of ballot secrecy; and without knowledge as to other counties.

26. These answering respondents deny that there is any threat to ballot secrecy in the use of bar codes and further deny that the use of MiBT enhances any perceived threat to secrecy; admit that the operations manual for MiBT describes three steps in the use of bar codes as set forth in paragraph 26 the purpose of which is to assure that each vote-by-mail voter receives one correct ballot and votes only one correct ballot; the remaining allegations are denied.

27. These answering respondents deny that the "intermix" process occurs with the procedures adopted in San Juan County with the MiBT; and that MiBT, as used in San Juan County, does not maintain a link between the Ballot ID and the Voter ID; and that such "intermix" process was only used prior to 2008 as a part of testing a new audit

system and that the secrecy of any ballot was never compromised with the "intermix" process; and the reference to the operations manual, if correct, are no longer applicable; and is therefore denied.

28. Theses answering respondents deny that the MiBT system has been used to establish a linkage between a voter and his or her ballot in a way that allows a person to know how a vote was cast in any race; the remaining averments are speculative statements and are accordingly denied.

29. These answering respondents deny that other security problems exist with MiBT and deny that public observers can view a voter's name and the ballot identification number; and further deny that sensitive information is stored on computers and accessed via the internet; and the remaining allegations are denied.

30. These answering respondents deny that the fear that ballots can be linked to voters is the reason ballots are not public records subject to copying; and the remaining allegations are denied.

31. These answering respondents deny that ballot bar codes undermine voters' confidence; and affirmatively allege that such bar codes assure confidence in the election process and guard against fraud. These answering respondents admit that the quoted material appears in the referenced King County study but, deny that the study is controlling law or fact in this proceeding; the remaining allegations are denied.

32. These answering respondents admit that Mr. Handy made the statements indicated, but deny that the statements reflect the current use of bar codes in San Juan County or Washington State.

33. Without knowledge as to the averments in Paragraph 33, they are denied by these answering respondents.

34. These answering respondents admit that MiBT has not been certified, but deny that MiBT is a "voting system" because MiBT is only used to track mailing and receipt of and the location status of ballots, and does not tabulate ballots and, therefore, is not subject to certification requirements; the remaining averments are denied.

35. These answering respondents state that MiBT provides a superior and accountable system for protecting the integrity of the voting process by assuring that each person voting by mail receives one correct ballot and votes only one correct ballot; without knowledge as to the quotation attributed to Mr. Handy or the number of voters who vote with ballots with bar codes; and admit that MiBT is not certified by the Secretary of State, but deny that an audit system is not a necessary component of a valid vote-by-mail system, the remaining averments are denied.

36. These answering respondents state that HAVA – the Help America Vote Act speaks for itself and that no response is necessary to conclusions of law; the remaining allegations are denied.

37. These answering respondents admit that MiBT has not been certified, because the Secretary of State does not certify ballot tracking systems. The remainder of Paragraph 37 is denied.

38. Denied.

IV. CAUSE OF ACTION PURSUANT TO 42 USC ¶ 1983 FOR VIOLATION OF EQUAL PROTECTION

39. These answering respondents incorporate the answers to the preceding paragraphs incorporated in paragraph 39.

40. Paragraph 40 is a statement of law to which no answer is required, and paragraph 40 is denied.

41. Paragraph 41 is a statement of law to which no answer is required, and paragraph 41 is denied. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

V. AFFIRMATIVE DEFENSES

By way of further answer and affirmative defense, Respondents San Juan County and Auditor Milene Henley allege as follows:

1. Petitioners have failed to state a claim for which relief can be granted against San Juan County and County Auditor Milene Henley.

2. San Juan County is not a proper party to this action seeking declaratory and injunctive relief in the use of the mail ballot audit system to conduct elections in San Juan County.

3. Pursuant to the separation of powers in the San Juan County Charter and state laws, no local elected official except for the County Auditor has the authority to conduct elections and use the mail-in ballot audit system of Election Trust.

4. The bar code on each ballot is placed on the ballot by the vote tabulation system used in San Juan County, which system is made by Hart InterCivic.

5. The voting tabulation and operating procedures to conduct and canvass elections in San Juan County have been approved by the Chief Elections Official for the state, the Secretary of State pursuant to RCW Chapter 29A.12 and certified for use pursuant to WAC 434-335-130.

6. Petitioners have failed to exhaust administrative remedies by failing to file a timely appeal of the certification of the Hart InterCivic system or other approved election system as required by WAC 434-335-230.

7. The mail-in ballot tracker system protects the integrity of the voting process by providing procedural checks and guards against fraud and mistakes by voters and election workers and assures that every vote is counted once and that the County Canvass board correctly reports all votes cast in all races and for and against all measures.

8. The MiBT system and the procedures used in San Juan County secure to voters absolute secrecy in the act of voting. Only illegal conduct, a voter not following instructions or an inadvertent mistake by election workers

will allow a person to determine who voted a specific ballot.

9. Petitioners have not alleged sufficient harm or injury to themselves or to the voting process to have standing to bring this action for mandamus or declaratory relief; their complaints are merely hypothetical concerns that are properly addressed by reference to the legislative directives and procedures used to protect the rights of every citizen in the voting process.

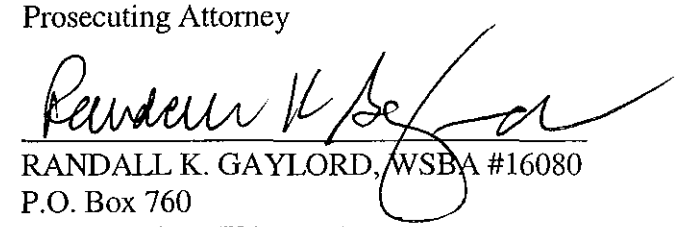
10. There is currently pending in San Juan County Case No. 06-2-051566-2; which case is substantially similar to the allegations brought in this proceeding and, which case should, for purposes of judicial economy, be stayed until this proceeding advances or combined with this case so that the two may proceed together.

PRAYER FOR RELIEF

WHEREFORE, Respondents San Juan County and Auditor Milene Henley pray that the petition be denied, they be awarded costs and attorney fees, and for such other and further relief as may be just and equitable.

DATED this 18th day of August 2009.

RANDALL K GAYLORD
Prosecuting Attorney



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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 Notice of Appearance to be served on the following via First Class United States Mail, postage prepaid:

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Smith & Lowney
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Anne Egeler and James Pharris
Assistant Attorney General
Attorney General of Washington
PO Box 40100
Olympia, WA 98504-0100

DATED this 18th day of August 2009.

Randall K. Gaylord

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SMITH & LOWNEY

September 28, 2018 - 4:39 PM

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