No. 102569-6

SUPREME COURT OF THE STATE OF WASHINGTON

VET VOICE FOUNDATION, THE WASHINGTON BUS, EL CENTRO DE LA RAZA, KAELEENE ESCALANTE MARTINEZ, BETHAN CANTRELL, GABRIEL BERSON, AND MARI MATSUMOTO,

Petitioners,

v.

STEVE HOBBS, IN HIS OFFICIAL CAPACITY AS WASHINGTON SECRETARY OF STATE, JULIE WISE, IN HER OFFICIAL CAPACITY AS THE AUDITOR/DIRECTOR OF ELECTIONS IN KING COUNTY AND A KING COUNTY CANVASSING BOARD MEMBER, SUSAN SLONECKER, IN HER OFFICIAL CAPACITY AS A KING COUNTY CANVASSING BOARD MEMBER, AND STEPHANIE CIRKOVICH, IN HER OFFICIAL CAPACITY AS A KING COUNTY CANVASSING BOARD MEMBER,

Respondents.

MEMORANDUM OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND WASHINGTON COMMUNITY ALLIANCE IN SUPPORT OF PETITIONERS

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I. IDENTITY OF *AMICI* AND SUMMARY OF ARGUMENT

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonpartisan, nonprofit organization with over 150,000 members and supporters, dedicated to the preservation of civil liberties and the principles of liberty and equality embodied in the Washington and United States Constitutions and federal and state civil rights laws. ACLU-WA has a long history of advocating for voting rights in Washington. ACLU-WA previously filed cases under the Federal Voting Rights Act seeking to ensure that every voter in Washington has the opportunity to vote and have their voice heard and issued a notice under the Washington Voting Rights Act this year for the same purpose. ACLU-WA strongly believes that any burden on the right to vote, especially a burden that seems correlated with race, must be subject to strict scrutiny.

Washington Community Alliance is a network of over 80 BIPOC led organizations in Washington state. We are signing

on in support of the plaintiffs because we are committed as an organization in ensuring that the voting rights of all people are protected and equitably administered, and we want to see a change to the racially disproportionate signature verification process in our current system. To this end, during the 2020 redistricting process, we worked to ensure an accurate census and fair redistricting once the census was complete. We see this effort as an extension of this work.

II. STATEMENT OF THE CASE

This Court should apply strict scrutiny because of the massive racial disparities in ballot rejection created by the signature matching process required by RCW 29A.40.110(3). This standard should be applied whenever there are racial disparities in access to a fundamental right and racial bias *could* play a role in creating those racial disparities.

Because of the subjective nature of the signature comparison process, the implicit biases we all carry, and the politicization of voting, it is easy to see how racial bias *could*

play a role in creating a racially disparate impact on the fundamental right to vote. For this reason, strict scrutiny should be applied.

The State's argument for a lesser degree of scrutiny recycles the same arguments used to justify literacy tests in voting and ignores the stark racial disparities in Washington's signature verification scheme. The Court should reject this argument.

At the very least, where a statutorily created and mandated practice has a racially disparate impact on a fundamental right, and that impact *could* result from racial bias, the State should have to prove that the statutorily created and mandated practice is narrowly tailored to accomplish a compelling governmental interest. This ensures that voters who have traditionally been excluded from the democratic process know that they have a meaningful opportunity to participate in our democracy.

III. ARGUMENT

A. The Consequences of Racialized Voter Disenfranchisement Threaten the Legitimacy of Our State's Democratic Institutions.

Courts have recognized that disenfranchisement from the democratic process drives voters out of the political process, resulting in low voter turnout for communities that have been historically subject to voter discrimination. *United States v. Blaine Cnty.*, *Montana*, 363 F.3d 897, 911 (9th Cir. 2004). The government has a corresponding interest in making sure voters are not driven from the process:

> The State's interest in preserving the integrity of the electoral process is undoubtedly important… [Distrust of the system] drives honest citizens out of the democratic process and breeds distrust of our government.

John Doe No. 1 v. Reed, 561 U.S. 186, 197, 130 S. Ct. 2811 (2010).

When voters find out that their votes are rejected and it appears that this rejection is correlated with their race, it feeds historical distrust of a process that has systematically and

repeatedly excluded Black, Indigenous and people of color (BIPOC) voters. From Jim Crow laws in the South to literacy tests and repeated violations of the Voting Rights Act in the Yakima Valley, BIPOC voters have repeatedly seen election officials and election systems exclude Black and brown voters from the democratic process.

The statutorily created practice of signature verification represents another burden in the long and sad history of burdens on the votes of BIPOC people. Before such a burden is allowed to stand, it must, at least, meet strict scrutiny to ensure the people of Washington that if their votes are being excluded it is because of a policy that is narrowly tailored to meet a compelling governmental interest.

B. The Subjective Nature of Signature Comparison Means that Implicit and Explicit Bias *Could* Enter the Process Controlling the Fundamental Right to Vote, Justifying Strict Scrutiny of the Signature Match Statute.

The people doing signature comparisons have implicit biases, as we all do. These election workers live in communities

where racial appeals are a part of electoral politics and may shape the workers' implicit biases. A voter's name suggests a voter's racial identity, potentially triggering these implicit biases when an election worker sees the voter's name as part of the signature matching process. These factors, along with the subjective nature of the signature matching process, create a perfect storm for implicit bias to become a part of the signature matching process.

1. Implicit and Explicit Forms of Bias Lead to Discrimination Based on Name Alone.

Most people, including the people doing signature matching, carry some implicit biases, even when they do not know they do or would not admit to such biases. Kirsten N. Morehouse, Mahzarin R. Banaji, *The Science of Implicit Race Bias: Evidence from the Implicit Association Test*, 153(1) Daedalus 21 (2024), https://direct.mit.edu/daed/article/153/1/21/119942/The-Science-of-Implicit-Race-Bias-Evidence-from. For example, the largest implicit bias survey—the Implicit Project—found that 65

percent of its 3.3 million survey respondents had an anti-Black/pro-white implicit bias, despite only 29 percent of respondents reporting such a bias. *Id*.

Implicit bias frequently translates into real world discrimination. Anthony Greenwold, et. al., *Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Validity*, 97(1) J. of Personality and Soc. Psych. 17 (2009), https://faculty.washington.edu/agg/pdf/GPU&B.meta-analysis.JPSP.2009.pdf. As a result, areas which test highest in implicit racial bias have worse outcomes in virtually every social category for non-white residents. Morehouse, *The Science of Implicit Race Bias*, *supra*.

Bias manifesting itself through discrimination extends to discrimination based on name alone. This makes sense. Indeed, names are used as a proxy for race when conducting the statistical analysis in virtually all Voting Rights Act cases because of the reliability of such correlations. *Yumori-Kaku v. City of Santa Clara*, 59 Cal. App. 5th 385, 399, 273 Cal. Rptr. 3d

437 (Cal. Ct. App. 2020) (noting that for decades, courts have "relied on surnames as a proxy for race/ethnicity classifications."). This is also the methodology used in a wide variety of social science disciplines—sociology, economics, political science, psychology, and management. S. Michael Gaddis, *Racial/Ethnic Perceptions from Hispanic Names: Selecting Names to Test for Discrimination*, Socius 3:1-11 (October 26, 2017), https://doi.org/10.2139/ssrn.2975829.

Because a name alone may suggest a racial identity, it also triggers explicit or implicit biases regarding that racial identity. This is shown in a raft of studies showing the disproportionate rejection of rental applications sent by fictitious people with names that suggest a non-white racial identity. Francis Thomas Flynn, *An Investigation into Discrimination: Racially Identifiable Names and the Effects They Have on the Home Renting Process*, Loyola E-Commons (2017) at 9, https://ecommons.luc.edu/cgi/viewcontent.cgi?article=4560&context=luc_theses; Judson Murchie, Jindong Pang, *Rental*

housing discrimination across protected classes: Evidence from a randomized experiment, 37 Reg. Sci. and Urban Econ. 170 (2018), https://www.sciencedirect.com/science/article/abs/pii/S0166046217302612.

2. Because Racial Appeals Have Become a Normal Part of Electoral Politics, Signature Comparison Could Trigger Racial Biases in People Doing Signature Comparison.

Signature matching draws attention to the name of the voter and doing so *could* trigger the implicit biases of the workers doing the signature verification, just as it does in landlords reading a rental application.

This Court has recognized that even subtle racial appeals can result in racial bias. *State v. Bagby*, 200 Wn.2d 777, 795, 522 P.3d 982 (2023). The people conducting signature comparisons are embedded in communities where explicit racial appeals are part of electoral politics and trigger implicit biases in the residents there, including the people doing signature comparison.

Such racial appeals during elections have called into question the legitimacy of non-white voters, calling into question whether such voters have the right to vote. In a report filed in *Soto-Palmer v. Hobbs*, a federal Voting Rights Act case challenging Washington's Fifteenth Legislative District, Dr. Josué Estrada explained that:

> By using racist terms like 'illegals' and spreading the disproven allegation that there is widespread voting by non-citizens in American elections, elected officials and candidates embrace and perpetuate a message *that denies Latino voters the presumed legitimacy other citizens enjoy*, creates an unwelcoming climate, *and discredits their participation in electoral politics*.

Josué Estrada, *Totality of the Circumstances Analysis Under Section 2 of the Voting Rights Act: Soto Palmer, et al., v. Hobbs, et al.*, 2022 WL 22617246, Section 6 (W.D. Wash. 2022). The Federal District Court for the Western District of Washington credited this report in finding that race played a significant role in political campaigns in the Yakima Valley. *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213, 1230 (W.D. Wash. 2023). This

Court also recognized this phenomenon, noting "that bias, intentional and unintentional, persists among some residents of Washington against people they perceive as immigrants from countries south of the United States." *State v. Zamora*, 199 Wn.2d 698, 723, 512 P.3d 512 (2022) (J. Gonzalez concurring).

We know that these biases translate to racialized voting in the Yakima Valley. Voters in the Yakima Valley vote in heavily racially polarized ways, with white voters voting for white candidates and against Latinx candidates in overwhelming numbers. *See e.g. Montes v. City of Yakima,* 40 F. Supp. 3d 1377, 1405-07 and 1414 (E.D. Wash. 2014); *Soto Palmer*, 686 F. Supp. 3d at 1226 and 1230-31. This is true even in instances where the Latinx candidate is far more qualified, and even when a white candidate has dropped out of the race. *Id*.

It is not hard to see how these appeals translate to real world discrimination, either implicit or explicit, toward certain groups of voters. Because politicians have created questions regarding the legitimacy of Latinx voters, when one of these

election workers see a Latinx name, it may trigger an implicit bias that these voters are not qualified to vote and should be rejected. This, in turn, may lead to higher rejection of ballots of Latinx people.

This illustrates one example of how implicit or explicit racial bias could result in the racial disparities observed in signature rejections. Certainly, other groups have been similarly maligned and demonized by politicians raising the possibility that these groups' legitimacy as voters may also be questioned. This would be incredibly hard to prove because people are unlikely, or even unable, to acknowledge these biases. This is precisely the reason strict scrutiny is necessary where racial bias could play a role in negating BIPOC Washingtonians' vote power.

3. The State Acknowledges That the Subjectivity of the Signature Comparison

Process Increases the Possibility of Racial Bias.

The possibility for racial bias, either implicit or explicit, is enhanced in a subjective process like signature comparisons. Here there is more than a 'possibility' of implicit or explicit racial bias. Indeed, the State's audit of the signature verification system found that signature comparison is subjective and disproportionately results in the rejection of BIPOC voters. CP 538. King County Elections similarly acknowledged that subjectivity of signature verification opens the possibility of implicit bias affecting signature matching. CP 666-67.

Additionally, this subjectivity means that the process is unlikely to meet the State's stated purpose: detecting voter fraud. This failure to meet the State's goals is evidenced by the fact that the State's leading expert, given unlimited time, failed to identify forged signatures and identified real signatures as fake. CP 2163. Similarly, election workers regularly reach different conclusions about whether signatures match. CP 543.

This subjective process invites racial bias into the process while not achieving the goal the State articulates in their pleadings.

C. Proof of Intentional Discrimination Should Not Be Required Before the Court Applies Strict Scrutiny.

"If a law disadvantages a suspect class or infringes on a fundamental right, [this Court applies] strict scrutiny and require[s] the State to demonstrate its classification has been narrowly tailored to serve a compelling governmental interest." *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 527, 475 P.3d 164 (2020) (J. Gonzalez concurring) (citing *Darrin v. Gould*, 85 Wn.2d 859, 865, 540 P.2d 882 (1975)). This Court should apply strict scrutiny even if intentional discrimination cannot be shown. The most important reason is that failing to do so sets an almost impossible barrier to addressing racial discrimination, which this Court has previously recognized.

Whether racially disparate impact is sufficient to trigger strict scrutiny is undecided in Washington. In *Washington v.*

Davis, the United States Supreme Court found that before strict scrutiny is applied to an equal protection claim, the Federal Constitution requires proof of invidious discrimination. 426 U.S. 229, 240, 96 S. Ct. 2040 (1976). *Davis* revolved around allegations of discrimination in hiring practices. *Id*. However, the Washington Constitution's privileges and immunities clause, article I, section 12, requires an independent analysis. *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 807, 83 P.3d 419, 426 (2004).[1] In fact, this Court has stated that such an analysis is necessary because federal anti-discrimination law "grew from an incorrect…decision that radically changed the intent of the Fourteenth Amendment away from that of the provision's congressional authors." *Martinez-Cuevas*, 196 Wn.2d at 518. As such, the anti-discrimination

[1] Because this Court has already determined an independent analysis of article I, section 12 is required, a *Gunwall* analysis is unnecessary. *Madison v. State*, 161 Wn.2d 85, 94–95, 163 P.3d 757, 764–65 (2007).

aspects of article I, section 12 are more protective as applied to fundamental rights than their federal counterparts. *Id*. Voting is such a fundamental right. *Madison v. State*, 161 Wn.2d at 94–95.

This Court has not applied article I, section 12's greater protections to situations where government action has a racially discriminatory effect on a fundamental right, but racially invidious intent is hard—if not impossible—to prove. Two Washington cases cite *Davis* for the proposition that laws with a racially disparate impact are not subject strict scrutiny without proof of invidious intent. *See Macias v. Dep't of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 271, 668 P.2d 1278 (1983)[2]; *Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn. App. 762, 770, 970 P.2d 774 (1999). However, both cases were

[2] *Macias v. Dep't of Labor & Indus. of State of Wash.* left open the question of whether heightened scrutiny should be applied to governmental action with a racially disparate impact because the Court found that strict scrutiny was appropriate on other grounds. 100 Wn.2d 263, 271, 668 P.2d 1278, 1283 (1983).

decided before 2004, when the Washington Supreme Court declared that article I, section 12 requires an independent analysis. *Grant Cnty.*, 150 Wn.2d at 807.

Since that time, the Court has repeatedly recognized the limitation of an approach that requires proof of invidious intent before courts take action to stop racial discrimination while trying to address racial discrimination in the legal system. For example, in the context of attempts to eradicate racial discrimination from jury selection, this Court struggled with the purposeful discrimination requirement from *Davis*. *See State v. Saintcalle*, 178 Wn.2d 34, 54, 309 P.3d 326 (2013). *Kentucky v. Batson*—the U.S. Supreme Court's first attempt to deal with racial discrimination in jury selection—relied on *Davis* for the proposition that "governmental action claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 476 U.S. 79, 93, 106 S. Ct. 1712 (1986) (citing *Davis*, 426 U.S. at 240.). In *Saintcalle*, the Court struggled to effectively address racial discrimination in jury selection,

noting that "strict purposeful discrimination requirement … blunts *Batson*'s effectiveness and blinds its analysis to unconscious racism." 178 Wn.2d at 54.

In response to this problem, the Washington Supreme Court promulgated General Rule 37 (GR 37) to eliminate the scourge of racial discrimination from jury selection. *State v. Berhe*, 193 Wn.2d 647, 664, 444 P.3d 1172 (2019). To further this goal, the Court implemented a standard that required a challenge to a juror to be denied if "an objective observer *could* view race or ethnicity as a factor…" GR 37(e) (emphasis added). The rule was meant to address the inadequacies of jury selection rules based on *Davis's* intentional discrimination requirement. *State v. Tesfasilasye*, 200 Wn.2d 345, 357, 518 P.3d 193 (2022). After carefully considering alternative proposals, GR 37 was implemented so that "a judge is required to deny a peremptory challenge when the effect is discriminatory regardless of whether there was discriminatory purpose." *Id*. Rather than requiring proof of discrimination, this Court imposed a higher standard of

scrutiny when there is a *potential* that racial discrimination played a role. *Berhe*, 193 Wn.2d at 664.

The Court has subsequently implemented this higher standard in several other contexts in the legal system, including criminal jury deliberations,[3] civil jury deliberations,[4] encounters between police and community members,[5] and prosecutorial misconduct,[6] to fight racial discrimination. For example, in the case of civil or criminal jury deliberations, if a party makes prima facie showing that race played a role in the verdict, a court is required to conduct an evidentiary hearing where the court must grant a motion for a new trial if an objective observer *could* find that race was a factor. *Henderson v. Thompson*, 200 Wn.2d 417, 435, 518 P.3d 1011 (2022). The higher standard, requiring a new trial if an objective observer *could* find race was a factor is likely overinclusive, capturing some situations where race was not a

[3] *State v. Berhe,* 193 Wn.2d 647 at 665.
[4] *Henderson v. Thompson*, 200 Wn.2d 417 at 434-435.
[5] *State v. Sum*, 199 Wn.2d 627, 631, 511 P.3d 92 (2022).
[6] *State v. Zamora*, 199 Wn.2d 698 at 717-718.

factor, but allows the Court to ensure that it is never a factor. This is a fair bargain to eradicate racial discrimination. Additionally, it ensures that people see the system as fair and untainted by racial bias.

Similarly, this Court did not require racial animus to be proven when striking down the death penalty because of its racially disproportionate effect. *State v. Gregory*, 192 Wn.2d 1, 14, 427 P.3d 621 (2018). There, the Court noted specific instances of intentional discrimination in the criminal legal system in finding that the statistical analysis in that case was unlikely to be the result of coincidence but ultimately relied entirely on the statistical analysis that the death penalty was administered in a racially discriminatory manner to find the statute unconstitutional. *Id*. at 21. Importantly, the Court did not require any proof that intentional racism played a role in Mr. Gregory's trial or sentencing. *Id*. The disproportionate impact of the system was sufficient to find that the death penalty violated article 1, section 14 of Washington's Constitution. *Id*.

This Court has clearly not accepted the federal courts' requirement of proof of purposeful discrimination before acting on racial discrimination in the criminal legal system and should not do so here. Where a fundamental right is at stake, the Court should apply the same tools as it uses in the criminal legal system to ensure race does not play a role in the exercise of fundamental rights. The right to vote, like the rights redeemed in the legal system, is among the most important aspects of our society. By using strict scrutiny where a statutorily created practice unduly burdens BIPOC voters' voting rights and the practice and resulting disparate impact on voters of color *could* reflect racial discrimination, the Court can ensure that racial discrimination never infects voting in Washington. Put another way, at the very least, if a governmental policy/practice disproportionately disenfranchises BIPOC voters, the State should have to show that that policy/practice is narrowly tailored to meet a compelling governmental interest.

D. The Court Should be Skeptical of the State's Arguments for a Lesser Degree of Scrutiny in this Case as it Simply Recycles Arguments Used to Justify Racially Discriminatory Voting Practices of the Past.

Suspect justifications for practices that result in racially disparate impacts raise the necessity for heightened scrutiny of those practices. For example, one of the factors for a court to consider in determining whether there is a Voting Rights Act violation is whether "the policy underlying the State's… use of the contested practice or structure is tenuous." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426, 126 S. Ct. 2594 (2006).

The State's justification for lesser scrutiny here is the same tenuous justification previously raised in defense of literacy tests. The saga of eliminating those literacy tests in Yakima County casts the State's justification for their request that the Court apply a lesser degree of scrutiny into proper context. Yakima County administered literacy tests throughout the 50s and 60s. Even after the Yakima County Auditor, Eugene Naff, became aware

that the Voting Rights Act required Yakima County to stop using literacy tests, Naff subjected Latinx voters to them, framing the tests as a simple regulation of the manner of voting: "I still don't see, however, how anyone who can't read English can figure out how to vote on a ballot." *Totality of the Circumstances Analysis Soto Palmer, et al.*, 2022 WL 22617246, section 1A. In fact, Yakima County subjected only Mexican American voters to these tests. *Id*. The Mexican American Federation sued to stop the use of literacy test. *Id*.

Yakima County's argument in that case, which was ultimately adopted by the Eastern District of Washington, was shockingly similar to the State's argument in this case: "The constitutional provision that a person otherwise eligible must speak and read the English language is a valid exercise of the State of Washington's power to determine the conditions under which the right of suffrage may be exercised." *Mexican-Am. Fed'n-Washington State v. Naff*, 299 F. Supp. 587, 591 (E.D. Wash. 1969), *vacated sub nom Jimenez v. Naff*, 400 U.S. 986, 91

S. Ct. 448 (1971). The State argues for lesser scrutiny, essentially claiming that the voter match scheme represents "the conditions under which the right of suffrage may be exercised" while, like Naff, willfully ignoring the massive disparities in the way the policy is implemented.

Despite the discriminatory impact of the signature verification scheme, the State invites this Court to adopt the same line of reasoning and apply a lesser degree of scrutiny. This Court should not follow the State's invitation, as the application of a lesser degree of scrutiny risks racially disproportionate disqualifications of ballots, and thus threatens the integrity and fairness of our election system.

The State asks the Court to ignore these impacts because they serve the interest of election security. But even this seemingly reasonable assertion is belied by the complete lack of evidence that signature matching is detecting or deterring any fraud. The record is replete with evidence that the signature

matching is not truly serving that goal, never having resulted in a prosecution for fraud, much less a conviction.

The State argues that if this provision was subject to strict scrutiny, then all provisions, including provisions regarding the time ballot drop-offs close, would be subject to challenge. First, this is a non-sequitur because there is no indication that significant numbers of ballots are being rejected because of the time that ballot drop boxes close. Secondly, if the State found out that the timing of ballot drop boxes closing was having a racially disproportionate, they would, ideally, be motivated to change the policy. But if not, the Court should subject the policy to strict scrutiny.

IV. CONCLUSION

For the foregoing reasons, the Court should apply strict scrutiny in this case.

This document contains 3,970 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 16th day of September, 2024.

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CERTIFICATE OF SERVICE

I certify that on this 16th day of September, 2024, I caused a true and correct copy of this document to be served on all parties by electronically filing this document through the Washington State Appellate Courts Secure Portal.

Signed this 16th day of September, 2024 at Seattle, WA.

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