

FILED
SUPREME COURT
STATE OF WASHINGTON
3/27/2024 4:49 PM
BY ERIN L. LENNON
CLERK

NO. 102569-6

SUPREME COURT OF THE STATE OF WASHINGTON

VET VOICE FOUNDATION, et al.,

Petitioners,

v.

STEVE HOBBS, et al.,

Respondents.

BRIEF OF RESPONDENTS

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- Comm’n on Fed. Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005),
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- Engrossed Substitute S.B. 5890,
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- Isaac Chotiner, *How Washington Holds Its Elections By Mail*, *The New Yorker* (Sept. 8, 2020),
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I. INTRODUCTION

Washington is a national leader in making voting both accessible and secure. For decades, Washington has made it easy to vote by mail, moving to universal mail-in voting in 2011. And for decades, our Legislature has required verification of mail-in voters' signatures. For almost 99 percent of voters, this is no burden at all. For the few whose signatures are disputed, curing a challenge is simple.

Plaintiffs here allege problems in how counties have verified signatures, but rather than challenging those alleged flaws, they claim that verifying signatures *at all* is unconstitutional. No court has ever adopted such an extreme position, and this Court should not be the first. Secretary of State Hobbs recognizes that there is important work to do to improve the implementation of signature verification, and the Secretary is doing that work. Under new regulations governing verification for the 2024 election and beyond, fewer signatures will be challenged and curing challenges will be easier than ever.

Plaintiffs come nowhere close to meeting their burden of proving that signature verification is *per se* unconstitutional.

Plaintiffs admit that they are bringing a facial challenge to Washington's signature verification statute, RCW 29A.40.110, but they ignore the standard they must meet to prevail on such a claim. This Court has long held that a facial challenge focuses on the statute's text and that a challenger must prove beyond doubt that there is "no set of circumstances" in which the statute could be constitutionally applied. *Portugal v. Franklin County*, 1 Wn.3d 629, 647, 530 P.3d 994 (2023), *appeal docketed*, No. 23-500 (U.S. Nov. 14, 2023). Yet Plaintiffs hardly even mention the text of RCW 29A.40.110 and never attempt to show that signature verification is inherently unconstitutional, much less that it is unconstitutional under the new regulations. Instead, they rely on disputed evidence about how signature verification was previously *applied*, which cannot meet the standard for a facial challenge. Secretary Hobbs is thus entitled to summary judgment regardless of what constitutional standard applies.

If the Court reaches the question of what standard applies, it should affirm the *Anderson-Burdick* framework adopted by the superior court. Under *Anderson-Burdick*, severe restrictions on the right to vote receive strict scrutiny, while lesser burdens demand lesser justification. That is exactly the approach this Court has historically taken. Plaintiffs claim that strict scrutiny should apply to any law that burdens voting at all, but no court has adopted that rule and it leads to absurd consequences. Properly analyzed under *Anderson-Burdick*, Washington's signature verification system easily passes constitutional muster: the minimal burden it imposes is amply justified by the State's interests in election security and public confidence in elections.

While the superior court adopted the correct standard for Plaintiffs' right to vote and due process claims, it erred in failing to apply the "no set of circumstances" facial challenge standard to these claims. The superior court also erred by failing to apply this Court's well-established framework for privileges or immunities claims. This Court should hold that the Secretary is

entitled to summary judgment on all of Plaintiffs' constitutional claims.

II. ASSIGNMENTS OF ERROR

The superior court erred in denying Secretary Hobbs's motion for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the superior court err in denying Secretary Hobbs summary judgment on Plaintiffs' facial article I, section 19 claim?

2. Did the superior court err in denying Secretary Hobbs summary judgment on Plaintiffs' facial privileges or immunities claim?

3. Did the superior court err in denying Secretary Hobbs summary judgment on Plaintiffs' facial due process claim?

IV. STATEMENT OF THE CASE

A. Washington is a National Leader in Ballot Accessibility

Washington is one of the top two states in making it easy to vote. Scot Schraufnagel et al., CP 1555; *Cost of Voting in the American States: 2022* 21 Election L.J. 220, 224 (2022). This is not an accident. Secretaries of State (of both political parties), the Legislature, and other officials consistently improve Washington's election laws and processes to ensure accessible, secure elections.

Washington was one of the first states to adopt universal vote-by-mail, *see* Laws of 2011, ch. 10, which measurably increases turnout by Washington voters, with particularly positive effects among younger voters, voters of color, and low-income voters, CP 1774, 1798-99. In Washington, every voter receives a ballot by mail, allowing voters to complete their ballots at home.

Washington law also makes registering to vote easy. Washington permits same-day registration, RCW 29A.08.140,

automatic voter registration, RCW 29A.08.355, .357, and online voter registration, RCW 29A.08.123. Sixteen- and seventeen-year-olds can sign up to be automatically registered to vote when they turn 18. RCW 29A.08.170. Many public assistance agencies offer voter registration services. *See* Proclamation by Governor Jay Inslee, No. 15-02 (Wash. 2015), https://governor.wa.gov/sites/default/files/exe_order/eo_15-02.pdf.

Washington also makes it exceptionally easy for voters to obtain a replacement or reissued ballot, including by downloading a replacement ballot directly from the VoteWA website. RCW 29A.40.070; CP 1553. A voter's name and birthdate is all the information required to get a replacement ballot. CP 1553. Voters have obtained over one million replacement or reissued ballots since the August 2019 primary. CP 1571.

B. Overview of Ballot Processing in Washington

Washington voters receive a ballot packet that consists of three basic elements: the ballot, a security envelope, and an outer envelope. To protect ballot secrecy, the ballot and security envelope contain no voter-identifying information. CP 1555; *see also* Const. art. VI, § 6. Voters place their completed ballots in a security envelope, and the security envelope in an outer envelope. CP 1555. Only the outer envelope includes the voter's name and other identifying information, including a machine-readable barcode. *Id.* The outer envelope also includes a declaration the voter must sign. *Id.*; *see also* RCW 29A.40.091. Once completed, voters can return ballots by mail, postage paid (RCW 29A.40.091), or to a ballot drop box (RCW 29A.40.170). Instead of signing a ballot declaration, voters also have the option of appearing at a voting center and providing identification, RCW 29A.40.160(9); CP 1636; App. at 8, as voters typically do in many other states and Washington voters have in the past.

Election officials begin processing ballots as soon as they are received. RCW 29A.40.110; CP 1555. Ballots are initially either “accepted” or “challenged.” Once an accepted ballot is removed from the outer envelope following the signature verification process, it is impossible to trace the ballot back to the voter or to remove the ballot from the vote count. *E.g.*, CP 1939. A ballot can be challenged for several reasons, including that it was not postmarked by Election Day, is missing a signature, or the signature does not match the registered voter’s signature. *See* CP 2702. The county canvassing board resolves all challenged ballots, determining whether they are accepted or rejected. *See* RCW 29A.60.050.

From the 2016 General Election through the August 2023 Primary, 37,636,320 ballots were cast in Washington, of which 37,064,537 were accepted—98.48 percent. CP 2702. Only 0.49 percent were rejected for mismatched signatures. The rest were rejected for being too late (0.57 percent) or for having no

signature at all (0.21 percent). *See id.*¹ Almost 99 percent of returned ballots were accepted without being challenged for signature mismatch. CP 344, 2702.

C. Washington Continues to Improve Its Signature Verification Process

To ensure that a returned ballot was cast by a registered voter, Washington generally relies on signature verification. RCW 29A.40.110. County election officials must “verify that the voter’s signature on the ballot declaration is the same as the signature of that voter in the registration files of the county.” RCW 29A.40.110(3).

State law imposes numerous safeguards around the signature verification process. Signature reviewers “must receive training on statewide standards for signature verification,” *id.*, county election officials must notify voters of signature issues, RCW 29A.60.165(2)(a), and voters have up to 20 days after a

¹ Adding the percentages together does not equal 100 because there are additional rejection reasons that make up a very small number of rejected ballots. *See* CP 1935.

general election to cure any signature issues, RCW 29A.60.190; WAC 434-261-050(3); App. at 5. State law also identifies certain instances in which a voter's signature must be accepted. RCW 29A.40.110(3); RCW 29A.60.165(2)(b), (c). Under 2024 legislation unanimously approved by the Legislature, county election officials must provide additional notice and outreach related to signature verification. Engrossed Substitute S.B. 5890, 68th Leg., Reg. Sess. (Wash. 2024), enacted as Laws of 2024, ch. 138 § 1(1). Beyond these requirements, state law gives the Secretary authority to establish standards and adopt regulations implementing the signature verification process. RCW 29A.04.611(54).

The Secretary recently adopted new signature verification regulations, which become effective in May 2024. Wash. St. Reg. 24-07-018; *see also* CP 1631-40.² The regulations contain

² There are minor, non-material differences between the adopted regulations and the proposed regulations in the record. A copy of the adopted regulations is included in the appendix.

significant changes designed to reduce erroneous signature challenges and make it easier for voters to cure any signature issues. CP 1562-64. Unlike prior rules, the new regulations create an express presumption that the signature on the ballot declaration is valid. CP 1631.

Under the new regulations, a reviewer may not challenge a signature unless there are “multiple, significant, and obvious discrepancies” between the declaration signature and all signatures in the registration record. CP 1632; App. at 4. (This replaces the former standard, which required “a combination or cluster of shared characteristics” to accept a ballot. WAC 434-379-020.) The regulations direct signature reviewers to accept signatures where discrepancies “can reasonably be explained” by factors such as aging, health, or the writing surface. CP 1631; App. at 3. If the first reviewer does not accept the signature, a second person conducts an independent review, and the signature may be challenged only if they both conclude that there are “multiple, significant, and obvious discrepancies.” CP 1632;

App. at 4. The regulations expressly allow for further review of a challenged signature, such as where “the county auditor becomes aware of reasonable explanations that should be considered” under the signature verification standards. CP 1632; App. at 4.

The new regulations also make it far easier to cure a signature challenge. In addition to returning a signature cure form, voters can now also cure through a form of secondary authentication, such as providing the last four digits of their Social Security number (SSN) or full driver’s license number or using a multi-factor authentication code sent by email or text. CP 1633-34; App. at 6. These cure methods are easy and commonly used, particularly by younger voters. If a voter uses the new cure procedure, election officials must accept the ballot unless two trained personnel “conclude beyond a reasonable doubt that a person other than the voter signed the ballot declaration.” CP 1634; App. at 6.

Additional improvements to the signature verification process may soon follow. Under recently-enacted legislation, the Secretary must regularly review signature verification standards. ESSB 5890.

Additionally, Washington will allow counties to conduct pilot projects to explore possible alternatives to signature verification. ESSB 5890. The law requires that any alternative involve “clear evidence which can be verified by the county auditor” showing the intended voter cast the ballot. *Id.* § 1(2)(b)(i). The Secretary must provide a final report by December 31, 2028. *Id.* § 1(2)(c), 1(4)(c).

D. Signature Verification Prevents Invalid Votes from Being Counted

Signature verification is currently the only means of protecting against a third party improperly submitting a ballot on behalf of a voter. CP 1367, 1555, 1800, 1821, 1940. While state law includes other protections that can prevent other types of fraud or identify fraud after the fact, there is currently no other

method for preventing an improperly cast ballot from being irreversibly introduced into the vote-counting stream.

While voter fraud is rare, election officials in Washington consistently identify and reject ballots that are submitted by persons other than the registered voter named on ballot return envelope. In Clark County, for example, election officials identified 153 instances of likely voter fraud from February 2022 to February 2023 alone. CP 1936-38, 2045-90. Examples of illegitimate voting caught through signature verification include ballots received from voters who were deceased when the ballot was signed, CP 2046, signatures reflecting an entirely different name from the voter's name, CP 3026, 3037, and instances where third parties later admitted to signing the ballot declaration, CP 2046. Signature verification kept these ballots from being counted. CP 1936-37. In each of Washington's five most populous counties, such illegitimate ballots are caught in every election. CP 1419, 1810-11, 1819-20, 1921-22, 1938.

While signature verification prevents these fraudulent ballots from being counted, only a few such cases lead to prosecutions, for a variety of reasons. *See* CP 1819, 1824-1909. Prosecutors may conclude they cannot prove the relevant elements beyond a reasonable doubt, as conviction often requires cooperation and testimony from third parties (such as household members). *See* CP 1778, 1820, 1916. Prosecuting attorneys can also take other actions. In Clark County, the prosecuting attorney sends warning letters to persons suspected of signing another person's ballot declaration. CP 1937, 1944-2043. These letters are intended to serve as a deterrent, and Clark County has not had to send letters to the same person a second time. CP 1937.

Individualized cases of voter fraud are not the only risks that must be guarded against in a universal vote-by-mail state like ours. Without a mechanism to authenticate voter identity, motivated partisans, paid election consultants, or hostile actors can exploit systemic vulnerabilities to influence the outcome of an election or simply to sow chaos. CP 1557, 1779. In a recent

example from North Carolina, a Republican Party operative collected many incomplete ballots and forged voters' signatures. CP 1776-77.

Foreign governments, such as Russia and China, also routinely seek to influence and destabilize elections in the United States, including in Washington. CP 1557-58. An organized institutional actor could take advantage of Washington's election accessibility and download and return thousands of ballots, targeting infrequent voters who would be unlikely to notice. *See* CP 1553, 1779. Without signature verification (or an alternative identity verification mechanism), those ballots would be accepted and irreversibly added to the vote-counting stream. *See* CP 1555 ("If it is later discovered that the ballot was fraudulent, there is no way to identify or prevent the ballot from being counted.").

As voting expert Dr. Robert Stein stated, "[i]n Washington's current system, broad access to the ballot and replacement ballots does not result in a systematic risk of voter

fraud” because of Washington’s signature verification process. CP 1779-80. But without signature verification, “there would be significant systemic risk.” CP 1780.

E. As Part of a Larger System, Signature Verification Reliably Verifies Identity

The purpose of signature verification is to ensure that the ballot that election officials receive was cast by a registered voter who did not already vote. CP 1557. Signature verification in the electoral context is different from signature comparison in other contexts, such as a criminal prosecution. CP 3048. In the electoral context, the objective is not to determine beyond a reasonable doubt whether a particular person signed the document. *See id.* Instead, the purpose is to provide basic assurances confirming the presumption that the signature is genuine. *See id.* Where election officials are unable to identify such assurances after multiple levels of review, voters are provided an opportunity to confirm the signature’s validity through an easy process. CP 1633-34; App. at 5-6.

Mark Songer, a forensic document examiner, testified that as part of a process with a presumption of validity and adequate cure procedures, signature verification performed by trained election officials can “reliably prevent the introduction of fraudulent ballots without rejecting genuine ballots.” CP 3052. Election official “can identify obvious discrepancies.” *Id.*; *see also* 3026, 3037. “Trained lay individuals can reliably assess whether there are multiple, significant, and obvious differences in ballot signatures versus voter registration signatures[.]” CP 3052-53.

Plaintiffs’ two experts purporting to call into question the reliability of signature verification acknowledged significant and material limitations on their analyses. Dr. Linton Mohammed, Plaintiffs’ handwriting expert, conceded that he had no basis to opine on the use of signature verification in the context of an elections system. *See* CP 1523-49, 2671-72. He did not know, for example, whether Washington had a cure process, CP 1542, and the studies he relied on did not measure reliability of signature

verification when reviewers operated under a presumption of validity or had training, multiple layers of review, or an opportunity to verify the identity of the signer through a secondary means of authentication, such as the last four digits of their SSN or driver's license number. CP 1545-47. Dr. Mohammed identified *fingerprinting* as a non-burdensome alternative to signature verification. CP 1532. Another of Plaintiff's experts, Dr. Michael Herron acknowledged that his report "defined an instance of voter fraud" as being limited to a case involving a guilty plea or criminal conviction. CP 1502-03.

The record further demonstrates that implementation of signature verification under the former regulations did not discriminate based on race, Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) status, or county of residence. Across all racial groups, certain factors—especially being a young or inexperienced voter—are correlated with a higher likelihood of having one's signature rejected. CP 1668-77, 1716, 2687, 2690-93. Accounting for all variables, there was no

consistent association between ballot rejection for signature mismatch and race, UOCAVA status, or county of residence. CP 1707, 1713, 2688-89, 2696. The only county-by-county evidence in the record demonstrates that race, UOCAVA status, and county of residence are not inherently correlated with ballot rejection for signature mismatch. CP 1663, 1706-07, 2688-89.

And all of the analyses related to race, UOCAVA status, and county of residence were based on data generated under the former signature verification regulations. Dr. Maxwell Palmer, Plaintiffs' statistical expert, repeatedly admitted that it was "beyond the scope of [his] report" whether changes in the signature verification process would change his results. CP 1440-41, 1445-46, 1452, 1456-57, 1463, 1467.

F. Signature Verification is Widely Supported

There is widespread support for signature verification as part of a vote-by-mail system.

Every election official to offer testimony in this case has testified that signature verification is a necessary component of

Washington's vote-by-mail system. CP 1148 ("[S]ignature verification is a key part of Washington's vote by mail system."), 1562 ("[S]ignature verification is the best solution of which I am aware."), 1811 ("Signature verification is a necessary step to make sure that registered voters are casting ballots and only voting once."), 1821 ("[S]ignature verification is the only way that election offices in Washington can tell that a ballot was submitted by a registered voter and not by someone who intercepted a registered voter's ballot."), 1922 ("[T]he signature verification process is adept at uncovering these instances [of fraudulently submitted ballots] and at ensuring that votes are submitted by only registered voters and that registered voters are able to vote only one time."), 1939 ("[S]ignature verification is an essential part of Washington's election system.").

The Commission of Federal Election Reform singled out signature verification as a successful method of protecting vote-by-mail elections. Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* at 35 (Sept. 2005),

https://www.eac.gov/sites/default/files/eac_assets/1/6/Exhibit%20M.PDF.

Signature verification in vote-by-mail elections is also supported by experts. Dr. Stein opines that signature verification “is preferable to other methods of voter identification that are either incompatible with a vote-by-mail system or would otherwise suppress voter turnout.” CP 1769. Dr. Stein’s expert report demonstrates how other identity verification mechanisms (such as requiring copies of identification, witness attestation, fingerprints, driver’s license numbers, or personal tokens like SSNs) would create additional barriers for voters who lack the required information or have privacy concerns. CP 1787-90.

G. The Superior Court Does Not Address the Standard for Facial Challenges and Denies Summary Judgment

Plaintiffs filed only a facial challenge to RCW 29A.40.110(3). Opening Br. at 38. Plaintiffs alleged that the signature verification requirement violates article I, sections

3, 12, and 19, of the Washington State Constitution and RCW 29.04.206. CP 130-33.

All parties moved for summary judgment on all of Plaintiffs' claims. CP 2922. In its summary judgment order, the superior court adopted the *Anderson-Burdick* framework for analyzing Plaintiffs' constitutional challenges. CP 2926. The superior court held that disputed issues of fact precluded summary judgment for any party, CP 2923-24, but its order failed to analyze the statute's text or apply the "no set of circumstances" standard applicable to facial constitutional challenges. The trial court certified its ruling for immediate appeal under RAP 2.3(b)(4), and this court granted direct, discretionary review. CP 2928-35.

V. ARGUMENT

Plaintiffs seek facial invalidation of a longstanding Washington statute that is a cornerstone of Washington's vote-by-mail system, but they come nowhere close to meeting the demanding standards applicable to facial constitutional

challenges for any of their claims. In a facial challenge, a challenger must prove beyond a reasonable doubt that it is *impossible* for the statute to be applied in a constitutional manner. *Portugal*, 1 Wn.3d at 647. The plaintiff must make this showing based on the statute’s text; facts about how the statute has been applied—such as those that feature so prominently in Plaintiffs’ brief—are generally irrelevant. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220-21, 5 P.3d 691 (2000). The Secretary is entitled to summary judgment on each of Plaintiffs’ constitutional claims.

A. Plaintiffs Cannot Establish that the Statute is Facially Unconstitutional

1. Statutes are presumed constitutional

This Court presumes that statutes are constitutional, “and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.” *Tunstall*, 141 Wn.2d at 220. This demanding standard reflects “great deference” to the judgment of “a coequal branch of government.” *Id.* In order to satisfy its burden, a challenger must, “by argument

and research, convince[] the court that there is no reasonable doubt that the statute violates the constitution.” *Quinn v. State*, 1 Wn.3d 453, 471 n.9, 526 P.3d 1 (2023) (alteration in original) (quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)).

2. Facial challenges are strongly disfavored

In Washington, facial challenges to statutes are “generally disfavored.” *Woods v. Seattle’s Union Gospel Mission*, 197 Wn.2d 231, 240, 481 P.3d 1060 (2021). While an as-applied challenge may narrowly prohibit application of a statute in certain circumstances, a successful facial challenge completely invalidates the law and prohibits it from being applied in *any* circumstances. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 258, 241 P.3d 1220 (2010). Facially invalidating a statute “short circuit[s] the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451, 128 S. Ct. 1184, 170

L. Ed. 2d 151 (2008). As a result, this Court has adopted a stringent standard for facially invalidating a statute, requiring plaintiffs to establish that there is “*no set of circumstances* in which the statute[, as currently written,] can constitutionally be applied.” *Woods*, 197 Wn.2d at 240 (alteration in original) (quoting *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1990)).

“[T]he court’s focus when addressing constitutional facial challenges is on whether the statute’s *language* violates the constitution, not whether the statute would be unconstitutional ‘as applied’ to the facts of a particular case.” *Tunstall*, 141 Wn.2d at 220-21 (emphasis added) (citing *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 3-4, 891 P.2d 720 (1995)); see also *Portugal*, 1 Wn.3d at 657; *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 58-59, 109 P.3d 405 (2005) (“[T]he parent’s challenge in this case *stems from the language of the statute itself*.”). A plaintiff may also bring an as-applied challenge to the way that a law is implemented. *E.g.*, *Woods*, 197 Wn.2d at 252 (concluding that

statute was facially constitutional and remanding to address as-applied claim).

In this case, Plaintiffs chose to bring only a *facial* challenge to Washington’s signature verification statute, RCW 29A.40.110. Opening Br. at 38. They do not challenge the Secretary’s regulations implementing the statute, nor do they challenge any specific county’s application of the statute or regulations. In order to succeed on their facial challenge, Plaintiffs must establish that every method of implementing the statute would violate the Constitution.

In seeking to avoid their burden on appeal, Plaintiffs ignore extensive Washington authority. They rely on out-of-state cases to suggest that the “no set of circumstances” language is not a requirement but merely “[i]ntended to describe the result of a facial challenge.” Opening Br. at 60-61 (quoting *N.H. Democratic Party v. Secretary of State*, 262 A.3d 366, 377 (N.H. 2021)). But this Court has repeatedly and recently applied the “no set of circumstances” requirement. *E.g.*, *Portugal*, 1 Wn.3d

at 661 (“[B]ecause it is impossible for Gimenez to show that the WVRA is unconstitutional in all of its potential applications, his facial equal protection challenge to the WVRA must be rejected.”); *State v. Fraser*, 199 Wn.2d 465, 487, 509 P.3d 282 (2022) (holding that a statute was not facially unconstitutional because there are “circumstances in which this statute can be constitutionally applied”). Indeed, this Court has specifically held that the “no set of circumstances” requirement is protected by stare decisis. *Portugal*, 1 Wn.3d at 660-61.

Plaintiffs suggest that the “no set of circumstances” requirement “would lead to the absurd result that a statute . . . could fail strict scrutiny or *Anderson-Burdick* but still be upheld” Opening Br. at 61-62. But that’s incorrect. If a statute failed strict scrutiny or *Anderson-Burdick* because of the way it was being applied, then an as-applied challenge would and should succeed. But when a plaintiff brings only a facial challenge, this Court will uphold the statute if it could be

implemented in a constitutional manner, as this Court recently explained:

Without a doubt, the WVRA could be applied in an unconstitutional manner, and it is subject to as-applied challenges. However, Gimenez did not bring an as-applied challenge. He brought a facial challenge. As detailed above, the WVRA, on its face, does not require unconstitutional actions.

Portugal, 1 Wn.3d at 659.

Plaintiffs also suggest that taking this Court’s “no set of circumstances” jurisprudence seriously would mean that “virtually no statute would ever be invalidated.” Opening Br. at 62 (quoting *United States v. Streett*, 434 F. Supp. 3d 1125, 1159 n.18 (D.N.M. 2020)). Not so. Facial challenges are appropriate, for example, when the statutory text itself reflects an unconstitutional classification. And this Court has facially invalidated statutes that cannot be constitutionally applied in any circumstances. *E.g.*, *JJR, Inc.*, 126 Wn.2d at 10 (facially invalidating ordinance that failed to provide constitutionally required mandatory stay in any circumstances). To be sure, a plaintiff’s burden in a facial challenge is, by design, very

demanding. Even so, this Court adhered to the “no set of circumstances” standard when confronted by a very similar argument in *Portugal*. 1 Wn.3d at 660-61.

3. Plaintiffs’ facial challenge fails under any level of scrutiny

Plaintiffs cannot satisfy their burden to facially invalidate RCW 29A.40.110. The statutory signature requirement specifies only a broad, general framework, requiring that “[p]ersonnel shall verify that the voter’s signature on the ballot declaration is the same as the signature of that voter in the registration files of the county.” RCW 29A.40.110(3). Other unchallenged statutory provisions (1) require that election officials receive signature verification training, RCW 29A.40.110(3); (2) require that election officials notify voters of any signature matching issues, RCW 29A.60.165(2)(a); (3) allow voters to cure signature issues, *id.*; and (4) identify certain instances that are not a basis for a signature challenge, RCW 29A.40.110(3); RCW 29A.60.165(2)(b), (c). Beyond those general requirements,

implementation of the signature verification process is left to rulemaking by the Secretary of State. RCW 29A.04.611(54).

In the words of *Portugal*, “the [statute], on its face, does not require unconstitutional actions.” 1 Wn.3d at 659. The statute’s text does not require the rejection of any registered voter’s ballot. Plaintiffs have instead attempted to satisfy their burden in this facial challenge by providing evidence that, as implemented by prior regulations, *see* WAC 434-250-120; WAC 434-379-020, the signature verification process unconstitutionally burdened the right to vote. Opening Br. at 13-29. But that is, at most, evidence that the statute was *applied* in an unconstitutional manner under the former regulations.³ Any factual disputes regarding the application of the statute are not material to whether the statute, on its face, “require[s] unconstitutional actions.” *Portugal*, 1 Wn.3d at 659. On its face,

³ It might also have been relevant to a facial challenge to the Secretary’s *regulations*. But Plaintiffs do not challenge the Secretary’s regulations.

RCW 29A.40.110 plainly does not. That is fatal to Plaintiffs’ facial challenges, and the Secretary is entitled to summary judgment on this basis alone. This Court need not address any of the other issues raised in the briefing.

B. The Superior Court Correctly Adopted the *Anderson-Burdick* Framework

If this Court concludes that it needs to address the proper constitutional standard for this case, it should affirm the superior court’s adoption of the *Anderson-Burdick* balancing framework for claims under article I, section 19 (free and equal elections) and article I, section 3 (due process) because that framework tracks this Court’s longstanding precedent. Under that precedent, laws imposing severe burdens (like “the complete denial of the right to vote to a group of affected citizens”) are subject to strict scrutiny, *Eugster v. State*, 171 Wn.2d 839, 845, 259 P.3d 146 (2011), while less burdensome election laws are subject to more deferential review, *see id.* (upholding election law without applying strict scrutiny); *State ex rel. Shepard v. Superior Ct. of*

King Cnty., 60 Wash. 370, 372-73, 111 P. 233 (1910) (same).

The *Anderson-Burdick* framework adopts essentially the same balancing approach, applying strict scrutiny to severe burdens on the right to vote, and lesser scrutiny to laws that impose lesser burdens. This approach provides strong protections for voters while recognizing that regulation of the election process is necessary in order to hold secure elections.

1. Laws regulating elections do not automatically trigger strict scrutiny

This Court should reject Plaintiffs’ proposal to subject all regulations of elections to strict scrutiny, *see* Opening Br. at 42. As the United States Supreme Court has recognized, “[e]lection laws will invariably impose some burden upon individual voters.” *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct 2059, 119 L. Ed. 2d 245 (1992). For example, elections necessarily involve deadlines, ballot access limitations, and measures to ensure election security. “Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be

narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.*

a. The text and structure of the Washington Constitution do not support automatic strict scrutiny

Multiple provisions of the Washington Constitution address the right to vote. Plaintiffs primarily rely on article I, section 19, which provides, “[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Article VI, section 1 provides that all persons who meet certain age and residency requirements, who are not otherwise disqualified, “shall be entitled to vote at all elections.”

Importantly, the Washington Constitution also expressly delegates authority to the Legislature to regulate the voting process. Article VI, section 7 provides that “[t]he legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote” *See also*

Const. art. VI, § 6 (providing that “[t]he legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot”). This Court has recognized that one purpose of the registration law is “determining the proof which one shall present to establish the fact that he is a citizen and entitled to register and vote.” *State ex rel. Hubbard v. Lindsay*, 52 Wn.2d 397, 404, 326 P.2d 47 (1958) (quoting *State ex rel. Carroll v. Superior Ct. of Wash. for King Cnty.*, 113 Wash. 54, 57, 193 P. 226 (1920)).

The constitutional assignment to the Legislature of responsibility for voter registration and methods of voting counsels against strict scrutiny. *See Wash. State Farm Bureau Fed’n v. Reed*, 154 Wn.2d 668, 675-77, 115 P.3d 301 (2005) (employing “deferential standard of review” to Legislature’s emergency clause despite impact on “constitutionally protected right to referendum”). Here, the Legislature exercised its authority under article VI when it determined that a person’s signature is the method of proving that the person casting the

ballot is a registered voter. That determination is entitled to deference.

b. Washington precedent does not support automatic strict scrutiny

This Court’s longstanding precedent is inconsistent with the automatic application of strict scrutiny. In practice, this Court has applied strict scrutiny to laws that completely deny the right to vote, *e.g.*, *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 408, 687 P.2d 841 (1984), but more deferential review to other elections laws, even though they implicate the right to vote, *e.g.*, *Eugster*, 171 Wn.2d at 845 (rejecting article I, section 19 challenge to population inequality among districts in Court of Appeals elections).

This Court has long recognized that “‘elections and voters may . . . be regulated[.]’” *Foster*, 102 Wn.2d at 408 (quoting *State v. Wilson*, 137 Wash. 125, 133, 241 P. 970 (1925)). “It is not within the power of the Legislature to destroy the franchise, but it may control and regulate the ballot, so long as the right is

not destroyed or made so inconvenient that it is impossible to exercise it.” *State ex rel. Shepard*, 60 Wash. at 372. This Court reiterated that point in *Eugster*, distinguishing between article I, section 19’s prohibition on the “complete denial of the right to vote to a group of affected citizens” and situations in which no voter is completely “shut out” and “every Washington voter has the opportunity to vote” 171 Wn.2d at 845.

This Court has decided multiple election law cases implicating the right to vote without applying strict scrutiny. In *State ex rel. Carroll*, this Court addressed, under article VI, sections 6 and 7, the constitutionality of a voter registration statute requiring documentation from persons born outside the United States, and this Court did not apply strict scrutiny. 113 Wash. at 57-63. In *State ex rel. Shepard*, 60 Wash. at 370, this Court rejected a constitutional challenge under article VI, section 6 to a ballot access law (limiting voters’ choices), without applying strict scrutiny. And the Court of Appeals has held that article I, section 19 is not implicated by laws creating residency

districts of unequal sizes. *Carlson v. San Juan County*, 183 Wn. App. 354, 374-75, 333 P.3d 511 (2014).

While there are no directly analogous cases involving article I, section 19 challenges to verification of a voter's identity, the absence of such cases is itself instructive. Washington law has required identity verification to cast an absentee ballot since at least 1921. *E.g.*, Laws of 1921, 1st Ex. Sess., ch. 143, § 3. For the past century, there has been no serious challenge to those requirements; indeed, Plaintiffs fail to identify a single case in the over 130-year history of article I, section 19 in which this Court has applied strict scrutiny to a law analogous to the signature verification requirement. “Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.” *Eugster*, 171 Wn.2d at 847 (quoting *Carrick v. Locke*, 125 Wn.2d 129, 136, 882 P.2d 173 (1994)).

The cases cited by Plaintiffs do not establish that strict scrutiny automatically applies to laws implicating the right to

vote. The cases relied on by Plaintiffs establish only that strict scrutiny *can* apply to restrictions on the right to vote, particularly laws that result in “the complete denial of the right to vote for a group of affected citizens.” *Eugster*, 171 Wn.2d at 845. In *City of Seattle v. State*, 103 Wn.2d 663, 673, 694 P.2d 641 (1985), this Court applied strict scrutiny to a law that allowed property owners to wholly “deny resident voters the opportunity to vote on annexation.” The *City of Seattle* decision relied on this Court’s earlier decision in *Foster*, which applied strict scrutiny to a statute that denied “directly and significantly affected” persons the right to vote in special purpose district elections, while also recognizing that “[t]he language of Const. art. I, § 19 is not to be interpreted literally: ‘elections and voters may . . . be regulated and properly controlled[.]’” *Foster*, 102 Wn.2d at 407 (quoting *Wilson*, 137 Wn.2d at 132-33). Plaintiffs also rely on dicta in *Madison* and *Portugal*, but both cases ultimately *rejected* strict scrutiny.

c. Automatic strict scrutiny is inconsistent with the treatment of other constitutional rights

Plaintiffs’ suggestion that statutes implicating fundamental rights always trigger strict scrutiny is incorrect. There is no dispute that voting is a fundamental right. But, under equal protection jurisprudence, strict scrutiny applies only to laws that “infringe” a fundamental right; it is not enough that a law “‘*threatens* a fundamental right.’” *Tunstall*, 141 Wn.2d at 225-26 (quoting *Tunstall*, 141 Wn.2d at 239 (Johnson, J., dissenting)). Nothing on the face of RCW 29A.40.110 infringes the right to vote. Particularly in light of the robust cure process, every voter—including voters whose signatures are challenged as part of the signature verification process—has the opportunity to cast a ballot.

Further, while this Court has held that “[f]ree speech is a fundamental right[,]” *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 536, 936 P.2d 1123 (1997), this Court does not automatically subject all speech restrictions to strict scrutiny.

Instead, the level of scrutiny depends on the context, such as whether the restriction merely regulates the “time, place, or manner” of expression, *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 127-28, 937 P.2d 154 (1997), or the nature of the forum, *e.g.*, *Sanders v. City of Seattle*, 160 Wn.2d 198, 208-11, 156 P.3d 874 (2007). *Cf. State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013) (applying balancing test in article I, section 24 firearms challenge).

One case relied on by Plaintiffs also illustrates that not all laws implicating fundamental rights are subjected to strict scrutiny. That case noted that, with respect to cases implicating the fundamental right to travel, “a certain ‘amount of impact’ on the right to travel is required before the strict scrutiny/compelling state interest test will be triggered.” *Macias v. Dep’t of Lab. & Indus.*, 100 Wn.2d 263, 273, 668 P.2d 1278 (1983) (quoting *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 256, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974)).

The right to vote is also conceptually different from other rights in a way that requires more deferential review. Most constitutional rights prohibit the government from interfering with private conduct. But the right to vote requires the government to hold an election, which requires government regulation necessarily involving line-drawing. *See State ex rel. Shepard*, 60 Wash. at 375 (recognizing that reality of elections “renders it absolutely necessary to make some regulations”). “[A]s a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)).

d. Other states do not automatically apply strict scrutiny

Plaintiffs are wrong to suggest that other states automatically apply strict scrutiny to all election regulations. The

cases cited by Plaintiff, Opening Br. at 50 n.10, establish only that those states *sometimes* apply strict scrutiny to laws implicating the right to vote. *E.g.*, *Weinschenk v. Missouri*, 203 S.W.3d 201, 215-16 (Mo. 2006) (stating that laws that do not “place a heavy burden on the right to vote” need only be “rationally related to a legitimate state interest”); *Orr v. Edgar*, 298 Ill. App. 3d 432, 437-38, 698 N.E.2d 560 (1998) (distinguishing between laws “infring[ing] upon the right to vote,” which are subject to strict scrutiny, and laws regulating time, place, and manner, which are subject to rational basis review).

Secretary Hobbs agrees that strict scrutiny has a role to play in the elections context. Under the *Anderson-Burdick* framework, laws imposing a severe burden are subject to strict scrutiny. *Burdick*, 504 U.S. at 434. But, contrary to Plaintiffs’ misleading suggestion, no state appellate court has held that strict scrutiny applies to *all* election regulations implicating the right to vote. Almost all states to squarely address the issue under their

state constitutions have adopted a test other than automatic strict scrutiny. *See League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 209 (Iowa 2020); *All. for Retired Ams. v. Sec’y of State*, 2020 M.E. 123, 240 A.3d 45, 52 (Me. 2020); *Chelsea Collaborative, Inc. v. Sec’y of Commonwealth*, 480 Mass. 27, 37-38, 100 N.E.3d 326 (2018).⁴

⁴ *See also, e.g., Lacy v. City & County of San Francisco*, 94 Cal. App. 5th 238, 236, 312 Cal. Rptr. 3d 391 (2023) (“The fact that voting is a fundamental right is not sufficient, on its own, to trigger heightened scrutiny.”); *Herr v. Indiana*, 212 N.E.3d 1261, 1268 (Ind. Ct. App. 2023); *State v. Arctic Village Council*, 495 P.3d 313, 321-22 (Alaska 2021); *DSCC v. Simon*, 950 N.W.2d 280, 292-94 (Minn. 2020); *League of Women Voters of Del., Inc. v. Del. Dep’t of Elections*, 250 A.3d 922, 936 (Del. Ch. 2020); *Rutgers Univ. Students Assembly v. Middlesex Cnty. Bd. of Elections*, 141 A.3d 335, 339-40 (N.J. Super. Ct. App. Div. 2016); *Milwaukee Branch of NAACP v. Walker*, 357 Wis.2d 469, 483, 851 N.W.2d 262 (2014); *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 728-29, 707 S.E.2d 67 (2011); *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E. 2d 758 (Ind. 2010); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 29, N.W.2d 444 (2007); *Puffer-Hefty Sch. Dist. No. 69 v. Du Page Reg’l Bd. of Sch. Trus. of Du Page Cnty.*, 339 Ill. App. 3d 194, 202, 789 N.E.2d 800 (2003).

e. Automatic strict scrutiny is unworkable

Applying strict scrutiny to all laws implicating the right to vote will make it impossible to administer elections. If this Court applies strict scrutiny, many longstanding election regulations face likely invalidation. For example, a deadline for returning ballots imposes a burden on the right to vote; ballots are regularly rejected for having been returned after the 8:00pm deadline or with a postmark after Election Day. CP 2702. Indeed, more ballots are rejected on this basis than based on signature verification. *Id.* An 8:01pm deadline would surely be less restrictive, as would 8:05pm or 11:59pm. And yet a deadline is necessary. Similarly, Plaintiffs cite as a virtue that voters “must sign, under penalty of perjury, a declaration on the ballot envelope affirming their eligibility to vote.” Opening Br. at 9-10. But each year, ballots are rejected because they are missing a signature. Particularly if the signature will not be verified, it is far from clear how this requirement would survive strict scrutiny. Strict scrutiny would also call into question ballot access laws

like RCW 29A.24.091 and RCW 29A.56.610, which limit who voters may cast a ballot for, laws regarding deadlines for mailing ballots to voters, RCW 29A.40.070, and more. *Cf. De La Fuente v. Wyman*, 773 F. App'x 868, 869-70 (9th Cir. 2019) (unpublished) (upholding Washington's third-party presidential candidate ballot access requirements under deferential standard). If strict scrutiny applied, it would also be difficult to explain why Washington's century-long practice of requiring in-person voting at polling places was constitutional. Voting by mail is clearly less burdensome for voters, so were Washington's elections unconstitutional for most of its history? Of course not. Automatic strict scrutiny is a poor fit for the elections context.

2. The *Anderson-Burdick* framework correctly balances the right to vote with the need to administer elections

Instead of automatically applying strict scrutiny, this Court should base the level of scrutiny on the magnitude of the burden on the right to vote. Consistent with longstanding precedent, laws that completely deny the right to vote to a group

of affected citizens would be subject to strict scrutiny. *Foster*, 102 Wn.2d at 408. But laws that simply regulate the voting process, though necessarily implicating the right to vote, would be subject to more deferential review. That is the approach that federal courts and most other states have taken by adopting the *Anderson-Burdick* framework, and this Court should adopt it as well. Federal cases would be persuasive authority, with this Court being free to depart from federal decisions on particular applications. In this way, the Washington Constitution could be more protective in particular applications of the framework.

The *Anderson-Burdick* framework involves a two-step inquiry. At the first step, courts determine the “‘character and magnitude’” of the burden. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Challenged regulations are not evaluated in isolation, but rather “in light of the state’s overall election scheme,” including alternatives that voters can use and any increased accessibility that the challenged provisions enable. *Prestia v. O’Connor*, 178 F.3d 86, 88 (2d Cir. 1999). If the

burden is “severe,” strict scrutiny applies. *Burdick*, 504 U.S. at 434. “‘The hallmark of a severe burden is exclusion or virtual exclusion’ from voting.” *Fisher v. Hargett*, 604 S.W.3d 381, 402 (Tenn. 2020) (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)). The burden of establishing a severe restriction on the right to vote is on the party challenging the law. *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 730 (9th Cir. 2015).

If the burden on the right to vote is less than severe, courts “identify and evaluate the precise interests put forward by the State as justifications[,]” weighing “the legitimacy and strength of each of those interests. *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1187 (9th Cir. 2021) (quoting *Anderson*, 460 U.S. at 789). Courts then “consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* (quoting *Anderson*, 460 U.S. at 789). The precise level of scrutiny will depend on the magnitude of the burden, but when the law “imposes only ‘reasonable, nondiscriminatory restrictions’” on

the right to vote, “‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). A *de minimis* burden need only satisfy rational basis review, *Ariz. Libertarian Party*, 798 F.3d at 732, while intermediate burdens can require more, such as a stronger interest or a tighter means-end fit.

Importantly, States may “respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986).

The *Anderson-Burdick* framework matches well with Washington’s elections jurisprudence. As discussed, this Court has applied strict scrutiny to severe burdens like complete denial of the right to vote, *e.g.*, *Foster*, 102 Wn.2d at 408, and less-searching scrutiny to other laws implicating the right to vote, *e.g.*, *State ex rel. Carroll*, 113 Wash. at 57-63.

The *Anderson-Burdick* framework has many advantages. First, it intuitively demands greater justification for more burdensome regulations. Second, there is an established body of law from federal courts and other states that can serve as persuasive authority in Washington. Third, it is versatile and can be used in multiple contexts (such as voter registration, candidate ballot access, and limitations on the initiative process) and to address multiple constitutional claims. *E.g.*, *Anderson*, 460 U.S. at 787-88 (freedom of association and substantive due process right to vote); *Ariz. Democratic Party*, 18 F.4th at 1195 (procedural due process); *Short v. Brown*, 893 F.3d 671, 675-76 (9th Cir. 2018) (equal protection).

Contrary to Plaintiffs' suggestion, the *Anderson-Burdick* framework provides strong protections against unwarranted burdens. Courts do not hesitate to invalidate laws that impose unjustified burdens. *E.g.*, *Anderson*, 460 U.S. at 806 (invalidating early registration deadline for minor party presidential candidates); *Esshaki v. Whitmer*, 813 Fed. Appx.

170, 171-72 (6th Cir. 2020) (unpublished) (upholding, in as-applied challenge, injunction against strict application of signature-gathering requirements during pandemic); *Priorities USA v. Missouri*, 591 S.W.3d 448, 451 (Mo. 2020) (invalidating requirement that would-be voters sign “misleading and contradictory” affidavit). And decisions from other courts would be only persuasive—not binding—authority.

Plaintiffs’ other objections to *Anderson-Burdick* are also unpersuasive. With respect to concerns about inconsistent outcomes, Plaintiffs argue at too high a level of generality. The burden of signature matching depends on the specific requirements of the state law. For example, the Florida law that the Eleventh Circuit described as an “at least serious burden” had a cure deadline that fell *before* many voters were notified of issues, making it impossible for many voters to cure signature issues, and also failed to establish statewide standards or training requirements. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319-21 (11th Cir. 2019). The burden is obviously less

substantial in states with training requirements, statewide standards, and a meaningful opportunity to cure, like Washington.

The *Anderson-Burdick* framework is uniquely suited for evaluating challenges to election laws and is consistent with this Court's precedent. The superior court correctly adopted it.

C. Signature Verification Complies with Article I, Section 19

Washington's signature verification law involves only a minimal burden. And that minimal burden is more than justified by the State's compelling interests in election security, public confidence in elections, and protecting the rights of voters.

1. Washington's signature verification law imposes a *de minimis* burden

On its face, Washington's signature verification law imposes almost no burden for voters. This is a facial challenge, so the relevant degree of burden is the lowest that the statute could possibly impose; not the burden as the statute may have been applied. *See Fraser*, 199 Wn.2d at 482. And here, that

burden amounts to the requirement that “[p]ersonnel shall verify that the voter’s signature on the ballot declaration is the same as the signature of that voter in the registration files of the county,” RCW 29A.40.110(3). *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 699 (M.D. Tenn. 2020) (“Substantively, that’s really it: they must provide a signature and suffer it to be compared with a former signature.”). On the face of the statute, signature verification does not require conclusive evidence of a match; indeed, as implemented, the regulations now presume a match and require “multiple, significant, and obvious discrepancies” to challenge a signature. CP 1632; App. at 4. Moreover, a voter’s signature does not even have to be their name; it could be a “distinctive mark or symbol.” WAC 434-250-120(1)(b).

For those voters whose ballots are not immediately accepted, the statutory cure process requires multiple forms of notice, ESSB 5890, and provides voters up to 20 days after a general election to return a signature cure form,

RCW 29A.60.190, one of the longest periods in the nation. National Conference of State Legislatures, *Table 15: States With Signature Cure Processes*, <https://www.ncsl.org/elections-and-campaigns/table-15-states-with-signature-cure-processes> (last visited Mar. 26, 2024). The statutory scheme also allows voters whose signatures are challenged to cast a provisional ballot in person with photo identification, provided the voter returned the ballot sufficiently in advance to receive notice of a signature issue before Election Day. RCW 29A.40.160(9).

Past implementation of signature verification demonstrates the minimal burden, as almost 99 percent of ballots that are returned on time with a signature are counted without any other action from the voter. *See* CP 2702. In the rare instances that signature matching issues have arisen, many voters have been able to take advantage of Washington’s simple cure process and have their ballots counted. *See, e.g.*, CP 1931. While some voters have chosen not to return a cure form after the election, CP 884, 939-40, 1927, or counties have reportedly not

provided the statutorily required notice, *E.g.*, CP 907, 911, 915, those facts do not establish a burden imposed on the *face* of the statute.

Further, application of the statute will result in even *less* of a burden under the Secretary's new regulations, which establish a higher bar for election officials to challenge signatures and make curing a signature exceptionally easy. *Supra* IV(C).

In context, signature verification actually *reduces* burdens on voters in several ways. First, it reduces the burden of identity verification as compared with any other currently available means, such as photo identification, appearing in-person, or providing a fingerprint or biometric information (as suggested by Plaintiffs' expert, CP 1525, 1529-34). CP 1785-90. Second, because Washington uses signature verification to verify voters' identities, it is able to allow voters to easily obtain replacement ballots on request, CP 1557, 1779, a feature voters have used nearly 800,000 times since August 2019. CP 2702. By

comparison, over that same time period, only 125,010 ballots have been rejected for mismatched signatures. *Id.* Signature verification also reduces burdens by allowing automatic ballot forwarding, no restrictions on submitting ballots on behalf of others, automatic re-issuance of ballots when a voter re-registers in a new jurisdiction, and universal vote-by-mail itself. CP 1553-57, 1773-85. With signature verification, there is little risk associated with issuing replacement ballots. Without signature verification, election officials would have to significantly restrict access to ballots.

Understood in context, signature verification results in an overall *reduction* in voting-related burdens. The facial burden of the statute is, at most, *de minimis*.

2. The State's interests are exceedingly weighty

The signature verification requirement advances at least three compelling governmental interests: it ensures the integrity of the election system as a whole; it protects the voting rights of individual voters; and it upholds public confidence in elections.

Plaintiffs concede these interests are compelling, Opening Br. at 69-70, and fail to establish, for purposes of this facial challenge, that signature verification cannot advance those interests. On the contrary, the statute clearly does advance each of the interests.

a. Signature verification protects election security and protects voters

Signature verification protects the security of the election system, and it is the only method currently available in Washington to verify that a ballot was cast by a registered voter. Without a verification process, an ineligible person could cast a voter's ballot. Similarly, a voter could cast both their own and another voter's ballot. And without verification, foreign actors could easily cause chaos in Washington elections.

A vote-by-mail system makes voting easily accessible but introduces new challenges. CP 1773-82. It is undisputed that obtaining another person's ballot is easier in universal vote-by-mail states, like Washington, than in states that require voting in-person. Automatically mailing ballots to all registered voters creates inherent risks that some ballots will be incorrectly

delivered to third parties, like when the voter moves shortly before an election or mail is misdelivered. CP 1940-41. Ballots can also be stolen from mailboxes, or a voter's household member can misappropriate a voter's ballot. *See* CP 2046. Easy access to replacement ballots also creates risks. A third party could misuse the online system and print a replacement ballot for a voter, or a hostile foreign government could engage in a coordinated campaign and print replacement ballots for thousands of voters. CP 1779-80.

Currently, the risks associated with universal mail-in voting and easy access to replacement ballots are fully addressed by signature verification. CP 1557. Even if a third party obtains a voter's ballot, the third party cannot *cast* the voter's ballot because the signature will not match. *See* CP 1733. Unrebutted testimony from county election officials establishes that signature verification routinely prevents invalid ballots from being counted. CP 1419, 1810-11, 1819-20, 1921-22, 1936-38,

2045-90, 2632-33, 3023-47. None of Plaintiffs' experts disputed the county officials' conclusions.

Plaintiffs' argument that signature verification is ineffective ignores this evidence and instead focuses on the absence of criminal prosecutions or convictions. Opening Br. at 3, 19, 30, 31, 72, 80. But that is not material. *See* CP 1784 ("No one would accept convictions for a crime as an adequate, reliable or valid measure of the incidence of crime."). The relevant inquiry is whether signature verification advances the State's interest in preventing the counting of illegitimate ballots. Undisputed evidence demonstrates that it does. This explains why county election officials describe signature verification as "the best," "only," and "essential" tool for preventing invalid ballots from being counted. CP 1562, 1811, 1821, 1922, 1939.

Signature verification is supported by the judgment and experience of other vote-by-mail states. All states that have fully implemented universal vote-by-mail use signature verification. Cal. Elec. Code § 3019(a)(1); Colo. Rev. Stat. § 1-7.5-

107.3(1)(a); Haw. Rev. Stat. § 11-106; Nev. Rev. Stat. § 293.269927; Utah Code § 20A-3a-401; Or. Rev. Stat. § 254.470(11).

Plaintiffs' reliance on Connecticut, Delaware, Maryland, New Mexico, Pennsylvania, Vermont, and Wyoming is not persuasive. Most of these states limit absentee ballots to voters who opt-in, often requiring various forms of identity verification just to get an absentee ballot and a new application each year. Conn. Gen. Stat. §§ 9-135(a), 9-140e; Del. Code tit. 15, §§ 5502, 5503; Md. Code Ann., Elec. Law § 9-305; N.M. Stat. § 1-6-4; Wyo. Stat. Ann. §§ 22-9-104, 105. Pennsylvania requires voters to prove who they are on the absentee ballot application with signature verification. 25 Pa. Cons. Stat. §§ 3150.12, 3150.12b(a).

Vermont is unique. Vermont is not a fully universal vote-by-mail state; it uses universal vote-by-mail only for general elections. Vt. Stat. Ann. tit. 17, § 2537a. For all other elections, voters must apply each year for an absentee ballot. *Id.* § 2531-32.

While Vermont does not use signature verification for absentee ballots, it also limits access to replacement ballots, requiring an application accompanied by a “sworn statement.” *Id.* § 2532(e). And voters must cure a missing signature no later than Election Day. *Id.* § 2547(d)(1)(C). And Vermont only started providing vote-by-mail ballots in general elections in 2020, in response to the COVID-19 pandemic. Vermont is a much smaller state than Washington, and while there is no indication to date that its experiment with verification-less vote-by-mail has materially undermined its election system, that does not mean that Washington is constitutionally compelled to join it.

Signature verification also *deters* attempted fraud, CP 1785, and protects against systemic vulnerabilities. Washington works with the Department of Homeland Security to protect its election systems from these vulnerabilities, whether or not they have been successfully exploited in the past. CP 1557-58. Washington, for example, has not stopped protecting its elections systems from hackers simply because

there has never been a documented instance of a foreign government successfully changing a vote electronically. CP 1793. The Legislature and the People should not be required to “throw[] away [their] umbrella in a rainstorm because [they] are not getting wet.” *Shelby County v. Holder*, 570 U.S. 529, 590, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) (Ginsburg, J., dissenting).

Plaintiffs also incorrectly argue that there are alternative safeguards. Opening Br. at 72. While there are safeguards against *other* risks to elections, none are substitutes for signature verification. CP 1790-94. No amount of voter list maintenance, post-election fraud detection, or post-election audits will prevent invalid ballots from being counted. *Id.* And while “ballot tracking and notifications so voters can be alerted to suspicious activity,” Opening Br. at 72, are a valuable part of the system, voters would have to notify election officials immediately to prevent the irreversible introduction of an invalid ballot into the counting stream, *see, e.g.*, CP 1919, 1791. And hostile actors are

most likely to target the ballots of infrequent voters to avoid detection. CP 1792. Only signature verification reliably prevents the counting of invalid ballots.

b. Signature verification advances public confidence in elections

Signature verification also protects public confidence in the election system. “Building confidence in U.S. elections is central to our nation’s democracy.” *Comm’n on Fed. Election Reform* at iv. “The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) (quoting *Comm’n on Fed. Election Reform* at 18); CP 1772.

Signature verification is essential to ensuring public confidence in the vote-by-mail system. Public confidence “is particularly important in the current political environment. In recent years, the American political system has been challenged by political actors deliberately calling into question the processes

by which elections are conducted, often with no or little basis in fact.” CP 1773. In 2020, following COVID-related changes to voting procedures in a number of states and disinformation campaigns, public confidence in national vote-counting decreased significantly. CP 1795-96. When voters lose confidence in elections, they are less likely to vote and can have “decreased faith in public institutions.” CP 1773.

Signature verification provides assurance that invalid ballots will be rejected. Election officials have relied on signature verification to counter election misinformation in public statements. *E.g.*, Melissa Santos, *A Q&A with Kim Wyman, departing WA secretary of State*, Crosscut (Nov. 19, 2021) <https://crosscut.com/politics/2021/11/qa-kim-wyman-departing-wa-secretary-state> (the more counties highlight signature verification and other security measures, the more they can “inspire[] confidence in those local elections”); *see also* Isaac Chotiner, *How Washington Holds Its Elections By Mail*, The New Yorker (Sept. 8, 2020), <https://www.newyorker.com/news>

[/q-and-a/how-washington-state-holds-its-elections-by-mail](#)

(Washington has been able to “inspire confidence” through “control measures, like checking every signature on every return envelope”).

Election officials have also relied on signature verification when testifying before Congress. Responding to a question about whether vote-by-mail “opens the door to more fraud,” the California Secretary of State invoked “[t]he all-important signature verification.” *Voting Safely in a Pandemic: Hearing Before the H. Comm. on House Administration*, 116th Cong. 57-58 (2020), <https://www.govinfo.gov/content/pkg/CHRG-116hhrg42740/pdf/CHRG-116hhrg42740.pdf>. King County Director of Elections Julie Wise similarly testified to Congress that signature verification “is how you ensure that the voter voted their ballot and no one else did.” *Id.* at 64.

In the face of this, Plaintiffs insist that the State must come forward with studies and data to prove that the Legislature’s decision to require signature verification benefits public

confidence. Opening Br. at 73-76. It is true that, in a case in which the Court looks beyond the face of the statute, the State needs to “put forward” specific interests and explain the manner in which the regulation serves them, *Ariz. Democratic Party*, 18 F.4th at 1187, but where (as here) the burden is minimal, the State need not provide “elaborate, empirical verification of the weightiness of the State’s asserted justifications,” *Timmons v. Twin Cities New Party*, 520 U.S. 351, 364, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997); *Munro*, 479 U.S. at 195 (recognizing that states “should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively”). Indeed, requiring studies makes little sense where Washington has relied on signature verification ever since it began accepting votes by mail. *See Burson v. Freeman*, 504 U.S. 191, 208, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) (“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.”).

In any event, Plaintiffs ignore the record. The State's expert, Dr. Stein, cited and relied on studies which "show that voters respond with greater confidence in election outcomes when their respective states enact laws designed to prevent voter fraud." CP 1797; *see also* CP 1925, 1927-28, 1931 (voter declarations expressing concern about ballots without verification). A poll in Florida showed that a majority of voters there thought that Florida's signature verification law was "just right" (26 percent thought it was "not strict enough"). CP 1786. This evidence is not disputed; Plaintiffs' experts acknowledged that they did not address signature verification's impacts on voter confidence. *See* CP 1473 (Dr. Palmer), 1490-91, 1498 (Dr. Herron), 1533 (Dr. Mohammed).

Plaintiffs assert that signature verification can erode voter confidence in elections. Opening Br. at 75-76. But the evidence Plaintiffs cite does not support their assertion. It is true that the record shows a correlation between voters who do not cure their ballots and a decreased likelihood of voting in future elections,

CP 346, 1667, 1717, but that does not establish that the electorate was less confident in the election process. More specific evidence in the record demonstrates that some voters relied on challenges to their signatures as a source of confidence in election results. CP 1927-28 (“I have relatives who do not support voting by mail (as I do). After my signature was challenged, I pointed them to the challenge as a sign that the system works as it should.”). And the qualified boilerplate language in a handful of declarations that Plaintiffs rely on, Opening Br. at 76, does not directly address confidence.

More fundamentally, in this facial challenge, Plaintiffs must establish that there is no signature verification system that could advance the State’s interest in public confidence in the elections process. *Portugal*, 1 Wn.3d at 647. They cannot do so.

3. The State’s interests justify the minimal burden imposed by signature verification

Each of the State’s interests is sufficiently strong to outweigh the minimal burden of signature verification. For

purposes of this facial challenge, the relevant burden is the minimum possible burden required by the statute. As explained, that burden is *de minimis* and easily outweighed by the concededly compelling interests put forward by the State.⁵

This conclusion is consistent with every other decision by other courts. The State is not aware of—and Plaintiffs have not cited—a single case in which a court has invalidated a signature verification requirement that contains a meaningful opportunity to cure. In most cases, courts have upheld signature verification requirements. *Richardson v. Texas Sec’y of State*, 978 F.3d 220, 237 (5th Cir. 2020); *League of Women Voters of Arkansas v. Thurston*, No. 5:20-cv-05174, 2023 WL 6446015, at *16 (W.D. Ark. Sept. 29, 2023); *Memphis A. Phillip Randolph Inst.*, 482 F. Supp. 3d at 701; *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 737 (S.D. Ohio 2020); *All. for Retired Ams.*,

⁵ While strict scrutiny does not apply, the State’s compelling interests would also justify the law on this facial challenge. There is currently no less restrictive means of verifying identity; Plaintiffs do not even suggest one.

240 A.3d at 56 (Me. 2020). In three other cases, the problem was the absence of an opportunity to cure signature matching issues, which is not at issue here. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1321; *Self Advocacy Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1053-54 (D.N.D. 2020); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016).

Signature verification is perfectly consistent with article I, section 19. Plaintiffs cannot establish that there is no set of circumstances in which RCW 29A.40.110 can be constitutionally applied, and the Secretary should be granted summary judgment.

D. Secretary Hobbs is Entitled to Summary Judgment on Plaintiffs' Privileges or Immunities Claim

Plaintiffs cannot satisfy their burden of establishing a violation of the privileges or immunities clause in this facial challenge. The superior court appears to have erroneously applied the *Anderson-Burdick* framework to this claim despite

the fact that this Court has adopted a distinctive framework for article I, section 12 challenges. CP 2926.

Under this Court’s precedent, the privileges or immunities clause proscribes only laws that grant a “citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms *shall not equally belong* to all citizens, or corporations.” Const. art. I, § 12 (emphasis added). The clause prohibits only legal classifications and regulatory exemptions that benefit certain citizens at the expense of others. *Am. Legion Post # 149 v. Dep’t of Health*, 164 Wn.2d 570, 607, 192 P.3d 306 (2008). Nothing on the face of RCW 29A.40.110 grants a privilege or immunity to a class of voters.

This Court’s decision in *Portugal* is dispositive here. In *Portugal*, this Court rejected a party’s facial challenge to the Washington Voting Rights Act. While recognizing that heightened scrutiny might apply “in an *as-applied* challenge,” for purposes of the facial challenge, the law “simply does not implicate article I, section 12,” because the statute, “on its face,”

did “not confer any privilege to any class of citizens.” *Portugal*, 1 Wn.3d at 675. Similarly, in *Madison*, this Court rejected a challenge to the statutory requirement that felons repay all of their legal financial obligations before regaining the right to vote as granting a privilege to those with financial resources. *Madison v. State*, 161 Wn.2d 85, 97, 163 P.3d 757 (2007). Because the “same standard is applied evenly to all felons seeking restoration of their voting rights,” the statutory scheme did not violate the privileges or immunities clause, even if such conditions fall harder on felons without financial resources. *Id.*

Like the statutes in *Portugal* and *Madison*, the signature verification statute, on its face, creates no classifications of any kind. It applies the same standards on the same terms to all Washington voters.⁶ RCW 29A.40.110(3). Election officials must “examine . . . [the] signature on the declaration before

⁶ There is one exception, though Plaintiffs sensibly do not challenge it. A voter who is “unable to sign their name” may verify their ballot by witness attestation. WAC 434-250-120(1)(b)(i).

processing the ballot” and “verify that the voter’s signature on the ballot declaration is the same as the signature of that voter in the registration files of the county.” *Id.* Because there is no classification on the face of the statute, the signature verification law “simply does not implicate article I, section 12.” *Portugal*, 1 Wn.3d 657.

Plaintiffs’ appeal to “consistent penmanship,” Opening Br. at 1, 48, does not lead to a different result.⁷ Simply put, RCW 29A.40.110(3) does not require “penmanship,” much less “consistent penmanship.” For purposes of ballot declarations, a “signature” can be any “distinctive mark or symbol”; it need not use letters of any kind. And under the Secretary’s new regulations, a voter can cure a signature challenge without even reproducing that mark or symbol. CP 1633-34; App. at 5-6.

⁷ Plaintiffs do not claim that signature verification violates article VI, section 1, which sets forth voter qualifications. CP 103-09.

Further, RCW 29A.40.160 provides the alternative of appearing in person and presenting identification.

Because RCW 29A.40.110(3) does not implicate article I, section 12 for purposes of this facial challenge, the Secretary is entitled to summary judgment.

E. Secretary Hobbs is Entitled to Summary Judgment on Plaintiffs’ Due Process Claim

Signature verification is also consistent with the due process clause of the Washington Constitution, article I, § 3.

“[A]rticle I, section 3 substantive due process claims are subject to the same standards as federal substantive due process claims.”

Yim v. City of Seattle, 194 Wn.2d 682, 692, 451 P.3d 694 (2019).

Under the federal constitution, due process claims in the voting context are generally analyzed under the *Anderson-Burdick* framework. *E.g.*, *Ariz. Dem. Party*, 18 F.4th at 1181 (“[T]he *Anderson/Burdick* framework applies equally to [p]laintiffs’ procedural due process claim[.]”); *Richardson*, 978 F.3d at 233-34 (“[T]he *Anderson/Burdick* framework provides the

appropriate test for the plaintiffs’ due process claims.”). For the reasons described above, Washington’s use of signature verification readily survives review under the *Anderson/Burdick* framework. *Supra* § V(C). Secretary Hobbs is entitled to summary judgment on this claim.

VI. CONCLUSION

For the reasons stated above, this Court should reverse the superior court’s denial of Secretary Hobbs’s motion for summary judgment and remand for entry of summary judgment in favor of Secretary Hobbs on each of Plaintiffs’ constitutional claims.

This document contains 11,972 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 27th day of March 2024.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be served, via electronic mail, on the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of March 2024, at
Olympia, Washington.

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APPENDIX



RULE-MAKING ORDER PERMANENT RULE ONLY

CR-103P (December 2017)
(Implements RCW 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: March 08, 2024

TIME: 11:01 AM

WSR 24-07-018

Agency: Office of the Secretary of State

Effective date of rule:

Permanent Rules

- ☐ 31 days after filing.
- ☒ Other (specify) May 4, 2024 (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- ☐ Yes ☒ No If Yes, explain:

Purpose: These proposed rules expand and enumerate the requirements to verify a provided signature on a ballot declaration matches the signature provided on a voter registration record and updates the signature cure process.

Citation of rules affected by this order:

New: WAC 434-261-051, WAC 434-261-052, WAC 434-261-053
Repealed: WAC 434-261-050
Amended: WAC 434-262-032, WAC 434-250-120, WAC 434-262-031, WAC 434-324-111, WAC 434-264-010
Suspended:

Statutory authority for adoption: RCW 29A.04.611

Other authority:

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 24-03-153 on January 23, 2024 (date).
Describe any changes other than editing from proposed to adopted version:

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Web site:
Other:

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

| | | | | | | |
|----------------------------------|-----|-----|---------|-----|----------|-----|
| Federal statute: | New | ___ | Amended | ___ | Repealed | ___ |
| Federal rules or standards: | New | ___ | Amended | ___ | Repealed | ___ |
| Recently enacted state statutes: | New | ___ | Amended | ___ | Repealed | ___ |

The number of sections adopted at the request of a nongovernmental entity:

| | | | | | |
|-----|-----|---------|-----|----------|-----|
| New | ___ | Amended | ___ | Repealed | ___ |
|-----|-----|---------|-----|----------|-----|

The number of sections adopted on the agency's own initiative:

| | | | | | |
|-----|----------|---------|----------|----------|----------|
| New | <u>3</u> | Amended | <u>5</u> | Repealed | <u>1</u> |
|-----|----------|---------|----------|----------|----------|

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

| | | | | | |
|-----|----------|---------|----------|----------|----------|
| New | <u>3</u> | Amended | <u>5</u> | Repealed | <u>1</u> |
|-----|----------|---------|----------|----------|----------|

The number of sections adopted using:

| | | | | | | |
|--------------------------------|-----|----------|---------|----------|----------|----------|
| Negotiated rule making: | New | <u>3</u> | Amended | <u>5</u> | Repealed | <u>1</u> |
| Pilot rule making: | New | ___ | Amended | ___ | Repealed | ___ |
| Other alternative rule making: | New | ___ | Amended | ___ | Repealed | ___ |

Date Adopted: March 8, 2024

Name: Amanda Doyle

Title: Secretary of State Chief of Staff

Signature:



NEW SECTION

WAC 434-261-051 Standards for verifying ballot declaration signatures. (1) This regulation, together with WAC 434-261-052 and 434-261-053, describes the process for verifying that a signature on the ballot declaration is the voter's registration signature.

(2) At each stage of the signature verification process, there is a presumption that the signature on the ballot declaration is the voter's signature.

(3) When reviewing ballot declaration signatures, staff assigned to verify signatures shall consider the following criteria:

(a) Agreement in style and general appearance, including basic construction, skill, alignment, fluency, and a general uniformity and consistency between signatures;

(b) Agreement in the proportions of individual letters, height to width, and heights of the upper to lower case letters;

(c) Irregular spacing, slants, or sizes of letters that are duplicated in both signatures;

(d) Agreement of the most distinctive, unusual traits of the signatures;

(e) The ballot declaration signature is in the same format as the voter registration signatures, such as printed, in cursive, or another form;

(f) Agreement of individual characteristics, such as how "t's" are crossed, "i's" are dotted, or loops are made on letters;

(g) Agreement of initial strokes and connecting strokes of the signature;

(h) Agreement of similar endings, such as an abrupt end, a long tail, or loop back around;

(i) Agreement of presence or absence of pen lifts;

(j) Agreement in the way names are spelled; and

(k) After considering the general traits, agreement of the most distinctive, unusual traits of the signatures.

(4) When reviewing ballot declaration signatures that appear to contain discrepancies, staff verifying signatures should accept signatures if the appearance of a discrepancy can reasonably be explained by the following:

(a) A shaky signature that could be health-related or the result of aging;

(b) The voter's use of a variation of the voter's full name, such as the use of initials, including or omitting a middle name, or substituting a middle name for a first name;

(c) A change in the voter's signature over time;

(d) A signature written in haste;

(e) A signature in the voter's registration file that was written with a stylus pen or other electronic signature tool, which may result in a thick or fuzzy quality;

(f) A writing surface that was hard, soft, uneven, or unstable;

(g) The voter has a limited history of fewer than three ballots returned; and

(h) Any other reasonable factor.

(5) An agent, including someone acting under a power of attorney, cannot sign a ballot declaration on behalf of their principal.

(6) If a voter inadvertently signs another voter's ballot declaration, but elections personnel can identify the correct voter and

verify that voter's signature, the signature and the ballot must be accepted for the voter that signed the ballot declaration.

(7) All staff verifying ballot declaration signatures must receive training on these signature verification standards before verifying ballot declaration signatures. They must attend the training at least once every two years. This applies to, but is not necessarily limited to, individuals performing the initial review, secondary review, and review of signatures as part of the cure process. Members of the county canvassing board are required to receive training except as exempted by RCW 29A.04.540.

(8) The canvassing board may designate the county auditor or the county auditor's staff to perform the signature verification function. All personnel assigned to the duty of signature verification shall subscribe to an oath administered by the county auditor regarding the discharge of their duties.

(9) The signature verification process shall be open to the public, subject to reasonable procedures adopted and promulgated by the canvassing board to ensure that order is maintained and to safeguard the integrity of the process.

NEW SECTION

WAC 434-261-052 Initial and secondary review of ballot declaration signatures. (1) When conducting an initial review of a ballot declaration signature, the county auditor must accept the signature under the following conditions:

(a) The county auditor must accept the signature unless, considering the criteria in WAC 434-261-051 (3) and (4), the signature on the ballot envelope has multiple, significant, and obvious discrepancies from all signatures in the voter's registration record; or

(b) If the voter is unable to sign their name as they are registered to vote, the signature must be accepted so long as the voter has made a mark, symbol, or signature stamp, and the ballot declaration includes two witness signatures.

(2) If the signature is not accepted following the initial review, the ballot declaration signature must be referred to a second review.

(a) A different person who has received signature verification training under WAC 434-261-051(7) must conduct the second review of the signature.

(b) If, considering the criteria in WAC 434-261-051 (3) and (4), the second reviewer determines that there are multiple, significant, obvious discrepancies from all signatures in the voter's registration record, the voter must be notified of the process to cure the signature;

(3) The county auditor may conduct additional reviews of ballot declaration signatures that have not yet been accepted. For example, if the county auditor becomes aware of reasonable explanations that should be considered under WAC 434-261-051(4), an additional review may be appropriate.

(4) Even if the ballot declaration signature appears to match the signature in the voter registration record, and notwithstanding any other provision, a ballot may be referred to the canvassing board if there is clear, objective evidence, beyond the signature itself, that

a ballot declaration signature is fraudulent. This provision is intended to apply only very rarely, such as in instances of confessed forgery or similar circumstances. A person verifying signatures may refer a ballot declaration signature to the county auditor, and, if satisfied that the standard is met, the county auditor may refer the ballot to the canvassing board. The county auditor and the canvassing board may refer the matter to law enforcement.

(5) The county auditor may conduct the initial signature review by using an automated verification system approved by the secretary of state. If a signature is not accepted by the automated verification system, the county auditor must manually use the process described in this section.

(6) If two ballots are returned in one return envelope, ballots may be accepted in the following manner. In all other circumstances, the ballots must be referred to the canvassing board for rejection.

(a) If there is only one valid signature on the ballot declaration and the races and measures voted are the same on both ballots, the races and measures voted the same on both ballots may be counted once;

(b) If there are two valid signatures on the ballot declaration, both ballots may be counted in their entirety; or

(c) If there is one valid signature on the ballot declaration and the envelope contains one voted ballot and one blank ballot without marked votes, the voted ballot may be counted in its entirety.

NEW SECTION

WAC 434-261-053 Ballot declaration signature cure process. (1)

If a ballot declaration signature is not accepted following secondary review, the voter used a mark or signature stamp but did not include witnesses, or if the ballot declaration was not signed, the ballot cannot be counted until the voter cures their signature. The voter identified on the ballot return envelope must be notified as soon as practicable, but no later than three business days following receipt, of the procedure for curing their signature by:

(a) A notice letter package sent by first class mail with a signature update form or a missing signature form. The forms must include the ballot declaration required by WAC 434-230-015. The notice letter package must also include a prepaid envelope in which to return a completed signature update or missing signature form. The notice letter must:

(i) Be in substantially the same form as the sample notice letter created by the secretary of state; and

(ii) Be available in all languages required by the Department of Justice.

(b) Phone (if the voter has provided a phone number);

(c) Text message (if the voter has opted into text message notifications); and

(d) Email (if the voter has provided an email address).

(2) The voter may cure their ballot signature no later than the close of business the day before the election is certified.

(3) A voter may cure a missing signature by:

(a) Returning a signed missing signature form. The signature on the form must be compared to the voter's signature in the voter registration record using the process described in WAC 434-261-052; or

(b) Appearing in person and signing the ballot declaration. The signature on the ballot declaration must be compared to the voter's signature in the voter registration record using the process described in WAC 434-261-052.

(4) A voter using a mark may cure a failure to have two witnesses attest to the ballot declaration signature by returning a missing signature form. The form must contain the voter's mark and the signatures of two witnesses.

(5) A voter may cure a nonmatching signature by either:

(a) Returning a signature update form or appearing in person and signing a new registration form.

(i) The signature on the form must be compared to the signature on the ballot declaration using the process described in WAC 434-261-052;

(ii) The signature on the form is saved as a new signature in the voter registration record for the current and future elections; or

(b) Providing valid secondary identity verification. The county auditor must verify the secondary identification is for the voter who signed the ballot declaration. Secondary identification may be:

(i) The last four digits of the voter's Social Security number or the voter's full driver's license number or state identity card number;

(ii) Photo identification, valid enrollment card of a federally recognized Indian tribe in Washington state, copy of a current utility bill or current bank statement, copy of a current government check, copy of a current paycheck, or a government document, other than a voter registration card, that shows both the name and address of the voter; or

(iii) A multifactor authentication code, from a system approved by the secretary of state, the county auditor sent to the voter's phone number or email address that has previously been provided by the voter.

If a voter successfully provides secondary identity verification and confirms, orally or in writing, that the voter in fact returned the ballot, the ballot must be accepted unless two persons who have received signature verification training under WAC 434-261-051(7) conclude beyond a reasonable doubt that a person other than the voter signed the ballot declaration. This conclusion may be based on evidence including, but not limited to, other ballots in the same election bearing the same signature.

(6) If the registered voter asserts that the signature on the ballot declaration is not the voter's signature prior to 8:00 p.m. on election day, the voter may vote a provisional ballot.

(7) If the voter does not successfully cure their signature by close of business the day before certification of the election, the ballot must be sent to the canvassing board.

(8) A record must be kept of the process used to cure ballot envelopes with missing and mismatched signatures. The record must contain the date on which each voter was contacted, the notice was mailed, and the date on which each voter subsequently submitted a signature to cure the missing or mismatched signature.

WAC 434-262-032 Provisional ballots—Disposition. Upon receipt of the provisional ballot, including provisional ballots from other counties or states, the county auditor must investigate the circumstances surrounding the provisional ballot prior to certification of the primary or election. A voted ballot received from an unregistered voter, other than a service, overseas, or conditionally registered voter, is considered a provisional ballot. A provisional ballot cannot be counted unless the voter's name, signature and the date of birth, if available, matches a voter registration record. Once the provisional ballot has been investigated, disposition of the ballot is as follows:

(1) If the voter was previously registered (~~((and))~~), their voter registration was later canceled, and the auditor determines that the cancellation was in error, the voter's registration must be immediately restored and the provisional ballot counted.

(2) If the voter was previously registered (~~((and))~~), their voter registration was later canceled, and the auditor determines that the cancellation was not in error, register the voter and count the ballot.

(3) If a registered voter has voted a ballot for a previous address, the auditor must ensure that only those votes for the positions and measures for which the voter was eligible to vote are counted.

(4) If the voter is registered in another county, the auditor shall immediately forward the ballot to the elections official for the jurisdiction in which the voter is registered. The provisional ballot must be forwarded within seven calendar days after a primary or special election and (~~((fourteen))~~) 14 calendar days after a general election, and as soon as possible if past that date.

(5) If the voter voted a regular ballot and a provisional ballot, the provisional ballot is not counted if the regular ballot has already been counted. The regular ballot is not counted if the provisional ballot has already been counted.

(6) If the voter voted a provisional ballot because (~~((he or she))~~) the voter failed to produce identification at a voting center, the ballot is counted if the signature on the envelope matches the signature in the voter registration record, using the standards and processes set forth in WAC 434-261-051 through 434-261-053.

(7) If the voter voted a provisional ballot because the voter is provisionally registered and the voter's registration record is still flagged as requiring verification of identity, the provisional ballot is not counted.

(8) Provisional ballots voted for reasons not covered by this section or state statute must be determined by the county canvassing board.

WAC 434-250-120 Verification of the signature and return date.

(1) A ballot shall be counted if:

(a) The voter has not already cast a ballot that has been accepted in the election;

(b) The voter signed the ballot declaration (~~((is signed))~~) with a valid signature (~~((. A valid signature may be the voter's name or a distinctive mark or symbol signed by the voter:~~

~~((i) If the voter is unable to sign their name, the voter may make a mark or symbol with two witnesses' signatures. A signature stamp accompanied by two witness signatures is an acceptable mark;~~

~~((ii) A power of attorney cannot be used as a signature for a voter.~~

~~((c) The signature has been verified by the county of current registration pursuant to WAC 434-379-020; and~~

~~((d)), as determined by WAC 434-261-051 through 434-261-053, or the voter has provided identification at a voting center; and~~

(c) The envelope is returned in one of the following methods:

(i) The envelope is postmarked not later than the day of the election and received not later than close of business the day before certification of the election. A postmark is any official mark, imprint, or application that verifies when a ballot entered the U.S. postal system. The mailing date of a ballot sent through a commercial mailing service, such as FedEx or UPS, may be considered a postmark. The postmark on the envelope is the official date of mailing. If there are ~~((two))~~ multiple postmarks, the ~~((earlier))~~ earliest postmark is the date of mailing. A hand cancellation by an agent of the U.S. Postal Service is a postmark.

If the postmark is illegible or missing, the date of the voter's signature is the date of mailing as per RCW 29A.40.110. If the postmark is illegible or missing and the voter did not include a date with their signature, county auditors may use available U.S. Postal Service tools to verify the date of mailing;

(ii) The ballot is deposited in a ballot drop box no later than 8:00 p.m. on election day; or

(iii) For service and overseas voters, the ballot is received by fax or email no later than 8:00 p.m. on election day. Only service and overseas voters can submit ballots by fax or email.

(2) Postage that includes a date, such as meter postage or a dated stamp, does not qualify as a postmark. If an envelope lacks a postmark or if the postmark is unreadable, the date to which the voter has attested on the ballot declaration determines the validity of the ballot, per RCW 29A.40.110. If a ballot is from a service or overseas voter, the date to which the voter has attested on the ballot declaration determines the validity of the ballot, per RCW 29A.40.100.

(3) Consistent with WAC 434-250-080, the voter's current ballot and signed declaration shall be accepted for initial processing; ballots previously or subsequently received for the same voter are not counted nor rejected by the county canvassing board. Such ballots ~~((shall be))~~ are invalid and categorized as informational only.

(a) If the first ballot received is identical to the voter's current ballot because the voter submitted a replacement ballot, the replacement ballot shall be referred to signature verification for initial processing.

(b) If the first ballot received is suspended because of a voter registration update, the suspended ballot shall be held by the county of current registration. The county of registration may choose to manually check the suspended ballot for signature issues and send a ~~((eure))~~ signature update form, while allowing time for the current ballot to be received and accepted.

~~(4) ((The signature on the ballot declaration must be compared with the signature in the voter's voter registration file using the standards established in WAC 434-379-020. The signature on)) A ballot ((declaration)) may not be rejected merely because the ((signature)) ballot envelope is not dated, unless the date is necessary to validate the timeliness of the ballot. The signature on a ballot declaration may not be rejected merely because the name in the signature is a variation of the name on the voter registration record. ((The canvassing board may designate in writing representatives to perform this function. All personnel assigned to the duty of signature verification shall subscribe to an oath administered by the county auditor regarding the discharge of their duties. Personnel shall be instructed in the signature verification process prior to actually canvassing any signatures. Local law enforcement officials may instruct those employees in techniques used to identify forgeries.))~~

~~(5) Only service and overseas voters are eligible to return a ballot by fax or email. For ((service and overseas)) ballots returned by fax or email from service or overseas voters, the county auditor must apply procedures to protect the secrecy of the ballot.~~

~~(a) If returned by email, the county auditor must print the email and attachments; the printed email and signed declaration page must be processed and retained like other ballot declarations, and the printed ballot must be processed and retained like other ballots. The electronic versions of the email, ballot declaration, and ballot are exempt from public disclosure in order to maintain secrecy of the ballot. Voted service and overseas ballots returned by email may be returned with multiple attachments or in multiple emails.~~

~~((a)) (b) Service and overseas ballots returned by fax or email with a missing or mismatched signature are processed as established in RCW 29A.60.165 and WAC 434-261-050.~~

~~((b) Only service and overseas voters are eligible to return a ballot electronically.)~~

~~(6) For ((electronic)) faxed or emailed ballots received from voters who are not service or overseas voters the county auditor must:~~

~~((i)) (a) Contact the voter immediately if a ((fax)) faxed or ((email)) emailed ballot is received to notify the voter that they must return their ballot by mail or ballot drop box.~~

~~((ii)) (b) Count only the ballot received by mail or ballot drop box if the voter returns both ((an electronic)) a faxed or emailed ballot and a ballot by mail or ballot drop box.~~

~~((iii)) (c) Send the ((electronic)) faxed or emailed ballot to the canvassing board for rejection if the voter did not return a ballot by mail or ballot drop box.~~

~~((6)) (7) The signature verification process shall be open to the public, subject to reasonable procedures adopted and promulgated by the canvassing board to ensure that order is maintained and to safeguard the integrity of the process.~~

WAC 434-262-031 Rejection of ballots or parts of ballots. (1)

The disposition of provisional ballots is governed by WAC 434-262-032. The county canvassing board must reject any ballot cast by a voter who was not qualified to vote, or for other reasons required by law or administrative rule. A log must be kept of all voted ballots rejected, and must be included in the minutes of each county canvassing board meeting.

(2) Ballots or parts of ballots shall be rejected by the canvassing board in the following instances:

(a) ~~((Where two voted ballots are returned together:~~

~~(i) If the two ballots are returned with only one valid signature on the ballot declaration, the races and measures voted the same on both ballots may be counted once;~~

~~(ii) If the two ballots are returned with two valid signatures on the ballot declaration, both ballots may be counted in their entirety;~~

~~(iii) If two ballots are returned with one valid signature on the ballot declaration, one voted ballot and one blank ballot without marked votes, the voted ballot may be counted in its entirety.~~

~~(b))~~ Where a ballot or parts of a ballot are marked in such a way that it is not possible to determine the voter's intent consistent with WAC 434-261-086;

~~((e))~~ (b) Where the voter has voted for candidates or issues for whom ~~((he or she))~~ the voter is not entitled to vote;

~~((d))~~ (c) Where the voter has overvoted;

~~((e))~~ (d) Where the ballot was created for a prior election;

(e) Where a ballot was submitted with a fraudulent signature; and

(f) Where the ballot signature did not match the voter registration signature or the signature was missing and the voter did not cure the signature by close of business the day before the election was certified.

WAC 434-324-111 Voluntary cancellation of voter registration. A voter may cancel their own voter registration by submitting a signed written notification to the auditor for the county in which the voter is registered to vote. Prior to cancellation of such a registration record, the auditor must ensure the signature on the notification matches the signature in the voter registration file by utilizing criteria outlined in WAC ((~~434-379-020~~)) 434-261-051. A county auditor may not process a voluntary cancellation between the deadline in RCW 29A.08.140 for updating a registration and certification of the primary or election.

A participant in the future voter program established under RCW 29A.08.170 may be removed from the program by submitting a signed written notification to the auditor for the county in which they live. The auditor shall process the notification in the same manner as other voluntary cancellations.

WAC 434-264-010 Recount. (1) A recount is the process for retabulating the votes, including write-ins, for a specific office or issue on all valid ballots cast in a primary or election.

(2) All questions of voter registration, voter qualification, and voter intent previously considered during the original count shall not be reconsidered during a recount. If a ballot has been duplicated in accordance with WAC 434-261-005, the duplicate shall be counted.

(3) A voter may not cure a missing or mismatched signature for purposes of counting the ballot in a recount.

(4) Prior to beginning the recount, the county auditor shall exercise due diligence to confirm that all returned ballots have been identified and reconciled, and that no ballots have been erroneously omitted from the original count.

~~((4))~~ (5) If any ballots or votes are discovered during the recount process that were erroneously not counted or canvassed during the original count or during a previous recount, the ballots shall be presented to the county canvassing board in accordance with RCW 29A.60.050, and the county canvassing board shall determine whether such ballots are to be included in the recount.

REPEALER

The following section of the Washington Administrative Code is repealed:

| | |
|-----------------|-------------------------------------------------------|
| WAC 434-261-050 | Unsigned ballot declaration or mismatched signatures. |
|-----------------|-------------------------------------------------------|

SOLICITOR GENERAL OFFICE

March 27, 2024 - 4:49 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 102,569-6
Appellate Court Case Title: Vet Voice Foundation et al. v. Steve Hobbs et al.

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- 1025696_Briefs_20240327164654SC416746_5207.pdf
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