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Case No. 102569-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

v.

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

Respondents.

MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. IDENTITY OF PETITIONER	3
III. DECISION BELOW	4
IV. ISSUES PRESENTED FOR REVIEW	4
V. STATEMENT OF THE CASE	5
A. Petitioners challenge the signature verification requirement as an unconstitutional burden on the right to vote	Error! Bookmark not defined.
B. The Superior Court chooses to apply a new standard for review and denies summary judgment to all parties	Error! Bookmark not defined.
VI. ARGUMENT	5
VII. CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Castro v. Stanwood School Dist. No. 401</i> , 151 Wn.2d 221, 86 P.3d 1166 (2004).....	10
<i>Frechin v. King Cnty. Dep't of Transp.</i> , 194 Wn. App. 1002 (2016) (unpublished).....	10
STATUTES	
RCW 29A.40.110(3)	2, 4, 9
RULES	
RAP 2.3(b)(1)	3
RAP 2.3(b)(3)	3
RAP 2.3(b)(4)	3, 8, 9, 10
OTHER AUTHORITIES	
Washington Constitution Article 1, Section 3.....	4, 5, 9
Washington Constitution Article 1, Section 12.....	4, 5, 9
Washington Constitution Article 1, Section 19.....	4, 5, 9, 11

Petitioners respectfully move this court to accept discretionary review of the King County Superior Court's decision discussed below.

I. Introduction

More than 170,000 Washington voters have been disenfranchised in the last seven years because election officials, enforcing a statutory “signature matching” requirement, thought these voters’ signatures on their ballot envelopes did not “match” their voter file signatures. Making matters worse, the disenfranchised voters are disproportionately from some of Washington’s most vulnerable groups of citizens—voters of color, young voters, uniformed servicemembers serving outside of Washington, citizens living abroad, first-time voters, voters with physical limitations, and voters who speak a language other than English.

This mass—and massively unequal—disenfranchisement resulted, and will continue to result, from the statutory mandate that 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).

Worse still, signature verification benefits no one. While ostensibly deployed as a means to verify a voter's identity, signature verification is nothing more than election integrity theater—there is no evidence that it actually works. Indeed, the record shows that signature verification is wildly inaccurate and ineffective. Indeed, the Secretary of State has not identified even *a single case* of convicted voter fraud caught by signature verification.

Plaintiffs—voting rights organizations and individual voters who have been disenfranchised by signature verification—filed this lawsuit to challenge this guilty-until-proven-innocent regime as violative of the Washington Constitution. Because signature verification disenfranchises thousands of Washington voters every election and thus substantially infringes the fundamental right to vote, Washington law requires application of the “strict scrutiny” standard of constitutional review. Defendants, by contrast, argued for application of the lowest level of constitutional scrutiny: Rational basis review.

In considering the parties' cross motions for summary judgment, the Superior Court rejected both

arguments and instead adopted an admittedly new legal standard, imported from federal law, based on the *Anderson-Burdick* framework. Applying this newly-adopted standard, the Superior Court then denied both motions.

Because the Superior Court found that its ruling involved “a controlling question of law as to which there is a substantial ground for a difference of opinion” and immediate review “may materially advance the ultimate termination of the litigation,” the court certified two questions for review. *See* RAP 2.3(b)(4). Plaintiffs request that this Court grant discretionary review of the two issues certified by the trial court.¹

II. Identity of Petitioner

Vet Voice Foundation, The Washington Bus, El Centro De La Raza, Kaeleene Escalante Martinez, Bethan Cantrell, Gabriel Berson, and Mari Matsumoto (collectively, “Plaintiffs” or “Petitioners”) ask this court to accept review of the decision designated in Section

¹ Petitioners do not join Secretary Hobbs in requesting discretionary review pursuant to RAP 2.3(b)(1) and (b)(3).

III of this motion.

III. Decision Below

Petitioners seek review of the Order re: Plaintiffs' Motion for Summary Judgment; Defendant Hobbs' Cross Motion for Summary Judgment, and Defendant King County Canvassing Board Members' Motion for Summary Judgment entered by the King County Superior Court on October 12, 2023 ("Order"). A copy of the Order is in the Appendix at pages A-265–A-289.

IV. Issues Presented for Review

Plaintiffs seek review by this Court of the two issues certified by the Superior Court:

1. Under this Court's precedent, statutes infringing on fundamental rights are subjected to strict scrutiny. Voting is indisputably a fundamental right, and the signature verification requirement, codified at RCW 29A.40.110(3), results in the rejection of tens of thousands of ballots each election. What is the appropriate standard of judicial review for Plaintiffs' facial challenges to RCW 29A.40.110(3) under the Washington Constitution Article 1, sections 3, 12, and 19?

2. There is no dispute that (a) signature verification has resulted in approximately 170,000 ballots being rejected in the last 7 years; (b) many thousands of additional ballots were initially rejected for purported signature mismatches and then cured in that same time frame; (c) signature verification disproportionately rejects ballots cast by young, less experienced and nonwhite voters; and (d) Defendants have not identified a single case of confirmed voter fraud identified by signature verification. Is any party entitled to summary judgment under the appropriate standard of judicial review?

V. Statement of the Case

A. Petitioners challenge the signature verification requirement as an unconstitutional burden on the right to vote.

Petitioners filed suit in King County Superior Court on November 22, 2022, seeking a declaration that signature verification violates the Washington Constitution, specifically, the right to vote protected by Article I, Section 19; the right to equal treatment protected by Article I, Section 12; and the right to due

process protected by Article I, Section 3. A-1–A-39. Plaintiffs sought an injunction preventing Defendants and Washington election officials from using signature verification for any purpose other than verifying that a ballot return envelope had been signed. A-38.

Plaintiffs' complaint named as defendants Steve Hobbs, in his official capacity as Washington State Secretary of State ("Secretary"); and Julie Wise, in her official capacity as the Auditor/Director of Elections in King County and a King County Canvassing Board Member, Susan Slonecker, in her official capacity as a King County Canvassing Board Member, and Stephanie Cirkovich, in her official capacity as a King County Canvassing Board Member (collectively, "King County"). A-9–A-10.

The Secretary moved to change venue to Thurston County. A-40–A-48. After Plaintiffs clarified that their lawsuit was a facial challenge to signature verification—not a challenge to the Secretary's particular implementation of the statute—and offered to amend their complaint if necessary to make that even more apparent, the Superior Court denied the motion to transfer. A-61; A-64–A-66. Plaintiffs then filed their second amended complaint. A-67–A-109.

Plaintiffs moved for summary judgment on July 27, 2023. A-110–A-168. Plaintiffs urged the Superior Court to review signature verification under strict scrutiny because it affects and infringes on the most fundamental of rights—the right to vote—by disenfranchising thousands of lawful Washington voters every election. A-149–A-159. Plaintiffs argued that signature verification cannot survive strict scrutiny because it serves no compelling state interest and is not narrowly tailored in any event. *Id.* Plaintiffs further argued that there were no disputed facts material to the strict scrutiny analysis, making summary judgment appropriate. A-147–A-148.

The Secretary and King County moved for summary judgment on August 16, 2023, and argued, in their respective motions, that strict scrutiny was not the appropriate level of review, and that the Superior Court should grant summary judgment in their favor and dismiss the lawsuit. A-169–A-264. The Secretary, for his part, expressly urged the court to apply rational basis review, or, in the alternative, the federal *Anderson-Burdick* balancing test. A-199–A-208. The Secretary also argued that there were disputed facts relating to expert opinions and the disparate impacts of

signature verification. A-345–A-348.

B. The Superior Court chooses to apply a new standard of review and denies summary judgment to all parties.

The Superior Court denied all three motions for summary judgment. A-265–A-289. In its Order, the court rejected the arguments for the application of both the “strict scrutiny” and the “rational basis” standards of review, concluding that “[n]either provides a solid framework to address the constitutionality of the signature verification requirement” and instead decided to apply the “hybrid *Anderson-Burdick* framework.” A-278; A-281. The Superior Court recognized “that no Washington court has examined the *Anderson-Burdick* framework” but concluded that it was a “reasonable alternative” under the circumstances. A-282.

The Superior Court further concluded that “the implementation of the *Anderson/Burdick* standard and conclusions therefrom can only be determined after the factual development is completed[,]” and, consequently, denied summary judgment to all parties. A-283; A-285–A-286.

Defendants, without opposition, jointly moved the

Superior Court under RAP 2.3(b)(4) to certify its Order for discretionary review. A-290–A-299.

On November 9, 2023, the Superior Court granted the motion and certified two issues: (1) What is the appropriate standard of judicial review for Plaintiffs’ facial challenges to RCW 29A.40.110(3) under the Washington Constitution Article 1, sections 3, 12, and 19; and (2) Whether, under the appropriate standard of judicial review, any party is entitled to summary judgment? A-300–A-302.

That same day, the Plaintiffs and the Defendants filed notices of discretionary review. A-303–A-337. The Secretary’s and King County’s notices were directed to the Court of Appeals. A-331–A-337. Plaintiffs’ notice was directed to this Court. A-303–A-330.

VI. Argument

Discretionary review is warranted under RAP 2.3(b)(4) because the Superior Court certified that its Order “involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the

litigation.” The Superior Court correctly certified the Order, and this Court should accept discretionary review, for three reasons.

First, the Order involves a controlling question of law—the standard of scrutiny applicable to Petitioners’ constitutional challenge. Whether *Anderson-Burdick*, strict scrutiny, or another standard is the correct legal framework for analyzing the constitutionality of signature verification is a question of law that may, and likely will, ultimately dictate the outcome of this litigation. And, particularly given Petitioners bring a facial challenge to the statute, it is a question “that can be analyzed without delving too deeply into the factual details of the case.” *Frechin v. King Cnty. Dep’t of Transp.*, 194 Wn. App. 1002, at *2 (2016) (unpublished) (granting, under RAP 2.3(b)(4), motion for discretionary review of denial of summary judgment); see *Castro v. Stanwood School Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004) (accepting, under RAP 2.3(b)(4), direct review of a denial of summary judgment to consider the correct interpretation of statutory tolling provision).

Second, there is substantial ground for difference of opinion on this question because, as the parties and

the trial court agree, the Superior Court's choice to apply *Anderson-Burdick* is novel. See Order at 18 ("This Court is cognizant that no Washington court has examined the *Anderson-Burdick* framework."); Motion to Certify at 5 ("There is no published authority addressing whether the standard under article I, section 19 [of] the Washington Constitution is identical to federal constitutional challenges in this context[.]"). Petitioners maintain that this Court's precedent mandates the application of strict scrutiny because signature verification infringes on the fundamental right to vote by disenfranchising thousands of eligible Washington voters, but Defendants—and the Superior Court—disagree, and, as the trial court noted, there is "a paucity of Washington cases evaluating constitutional challenges to manner of voting statutes with analogous facts." A-282.

Finally, immediate review will materially advance the termination of this litigation because resolution of the certified issues would either dispose of the need for trial entirely or significantly reduce the chance for further proceedings after trial. If this Court determines that one party is entitled to summary judgment under the appropriate level of scrutiny, trial

would be unnecessary.

Regardless, clarifying the standard applicable at trial would expedite resolution of this litigation in two ways. First, a clarified standard would allow the parties to tailor their arguments and evidence to that standard of scrutiny. Second, a clarified standard would eliminate the possibility that an additional trial would be required in the event this Court decided, after a post-trial appeal, that the Superior Court erred by applying the *Anderson-Burdick* framework. Resolution by the Court of these issues at this stage would lead to faster resolution of the case. And prompt resolution is particularly important here, given the upcoming 2024 elections and the reality that, if signature verification remains, it will inevitably lead to the disenfranchisement of tens of thousands of eligible Washington voters in those elections. *See* Mot. for Accelerated Review, Case No. 102569-6 (Nov. 27, 2023).

VII. Conclusion

For these reasons, Petitioners request that the Court grant this motion for discretionary review.

Certificate of Compliance: I certify this brief contains 1948 words in compliance with Rules of Appellate Procedure 10.4 and 18.17(b).

RESPECTFULLY SUBMITTED this 27th day of
November, 2023.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on November 27, 2023, I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

DATED this 27th day of November, 2023.

s/June Starr

June Starr

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Comments:

Appendix should be attachments to the Motion for Discretionary Review and Statement of Gounds for Direct Review

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