

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.

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I. Introduction

Consistent penmanship is not a constitutional criterion to vote in Washington. Yet Washington's statutory signature verification requirement has disenfranchised over 170,000 voters in the last seven years solely because election officials thought voters' ballot envelope signatures did not "match" their voter file signatures. *See* RCW 29A.40.110(3).

Worse, signature verification disproportionately disenfranchises voters of color, young voters, uniformed servicemembers serving abroad, first-time voters, and voters who speak a language other than English. The differences are stark: Young Black and Hispanic voters are disenfranchised at over *17 times the rate* of older White voters, and first-time voters are *five times more likely* to have their ballots rejected than voters with experience voting.

This widespread disenfranchisement offers no discernable benefit. While ostensibly deployed to “verify” a voter’s identity, signature verification is election integrity theater. And it is subjective and error-ridden at that—unsurprising, given all the reasons why a voter’s signature could vary, including age, disease, type of pen used, and writing surface.

To end ballot rejection based on signature verification, Petitioners, a collection of four voters who were wrongly disenfranchised by signature verification and three advocacy organizations (collectively, “Plaintiffs”), sued Secretary of State Steve Hobbs and several members of the King County Canvassing Board (collectively, “Defendants”). And because the constitutional problems with signature verification are not simply a matter of implementation—the whole enterprise is fundamentally flawed—Plaintiffs

challenged, on its face, the statute requiring signature verification.

Defendants know about the rejection of valid ballots and the disproportionate effects yet maintain that signature verification is key to election integrity and voter confidence. But Defendants cannot identify *a single case* of convicted voter fraud caught by signature verification. And data from three counties show that *less than one percent* of voters disenfranchised for non-matching signatures were even referred to prosecutors in the first place—and no one was charged with, let alone convicted of, fraud. In other words, over 99 percent of the ballots rejected in those counties did not even raise suspicions of wrongdoing.

Rather than confront these data, Defendants try to sidestep the evidence by arguing that this is a facial challenge, so courts must overlook *all* evidence of

disenfranchisement and must uphold signature verification if there is any *conceivable* way it could be constitutional. But a facial challenge does not change the constitutional tests the court applies, and those tests *require* consideration of such evidence and require Defendants to show that signature verification actually advances compelling state interests—a burden unmet in this record.

It's hardly a surprise that Defendants want to avoid the evidence—the record shows that signature verification imposes an unconstitutional burden, stripping the most precious and fundamental civil right from tens of thousands of lawful Washington voters who did everything required to vote.

Based on that record, Plaintiffs moved for summary judgment. But the trial court denied the motion and erroneously ruled that it would apply the

federal *Anderson-Burdick* framework at trial rather than strict scrutiny, the standard the Court has repeatedly applied to statutes infringing on fundamental rights, including the right to vote. The trial court also erred by denying Plaintiffs' motion because Defendants did not—and cannot—establish that signature verification advances any state interest.

Plaintiffs respectfully request that the Court reverse the order below and remand with instructions to enter summary judgment in Plaintiffs' favor.

II. Assignments of Error

1. The Superior Court erred in adopting the federal *Anderson-Burdick* standard, rather than strict scrutiny, to assess Plaintiffs' article I, section 19 claim challenging RCW 29A.40.110(3).
2. The Superior Court erred in denying Plaintiffs' Motion for Summary Judgment on their article I,

section 19 claim.

III. Issues Pertaining to Assignments of Error

1. Under the Court's precedent, statutes infringing Washingtonians' fundamental rights are subject to strict scrutiny. Voting is indisputably a fundamental right, and signature verification results in a subjective and ineffective burden on that right, and the disenfranchisement of tens of thousands of Washington voters in every election. What is the appropriate standard of judicial review for Plaintiffs' facial challenge to RCW 29A.40.110(3) under the Washington Constitution article I, section 19?
2. There is no dispute that (a) signature verification has resulted in the rejection of approximately 170,000 ballots in the last seven years; (b) many thousands of additional ballots were initially

rejected for purported signature mismatches and then cured; (c) signature verification disproportionately rejects ballots cast by young, less experienced, and non-White voters; (d) Defendants have not identified a single case of convicted voter fraud identified through signature verification; and (e) election officials suspected fraud in only a small fraction of rejected ballots. Based on the undisputed facts, are Plaintiffs entitled to summary judgment under strict scrutiny or any iteration of *Anderson-Burdick*?

IV. Statement of the Case

A. Factual Background

1. Washington Is a Universal Vote-by-Mail State with Scant Fraud

Washington has been a universal vote-by-mail state since 2011, and “all eligible voters are sent a

ballot.” CP 2118.

Election fraud is extremely rare in Washington. In the last 11 years, Washingtonians cast roughly 56 million mail-in ballots, during which there were, at most, *forty* confirmed cases of voter fraud, a rate of 0.000071 percent—none of which were caught by signature verification. CP 195, 231, 299–300, 687–774. This scarcity of fraud reflects Washington’s many overlapping election security measures ensuring that only the intended voter casts the submitted ballot, including:

Voter Registration: When voters register, they provide data including their mailing address.

RCW 29A.08.010; RCW 29A.08.125. Election officials verify the individual’s identity. CP 415–17. Washington law penalizes individuals who provide false information. RCW 29A.84.130. A voter’s registration

may also be challenged. RCW 29A.08.810.

Voter List Maintenance: Washington election officials are required to maintain the accuracy of the voter list and ensure that only eligible voters are allowed to vote. RCW 29A.08.125. This maintenance includes updating the addresses of those who have moved within Washington and removing those who have moved out of state, passed away, are ineligible because of a felony, or are inactive. CP 417–20.

Ballot Security: Election officials mail ballots via U.S. Mail addressed to each individual voter at their registered address. See RCW 29A.40.010. Each ballot envelope has a unique barcode associated with the voter. CP 1222, 1555. When a ballot is returned, election officials scan the barcode to ensure that the voter has not already cast a ballot. CP 429–31, 1222.

Ballot Affirmation: All voters must sign, under

penalty of perjury, a declaration on the ballot envelope affirming their eligibility to vote. RCW 29A.40.091(2). The declaration also includes notice that it is illegal to cast a ballot or sign a ballot declaration on behalf of another voter. *Id.*

Ballot Notification: All voters can track their ballot status online through vote.wa.gov, which allows voters to learn about and report suspicious behavior. King County also offers ballot status email and text alerts to all voters who sign up. CP 636.

Post-Election Fraud Detection: After an election, officials conduct additional reviews of the voter list for potential fraud by comparing the voter list with other states (multi-state voters), other counties (double voters), and vital records (deceased people). CP 823.

Post-Election Audits: Election officials are required to conduct post-election audits and reviews to

look for voting irregularities. *Id.*

County Canvassing Board: The County

Canvassing Board has the authority to reject any challenged or questioned ballot. RCW 29A.60.140, .050.

2. Signature Verification Disenfranchises Thousands of Washington Voters

a. The Statutory Signature Verification Requirement

After county election officials receive a voted ballot, they are required to “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).¹

¹ On July 31, 2023, Secretary Hobbs proposed changing the signature verification rules because so many valid ballots are mistakenly rejected. CP 1562–63. According to the Secretary, the proposed rule “is expected to result in fewer mistaken rejections of valid ballots.” Wash. St. Reg. § 23-16-099 (July 31, 2023). The Secretary offered no empirical evidence that the new regulations would meaningfully reduce the rejection rates. CP 1562–63, 1803.

If election officials do not believe the signatures are the same, the ballot is rejected and will not be counted unless the voter takes additional steps to “cure” the ballot. CP 52–53, 812–14; WAC § 434-261-050.

Curing requires that voters first learn their ballot was rejected and then provide further documentation. CP 52–53, 812–14. Election officials are required to mail a notice of a rejected ballot and a declaration. RCW 29A.60.165.² If a voter receives the notification and signs and timely returns that declaration, election officials compare the signature on the new declaration against the signature on the voter’s ballot declaration. CP 53. If the election officials decide the two signatures

² Some counties, such as King County, call or send emails when they have such contact information available, but counties are not required to make such efforts. CP 50–51.

match, the rejected ballot is “cured” and the vote counted, but otherwise the ballot is not counted. CP 812–13. The ballot will also remain uncured and uncounted if the voter is not notified their ballot has been rejected or if they are unable to timely return their declaration. WAC § 434-261-050.³

b. Signature Verification Results in the Rejection of Thousands of Ballots Each Election

From the 2016 general election through the February 2023 special election, signature verification caused the rejection of over 170,000 ballots, including approximately 24,000 in each of the last two general elections. CP 325, 337.

Even more ballots were rejected but later cured.

³ The Secretary’s proposed, but not yet adopted, new regulations would expand the options for curing ballots. *See* Wash. St. Reg. § 23-16-099 (July 31, 2023).

In the 2020 and 2022 general and primary elections, election officials initially rejected almost 148,000 ballots for non-matching signatures, and nearly 79,000—more than half—of those voters took additional burdensome steps to prove that election officials *wrongly* rejected their ballots. CP 344.

3. Signature Verification Is a Subjective, Error-Ridden Process That Disproportionately Affects Young and Minority Voters

That rate of ballot rejection, “and the possibility that rates varied between counties and different groups of Washington voters,” prompted the Washington Legislature to mandate a performance audit of signature verification, and that audit found that signature verification is subjective and disproportionately affects certain subgroups, including young and minority voters. CP 538.

a. Signature Verification Is Highly Subjective

The Washington State Auditor found fundamental issues with signature verification—namely, that “[s]ignature verification is ultimately subject to human judgment” and “deciding whether a signature matches is inherently subjective.” CP 543. Defendants agree. CP 391 (the Secretary); CP 666–67 (King County Elections: “We all have implicit biases, and since signature verification is inherently subjective, those biases can influence our decisions to accept or reject a signature.”).

The Auditor further found that “even experienced reviewers can come to different conclusions.” CP 543. This conclusion flowed from direct experience: The Auditor “observed county officials debate and reverse decisions about signature matches” and noted, “employees from the Secretary of State’s office

sometimes disagreed with each other about signature matches.” *Id.* Even the auditors themselves “disagreed on whether many of the signatures matched.” *Id.* The Auditor also found “that county officials interpreted statewide criteria for signature verification differently.” *Id.*

Perhaps most alarmingly, the Auditor “found few discernable patterns that helped explain differences in rejection rates.” CP 544.

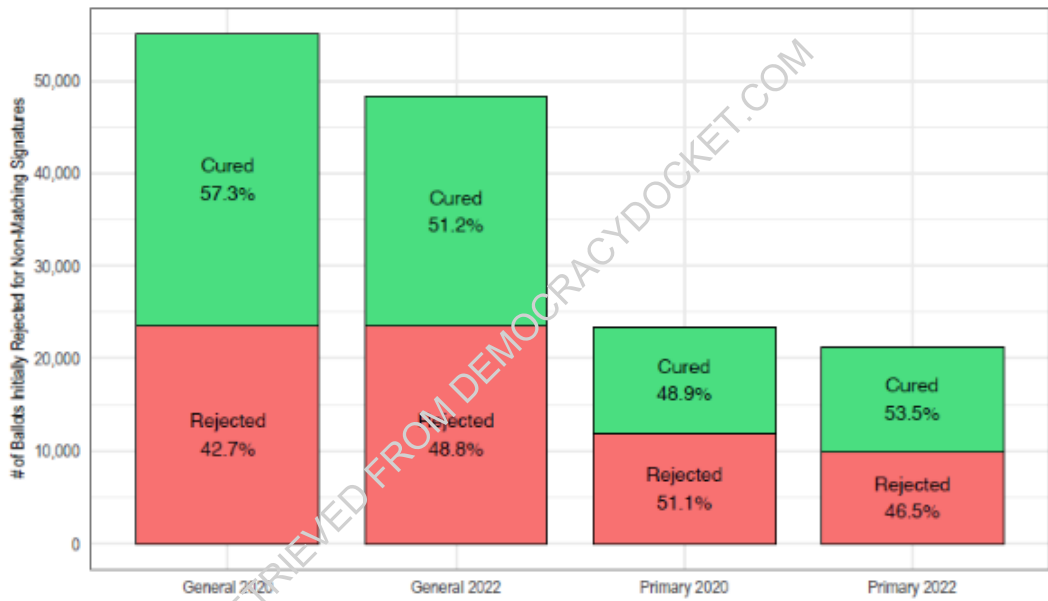
b. Signature Verification Is Error-Prone

There is no dispute that signature verification has resulted in the rejection of valid ballots—*i.e.*, disenfranchisement of lawful voters. The Secretary admits with rather dramatic understatement that “[a]t times, valid ballots are not accepted because the signatures do not appear to match.” Wash. St. Reg. § 23-16-099 (July 31, 2023). Indeed.

On the other hand, neither the Secretary nor King County identified any evidence indicating that any more than a handful of the 170,000 rejected ballots were submitted by somebody other than the voter. Both acknowledge they have no data on whether ballots rejected for non-matching signatures “were actually submitted and signed by someone other than the voter as opposed to just being signed in a different way by the actual voter.” CP 467 (“Correct, or the reverse of that.”); *see* CP 498–99 (King County Elections: “We have not done a specific study on that.”).

Cure data and other evidence indicate that signature verification is highly inaccurate and that the vast majority, if not nearly all, of rejected ballots were actually cast by the voters to whom the ballots were sent.

Cure data alone demonstrates that, at minimum, more than half of the rejected ballots were erroneous: In the last four statewide elections, 49 to 57 percent of the ballots rejected based on signature verification were cured. CP 345.



The total error rate is much higher, as demonstrated by the experience of three counties—King, Clark, and Snohomish. In recent years, signature verification disenfranchised 56,000 voters in those three counties, but election officials suspected fraud in only 434 cases that were flagged by signature

verification. CP 2103–08. In other words, those three counties referred *only 0.77 percent* of rejected ballots to prosecutors, indicating that election officials did not suspect wrongdoing in the other 99.23 percent of ballots that they rejected. Not even one of those referrals resulted in charges, let alone any convictions or guilty pleas. *Id.*

The data from these counties illustrates that many disenfranchised Washington voters are not able to “cure” their ballots, something further demonstrated by dozens of declarations, including those referenced below.

Some voters never received notice that their ballots had been rejected. CP 910–28. One of those voters serves in the U.S. Air Force and was stationed in Georgia during the 2020 general election. CP 1057. He never received notice from Benton County and only

learned that his ballot was rejected in connection with this lawsuit. *Id.* Other Washington voters received notice only after the deadline to cure had passed. CP 865–67, 929–31.

Some voters, like Plaintiffs Dr. Gabriel Berson and Mari Matsumoto, lawfully cast their ballots and went through the additional steps to cure their ballots but still had their ballots rejected. CP 865–70. One voter tried to cure his ballot *twice in the same election*, yet still had his ballot rejected. CP 906–09.

Some Washington voters simply did not have the time, opportunity, or resources to cure their ballots, including working single moms with limited time, a voter who was traveling, a voter transitioning to a new job, a voter who was closing on her home, and a voter taking her young family on a camping trip. CP 936–62.

One voter from Dallesport was in declining

health, yet, hand shaking, she held her pen and signed her ballot. CP 933. She was devastated when she learned her ballot had been rejected for a non-matching signature because she knew that would be her last election. *Id.* She died less than two weeks later.

CP 933–34. Her vote did not count. CP 934.

Some voters have had their ballots rejected multiple times in recent elections. CP 922–25, 963–66. Plaintiff Kaeleene Escalante Martinez’s ballot has been rejected *three times* in recent years. CP 872. Even Defendant Julie Wise, the Director of Elections for King County and a member of the King County Canvassing Board, has had her ballot wrongly rejected *twice* for a non-matching signature. CP 363.

The erroneous rejections reflect the fact that signatures vary for many reasons, including age, disease, injury, different writing surfaces and writing

instruments, prescription drug use, whether the writer is sitting or standing, whether the writer has multiple signatures, whether the writer is hurried, and even carelessness or stress. CP 245–49. For example, in his work as a pediatrician, Dr. Berson signs many documents every day and signs his name several different ways. CP 866. Election officials wrongly rejected his ballot and the ballots of other voters who have multiple varying signatures. CP 866, 874–85.

**c. Signature Verification
Disproportionately
Disenfranchises Certain Groups**

The Washington State Auditor concluded that in the 2020 general election, signature verification led to the disproportionate rejection of ballots cast by voters of color, young voters, first-time voters, non-English speakers, and those who have previously had ballots rejected for non-matching signatures. CP 544–46.

Specifically, the Auditor found:

- Black voters had ballots rejected at *four times* the rate of White voters. CP 546. Native American, Hispanic, and Asian voters were rejected roughly twice as often. *Id.*
- Voters aged 18–21 had their ballots rejected at *seven times* the rate of voters 45 to 64 and over *fifteen times* the rate of voters 65 and over. CP 544. Voters aged 22–25 were rejected at over five times the rate of voters 45 to 64 and twelve times the rate of voters 65 and over. *Id.*
- First-time voters had their ballots rejected at *five times* the rate of experienced voters.

CP 545.⁴

- Voters who cast non-English ballots in King County were 47 percent more likely to have their ballots rejected. CP 546.
- Voters who had their 2020 primary election ballot rejected were almost *four times* more likely to have their 2020 general election ballot rejected. CP 545.

In their respective Civil Rule 30(b)(6) depositions, Defendants agreed with the Auditor's conclusions.⁵

⁴ The Secretary and his expert also found that first-time and younger voters are rejected at higher rates. CP 382, 1703–04.

⁵ After Plaintiffs filed their Motion for Summary Judgment on July 27, 2023, and after a CR 30(b)(6) deposition of the Secretary on May 8, 2023, the Secretary submitted an expert report that critiques the Auditor's methodology. *See* CP 164, 367, 1656, 1677–80. The Secretary has not attempted to amend his CR 30(b)(6) responses to retract his admissions.

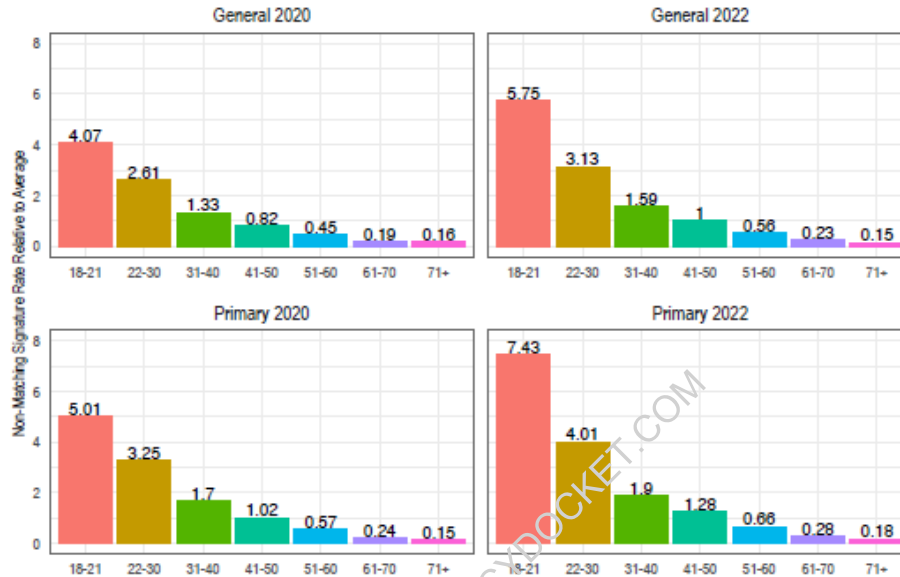
CP 389–91, 514–15. King County Elections

characterized the higher rejection rates among voters of color as “a disturbing trend.” CP 522.

Plaintiffs’ expert Dr. Maxwell Palmer analyzed the last four major elections and confirmed that the Auditor’s conclusion that voters of color and young voters had their ballots rejected at higher rates was no outlier.⁶ CP 336–46. The chart below shows relative

⁶ The Secretary submitted an expert report that critiqued Dr. Palmer’s methodology. CP 1668–86. But the Secretary’s expert, Dr. Aleksandr Aravkin, does not dispute that young voters and first-time voters are disparately impacted by signature verification. CP 1661–62. Moreover, he did not calculate comparative rates of rejection for various groups of voters as Dr. Palmer did, so Dr. Aravkin admittedly has no basis to dispute Dr. Palmer’s calculations. CP 2281–82.

rates of rejection based on age for these four elections:



Dr. Palmer also found that young voters of color across the state have had their ballots rejected at *much* higher rates. For example, in the 2020 general election, Black voters aged 18–21 had their ballots rejected at *18 times* the rate of White voters over age 40. CP 343. For Hispanic voters aged 18–21, the rate of rejection was more than *17 times* higher. *Id.*

Dr. Palmer also concluded that ballots from United States military voters and other citizens

serving or living overseas were 1.6 times more likely to be rejected for non-matching signatures than those submitted by other voters. CP 614.

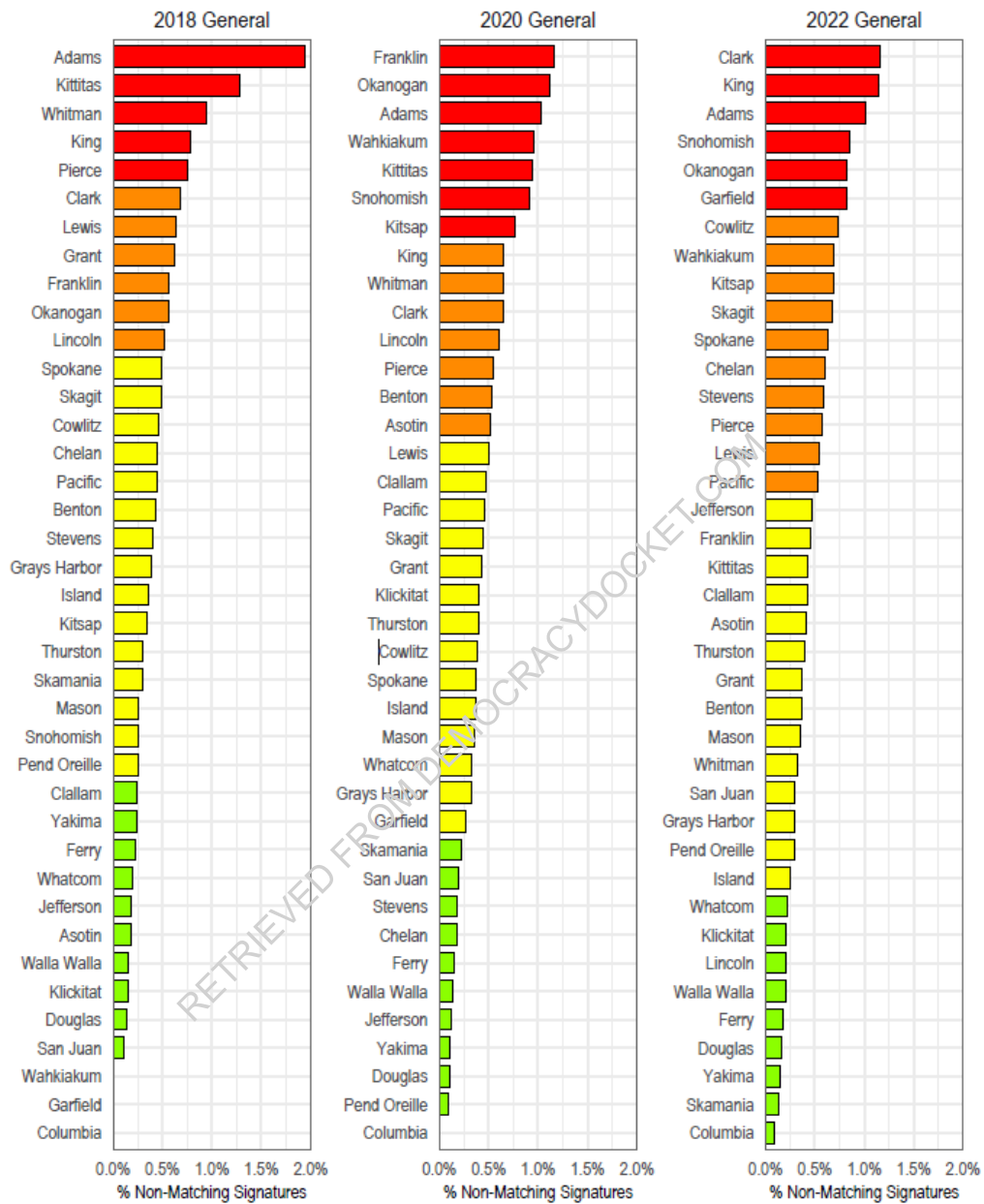
d. Rejection Rates Vary Considerably Among Counties

The Auditor also concluded that, “[f]or the 2020 general election, the county where a ballot was cast was the most significant variable related to rejection.” CP 540. Indeed, “ballots submitted to some counties were *four to seven times* more likely to be rejected than ballots submitted to other counties.” CP 530.

Dr. Palmer again concluded that the Auditor’s findings were not outliers: He found that rejection rates vary widely among Washington counties and within the same county across election years. CP 346–48. For example, in the 2018 general election, the county with the highest rejection rate, Adams County, rejected ballots at 18 times the rate of San Juan

County. CP 347. Similarly, in the 2022 general election, the county with the highest rejection rate, Clark County, rejected ballots at almost 13 times the rate of Columbia County. *Id.* And the rejection rate for non-matching signatures varied twofold or more from one election to the next within the same county in multiple instances. *Id.* The chart below shows the rejection rate in each county in the last three general elections. CP 348.

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4. Signature Verification Is Ineffective

a. Signature Verification Does Not Catch Fraud

Despite widespread disenfranchisement, Defendants acknowledge that they have conducted no analyses to determine whether signature verification actually improves election security or prevents voter fraud. CP 449–50 (Secretary: “[T]here has been none.”), 467. And Defendants have not identified a single case of convicted voter fraud caught by signature verification, *ever*. CP 265–66, 2469, 2481–82. In fact, signature verification failed to catch what few cases of voter fraud *have* resulted in a guilty plea or conviction in recent years. CP 195, 231, 687–774.

Even cases of *possible* or *alleged* voter fraud flagged by signature verification constitute only a vanishingly small fraction of the tens of thousands of voters stripped of their right to vote. As discussed,

King, Clark, and Snohomish Counties referred to prosecutors less one percent of the ballots rejected by signature verification. CP 2103–08.

Even that miniscule percentage of suspected fraud overstates the number of potentially fraudulent ballots. The Secretary’s handwriting expert, a certified forensic document examiner, analyzed—at the Secretary’s request—a sample of ballot signatures, including 173 signatures that county election officials deemed “likely” fraudulent. CP 2226. The expert concluded that eight percent of those ballots were signed by the voter and should have been accepted and counted. CP 2227. He also concluded that at least some of the rest were instances of one spouse signing for the other—where both spouses were properly registered and “fully entitled to vote.” CP 2236–37.

b. Elections in States That Do Not Conduct Signature Verification Are No Less Secure

At least seven states—Connecticut, Delaware, Maryland, New Mexico, Pennsylvania, Vermont, and Wyoming—do not conduct signature verification on absentee ballots. CP 2116–17. There is no evidence that voter fraud in those states is any more prevalent, or that fraud is deterred any less effectively. *Id.*

Vermont, for example, transitioned to a universal vote-by-mail system for the 2020 general election, did not implement signature verification, and saw record turnout and almost no instances of even potential fraud. CP 2117. According to the Vermont Secretary of State, of the 370,968 votes cast, election officials referred only seven cases of potential voter fraud to the Attorney General. *Id.* Not one of those cases, or any cases of suspected voter fraud in Vermont in the last

four election cycles, involved someone signing a ballot on behalf of another voter. *Id.*

5. Even Conducting Signature Verification Under Ideal Conditions Necessarily Results in Errors

Accurately verifying a person's identity by their signature alone requires trained and certified forensic document examiners who have: (1) sufficient time to review each signature—around an hour for a simple signature and at minimum two to four hours for a complex signature; (2) sufficient contemporaneous comparator signatures (generally 10–15) to understand the signor's natural signature variation range and account for multiple potential signatures; (3) adequate equipment (including magnification tools and proper lighting); and (4) excellent eyesight. CP 243.⁷

⁷ Forensic document examiner certification requires at least two, but typically three, years of full-time

Election officials don't have that many hours or resources—King County acknowledges that it does not have the “weeks or years” required to properly validate signatures. CP 671 (“People would go nuts.”). Instead, King County expects its first-level reviewers to review each signature in about five seconds. CP 629–30. And the Secretary suggests that election officials should go even faster—three seconds per signature. CP 442–43.

Even under ideal circumstances, there will still be a significant rate of error and inconclusive results that will inevitably lead to ballots being improperly rejected for non-matching signatures. CP 243–44. For example, the retired Washington State Patrol Forensic Document Examiner responsible for training Washington election officials was asked to verify

training with an experienced examiner. CP 244.

twelve signatures during his deposition. CP 2162–63. The expert correctly accepted or rejected only about 42% of the signatures he evaluated. CP 2163. Indeed, he “accepted” all three forged signatures, and he wrongly rejected four genuine signatures. *Id.* He admitted that if the goal is to verify a voter’s identity, signatures alone cannot eliminate rejection errors. CP 2206.

B. Procedural History

Plaintiffs Vet Voice Foundation, The Washington Bus, El Centro De La Raza, Kaeleene Escalante Martinez, Bethan Cantrell, Gabriel Berson, and Mari Matsumoto sued Secretary of State Steve Hobbs and King County Canvassing Board Members Julie Wise, Susan Slonecker, and Stephanie Cirkovich in King County Superior Court on November 22, 2022, seeking a declaration that signature verification violates the

Washington Constitution, article I, sections 3, 12, and 19. CP 71–113, 3067.

The Secretary moved to change venue to Thurston County. CP 1–12. The Superior Court denied the motion contingent on Plaintiffs amending their complaint to make clear that they were not challenging the Secretary’s particular implementation of the statute but instead challenging the constitutionality of the statute requiring ballot rejection based on signature verification. CP 68–70. Plaintiffs then filed their second amended complaint. CP 71–113.

Plaintiffs moved for summary judgment on July 27, 2023, and Defendants cross-moved three weeks later. CP 164–228, 1304–54, 1092–140. A key issue in the motions was the appropriate level of scrutiny, with Plaintiffs arguing for strict scrutiny and Defendants arguing for rational basis review or, in the

alternative, the federal *Anderson-Burdick* approach. CP 203, 1118–23, 1334–1345, 2120. The Superior Court denied the motions and decided to apply *Anderson-Burdick* at trial, despite recognizing “that no Washington court has examined the *Anderson-Burdick* framework.” CP 2920, 2923–24.

On Defendants’ unopposed motion, the Superior Court certified two issues for discretionary review:

(1) What is the appropriate standard of judicial review for Plaintiffs’ facial challenges to RCW 29A.40.110(3) under the Washington Constitution article I, sections 3, 12, and 19?; (2) Whether, under the appropriate standard of judicial review, any party is entitled to summary judgment? CP 2928–37, 2982–84.⁸

⁸ Plaintiffs are not pursuing discretionary review of their substantive due process and privileges and immunities claims under article I, sections 3 and 12, but reserve their right to appeal, if necessary, after any

Each party filed notices of discretionary review, Plaintiffs to this Court and Defendants to the Court of Appeals. CP 2949–81, 2985–3012. This Court granted discretionary direct review.

V. Argument

A. Summary of Argument

Plaintiffs challenge the signature verification requirement in RCW 29A.40.110(3) on its face because signature verification is a fundamentally flawed and error-ridden procedure that cannot be implemented in a constitutional manner. As the record demonstrates, it will always result in the wrongful rejection of otherwise lawfully cast ballots.

For decades, the Court has clearly and repeatedly held that a law that infringes or denies the right to vote, or another fundamental right, is subject to strict

disposition on the merits.

scrutiny. Signature verification merits that highest level of review because it disenfranchises thousands of lawful Washington voters every election cycle.

This Court should reject the federal *Anderson-Burdick* test because it would undermine the Washington Constitution's explicit and heightened protection of the right to vote, and its subjectivity and imprecision lead to unworkable and unpredictable results. If the Court is inclined to adopt a test similar to *Anderson-Burdick*, it should be one that honors the Washington Constitution by more carefully safeguarding the right to vote. Meanwhile, there is simply no support in Washington law for rational basis review. Not even the federal courts, interpreting a constitution less protective of the right to vote, apply such a deferential standard.

The Court should further reject Defendants'

argument that because this challenge is “facial” a court must ignore *all* evidence of disenfranchisement, must overlook Defendants’ failure to adduce evidence connecting signature verification to any actual state interest, and must uphold signature verification if there is any *conceivable* way it could be constitutional. A challenge to the text of the statute does not change the constitutional test the court applies. And consideration of evidence about signature verification’s burdens and Defendants’ asserted interests is *required* by either strict scrutiny or *Anderson-Burdick*. Nor does a facial challenge negate Defendants’ burden to produce sufficient evidence that signature verification actually advances the asserted state interests—a burden Defendants have not met.

Because the undisputed evidence shows signature verification’s heavy burden on the right to vote, and

Defendants have not shown that it actually advances any state interest—let alone that it’s narrowly tailored—the signature verification requirement in RCW 29A.40.110(3) cannot survive strict scrutiny or any version of *Anderson-Burdick*. As a result, Plaintiffs submit that the order below should be reversed and the case remanded with instructions to enter summary judgment for Plaintiffs on their article I, section 19 claim.

B. Standard of Review

“The standard of review on summary judgment is well settled. Review is de novo; the appellate court engages in the same inquiry as the trial court.” *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92, 993 P.2d 259 (2000).

C. Strict Scrutiny Is the Correct Test for Infringements on the Right to Vote Like Signature Verification

Strict scrutiny is the proper standard of review for laws that burden a fundamental right held by Washington residents, including, and especially, the right of Washington voters to vote. The trial court erred by failing to apply strict scrutiny to Plaintiffs' right to vote claim.

Article I, section 19 of the Washington State Constitution guarantees Washingtonians the right to vote free from government interference: "All 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." The Court's precedents establish that signature verification should be subject to strict scrutiny because it infringes, abridges, burdens, and denies the fundamental right to vote of

thousands of voters in every election.

Defendants asked the trial court to reject this well-established framework for safeguarding the right to vote, and fundamental rights generally, and instead apply the least protective standard of review, rational basis, or—alternatively—the federal *Anderson-Burdick* framework. But nothing in the Washington Constitution nor Washington law supports such deference to a restrictive voting measure. Indeed, the suggestion of rational basis review is particularly problematic, given that the Washington Constitution is *more* protective of the right to vote than the federal constitution. See *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841 (1984) (“[T]he Washington constitution goes further to safeguard [the right to free and equal elections] than does the federal constitution.”).

1. **Strict Scrutiny Applies to Laws That Infringe the Right to Vote**

The Court has long safeguarded Washingtonians' right to vote by applying the highest level of scrutiny to laws that burden it. Nearly 40 years ago, the Court made clear that "any statute which infringes upon or burdens the right to vote is subject to strict scrutiny." *City of Seattle v. State*, 103 Wn.2d 663, 670, 694 P.2d 641 (1985). And 17 years ago, the Court reaffirmed that "because the right to vote has been recognized as fundamental for all citizens, restrictions on that right generally are subject to strict scrutiny, meaning they must be narrowly tailored to further a compelling state interest." *Madison v. State*, 161 Wn.2d 85, 99, 163 P.3d 757 (2007); *see Portugal v. Franklin County*, 1 Wn.3d 629, 634, 530 P.3d 994 (2023) (laws "trigger strict scrutiny" when they "abridge[e] voting rights"), *cert. docketed*, *Gimenez v. Franklin County*, No. 23-500 (U.S.

Nov. 14, 2023).

This precedent protecting the right to vote is consistent with other decisions of the Court affirming that restrictions on fundamental rights, generally, are subject to strict scrutiny. *See, e.g., Yim v. City of Seattle*, 194 Wn.2d 682, 689, 451 P.3d 694 (2019) (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006)) (“[S]tate interference with a fundamental right is subject to strict scrutiny.”); *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006) (strict scrutiny applies when “state action threatens a fundamental right”); *Macias v. Dep’t of Lab. and Indus. of State of Wash.*, 100 Wn.2d 263, 271, 668 P.2d 1278 (1983) (applying strict scrutiny to statute infringing fundamental right to travel).

The Court has recognized that the right to vote deserves the utmost protection because it is not just a

fundamental right, it is *the* fundamental right. See *Gold Bar Citizens for Good Gov't v. Whalen*, 99 Wn.2d 724, 730, 665 P.2d 393 (1983) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).⁹ Indeed, the very first section of the very first article in the Washington Constitution establishes the fundamental importance of suffrage: “All political power is inherent in the people, and governments derive their just powers from the consent of the

⁹ See *McDonald v. Sec’y of State*, 153 Wn.2d 201, 204, 103 P.3d 722 (2004) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”); *Foster*, 102 Wn.2d at 404 (“The right of all constitutionally qualified citizens to vote is fundamental to our representative form of government.”)

governed, and are established to protect and maintain individual rights.” Wash. Const. art. I, § 1.

Moreover, unlike the United States Constitution, the Washington Constitution “specifically confers upon its citizens the right to ‘free and equal’ elections.”

Foster, 102 Wn.2d at 404; *Madison*, 161 Wn.2d at 97 (“The Washington Constitution grants the right to vote to all Washington citizens on equal terms.”); see Wash. Const. art. I, § 19. Because the Washington Constitution expressly guarantees the right of suffrage, it “goes further to safeguard [the right to vote] than does the federal constitution.” *Foster*, 102 Wn.2d at 404; *Madison*, 161 Wn.2d at 96.

The Washington Constitution requires that laws infringing the right to vote must advance a compelling state interest and be narrowly tailored to meet that interest because the right to vote is so important. *See*

City of Seattle, 103 Wn.2d at 670. The trial court erred in failing to apply strict scrutiny to Plaintiffs' right to vote claim.

2. Signature Verification Infringes, Abridges, Burdens, and Denies the Right to Vote

In every election, signature verification infringes, abridges, burdens, and—for tens of thousands of Washington voters—denies the right to vote through no fault of the voters themselves. After all, unlike age, citizenship status, and residency, consistent penmanship is not a constitutional requirement to vote. *See* Wash. Const. art. VI, § 1 (listing eligibility requirements). Yet, by requiring signature verification, the Legislature has added a penmanship requirement that burdens the right to vote and disenfranchises Washington voters by the tens of thousands every election cycle.

Signature verification has disenfranchised 170,000 voters since 2016 and has threatened and burdened that fundamental right for tens of thousands more who had to take additional steps to fix mistakes made by election officials. These voters did everything required of them under the Washington Constitution: They were eligible and registered to vote, they filled out their ballots, they sealed the envelopes, they signed the declaration on the back, and they timely returned their ballot to election officials with the understanding that their votes would be counted. Because of signature verification, they weren't. *See* CP 862–1067.

3. Other States Apply Strict Scrutiny to Laws That Abridge Fundamental Rights Including the Right to Vote

This Court's protection of the right to vote through strict scrutiny is consistent with other states' approaches. Arkansas, Idaho, Illinois, Mississippi,

Missouri, Montana, Pennsylvania, and Wyoming apply strict scrutiny to laws that infringe the right to vote.¹⁰

¹⁰ See *Weinschenk v. State*, 203 S.W.3d 201, 215 (Mo. 2006) (subjecting photo ID requirement to strict scrutiny); *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 23, 314 Mont. 314, 65 P.3d 576 (applying strict scrutiny to claims alleging violation of right to vote); *Shumway v. Worthey*, 2001 WY 130, ¶ 9, 37 P.3d 361 (2001) (statutes limiting the right to vote are subject to strict scrutiny); *Orr v. Edgar*, 283 Ill. App. 3d 1088, 1103, 670 N.E.2d 1243 (1996) (applying strict scrutiny to a two-tiered registration system); *Van Valkenburg v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129 (2000) (applying strict scrutiny to ballot-legend law because “the right of suffrage is a fundamental right”); *Wells ex rel. Wells v. Panola Cnty. Bd. of Educ.*, 645 So. 2d 883, 893 (Miss. 1994) (“A statute . . . interfering with the exercise of a fundamental right, such as voting, is subject to strict scrutiny.”); Findings of Fact, Conclusions of Law, and Mem. Order Granting Declaratory Judgment and Permanent Injunctive Relief at 15, *League of Women Voters of Ark. v. Thurston*, No. 60CV-21-3138 (Ark. Cir. Ct. Mar. 24, 2022) (ordering a permanent injunction after applying strict scrutiny to signature matching requirement restrictions and other voting statutes) (CP 2306–91); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Commw. Ct. Jan. 17, 2014).

Other states apply strict scrutiny to statutes that burden fundamental rights generally and also consider voting a fundamental right but have not yet had the occasion to tie the two together in the same case.¹¹

These states, like Washington, recognize the importance of protecting fundamental rights, including

¹¹ See, e.g., *Wrigley v. Romanick*, 2023 ND 50, ¶ 28, 988 N.W.2d 231 (“A statute which restricts a fundamental right is subject to strict scrutiny”); *Poochigian v. City of Grand Forks*, 2018 ND 144, ¶ 15, 912 N.W.2d 344 (“The right to vote is a fundamental constitutional right.”); *Williams v. State*, 92 Nev. 536, 542, 50 P.3d 1116 (2002) (statutes implicating fundamental rights are subject to strict scrutiny); *Clark County v. City of Las Vegas*, 92 Nev. 323, 342, 550 P.2d 779 (1976) (“It is, of course, well established that the right to vote is fundamental in a free democratic society.”); *Baehr v. Lewin*, 74 Haw. 530, 571–72, 852 P.2d 44 (1993) (“This court has applied ‘strict scrutiny’ analysis to laws . . . impinging upon fundamental rights expressly or impliedly granted by the constitution”) (alterations and internal quotation marks omitted); *Akizaki v. Fong*, 51 Haw. 354, 356, 461 P.2d 221 (1969) (“The right to vote is perhaps the most basic and fundamental of all the rights guaranteed by our democratic form of government.”).

the right to vote, with the highest level of scrutiny.

4. *Anderson-Burdick* Is the Wrong Test to Protect Voting Rights in Washington

Rather than applying strict scrutiny to

Petitioner's right to vote claim, the trial court instead embraced a federal standard that even it acknowledged found no support in Washington law. This, too, was error.

Anderson-Burdick is a framework that federal courts deploy to determine which level of scrutiny applies to laws burdening the right to vote under the federal constitution—which, unlike the Washington Constitution, does not have an express right to vote clause. *Tedards v. Ducey*, 951 F.3d 1041, 1066 (9th Cir. 2020); *Foster*, 102 Wn.2d at 404. Under *Anderson-Burdick*, the level of scrutiny depends on the severity of the burden imposed. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Severe burdens require strict scrutiny

and lesser burdens warrant a balancing test that weighs the benefit of the law against the burden it imposes on voters. *Id.*

The trial court erred in adopting *Anderson-Burdick* for three reasons.

First, the trial court departed from this Court's precedent to make new law. Indeed, the court candidly admitted that "no Washington court has examined the *Anderson-Burdick* framework." CP 2920. Meanwhile, the Court has made clear, multiple times, that strict scrutiny applies to statutes infringing fundamental rights, generally, and the right to vote, specifically. *See* Section V(C)(1) *supra*.

Second, as discussed, it is well settled that the Washington Constitution is more protective of the right to vote than its federal counterpart. *Foster*, 102 Wn.2d at 404; *see* Section V(C)(1) *supra*. Because it is

premised on the federal constitution, *Anderson-Burdick* is merely a floor for protections of the right to vote and is an ill fit for states like Washington with more protective constitutions.

Indeed, for this precise reason, *Anderson-Burdick* has been called “particularly inappropriate” for state constitutional challenges and a “grave threat to independent state constitutions.” See Dylan O’Sullivan, *Constitutional Challenges to Voter Registration Deadlines: State Constitutions as a Tool for Voting Reform*, 13 *Ne. U. L. Rev.* 485, 499–500 (2021). It would make no sense for Washington to apply a federal standard premised on the less protective federal constitution.

Third, *Anderson-Burdick* is a flawed, rudderless test that invites subjective and inconsistent rulings. Joshua A. Douglas, *A Vote for Clarity: Updating the*

Supreme Court’s Severe Burden Test for State Election Regulations that Adversely Impact an Individual’s Right to Vote, 75 Geo. Wash. L. Rev. 372, 373 (2007) (*Anderson-Burdick* is “nebulous and unclear, resulting in vague decisions that fail to distinguish between constitutional and unconstitutional state election regulations.”).

The inherent danger of a test that makes the level of scrutiny dependent on the judge’s subjective perception of the burden on voters is apparent in the extremely inconsistent outcomes in federal cases applying *Anderson-Burdick* to similar laws.¹²

¹² Compare, e.g., *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (finding signature matching scheme imposed “at least a serious burden on the right to vote”) with *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 735–36 (S.D. Ohio 2020) (finding signature matching requirements impose “some burden on the right to vote”) and *Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 237

Adopting *Anderson-Burdick* would be particularly ironic in light of the Washington Constitution's explicit and enhanced protection of the right to vote and would expose that right to judicial inconsistency and overly deferential treatment of election laws. Any balancing test similar to *Anderson-Burdick* in Washington should account for the explicit textual protections for voting rights in the Washington Constitution.

5. There Is No Support in Washington Law for Rational Basis Review

Defendants argue that, despite disenfranchising over 170,000 voters in the last six years alone,

(5th Cir. 2020) (finding signature verification requirements without notice and an opportunity to cure “are even less burdensome than photo ID requirements”); *Buscemi v. Bell*, 964 F.3d 252, 263 (4th Cir. 2020) (applying *Anderson-Burdick* to uphold petition deadline of March 3) *with Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (holding that petition deadline of March 20 was invalid).

signature verification is merely a regulation of the “manner” of elections and that this Court should apply the lowest form of scrutiny, rational basis review.¹³ CP 1334–35, 2710–11. But that argument defies this Court’s precedent, and it would be illogical to adopt a test that is *even less* protective than that used by federal courts when the Washington Constitution is *more* protective of the right to vote than its federal counterpart.

This Court has *never* applied rational basis to a law infringing a fundamental right, let alone the fundamental right to vote. Not even the federal courts—applying a constitution which offers *less* protection to the right to vote—use rational basis

¹³ Rational basis review requires a law to be rationally related to a legitimate government interest. *Am. Legion Post #149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 605, 192 P.3d 306 (2008).

review for laws infringing on the right to vote. A burden on the right of suffrage “always triggers a higher standard of scrutiny than rational basis review.” *Tedards*, 951 F.3d at 1066; see Section V(C)(4) *supra*.

Indeed, this Court recently rejected rational basis review in a challenge to an economic regulation that merely implicated an economic right—a far cry from signature verification’s infringement on *the* fundamental right. See *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 518–19, 475 P.3d 164 (2020). Rational basis review is unsupported and illogical and would afford far too little protection for the right to vote. The suggestion should be rejected.

D. Defendants’ Framing of Plaintiffs’ Facial Challenge Is Logically and Legally Flawed

Lacking authority for applying rational basis review to a statute that infringes the right to vote,

Defendants attempt to avoid their burden by arguing that Plaintiffs must show that signature verification is constitutional under “no set of circumstances.” CP 1115, 1329, 2716.¹⁴ But that’s just a back-door way of attempting to circumvent the more stringent review the Court has consistently applied to protect fundamental rights and jump to rational basis review. *See Wash. Food Indus. Ass’n & Maplebear, Inc. v. City of Seattle*, 1 Wn.3d 1, 24–25, 524 P.3d 181 (2023) (“On rational basis review . . . the challenger has the burden to negative every conceivable basis which might support it.”) (internal quotations omitted).

The argument that Plaintiffs must prove the statute is unconstitutional in every conceivable

¹⁴ *Citing, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *State v. Fraser*, 199 Wn.2d 465, 476, 509 P.3d 282 (2022); *Portugal*, 530 P.3d at 1006.

circumstance, no matter how far it stretches the bounds of reality, misapprehends facial challenges and what “no set of circumstances” means. “A facial challenge is best understood as ‘a challenge to the terms of the statute, not hypothetical applications,’ . . . and is resolved ‘simply by applying the relevant constitutional test to the challenged statute without attempting to conjure up whether or not there is a hypothetical situation in which application of the statute might be valid.’” *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016) (quoting *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124–27 (10th Cir. 2012)) (cleaned up).

For that reason, “the ‘no set of circumstances’ language is not intended to be a test that prescribes a specific method of determining constitutional validity, but, rather, is intended to describe the result of a facial

challenge analyzed under the applicable constitutional standard.” *N.H. Democratic Party v. Sec’y of State*, 262 A.3d 366, 377 (N.H. 2021).¹⁵

Defendants essentially attempt to graft a “no conceivable circumstances” test on top of the “relevant constitutional test” as an additional hurdle for Plaintiffs to overcome. But that would lead to the absurd result that a statute such as the requirement to conduct signature verification could fail strict scrutiny or *Anderson-Burdick* but still be upheld and continue

¹⁵ See *Supreme Ct. of N.M.*, 839 F.3d at 917 (“no set of circumstances” simply “describe[es] the result of a facial challenge in which a statute fails to satisfy the appropriate constitutional standard”); see also *Henry v. Abernathy*, No. 2:21-cv-797-RAH, 2022 WL 17816945, at *5–8 (M.D. Ala. Dec. 19, 2022) (“The Defendants’ free-floating ‘no set of circumstances’ test, untethered from any constitutional standard, not only doesn’t make sense on its face (no pun intended) but is also inconsistent with both the Supreme Court’s and the Eleventh Circuit’s treatment of facial challenges.”).

disenfranchising voters by the tens of thousands in every election. Simply put, “[i]f the [no set of circumstances standard] were taken seriously, virtually no statute would ever be invalidated.” *United States v. Streett*, 434 F. Supp. 3d 1125, 1159 n.18 (D.N.M. 2020).

1. This Court Must Consider Evidence to Assess Whether Defendants Have Met Their Burden

The “relevant constitutional tests” here—strict scrutiny or *Anderson-Burdick*—not only require a court to consider evidence but place the burden on Defendants to show, at minimum, evidence that a restriction actually advances state interests.

Strict scrutiny requires evidence of a statute’s interference with the right to vote, advancement of the state’s interests, and the tailoring of the statute to serve those interests. *Madison*, 161 Wn.2d at 99;

Collier v. City of Tacoma, 121 Wn.2d 737, 753–54, 854 P.2d 1046 (1993).

And *Anderson-Burdick* is entirely predicated on the evaluation of facts regarding the burden and the state interests; indeed, “[e]vidence is key to the balancing of interests at the heart of the *Anderson-Burdick* framework.” *Mazo v. N.J. Sec’y of State*, 54 F.4th 124, 152 (3d Cir. 2022); see Section V(F) *infra*.¹⁶

¹⁶ See, e.g., *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018) (application of *Anderson-Burdick* “rests on the specific facts of a particular election system, not on strained analogies to past cases,’ as ‘[a]nalogy and rhetoric are no substitute for evidence”); *Doe*, 667 F.3d at 1132 (“This begs the question of how a reviewing court is supposed to discern the interest to be served by a restriction in the absence of any evidence.”); *Obama for Am. v. Husted*, 697 F.3d 423, 441 (6th Cir. 2012) (“*Anderson/Burdick* balancing . . . should not be divorced from reality, and [] both the burden and legitimate regulatory interest should be evaluated in context.”).

Both tests require *the state* to establish that the statute actually advances the proffered interests. *See* Sections V(E)–(F) *infra*; *Collier*, 121 Wn.2d at 753–54; *Burdick*, 504 U.S. at 434. And courts must “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018).

Moreover, contrary to Defendants’ contention, courts in Washington and across the country routinely look beyond the text of the statute and consider evidence in facial challenges. *See, e.g., City of Redmond v. Moore*, 151 Wn.2d 664, 672, 91 P.3d 875 (2004) (in facial challenge, “documents pertaining to nonparties . . . provide[d] telling examples of the

significant risk of error” posed by the statute).¹⁷

2. Even Under Defendants’ Framing of a Facial Challenge, Signature Verification Cannot Survive

Even if it were necessary to establish that signature verification was unconstitutional in “every conceivable circumstance,” the record does so. Signature verification in elections is fundamentally and irreparably flawed because it cannot reliably accomplish its goal of verifying the identity of voters

¹⁷ See *Rental Housing Ass’n v. City of Seattle*, 22 Wn. App. 2d 426, 464–65, 512 P.3d 545 (2022) (considering, as part of facial challenge to statute, evidence of report on connection between evictions and risk of homelessness); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) (considering rejection rates and expert testimony of Plaintiffs’ expert Dr. Linton Mohammed in facial challenge to signature matching statute); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008) (plurality op.) (in facial challenge to voter ID law, evidence in the record went to the “magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified”).

based on signatures. Election officials do not have the resources required to more reliably analyze signatures—they have neither millions of hours to devote to signature analysis nor access to 10–15 contemporaneous comparator signatures to account for the natural variation in every voter’s signature. CP 243, *see* Section IV(A)(5) *supra*.

Moreover, even under ideal circumstances—which do not and cannot exist in elections—signature verification will always wrongly disenfranchise some voters. The retired Washington State Patrol Forensic Document Examiner responsible for training Washington election officials highlights the point. Despite his years of experience and training, as well as unlimited time to review signatures, he correctly accepted or rejected less than half of the signatures he evaluated. CP 2163. Indeed, he accepted all three

forged signatures, and he wrongly rejected four genuine signatures. *Id.*

These fundamental flaws are endemic to signature matching and cannot be tweaked, adjusted, or modified in a way that comports with the Washington Constitution's guarantee that the right to vote be free and equal to all Washington voters. Instead, signature verification will always result in the wrongful rejection of ballots.

The Secretary's new proposed rules do not change this result. The rules tinker with the mechanics of signature verification but do not change the fundamental problem—ballots will still be rejected based on a subjective, error-prone exercise. And even if the new regulations were to have a remarkable impact—even if they reduce by half the number of voters disenfranchised for non-matching signatures—

over 12,000 Washington voters will *still* have their right to vote stripped in the 2024 general election. And there will *still* be no discernable benefit.

E. Applying Strict Scrutiny, Plaintiffs Are Entitled to Summary Judgment That Signature Verification Unconstitutionally Violates Article I, Section 19

As discussed, strict scrutiny is the correct constitutional test because signature verification infringes and burdens the fundamental right to vote. And Defendants bear the burden of showing that signature verification survives strict scrutiny—they “must prove” that it is “narrowly drawn to serve a compelling state interest.” *Collier*, 121 Wn.2d at 753–54. To meet that burden, Defendants must provide actual evidence of both. *See, e.g., id.* at 756–58 (striking down prohibition on political yard signs because the city failed to support claim that the prohibition

advanced any compelling state interest).¹⁸ But

Defendants do neither.

1. Defendants Have Not Shown That Signature Verification Furthers Any State Interest

Defendants claim that signature verification furthers four state interests: election security, public confidence in elections, protecting voting rights of individual voters, and promoting efficient

¹⁸ See also *Pilloud v. King Cnty. Republican Cent. Comm.*, 189 Wn.2d 599, 606, 404 P.3d 500 (2017) (holding campaign finance statute unconstitutional after proponent failed to “present[] evidence to support” claim that the law was necessary to advance compelling state interest); *Fish v. Schwab*, 957 F.3d 1105, 1132 (10th Cir. 2020) (finding the state’s interests were insufficiently weighty to justify voting restrictions because the Secretary could not point to “concrete evidence” that the state interests merited imposing such restrictions); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 547 (6th Cir. 2014) (a handful of examples of voter fraud and general testimony was insufficient to present a “precise” problem of voter fraud), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. 2014).

administration of elections. CP 1335.

While Plaintiffs do not dispute that these interests are compelling, there is scant evidence that signature verification actually advances them. Instead of data, Defendants rely on self-serving declarations and anecdotal evidence, none of which suffices to meet their burden. And the undisputed evidence shows the opposite.

a. Defendants Cannot Show That Signature Verification Improves Election Security or Protects Individual Voting Rights

Defendants admit that they have conducted no studies to determine whether signature verification actually improves election security or prevents voter fraud. CP 449–50 (Secretary: “There has been none.”); 467. Indeed, Defendants have no data or evidence about whether the hundreds of thousands of ballots rejected for non-matching signatures “were actually

submitted and signed by someone other than the voter as opposed to just being signed in a different way by the actual voter.” CP 449–50, 467. And the Secretary admits that he has never even talked to any voters who have had their ballots rejected to see whether they were the voters who actually signed the ballot declaration. CP 451. That lack of evidence of any connection between signature verification and election security is fatal. *Collier*, 121 Wn.2d at 755; *Pilloud*, 189 Wn.2d at 606.

Without even knowing whether any of the hundreds of thousands of ballots rejected for non-matching signatures were actually fraudulent—let alone *how many*—Defendants cannot meet their burden to show that disenfranchising voters serves a compelling state interest—let alone that it’s narrowly tailored. *See Fish*, 957 F.3d at 1132; *Ohio State Conf. of*

NAACP, 768 F.3d at 547.

In any event, the evidence is that signature verification is ineffective: It has not identified *a single case of confirmed voter fraud*, ever, and it failed to catch all three recent cases of voter fraud involving somebody signing another's ballot. There is no evidence in the record that it actually deters any fraud. It is, in short, demonstrably *ineffective* at its stated purpose.

There is also no evidence that signature verification—as opposed to the other safeguards in place to protect Washington elections, such as signing a ballot under penalty of perjury, continuously updating voter addresses, sending ballots via U.S. Mail directly to those specific addresses, and offering ballot tracking and notifications so voters can be alerted to suspicious activity—deters ballot fraud. Nor do Defendants have any evidence of higher rates or

incidences of fraud from states that accept returned absentee ballots without signature verification. The Secretary recognizes as much. CP 404 (“[W]e don’t have any data that shows—or studies that we’ve conducted that show a comparative rate of what life without signature verification would be like.”).

Defendants cannot meet their burden to show that signature verification actually improves election security or enhances the rights of individual voters.

b. Defendants Cannot Show That Signature Verification Promotes Public Confidence in Washington Elections

Defendants next contend that signature verification is necessary to uphold public confidence in Washington elections, but there is no credible empirical evidence in the record to support Defendants’ claim.

That’s in part because while Defendants assume

signature verification affects public confidence in elections, they have never actually studied the matter. CP 396 (“We haven’t done any studies, per se, on that particular topic.”), 399 (Q. “I’m asking about if the Secretary is aware of any studies or data that analyze relationships between signature verification and voter confidence. A. I’m not aware of any.”), 464 (“We haven’t studied that the signature verification if removed would impact voter confidence.”), 486–87 (“I cannot recall any studies that King County Elections has conducted with regards to voter confidence and the signature-matching process.”).

Moreover, the idea that disenfranchising (mostly younger and minority) voters by the tens of thousands in every election somehow generates “public confidence” in Washington elections is implausible. Certainly, it’s hard to imagine that signature

verification inspires confidence among those voters who are wrongly rejected and forced to prove that they cast their ballot or face rejection. See *Fish*, 957 F.3d at 1115, 1134–35 (when a regulation enacted under guise of “safeguarding voter confidence” results in disenfranchising otherwise eligible voters, it may “have the inadvertent effect of eroding, instead of maintaining, confidence in the electoral system”); see also *Rickert v. State, Pub. Disclosure Comm’n*, 161 Wn.2d 843, 855, 168 P.3d 826 (2007) (challenged statute failed strict scrutiny because it undermined the state’s interest in assuring public confidence in elections).

Unsurprisingly, the record shows that signature verification erodes, rather than inspires, voter confidence in elections. The experts agree that disenfranchisement by signature verification makes

voters less likely to vote in the future. CP 346, 1667.

And 22 voters who were wrongfully disenfranchised by signature verification submitted declarations expressing concern “that the signature verification system may prevent myself and many of my fellow citizens from being able to exercise their right to vote.” CP 862–67, 871–73, 880–85, 874–76, 922–25, 939–41, 963–66, 989–94, 1001–09, 1010–15, 1019–20, 1043–48, 1053–58, 1062–64.

c. Defendants Cannot Show That Signature Verification Promotes Efficient Administration of Elections

Defendants also claim that signature verification promotes the efficient administration of elections. But they merely argue, without evidence, that “the State will be forced to choose between leaving its election system unsecured against attack or adopting *more* burdensome measures.” CP 1341 (emphasis in

original). That's a false dichotomy, one that ignores the many overlapping safeguards in place to secure the election: Ballots are mailed to specific voters by U.S. Mail to their current address; addresses are regularly updated; ballots are signed by the voter under penalty of perjury; those ballots are tracked and can generate notifications; and then election workers confirm upon receipt that the voter has not already submitted a ballot. *See* Section IV(A)(1) *supra*.

Moreover, the notion that signature verification leaves an election "unsecured" is contrary to the experience of states such as Vermont and Pennsylvania, where millions of voters returned their ballots by mail without signature verification and without fraud in their elections. CP 2117; *McLinko v. Dep't of State*, 279 A.3d 539, 575 n.44 (Pa. 2022) ("We are unaware of **any** evidence to call into question the

integrity of any elections in this Commonwealth since the enactment of [mail-in voting].”) (emphasis in original).

It is especially curious for the Secretary to advance such a false choice given his admission that Washington has never “done anything to study whether there are feasible alternatives to signature verification.” CP 381.

2. Defendants Cannot Show That Signature Verification Is Narrowly Tailored

Even if signature verification advanced a compelling state interest, it would fail strict scrutiny because it is not the “least restrictive means available” to serve those interests. *OneAmerica Votes v. State*, 23 Wn. App. 2d 951, 989, 518 P.3d 230 (2022). A statute is narrowly tailored if “the means chosen are not substantially broader than necessary to achieve the

government's interest." *Matter of Recall of Inslee*, 199 Wn.2d 416, 431, 508 P.3d 635 (2022). In other words, "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Matter of Dependency of M.-A.F.-S.*, 4 Wn. App. 2d 425, 421 P.3d 482 (2018) (internal quotations omitted).

Signature verification is not just "substantially broader;" it is wildly overinclusive. Most, if not nearly all, of the ballots rejected based on signature verification were wrongfully rejected. In the 2020 and 2022 elections, Washington election officials initially rejected almost 148,000 ballots for non-matching signatures, and *more than half* of those ballots were ultimately proven to be genuine by the voters themselves. CP 344.

The true error rate is significantly higher. Even

the ballots that local election officials *suspect* were fraudulent represent a vanishingly small fraction of the voters who are stripped of their right to vote for a non-matching signature. Less than one percent of the over 56,000 ballots rejected by King, Snohomish, and Clark Counties in recent elections were referred to prosecutors—election officials did not even *suspect* wrongdoing in the other 99.23 percent of rejected ballots. CP 2103–08. And none of those were even charged, let alone convicted. *Id.* And sixty-five voters who lawfully cast their ballots but were disenfranchised by signature verification submitted declarations to the trial court—clear evidence of the pervasive problem. CP 862–1067.

A state policy that strips voters of the fundamental right to vote based on a process that is wrong so often can hardly be deemed narrowly tailored.

See, e.g., Ams. for Prosperity Found. v. Bonta, 594 U.S. ---, 141 S. Ct. 2373, 2386 (2021) (“There is a dramatic mismatch, however, between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end.”).

In short, the undisputed facts show that signature verification cannot survive strict scrutiny. Because that is the applicable constitutional standard, the trial court erred by denying summary judgment to Plaintiffs.

F. Signature Verification Cannot Survive *Anderson-Burdick*

Even if this Court were to adopt some variation of *Anderson-Burdick*, the lack of evidence that signature verification advances a state interest should lead to the same result: summary judgment for Plaintiffs.

a. The *Anderson-Burdick* Framework

Anderson-Burdick is not itself a tier of scrutiny but rather an analytical framework through which courts determine which level of scrutiny applies to a law burdening the right to vote based on the burden imposed. *Tedards*, 951 F.3d at 1066.

Under this framework, the first step is to characterize the burden. Severe burdens on the right to vote must be “narrowly drawn to advance a state interest of compelling importance”—in other words, they are subject to strict scrutiny. *Burdick*, 504 U.S. at 434. Moderate burdens are weighed against “the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* (quoting *Anderson*, 460 U.S. at 788).

Either way, Defendants must do more than just wave at state interests because “the burdening of the right to vote always triggers a higher standard of scrutiny than rational basis review.” *Tedards*, 951 F.3d at 1066.

b. Signature Verification Cannot Survive *Anderson-Burdick* Scrutiny

Regardless of how the burden here is characterized, the lack of evidence of a connection to state interests necessarily dooms signature verification under *Anderson-Burdick*. Defendants must show that the law furthers “specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth.” *Ohio State Conf. of NAACP*, 768 F.3d at 545. But instead, Defendants rely on “vague and unsupported” justifications and identify

no empirical evidence that signature verification is “actually necessary” for the asserted compelling state interests. *Id.*; see *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 666 (6th Cir. 2016); see Section V(E)(1) *supra*. Moreover, Defendants have not established that “less burdensome . . . alternatives would not accomplish the goal.” *Soltysik*, 910 F.3d at 447; *Mi Familia Vota v. Hobbs*, 608 F. Supp. 3d 827, 842 (D. Ariz. 2022); see Section V(E)(2) *supra*.¹⁹

As a result, regardless of whether this Court were to deem the burden severe or less than severe, signature verification would still necessarily fail under

¹⁹ See *Mich. State A. Philip Randolph Inst.*, 833 F.3d at 666 (“[V]ague and largely unsupported justifications of fostering voter knowledge and engagement” are not enough to satisfy state’s burden under *Anderson-Burdick*.); *Obama for Am.*, 697 F.3d at 433–34 (assessing under *Anderson-Burdick* whether the state had presented actual evidence to support the justifications it provided for the challenged law).

Anderson-Burdick. See *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020) (“[W]here the burden on the right to vote is moderate [o]nly where the State’s interests outweigh the burden on the plaintiff’s right to vote do voting restrictions” survive *Anderson-Burdick*.)

Because Defendants rely on exactly the vague and unsupported justifications that are insufficient under the *Anderson-Burdick* analysis, summary judgment should be entered for Plaintiffs.

VI. Conclusion

Plaintiffs respectfully submit that this Court should reverse the Superior Court, apply strict scrutiny to the signature verification requirement found in RCW 29A.40.110(3), and remand this case with instructions to enter summary judgment for Plaintiffs.

Certificate of Compliance: I certify this brief contains 11,392 words in compliance with Rules of

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on February 26, 2024, I electronically filed the foregoing document via the Washington State Supreme Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

DATED this 26th day of February, 2024.

s/June Starr

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