

No. 102569-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VET VOICE FOUNDATION, et al.,

Petitioners,

v.

STEVE HOBBS, et al.,

Respondents.

KING COUNTY CANVASSING BOARD'S
CROSS-REPLY BRIEF

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I. INTRODUCTION

Washington's universal mail voting system is not "fundamentally flawed" as Vet Voice suggests. Indeed, it is arguably the most accessible voting systems in the nation according to experts. In the November 2020 general election, an unprecedented 86.67% of registered King County voters cast ballots.¹ Consistently, more than 99% of King County voters have their ballots accepted without issue. CP 1150. Those whose ballots are challenged for mismatched signatures have multiple, convenient ways to cure the challenge. In light of these facts, Vet Voice's claim that Washington universal mail voting system is "fundamentally flawed" and "broken" because of signature verification rings hollow.

What is fundamentally flawed is Vet Voice's argument that signature verification must be subject to strict scrutiny

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<https://kingcounty.gov/en/legacy/depts/elections/results/2020/202011.aspx>

because it results in the rejection of otherwise lawful voters. *Any* voting regulation results in the rejection of otherwise lawfully cast ballots. For example, each election thousands of ballots are rejected in Washington because they are not returned before the deadline. And each election thousands of ballots are rejected in Washington because the voter fails to sign the ballot declaration at all.

Vet Voice cannot and does not argue that all voting regulations are subject to strict scrutiny because such a rule would make election administration impossible. Vet Voice offers no coherent argument as to why the signature verification requirement should be singled out for strict scrutiny. Deference is owed to the legislature because they have been tasked by both the federal and state constitutions with providing for the method of voting. This Court has never held that neutral voting regulations are subject to strict scrutiny, particularly when there is zero evidence that the regulation was motivated by any discriminatory animus. This Court should decline to apply strict

scrutiny in this case. Rational basis review is consistent with this Court's precedent and the deference due to the legislature. Washington's long-standing signature verification requirement, which is the only safeguard that protects Washington's elections against the real risk of fraudulently intercepted ballots, easily meets the rational basis test.

II. ARGUMENT IN CROSS-REPLY

A. The Signature Verification Requirement Is Not Severable from Washington's Universal Mail Voting System.

Vet Voice asks this Court to strike down the signature verification requirement but argues that the requirement's severability from the universal mail voting system is not before this Court. It is unclear from their Reply Brief when or how severability would be addressed, or by what court. Since severability is a question of statutory construction which this Court reviews de novo, it would make no sense to remand this issue to the trial court. In considering a party's proposed statutory interpretation, this Court should consider the destruction that

would be left in its wake.

If this Court finds the signature verification requirement to be unconstitutional it cannot simply sidestep the severability question. The question is properly before this Court. It was raised in the trial court, and was presented as an issue for review in the King County Canvassing Board's Motion for Discretionary Review, which was granted without limitation. *See* RAP 2.4, 13.4(b).

Vet Voice argues that the signature verification requirement is severable because it is not "necessary." But that is not the proper inquiry. The proper inquiry is whether it can be "reasonably believed that the legislative body would have passed the remainder of the act's provisions without the invalid portions." *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 411, 355 P.3d 1131 (2015). In other words, is it reasonable to believe that the Washington legislature would have enacted universal mail in voting in 2011 without any method of verifying the voter's identity?

Vet Voice's cavalier suggestion that the "if the legislature believes verification or an additional safeguard is necessary, it can choose a new one or not" is unresponsive to this question. Reply Brief of Petitioners (hereinafter "Reply"), at 84. It also ignores Dr. Stein's unrebutted declaration which explains that other methods of verifying a voter's identity, like requiring a copy of photo identification or requiring identification numbers, have shown to be more burdensome on voters than signature verification. CP 1787-90.

The legislature has already chosen signature verification as the method to verify voter identity and that method cannot be cast aside without upending the entire framework. For decades signature verification was the safeguard the legislature chose to protect against fraudulently intercepted absentee ballots. The legislature chose to retain it as the verification method for universal mail voting. And recent legislative enactments show that the verification of voter identity remains of tantamount importance to the legislature. In its recent session the legislature

established a pilot project authorizing counties to explore alternatives to signature verification. SSB 6269, § 1. Notably, the legislature did not authorize counties to explore *no* verification. Any proposed alternatives must “allow the voter to submit clear evidence which can be verified by the county auditor indicating that the intended voter was the one who filled out and returned the ballot.” *Id.*, § 1, (2)(b)(i). The legislature mandated that any alternatives “may not entirely replace signature verification.” SSB 6269, § 1, (3)(b). This conclusively demonstrates not only the importance of voter identity verification to the legislature, but the importance of signature verification unless and until some alternative is proven more workable.

Vet Voice’s argument that the signature verification requirement is functionally severable ignores a fundamental truth: the design of any voting system requires the careful balancing of ballot access with election security.² The signature

² Dr. Stein explained, “It is thus important to recognize that the goals of broad ballot access and preserving election security can

verification requirement is an integral part of the legislature's balancing process, for example, in choosing to make replacement ballots easily available (as explained in the Secretary's response brief). *See* RCW 29A.40.070; Brief of Respondent of Secretary Hobbs, at 6, 55-58; CP 1779-80. The legislature's reliance on signature verification to protect against fraudulently intercepted ballots has necessarily affected the legislature's choice to provide broad ballot access. *See In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 68-69, 109 P.3d 405 (2005). Striking down the signature verification requirement would upset the legislative compromise and bring about a result the legislature never intended: the acceptance of ballots without any verification as to the voter's identity. *Id.*; *Jensen v. Henneford*, 185 Wash. 209, 224, 53 P.2d

be in tension, and that legislatures and election administrators must make choices between protecting against illegitimate votes, which may have the unintended effect of reducing the number of legitimate votes, versus reducing protections as a means of facilitating more legitimate votes, which may have the unintended effect of increasing the number of illegitimate votes." CP 1771.

607 (1936). Signature verification is so intertwined in the balancing of ballot access with election security that it cannot be deemed severable. *League of Women Voters*, 184 Wn.2d at 142.

Luckily, Vet Voice has failed to show that the signature verification requirement is unconstitutional. But if it were, this Court cannot conclude that it is severable from the rest of Washington's universal vote by mail system.

B. Plaintiffs Agreed to a Facial Challenge to Preserve Venue in King County, and Have Failed to Meet the Demanding Standard for Facial Challenges.

Vet Voice agreed to a facial challenge in order to preserve venue in King County. When Vet Voice filed this lawsuit in King County, the Secretary moved to change venue to Thurston County, arguing that Thurston County was the only proper venue for claims based on acts of the Secretary or the validity of regulations adopted by the Secretary. *See* RCW 4.12.020; CP 1-8. In response, Vet Voice asserted that their constitutional challenge was to the statute only, not to its implementation, and agreed to amend the complaint. CP 41-53. The trial court denied

the motion to change venue on that condition. CP 68-69. Vet Voice filed a Second Amended Complaint, clarifying that it was only challenging the statute that imposes the signature verification requirement, not the “signature verification procedure” or any implementing regulations. CP 71-115, 3124-3166. Vet Voice reaffirmed the facial nature of their constitutional challenge in their motion for summary judgment. CP 202 (arguing that the signature verification requirement is “facially unconstitutional”).

In reply, Vet Voice tries to wriggle out from under the demanding standard for facial constitutional challenges, arguing that this Court should “consider the facts,” in particular, the number of voters who have had their ballots “rejected” in the past seven years. Reply, at 9, 12. Indeed, Vet Voice argues that the strict scrutiny is *triggered* by these facts. Vet Voice improperly relies on implementation of the statutory requirement as the evidentiary basis for applying strict scrutiny in their facial challenge.

This Court recently reaffirmed the facial challenge standard in *Portugal v. Franklin County*, 1 Wn.3d 629, 659, 530 P.3d 994 (2023). In that case, the plaintiff, like Vet Voice, argued he should not be required to prove that Washington’s Voting Rights Act (WVRA) was unconstitutional “*in all its potential applications.*” *Id.* This Court rejected the argument, stating, “that is the standard that applies to a facial constitutional challenge in accordance with this court’s controlling precedent.” *Id.* This Court explained that if the WVRA was applied in a way that granted privileges to some racial groups it would be subject to an as-applied challenge. *Id.* at 657. But this Court applied rational basis review to the facial challenge. *Id.* at 658. Indeed, under the facial challenge standard, Vet Voice’s admission that in past recent elections the signature verification challenge rate has been very low in some counties should be fatal to their facial challenge. *See* Appellant’s Opening Brief, at 29.³

³ Vet Voice asserts that different rates of ballot rejection due to signature verification practices between counties renders the

Vet Voice claims it has brought only a facial challenge, but in fact challenges the way the signature verification requirement has been implemented. Vet Voice's argument for strict scrutiny is based solely on implementation of the statute and is thus beyond the scope of the facial challenge.

Even if the implementation of the signature verification requirement could be considered in this facial challenge to the statute only, this Court should consider the regulations governing signature verification and the cure process as they currently exist.⁴ At the very least, these new regulations demonstrate one possible constitutional application of the challenged statute, which completely undermines the Vet Voice facial challenge.

requirement arbitrary. Reply, at 71. But this is not an as-applied challenge to implementation. And Vet Voice has failed to join any other counties, who would be necessary parties to challenge implementation of the statutory requirement by those county election officials. *See* CR 19.

⁴ Otherwise, Vet Voice's challenge to implementation under the previous regulations is moot. *Citizen Center v. Gessler*, 770 F.3d 900, 907 (10th Cir. 2014) (finding challenge to disputed election regulations partially mooted by changes in those regulations).

Under the current regulations Vet Voice has not proven that the signature verification requirement cannot be constitutionally applied and is thus unconstitutional in all its potential applications. For this reason, Vet Voice's challenge to the signature verification requirement fails.

C. The Signature Verification Requirement Is Not Subject to Strict Scrutiny Under Washington Law.

Vet Voice argues that voting regulations that “infringe” upon the right to vote should be subject to strict scrutiny while voting regulations that “implicate” the right to vote are not. Reply, at 20. Vet Voice argues that strict scrutiny must apply to the signature verification requirement because it infringes upon, rather than implicates, the right to vote. In reply, Vet Voice still fails to offer any coherent framework by which this Court can determine which voting regulations only implicate the right to vote and which regulations infringe upon it.

Notably, Vet Voice does not challenge the requirement to sign the ballot envelope, presumably because it does not infringe

upon the right to vote.⁵ But thousands of ballots are challenged each election for the lack of a signature on the ballot envelope. Indeed, in two recent elections in King County the number of ballots initially challenged for no signature exceeded the number of ballots challenged for mismatched signatures. CP 1150; King County Canvassing Board Brief of Respondent, Appendix A.⁶

Washington elections have always involved, and necessarily involve, facially neutral voting regulations that apply

⁵ Indeed, Vet Voice states “To be clear, Plaintiffs don’t challenge the requirement *to sign* the ballot envelope under penalty of perjury or the rejection of *unsigned* ballots.” Reply, at 23-24 (emphasis in original).

⁶ For example, during the August 2020 primary election 6,996 ballots were challenged for having no signature and 5,279 ballots were challenged for mismatched signatures in King County. In that election, 3,164 ballots remained challenged for no signature at certification (in other words, were not cured), and 3,657 ballots remained challenged for mismatched signatures at certification. Similarly, during the November 2021 general election 3,904 ballots were challenged for having no signature and 3,380 ballots were challenge for mismatched signatures in King County. In that election, 1,602 ballots remained challenged for no signature at certification and 2,235 ballots remained challenged for mismatched signatures at certification. CP 1150; King County Canvassing Board Brief of Respondent, Appendix A.

to all voters. No Washington case has previously subjected a neutral voting regulation that governs the method of voting to strict scrutiny. While Vet Voice cites *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 687 P.2d 841 (1984), and *City of Seattle v. State*, 103 Wn.2d 663, 694 P.2d 641 (1985), those cases applied strict scrutiny where the question involved *who* was eligible to vote, not the method of voting.

The signature verification requirement has existed for over 100 years in some form, and no Washington court has ever suggested that it is not within the legislature's authority to impose such a requirement in order to verify voters' identities and protect against fraudulently intercepted ballots. There is no basis for applying strict scrutiny to Vet Voice's facial challenge to the signature verification requirement under the state constitution.

Application of strict scrutiny to a facially neutral statute establishing the method of casting a lawful vote raises substantial separation of powers concerns. As this Court has recognized, the

method of voting is a matter generally entrusted to the legislature under both the state and federal constitutions. *See Island Cnty. v. State*, 135 Wash. 2d 141, 147, 955 P.2d 377, 380 (1998). In the absence of evidence demonstrating discriminatory animus behind an otherwise neutral law establishing the method of voting, strict scrutiny violates separation of powers by reversing the presumption that statutes are constitutional. *Id.* (“The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution.”)

D. If Strict Scrutiny Applied, the Signature Verification Requirement Would Survive It.

Vet Voice does not dispute that protecting election security is a compelling state interest. But Vet Voice contends that the signature verification requirement is not narrowly tailored because the King County Canvassing Board and the Secretary of State “have never actually studied whether signature verification either improves election security or prevents voter

fraud.” Reply, at 37. This argument is spurious. Since the signature verification requirement has long been imposed by the legislature, there is no reason for either the King County Canvassing Board or the Secretary of State to commission studies to evaluate its efficacy.

The state constitution does not require the legislature to play Russian Roulette with the integrity of our elections. It does not prevent the legislature from acting proactively to prevent election fraud. For example, in *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), the Court applied strict scrutiny to a Tennessee statute that prohibited electioneering within 100 feet of a polling place. Strict scrutiny applied not because it was a voting regulation but because it was a content-based regulation of political speech under First Amendment analysis that is inapplicable in this case. *Id.* at 198. The Court found that the state’s interest in “ensuring that an individual’s right to vote is not undermined by fraud in the election process” is compelling. *Id.* at 199. Turning to the narrowly tailored part of

the inquiry, the Court rejected the plaintiffs' argument that the 100-foot boundary was not narrowly tailored. *Id.* at 208-09. The Court rejected the need for empirical evidence to support voting regulations that are intended to enhance election security, even under a strict scrutiny standard. Contrary to Vet Voice's argument in this case, strict scrutiny does not "necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986)).

"The right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 442, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). This Court should reject Vet Voice's invitation to totally disregard the obvious risk of fraudulently intercepted ballots that the non-partisan election officials in this case have spoken to. The signature verification requirement is narrowly tailored to prevent fraudulently

intercepted ballots because no other verification method has been proven to be more workable. CP 1787-90. Vet Voice has never suggested a workable alternative, and its alternative of no voter verification potentially leaves Washington's vote vulnerable to claims of fraud that could result in noncertification in the next presidential election.

E. Washington's Signature Verification Requirement Comports with the Privileges and Immunities Clause of Article 1, § 12.

Vet Voice questions the application of the reasonable grounds test under article 1, § 12, the privileges and immunities clause of the state constitution. This Court recently explained that independent state law analysis under article 1, § 12 involves a two-part test. *Bennett v. United States*, 2 Wn.3d 430, 443, 539 P.3d 361 (2023). If the law grants a privilege or immunity then this Court asks whether there are reasonable grounds for granting that privilege or immunity. *Id.* The law fails if it is not supported by reasonable grounds. *Id.* Even where a statute implicates a fundamental right, it is subject to the reasonable grounds test. *Id.*

at 446. This test requires careful consideration of the legislative purpose and is more exacting than rational basis review. *Id.* at 449. But “the legislature is not required to satisfy an evidentiary burden before exercising its broad authority to legislate.” *Id.* There must be a nexus between the legislative purpose and the statute. *Id.*

Even if the signature verification requirement could be said to grant a privilege, there is a nexus between preventing election fraud and requiring signature verification to guard against fraudulently intercepted ballots. Vet Voice has failed to prove that the signature verification requirement violates the privileges and immunities clause of the Washington Constitution. *Associated General Contractors of Washington v. State*, 200 Wn.2d 396, 403, 518 P.3d 639 (2022) (party challenging the constitutionality of a statute bears the burden of proving unconstitutionality beyond a reasonable doubt).

F. Washington’s Signature Verification Requirement Comports with Substantive Due Process Under Article 1, § 3.

While the right to vote is fundamental, there is no fundamental right to vote without proof of identity. *See Burdick*, 504 U.S. at 433 (explaining that while voting is “fundamental,” the “right to vote in any manner” is not and states may prescribe the manner of elections so that they are “honest and fair” without being subject to strict scrutiny). Thus, the proper test to apply to Vet Voice’s substantive due process claim is that set forth in *Yim v. City of Seattle*, 194 Wn.2d 682, 688, 451 P.3d 694 (2019). Pursuant to *Yim*, a law violates substantive due process only if it fails to serve any legitimate governmental objective, thereby making it arbitrary. *Id.* This test corresponds with rational basis review. *Id.* Detecting fraudulently intercepted ballots is a compelling state interest, not just a legitimate government objective, and the signature verification requirement easily passes the *Yim* test.

III. CONCLUSION

Vet Voice's facial challenge to the signature verification requirement fails as a matter of law. Summary judgment for the King County Canvassing Board and the Secretary of State should have been granted. The trial court's order should be reversed and the case remanded for entry of summary judgment in favor of the defendants and dismissal.

I certify that this brief contains 3,397 words in compliance with RAP 18.17(c)(5).

DATED this 28th day of May, 2024.

Respectfully submitted,

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