SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SAN JUAN COUNTY

Donald E. Eaton
Judge

Jane M. Hutchison
Court Administrator

March 27, 2013

Knoll Lowney
Smith & Lowney, PLLC
2317 E. John Street
Seattle, WA 98122

Anne E. Egeler, Peter B. Gonick
Attorney General of Washington
Post Office Box 40100
Olympia, WA 98504-0100

Randy K. Gaylord
Prosecuting Attorney's Office
San Juan County Courthouse
350 Court Street
Friday Harbor, WA 98250

Re: White/ Rosato, et al v. Reed/ San Juan County, et al
Superior Court Cause No. 06-2-05166-2 & 10-2-05002-8

Dear Counsel:

By letter dated May 15, 2012 this Court advised the parties that Plaintiffs' Motion for Partial Summary Judgment, argued to the Court on February 3, 2012, was denied. On May 25, 2012, Plaintiffs filed a Motion for Reconsideration with respect to that part of the Court's letter decision that addresses the question of whether or not the ballot tracking software, called Mail-in Ballot Tracker (MiBT), used by San Juan County election officials is part of a "voting system" as defined in RCW 29A.12.005. If MiBT is part of a voting system it must be certified by the Secretary of State, in accordance with RCW 29A.12.050 and WAC 434-335-010 and the parties agree that no such certification of MiBT has occurred.

Because Plaintiffs did not note their Motion for oral argument, the Court, by letter dated June 28, 2012, advised the parties that it should be noted for oral argument without additional briefing. However, prior to oral argument on September 28, 2012, Plaintiffs submitted additional briefing and so, after oral argument, Defendant State of Washington asked for permission to submit briefing before the Court ruled on Plaintiffs' Motion. The Court approved that request and gave the parties until November 21, 2012 to submit additional briefing.

As part of its response to Plaintiffs' Motion, Defendant San Juan County filed a Motion for Reconsideration on November 9, 2012, asking, among other things, for the Court to rule that Plaintiffs do not have standing. By letter dated December 4, 2012, the Court established a briefing schedule. By February 11, 2013, the Court had received briefing from all parties on the County's Motion for Reconsideration, to include, as part of their response, Plaintiffs' Cross Motion re RAP 2.2(D); Plaintiffs' Motion to Strike re Declaration of Doris Schaller; and Plaintiffs' request that the Court grant summary judgment for them on the fact that, prior to 2008, the MiBT system did link ballot numbers with voter identification. The Court then advised the parties that it would rule on all motions without oral argument.

A. Standing.

Plaintiffs have brought an equal protection claim, asserting that the State of Washington has violated the Equal Protection Clause in the 14th Amendment to the United States Constitution. Among other things they argue that the use of the uncertified MiBT software in San Juan County, where they reside, denies them equal protection of the law because MiBT is not used in all counties in Washington.

In order to have standing Plaintiffs must demonstrate that they have a legally protected right. There is no question that the right to vote is not only a legally protected right, but a fundamental right. And that right involves more than just the right to cast a vote. As the U.S. Supreme Court held in *Bush v Gore*, 531 U.S. 98 (2000), at page 104:

> "When the state legislature vests the right to vote...in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." (Underlining added.)

Under classic equal protection analysis the essential inquiry is whether similarly situated persons are treated differently. Here it is undisputed that in some Washington counties, including San Juan County where Plaintiffs reside, citizens exercise their right to vote in a system that includes the use of MiBT, while the residents of other counties vote in a system that does not include MiBT. It is also undisputed that MiBT has not been certified by the Secretary of State. The dispute between the parties only concerns whether or not MiBT is part of a "voting system" as defined by RCW 29A.12.050. If, as Plaintiffs argue, MiBT is part of a voting system as defined by that statute, it is clear to this Court that similarly situated persons in Washington are treated differently with respect to their fundamental right to vote because some vote by a fully certified system and some vote by a system that is only partly certified. In this Court's opinion, such a distinction would go directly to the heart of the "equal dignity owed to each voter" referred to in *Bush v. Gore*.

Defendants argue that Plaintiffs do not have standing because they have not made the requisite showing of injury. They assert that Plaintiffs are incorrect in arguing that standing does not require proof of injury at the outset of the case. But the Court does not read Plaintiffs' briefing to argue that they are not required to show proof of injury. Instead, they argue that they are injured if, among other reasons, MiBT must be certified.

One of the essential elements of standing is injury in fact—defined in *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560 (1992) as:

> "...an invasion of a legally protected interest which is (a) concrete and particularized (citations omitted) and (b) actual or imminent, not conjectural or hypothetical (citations omitted)."

The question then is whether Plaintiffs' alleged injury rises to the level required by the definition in that case. And as the Court in *Lujan* points out, the degree of evidence required to show the injury in fact element of standing, as well as the other essential elements, increases at successive stages of the litigation. Thus, Plaintiffs are not required to prove injury at this stage, but only to meet the level of proof that is always required of the non-moving party at the summary judgment stage.

Here, Plaintiffs have set forth specific facts that are sufficient to survive Defendants' request that the Court rule, as a matter of law, that Plaintiffs do not have standing because they have not suffered an injury in fact. If the Court grants Plaintiffs' Motion for Reconsideration on the MiBT certification issue, Plaintiffs clearly have been injured. If the Court denies that Motion and affirms the decision set forth in its May 15, 2012 letter ruling, the MiBT issue would be resolved after a trial at which Plaintiffs' evidence of injury would have to meet a higher standard than at this stage. And to rule that Plaintiffs have not provided the necessary degree of proof at this stage because the Court might change its May 15, 2012 letter ruling and grant summary judgment to Defendants on the MiBT issue, as Defendants San Juan County requests in its Motion for Reconsideration, would put the cart before the horse because standing has to be resolved before the Court rules on the MiBT issue.

Defendants also argue that Plaintiffs are incorrect in arguing that "loss of trust" is enough to seek enforcement of voting laws by private citizens because that argument is exactly the kind of generalized grievance that is considered insufficient to confer standing. But the *Lujan* case, on which Defendants rely, only rejects grievances that do not affect the claimant any more than they affect all members of the public. While this Court understands the point made in *Lujan* that it is the function of congress and the chief executive to vindicate the public interest, the Court views Plaintiffs' grievances as particularized, not generalized, because the treatment they complain of only affects them and others similarly situated, but not the public at large.

The Court concludes that, on the issue of MiBT certification, Plaintiffs have standing. The Court therefore will address the MiBT certification issue presented by Plaintiffs' Motion for Reconsideration.

B. MiBT Certification

The Court's May 15, 2012 letter ruling on the MiBT certification issue was based on its decision regarding the bar code issue of linkage – i.e., does the placement of bar codes on ballots violate Washington's constitutional and/or statutory guarantees of a secret ballot. In their Motion for Reconsideration Plaintiffs argue that the two issues are entirely separate and that, even if bar codes do not permit linkage, the MiBT issue should be resolved as a matter of law. The Court finds Plaintiffs' argument on this point to be persuasive. The two issues are separate and if MiBT is part of a voting system it should be certified even if there is no linkage. Because all parties

agree that MiBT is not certified, there is no genuine issue of material fact and the issue regarding certification is appropriately resolved by summary judgment.

RCW 29A.12.005 defines voting system in two subsections. Subsection (1) covers equipment, expressly including software, and Subsection (2) covers practices and associated documentation. Plaintiffs' contend that Subsection (1)(b) and Subsection (1)(d) both apply because MiBT is part of the equipment used in some counties to cast and count votes and because MiBT is used to maintain and produce audit trail information. They point to numerous portions of Defendant's pleadings in which these uses are acknowledged – in particular to statements asserting that MiBT helps assure that all votes are counted and counted only once and to statements about MiBT being an audit tool that is used to keep track of ballots.

Defendants acknowledge that MiBT does track ballots, but argue that it is not part of a voting system because it only tracks the location of ballots and has nothing whatsoever to do with the votes that are cast on those ballots. The court finds this distinction to be unconvincing in light of the very broad fashion in which Subsection (1) was written by the legislature. Subsection (1) begins by defining a voting system as the total combination of various types of equipment used for a variety of purposes that pertain to voting. And contrary to the Defendants' argument, Subsection (1)(b) is not limited to equipment used only for counting votes; it expressly includes equipment (software) used to cast and count votes. By playing an essential role in sending proper ballots to voters, determining that voters have cast only one correct ballot, and assuring that all ballots which are correctly cast are counted once and only once, MiBT is part of the total combination of equipment used to cast votes as well as to count votes.

Subsection (1)(d) also reflects the legislature's intention that the definition of a voting system not be narrowly construed. In addressing auditing functions Subsection (1)(d) expressly includes any audit trail information, not just audits of how many votes were cast for a particular candidate or ballot issue. As acknowledged by Defendants, MiBT does provide audit trail information and it is an audit tool. The Court again finds the suggested distinction between auditing the sending and receiving of ballots and the auditing of the votes actually cast to be unpersuasive.

The Court concludes that although MiBT is not used to count votes, it is part of the total combination of equipment used by some counties in connection with the casting of votes and in connection with the maintaining and producing of audit trail information about the ballots that are sent to voters and returned by the voters, all for the very purpose of assuring a proper election. MiBT should be certified by the Secretary of State. Defendant's Motion for Reconsideration is granted.

C. Pre-2008 Violations.

Because the Court has granted Plaintiffs' Motion with respect to MiBT certification, there is no need to rule separately on their request for the Court to address pre-2008 violations.

D. Schaller Declaration.

Plaintiffs' Motion to Strike the Declaration of Doris Schaller that was filed on January 10, 2012 is based on concerns about the declarant's statements regarding the allegedly unbreakable encryption that was part of MiBT before 2008. Because the decision of this Court to grant Plaintiffs' Motion for Reconsideration obviates the need for a distinct ruling on pre-2008 violations, the Court considers a ruling on Plaintiffs' Motion to Strike to be unnecessary. However, the Court does not find Plaintiffs' arguments on the Motion to be persuasive and therefore will deny the Motion. Ms. Schaller's Declaration will be given the weight to which it is entitled, with due regard to her level of knowledge and expertise on the many different matters discussed therein.

E. RAP 2.2(D)

Although the Court is inclined to grant Plaintiffs' Motion for Findings under RAP 2.2(D), the Court agrees with Defendants that a ruling on that Motion should await entry of proper orders on the various pending motions. It does strike the Court that judicial economy would be best served if Plaintiffs' arguments (and this Court's rulings) on the per se violation issue and the MiBT certification issue were reviewed by the appellate court before an expensive and time consuming trial is conducted. The Court will therefore reserve a ruling on the Motion. After entry of appropriate orders on the other motions, Plaintiffs may re-note their RAP 2.2(D) motion for hearing. The Court will then have the benefit of oral argument and, presumably, proposed findings from Plaintiffs.

Sincerely,

Donald E. Eaton,
Judge

DEE:jmh