IN THE SUPREME COURT
OF THE STATE OF MONTANA
Case No. 04-851

ANITA BIG SPRING, Contestant-Appellant, vs. RICK JORE, Contestee-Appellee.	)	District Court Cause No. DV-04-258 **APPELLANT'S OPENING BRIEF**

ON APPEAL FROM THE MONTANA TWENTIETH JUDICIAL
DISTRICT COURT, LAKE COUNTY

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ISSUE PRESENTED

Whether the district court erred in counting seven overvoted ballots as votes for Contestee-Appellee Rick Jore.

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

Anita Big Spring brought this action in the district court pursuant to §§ 13-36-101 *et seq.*, MCA, to contest the certification of the race for House District 12 as a tie. The petition was filed on December 10, 2004. The district court held a hearing on the morning of Friday, December 17, 2004, at which evidence was received and arguments presented. The district court issued its decision in favor of the contestee, Rick Jore, that afternoon. The district court speculated that all seven voters intended to vote for Rick Jore and stated that this Court's precedents prohibiting speculation about voter intent did not apply. It also held that affording relief as to the specific ballots contested in this case would violate the state and federal constitutions because similar ballots cast in other races have not been challenged.

On the same day, Ms. Big Spring filed her Notice of Appeal and asked this Court to implement an expedited schedule for consideration of this case.

B. FACTUAL BACKGROUND

On November 2, 2004, an election was held in Lake County to select a representative for House District 12. (Stip. Facts ¶ 4.) The candidates listed by name on the ballot were Jeanne Windham, the nominee of the Democratic Party;

Rick Jore, the nominee of the Constitution Party; and Jack Cross, the nominee of the Republican Party. (Stip. Facts ¶¶ 2-3.)

Lake County election officials used an AIS 315 scanning machine to count the number of votes cast for each candidate. The scanning machine is designed not to count ballots on which the elector has made a mark in more than one designated voting area for the same contest. Any ballot on which there is more than one mark is rejected by the machine as an "overvote." It is then examined separately by the "Resolution Board." (Stip. Facts ¶ 5.)

With respect to the votes cast for the three candidates for House District 12, seven ballots at issue here had marks in the designated areas for more than one candidate. (Appendix, Exs. 1-7.) On five of the seven ballots, the oval for Mr. Jore was filled in, and the oval for Mr. Cross was filled in and marked with an "x". (Exs. 1-5.) On the sixth ballot, both ovals were filled in, but the area next to Mr. Cross's name was also marked with a squiggly figure. (Ex. 6.) On the seventh ballot, both ovals were filled in, but the area next to Mr. Cross's name was marked with an additional line extending towards and under his name and with what appear to be the letters "NRA" or "NLA." (Ex. 7.)

In the course of the campaign for House District 12, Mr. Cross placed radio advertisements, which ran 18 times in the last two days before the election and

which included the statement, "Cross out the opposition and vote for the Cross that matters." (Tr. of Hrg., Test. of Ms. Windham; Ex. 8.)

Exhibits 1 through 7 were read as "overvotes" and rejected by the AIS 315 scanning machine. Upon examining the ballots, the Resolution Board placed white labels over the marks for Mr. Cross and fed the ballots back through the machine so the votes would be counted for Mr. Jore. At the conclusion of the initial count, the votes were tallied and Mr. Jore was determined to be the winner by two votes. (Stip. Facts ¶ 6.)

Ms. Windham requested a recount. During the course of the recount, she became aware of what had occurred with respect to the seven ballots at issue here. (Stip. Facts ¶ 7.) At the conclusion of the recount, the Recount Board determined that the result of the election was a tie between Ms. Windham and Mr. Jore, including the seven disputed votes for Mr. Jore. (Stip. Facts ¶ 8.) That result has now been certified by the State Board of Canvassers. Pursuant to § 13-16-503, MCA, the Secretary of State certified this result to the Governor. On Wednesday, December 15, 2004, the Governor appointed Mr. Jore to represent House District 12. (Appendix, Tab 14, Dist. Ct. Order at 2, Findings of Fact ¶¶ 8-10.)

In addition to the seven ballots at issue in this case, 73 other ballots were offered and admitted as exhibits at the hearing of this matter. None of these 73 ballots was cast in the race for House District 12. However, 41 of these additional

ballots had markings similar to the markings on Exhibits 1 through 5: two ovals darkened in the same race, with a mark like an "x" over one of them. Two such ballots, Ms. Big Spring's Exhibits 9A and 9B, were disqualified as overvotes. The remainder were counted as were Exhibits 1 through 5.

Thirty-one additional ballots were double-voted and had other kinds of extraneous marking such as scribbles or words like "yes" or "no." Each of these ballots was counted according to what election officials believed to be the voter's intent.

The seventy-third additional ballot is Ms. Big Spring's Exhibit 10, which has multiple marks in the area for Constitutional Initiative No. 96. The oval to vote "FOR" the initiative is filled in and marked with an "x," like the marks for Mr. Cross on the disputed ballots. The oval to vote "AGAINST" the initiative is obscured by heavy marking covering the entire area and the word "not." On cross-examination at hearing, the chair of the Lake County Recount Board testified that this ballot could not be counted because the inference that the voter intended to vote for CI-96 required "speculation." He then admitted, however, that the decision to count Exhibits 1 through 7 for Mr. Jore also required "a level of speculation." (Tr. of Hrg., Test. of Mr. Stipes.)

SUMMARY OF ARGUMENT

This Court has consistently applied an objective standard in deciding when an ambiguously marked ballot may be counted: Ballots that do not clearly express the intent of the voter, without speculation, will be disallowed. *Paulsen v. Huestis*, 2000 MT 280 ¶¶ 17-18, 302 Mont. 157, 161, 13 P.3d 931, 933-34 (citing *Marsh v. Overland* (1995), 274 Mont. 21, 28, 905 P.2d 1088, 1092). In 2003, the Legislature enacted reforms to the election code which re-affirmed and strengthened these precedents. Because the elector's choice cannot be clearly determined from the face of the seven ballots at issue, the seven votes counted for Mr. Jore are invalid, and Ms. Windham must be declared the winner of the race for House District 12.

The new rules in Montana and developments in federal law impose on this Court a duty to give the final word on interpretation of ballots and application of the controlling statutes and regulations, thereby establishing a uniform, statewide approach to counting votes. The district court turned this duty on its head when it incorrectly held that the state and federal constitutions prohibit judicial relief on contested ballots in close races merely because similar ballots were also cast in other, uncontested races.

STANDARD OF REVIEW

This Court's review of the district court's decision is *de novo*. *Rennie v. Nistler* (1987), 226 Mont. 412, 415, 735 P.2d 1124, 1126 (rejecting argument that

supreme court should use deferential standard of review in election contest). That is, this Court applies the same standard that should have been applied by the district court. *Cf., e.g., Glacier Club at Summit, LLC v. Treweek Constr. Co.*, 2004 MT 70 ¶ 34, 320 Mont. 351, 362, 87 P.3d 431, 439. That standard, in turn, is one of plenary review of the validity of the challenged ballots. *Rennie*, 226 Mont. at 415, 735 P.2d at 1126. As discussed in more detail in part B of the Argument, below, the district court erred by applying a deferential standard to the decisions of Lake County election officials.

ARGUMENT

A. MONTANA LAW PROHIBITS ELECTION OFFICIALS OR THE COURT FROM SPECULATING ABOUT THE INTENT OF A VOTER.

1. The Overriding Goal Of The Election Code And Rules Is To Set Objective, Uniform Standards For Tallying Votes.

The process of casting and counting ballots is governed by detailed statutes and regulations.

At the polling place, each voting station must display instructions that include an explanation of how to prepare a ballot, how to correct a mistake, and how to obtain a new ballot in place of one spoiled by accident. § 13-13-112, MCA. In Lake County, posted at each voting station is the warning:

> **DO NOT** cross out or erase. If you change your mind, please ask the judges for a new ballot. They will instruct you.

(Ex. 11; Stip. Facts ¶ 9.)

When the votes are counted, separate rules explain how to deal with questionable ballots under each possible voting system. Lake County uses the AIS 315 voting system, an optical scanner. Any ballot that the machine rejects as an "overvote" must be set aside and counted only "if the voter's intent can be *clearly determined* and agreed upon by a majority of the election judges on the counting board in accordance with rules adopted [by the Secretary of State]." § 13-15-206(4)(a) and (7), MCA (emphasis added). Otherwise the vote is invalid. § 13-15-206(6), MCA. All such determinations must be made "in a uniform manner." § 13-15-206(1), MCA.

As mandated by the statute, the Secretary of State has adopted regulations to promote the uniform treatment of questionable ballots. The regulations require that ballots rejected as overvotes by the AIS 315 be referred to a Resolution Board. ARM 44.3.1771(3)(b). Two separate regulations ensure political balance and neutrality on the Resolution Board: ARM 44.3.1765(4) states that the Resolution Board "shall consist of a minimum of one person each from at least two political parties having ballot access." ARM 44.3.1771(1) requires the election

administrator to "appoint members of opposite parties to serve as judges on the 'Resolution Board'."

The Resolution Board is authorized to resolve overvoted ballots as follows:

> If any smudge, tear, or mark of some kind is able to be identified as clearly an unintentional mark made by the voter, but had the effect of registering too many votes for an office, the Resolution Board may place an adhesive sticker (Avery-0-806 Removable Labels) over the unintentional mark.

ARM 44.3.1771(3)(b)(ii).

In addition, the Secretary of State has adopted the following regulation to implement the statutory requirement that questionable ballots be counted only "if the voter's intent can be clearly determined" under uniform rules. § 13-15-206(1) and (4)(a), MCA.

> The following general rules shall apply in a count or recount of paper and opti-scan ballots:
>
> (a) two (or more) designated voting areas have been marked and one (or more) mark has been erased, but residue is left. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area that has been marked;
>
> **(b) one designated voting area is marked and a second designated voting area is marked with a heavy mark and no eraser has been attempted. The election official shall cause this to be counted as an overvote;**
>
> (c) the designated voting area has been marked for one response and a partially completed mark is made in a designated voting area. The mark may or may not have some erasure although for the purpose of

this rule erasure is not required. The election official shall cause this to be counted as an overvote;

(d) the designated voting area has been marked for one response and a hesitation mark is present within other designated voting area. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area that has been marked;

(e) the designated voting area has not been marked according to instructions but the response is circled. The election official shall clarify the ballot by marking the designated voting area beside the circled vote if the marking of the designated voting area is consistent throughout the individual's ballot, and cause a vote to be counted for the marked designated voting area;

(f) the designated voting area has not been marked according to instructions but there is a connective line or arrow between the response and the designated voting are to indicate the vote. The election official shall clarify the ballot if the connective line or arrow beside the designated voting area is consistent throughout the individual's ballot, and cause a vote to be counted for the marked designated voting area;

(g) more than one designated voting area has been marked, but no clear mark is used to indicate the correct vote. The election official shall cause this to be counted as an overvote;

(h) more than one designated voting area has been marked, but a clear word, mark or statement is used to indicate the correct vote. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area indicated as the correct vote.

(i) a word or statement has been used to indicate the correct vote instead of marking the designated voting area. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area indicated as the correct vote;

(j) all of the designated voting areas are crossed out. The election official shall clarify the ballot and cause this to be counted as an undervote.

ARM 44.3.2402 (emphases added).

2. This Court's Precedents Prohibit Speculation And Adhere To Objective Standards.

This Court has previously been called upon to resolve election challenges under the "intent of the voter" standard. Specific examples from the case law are discussed in more detail below. As a guiding principle, however, even before the enactment of most of the foregoing statutes and regulations, the Court required that a ballot be disallowed unless the intent of the voter could be established with reasonable certainty from the ballot. *Paulsen v. Huestis*, 2000 MT 280 ¶ 17, 302 Mont. 157, 161, 13 P.3d 931, 933 (citing *Marsh v. Overland* (1995), 274 Mont. 21, 28, 905 P.2d 1088, 1092). The Court has insisted that the voter's intent be clear without any speculation, and it has rejected the "substantial compliance" test used in some states, in favor of a strictly objective standard. *Marsh*, 274 Mont. at 26, 905 P.2d at 1091.

In *Paulsen* the Court explained:

> Our rationale for rejecting ballots where the voters' intent is not clear was set forth in *Spaeth v. Kendall* (1990), 245 Mont. 352, 354-55, 801 P.2d 591, 593. In that case we stated, "The paramount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters upon all questions submitted to them. *When such expression cannot be gleaned without*

> *speculation, however, the vote is to be voided*, to insure a standard of objectivity in our election process." *Spaeth*, 245 Mont. 352, 354-55, 801 P.2d 591, 593.

Paulsen ¶ 18, 302 Mont. at 161, 13 P.3d at 934 (emphasis added).

3. The 2003 Revisions To The Election Code Emphasized The Need For Objective, Uniform Standards.

Many of the detailed statutes and regulations that govern the counting of ballots were only recently enacted in response to problems that arose during the 2000 presidential election and the U.S. Supreme Court's decision in *Bush v. Gore* (2000), 531 U.S. 98. In particular, the Legislature was concerned about compliance with *Bush v. Gore*'s holding that the Equal Protection Clause requires all ballots to be judged according to uniform standards. *See id.* at 105.

Tabs 12 and 13 of the Appendix to this brief are portions of the legislative history for the 2003 revisions to the election code. Tab 12 of the Appendix contains minutes from committee hearings on the revisions. These hearings clearly evince the Legislature's goal of adopting a uniform system throughout the State. (Appendix Tab 12 at 3, 11.) ARM 44.3.2402, quoted at length above, was adopted by the Secretary of State as the primary means for implementing this legislative goal.

Tab 13 of the Appendix is a legislative staff report entitled "Equal Protection of Your Vote: Montana's Voting Systems and Vote Counting Process, A Report to

the 58th Legislature by the State Administration and Veterans' Affairs Interim Committee." This report also emphasizes the need for uniform rules but is particularly pertinent to this case because it highlights the ambiguity of an "x" marking a spot on a ballot:

> [T]erminology used in current law makes no distinction between paper ballots that are manually counted and paper ballots that are machine-tabulated. For example, section 13-12-209, MCA, specifies that on the stub must be printed instructions that the voter should mark the ballot with an "x" to indicate the voter's choice. However, optically scanned paper ballots typically require the voter to completely darken an oval. Marking an "x" on an optically scanned ballot may not be recognized by the scanner as a valid vote. ...
>
> [Y]ou may have marked a ballot with an "X" when you should have darkened in the oval. In a manual count, the human counter would have to determine whether you marked an "X" because you intended to vote for that candidate or because you did not want to vote for that candidate. Furthermore, in one county, the counters may have been instructed to interpret an "X" as a vote, while in another county, the counters may have been instructed to interpret an "X" as a nonvote.

(Appendix Tab 13 at 11, 17.) Thus, until the 2003 revisions, Montana law expressly mandated that voters be instructed to mark their ballots with "x"s. In this case, different rules for interpreting an "x" were applied even within Lake County.

The Court should note that nothing in the statutory revisions or the legislative history suggests any intent to overrule or modify existing precedent on determination of voter intent. To the contrary, this Court's traditional insistence on objective criteria and its refusal to speculate about voter intent is in harmony with

the Legislature's desire for uniform criteria that do not vary according to the subjective perceptions of individual election administrators. If anything, the Legislature has imposed more stringent requirements than this Court has previously enforced.

Under prior law, a vote was to be counted if the voter's intent could "be determined" based on a ballot giving "sufficiently plain" indication of that intent. § 13-15-202, MCA (2001). This Court interpreted the statute as imposing a standard of reasonableness: a vote would be counted if it could be "established with reasonable certainty from the ballot." *Paulsen* ¶ 17, 302 Mont. at 161, 13 P.3d at 933. At times the Court also described this standard as requiring that the ballot "clearly express" the voter's intent. *Paulsen* ¶ 18, 302 Mont. at 161, 13 P.3d at 934. The 2003 Legislature repealed § 13-15-202 and stated that a questionable ballot should be counted only if the voter's intent can "be *clearly* determined." § 13-15-206(4)(a), MCA (emphasis added). This new language requires more than reasonableness and must be construed either as codifying the "clearly express" standard or as imposing a more stringent standard than then-existing precedent. Objective criteria are the only means for achieving the state-wide uniformity desired by the Legislature, and they require that the seven ballots at issue in this case be disqualified.

B. THIS COURT'S REVIEW OF THE VALIDITY OF THE BALLOTS IS PLENARY.

This case presents questions of law: this Court's review of the district court's judgment is *de novo*, and its review of the facial validity of the ballots themselves is plenary. In addition, federal law requires this Court to give the final word on the criteria for determining the validity of a ballot or the intent of a voter, not to leave the matter to the varying discretion of individual counties.

In a previous Lake County election contest, *Rennie v. Nistler* (1987), 226 Mont. 412, 735 P.2d 1124, the Democratic candidate for Lake County Attorney, Keith C. Rennie, challenged the failure to count one ballot as a vote for him. *Id.* at 413-14, 735 P.2d at 1125. As a threshold issue on appeal, Nistler contended that this Court was bound to accept the findings of the district court "as a matter of discretion unless the discretion was abused, and that to rule otherwise would 'put the Supreme Court in the election booth.'" *Id.* at 415, 734 P.2d at 1126. The *Rennie* court rejected this argument:

> [T]he findings of the District Court are based solely on that court's examination of the photocopy of the contested ballot, the same photocopy that is now before us. The District Court also heard oral testimony, but the oral testimony was not helpful with respect to the problems presented by the contested ballot, but rather established for the record that this ballot was in fact rejected by the election judges, the board of canvassers, and the recount board. In the situation before us, we are free to make our own examination of the entire case, and to make a determination in accordance with our findings.

Rennie, 226 Mont. at 415, 735 P.2d at 1126. Likewise, in the instant case, the Court has before it copies of the disputed ballots and is equally free to make its own determination of this case based on the well-established legal standards.

Implicit in the *Rennie* court's discussion was that this Court would defer neither to the district court nor to the Lake County election officials who counted and recounted the ballots. Nonetheless, the district court in this case incorrectly applied an "abuse of discretion" standard to the actions of the election officials. (Appendix Tab 14, Dist. Ct. Order at 13, Conclusions of Law ¶¶ 30-32.) The district court, in findings that closely tracked the proposed findings submitted by Mr. Jore, appeared to accept the argument that the 2003 amendments altered the standard of judicial review of disputed ballots. (Appendix Tab 14, Dist. Ct. Order at 11, Conclusions of Law ¶ 17.) This argument has no basis in the legislation that was enacted or its history. The argument is particularly absurd because the 2003 law was adopted specifically to address the holding in *Bush v. Gore* that allowing county officials to exercise their individual discretion in interpreting ballots violated the Equal Protection Clause of the U.S. Constitution.

Looking first only at the terms of the Montana statutes, nothing in the 2003 amendments suggests a desire on the part of the Legislature to give increased discretion to local election officials. To the contrary, the overriding goal of the amendments was statewide uniformity; local discretion would utterly defeat that

goal. Interpretation of a questionable ballot does not depend on assessing witness credibility or other facts not available to an appellate court. The courts have exactly the same set of relevant information as the election officials. In such a situation, the only reason for applying an abuse of discretion standard would be to allow some freedom on the part of the administrators to make policy decisions within their area of expertise. *See generally Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* (1984), 467 U.S. 837. While local Boards of Resolution have expertise in matters such as the operation of the scanning machine (and, indeed, were apparently selected on that basis, *see* Tr. of Hrg., Test. of Ms. Newgard), they are not experts in questions of law regarding the "intent of the voter" standard. There is thus no legal or institutional reason to defer to local officials, and nothing in the 2003 amendments changed the rule of *de novo* review established by *Rennie*.

Even if Montana law purported to confer such discretion on the counties, doing so would violate federal law as set out in *Bush v. Gore*. The question presented in that case was as follows:

> A "legal vote," as determined by the [Florida] Supreme Court, is "one in which there is a 'clear indication of the intent of the voter.'" ... The petition presents the [question] whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses.

Bush v. Gore, 531 U.S. at 103. The U.S. Supreme Court thus equated the "intent of the voter" standard with "standardless"-ness at the level of the actual count. It proceeded to hold as follows:

> The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. ... This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these *recurring circumstances* is practicable and, we conclude, necessary.

Bush v. Gore, 531 U.S. at 105-06 (emphasis added). Although the Montana Legislature and Secretary of State have now adopted rules more specific than the general "intent of the voter" rule, nowhere do those rules describe how to treat a double-marked ballot with an "x" in one of the voting areas. The issues of how to treat double-marked ballots and how to an interpret an "x" are "recurring circumstances" in need of a uniform rule. Indeed, the legislative staff report specifically anticipated the likelihood that different counties would interpret an "x" differently. The report itself acknowledges that either interpretation might be reasonable, and using the district court's deferential standard of review would mean that this Court would be powerless to impose a uniform rule when different counties made different choices among reasonable alternatives. Just as in *Rennie*, this Court's authority and obligation is to set forth the definitive rules for applying the controlling statutes and regulations to interpret disputed ballots.

One additional point related to the standard of review is that this Court's review is of *the ballots* at issue in this case, not the election as a whole. The district court misunderstood this principle by making findings of fact and conclusions of law apparently intended to describe in some way the collective intent of the voters in House District 12 as a whole. (Appendix Tab 14, Dist. Ct. Order at 7, Findings of Fact ¶ 40; Order at 13, Conclusions of Law ¶¶ 29, 32.) The district court's findings state that none of the seven ballots was intended as a vote for Ms. Windham, and that it would be improper to disqualify them because doing so would result in Ms. Windham's being elected. The district court's apparent belief that this information was relevant reflects two errors in that court's reasoning.

First, the district court's order echos arguments that have been made in the political arena that the votes should be counted for Mr. Jore because a majority voted either for Mr. Cross *or* Mr. Jore, both of whom are conservative, and disqualifying the ballots would result in the election of a Democrat. It is equally true, however, that a majority of the voters rejected Mr. Jore, who was running under the banner of a more conservative party than Mr. Cross. There is no way of knowing—and certainly no way of determining on the record of this case—where the collective political orientation of House District 12 lies on the spectrum from

Ms. Windham to Mr. Jore, and such speculation is, if possible, even more inappropriate than speculation about the intent of an individual voter.

Second, focusing specifically on the seven voters who cast the ballots at issue here, the district court also appeared to believe it would be wrong to interpret their ballots in a way that would result in Ms. Windham's election. Again, this assumes that even if the votes were for Mr. Cross, Mr. Jore must have been the second choice. Such an inference is not only improper speculation but also grossly unfair to the 4,219 other voters in the race for House District 12, none of whom was able to designate a second choice in this three-way race. The right to pick a second choice is a feature of "instant run-off voting" and other alternative systems, none of which has been adopted in Montana legislative races, and it should not afforded only to a few select voters merely because they ignored the instructions about how to fill out their ballots. Indeed, rather mere mistake or inattention, the hope of circumventing the instruction to "VOTE FOR ONE" candidate for House District 12 is a possible explanation for making more than one mark on the ballot.

This Court should determine the validity of the seven disputed ballots on their faces, without deference to any lower tribunal. It should also make its decision based on the narrow legal question of the validity of the seven disputed ballots, not based on the political consequences of the answer.

C. THE COURT SHOULD BE COGNIZANT OF THE IRREGULARITY IN APPOINTING THE LAKE COUNTY RESOLUTION BOARD.

Although the central issue in this case is the facial validity of the seven disputed ballots, the Court should take note of the fact that the initial decision to count those ballots for Mr. Jore was made by an illegally constituted Resolution Board. The regulations cited above require the Resolution Board to consist of two people from opposite parties. The two members of the Resolution Board who handled those ballots were a Republican and a person who identifies herself as "independent." (Tr. of Hrg., Test. of Ms. Newgard and Ms. Windham.) This composition of the Board was directly in violation of the regulations.

The Rule's requirement for "opposite parties" can only be understood in relation to the meaning of "party" contemplated by the Montana Code, which sets out committee structures and procedures required for "political parties." §§ 13-38-101 *et seq.*, MCA. Moreover, ARM 44.3.1765(4) is even more explicit about the need for "party" representation on the Board of Resolution: it requires at least "one person each from at least two political parties having ballot access." There is no "independent" party with ballot access in Lake County. The Resolution Board was convened and constituted in violation of both these regulatory requirements.

D. THE SEVEN OVERVOTED BALLOTS MUST BE DISQUALIFIED.

1. The Controlling Statutes And Rules Require That The Seven Overvoted Ballots Be Disqualified.

The administrative rules outlined above were adopted precisely to set forth objective standards and to avoid the kind of speculation about voter intent in which Lake County officials engaged in this case.

Election officials first violated the express requirements of the regulations when the Resolution Board placed white stickers over the marks for Mr. Cross on the disputed ballots. In counties using the AIS 315 scanning device, the Resolution Board is authorized to place an adhesive white label over a mark on a ballot *only* if the mark is "clearly unintentional." ARM 44.3.1771(3)(b)(ii). The marks on the seven disputed ballots clearly are *not* unintentional stray marks. The Resolution Board was not authorized to use the white stickers to make the votes count for Mr. Jore in the machine.

County officials also disregarded the express, detailed rules set out in ARM 44.3.2402 for dealing with overvoted ballots. The applicable subsection of the Rule is subsection (b) because two designated voting areas in the same race were marked and no eraser was attempted. In those circumstances, the Rule requires that the ballot be counted as an overvote and not credited to either candidate. Moreover, under subsection (g) of the same Rule, since no clear mark was used to

indicate the correct vote, it should have been counted as an overvote. Even under subsection (h) of the Rule, no clear mark or statement was used to indicate the *correct* vote. Therefore, these seven ballots should not have been counted.

For purposes of this case, Ms. Windham must be declared the winner of the race for House District 12 if even one of the contested ballots is invalid.

a. Ballots Nos. 1-5: Xs and Ovals

Exhibits 1 through 5 do contain clear marks next to Mr. Cross's name, in addition to the filled-in oval. Each of these voters marked the space next to Mr. Cross's name with an "x" in addition to filling in the oval. The conclusion by County officials that these "x"s indicated an intent *not* to vote for Mr. Cross is impermissible speculation. Until this year, Montana law expressly required that paper ballots instruct voters to mark their choices with an "x," and many voters are likely to be accustomed to voting in this manner. The voters who cast Exhibits 1 through 5 may have placed an "x" in the oval for Mr. Cross to emphasize their votes for the Republican candidate, or perhaps in the belief that it was appropriate to vote for two candidates in a field of three.

The County's decision to count Exhibits 1 through 5 as votes for Mr. Jore was also contrary to the statutory requirement that ballots be evaluated under uniform standards. Exhibits 9A and 9B have identical sets of marks as those at issue on Exhibits 1 through 5 and were disqualified as overvotes. The decision to

apply a different standard in the course of a recount that was known at the time to be determinative of political control of the House of Representatives cannot be justified under the objective standards required by statutory and decisional law.

The district court's argument that the differing treatment of Exhibits 9A and 9B was a mistake merely illustrates how subjective and speculative was the decision regarding how to treat an "x." Those two ballots stopped the machine and were examined individually by a two-person Resolution Board just like Exhibits 1 through 5, yet the Board made a conscious decision not to count those ballots as votes. It is perfectly understandable that the Board would have done so: Legislative staff in fact anticipated this very type of ballot in citing the use of an "x" as a classic example of an ambiguous mark, since it carries two meanings, one for a "cross out" and one for "x marks the spot." The district court's assumption, and its repeated reference to the "x"s as "cross outs," is pure speculation.

The district court also avoided any discussion of Exhibit 10, which perfectly illustrates the ambiguous nature of an "x." Appellant submits that a person forced to guess would say that the voter who cast Exhibit 10 meant to vote "FOR" CI-96. Possibly the voter meant to reject both choices, but why then would the negative mark not be the same in each space? Having (1) messed up the ballot by filling in both ovals, this voter most likely (2) proceeded to obscure the vote "AGAINST" the amendment and (3) emphasized the vote "FOR" the amendment with an "x."

Ms. Big Spring freely admits, however, that this is speculation on her part and that she therefore agrees with Mr. Stipes, who testified that this vote was not counted either way because determining the intent of the voter required such speculation.

The problem, of course, is that this voter's apparent mark "FOR" CI-96 was treated as invalid, while the identical mark for Mr. Cross on Exhibits 1 through 5 was treated as indicating a vote for Mr. Jore; and Mr. Stipes admitted that the latter also required speculation. The district court, too, assumed that each voter intended to reject Mr. Cross, which may be the case, but it may also be the case that voters 1 through 5, like voter 10, believed that the "x" would emphasize their favorable vote but omitted voter 10's extra effort to obliterate the mistaken choice. Both are possible but neither is clearly determinable from the face of the ballots.

In order to try to justify counting Exhibits 1 through 5 as votes for Mr. Jore, the district court mischaracterized Ms. Big Spring's argument and mis-applied ARM 44.3.2402. The district court claimed Ms. Big Spring wanted the ballots counted for Mr. Cross and that the "x"s were clearly not intended to indicate the voter's choice because the same voters did not use "x"s elsewhere on their ballots. (Appendix Tab 14, Dist. Ct. Order at 7, 12, Findings of Fact ¶ 38 and Conclusions of Law ¶ 26.) Ms. Big Spring has never argued that these ballots should have been counted for Mr. Cross; she has consistently argued that the ballots do not contain valid votes in the House District 12 race at all.

Moreover, the district court erroneously relied upon ARM 44.3.2402(e) to argue that the voters' failure to use an "x" elsewhere on their ballots justified counting the votes for Mr. Jore. ARM 44.3.2402(e) requires that when a voter does not follow instructions when making their marks, the ballot should be examined to see if there is a discernible pattern uniformly proving that the voter used an unconventional mark to indicate his or her choices. It does not follow, however, that the absence of other "x"s on these ballots means that, to these voters, "x" is negative. As Exhibit 10 demonstrates, a voter who uses "x" as an affirmative mark may only do so where additional emphasis is needed because of a mistake on a particular race. The district court's result of counting these ballots for Mr. Jore simply cannot be achieved without engaging in speculation and making unfounded assumptions about how and why these ballots came to be overvoted. The ballots must therefore be disqualified.

b. Ballot No. 6: The Squiggly Line

Exhibit 6 must also be disqualified as an overvote. In addition to subsection (b) of ARM 44.3.2402, subsection (f) is also instructive with respect to this ballot. Exhibit 6 contains a "connective line … between the response and the designated voting area." ARM 44.3.2402(f). Although this subsection does not otherwise apply (because the ballot is not consistent and because there is an additional mark for Mr. Jore), the regulation indicates that such a "connective line"

is generally to be deemed an affirmative, rather than a negative, statement about the candidate. The voter's intent on this ballot therefore cannot be determined except through speculation.

c. Ballot No. 7: The Underline

Exhibit 7 is the clearest example of a ballot that must be disqualified as an overvote. On this ballot, the ovals for both Mr. Cross and Mr. Jore are filled in. No "x"s are used for either candidate. The shaded area for Mr. Cross actually extends somewhat beyond the oval, but there is no information in the record about whether the additional shading was done by the voter or was created in the process of applying and then removing an adhesive label to the ballot. More importantly, there is a line that appears to begin near Mr. Cross's oval and extend under and slightly through his name and party designation. What appear to be the letters "NRA" or "NLA," possibly the voter's initials, are written above Mr. Cross's name, near the beginning of the line. Specifically, the line passes through the lower curve of the "C" and the lower lines of the "K" in "JACK," and then directly under Mr. Cross's last name and the first three letters of "REPUBLICAN."

It is impossible to tell whether this voter intended to underline Mr. Cross's name or to cross it out. Common experience teaches that a person often intends to do one but accidentally does the other, and this ballot was not marked by a voter going to any great lengths to make his or her intentions clear. If underlining were

clearly intended, it might satisfy the requirement of ARM 44.3.2402(h) as a clear mark indicating the correct vote (for Mr. Cross). The voter's decision to affix what may be his or her initials to Mr. Cross's name, rather than Mr. Jore's, also supports the likelihood that the vote for Mr. Cross was intended to be the correct one. Certainly, one normally "signs" a statement with which one agrees rather than a statement with which one disagrees. Again, however, Ms. Big Spring does not argue that such speculation should be entertained so as to count this ballot for Mr. Cross. The ballot should be disqualified.

In any event, there is no clear mark indicating that the mark for Mr. Jore was the correct one, and therefore, under applicable regulations, this ballot cannot be counted for Mr. Jore. ARM 44.3.2402(h).

None of these seven ballots satisfied the objective standards set forth in the regulations for clearly determining voter intent on overvoted ballots. *See* § 13-15-206(4)(a), MCA. They should have been handled in accordance with ARM 44.3.2402 and been disqualified as overvotes.

2. This Court's Precedents Require That The Seven Overvoted Ballots Be Disqualified.

In order to uphold the integrity of the electoral process, this Court held even before *Bush v. Gore* and the 2003 revisions to the Montana Code that ballots must be disqualified unless the intent of voter can be "established with reasonable

certainty from the ballot." *Paulsen v. Huestis*, 2000 MT 280 ¶ 17, 302 Mont. 157, 161, 13 P.3d 981, 933 (citing *Marsh v. Overland* (1995), 274 Mont. 21, 28, 905 P.2d 1088, 1092). The Court has required that the voter's intent be clear without any speculation. Insisting on an objective standard for all ballots, the Court rejected the "substantial compliance" test used in some states, instead adopting a strictly objective standard. *Marsh*, 274 Mont. at 26, 905 P.2d at 1091. Exhibits 1 through 7 could never have passed muster even under these pre-2003 precedents and certainly cannot do so now.

In *Paulsen*, the Court explained its approach to determining questionable ballots:

> [W]e have consistently ruled that ballots that do not clearly express the intent of the voter will be disallowed. *See Rennie v. Nistler* (1987), 226 Mont. 412, 735 P.2d 1124; *Peterson v. Billings* (1939), 109 Mont. 390, 96 P.2d 922. Our rationale for rejecting ballots where the voters' intent is not clear was set forth in *Spaeth v. Kendall* (1990), 245 Mont. 352, 354-55, 801 P.2d 591, 593. In that case we stated, "The paramount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters upon all questions submitted to them. *When such expression cannot be gleaned without speculation, however, the vote is to be voided*, to insure a standard of objectivity in our election process." *Spaeth*, 245 Mont. 352, 354-55, 801 P.2d 591, 593.

Paulsen ¶ 18, 302 Mont. at 161, 13 P.3d at 934 (emphasis added).

In *Rennie v. Nistler* (1987), 226 Mont. 412, 735 P.2d 1124, the single disputed vote in the race for Lake County Attorney appeared thus:

FOR ATTORNEY
(VOTE FOR ONE)
[ ] LARRY J. NISTLER--Republican
[ ] KEITH C. RENNIE--Democrat
[/] (Handwritten) Keith C. Renne

Rennie, 226 Mont. at 416, 735 P.2d at 1127. The *Rennie* Court determined that the voter's intentions were not "clearly and plainly shown on the contested ballot." *Id.* at 415, 735 P.2d at 1126.

The *Marsh* case is similarly instructive. In *Marsh*, three candidates sought the office of Sheridan County Sheriff. One of them, Gaylen Marsh, ran as a write-in candidate. Mr. Marsh claimed that the following ballots had improperly been disqualified:

12 ballots	"Marsh"
1 ballot	"Mr. Marsh"
1 ballot	"David Marsh"
1 ballot	"Dave Marsh"
1 ballot	"Gilbert Marsh"
1 ballot	"Lloyd Marsh"
1 ballot	Misspelled or illegible
22 ballots	No "X" marked in the box preceding the name "Gaylen Marsh"

Marsh, 274 Mont. at 24, 905 P.2d at 1090. Both the district court and the supreme court concluded that these votes were properly disqualified. In reaching this conclusion, this Court rejected Marsh's request for a "substantial compliance" test, which is used by several states. Instead, the Court recognized the controlling Montana rule:

> [B]oth statute and case law on the subject of determining voters' intent *require that ballots be disallowed unless the electors' intent can be established with reasonable certainty.* ...
>
> This Court has consistently disallowed ballots when the voters' intent does not plainly appear. *See Rennie v. Nistler* (1987), 226 Mont. 412, 735 P.2d 1124; *Peterson v. Billings* (1939), 109 Mont. 390, 96 P.2d 922. We recently summarized the rationale underlying our consistent rejection of ballots where the voters' intent is not clear:
>
> "[T]he paramount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters upon all questions submitted to them."
>
> *When such expression cannot be gleaned without speculation, however, the vote is to be voided, to insure a standard of objectivity in our election process.* [Citing *Spaeth v. Kendall* (1990), 245 Mont. 352, 354-55, 801 P.2d 591, 593.]

Marsh, 274 Mont. 25-26, 905 P.2d 1091. Applying these standards, the *Marsh* court concluded that the disputed votes could not be credited to Marsh without "speculating" about the voters' intent. Such speculation was improper, and the votes were therefore disqualified. *Id.*

In the instant case, applying a "standard of objectivity" unequivocally leads to the conclusion that the intent of the electors cannot be established with reasonable certainty from the seven ballots at issue. On all seven ballots, the ovals were filled in for Mr. Jore and Mr. Cross but were counted for Mr. Jore. Just as plausible as the County's decision, however, is that the marks might mean that each voter was emphasizing his or her vote for Mr. Cross, not trying to change it to

Mr. Jore as was assumed. In fact, in advertisements prior to the election, Mr. Cross urged voters to "cross out the competition and choose the Cross that matters." Marking an "x" on the ballot has a long and consistent history in Montana as the method a voter uses to mark his or her vote for a candidate; it was even required by law until 2003. *See* § 13-12-209, MCA (repealed 2003); Appendix Tab 13 at 11, 17; *see also Rennie*, 226 Mont. at 416-17, 735 P.2d at 1127. It could also be the case that the voter saw three candidates and assumed a vote for two was appropriate. Some voters may even believe that the machine can be fooled into letting them vote twice, for a first and second choice.

Regardless of any speculation of this sort, the instructions posted in the voting booth clearly told each voter what to do in case of a mistake. They were warned not to try to correct a mistake or change their mind on their original ballots. As in *Spaeth v. Kendall* (1990), 245 Mont. 352, 801 P.2d 591, the method for correcting a mistake was clearly posted, and if any presumption can be made, it is that the marks on the ballot were intentional, and each voter cast an overvote in the race. At best it cannot be determined what each voter's choice might have been.

The precedents described above establish an exacting standard for objective determination of voter intent. If "Mr. Marsh" and "Keith C. Renne" were insufficient votes for "Gaylen Marsh" and "Keith C. Rennie," it is difficult to imagine how one could even consider counting the much more questionable ballots

in this case. The district court utterly failed to analyze the requirements of this Court's precedents, dismissing them in a few sentences as "factually distinguishable." (Appendix Tab 14, Dist. Ct. Order at 10, Conclusions of Law ¶ 16.) This effort to avoid controlling precedent invokes a classic distinction without a difference—in fact, the district court barely tried to articulate one, merely noting slight factual differences in *Rennie*, *Marsh*, *Paulsen*, and *Spaeth*, and then falling back on the mis-guided equal protection argument, discussed in part E below. Indeed, the district court even erred on the facts in trying to distinguish *Spaeth* by claiming that it involved two filled-in ovals but not "any names being stricken or crossed out." In fact, the ovals in *Spaeth* were scribbled over, and none of the ballots at issue in this case has a name of a candidate crossed out.

Moreover, factual differences do not render each of this Court's precedents *sui generis*; they must nonetheless guide the later decisions of both this Court and the district courts. The district court improperly resorted to slight factual differences in order to refuse to be bound by the exacting standards of objectivity and lack of speculation that this Court has required in all interpretations of voter intent.

The County's action in assigning these seven votes to Mr. Jore does not accord with the well-established standards of this Court, that ballots that do not

clearly express the intent of the voter will be disallowed. Any conclusion requires substantial, inappropriate speculation about the voter's intent. Because the elector's choice cannot be clearly determined from the seven ballots at issue, the seven votes assigned to Mr. Jore are invalid, and Ms. Windham must be declared the elected representative of House District 12.

E. APPLYING OBJECTIVE, NON-SPECULATIVE STANDARDS TO A CONTESTED ELECTION DOES NOT VIOLATE—AND IN FACT IS REQUIRED BY—FEDERAL LAW.

As discussed above, part B, federal law requires uniform standards for interpreting ballots, not discretion for local officials to make up their own rules. Yet the district court accepted Mr. Jore's contentions that this Court is powerless to articulate such standards in the course of an election contest if similar ballots were cast in another, uncontested race. (Appendix Tab 14, Dist. Ct. Order at 11-12, Conclusions of Law ¶¶ 16-25.) This claim turns equal protection analysis on its head and reflects a serious misunderstanding of the *Bush v. Gore* decision.

As described above, the central concern of *Bush v. Gore* was the use of widely varying standards to evaluate ballots in the same race. The presidential race would be decided by a small margin, and some voters were having their votes counted if they made even a slight indication of preference, while others were being held to more exacting standards of compliance with the voting instructions, under which the voter was supposed to push the stylus completely through the

"chad" on the Florida ballot. Although the Supreme Court suggested that its decision in *Bush v. Gore* may be *sui generis*, seven Justices expressed at least some constitutional concern about the fairness of the Florida system. *Bush v. Gore*, 531 U.S. at 111. (The more controversial aspect of the decision was the question of remedy in light of the Court's previous issuance of a stay, and the related question of how the Court interpreted state law regarding the "safe harbor" deadline for certifying the results.)

As discussed in part B, the *Bush v. Gore* decision plainly supports Montana's recent effort to begin developing uniform standards for evaluating ballots. Because no administrative regulation can anticipate everything a voter might do to a ballot, achieving uniformity will also require this Court to provide the last, binding interpretation of various types of mis-marked ballots as they occur. This case, for example, provides an opportunity to demonstrate how ARM 44.3.2402 should be applied to certain kinds of double-marked ballots. Yet Mr. Jore argued, and the district court ruled, that even to rule on this issue would violate the Fourteenth Amendment as interpreted in *Bush v. Gore*; Article II, §§ 4 and 13 of the Montana Constitution (individual dignity and the right of suffrage); and § 13-15-206, MCA (requiring that ballots be evaluated in a uniform manner). (Appendix Tab 14, Dist. Ct. Order at 11-12, Conclusions of Law ¶¶ 18-25. In

doing so, Mr. Jore and the district court commited the common error of confusing the particular examples before the court with the scope of a general rule.

As an initial matter, the Court should note that Mr. Jore and the district court's equal protection/uniformity argument defined the "class" by assuming the very issue central to this case: the intent of the voter. Although the markings on Exhibits 1 through 5 are similar to the markings on 41 of Mr. Jore's demonstrative ballots, the remaining 31 demonstrative ballots have a varied assortment of markings and none is quite like Exhibit 6 or 7. There is no basis for Mr. Jore's argument that all of these ballots are part of the same "class." (Of course, the argument also ignores Exhibits 9A and 9B, which were disqualified for having identical defects to those on Exhibits 1 through 5.)

The district court accepted the bizarre argument that it could provide no relief for the illegal counting of Exhibits 1 through 7 because doing so would be unfair to those voters, as compared to the voters who cast the 70 ballots from other races. Only Exhibits 1 through 7, however, are at issue in this case, and Ms. Big Spring is obviously not arguing that other, similar ballots should be treated differently in other challenges in other races. If any of those 70 ballots is currently being challenged in some other proceeding and is the same as one of the ballots at issue here, she would argue for the same result. She is not, however, a party to such a proceeding, and to her knowledge none of those other ballots was cast in a

race so close as to require a determination of whether or not it was a valid vote (which may mean that no one would have standing to challenge them even if inclined to do so).

As an analogy, consider a local police department's enforcement of speed limits. It seems fair to assume that police officers routinely observe cars going somewhat over the applicable limit, without necessarily stopping and ticketing each car. But if a speeding car is involved in an accident, it is incumbent on the responding officer—and any court hearing a subsequent criminal or civil case—to determine whether the law was violated. There is thus something of a "no harm, no foul" approach to minor violations of the speed limit. Similarly, the 70 ballots from the other races may have been "caught speeding" in retrospect, but they have not been challenged, and any improper decision to count them as votes for a particular candidate (or initiative) did not determine the outcome of any election. There is no reason to require that those ballots, too, be challenged in order for the Court to rule on the validity of the ballots that are at issue in this case.

The district court's reasoning to the contrary is based solely on a misconstruction of *Bush v. Gore*. The problem in *Bush v. Gore* was the use of different standards to evaluate ballots throughout the election. The analogous situation in this case would be if Ms. Big Spring sought to break the "tie" between Ms. Windham and Mr. Jore by asking that Exhibit 1 be disqualified while

simultaneously arguing that some other ballot—still with an oval and an "x" for Mr. Cross but with an oval for Ms. Windham instead of Mr. Jore—be counted as a vote for Ms. Windham. Such a position would surely be untenable and contrary to *Bush v. Gore*. What makes no sense is to hold that there is no way for the courts to provide authoritative interpretations of the rules for interpreting ballots unless every election contestant manages to find and challenge every ballot cast that bears substantial similarity to the ones that actually matter.

The Florida 2000 ballots were not limited to the presidential race but included the races for whatever other federal, state, and local offices were to be selected that year, as well as whatever ballot measures were being considered. The problems with hanging chads, dimples, and other ambiguous efforts at voting on a punch card ballot were "recurring circumstances" not limited to the presidential race. *See Bush v. Gore*, 531 U.S. at 106. Yet it would have made no sense for any of the courts in that case to deny relief on the question of whether, for example, a chad hanging by one corner was a vote for president but a chad still attached by two corners a non-vote, merely because similarly attached chads had or had not been counted in a local city council race that was decided by a margin far exceeding the number of ambiguous chads.

Ms. Big Spring certainly agrees that the State should apply uniform standards to the interpretation of all ballots, and this case provides the Court with

its first opportunity to help in that process by demonstrating, in a decision that will be binding on all counties, how to apply the new statutes and regulations. She also agrees that her arguments in this case require that virtually identical ballots in other races if they are ever challenged. Unless and until that happens, nothing in the relief she seeks here results in valuing any one person's vote over another's. To the contrary, adjudication of how to deal with disputed ballots is essential to the development of uniform standards that will allow the State to treat every voter the same.

With respect to *Bush v. Gore*, the 2000 election, and the 2003 revisions to Montana law, the Court should also bear in mind that the overriding lesson of Florida 2000 was to make voting as simple, fair, and objective as possible, and then count the results, not to "stretch" or speculate to count a "vote" by someone who may or may not even have formed a clear intent in his or her own mind, or whose intent the Court might misconstrue. Although *Bush v. Gore* focused on concern for voters whose ballots were rejected by the machines and never counted, of equal concern at the time were the voters—including at least a few Jewish Holocaust survivors—whose markings on the "butterfly ballots" were misconstrued as votes for Pat Buchanan, an outcome that even he decried. Those ballots never gave rise to significant legal challenge for the very reason that the ballots here must be disqualified: under an objective standard, they *were* votes for

Mr. Buchanan on the face of the ballot, and the courts must not look behind that face. Here, objective standards require the conclusion that ballots 1 through 7 were overvoted and must be disqualified.

CONCLUSION

The Court should reverse the judgment of the district court and declare pursuant to § 13-36-212, MCA, that Ms. Windham was elected by the voters to represent House District 12 in the Montana House of Representatives. *See* § 13-1-103, MCA ("The individual receiving the highest number of valid votes for any office at an election is elected or nominated to that office.").

On remand, the district court should also be instructed to award Ms. Big Spring her reasonable costs and attorney fees as provided by § 13-36-206, MCA.

Respectfully submitted this 20th day of December, 2004,

MELOY TRIEWEILER
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By _____
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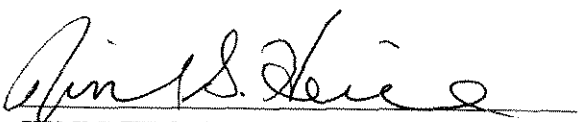
JENNIFER S. HENDRICKS

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document is double-spaced in a proportionately spaced font, 14 point-size, and that it contains 9,754 words according to the Word Count feature in the word processing software.



JENNIFER S. HENDRICKS

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of December, 2004, a true and exact copy of the foregoing document was served by U.S. mail, postage prepaid, and by facsimile on opposing counsel at:

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The Appendix accompanying this brief was also served by fax and by U.S. mail, postage prepaid, on the same date.

JENNIFER S. HENDRICKS