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

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

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

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A. MR. JORE'S BRIEF MISREPRESENTS THE TESTIMONY AT HEARING.

Mr. Jore's Statement of Facts takes issue with Ms. Big Spring's direct quotation of Mr. Stipes's testimony, in which he stated that counting Exhibits 1 through 5 as votes for Mr. Jore requires "a level of speculation." Mr. Stipes's admission was made on cross-examination. Mr. Jore's objection pertains to a "clarification" which Mr. Jore's counsel hoped, but failed, to elicit on redirect. Indeed, throughout his testimony and despite a battery of leading questions from Mr. Jore's counsel, Mr. Stipes refused to agree to claims that Mr. Jore tried to make through his testimony.

As early as his direct examination, Mr. Stipes refused to assent to Mr. Jore's characterization of Exhibits 1 through 7 as valid within the terms of the controlling rule. Quoting the language of ARM 44.3.2402(h), and referring to Exhibit 1 and Exhibit A-4, Mr. Jore's counsel asked, "And on each vote did the voter make a clear word, mark or a statement to indicate the correct vote?" Instead of answering "yes," Mr. Stipes replied, "On that one *all's they did* was make the 'X' through it." (Tr. of Hrg. at 53, Direct Examination of Mr. Stipes, emphasis added.) Mr. Stipes thus expressly distinguished a "clear word, mark or a statement" from the marks on those exhibits.

The discussion on cross-examination began with the treatment of Exhibit 10 as compared to the treatment of the challenged ballots. Mr. Stipes testified as follows:

> Q: But you have no way of knowing what the voter intended there [on Exhibit 10].
>
> A: Other than to know that the voter was confused.
>
> Q: Well, not necessarily. He says not against amending the constitution and then he puts two marks in the for. Wouldn't that be pretty clear intent to vote for that one?
>
> A: Uh; no.
>
> Q: You'd have to do some speculating about that one, wouldn't you.
>
> A: Yeah.
>
> *Q: Just like you'd have to do some speculating about what the voter meant when he put an "X" in the oval next to Mr. Cross.*
>
> *A: There's a level of speculation involved.*

(Tr. of Hrg. at 57-58, Cross-Examination of Mr. Stipes, emphasis added.)

On redirect, counsel repeated his earlier question, trying to get the witness to attest to his belief that the requirements of ARM 44.3.2402(h) had been satisfied, or that counting the votes for Mr. Jore had not required speculation:

> Q: Now in each instance [Exhibits 1 through 7] did the recount board find that the voter had indicated by a clear mark that he or she intended to vote for Mr. Jore?
>
> MR. MELOY: Objection; leading.
>
> THE COURT: Sustained.
>
> Q (BY MR. SCOTT): Was there any speculation as you were determining those seven ballots by the Board of Resolution?

(Tr. of Hrg. at 59, Redirect of Mr. Stipes.) The witness refused to give the answer sought by counsel:

A: There wasn't any disagreement. It was clear to all three of us.
Q: What was clear?
A: That they were votes for Rick Jore.
Q: So there was no—are you saying there was no speculation?
MR. MELOY: Objection; leading.
THE COURT: Sustained.

(Tr. of Hrg. at 59-60, Redirect of Mr. Stipes.) Despite the sustained objection, the witness answered the question but still refused the words that counsel tried to put in his mouth:

THE WITNESS: There was no disagreement amongst us. It was the same opinion amongst all of us.

(Tr. of Hrg. at 60, Redirect of Mr. Stipes.)

The so-called clarification occurred at the end of Mr. Stipes's testimony. Examination of the transcript, however, reveals that Mr. Stipes never answered the question about whether he really meant what he said about speculating on Exhibits 1 through 5. Instead, he began to recount the exchange during cross-examination and then was interrupted by counsel and asked merely to re-affirm that any decision to count Exhibit 10 would have required speculation. (Tr. of Hrg. at 60-61, Redirect of Mr. Stipes.) Mr. Stipes never contradicted his prior testimony, just as he never went along with the several attempts by Mr. Jore's counsel to get him to agree to a lack of speculation or to compliance with ARM 44.3.2402(h).

Mr. Stipes's testimony was that counting Exhibits 1 through 5 for Mr. Jore required "a level of speculation" because "all's [those voters] did was make the 'X,'" rather than a clear word, mark, or statement.

B. MR. JORE MISREPRESENTS THE LAW THAT CONTROLS THE COMPOSITION OF THE RESOLUTION BOARD.

Mr. Jore's rendering of the law is no more accurate than his rendering of the facts. He tries to justify the illegally constituted Resolution Board by blaming the Democratic Party for not submitting a list of proposed election judges, and by citing § 13-4-102(1), MCA, for the proposition that the election administrator is only supposed to do her best. Mr. Jore goes on to suggest that the Court assume it is virtually impossible to find a Democrat in Lake County qualified to serve on a Resolution Board. (Jore's Answer Br. at 21.)

The statute on which Mr. Jore relies is the statute governing the appointment of precinct-by-precinct election judges, who are appointed by the governing authority of the county. *See* § 13-4-101, MCA. The Resolution Board is appointed by the Election Administrator, and her choice is governed by the regulations quoted in Ms. Big Spring's opening brief and ignored by Mr. Jore. Under those regulations, political diversity on the Resolution Board is not optional. *See* ARM 44.3.1765(2)(f); 44.3.1765(4); 44.3.1771(1).

Ms. Newgard was more forthright than Mr. Jore about her violation of the law: she frankly admitted that she had not complied with the regulation. Although the Democrats had not submitted a list of judges, neither had the Republicans. (Tr. of Hrg. at 27, Test. of Ms. Newgard.) In selecting her Resolution Board, she made no effort at all to achieve political party representation—she did not even inquire as to party affiliation, instead appointing two of her own subordinates based solely on the fact that they were familiar with the use of the scanner. (Tr. of Hrg. 37-38, Test. of Ms. Newgard.) When asked, "So you didn't follow that regulation," Ms. Newgard answered, "Right." (Tr. of Hrg. 38-39, Test. of Ms. Newgard.)

Violation of the carefully orchestrated process of vote-counting is not a trivial matter, particularly in light of Mr. Jore's argument that this Court should give great deference to the local counting boards. Even with subsequent review by the Recount Board, and even with de novo review by the courts, as a matter of realpolitik, a reversal is more difficult than an affirmance. Indeed, such a claim was the only stated basis for the U.S. Supreme Court's decision to order a stay in the Florida recount in 2000: Justice Scalia's concurrence explained that Mr. Bush would suffer "irreparable harm" if the recount showed Mr. Gore the winner but a court ruling on the ballots changed the outcome, because it would be "casting a cloud" on his legitimacy. *Bush v. Gore I* (2000), 531 U.S. 1046, 1047 ("*Bush v.*

Gore I") (Scalia, J., concurring). The initially announced outcome is practically important even if legally unentitled to deference.

Despite the obvious illegality of the Lake County Resolution Board, Mr. Jore repeatedly invokes its conclusions and asks the Court to defer. Ms. Big Spring asks the Court to be cognizant of the irregular appointments so that its de novo review will be truly without any preconceived idea that the original decision was properly made.

C. MR. JORE IMPROPERLY ASKS THE COURT TO SPECULATE ABOUT VOTER INTENT.

1. Mr. Jore Openly Speculates About The Intentions And Actions Of The Voters.

Mr. Jore's own descriptions of the ballots at issue and admitted as evidence in this case reveal the type of speculation that is occurring here. Mr. Jore claims to be able to determine not only the intent of each voter but also the sequence of his or her thought process. For example, his purportedly factual description of one ballot states that the voter "slightly filled in the oval for Cross, *then* completely filled in the oval for Jore." (Jore Answer Br. at 9.) On Exhibits 1 through 7, as well as Exhibits 9A and 9B, Mr. Jore asserts that "the voter filled out two ovals, then crossed out one choice." (Jore Answer Br. at 9-10.) Mr. Jore does not reveal how he has determined the sequence in which the marks were made. His

purportedly factual description of the ballots at issue is itself a demonstration of the speculation inherent in the attempt to determine these voters' intentions.

2. Mr. Jore Ignores A Range Of Differences Among Ballots In Order To Cajole The Court Into Deferring To Local Election Officials On Questions Of Law.

Seventy-two wrongs do not make a right. A key element of Mr. Jore's argument is to try to blur distinctions among a widely varying range of double-marked ballots lumped together in his Exhibit A. Mr. Jore then suggests, without evidence, that these supposedly identical ballots were treated identically to other ballots he claims are similar across the State. He further tries to suggest that adhering to this Court's high standards of objectivity in interpreting ballots would result in mass disenfranchisement. All of this is based on a set of flimsy assumptions and distortions of the facts.

Counsel for Mr. Jore tried to elicit testimony from the Election Administrator that specific instructions about "x" marks were given to the election judges as part of the uniform instructions and training provided by the Secretary of State. (Tr. of Hrg. at 22, Test. of Ms. Newgard.) While Ms. Newgard did not respond directly to this question on direct examination, she admitted on cross-examination that the Secretary of State's training materials do not specify what to do in the case of ballots such as Exhibits 1 through 5, and she could fall back only on the general injunction to determine voter intent, the very standard which *Bush v.*

Gore (2000), 531 U.S. 98 ("*Bush v. Gore I*"), held was not specific enough to guide local election officials. (Tr. of Hrg. at 39, Test. of Ms. Newgard.)

Mr. Jore's assertion that the 70 ballots contained in his Exhibit A are identical to Exhibits 1 through 7—which are themselves varied—is simply absurd. Many are quite different from Exhibits 1 through 5, and none is quite like Exhibits 6 or 7.

Of particular interest in connection with the disputed ballots is Exhibit A-42. Recall that Mr. Jore contends that an "x" is always negative and that the underlining and initials next to Mr. Cross's name on Exhibit 7 also represent rejection of Mr. Cross. Exhibit A-42 has two ovals darkened in the race for I-147. *Each* oval also has an "x" through it, which under Mr. Jore's supposedly uniform rule should count as an abstention/undervote. But the oval "AGAINST" I-147 also has some kind of writing next to it, possibly the voter's initials; it does not appear to be any kind of negative word such as "no." The County officials nonetheless covered the *latter* with a white sticker, forcing the ballot to count as a vote "FOR" I-147. It is impossible for the County to claim to have a universal and uniform rule for interpreting "x"s in light of ballots such as this one.

Mr. Jore also tries to suggest, relying on the wholly improper submission of a new affidavit from a single other county, *see* Appellant's Motion to Strike, that the 70 ballots in Exhibit A are not only identical but would receive identical

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Of particular interest in connection with the disputed ballots is Exhibit A-42. Recall that Mr. Jore contends that an "x" is always negative and that the underlining and initials next to Mr. Cross's name on Exhibit 7 also represent rejection of Mr. Cross. Exhibit A-42 has two ovals darkened in the race for I-147. *Each* oval also has an "x" through it, which under Mr. Jore's supposedly uniform rule should count as an abstention/undervote. But the oval "AGAINST" I-147 also has some kind of writing next to it, possibly the voter's initials; it does not appear to be any kind of negative word such as "no." The County officials nonetheless covered the *latter* with a white sticker, forcing the ballot to count as a vote "FOR" I-147. It is impossible for the County to claim to have a universal and uniform rule for interpreting "x"s in light of ballots such as this one.

Mr. Jore also tries to suggest, relying on the wholly improper submission of a new affidavit from a single other county, *see* Appellant's Motion to Strike, that the 70 ballots in Exhibit A are not only identical but would receive identical

treatment anywhere in the State. Mr. Jore speculates that 0.6 percent of all ballots would be disqualified if the statutes and regulations were followed, as Ms. Big Spring requests. This calculation, however, is intended to be daunting rather than accurate. Even assuming that Mr. Jore is correct that all 70 ballots are invalid under objective standards, and that he is correct that the same proportions exist statewide, each ballot was overvoted with respect to only one or two races. The most frequently overvoted race was for CI-96, which was overvoted on 18 of the 70 ballots. (Exs. A-2, 9, 10, 28, 29, 30, 33, 36, 43, 47, 48, 52, 56, 57, 58, 61, 66, 70.) Thus, even the worst case scenario involved an overvote rate of 0.1 percent rather than 0.6 percent.

Mr. Jore has lumped together a set of ballots with widely varying characteristics; incorrectly claimed that those ballots were interpreted by the County according to some uniform, objective rule; and made extravagant and unfounded claims about interpretation of ballots statewide. Mr. Jore then contends that the Court should throw out its precedents and defer to the County's decisions. Mr. Jore refers extensively to the 2003 revisions to the election code and cites the Resolution instructing staff to perform a comprehensive review of voting law, including problems with recounts and determination of voter intent. (Jore's Appendix Ex. B, HJR No. 8 item (6)(b).) In all of that material, Mr. Jore uncovers not a single critique of this Court's precedents, nor any wish to revise them.

Despite the Legislature's acquiescence and codification of this Court's standards, Mr. Jore contends that the Court should reverse course and adopt Justice Trieweiler's dissenting opinion in *Marsh v. Overland* (1995), 274 Mont. 21, 905 P.2d 1088. Justice Treiweiler's dissent was, as an initial matter, a lone dissent. It was also a dissent written prior to *Bush v. Gore* and the 2003 legislative overhaul of Montana law, aimed at the overriding goal of uniformity. The *Bush v. Gore* decision makes plain the flaws in his position that local election officials should receive deference based on their familiarity with local politics. Does this mean that whether a mis-marked presidential ballot is valid could depend on which particular radio and TV ads aired in the precinct? When in doubt, should the Recount Board go by what it thinks most of the people in the area believe? There is no room for local variation after *Bush v. Gore*, and Mr. Jore's argument of convenience for deferential review is flatly at odds with his frequent references to the need for uniformity.

Moreover, one could even agree with Justice Trieweiler that the Court was too exacting in *Marsh*, and that view would not come close to justifying the votes for Mr. Jore in this case. As Mr. Jore points out, *Marsh* involved imperfect write-in votes, with votes for "Marsh," "Mr. Marsh," or a Marsh with the wrong first name. Justice Treiweiler's discussion of local control is focused primarily on local officials' knowledge about whether there were other politically prominent Marshes

for whom the voters may have intended to vote. When such local issues are not present, the argument for local discretion is even weaker, and directly at odds with the Legislature's and Secretary of State's efforts to set out uniform standards for the State.

Mr. Jore also cites a West Virginia case in which the courts deferred to local election officials in their determination of voter intent. *Bowling v. County Comm'n* (2002), 575 S.E.2d 257. This case sets forth the position that this Court already rejected in its prior cases. Its holding and it discussion of liberal construction of the election laws echo Justice Treiweiler's dissent in *Marsh*, and even though the case was decided in 2002, it makes no reference to *Bush v. Gore*, relying instead on a West Virginia case from 1975. *See, e.g., Bowling*, 575 S.E.2d at 258 (Syllabus by the Court, citing *Brooks v. Crum* (1975), 216 S.E.2d 220). Moreover, the court relies on West Virginia statutes quite different from Montana's: West Virgnia's statute spells out that the "trial court" in an election contest is the county commission, while the courts serve in an appellate role. *Bowling*, 575 S.E.2d at 259. The West Virginia courts have concluded that this scheme requires them to defer to factual findings, a view directly at odds with this Court's holding in *Rennie v. Nistler* (1987), 226 Mont. 412, 415, 735 P.2d 1124, 1126. *See also* Steve Bickerstaff, "Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election" (2001), 29 Fla. St. U. L. Rev. 425, 460 ("The essential

requirement for equal and fair treatment is the presence of a fair and adversarial process before a single, impartial arbiter with responsibility for adjudicating contested issues. ... The judicial election contest provides a check on the exercise of [local] authority by making the outcome of the election subject to de novo challenge before a single impartial arbiter subject to appellate review.").

Mr. Jore's reliance on *Bowling* is particularly curious in light of the substance of that election contest. The disputed ballots in *Bowling* were identical to Exhibits 1 through 5 and were disqualified:

> In the election contest, the Commission decided *not* to count two ballots on which the voter had filled in the ovals beside two candidates' names, instead of beside only one name. In each case, the voter apparently placed a handwritten "X" over (or possibly under) one of the two filled-in ovals.

Bowling, 575 S.E.2d at 262 (emphasis original). The lower court had disagreed with the County Commission and taken Lake County's approach to counting these ballots. The supreme court reversed, stating, "[W]e recognize that in the instant case reasonable minds can certainly differ on the answer to this question." *Id.*

In West Virginia, following pre-*Bush v. Gore* precedent, the fact that reasonable minds could differ meant that the courts would defer to the discretion of local officials. This approach is no longer valid after *Bush v. Gore*, nor is it consistent with either this Court's precedent or the legislative command of statewide uniformity. *See also Gore v. Harris* (2000), 772 So.2d 1243, 1252

(holding that trial court "relinquished an improper degree of its own authority" when it applied abuse of discretion standard to review of ballot interpretations by local officials), *rev'd on other grounds, Bush v. Gore II*. If reasonable minds can differ over interpretation of Exhibits 1 through 7, the only way to choose among the reasonable options is to speculate. The ballots must therefore be disqualified.

D. MR. JORE FAILS TO PROVIDE ANY RATIONALE FOR HIS EQUAL PROTECTION ARGUMENT.

Mr. Jore's brief repeats sections of the district court's order but does not provide any substantial argument or rationale for his argument that granting relief in this case would violate the state or federal constitutions or the statutory requirement for uniform interpretation of ballots. He makes no response at all to Ms. Big Spring's discussion of *Bush v. Gore II*, and its *requirement* that a State's highest court police the uniformity of standards applied by local officials, or her point that deferring to local officials would inherently defeat the goal of uniformity. Mr. Jore also fails to dispute Ms. Big Spring's argument that the 2003 legislation adopted, if anything, a stricter standard than the one that was previously in place. It makes no sense to say that questions of ballot interpretation were to be resolved by the State's highest tribunal when there was no explicit statutory goal of uniformity, but now that the Legislature has expressed that goal, the Court should

defer to the discretion of the Resolution Board appointed afresh for each election, in each county.

Instead, Mr. Jore takes this absurd argument even farther, now contending that Ms. Big Spring was required to challenged not only the 70 ballots in Exhibit A but also any additional ballots that may or may not have been cast throughout the State which are similar to those 70 ballots, according to whatever unarticulated standard Mr. Jore has used to determine that all the ballots in Exhibit A belong to the same "class." In addition to the rank absurdity of this approach and its lack of grounding in a reasoned equal protection analysis, Mr. Jore fails to point to anything in the election contest statute indicating that the Legislature contemplated a proceeding even remotely like the one he proposes.

As a threshold matter, Mr. Jore is fundamentally incorrect in about the type of challenge that is authorized by §§ 13-36-101 *et seq.*, MCA. A contestant has the right to challenge "the right of any person to any nomination or election" to an office for which the contestant has the right to vote. § 13-36-101, MCA. One cannot simply run around the State challenging individual ballots; one may only challenge the result of an election, based on various grounds which include the receipt of illegal votes. And one may do so only with respect to elections in which one had the right to vote. Mr. Jore's contention that Ms. Big Spring was *required*

to challenge all the ballots he has identified, in addition to any similar ones across the State, must be rejected since the statute does not even *allow* her to do so.

The detailed procedures set out by the statute reflect the narrow focus of an election contest. For primary elections, Montana law requires that any contest be filed within five days after the result of the election is certified, and the contest can proceed with only three days notice to the contestee. § 13-36-102(1), MCA. In a general election, the contestant need give only three days notice of which ballots are challenged, and the procedure set out by the statute specifically refutes Mr. Jore's contention that the challenge must sweep up any similar ballots from across the State, regardless of their impact on the contested race:

> When the reception of illegal votes is alleged as a cause of contest, *it shall be sufficient* to state generally that in one or more specified voting precincts illegal votes were given *to the candidate whose nomination or election is contested* which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other candidate for the same office.

§ 13-36-202, MCA (emphasis added). These statutes do not contemplate that contestants will conduct ballot-by-ballot surveys of the entire State before filing a challenge, nor do they contemplate a statewide advisory opinion on all potentially challengeable ballots.

Mr. Jore has yet to explain how affording relief in this case could possibly be construed as giving greater weight to any particular votes or to put forth any

logical reason why a court should be forced to review the validity of tens or hundreds of ballots when only a few are actually at issue and determinative of any election. Mr. Jore's *Bush v. Gore II* argument, whether bootstrapped to the federal or state constitution or to state statutes, is a desperate effort to avoid this Court's review of this dispute on its merits.

E. ANY DISCUSSION OF ARTICLE V, SECTION 10, IS PREMATURE.

The final section of Mr. Jore's brief is a reference to Article V, § 10 of the Montana Constitution, with the suggestion that it renders the decision of the Court in this matter non-binding on the House of Representatives. There is no discussion or argument regarding why this assertion might be relevant to the validity of the seven disputed ballots in this case. If the intent is to suggest that the Court should not bother deciding the case at all this suggestion is obviously incorrect even under the *Ainsworth* decision cited in the brief, which held that the election contest statutes applied to legislative races. *Ainsworth v. Dist. Ct.* (1938), 107 Mont. 370, 86 P.2d 5. It is also curious that Mr. Jore would place so much emphasis, throughout his brief, on the federal mandate to give equal weight to each person's vote, yet continue to contend, even after *Bush v. Gore II* and *Reynolds v. Sims* (1964), 377 U.S. 533 (holding that both houses of bicameral state legislature must be elected in proportion to population, an rejecting analogy to U.S. Senate), that the House can defy the results of a popular election rather than give equal

importance to every vote and abide by the majority decision as a matter of federal constitutional law. Mr. Jore seemingly wants to have each branch of government apply the law to the facts of the case except the branch uniquely qualified for that task.

In any event, Mr. Jore does not even pretend to give this Court any argument regarding the relevance of Article V, § 10, to this case, and his intimations about further controversy over the race for House District 12 should be disregarded.

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 22nd day of December, 2004,

MELOY TRIEWEILER

By 
PETER MICHAEL MELOY
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 4,173 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 22nd 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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