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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, Thomas Canterbury, Tom
Huff, Margie Ferris, Paul Elvig, Edward
Monaghan, and Christopher Vance, Washington
residents and electors, and the Rossi for
Governor Campaign, a candidate committee,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services;
Adams County and Nancy McBroom, its
Auditor; Asotin County and Elaine Johnston, its
Auditor; Benton County and Bobbie Gagner, its
Auditor; Chelan County and Evelyn L. Arnold,
its Auditor; Clallum County and Cathleen
McKeown, its Auditor; Clark County and Greg
Kimsey, its Auditor; Columbia County and
Sharon Richter, its Auditor; Cowlitz County and
Kristina Swanson, its Auditor and Ex-Officio
Supervisor of Elections, Douglas County and
Thad Duvall, its Auditor; , Ferry County and
Clydene Bolinger, its Auditor; Franklin County
and Zona Lenhart, its Auditor; Garfield County
and Donna Deal, its Auditor; Grant County and
Bill Varney, its Auditor; Grays Harbor County
and Vern Spatz, its Auditor; Island County and
Suzanne Sinclair, its Auditor; Jefferson County
and Donna Eldridge, its Auditor; Kitsap County
and Karen Flynn, its Auditor; Kittitas County
and Judy Pless, its Auditor; Klickitat County and
Diana Housden, its Auditor; Lewis County and
Gary Zandell, its Auditor; Lincoln County and
Shelly Johnston, its Auditor; Mason County and
Allan T. Brotche, its Auditor; Okanogan County
and Peggy Robbins, its Auditor; Pacific County,

No.

**PETITIONERS' MOTION FOR
EXPEDITED DISCOVERY**

PETITIONERS' MOTION FOR EXPEDITED
DISCOVERY - 1

SEA 1594605v1 55441-3

Davis Wright Tremaine LLP
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1 and Pat Gardner, its Auditor; Pend Oreille)
 2 County and Carla M. Heckford, its Auditor;)
 3 Pierce County and Pat McCarthy, its Auditor;)
 4 San Juan County and Si A. Stephens, its Auditor;)
 5 Skagit County and Norma Hickock-Brummett,)
 6 its Auditor; Skamania County and Mike)
 7 Garvison, its Auditor; Snohomish County and)
 8 Bob Terwilliger, its Auditor; Spokane County)
 9 and Vicky Dalton, its Auditor; Stevens County)
 10 and Tim Gray, its Auditor; Thurston County and)
 11 Kim Wyman, its Auditor; Wahkiakum County)
 12 and Diane L. Tischer, its Auditor; Walla Walla)
 13 County and Karen Martin, its Auditor; Whatcom)
 14 County and Shirley Forslof, its Auditor;)
 15 Whitman County and Eunice Coker, its Auditor,)
 16 and Yakima County and Corky Mattingly, its)
 17 Auditor, Sam Reed, in his official capacity as)
 18 Secretary of State for the State of Washington;)
 19 Frank Chopp, Speaker of the Washington State)
 20 House of Representatives, and Lieutenant)
 21 Governor Brad Owen, President of the)
 22 Washington State Senate,)

23 Respondents.)

24 **I. INTRODUCTION AND RELIEF REQUESTED**

25 This is an action contesting the 2004 election for the Office of Governor.
 26 Petitioners anticipate that evidence obtained in discovery, in addition to Petitioners'
 27 affidavits, will demonstrate that the number of illegal votes counted, and the number of
 affidavits, will demonstrate that the number of illegal votes counted, and the number of
 valid votes improperly rejected in this election, are so great as to render the true result of
 the election uncertain. So long as the uncertainty remains, a cloud will exist over the
 legitimacy of any administration taking office. Confidence in the results of the election
 must be restored quickly. The people of the State of Washington are entitled to the prompt
 resolution of the issues clouding the election and an expeditious development of the facts
 and evidence that will determine whether a new election is necessary.

As it currently stands, the legislature is scheduled to issue a certificate of election
 on Tuesday, January 11, 2005, with inauguration scheduled for Wednesday, January 12.

1 Yet serious questions exist as to the accuracy of the vote totals certified by the Secretary of
2 State on December 30, 2004. Those issues include, among others, the following:

- 3 • Thousands more votes have been counted than there are voters for whom
4 counties have records of having voted in the election. The discrepancy suggests
5 that the excess votes are invalid or illegal.
- 6 • King County's Elections Superintendent has acknowledged that "[a]n
7 unknown number of provisional voters, some of whom may not even have been
8 registered to vote, improperly put their ballots directly into vote-counting machines
9 at polling places." See "Election Scrutiny Reveals Provisional-Vote Flaws,"
10 Seattle Times, January 5, 2005. These provisional ballots – which were not
11 checked to ensure that they were submitted by registered voters and for which there
12 was apparently no investigation to determine whether the person had already voted
13 by absentee or other means – have apparently been cast into the sea of counted
14 ballots and cannot now be retrieved.
- 15 • Numerous individuals ineligible to vote, such as convicted felons whose
16 civil rights had not been restored, deceased individuals, and individuals with
17 multiple registrations, appear to have been credited with having voted in the
18 election.
- 19 • Military overseas and other absentee voters may not have received or been
20 sent their absentee ballots in a timely manner and could have been disenfranchised
21 by the neglect, mistake, or error of election officials.
- 22 • In at least one county, election workers "enhanced" ballots by obscuring
23 original voter marks in violation of the Washington Administrative Code and likely
24 rendering it impossible to determine now the voter's original intent.
- 25 • In violation of the Equal Protection Clause, King County used inconsistent
26 and changing standards for handling overvotes – ballots on which a voter appeared
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1 to have made multiple marks – during its counting and recounting of the ballots.
2 Ballots were treated differently depending on when and where they were reviewed.

3 • When presented with sworn statements by hundreds of voters whose ballots
4 had been improperly rejected, several counties abused their discretion and violated
5 the Equal Protection Clause by failing to recanvass those ballots and correct those
6 errors during the manual recount.

7 • Serious questions exist as to the security of ballots during the initial count
8 and two recounts which, when coupled with the existence of thousands more votes
9 counted than identifiable individuals credited with voting, raises the specter of
10 manipulation and illegitimate ballots.

11 These serious questions go to the fundamental legitimacy of the election and
12 require immediate investigation and resolution. Accordingly, Petitioners seek expedited
13 discovery in this matter including an order:

14 1. Compelling responses to its requests for production of documents and its
15 interrogatories within 10 calendar days of service of such requests and interrogatories; and

16 2. Granting them leave to take depositions in this matter immediately on two
17 days' notice to the deponent.

18 **II. FACTUAL BACKGROUND**

19 **A. Discovery Requested**

20 Petitioners will be serving interrogatories and requests for production seeking
21 information about how ballots were verified, validated, and counted in the November 2004
22 general election.¹ The requests will cover each of the specific errors, omissions, and

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24 ¹ The Washington State Republican Party, through counsel for Petitioners in this case, has
25 submitted a request under the Public Disclosure Act to King County that covers some of
26 the documents described here. The County has promised to provide many documents
27 responsive to that request by 3:00 p.m. on January 7, 2005. Depending on the documents
produced, some of the anticipated discovery requests in this case may not be necessary.
For this reason, Petitioners will finalize the particular discovery requests after receiving the
response to the Public Disclosure Act request. Petitioners expect to do so, and to serve the
PETITIONERS' MOTION FOR EXPEDITED

1 discrepancies alleged in the Election Contest Petition, including the process in each county
2 of reconciling the number of votes cast with the number of individual voters credited with
3 voting; whether or to what extent provisional and absentee ballots were counted before
4 being verified and whether they can be identified after they were counted; whether or to
5 what extent ballots submitted by felons, dead persons, or those who voted more than once
6 were counted; the number of unverified ballots counted and the manner in which that
7 number was calculated; the manner of “enhancement” of ballots by election workers; the
8 manner of handling overvotes and undervotes; the failure to recanvass ballots of select
9 voters whose ballots had been improperly rejected while recanvassing others; and the
10 security of ballots during the initial count and two recounts. Petitioners also seek to
11 depose certain County and State officials and their employees who were responsible for the
12 administration of the election to develop evidence regarding the subjects covered in their
13 discovery requests. Information regarding these subjects is central to establishing the exact
14 nature and extent of the unlawful votes that were allowed to be counted and the lawful
15 votes that were improperly rejected. The ascertainment of that number will likely
16 determine whether a re-vote is necessary: if the number exceeds the margin of victory,
17 then the election is void. *See Foulkes v. Hays*, 85 Wn.2d 629, 633 (1975).

18 **B. Procedural Context**

19 After an election contest has been commenced, the clerk of the court is required to
20 issue an order setting a hearing to occur “not less than ten nor more than twenty days from
21 the date of the notice [of hearing], to hear and determine such contested election.” RCW
22 29A.68.040. Although the statute does not require the clerk to issue the order setting the

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24 requests, by Monday, January 10. If the Court grants this motion, responses will be due on
25 Thursday, January 20. Petitioners will submit a bench copy of their discovery requests to
26 the Court when they are served on Respondents so the Court can review them before the
27 hearing on this motion. However, any objections Respondents may raise to specific
requests has no bearing on the overall merits of this motion.

1 hearing within a specified period of time, “the spirit of the law dictates that contests
2 instituted thereunder *shall be promptly heard and determined.*” *Thomas v. Van Zandt*,
3 56 Wash. 595, 599, 601 (1910) (interpreting a predecessor statute that was substantively
4 identical in relevant respects) (emphasis added). It is Petitioners’ hope that the Court will
5 issue the order setting a hearing to determine this election contest as quickly as possible,
6 and that the hearing will take place within 20 days of the filing of their petition. To be
7 meaningful, all discovery in this case needs to be completed before the hearing.

8 III. AUTHORITY

9 The Court has wide discretion to expedite discovery. Under CR 34(b), a “court
10 may allow a shorter . . . time” for a party to respond to requests for production than the
11 30 days (or 40 days from the date of the complaint) otherwise provided.² Under CR 30(a),
12 a party may note depositions to take place within 30 days from the date of the complaint
13 upon “[l]eave of court, with or without notice.” In addition, the general rule requiring a
14 party to give five days’ notice of a deposition is subject to the provision that “the court
15 may for cause shown enlarge or shorten the time for taking the deposition.” CR 30(b)(3).
16 Finally, a trial court has broad discretion under CR 26 to manage the discovery process.
17 *See Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416 (2002).

18 Federal courts interpreting substantially the same provisions grant leave for
19 expedited discovery upon a showing of good cause. *See Yokohama Tire Corp. v. Dealers*
20 *Tire Supply, Inc.*, 202 F.R.D. 612 (D. Ariz. 2001); *Semitool, Inc. v. Tokyo Electron*
21 *America, Inc.*, 208 F.R.D. 273 (N.D. Cal. 2002).³ “Good cause may be found where the
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23 ² As a suit of a civil nature in the superior court, the Civil Rules should govern the
24 procedure in this matter. CR 1.

25 ³ Petitioners have not found Washington published cases addressing the standard for
26 expediting discovery. In interpreting the Civil Rules, however, Washington courts are
27 guided by federal cases interpreting substantially similar federal rules. *See Casper v. Esteb*
Enters., 119 Wn. App. 759, 767 (2004); *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222,
225 (1982); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218 (1992).

1 need for expedited discovery, in consideration of the administration of justice, outweighs
2 the prejudice to the responding party.” *Semitoool*, 273 F.R.D. at 276.

3 The need for expedited discovery in this case is compelling. The People of the
4 State of Washington deserve a fair election, and they deserve to have the true results of
5 such an election determined in a timely matter. Washington’s November 2004 election
6 was not conducted in a fair manner: the results include votes that cannot be ascribed to any
7 lawfully registered voters and the votes of unregistered and ineligible voters were
8 apparently counted while certain legitimate votes were not. Thus, the voters of
9 Washington are lawfully entitled to a re-vote, and Petitioners expect to establish this at the
10 hearing to be scheduled under RCW 29.68.040.

11 For the Court to fully evaluate and remedy the serious errors and abuses of process
12 that have transpired in this election, Petitioners need the discovery described before the
13 hearing. Under normal discovery rules, there would be no way to conduct this discovery
14 before the hearing unless it was scheduled at least six weeks after the filing of the petition.
15 Then, assuming the Court were to agree that a re-vote is required under the law, another
16 delay would occur. The voters are entitled to a fair and final resolution of this important
17 issue much sooner, and the integrity of Washington’s democratic process demands it.

18 Furthermore, expedited discovery will not prejudice Respondents. They are well
19 aware of the issues raised in this petition and can hardly claim that the petition or the
20 discovery requests come as surprise. Indeed, some counties and the State have been
21 actively researching and assessing the very issues Petitioners raise here over the last
22 several weeks, and Petitioners simply seek access to the information Respondents have
23 developed. Even if certain counties were to object that they cannot respond to certain
24 requests in time, this does not amount to prejudice; nor would it affect the need for
25 expedited discovery in this matter.

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IV. CONCLUSION

Given the importance not only of the issues themselves but also of their quick resolution, the Court should exercise its broad discretion to allow the expedited discovery Petitioners request here.

DATED this 7th day of January, 2005.

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Attorneys for Petitioners

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