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THE HONORABLE T.W. SMALL
Hearing: **Wednesday January 12, 2005 at 2 p.m.**

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al., Petitioners, v. King County et al., Respondents, and Washington State Democratic Central Committee, Applicant Intervenor-Respondent.	NO. 05-2-00027-3 WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION TO INTERVENE

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

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Perkins Coie LLP
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Seattle, Washington 98101-3099
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I. INTRODUCTION

On December 6, 2004 the Washington State Democratic Central Committee ("WSDCC") requested a final manual recount of the Governor's race pursuant to RCW 29A.64.011 and deposited $730,000 with the Secretary of State as security against costs in the event that the recount did not change the results of the preceding mandatory recount. The manual recount did, in part, change the results of the election and on December 30, 2004, at the completion of the manual recount. Secretary of State Sam Reed certified Christine Gregoire as the Governor-Elect of Washington State. Governor-Elect Gregoire is scheduled to be inaugurated on Wednesday, January 12, 2005.

Petitioners, led by the Rossi for Governor Campaign, have brought this election contest seeking to set aside the certified results of the election. Petitioners' contest does not seek to have Dino Rossi declared elected to the position of Governor. Nor does Petitioners' contest seek to prove fraudulent conduct on the part of election officials. Instead, based solely on alleged miscellaneous errors Petitioners ask this court to simply set aside the most expensive election in Washington state history and order that it be done again. Were this court to grant Petitioners' request, all Democratic and Republican legislators and state-wide office holders would also have to stand for re-election because of Article III, Section 1 of the State Constitution. ("The … governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, … shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.") As respondents, petitioners have named every county in Washington State and its Auditor; the Secretary of State Sam Reed (the "Secretary"); Frank Chopp, the Speaker of the Washington State House of

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

Representatives; and Lieutenant Governor Brad Owen, President of the Washington State Senate. Based on the pendency of this and election contests filed by other petitioners elsewhere in the state, the Secretary of State has refused to return to the WSDCC its $730,000 deposit.

The WSDCC seeks the Court's permission to intervene in this contest as a party. The WSDCC, on its own behalf and on behalf of Democratic voters throughout the state, has a substantial interest in ensuring that the results of this election stand.

WSDCC's unique position mandates its intervention. WSDCC has been actively involved in monitoring and observing all aspects of the determination of the results of this election, including four lawsuits related to the recounts.[1]

Through communication with Petitioners, WSDCC believes that Petitioners do not oppose this Motion to Intervene.

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[1] Petitioners filed *Washington State Republican Party v. Reed*, No. C04-2350M in U.S. District Court for the Western District of Washington and *Washington State Republican Party v. King County*, No. 04-2-14599-1 in Pierce County Superior Court. The WSDCC filed *McDonald et.al. v. Reed et.al*, No. 76321-6 in the Washington State Supreme Court and *McDonald v. King County*, No. 04-2-36048-0 in King County Superior Court. Several of the allegations made by Petitioners in this lawsuit have been made in these other lawsuits. For example in *McDonald et.al. v. Reed et.al.*, whether absentee and military voters might be disenfranchised by administrative error, whether the number of votes exceeded the number of registered voters in many counties, and whether different standards for evaluating ballots and signatures violated state election law were all raised, and in *Washington State Republican Party v. Reed* in U.S. District Court, allegedly improper enhancement or duplication of ballots was raised. The WSDCC is familiar with the issues presented by this case.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

II. IDENTITY OF INTERVENOR

The WSDCC is the governing body of the Washington State Democratic Party. This election contest and the relief requested impacts the Washington State Democratic Party, its supporters, its elected officials and, most important, its Governor. .

III. ISSUE PRESENTED

Whether Applicant-Intervenor WSDCC should be permitted to intervene in this election contest pursuant to the liberal standards for intervention in CR 24.

IV. BACKGROUND

A. Factual Background

On November 30, 2004, based on certified election results from all 39 counties of Washington, Secretary of State Sam Reed (the "Secretary") declared Dino Rossi the Governor-Elect. On December 3, 2004, pursuant to RCW 29A.68.011, the Washington State Democratic Party applied for a statewide manual recount of the results of the election, depositing $730,000 with the Secretary. On December 30, 2004, the Secretary declared Christine Gregoire the Governor-Elect based on the certified manual recount results from all 39 counties. Declaration of David T. McDonald ("McDonald Decl.") ¶¶ 8-9, Ex. B. Pursuant to the State Constitution and RCW 43.01.010, Ms. Gregoire is to take office on January 12, 2005.

The initial count, mandatory machine recount and requested manual recount were observed by literally hundreds of representatives from the Democratic Party and Petitioners' party. McDonald Decl. ¶ 7. Petitioners, fully advised by their observer representatives, have previously declared the election valid and called on Ms. Gregoire to concede the valid election—so long as Mr. Rossi was ahead in the counting. Declaration of William Rava, ("Rava Decl.")¶ 5. Now Petitioners seek to set aside the election and start over because the

Perkins Coie LLP
1201 Third Avenue, Suite 4800
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count that Washington law says determines the winner—the final count—does not have Mr. Rossi ahead. Petitioners do not identify any specific instances of wrongdoing by poll workers or election officers. Affidavit of Chris Vance in Support of Election Contest Petition ("Vance Affidavit") ¶¶ 5-6. Rather, they identify generalized categories of alleged errors, omissions, and mistakes. *Id.* Moreover, Petitioners re-raise arguments that have already been rejected in prior legal proceedings regarding documents used to verify provisional ballots and the actions of canvassing boards. Vance Affidavit ¶¶ 5.h, 8.

B. Respondent Secretary of State Sam Reed has Refused to Refund the WSDCC's Deposit Pursuant to RCW 29A.64.081 Pending the Outcome of this Contest.

On November 17, 2004, the Secretary certified the first count of the 2004 election for Washington governor. McDonald Decl. ¶ 4. Those results showed that Dino Rossi had a narrow lead, within the margin requiring a recount. Id. The Secretary ordered a machine recount pursuant to RCW 29A.64.021(1). McDonald Decl.¶¶ 4-5. As a result of this machine recount, Dino Rossi's lead shrank to 42 votes out of 2.8 million. On December 3, the WSDCC requested a statewide manual recount and delivered a cashier's check in the amount of $730,000 to the Secretary of State Sam Reed as a deposit, pursuant to RCW 29A.64.030. McDonald Decl. ¶ 6. On December 30, pursuant to RCW 29A.64.061, the Secretary certified an amended and superseding abstract, changing the results of the election and declared Christine Gregoire as the winner of the Governor's race. McDonald Decl. ¶¶8-9. Immediately after the Secretary's declaration the WSDCC requested from the Secretary of State an immediate return of the WSDCC's deposit pursuant to RCW 29A.64.081. McDonald Decl. ¶ 10. The Secretary of State refused, asserting that the WSDCC would be liable for the entire cost of the recount if an election contest such as this one were successful.

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V. ARGUMENT

WSDCC seeks to intervene in this case as a matter of right under CR 24(a) or, in the alternative, permissively under CR 24(b).[2] CR 24(a) provides an absolute right of intervention if the intervenor shows that: (1) it claims an interest in the property or transaction which is the subject matter of the action and that the deposition of the action may impair or impede its ability to protect that interest; (2) that its interest is not being adequately represented by existing parties; and (3) its application is timely. *Loveless v. Yantis*, 82 Wn.2d 754, 758, 513 P.2d 1023 (1973). WSDCC satisfies all three standards, and is entitled to intervene as of right under CR 24(a).

1. Interest Requirement

Those cases considering the "interest requirement" of CR 24(a) have consistently held that "a party has a right to intervene in an action either where he has an interest in the matter in litigation, or has an interest in the success of either party thereto." *Moses Lake Homes v. Grant County*, 49 Wn.2d 182, 299 P.2d 840 (1956). An intervenor's interest is to be construed broadly. *Vashon Island v. Boundary Review Bd.*, 127 Wn.2d 759, 765, 903 P.2d 953 (1995); *Fritz v. Gorton*, 8 Wn. App. 658, 509 P.2d 83 (1973). The "interest" requirement is met if the intervenor could either gain or lose by the direct operation or immediate effect of a possible final judgment. *Am. Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 36, 499 P.2d 869 (1972). When in doubt, intervention should be granted. *Id.* at 40.

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[2] A total of four lawsuits have been filed during the course of the 2004 Washington Governor's race, by either the WSRP or the WSDCC. Rava Decl., ¶ 3. Intervention by the opposing party has been granted on all occasions. *Id.*

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Intervenor-Respondent WSDCC has an obvious interest in the outcome of this election content, which seeks to nullify the results of the Washington governor's race. The WSDCC's candidate for governor, Ms. Gregoire, was determined in the manual recount to be the winner of the election and on January 12, 2005 will be sworn into office. McDonald Decl. ¶¶ 8-9. This election contest is unfounded in fact and law and the WSDCC's intervention is needed to ensure that the valid results of the governor's race are not disturbed. WSDCC's interest is clearly at issue here under the broad construction of that requirement in Washington law. *Vashon Island*, 127 Wn.2d at 765.

Moreover, the Secretary has indicated that he will not refund to the WSDCC its recount deposit if this (or any other) election contest is successful. Thus, in addition WSDCC's interest in the outcome of the election in general, the WSDCC has a specific interest in the outcome of this litigation.

2. Interest Not Adequately Represented

It is not necessary that the intervenor's interest be in direct conflict with those of the existing parties. It is only necessary that the interest may not be adequately articulated and addressed. *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn. App. 618, 630, 989 P.2d 1260 (1999) (citing *Am. Discount v. Saratoga West, Inc.*, 81 Wn.2d 34, 41, 499 P.2d 869 (1972)). Once an applicant for intervention shows interests different than those of the existing parties, the requirement of showing that such interest would not be given adequate representation is minimal. *Fritz*, 8 Wn. App. at 661-62. Even though an intervenor's interest may appear to be aligned with a party to the action, the intervenor cannot be considered to be adequately represented if there may be a divergence in viewpoint between the two. *See Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (allowing

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1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

a second environmental group to intervene in an action when the plaintiff was also an environmental group).

Here, WSDCC, who was involved in the recount process as a party to the legal challenges to the manner in which the recount was conducted and an observer of the recount, and whose candidate was ultimately elected governor, is in the best position to ensure that this election contest does not overturn the valid and lawful results of the election. WSDCC and the Respondent County Auditors and the Secretary have aligned interests to the extent all seek to uphold the results of this election and recount on the basis that that they were conducted and implemented according to the requirements of Washington law. It is WSDCC's validly elected candidate Ms. Gregoire, however, that this contest seeks to oust from her position as governor. WSDCC's interest is not represented by Respondents on that point, which is all that is needed for intervention to be granted. In addition, while the government Respondents may have an interest in ensuring that the election results are upheld, those Respondents do not share the WSDCC's interest in defending against Petitioners' partisan allegations, and hence the government Respondents will not adequately represent the WSDCC's interests either. Finally, the WSDCC is the *only* party that can adequately represent its own interest in connection with the potential impact of the outcome of this contest on the refund of the deposit it paid for the manual recount. This interest is in conflict with at least one of the respondents, the Secretary.

3. Timeliness

A motion for intervention is timely when made prior to trial. *Am. Discount Corp.*, 81 Wn.2d at 43. Leave to intervene should be interpreted as timely to allow an intervention of right unless it would work a hardship on one of the original parties. *Loveless*, 82 Wn.2d at 759. Intervention has been allowed in Washington as late as the trial court's oral decision

Perkins Coie LLP
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Phone: (206) 359-8000
Fax: (206) 359-9000

for the purposes of appeal. *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971). WSDCC's motion to intervene was filed within one court day of the Petitioners' election contest.

C. Alternatively, WSDCC Should Be Allowed Permissive Intervention

In the event this Court concludes that WSDCC may not intervene as a matter of right, permissive intervention is clearly appropriate. CR 24(b) provides in relevant part:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:
>
> . . . . . .
>
> (2) When an applicant's claim or defense and the main action have a question of law or fact in common...In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As with CR 24(a), Rule 24(b) should be liberally construed so as to permit permissive intervention. *W. States Mach. Co. v. S. S. Hepworth Co.*, 2 F.R.D. 145 (E.D.N.Y. 1941). A mere general interest in the subject matter of the litigation is sufficient if the intervenor's claim or defense presents a question of law "in common" with the main action. *Id.*

As discussed above, this motion is timely. Intervention will cause no delay or prejudice. Moreover, the WSDCC's defenses, including but not limited to arguments that the procedures used to conduct the election and the recount fully comport with state law and that the Petitioners' unsubstantiated allegations of fraud or misconduct fail to meet the high standards required in election contests, will respond to the legal and factual claims made by Plaintiffs. Equally important to the Court's exercise of discretion, it is in the interest of justice to allow all those with affected interests, including both sides of the political spectrum, to participate in this case, which concerns matters of great public importance.

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Phone: (206) 359-8000
Fax: (206) 359-9000

IV. CONCLUSION

For the reasons set forth above, Intervenor-Respondent Washington State Democratic Central Committee respectfully requests that the Court grant its Motion for Intervention.

DATED: January 10, 2005.

PERKINS COIE LLP

By _____

Russell J. Speidel, WSBA # 12838
Kevin J. Hamilton, WSBA # 15648
William C. Rava, WSBA # 29948
Attorneys for Applicant Intervenor-Respondent Washington State Democratic Central Committee

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000