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NOTE FOR SPECIAL SETTING

Please note that this matter has been set before the Honorable John E. Bridges on the 2nd day of May, 2005 at 8:30 a.m.

Nature of hearing: **Washington State Democratic Central Committee's Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters**

DATED: April 13, 2005.

PERKINS COIE LLP

By /s/ Kevin J. Hamilton
Kevin J. Hamilton, WSBA # 15648
William C. Rava, WSBA # 29948
1201 Third Avenue, Suite 4800
Seattle, WA 98101

Attorneys for Intervenor-Respondent
Washington State Democratic Central
Committee

SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838
7 North Wenatchee Avenue, Suite 600
Wenatchee, WA 98807

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751
c/o Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

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I. INTRODUCTION

On February 4, 2005, the Court ruled that, with the exception of claims of votes by persons disqualified under Article VI, section 3 of the state constitution, and claims that a single voter cast more than one vote, RCW 29A.68.020(5)(b) requires that Petitioners have challenged prior to election day the registration of any voter that they claim is unlawfully registered. Declaration of William C. Rava in Support of Motion for Partial Summary Judgment ("Rava Decl."), Ex. B at 22. In addition, the Court concluded that all declarations filed by Petitioners stating causes for this election contest that were filed after January 21, 2005 were untimely. *Id.* at 17. Despite these rulings, Petitioners now assert as illegal votes ballots cast by two individuals alleged to be non-citizens of the United States, but whose registrations were not previously challenged as required by RCW 29A.68.020(5)(b).

Petitioners did not identify votes by non-citizens as a cause of contest in their Election Contest Petition, or in any of the affidavits of electors filed in support of the Petition, but raised this claim for the first time in April 2005. Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC") respectfully requests that the Court dismiss Petitioners' belated claim regarding non-citizen voters.

II. FACTUAL BACKGROUND

On January 7, 2005, Petitioners filed their Election Contest Petition. Neither the Petition nor any of the declarations filed in support of the Election Contest Petition alleges that non-citizens voted illegally in the 2004 Gubernatorial Election. Petitioners raised the claim regarding non-citizen voters for the first time on April 7, 2005, in answers to WSDCC's second set of interrogatories. Rava Decl., Ex. C at 30. Petitioner Rossi for Governor Campaign claims it "began to learn of this . . . on or about March 8, 2005." *Id.* In

1 its interrogatory answer, Petitioner Rossi for Governor Campaign specifically alleged that
2 non-citizens' ballots were counted, these votes are illegal votes, and "thus the basis for an
3 election contest under RCW 29A.68.020(5)." *Id.* Exhibit B to Petitioners' discovery
4 responses to WSDCC identifies the two alleged non-citizens who voted in the 2004
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Previously, when asked to "[i]dentify any Challenge you made to any person's right to vote in the 2004 General Election or Gubernatorial Election on or before Election Day," in answer to WSDCC's first interrogatory, Petitioners uniformly admitted that they "did not make any such challenges." Rava Decl., Ex. D.

III. ARGUMENT AND AUTHORITY

A. Summary Judgment Standard

Summary judgment is appropriate if "the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the party bringing the motion is entitled to judgment as a matter of law." *DuVon v. Rockwell Int'l*, 116 Wn.2d 749, 753, (1991) (internal quotation marks omitted). The nonmoving party must go beyond the pleadings and identify specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Petitioners' Belated Claim That Two Non-Citizens Voted Illegally Is Barred by the Statute of Limitations for Election Contests.

Under Washington law, an affidavit of an elector charging an error in the issuance of a certificate of election "must be filed with the appropriate court no later than ten days following the issuance of a certificate of election." RCW 29A.68.030; *see also* RCW 29A.68.011 (requiring affidavits alleging errors in the certification of an election to be filed within ten days of the certification). The statute of limitations for election challenges is

1 clear and unyielding. *See Becker v. County of Pierce*, 126 Wn.2d 11, 19 (1995) (noting that
2 election contests are governed by "strict time limits"); *Reid v. Dalton*, 124 Wn. App. 113,
3 122 (2004) (dismissing election contest based on the "bright-line time limitation of elections
4 challenges"). An election contest filed outside of the ten-day statute of limitations is
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9 untimely and should be dismissed. *Becker*, 126 Wn.2d at 22.

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11 Additionally, Washington's election contest law requires an affidavit of an elector to
12 "set forth *specifically* . . . [t]he *particular* causes of the contest." RCW 29A.68.030
13 (emphasis added). Read in its entirety, the election contest statute provides an unambiguous
14 statement that the specific causes of an election contest must be claimed within ten days of
15 certification of the election.
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21 Neither the Election Contest Petition nor any of the affidavits or declarations filed in
22 support of the Petition made any claim about illegal ballots cast by non-citizens. Yet,
23 months later, Petitioners now assert that ballots allegedly cast by two persons who are not
24 citizens of the United States form a "basis for an election contest under
25 RCW 29A.68.020(5)." Rava Decl., Ex. C at 30. This "cause[] of the contest" was not
26 alleged until nearly three months after the statute of limitations for such a claim had expired.
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33 Statutes of limitations are of paramount importance in the context of an election
34 challenge. In a recent election contest, a Washington court explained: "Statutes of
35 limitation assume particular importance when swift resolution of potential legal
36 uncertainties is in the public interest." *Reid v. Dalton*, 124 Wn. App. at 122; *see also*
37 *LaVergne v. Boysen*, 82 Wn.2d 718, 721 (1973) ("There exists a substantial public interest in
38 the finality of elections, necessitating prompt challenges."). Indeed, the United States
39 Supreme Court has long endorsed this view: "The fact that cutting off the right to challenge
40 conceivably may result in the counting of some ineligible votes is thought to be far
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1 outweighed by the dangers attendant upon the allowance of indiscriminate challenges after
2 the election." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 331 (1946). Adding a new claim
3 beyond the statute of limitations is the functional equivalent of bringing a time-barred
4 election challenge. Both frustrate the public goal of finality of elections.
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8 The role of the judiciary in election contests is constrained. "Chief among [the
9 principles governing election contests] is the principle, long followed by this Court, that the
10 judiciary should 'exercise restraint in interfering with the elective process which is reserved
11 to the people in the state constitution.'" *Dumas v. Gagner*, 137 Wn.2d 268, 284 (1999)
12 (quoting *McCormick v. Okanogon County*, 90 Wn.2d. 71, 75 (1978)). Strict adherence to
13 the statute of limitations for election contests promotes judicial restraint. To open the door
14 to time-barred claims of the sort advanced here by Petitioners, contravenes the public
15 interest in finality of elections and expands the judicial role in the electoral process – results
16 contrary to the letter and intent of the election contest statute.¹
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27 **C. Petitioners' Claim of Non-Citizen Voters Is Also Barred Because**
28 **Petitioners Failed to Challenge the Qualifications of the Alleged Non-**
29 **Citizen Voters Prior to or on the Day of the Election.**
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31 In an election contest, "[i]llegal votes do not include votes cast by improperly
32 registered voters who were not properly challenged under RCW 29A.08.810 and
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38 ¹ In *Foulkes v. Hays*, 85 Wn.2d 629 (1975), the Court consolidated two election challenges,
39 the later of which was filed more than ten days after certification of the election. However, *Foulkes*
40 is not contrary to WSDCC's position for two reasons. First, the predecessor statute to
41 RCW 29A.68.011 under which the later challenge in *Foulkes* was brought, RCW 29.04.030,
42 contained no explicit statute of limitations in non-primary elections at that time. 85 Wn.2d at 635.
43 The timeliness of non-primary election challenges was governed instead by the more flexible
44 equitable doctrine of laches. *Id.* Second, in *Foulkes* the later-filed motion "made no new
45 allegations," and "the public interest in election finality was not jeopardized." *Id.* Here, where the
46 election contest statute includes a specific statute of limitations, and Petitioners have untimely added
47 a new "cause[] of the contest" not contained in their Petition, a different result is warranted.

1 29A.08.820." RCW 29A.68.020(5)(b). *See* Rava Decl., Ex. B at 22. This measure is
2
3 designed to promote the correction of errors in advance of elections. This Court previously
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5 "conclude[d] that to the extent that petitioners are attacking votes on grounds of voter
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7 eligibility or qualifications to vote, the petitioners must first establish that each voter was
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9 challenged prior to or on the day of the November 2nd, 2004 general election." *Id.* Thus, to
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11 prove that a vote cast by a non-citizen voter was an "illegal vote" in an election contest,
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13 Petitioners must first establish that the voter's qualifications were challenged in a timely and
14
15 proper fashion.²

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17 Petitioners have conceded that they "did not make any such challenges," Rava Decl.,
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19 Ex. D, and have produced in discovery no evidence that any other person made such a
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21 challenge to the qualification of the two allegedly non-citizen voters. Accordingly, the
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23 Court should dismiss Petitioners' belated claim on summary judgment.³
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33 ² As the Court stated in its oral ruling on February 4, 2005: "In sum, the Court reads
34 subsection (5)(b) to refer to illegal votes other than more than one vote cast by a single voter and
35 votes cast by persons disqualified under Article VI, Section 3 of our Constitution." Rava Decl.,
36 Ex. B at 27.

37
38 ³ In *Gold Bar Citizens v. Whalen*, 99 Wn.2d 724 (1983), the Court found that votes cast by
39 voters not resident within the city limits (and thus not eligible to register or to vote) constituted
40 "illegal votes" relevant to an election contest whether challenged on or before election day, or not so
41 challenged at all. *Id.* at 731. At the time *Gold Bar* was decided, however, the election contest statute
42 did not define "illegal votes." *See* Session Laws, 1983, ch. 30, § 6. That statute was amended the
43 same year by the Legislature and became effective after the Court's decision in *Gold Bar*. Session
44 Laws, 1983, ch. 30, § 6. The amendment added what is now section 5(b) of the statute, which limits
45 the ability of an election contestant to base a contest upon votes cast by individuals on the voting
46 rolls (rightly or wrongly) by requiring that the individuals' right to vote have been challenged on or
47 before election day. RCW 29A.68.020(5)(b).

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IV. CONCLUSION

For the reasons set forth above, the Court should grant WSDCC's Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters.

DATED: April 13, 2005.

<p>PERKINS COIE LLP</p> <p>By <u> /s/ Kevin J. Hamilton </u> Kevin J. Hamilton, WSBA # 15648 William C. Rava, WSBA # 29948 1201 Third Avenue, Suite 4800 Seattle, WA 98101-3099</p> <p>Attorneys for Intervenor-Respondent Washington State Democratic Central Committee</p>	<p>SPEIDEL LAW FIRM</p> <p>Russell J. Speidel, WSBA # 12838 7 North Wenatchee Avenue, Suite 600 Wenatchee, WA 98807</p> <p>JENNY A. DURKAN</p> <p>Jenny A. Durkan, WSBA # 15751 c/o Perkins Coie LLP 1201 Third Avenue, Suite 4800 Seattle, WA 98101-3099</p>
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EXHIBIT A

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FILED 310
FEB 18 2005 (A)

BY SIRI A. WOODS
CHELAN COUNTY CLERK

**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 Dcan Logan, its Director of Records, Elections and Licensing Services, et al.,

Respondents.

and

Washington State Democratic Central Committee,

Intervenor-Respondent,

and

Libertarian Party of Washington State et al.,

Intervenor-Respondents.

No. 05-2-00027-3

**ORDER DENYING IN PART
AND GRANTING IN PART
MOTIONS OF RESPONDENTS
AND INTERVENORS**

~~PROPOSED~~

**ORDER DENYING IN PART AND GRANTING
IN PART MOTIONS OF RESPONDENTS AND
INTERVENORS - 1**

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ORDER

This matter comes before the Court on the Washington State Democratic Central Committee's ("WSDCC") Motion to Dismiss for Lack of Subject Matter Jurisdiction, Motion to Dismiss for Improper Venue or in the Alternative to Transfer Venue, Motion to Strike Requested Relief, and Motion to Dismiss Causes for Election Contest, as well as the motions of several respondent counties and auditors who joined in the WSDCC's motions and/or made separate arguments relating thereto. Having considered the motions, the oppositions, the evidence submitted therewith, the record to date, and the argument of counsel February 4, 2005, the Court is fully informed.

For the reasons set forth in the Court's oral opinion, a transcript of which is attached hereto as Exhibit 1, it is hereby **ORDERED** that

- (1) The motions to dismiss for lack of subject matter jurisdiction are **DENIED**;
- (2) The motions to dismiss for improper venue are **DENIED**, and the alternative motions to transfer venue are **DENIED**;
- (3) The motions to dismiss causes for election contest are **GRANTED** with respect to that certain cause for contest in which Petitioners allege a violation of equal protection under the law, and are **DENIED** in each and every other respect;
- (4) The motions to strike requested relief are **GRANTED** with respect to Section VII, Paragraph (4) of the Election Contest Petition, pursuant to which the Court shall strike the phrase "directing that a new election be conducted as soon as practicable" from the Petition, and are **DENIED** in each and every other respect.

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(5) The motions to dismiss brought with respect to timeliness of the election contest petition, sufficiency of the affidavits, and propriety of the Rossi Campaign as party to this election contest are **DENIED**.

(6) The motions to dismiss brought by respondent counties and auditors on the grounds that they are not necessary parties to this litigation are **GRANTED** with respect to those counties and auditors who desire to be dismissed from this action.

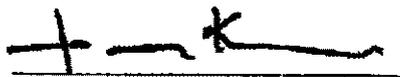
(7) It is further **ORDERED** that each respondent county and auditor shall be dismissed as a party to this election contest unless, within seven (7) days of the date of this Order, such county or auditor notifies the Court of that party's desire to remain a party to the contest.

Done in open court this 18th day of February, 2005.


The Hon. John E. Bridges
Superior Court Judge

Presented by:

Davis Wright Tremaine, LLP
Attorneys for Petitioners


Harry J. F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

The Law Offices of Dale M. Foreman
Attorneys for Petitioners

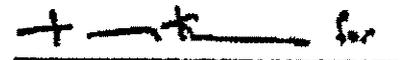

Dale M. Foreman, WSBA #6507

EXHIBIT B

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

TIMOTHY BORDERS, et al.,
Petitioners,
vs.
KING COUNTY and DEAN LOGAN,
its Director of Records,
Elections and Licensing
Services, et al.,
Respondents,
and
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,
Intervenor-Respondent,
and
LIBERTARIAN PARTY OF
WASHINGTON STATE, et al.,
Intervenor-Respondent.

No. 05-2-00027-3

COPY

VERBATIM REPORT OF PROCEEDINGS
Court's Oral Decision

BE IT REMEMBERED that on the 4th day of FEBRUARY, 2005,
the above-entitled and numbered cause came on for hearing
before the HONORABLE JOHN E. BRIDGES at the Chelan County
Auditorium, Wenatchee, Washington.

APPEARANCES

FOR THE PETITIONERS: Mr. Harry Korrell
Mr. Robert Maguire
Mr. Dale Foreman
Ms. Diane Tebelius

LuAnne Nelson, Official Court Reporter
P.O. Box 880, Wenatchee, WA 98807 509-667-6209

1	FOR THE DEMOCRATIC CENTRAL COMMITTEE:	Ms. Jenny Durkan Mr. Kevin Hamilton Mr. Russell Speidel
2		
3	FOR SECRETARY OF STATE:	Mr. Jeffrey Even Mr. Tom Ahearne Mr. John Pearson
4		
5	FOR LIBERTARIAN PARTY:	Mr. Richard Shepard
6	FOR ASOTIN COUNTY: (Telephonically)	Mr. Ben Nichols
7		
8	FOR BENTON COUNTY:	Ms. Rea Culwell
9	FOR CHELAN COUNTY:	Mr. Gary Riesen
10	FOR CLARK COUNTY: (Telephonically)	Mr. Curt Wyrick
11	FOR COLUMBIA COUNTY: (Telephonically)	Ms. Colleen Fenn
12		
13	FOR COWLITZ COUNTY: (Telephonically)	Mr. Ron Marshall
14	FOR FERRY COUNTY:	Mr. James von Sauer
15	FOR GRANT COUNTY:	Mr. Stephen Hallstrom
16	FOR ISLAND COUNTY: (Telephonically)	Mr. Greg Banks
17		
18	FOR JEFFERSON COUNTY:	Mr. David Alvarez
19	FOR KING COUNTY:	Mr. Thomas Kuffel Ms. Janine Joly
20	FOR KITTITAS COUNTY: (Telephonically)	Mr. James Hurson
21		
22	FOR KLICKITAT COUNTY: (Telephonically)	Mr. Tim O'Neill Mr. Barnett Kalikow
23	FOR LEWIS COUNTY: (Telephonically)	Mr. Michael Golden
24		
25	FOR LINCOLN COUNTY: (Telephonically)	Mr. Ron Shepard

1 FOR PIERCE COUNTY: Mr. Daniel Hamilton
2 FOR PEND OREILLE COUNTY: Mr. Tom Metzger
(Telephonically)
3
4 FOR SKAGIT COUNTY: Mr. Don Anderson
(Telephonically)
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6 FOR SNOHOMISH COUNTY: Mr. Gordon Sivley
7
8 FOR SPOKANE COUNTY: Mr. Steve Kinn
(Telephonically)
9
10 FOR STEVENS COUNTY: Mr. Lloyd Nickol
(Telephonically)
11
12 FOR WAHKIAKUM COUNTY: Mr. Fred Johnson
(Telephonically)
13
14 FOR YAKIMA COUNTY: Mr. Martin Muench
(Telephonically)
15

16 (Argument by counsel)

17 THE COURT: All right. I'm going to take up first what
18 I'm going to call the intervenor's motion to dismiss for lack
19 of subject matter jurisdiction. And, ladies and gentlemen, I
20 think Ms. Sugg indicated that some of you in the back have a
21 difficult time hearing. I really apologize for that, but we
22 don't have a sound system in here and the county doesn't have
23 enough money right now to pay for one, and if you'd like to
24 put some money in a collection box at the back of the room
25 today, we'd really like that. I'll do the best I can to speak
up, but I have a cold that I can't get rid of, probably from
lack of sleep, and I'm trying to not cough, so we'll see how
this all works out and comes together.

So first I'd like to start with the intervenor's motion

1 to dismiss for lack of subject matter jurisdiction. And as I
2 term the issue here, it is this. Does this Court and, for
3 that matter, any court have subject matter jurisdiction to
4 hear any petition contesting the outcome of an election for
5 the governor of this state. The analysis starts with the
6 Constitution. Article III of our state Constitution focuses
7 on the executive department and Section 1 of Article III says
8 this: The executive department shall consist of a governor,
9 lieutenant governor, secretary of state, treasurer, auditor,
10 attorney general, superintendent of public instruction and a
11 commissioner of public lands, who shall be severally chosen by
12 the qualified electors of the state at the same time and place
13 of voting as for the members of the legislature. As was first
14 pointed out in the case of State v. Clausen in 1928, the Court
15 observed that the governor is not merely part of the executive
16 department but is in fact the supreme executive and possesses
17 the supreme executive power in the State of Washington.

18 The issue here as to whether the courts of this state
19 have subject matter jurisdiction to hear and determine an
20 election contest involving the governor arises because of the
21 language of one sentence in Article III, Section 4. I'm not
22 going to read all of Section 4 to you. Counsel are well aware
23 of what it says but, for instance, that article provides that
24 if there is an election for governor and as a result of that
25 election both candidates are tied, then the legislature will

1 decide which candidate will be the governor of the state.

2 The very next sentence then says this: Contested

3 elections for such officers shall be decided by the

4 legislature in such manner as shall be determined by law.

5 And, ladies and gentlemen, this language in this particular

6 section of Article III has not changed in the last 116 years

7 since our Constitution was adopted in 1889. The language at

8 issue and its meaning has never been addressed by any

9 published opinion of any court in the State of Washington.

10 The Washington State Democratic Central Committee, the

11 intervenors here, and others argue that the courts of

12 Washington lack subject matter jurisdiction to hear this

13 election contest because the above-referenced language from

14 the Constitution vests the power to consider election contests

15 for governor exclusively with the legislature. And in support

16 of that proposition, the Washington State Democratic Central

17 Committee rely upon the language of Article III, Section 4

18 which again states: Contested elections for such officers

19 shall be decided by the legislature in such manner as shall be

20 determined by law.

21 In further support of their argument, the intervenors

22 advise this Court that the Court should employ various rules

23 of constitutional interpretation. First, the Court should

24 look to the plain language of the text and accord it its

25 reasonable interpretation. Second, when considering the plain

1 meaning of a constitutional provision, the text necessarily
2 includes the words themselves, their grammatical relationship
3 to one another as well as their context. And third, if a
4 constitutional provision is plain and unambiguous on its face,
5 then no construction or interpretation is necessary or, for
6 that matter, permissible. And fourth, constitutional
7 provisions should be construed so that no clause, sentence or
8 word shall be superfluous, void or insignificant.

9 In addition to the rules of constitutional
10 construction, the intervenors rely upon the following: That
11 in 1941, an election contest was filed against the election of
12 Governor Langlie in this state and that that contest was filed
13 in the Washington State legislature, that the legislature held
14 a joint session as a judicial body to hear and determine
15 election contests and that on a roll call vote of both houses,
16 the legislature rejected a motion to refer the contest to a
17 special joint committee for investigation.

18 The intervenors also point out that in 1949, another
19 election contest, this time involving the commissioner of
20 public lands, a state executive officer, was filed and that
21 was also filed with the legislature and again the legislature
22 did not grant the petition. The intervenors point out that
23 some courts in other states have ruled that similar language
24 in their state's Constitution requires election contests
25 involving statewide executive officers to be held and handled

1 by the legislature and not by the courts.

2 And finally, the intervenors advance the grammatical
3 argument that this sentence consists of two parts; the first
4 part dictates the forum, that is, contested elections for such
5 officers shall be decided by the legislature, with the second
6 clause, in such manner as determined by law, referring to the
7 standard that the legislature should employ in handling the
8 contest. Finally -- and this Court does not intend that this
9 summary be exhaustive as to all the legal arguments
10 intervenors have advanced. The Washington State Democratic
11 Central Committee argue that the legislature may not and has
12 not delegated its duty to decide general election contests for
13 statewide executive officers to the courts.

14 In response to all of these arguments, the petitioners
15 in this case assert the following: That the same sentence
16 that we've just discussed from Article III, Section 4
17 authorized the legislature to confer jurisdiction over
18 election contests on and in the courts of this state, and
19 petitioners' reading of this particular sentence is that the
20 clause, in such manner as shall be determined by law, allows
21 the legislature to delegate its power with respect to election
22 contests for executive branch officers to the judicial branch.

23 Petitioners argue that the intervenor's interpretation
24 of Article III, Section 4 runs counter to two common rules of
25 statutory construction. First, it ignores the plain language

1 of the provision, that is, the Court will not add to or
2 subtract from the clear language of the statute even if the
3 Court believes that the legislature intended something else
4 but did not adequately express it unless the addition or
5 subtraction of language is imperatively required to make the
6 statute rational. And, second, that the intervenor's
7 interpretation would render part of the sentence superfluous,
8 violating another rule of construction that the Court is
9 required, when possible, to give effect to every word, clause
10 and sentence of a statute or constitutional article. In
11 essence, petitioners here are saying that although the
12 legislature cannot delegate its power to make a law, the
13 legislature can make a law to delegate its power.

14 Petitioners then point out that the legislature has
15 exercised its constitutional authority by enacting legislation
16 which confers jurisdiction over election contests with the
17 courts and that RCW 29A.68.020 specifically provides that all
18 election contests must proceed under 29A.68.010, and that
19 statute, now recodified as 011, confers jurisdiction of
20 election contests with any justice of the Supreme Court, judge
21 of the Court of Appeals or judge of the Superior Court in the
22 proper county.

23 The Secretary of State of our state advances the
24 proposition that neither the text nor the history of Article
25 III, Section 4 prohibits the legislature from allowing court

1 jurisdiction to hear statewide election contests. And
2 further, that the Secretary of State asserts that in 1977, in
3 recognition that jurisdiction for partisan election contests
4 should not be in the partisan legislature, the legislature
5 decided to extend the state's election contest statute to
6 provide that all such election contests would be dealt with by
7 the Court.

8 After reviewing Article III, Section 4, the various
9 contest election statutes, the rules of construction and
10 certainly, I think, all of the cases cited but focusing upon
11 the following, State ex rel. Troy, T-r-o-y v. Yelle decided in
12 1947, Foulkes v. Hays decided in 1975, Yelle v. Bishop decided
13 in 1959 and State ex rel. O'Connell v. Dubuque decided in
14 1966, this Court concludes that Article III, Section 4
15 conferred upon the legislature the authority to delegate the
16 hearing of election contests and that in 1977 and thereafter,
17 the legislature enacted an election contest statute conferring
18 jurisdiction to hear all election contests upon those persons
19 named in RCW 29A.68.011 which include again justices of the
20 Supreme Court, judges of the Court of Appeals and judges of
21 the Superior Court in the proper county.

22 Therefore, intervenor's motion to dismiss for lack of
23 subject matter jurisdiction shall be dismissed. In doing so,
24 this Court is mindful of the admonition of this state's
25 Supreme Court. First, in Dumas v. Gagner, a case that was

1 decided earlier, the Court said this. It's a 1999 case.
2 Election contests are governed by several general principles.
3 Chief among them is the principle long followed by this Court
4 that the judiciary should exercise restraint in interfering
5 with the elective process which is reserved to the people in
6 the state Constitution. Unless an election is clearly
7 invalid, when the people have spoken, their verdict should not
8 be disturbed by the courts.

9 In O'Connell v. Dubuque, our Court said this. We
10 apprehend grave danger to our democratic institutions if it be
11 the inexorable rule that, without regard to concepts of fair
12 play and due process of law, the House and Senate of either
13 the State Legislature or the Congress have exclusive
14 jurisdiction to disqualify and unseat members thereof and that
15 the courts are completely powerless in the premises.
16 Conceding the separation of powers to be one of the keystones
17 of freedom, we note, among other dangers, that should the
18 courts be deemed utterly without jurisdiction, one political
19 party can, if ruthlessly bent upon destruction of its
20 opposition, disqualify and unseat all of its opposing members.
21 And so, in summary, again the Court denies the intervenor's
22 motion to dismiss for lack of subject matter jurisdiction.

23 The second motion consists of the intervenor's motion
24 to dismiss for improper venue or, I think, in the alternative,
25 to transfer venue to the Washington State Supreme Court or the

1 Thurston County Superior Court. The Court's going to deny
2 this motion, also. 29A.68.011 requires that election contests
3 must be brought in the appropriate court. And in this
4 statewide election contest, it's argued by intervenors that
5 Chelan County is not the appropriate court and, therefore, the
6 appropriate venue. The argument is that the Washington State
7 Supreme Court is the only appropriate court. 29A.68.011
8 provides, in part, that any judge of the Superior Court in the
9 proper county may take appropriate action. This statute does
10 not define the appropriate county.

11 It's important to note that the specific issue here is
12 venue and not jurisdiction. And after our Supreme Court's
13 ruling in Shoop, S-h-o-o-p v. Kittitas County, it's clear that
14 the remedy of dismissal that the intervenors seek is not
15 available but, rather, only the remedy of transfer if Chelan
16 County does not have proper venue. RCW 4.12.025 instructs
17 that in any action in which there is more than one defendant,
18 venue is proper where any of the defendants reside at the time
19 of the commencement of the action. Although the counties take
20 the position that the venue statute with respect to public
21 officials should apply, our courts have held that venue
22 statutes should be read together such that a suit against
23 multiple counties or county officials can be brought where
24 venue is proper as to any one of those persons or entities.
25 Chelan County is such a county because both the county as well

1 as its auditor have been named as defendants in this case.

2 If this Court's conclusion is correct that the courts
3 of this state have subject matter jurisdiction of a statewide
4 election contest, then pursuant to the language of 29A.68.011,
5 this judge has concurrent jurisdiction with any other of the
6 176 judges of the Superior Courts of the State of Washington
7 or 22 judges of the Courts of Appeals or the nine justices of
8 the Supreme Court. There is no evidence in the record before
9 this Court that would allow this Court to conclude that a
10 transfer of this case to any other judge either of the
11 Superior Court or of the Court of Appeals would satisfy the
12 traditional notions of convenience of witnesses or the ends of
13 justice.

14 And this Court also concludes that there is no
15 authority, either pursuant to the statute or civil rules, that
16 authorizes this Superior Court to transfer this case to the
17 Supreme Court. And absent such directive in this regard --
18 preferably if there be a directive, it come directly from the
19 Supreme Court -- this Court will not accept the invitation to
20 transfer this case to the Supreme Court. And so again, in
21 summary, the Court denies the intervenor's motion to dismiss
22 as well as the counties' motions to dismiss for improper
23 venue. Counsel, which matter would you like to address next?

24 (Argument by counsel)

25 THE COURT: Counsel, I'm ready to rule on this issue

1 unless someone feels they really have to say something. Okay.
2 There are a series of issues before the Court and as soon as I
3 rule, because it's almost 12:30, we'll take a noon recess.
4 And I understand the issues are as follows generally: That
5 the affidavits are not sufficient, that the Rossi Campaign is
6 not a proper party and the issue of -- I think counsel have
7 referred to it as timeliness, and I'm going to take up those
8 issues not in any particular order, and I think I'll start
9 with the Rossi Campaign as being a proper or a not proper
10 party, and I think it's pretty clear they're not a proper
11 party, but at this point in this case, they are as proper as
12 the Washington State Democratic Central Committee or the
13 Libertarian Party so I don't think it makes much difference
14 whether they're in or they're out and I'm going to leave them
15 in at this point. I'm mindful of the statute and that's why I
16 say I don't think they are necessarily a proper party because
17 29A.68.011 defines these folks, as does 020.

18 With respect to timeliness, I'm going to deny the
19 counties' motions for timeliness. I understand how and why
20 the counties make these motions, the motion, of course, being
21 that this action was not brought within ten days of the filing
22 of the certificate of election. I have to make the threshold
23 determination of what is meant by the certificate of election,
24 whether it's the certificates issued by the county election
25 officers or officials or it's that certificate contemplated by

1 Article III, Section 4 or perhaps it's even the certificate
2 issued by the Secretary of State. And in this case I'm going
3 to find that it should be the latest of those filings, that
4 being, I think, in this case it was January 10th when the
5 President of the Senate and the Speaker of the House signed
6 the certificate of election for the governor. And in any
7 event, the petitioners, of course, filed this action, I think,
8 before that date, if I remember my dates correctly.

9 The next issues are two-fold and I don't -- and for you
10 folks on the phone, I don't mean to give this short shrift.
11 I'm going to actually because I'm going to address it a lot
12 more thoroughly when the intervenors argue their motion to
13 dismiss causes here because I think the two arguments overlap
14 somewhat and I'm prepared to address it more thoroughly when
15 we talk about the intervenor's motion to dismiss causes.

16 But here, as Benton County has pointed out, as Ferry
17 County has pointed out, clearly there are some counties that
18 are parties to this action that there have been no allegations
19 really made to support an action against them and they will be
20 dismissed out of this case. But I think more after looking at
21 the causes and after looking at the petition and looking at
22 the motions that have been filed to extricate themselves from
23 this action by the counties, the Court's going to dismiss
24 every county from this case. I don't see where the
25 counties -- and this is not a criticism of the cluster of

1 prosecutors actually that we have here. I don't -- I can't
2 see where their involvement -- the counties' participation is
3 necessarily helpful to the Court and probably in the
4 administration of justice or the efficient administration of
5 justice, they're not necessarily helpful and are more
6 burdensome.

7 To the extent that petitioners would argue the counties
8 need to be in because of discovery, I don't read the election
9 contest statute as requiring the counties in. I don't read
10 the Pemberton case as suggesting the counties should be in and
11 I think discovery can proceed whether the counties are in or
12 they're out. In other words, I don't see any prejudice to
13 petitioners in dismissing the counties from this action. Now,
14 as I think Ferry County has pointed out, there may be folks
15 who would like to stay in this action and that's certainly
16 welcome, I'm sure, by everybody and they can do that, but they
17 need to indicate that affirmatively, that they intend to stay
18 in, because I think the Supreme Court is going to want to know
19 who's in and who's out at some point in time.

20 So with respect to the counties' argument and, in
21 summary, that the affidavits are not sufficient, I'm going to
22 rule that the affidavits are sufficient for purposes of this
23 particular motion and I'm going to explain why more fully --
24 and I'm sorry I do it this way -- but when the intervenors
25 argue their motion to dismiss certain causes because I've

1 broken this down in some detail actually in that regard.

2 MS. DURKAN: Your Honor, when you said you were
3 dismissing all the counties, would that include the county
4 auditors as well?

5 THE COURT: Yes. I think -- and I'm not as smart as
6 counsel in this case and certainly petitioners' counsel. I
7 had the impression that one of the arguments made was that if
8 the Court were to grant the relief, if the evidence was
9 sufficient, the Court would be ordering a new election. Now,
10 of course, that's an issue that we're going to decide this
11 afternoon apparently, but I don't think it's necessary that
12 the counties be in even if that was a remedy the Court could
13 afford so -- because that's going to happen pursuant to state
14 law, in any event.

15 MR. NICHOLS: Your Honor.

16 THE COURT: Yes. Who are we talking to?

17 MR. NICHOLS: Dan Nichols, Asotin County.

18 THE COURT: Mr. Nichols.

19 MR. NICHOLS: Your Honor, I don't think I've ever been
20 so happy to hear that my comments were not needed or
21 necessarily helpful. In light of that and by way of thanking
22 you, I'd like to be asked -- I'd like to ask permission to go
23 ahead and get on with my duties here and leave you folks to
24 weightier matters there in Chelan County and on the phone.

25 THE COURT: Could you hang on just a second. I mean,

1 I'm only going to go about one more minute and we're going to
2 be in recess.

3 MR. NICHOLS: Yes, sir.

4 THE COURT: I just don't want to hear any music, sir.
5 Ms. Culwell.

6 MS. CULWELL: For clarification and for the record, you
7 denied timeliness -- the motions on timeliness. Does that
8 ruling apply to the affidavits submitted after the ten days?

9 THE COURT: No.

10 MS. CULWELL: Thank you, Your Honor.

11 THE COURT: With respect to any timeliness argument --
12 I don't think I actually need to rule on this. I don't think
13 it's necessary, but I think the affidavits should be stricken
14 for purposes of the counties' motion that were filed after the
15 ten-day period as set by the legislature which I think,
16 according to the certificate I have here, was January the
17 10th.

18 MS. CULWELL: Thank you, Your Honor.

19 THE COURT: You bet. Folks, is it okay if we take up
20 at 1:30 again and try to finish this? Okay. For you ladies
21 and gentlemen on the phone, the Court's going to be in recess.
22 We'll take up at 1:30 this afternoon. Thank you very much.
23 We're going to hang up.

24 (Noon recess taken)

25 (Argument by counsel)

1 THE COURT: All right. The Court will address this
2 particular motion now and I have found this motion exceedingly
3 difficult. And part of the difficulty, admittedly, is the
4 amount of time that we all have had to deal with this subject.
5 Dealing with the law is one thing, but in this case we're also
6 dealing with some allegations that are set out either in the
7 petition or, more specifically, set out in petitioners'
8 affidavits in support of their election petition. And I would
9 certainly like to have had more time to digest some of that,
10 but I haven't had it and I don't have it. You folks don't
11 have it because you need to move on to the next step here,
12 which I think is the Supreme Court, and so I'm going to make a
13 ruling. And to the extent I can, I'll address Mr. Hamilton's
14 invitation to talk about some of these issues that are indeed
15 important. And as a part of this decision, I will hearken
16 back to the arguments this morning made by the counties as
17 relates to insufficiency of the affidavits because that is a
18 theme that carries through here, that is, the intervenor's
19 motion to dismiss the causes.

20 Petitioners in this case filed their election petition
21 on January 7th of this year and they filed at least, I think,
22 22 affidavits from electors pursuant to the statute, and the
23 petition and the affidavits allege and allege generally, I
24 think, that, first, election officials, including precinct
25 election boards, failed to comply with state election law

1 requirements and that, for example, election officials allowed
2 provisional ballots to be cast directly into the tabulating
3 machines without first or, for that matter, ever determining
4 that the voters casting the ballots were properly registered
5 and had not previously voted.

6 Second, that election officials counted thousands of
7 votes in excess of the number of persons who were credited as
8 voting so that it can never be determined whether the ballots
9 were cast by registered voters or, indeed, were each cast
10 separately by a person who had not already voted. Third, that
11 election officials accepted and counted ballots cast in the
12 name of deceased persons. Fourth, that election officials
13 accepted and counted ballots from persons who, under the
14 Constitution, may not vote because of felony convictions.
15 Five, that election officials accepted and counted absentee
16 ballots signed by persons other than the registered voters to
17 whom the ballots had been issued. Six, that election
18 officials accepted and counted ballots by persons who also
19 voted in other jurisdictions in the general election.

20 Seven, that the manner in which the election was
21 conducted violated the rights of some of the voters of the
22 State of Washington under the equal protection clause in that,
23 for example, some counties, but not others, permitted the
24 correction of election worker errors detected after the
25 initial certification of county results, that some counties,

1 but not others, allowed third parties to solicit and present
2 revised election documents in an effort to rehabilitate
3 previously wrongfully rejected absentee ballots and that
4 uniform standards were not applied between counties or between
5 election officials in a single county regarding how and
6 whether to count overvotes, that is, ballots filled out in a
7 way as to suggest that the voter had voted for more than one
8 candidate for governor. Also, apparent undervotes and
9 apparent write-in attempts.

10 In support of their motion to dismiss, the intervenors
11 in this case set forth a number of arguments which the Court
12 now will attempt to address individually. First, the
13 Washington State Democratic Central Committee assert that in
14 order to prevail on this election contest, the petitioners
15 must prove that the 2004 election for the office of governor
16 was clearly invalid. In response to that argument, the Court
17 will indicate this, that the Court believes that this argument
18 is premature because the petitioners have not yet been put to
19 their proof. Further, as observed by the Court in the Foulkes
20 v. Hays case, a 1975 case, our Court discusses preponderance
21 of the evidence in the case of negligence, and clear, cogent
22 and convincing evidence in the case of fraud allegations in an
23 election contest. Today I'm not determining what the burden
24 of proof is. I just wanted to note that at least that
25 discussion has been made.

1 Next, the intervenors assert that election contests
2 must proceed under RCW 29A.68.020, not under 29A.68.011, and
3 that election contests are limited to the specific causes
4 enumerated in 020. The Court believes that the Foulkes case
5 addressed those issues and our Court, again speaking through
6 Justice Utter, clearly determined that even though a cause
7 could not be maintained under the predecessor statute to
8 29A.68.020, it could be maintained under the predecessor
9 statute to 29A.68.011.

10 The intervenors allege that limitations on illegal
11 votes as grounds for an election contest exist under
12 29A.68.020 and in that regard, that any objection to the
13 qualifications of a voter must have been made prior to or on
14 the day of the election and that illegal votes must be
15 attributable to Governor Gregoire in order for petitioners'
16 allegations to have any merit here. 29A.68.020 provides, in
17 part, as we have heard this afternoon, that illegal votes
18 include, but are not limited to, first, more than one vote
19 cast by a single voter and, secondly, a vote cast by a person
20 disqualified under Article VI, Section 3 of our state
21 Constitution. And subsection (c) provides that illegal votes
22 do not include votes cast by improperly registered voters who
23 were not properly challenged under 29A.08.810 and 820,
24 statutes counsel have addressed this afternoon.

25 The Court concludes that to the extent that petitioners

1 are attacking votes on grounds of voter eligibility or
2 qualifications to vote, the petitioners must first establish
3 that each voter was challenged prior to or on the day of the
4 November 2nd, 2004 general election. Based on the record
5 before the Court, however, it is very difficult, if not
6 impossible, at this stage to know the answer to that
7 particular question. The Court, however, believes that the
8 only reasonable interpretation of section (5) (a) and (5) (b)
9 of 29A.68.020 is that such a challenge as provided by
10 29A.08.810 and 29A.08.820 does not pertain to, nor exclude
11 from consideration in an election contest those references in
12 subsection (5) (a) (i) and (ii), that is, more than one vote
13 cast by a single voter and/or votes cast by persons
14 disqualified under Article VI, Section 3.

15 In other words, such classification of illegal votes
16 remain a valid cause for a contested election, subject,
17 however, to 29A.68.100 and 29A.68.110. 29A.68.100 requires
18 that no testimony may be received as to any illegal votes
19 unless the party contesting the election delivers to the
20 opposite party, at least three days before trial, a written
21 list of the number of illegal votes and by whom given that the
22 contesting party intends to prove at trial. No testimony may
23 be received as to any illegal votes except as to such as are
24 specified in the list. And secondly, with respect to
25 29A.68.110, no election may be set aside on account of illegal

1 votes unless it appears that an amount of illegal votes has
2 been given to the person whose right is being contested, that,
3 if taken from that person, would reduce the number of the
4 person's legal votes below the number of votes given to some
5 other person for the same office, after deducting therefrom
6 the illegal votes that may be shown to have been given to the
7 other person.

8 This same requirement was recognized early in our
9 state's history when in 1912 our Supreme Court in Hill v.
10 Howell held that where there was no evidence to show for whom
11 the elector voted and because both candidates were innocent of
12 wrongdoing, the vote must be treated between the parties as a
13 legitimate vote. Now, today the intervenors ask the Court to
14 dismiss certain of these causes including allegations of
15 illegal votes.

16 Although it may be problematical for petitioners to
17 ultimately prevail based on a theory or cause of illegal
18 votes, 29A.68.090 provides that initially, at least, at this
19 stage of the proceedings, when the reception of illegal votes
20 is alleged as a cause of contest, it is sufficient to state
21 generally that illegal votes were cast, that, if given to the
22 person whose election is contested in the specified precinct
23 or precincts, will, if taken from that person, reduce the
24 number of that person's legal votes below the number of legal
25 votes given to some other person for the same office. The

1 Court concludes that with respect to the causes asserted in
2 this election petition by petitioners that relate to illegal
3 votes, it would be premature at this point to grant the
4 intervenor's motion to dismiss.

5 The next basis for intervenor's motion to dismiss
6 relates to petitioners' allegations of misconduct. 29A.68.020
7 provides that one of the causes for an election contest is
8 misconduct. More specifically, misconduct on the part of any
9 member of any precinct election board. A precinct election
10 board is comprised of the inspector, judge of election and
11 other precinct election officers appointed by the county
12 auditor to oversee the election proceedings at a given
13 precinct or polling place. The misconduct reference in
14 29A.68.020 subsection (1) must be by one of these election
15 officials.

16 And RCW 29A.68.070 instructs that no irregularity or
17 improper conduct in the proceedings of any election board or
18 any member of the board amounts to such malconduct as to annul
19 or set aside any election unless the irregularity or improper
20 conduct was such as to procure the person whose right to the
21 office may be contested to be declared duly elected although
22 the person did not receive the highest number of legal votes.
23 After reading a number of Washington State Supreme Court cases
24 dating from the early part of this century until now, it's
25 clear that more election contests have been rejected than have

1 been successful. The reason, of course, is that there are
2 some well-recognized presumptions, if not policy reasons, why
3 elections should not be overturned. For instance, do we as
4 voters and as constituents of candidates want to engage in
5 what one judge referred to as seasons of discontent commencing
6 the moment after the polls close on election day.

7 Our Supreme Court has observed that election officers
8 are presumed to have complied with the duties required of them
9 in an honest and careful manner. That was the Quigley case.
10 And also in Quigley the Court noted that the returns of any
11 election official are entitled to the presumption of
12 regularity. Even our legislature has indicated in 29A.08.810
13 that registration of a person as a voter is presumptive
14 evidence of his or her right to vote at any primary, general
15 or special election. And in McCormick v. Okanogan County in
16 1978, the Supreme Court observed that informality or
17 irregularity in an election that does not affect the result is
18 not sufficient to invalidate the election.

19 Nevertheless, having noted those presumptions and those
20 directives from our statutes, the Court believes that at this
21 juncture in this case the Court should deny intervenor's
22 motion to dismiss the alleged cause of misconduct. The Court
23 concludes that pursuant to 29A.68.050, the facts alleged in
24 the affidavits and verified petition, which if proven, are
25 sufficient to meet a prima facie showing to support an

1 election contest under 29A.68.020 based on causes of
2 misconduct and illegal votes. If the Court finds that, and I
3 do, then this case should go forward at least at this point.

4 Next, the intervenors argue that many of the causes
5 enumerated in the petition are insufficient to sustain an
6 election contest and, more specifically, the intervenors claim
7 there are at least five specific causes that petitioners
8 assert which the Court should now dismiss, and I'm going to
9 deal with those in the reverse order to how they were argued
10 in the written materials. First, the intervenors move the
11 Court to dismiss the petitioners' equal protection violations.
12 I'm going to do that and I will dismiss the equal protection
13 violations. This Court perceives that an equal protection
14 violation claim should not survive a motion to dismiss when
15 Washington State law provides a means by which a losing
16 candidate for office may avail himself of this state's
17 election contest laws. And further, that an equal protection
18 argument should not, in view of this state's comprehensive
19 contested election law, serve as a separate and distinct cause
20 to overturn an election.

21 Next, the intervenors argue that the petitioners can
22 only claim illegal votes of deceased persons to the extent
23 that such registrations were challenged on or before election
24 day. As indicated previously, this Court rejects that
25 interpretation of 29A.68.020 subsections -- section (5) and

1 subsection (5) (a) and (b). In sum, the Court reads subsection
2 (5) (b) to refer to illegal votes other than more than one vote
3 cast by a single voter and votes cast by persons disqualified
4 under Article VI, Section 3 of our Constitution. The
5 intervenor's motion to dismiss this cause, other than I've
6 indicated with respect to equal protection, then is denied.

7 Finally, petitioners allege causes that cannot be
8 attributable to or against a candidate -- I'm sorry.
9 Petitioners here allege causes that cannot be attributed to or
10 against a candidate and discrepancies that do not allege
11 illegal votes or misconduct and wrongdoing that may not be
12 attributable to precinct election officers, all matters that
13 are generally referenced in 29A.68.020 and 29A.68.011. In
14 response, intervenors argue that all of these allegations are
15 insufficient to sustain an election contest. In reliance upon
16 this argument, intervenors point to 29A.68.020 which sets
17 forth the causes for an election contest.

18 Certainly, petitioners' causes do not fall within
19 29A.68.020, but they do, at least, on a prima facie basis,
20 fall within 29A.68.011, a statute entitled Prevention and
21 Correction of Election Frauds and Errors. The Court concludes
22 that this statute, by its terms, establishes separate causes
23 for election contests which include wrongful acts in section
24 (4), neglect of duty on the part of election officers in
25 section (5) and errors or omissions in the issuance of a

1 certificate of election in section (6).

2 Besides the clear language of this statute, the Court
3 concludes that the Foulkes v. Hays case is squarely on point
4 factually and legally with the arguments advanced by
5 petitioner and adopted by this Court, that petitioners are not
6 limited just to those causes outlined in 29A.68.020. In
7 summary then, intervenor's motion to dismiss will be denied.
8 And, Mr. Hamilton, hopefully for the benefit of you folks, the
9 Court has set this out so that you can have your plate full
10 when you reach the Supreme Court.

11 MR. HAMILTON: Thank you, Your Honor.

12 THE COURT: You're welcome. Counsel, I think there's
13 one more motion.

14 MS. DURKAN: There is, Your Honor, on remedy. Does the
15 Court want to do it now or take a two-minute break?

16 THE COURT: Do you need a two-minute break?

17 MS. DURKAN: I wouldn't mind one if the court reporter
18 wouldn't mind one, Your Honor.

19 THE COURT: Why don't we take a two-minute break.

20 MS. DURKAN: Thank you.

21 THE COURT: For folks on the phone, we're going to take
22 two minutes.

23 (Brief recess taken)

24 THE COURT: Counsel, if you'll permit me, I'd like to
25 elaborate with one more sentence on my decision with respect

1 to these causes, and I think I tried to be as plain as I could
2 with respect to what I felt the statutory standard was
3 relating to illegal votes. With respect to misconduct,
4 whether that misconduct falls in 020 or 011, I think the
5 standard is 29A.68.070, and so I want to say that so you folks
6 have some sense of what I think the ultimate standard of proof
7 is and what the petitioners have to show.

8 (Argument by counsel)

9 THE COURT: All right. The issue arises because in
10 their prayer for relief contained in their election contest
11 petition at page 10, petitioners ask the Court to direct that
12 a new election be conducted as soon as practicable. And in
13 response to that, intervenors filed a motion asking this Court
14 to strike that specific requested relief. And I think the
15 argument -- and I can't state it as eloquently as Ms. Durkan,
16 but I believe the intervenor's argument is something like
17 this, that assuming the judiciary -- sorry, that the
18 judiciary -- I'm feeling as old as our Constitution here.
19 That the judiciary has jurisdiction to decide an election
20 contest for the office of governor, and assuming that the
21 Court is the appropriate Court to hear the contest, does the
22 Court have the authority to grant petitioners' request for a
23 special election for governor.

24 And I know Mr. Korrell argues that this is premature,
25 something I've talked about earlier, but my thought in that

1 regard is I don't think it is premature because the proofs
2 here are not going to change what remedies may be available to
3 the Court based on the petitioners' request and so I'm going
4 to address the issue. Ms. Durkan argues that neither the
5 Constitution, nor the election contest statute, nor the
6 Court's equity jurisdiction provides for the extraordinary
7 remedy of the Court ordering, if petitioners are successful, a
8 special election for governor.

9 I would note first that the Foulkes case, which is
10 indeed a case that I relied on heavily today, I'm sure to the
11 consternation of the intervenors, has now been cited again to
12 me by the petitioners, but at this time I'm going to
13 distinguish the Foulkes case from what I have to decide here
14 because in the Foulkes case, our Supreme Court was faced with
15 the prospect of addressing the election of a county
16 commissioner. And here, this Court is faced with a state
17 executive officer and there are certain constitutional
18 provisions that attach to a state executive officer.

19 First of all, our Washington State Constitution
20 contains mandatory requirements for the manner in which the
21 governor will be elected and that's Article I, Section 29.
22 That particular section instructs that the provisions of the
23 Constitution are mandatory, unless by express words they are
24 declared to be otherwise. And Article III, Section 1 of our
25 Constitution provides that the executive department -- that's

1 the governor here -- shall be severally chosen at the same
2 time and place of voting as for members of the legislature.
3 The Constitution requires that the election for governor be on
4 the first Tuesday after the first Monday in November, unless
5 otherwise changed by law.

6 And Article III, Section 10 outlines the procedure for
7 succession to governor if the governor is removed and the
8 requirement that the election for a new governor be at a
9 general election. And RCW 29A.04.321 subsection (1) sets the
10 dates and the times for general elections and provides that
11 the office of governor is specific -- and I note that the
12 office of governor is specifically omitted from the statewide
13 general elections during odd-numbered years.

14 The Court concludes that the petitioners' request for
15 -- to order, if they're successful, a statewide special
16 election is not permitted by Washington's election contest
17 statute, 29A.68.050, which happens to be up on the easel and,
18 more particularly, not permitted by the Washington State
19 Constitution. The Court notes that back in 1902 when we had a
20 vacancy in the governor's office, our Supreme Court looked to
21 the Constitution, not the Court's inherent powers to resolve
22 how that vacancy was to be dealt with as far as elections were
23 concerned. And so in response to the intervenor's motion, I'm
24 going to grant the motion and the Court's going to strike that
25 portion of the petition which requests what I call special

1 relief, that is, the Court order a new election. The Court
2 doesn't have that authority either under the statute, the
3 Constitution and the Court thinks it should not exercise it on
4 grounds of equity.

5 (End of Court's Oral Decision)

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1 STATE OF WASHINGTON)

2 : ss

3 County of Chelan)

4 I, LuAnne Nelson, a Certified Shorthand Reporter, and
5 official reporter for Chelan County Superior Court, do hereby
6 certify:

7 That the foregoing Verbatim Report of Proceedings was
8 reported at the time and place therein stated and thereafter
9 transcribed under my direction and that such transcription is
10 a true, complete and correct record of the proceedings.

11 I further certify that I am not interested in the
12 outcome of said action, nor connected with, nor related to any
13 of the parties in said action or their respective counsel.

14
15 LuAnne Nelson
16 Official Court Reporter
17 CSR No. 299-06 NE-LS-OL-M464C7
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EXHIBIT C

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THE HONORABLE JOHN E. BRIDGES

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,

Intervenor-Respondent.

NO. 05-2-00027-3

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE'S SECOND
INTERROGATORIES AND THIRD
REQUESTS FOR PRODUCTION TO
PETITIONER ROSSI FOR GOVERNOR
CAMPAIGN

**AND
RESPONSES & OBJECTIONS
THERE TO**

WASHINGTON STATE DEMOCRATIC CENTRAL
COMMITTEE'S SECOND INTERROGATORIES
AND THIRD REQUESTS FOR PRODUCTION TO
PETITIONER ROSSI FOR GOVERNOR
CAMPAIGN-1

[15934-0006-000000/SEA 1625231v1 55441-4.]

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

1 such incidents had occurred in this election nor identified or suggested any further steps or
2
3 procedures that could be taken, either by the county or by those inquiring, to address the
4
5 issue.
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9 **INTERROGATORY NO. 22:** Identify all instances of misconduct, error, or
10 irregularity by election officials, and for each such instance identify the following:
11

- 12
13 a) why you believe the instance should be characterized as misconduct, error, or
14 irregularity;
15
16 b) the date upon which you learned of such misconduct, error, or irregularity;
17
18 c) whether you contend that the alleged misconduct, error, or irregularity
19 increased the total number of votes for Dino Rossi or decreased the total
20 number of votes for Governor Christine Gregoire in the Gubernatorial
21 Election;
22
23 d) whether you contend that the alleged misconduct, error, or irregularity
24 increased the total number of votes for Governor Christine Gregoire or
25 decreased the total number of votes for Dino Rossi in the Gubernatorial
26 Election;
27
28 e) the total number of votes affected by the alleged misconduct, error or
29 irregularity;
30
31 f) the voters whose votes were affected by the alleged misconduct, error, or
32 irregularity;
33
34 g) the means by which you identified those voters; and
35
36 h) all evidence supporting subparts a through g.
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WASHINGTON STATE DEMOCRATIC CENTRAL
COMMITTEE'S SECOND INTERROGATORIES
AND THIRD REQUESTS FOR PRODUCTION TO
PETITIONER ROSSI FOR GOVERNOR
CAMPAIGN-13

[15934-0006-000000/SEA 1625231v1 55441-4.]

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

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witnesses may be required to establish the authenticity and accuracy of certain documents and the number of fraudulent votes cast.

Category #7: Counting ballots cast by persons who were not citizens of the United States.

- a) This is misconduct, error, neglect, or irregularity because ballots cast by persons who are not citizens of the United States are *per se* illegal votes under Washington Constution Article 6, Section 1, and thus the basis for an election contest under RCW 29A.68.020(5). Counting ballots of non-citizens constitutes neglect of duties to ensure only eligible persons vote as set forth in Washington Constitution Art. 6, Section 1.
- b) Petitioner Rossi Campaign began to learn of this misconduct, error, or irregularity on or about March 8, 2005.
- c) No.
- d) Yes.
- e) Petitioner objects to this subpart as vague with respect to the phrase "votes affected by the alleged misconduct, error or irregularity." All valid votes cast in the 2004 General Election were "affected by" this category of misconduct, error, or irregularity. Discovery on this matter is ongoing, and the names and other identifying information of persons who cast ballots despite not being United States citizens are set forth in the Illegitimate, Invalid, & Illegal Vote Matrix, created in response to the Secretary of State's Discovery Requests to Petitioners, attached hereto as Exhibit B.
- f) Petitioner objects to this subpart as vague with respect to the phrase "voters affected by the alleged misconduct, error, or irregularity." All voters who

EXHIBIT B

ILLEGITIMATE, INVALID & ILLEGAL VOTE MATRIX

	Voter's Full Name	Address	Voter ID Registration Number	County & Precinct	Reason You Claim Vote Illegal
1.	Carlos C. Craff	190802 S Plymouth Rd Plymouth, WA 99346	621659	Benton, Expansion	Felon
2.	Jeremy Benjamin Johnson	120 W McGraw St Seattle, WA 98119	950266244	King, 1761	Felon
3.	Russell Martin	30405 S Gerards Rd Kennewick, WA 99337	587686	Benton, Hedges	Felon
4.	Cynthia McInturf	1011 Winslow Ave Richland, WA 99352	98316	Benton, 230	Felon
5.	Brian Meidrum	504 Newcomer St Richland, WA 99352	628011	Benton, 185	Felon
6.	Kristine Rasmussen	1715 Merlot Ct Richland, WA 99352	611446	Benton, 288	Felon
7.	Hank Robinson	9 Royalty Ln West Richland, WA 99353	611626	Benton, WR 1	Felon
8.	Dion Rowell	5880 Gray St No. 3 West Richland, WA 99353	631197	Benton, WR 2	Felon
9.	Scott G. Sarria	1110 W 37th Pl Kennewick, WA 99337	122106	Benton, W3-P556	Felon
10.	James L. Vann	4226 W 10th Ave Kennewick, WA 99336	610088	Benton, W2-P620	Felon
11.	Jose Villa	165401 W Johnson Rd Prosser, WA 99350	597548	Benton, Walnut Grove	Felon
12.	James W. Walters-Goulet	202003 E Bowles Rd Kennewick, WA 99337	621549	Benton, Randy	Felon
13.	David W. Webb	203610 E 14th Pl Kennewick, WA 99337	594827	Benton, Kennewick Valley	Felon
14.	Jay B. Wolf	70207 N 132 P R NE Benton City, WA 99320	628754	Benton, Kiona	Felon
15.	Daniel B. Zilch	509 Endress St Richland, WA 99352	617185	Benton, 260	Felon
16.	Shaun L. Appelman	9601 Steilacoom Blvd SW S-8 Lakewood, WA 98498	750181	Pierce, 28432	Felon
17.	Justin H. Ashby	314 E 12th St D Vancouver, WA 98660	4804991	Clark, 120	Felon
18.	Richard M. Byers	2117 Kauffman Ave Vancouver, WA 98660	4376610	Clark, 110	Felon
19.	David Christman	1718 NE Ione St Camas, WA 98607	4713142	Clark, 985	Felon
20.	Gregory W. Clark	888 12th St Washougal, WA 98671	4173251	Clark, 900	Felon
21.	Marie Clark	4311 NW Olive St Vancouver, WA 98660	4036201	Clark, 60	Felon
22.	Caren Coffield	2811 E 19th St Vancouver, WA 98661	4200546	Clark, 220	Felon
23.	Brandi J. Collum	3617 M St Vancouver, WA 98663	4720131	Clark, 150	Felon

		Ave N Seattle, WA 98109			
948	Patricia A. Brown	10106 NE 16th Pl Bellevue, WA 98004	710327149	King, 194	In State Duplicate
949	Patricia A. Brown	12709 NE 28th St Bellevue, WA 98005	710448825	King, 224	In State Duplicate
950	Paul F. Hessburg Jr	1421 First St Wenatchee, WA 98801	55233	Chelan, 59	In State Duplicate
951	Paul F. Hessburg Sr	1421 First St Wenatchee, WA 98801	17134	Chelan, 59	In State Duplicate
952	Sarah M. Sakimae	1039 NE 90th St Seattle, WA 98115	30003861	King, 2282	In State Duplicate
953	Sarah M. Sakimae	1039 NE 90th St Seattle, WA 98115	30084071	King, 2282	In State Duplicate
954	Tara B. Nelson	14310 37th Ave NE Seattle, WA 98125	245941	King, 2371	In State Duplicate
955	Tara Brooke Nelson	14310 37th Ave NE Seattle, WA 98125	10197813	King, 2371	In State Duplicate
956	Thomas J. Harleman	24210 SE 203rd St Maple Valley, WA 98038	880400568	King, 37	In State Duplicate
957	Thomas J. Harleman	24038 SE 203rd St Maple Valley, WA 98038	712220627	King, 37	In State Duplicate
958	Shari D. Bligh	10905 Avondale Rd NE T 178 Redmond, WA 98052	20273721	King, 3281	In State Duplicate
959	Shari D. Bligh	10905 Avondale Rd NE T178 Redmond, WA 98052	990650307	King, 3281	In State Duplicate
960	Chun C. Chen	4233 7TH Ave NE 110 Seattle, WA 98105	990598675	King, 2052	Non-U.S. Citizen
961	Ming Y. Anderson	308 6TH Ave S 510 Seattle, WA 98104	30437420	King, 2686	Non-U.S. Citizen

In addition to the above, for which Petitioners have individual names, the following are identified as illegitimate, invalid and/or illegal votes, though Petitioners do not yet have names for the persons casting the ballots (either because the counties have not provided the names or because it is impossible to determine who cast the ballot):

Provisional Ballots that were improperly cast directly into precinct vote counters and counted, instead of being sealed in envelopes to be processed and verified with other Provisional Ballots as required by law.

Ballots counted in excess of the number of lawfully registered voters who cast ballots in the election

Absentee ballots that were cast by persons other than the registered voters to whom they were sent

Absentee ballots that were not counted even though they had been previously determined to be valid and approved for counting (the inclusion of this category is based on the recent disclosures by King and Pierce Counties. Petitioners know little about the circumstances surrounding these newly discovered ballots and list them here without knowing yet the proper disposition of these ballots in this election contest.)

EXHIBIT D

THE HONORABLE JOHN E. BRIDGES

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

TIMOTHY BORDERS et al.,

Petitioners,

v.

KING COUNTY et al.,

Respondents,

and

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,

Intervenor-Respondent.

No. 05-2-00027-3

**OBJECTIONS, ANSWERS,
AND RESPONSES TO
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S FIRST
INTERROGATORIES AND
REQUESTS FOR PRODUCTION
TO PETITIONER TIMOTHY
BORDERS**

Petitioner Timothy Borders ("Petitioner") provides the following objections, answers, and responses to the Washington State Democratic Central Committee's First Interrogatories and Requests for Production.

GENERAL OBJECTIONS

1. Petitioner objects to Instruction No. 3 with regard to the instruction to "state all factual and legal justifications" supporting any objection or failure to answer as seeking to impose obligations beyond those required by the Civil Rules and as seeking work product. Petitioner will set forth its objections in compliance with the Civil Rules.

OBJECTIONS, ANSWERS, AND RESPONSES TO
WSDCC'S 1ST ROGS & RFPs TO PETITIONER TIMOTHY BORDERS -

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SEA 1612515v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES

2608 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1611
(206) 622-3150 • Fax: (206) 622-7699

1 the parties possess the information, in advance of the statutory deadline. In any event, the
2 final list of illegal votes that will be the subject of this election contest shall be produced in
3 accordance with RCW 29A.68.100.

4 11. Petitioner objects to these requests to the extent they seek the same
5 information set forth in the Affidavit of Timothy Borders dated January 15, 2005. The
6 WSDCC already has a copy of that affidavit and Petitioner will not here restate its
7 contents.

8 INTERROGATORIES

9 INTERROGATORY NO. 1: Identify any Challenge you made to any person's
10 right to vote in the 2004 General Election or Gubernatorial Election on or before Election
11 Day.

12 ANSWER: Petitioner did not make any such challenges.

13
14 INTERROGATORY NO. 2: For any Challenge identified in response to
15 Interrogatory No. 1, identify the person whose right to vote you Challenged.

16 ANSWER: See Answer to Interrogatory No. 1.

17
18 INTERROGATORY NO. 3: Identify any Personal Knowledge you have of any
19 felon having voted in the 2004 General Election, if any, and identify the following:

- 20 a. The felon;
- 21 b. The date that the county in which the felon voted learned of the
22 felon's conviction;
- 23 c. Any facts indicating whether the felon has had his or her rights
24 restored and, if they have been, the date the rights were restored;
- 25 d. What steps you took, if any, to determine if the person's rights had
26 been restored;
- 27 e. Any facts indicating that the felon voted in the Gubernatorial
Election; and

OBJECTIONS, ANSWERS, AND RESPONSES TO
WSDCC'S 1ST ROGS & RFPS TO PETITIONER TIMOTHY BORDERS -

4

SEA 1612515v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES

1600 Century Square - 1501 Fourth Avenue
Seattle, Washington 98101-1618
(206) 622-3150 • Fax: (206) 426-7699

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Objections dated this 26th day of February, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 

Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

THE HONORABLE JOHN E. BRIDGES

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

TIMOTHY BORDERS et al.,
Petitioners,
v.
KING COUNTY et al.,
Respondents,
and
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,
Intervenor-Respondent.

No. 05-2-00027-3

**OBJECTIONS, ANSWERS,
AND RESPONSES TO
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S FIRST
INTERROGATORIES AND
REQUESTS FOR PRODUCTION
TO PETITIONER THOMAS
CANTERBURY**

Petitioner Thomas Canterbury ("Petitioner") provides the following objections, answers, and responses to the Washington State Democratic Central Committee's First Interrogatories and Requests for Production.

GENERAL OBJECTIONS

1. Petitioner objects to Instruction No. 3 with regard to the instruction to "state all factual and legal justifications" supporting any objection or failure to answer as seeking to impose obligations beyond those required by the Civil Rules and as seeking work product. Petitioner will set forth its objections in compliance with the Civil Rules.

OBJECTIONS, ANSWERS, AND RESPONSES TO
WSDCC'S 1ST ROGS & RFPS TO PETITIONER THOMAS
CANTERBURY - 1
SEA 1612517v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES
1000 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1638
(206) 622-3150 • Fax: (206) 428-7699

1 the parties possess the information, in advance of the statutory deadline. In any event, the
2 final list of illegal votes that will be the subject of this election contest shall be produced in
3 accordance with RCW 29A.68.100.

4 INTERROGATORIES

5 INTERROGATORY NO. 1: Identify any Challenge you made to any person's
6 right to vote in the 2004 General Election or Gubernatorial Election on or before Election
7 Day.

8 ANSWER: Petitioner did not make any such challenges.

9
10 INTERROGATORY NO. 2: For any Challenge identified in response to
11 Interrogatory No. 1, identify the person whose right to vote you Challenged.

12 ANSWER: See Answer to Interrogatory No. 1.

13
14 INTERROGATORY NO. 3: Identify any Personal Knowledge you have of any
15 felon having voted in the 2004 General Election, if any, and identify the following:

- 16 a. The felon;
- 17 b. The date that the county in which the felon voted learned of the
18 felon's conviction;
- 19 c. Any facts indicating whether the felon has had his or her rights
20 restored and, if they have been, the date the rights were restored;
- 21 d. What steps you took, if any, to determine if the person's rights had
22 been restored;
- 23 e. Any facts indicating that the felon voted in the Gubernatorial
24 Election; and
- 25 f. Any facts indicating which candidate the felon voted for in the
26 Gubernatorial Election.

27 ANSWER: See General Objection No. 5. Without waiving this objection,
Petitioner has no such "Personal Knowledge" but refers to and incorporates the Answer to
Interrogatory No. 3 in the Objections, Answers, and Responses to the Washington State

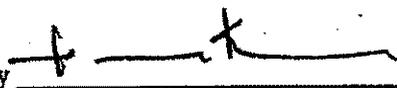
OBJECTIONS, ANSWERS, AND RESPONSES TO
WSDCC'S 1ST ROGS & RFPS TO PETITIONER THOMAS
CANTERBURY - 4
SEA 1612517v1 55441-4

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1400 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1684
(206) 622-3150 • Fax: (206) 624-7699

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Objections dated this 22nd day of February, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 

Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

THE HONORABLE JOHN E. BRIDGES

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

TIMOTHY BORDERS et al.,
Petitioners,
v.
KING COUNTY et al.,
Respondents,
and
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,
Intervenor-Respondent.

No. 05-2-00027-3

**OBJECTIONS, ANSWERS,
AND RESPONSES TO
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S FIRST
INTERROGATORIES AND
REQUESTS FOR PRODUCTION
TO PETITIONER PAUL ELVIG**

Petitioner Paul Elvig ("Petitioner") provides the following objections, answers, and responses to the Washington State Democratic Central Committee's First Interrogatories and Requests for Production.

GENERAL OBJECTIONS

1. Petitioner objects to Instruction No. 3 with regard to the instruction to "state all factual and legal justifications" supporting any objection or failure to answer as seeking to impose obligations beyond those required by the Civil Rules and as seeking work product. Petitioner will set forth its objections in compliance with the Civil Rules.

1 the parties possess the information, in advance of the statutory deadline. In any event, the
2 final list of illegal votes that will be the subject of this election contest shall be produced in
3 accordance with RCW 29A.68.100.

4 INTERROGATORIES

5 INTERROGATORY NO. 1: Identify any Challenge you made to any person's
6 right to vote in the 2004 General Election or Gubernatorial Election on or before Election
7 Day.

8 ANSWER: Petitioner did not make any such challenges.

9
10 INTERROGATORY NO. 2: For any Challenge identified in response to
11 Interrogatory No. 1, identify the person whose right to vote you Challenged.

12 ANSWER: See Answer to Interrogatory No. 1.

13
14 INTERROGATORY NO. 3: Identify any Personal Knowledge you have of any
15 felon having voted in the 2004 General Election, if any, and identify the following:

- 16 a. The felon;
- 17 b. The date that the county in which the felon voted learned of the
18 felon's conviction;
- 19 c. Any facts indicating whether the felon has had his or her rights
20 restored and, if they have been, the date the rights were restored;
- 21 d. What steps you took, if any, to determine if the person's rights had
22 been restored;
- 23 e. Any facts indicating that the felon voted in the Gubernatorial
24 Election; and
- 25 f. Any facts indicating which candidate the felon voted for in the
26 Gubernatorial Election.

27 ANSWER: See General Objection No. 5. Without waiving this objection,
Petitioner has no such "Personal Knowledge" but refers to and incorporates the Answer to
Interrogatory No. 3 in the Objections, Answers, and Responses to the Washington State

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Objections dated this 22nd day of February, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 
Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

THE HONORABLE JOHN E. BRIDGES

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

TIMOTHY BORDERS et al.,
Petitioners,
v.
KING COUNTY et al.,
Respondents,
and
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,
Intervenor-Respondent.

No. 05-2-00027-3

**OBJECTIONS, ANSWERS,
AND RESPONSES TO
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S FIRST
INTERROGATORIES AND
REQUESTS FOR PRODUCTION
TO PETITIONER MARGIE
FERRIS**

Petitioner Margie Ferris ("Petitioner") provides the following objections, answers,
and responses to the Washington State Democratic Central Committee's First
Interrogatories and Requests for Production.

GENERAL OBJECTIONS

1. Petitioner objects to Instruction No. 3 with regard to the instruction to "state
all factual and legal justifications" supporting any objection or failure to answer as seeking
to impose obligations beyond those required by the Civil Rules and as seeking work
product. Petitioner will set forth its objections in compliance with the Civil Rules.

1 the parties possess the information, in advance of the statutory deadline. In any event, the
2 final list of illegal votes that will be the subject of this election contest shall be produced in
3 accordance with RCW 29A.68.100.

4 INTERROGATORIES

5 INTERROGATORY NO. 1: Identify any Challenge you made to any person's
6 right to vote in the 2004 General Election or gubernatorial Election on or before Election
7 Day.

8 ANSWER: Petitioner did not make any such challenges.

9
10 INTERROGATORY NO. 2: For any Challenge identified in response to
11 Interrogatory No. 1, identify the person whose right to vote you challenged.

12 ANSWER: See Answer to Interrogatory No. 1.

13
14 INTERROGATORY NO. 3: Identify any Personal Knowledge you have of any
15 felon having voted in the 2004 General Election, if any, and identify the following:

- 16 a. The felon;
- 17 b. The date that the county in which the felon voted learned of the
18 felon's conviction;
- 19 c. Any facts indicating whether the felon has had his or her rights
20 restored and, if they have been, the date the rights were restored;
- 21 d. What steps you took, if any, to determine if the person's rights had
22 been restored;
- 23 e. Any facts indicating that the felon voted in the gubernatorial
24 Election; and
- 25 f. Any facts indicating which candidate the felon voted for in the
26 gubernatorial Election.

27 ANSWER: See General Objection No. 5. Without waiving this objection,
Petitioner has no such "Personal Knowledge" but refers to and incorporates the Answer to
Interrogatory No. 3 in the Objections, Answers, and Responses to the Washington State

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Objections dated this 22nd day of February, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 
Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

1 the parties possess the information, in advance of the statutory deadline. In any event, the
2 final list of illegal votes that will be the subject of this election contest shall be produced in
3 accordance with RCW 29A.68.100.

4 INTERROGATORIES

5 INTERROGATORY NO. 1: Identify any Challenge you made to any person's
6 right to vote in the 2004 General Election or Gubernatorial Election on or before Election
7 Day.

8 ANSWER: Petitioner did not make any such challenges.

9
10 INTERROGATORY NO. 2: For any Challenge identified in response to
11 Interrogatory No. 1, identify the person whose right to vote you Challenged.

12 ANSWER: See Answer to Interrogatory No. 1.

13
14 INTERROGATORY NO. 3: Identify any Personal Knowledge you have of any
15 felon having voted in the 2004 General Election, if any, and identify the following:

- 16 a. The felon;
- 17 b. The date that the county in which the felon voted learned of the
18 felon's conviction;
- 19 c. Any facts indicating whether the felon has had his or her rights
20 restored and, if they have been, the date the rights were restored;
- 21 d. What steps you took, if any, to determine if the person's rights had
22 been restored;
- 23 e. Any facts indicating that the felon voted in the Gubernatorial
24 Election; and
- 25 f. Any facts indicating which candidate the felon voted for in the
26 Gubernatorial Election.

27 ANSWER: See General Objection No. 5. Without waiving this objection,
Petitioner has no such "Personal Knowledge" but refers to and incorporates the Answer to
Interrogatory No. 3 in the Objections, Answers, and Responses to the Washington State

THE HONORABLE JOHN E. BRIDGES

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

TIMOTHY BORDERS et al.,
Petitioners,
v.
KING COUNTY et al.,
Respondents,
and
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,
Intervenor-Respondent.

No. 05-2-00027-3

**OBJECTIONS, ANSWERS,
AND RESPONSES TO
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S FIRST
INTERROGATORIES AND
REQUESTS FOR PRODUCTION
TO PETITIONER EDWARD
MONAGHAN**

Petitioner Edward Monaghan ("Petitioner") provides the following objections, answers, and responses to the Washington State Democratic Central Committee's First Interrogatories and Requests for Production.

GENERAL OBJECTIONS

1. Petitioner objects to Instruction No. 3 with regard to the instruction to "state all factual and legal justifications" supporting any objection or failure to answer as seeking to impose obligations beyond those required by the Civil Rules and as seeking work product. Petitioner will set forth its objections in compliance with the Civil Rules.

OBJECTIONS, ANSWERS, AND RESPONSES TO
WSDCC'S 1ST ROGS & RFPs TO PETITIONER EDWARD
MONAGHAN - 1
SEA 1612523v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1681
(206) 622-3150 • Fax: (206) 622-7699

1 the parties possess the information, in advance of the statutory deadline. In any event, the
2 final list of illegal votes that will be the subject of this election contest shall be produced in
3 accordance with RCW 29A.68.100.

4 **INTERROGATORIES**

5 **INTERROGATORY NO. 1:** Identify any Challenge you made to any person's
6 right to vote in the 2004 General Election or Gubernatorial Election on or before Election
7 Day.

8 **ANSWER:** Petitioner did not make any such challenges.

9
10 **INTERROGATORY NO. 2:** For any Challenge identified in response to
11 Interrogatory No. 1, identify the person whose right to vote you Challenged.

12 **ANSWER:** See Answer to Interrogatory No. 1.

13
14 **INTERROGATORY NO. 3:** Identify any Personal Knowledge you have of any
15 felon having voted in the 2004 General Election, if any, and identify the following:

- 16 a. The felon;
- 17 b. The date that the county in which the felon voted learned of the
18 felon's conviction;
- 19 c. Any facts indicating whether the felon has had his or her rights
20 restored and, if they have been, the date the rights were restored;
- 21 d. What steps you took, if any, to determine if the person's rights had
22 been restored;
- 23 e. Any facts indicating that the felon voted in the Gubernatorial
24 Election; and
- 25 f. Any facts indicating which candidate the felon voted for in the
26 Gubernatorial Election.

27 **ANSWER:** See General Objection No. 5. Without waiving this objection,
Petitioner has no such "Personal Knowledge" but refers to and incorporates the Answer to
Interrogatory No. 3 in the Objections, Answers, and Responses to the Washington State

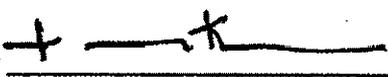
**OBJECTIONS, ANSWERS, AND RESPONSES TO
WSECC'S 1ST ROGS & RFPs TO PETITIONER EDWARD
MONAGHAN - 4
SEA 1612523v1 55441-4**

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2600 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1650
(206) 622-3150 • Fax (206) 622-7099

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Objections dated this 22nd day of February, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 

Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

THE HONORABLE JOHN E. BRIDGES

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

TIMOTHY BORDERS et al.,

Petitioners,

v.

KING COUNTY et al.,

Respondents,

and

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,

Intervenor-Respondent.

No. 05-2-00027-3

**OBJECTIONS, ANSWERS,
AND RESPONSES TO
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S FIRST
INTERROGATORIES AND
REQUESTS FOR PRODUCTION
TO PETITIONER ROSSI-FOR-
GOVERNOR CAMPAIGN**

Petitioner Rossi-for-Governor Campaign (the "Rossi Campaign") provides the following objections, answers, and responses to the Washington State Democratic Central Committee's First Interrogatories and Requests for Production.

GENERAL OBJECTIONS

1. The Rossi Campaign objects to Instruction No. 3 with regard to the instruction to "state all factual and legal justifications" supporting any objection or failure to answer as seeking to impose obligations beyond those required by the Civil Rules and as seeking work product. The Rossi Campaign will set forth its objections in compliance with the Civil Rules.

1 governed by RCW 29A.68.100. In an effort to expedite the discovery process, however,
2 the Rossi Campaign is willing to discuss and agree to a mutual exchange of such lists, to
3 the extent the parties possess the information, in advance of the statutory deadline. In any
4 event, the final list of illegal votes that will be the subject of this election contest shall be
5 produced in accordance with RCW29A.68.100.

6 INTERROGATORIES

7 INTERROGATORY NO. 1: Identify any Challenge you made to any person's
8 right to vote in the 2004 General Election or Gubernatorial Election on or before Election
9 Day.

10 ANSWER: The Rossi Campaign did not make any such challenges.

11
12 INTERROGATORY NO. 2: For any Challenge identified in response to
13 Interrogatory No. 1, identify the person whose right to vote you Challenged.

14 ANSWER: Please see answer to Interrogatory No. 1.

15
16 INTERROGATORY NO.3: Do you contend any felon voted in the 2004 General
17 Election. If so, state the basis for that contention and identify the following:

- 18 a. The felon;
- 19 b. The date that the county in which the felon voted learned of the
20 felon's conviction;
- 21 c. Any facts indicating whether the felon has had his or her rights
restored and, if they have been, the date the rights were restored;
- 22 d. What steps you took, if any, to determine if the person's rights had
23 been restored;
- 24 e. Any facts indicating that the felon voted in the Gubernatorial
Election; and
- 25 f. Any facts indicating which candidate the felon voted for in the
26 Gubernatorial Election.
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RESPONSE: Petitioner Rossi Campaign admits the matter asserted in Request for Admission No. 21.

DATED: March 8, 2005.

PERKINS COIE LLP

SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838
7 North Wenatchee Avenue, Suite 600
Wenatchee, WA 98807

By _____

Kevin J. Hamilton, WSBA # 15648
William C. Rava, WSBA # 29948
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751
c/o Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Attorneys for Intervenor-Respondent
Washington State Democratic Central
Committee

OBJECTIONS & RESPONSES DATED this 7th day of April, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 

Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909
1501 Fourth Avenue, Suite 2600
Seattle, Washington 98101-1688
Telephone: (206) 622-3150

WASHINGTON STATE DEMOCRATIC CENTRAL
COMMITTEE'S FIRST REQUESTS FOR
ADMISSION TO PETITIONER ROSSI FOR
GOVERNOR CAMPAIGN AND RESPONSES
THERE TO - 17

[15934-0006-000000/SEA 1625233v1 55441-4.]

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

1 THE HONORABLE JOHN E. BRIDGES

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

9 TIMOTHY BORDERS et al.,

10 Petitioners,

11 v.

12 KING COUNTY et al.,

13 Respondents,

14 and

15 WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,

16 Intervenor-Respondent.

No. 05-2-00027-3

**OBJECTIONS, ANSWERS,
AND RESPONSES TO
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S FIRST
INTERROGATORIES AND
REQUESTS FOR PRODUCTION
TO PETITIONER CHRISTOPHER
VANCE**

17
18 Petitioner Christopher Vance ("Petitioner") provides the following objections,
19 answers, and responses to the Washington State Democratic Central Committee's First
20 Interrogatories and Requests for Production. In his capacity as Chairman of the
21 Washington State Republican Party, Petitioner has coordinated the Republican Party's
22 observation of the 2004 election and its investigation into apparent mistakes, errors, and
23 instances of neglect and wrongful conduct by election officials. Many of the results of this
24 investigation are reflected in the Rossi for Governor responses.

25 **GENERAL OBJECTIONS**

26 1. Petitioner objects to Instruction No. 3 with regard to the instruction to "state
27 all factual and legal justifications" supporting any objection or failure to answer as seeking

**OBJECTIONS, ANSWERS, AND RESPONSES TO
WSDCC'S 1ST ROGS & RFPS TO PETITIONER CHRISTOPHER
VANCE- 1**

SEA 1612526v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES

2400 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 422-3150 • Fax: (206) 422-7499

1 governed by RCW 29A.68.100. In an effort to expedite the discovery process, however,
2 Petitioner is willing to discuss and agree to a mutual exchange of such lists, to the extent
3 the parties possess the information, in advance of the statutory deadline. In any event, the
4 final list of illegal votes that will be the subject of this election contest shall be produced in
5 accordance with RCW 29A.68.100.

6 11. Petitioner objects to these requests to the extent they seek the same
7 information set forth in the Affidavit of Chris Vance dated January 7, 2005. The WSDCC
8 already has a copy of that affidavit and Petitioner will not here restate its contents.

9 INTERROGATORIES

10 INTERROGATORY NO. 1: Identify any Challenge you made to any person's
11 right to vote in the 2004 General Election or Gubernatorial Election on or before Election
12 Day.

13 ANSWER: Petitioner did not make any such challenges.

14
15 INTERROGATORY NO. 2: For any Challenge identified in response to
16 Interrogatory No. 1, identify the person whose right to vote you Challenged.

17 ANSWER: See Answer to Interrogatory No. 1.

18
19 INTERROGATORY NO. 3: Identify any Personal Knowledge you have of any
20 felon having voted in the 2004 General Election, if any, and identify the following:

- 21 a. The felon;
- 22 b. The date that the county in which the felon voted learned of the
23 felon's conviction;
- 24 c. Any facts indicating whether the felon has had his or her rights
25 restored and, if they have been, the date the rights were restored;
- 26 d. What steps you took, if any, to determine if the person's rights had
27 been restored;

OBJECTIONS, ANSWERS, AND RESPONSES TO
WSDCC'S 1ST ROGS & RFPs TO PETITIONER CHRISTOPHER
VANCE- 4

SEA 1612526v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES

2400 Century Square - 1501 Fourth Avenue
Seattle, Washington 98101-1611
(206) 622-3150 • Fax: (206) 622-7699

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Objections dated this 22nd day of February, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 

Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

**OBJECTIONS, ANSWERS, AND RESPONSES TO
WSDCC'S 1ST ROGS & RFPS TO PETITIONER CHRISTOPHER
VANCE- 14**

SEA 1612526v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES
2500 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1488
(206) 622-3150 • Fax: (206) 421-7499

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THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central
Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

[PROPOSED] ORDER GRANTING
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT ON PETITIONERS'
BELATED CLAIM OF NON-CITIZEN
VOTERS

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THIS MATTER comes before the Court on Washington State Democratic Central Committee's Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters. The Court having reviewed Washington State Democratic Central Committee's Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters, and any other briefing filed in support of or opposition thereto, and any reply, and all declarations filed in support of or in opposition to the Motion, and being fully advised in the premises, now, therefore, it is hereby ORDERED that:

Washington State Democratic Central Committee's Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters is hereby GRANTED.

The Court hereby orders that Petitioners' Claim of Non-Citizen Voters be DISMISSED.

ENTERED this ____ day of _____ 2005.

The Honorable John E. Bridges

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Presented by:

/s/ Kevin J. Hamilton

Kevin J. Hamilton, WSBA # 15648
William C. Rava, WSBA # 29948
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838
7 North Wenatchee Avenue, Suite 600
Wenatchee, WA 98807

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751
c/o Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Attorneys for Intervenor-Respondent
Washington State Democratic Central
Committee



William C. Rava
PHONE: 206.359.6338
FAX: 206.359.7338
EMAIL: wcrava@perkinscoie.com

1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

April 13, 2005

Via Electronic Delivery

The Honorable John E. Bridges
Chelan County Superior Court
Department No. 3
401 Washington Street
Wenatchee, WA 98807

Re: *Borders v. King County, et al.*
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed with this letter are copies of out-of-state cases, referred to by Washington State Democratic Central Committee's Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters, filed today.

Yours truly,

William C. Rava

cc: All parties and counsel of record

WCR:ccs

Enclosures

[15934-0006/SL051020.268]

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · HONG KONG · LOS ANGELES
MENLO PARK · OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates



Briefs and Other Related Documents

Supreme Court of the United States
CELOTEX CORPORATION, Petitioner

v.

Myrtle Nell CATRETT, Administratrix of the Estate
of Louis H. Catrett,
Deceased.
No. 85-198.

Argued April 1, 1986.
Decided June 25, 1986.

Administratrix of estate of deceased worker brought action against asbestos manufacturer. The United States District Court for the District of Columbia granted manufacturer's motion for summary judgment and administratrix appealed. The Court of Appeals for the District of Columbia Circuit, 756 F.2d 181, reversed. The Supreme Court, Justice Rehnquist, held that: (1) Rule 56(c) mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.

Reversed and remanded.

Justice White filed an opinion concurring in the Court's opinion and judgment.

Justice Brennan filed a dissenting opinion in which Chief Justice Burger and Justice Blackmun joined.

Justice Stevens filed a dissenting opinion.

Opinion on remand, 826 F.2d 33.

West Headnotes

[1] Federal Civil Procedure **2466**
170Ak2466 Most Cited Cases

Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish that existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] Federal Civil Procedure **2470**
170Ak2470 Most Cited Cases

Where party will have burden of proof on an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmovant's case necessarily renders all other facts immaterial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] Federal Civil Procedure **2535**
170Ak2535 Most Cited Cases

Party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[4] Federal Civil Procedure **2536.1**
170Ak2536.1 Most Cited Cases
(Formerly 170Ak2536)

There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[5] Federal Civil Procedure **2536.1**
170Ak2536.1 Most Cited Cases
(Formerly 170Ak2536)

Regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may and should be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment set forth in Rule 56(c) is satisfied. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

(Cite as: 329 U.S. 324, 67 S.Ct. 324)

[6] Federal Civil Procedure  **2536.1**170Ak2536.1 Most Cited Cases

(Formerly 170Ak2536)

Where nonmoving party will bear burden of proof at trial on a dispositive issue, summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file and such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule" so that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[7] Federal Civil Procedure  **2545**170Ak2545 Most Cited Cases

Nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[8] Federal Civil Procedure  **2536.1**170Ak2536.1 Most Cited Cases

(Formerly 170Ak2536)

[8] Federal Civil Procedure  **2544**170Ak2544 Most Cited Cases

Last two sentences of Rule 56(e) precluding a nonmoving party from resting on its pleadings to avoid summary judgment were added to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings and were not intended to reduce the burden of the moving party or to add to that burden. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[9] Federal Civil Procedure  **2461**170Ak2461 Most Cited Cases

Summary judgment procedure is properly regarded not a disfavored procedural shortcut but, rather, as an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. Fed.Rules Civ.Proc.Rules 1, 56, 28 U.S.C.A.

[10] Federal Civil Procedure  **2461**170Ak2461 Most Cited Cases

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims

and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the Rule prior to trial, that the claims and defenses have no factual basis. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

****2549 *317 Syllabus [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

In September 1980, respondent administratrix filed this wrongful-death action in Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to *negate* such exposure, as required by Federal Rule 56(e) of Civil Procedure and the decision in Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary ****2550** judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 2552-2559.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for

discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to *318 make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 2552-2553.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. *Adickes v. S.H. Kress & Co.*, *supra*, explained. Pp. 2553-2554.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f). Pp. 2554-2555.

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance. P. 2555.

244 U.S.App.D.C. 160, 756 F.2d 181, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a

concurring opinion, *post*, p. ---. BRENNAN, J., filed a dissenting opinion, in which BURGER, C.J., and BLACKMUN, J., joined, *post*, p. ---. STEVENS, J., filed a dissenting opinion, *post*, p. ---.

Leland S. Van Koten argued the cause for petitioner. With him on the briefs were *H. Emslie Parks* and *Drake C. Zaharris*.

Paul March Smith argued the cause for respondent. With him on the brief were *Joseph N. Onek*, *Joel I. Klein*, *James F. Green*, and *Peter T. Enslein*.*

* *Stephen M. Shapiro*, *Robert L. Stern*, *William H. Crabtree*, *Edward P. Good*, and *Paul M. Bator* filed a brief for the Motor Vehicle Manufacturers Association et al. as *amici curiae* urging reversal.

*319 Justice REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett v. Johns-Manville Sales Corp.*, 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in **2551 *In re Japanese Electronic Products*, 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). [FN1] We granted certiorari to resolve the conflict, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985), and now reverse the decision of the District of Columbia Circuit.

[FN1. Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (1986).

Respondent commenced this lawsuit in September

1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product ... was the proximate cause of the injuries alleged within the jurisdictional *320 limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217. [FN2] Respondent *321 appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's **2552 summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its

motion." *322244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure, [FN3] and this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.*, at 167, 756 F.2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.*, at 166, 756 F.2d, at 187.

FN2. Justice STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products *in the District of Columbia*. See *post*, at 2560-2561. According to Justice STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970-1971. See *Ibid.*

Justice STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia *or elsewhere*." App. 217 (emphasis added). Unlike Justice STEVENS, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by Justice STEVENS, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was 'no showing that

the plaintiff was exposed to defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.' " Catrett v. Johns-Manville Sales Corp., 244 U.S.App.D.C. 160, 162, n. 3, 756 F.2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares Justice STEVENS' view of the District Court's decision.

FN3. Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[1][2] We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. [FN4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, *323 there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily

renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...." **2553 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

FN4. Rule 56(c) provides:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

[3][4][5] Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court

demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported *324 claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. [FN5]

[FN5]. See Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 *Yale L.J.* 745, 752 (1974); Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 *U.Chi.L.Rev.* 72, 79 (1977).

[6] Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

[7] We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

*325 The Court of Appeals in this case felt itself constrained, however, by language in our decision in

Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively **2554 show that it was not intended to modify the burden of the moving party ... to show initially the absence of a genuine issue concerning any material fact." *Id.*, at 159, 90 S.Ct., at 1609. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case.

[8] The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to *326 *facilitate* the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come

329 U.S. 324, 67 S.Ct. 324, 91 L.Ed. 322, 19 L.R.R.M. (BNA) 2128, 11 Lab.Cas. P 51,234
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forward with all of her evidence. See 244 U.S.App.D.C., at 167-168, 756 F.2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28-29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), [FN6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

FN6. Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was *327 made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if **2555 reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

[9][10] The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a

genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

*328 The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course,

329 U.S. 324, 67 S.Ct. 324, 91 L.Ed. 322, 19 L.R.R.M. (BNA) 2128, 11 Lab.Cas. P 51,234
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he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect *329 of the case, I agree that the case should be remanded for further proceedings.

Justice BRENNAN, with whom THE CHIEF JUSTICE and Justice BLACKMUN join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial **2556 burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. [FN1] This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

[FN1]. It is also unclear what the Court of Appeals is supposed to do in this case on remand. Justice WHITE--who has provided

the Court's fifth vote--plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, Justice WHITE's understanding would seem to be controlling. Cf. Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).

*330 I

Summary judgment is appropriate where the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.Rule Civ.Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15 [3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, *ante*, at 2551; *ante*, at 2553 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright, Miller & Kane § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion [FN2] unless and until the Court finds that the moving party has discharged its initial *331 burden of production. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-161, 90 S.Ct. 1598, 1608-10, 26 L.Ed.2d 142 (1970); 1963 Advisory Committee's Notes on Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626.

[FN2]. The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], pp. 56-466; 10A Wright, Miller & Kane § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary,

329 U.S. 324, 67 S.Ct. 324, 91 L.Ed. 322, 19 L.R.R.M. (BNA) 2128, 11 Lab.Cas. P 51,234
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Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, ----, 91 L.Ed.2d 202 (1986), and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright, Miller & Kane § 2721, p. 44; see, e.g., Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922, 930 (CA1 1983); Higgenbotham v. Ochsner Foundation Hospital, 607 F.2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (1983), rev'd on other grounds sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), "[i]f ... there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment...." 723 F.2d, at 258.

****2557** The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright, Miller & Kane § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence--using any of the materials specified in Rule 56(c)--that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.*; Fed. Rules Civ. Proc. 56(e), (f).

If the burden of persuasion at trial would be on the *non-moving* party, the party moving for summary

judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright, Miller & Kane § 2727, pp. 130- 131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 750 (1974) (hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, ----, 91 L.Ed.2d 202 (1986).

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party--who will bear the burden of persuasion at trial--has ***332** no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante*, at 2551 (WHITE, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 2553. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the Court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the Court's attention to supporting

evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production. [FN3] Thus, if the record disclosed that the **2558 moving *333 party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the Court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

FN3. Once the moving party has attacked whatever record evidence--if any--the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright, Miller & Kane § 2727, pp. 138-143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, e.g., First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

The result in *Adickes v. S.H. Kress & Co.*, *supra*, is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U.S.C. § 1983 claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's

complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present, ... it would be open to a jury, in light of the sequence that followed, *334 to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 U.S., at 158, 90 S.Ct., at 1609. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. *Id.*, at 157-158, 98 S.Ct., at 1608-1609.

The opinion in *Adickes* has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing cases). The Court of Appeals apparently read *Adickes* this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her **2559 decedent had ever been exposed to Celotex asbestos. [FN4] App. 170. Celotex supported this motion with a *335 two-page

"Statement of Material Facts as to Which There is No Genuine Issue" and a three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See *id.*, at 171-176.

FN4. Justice STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. *Post*, at 2561 (dissenting). The Court replies that what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." *Ante*, at 2560, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to Justice STEVENS' claim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." *Post*, at 2560 (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three

pieces of evidence which she claimed "[a]t the very least ... demonstrate that there is a genuine factual dispute for trial," *id.*, at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, *id.*, at 160; (2) a letter from T.R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, *id.*, at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, *id.*, at 164. Plaintiff also apparently indicated *336 at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6-7, 27-29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167. [FN5] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record *did* contain evidence--including at least one witness--supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5-7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence--noting that it had already been provided to counsel for Celotex in connection with the first motion--and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

FN5. Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial **2560 burden of production under Rule 56, and thereby rendered summary judgment improper. [FN6]

FN6. If the plaintiff had answered Celotex'

second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by Celotex other than in plaintiff's answers to interrogatories.

***337** This case is indistinguishable from *Adickes*. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production. [FN7]

[FN7. Although Justice WHITE agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact," he would remand "[b]ecause the Court of Appeals found it unnecessary to address this aspect of the case." *Ante*, at 2555-2556 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr. of Oral Arg. 6-7. Under the circumstances, then, remanding is a waste of time.

Justice STEVENS, dissenting.

As the Court points out, *ante*, at 2551, petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia. [FN1]

***338** Respondent made an adequate showing--albeit possibly not in admissible form [FN2]--that her

husband had been exposed to petitioner's product in Illinois. [FN3] Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia*, the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no written ****2561** opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language. [FN4]

[FN1. See Motion of Defendant Celotex Corporation for Summary Judgment, App. 170 ("Defendant Celotex Corporation, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court*") (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.*, at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence *within the jurisdictional confines of this Court*") (emphasis added); Transcript of Argument in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.*, at 211 ("Our position is ... there has been no product identification of any Celotex products ... that have been used *in the District of Columbia* to which the decedent was exposed") (emphasis added).

[FN2. But cf. *ante*, at 2553 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary

329 U.S. 324, 67 S.Ct. 324, 91 L.Ed. 322, 19 L.R.R.M. (BNA) 2128, 11 Lab.Cas. P 51,234
(Cite as: 329 U.S. 324, 67 S.Ct. 324)

judgment").

FN3. See App. 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by Celotex); *id.*, at 162 (letter from Anning-Johnson Co.) (confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); *id.*, at 164, 164c (deposition of Catrett) (description of his work with asbestos "in Chicago").

FN4. See *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 185, n. 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the *339 District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground. [FN5]

FN5. Cf. n. 2, *supra*. The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," *ante*, at 2555, is bewildering because there is no question of local law to be decided. Cf. *Bishop v. Wood*, 426 U.S. 341, 345-347, 96 S.Ct. 2074, 2077-2079, 48 L.Ed.2d 684 (1976).

The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, e.g., *New York v. P.J. Video, Inc.*, 475

U.S. 868, 884, 106 S.Ct. 1610, 1619, 89 L.Ed.2d 871 (1986) (MARSHALL, J., dissenting); *Icicle Seafoods, Inc., v. Worthington*, 475 U.S. 709, 715, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986) (STEVENSON, J., dissenting); *City of Los Angeles v. Heller*, 475 U.S. 796, 800, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986) (STEVENSON, J., dissenting); *Pennsylvania v. Goldhammer*, 474 U.S. 28, 31, 106 S.Ct. 353, 88 L.Ed.2d 183 (1985) (STEVENSON, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

I respectfully dissent.

477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 54 USLW 4775, 4 Fed.R.Serv.3d 1024

Briefs and Other Related Documents [\(Back to top\)](#)

- [1986 WL 727833](#) (Appellate Brief) Reply Brief for Petitioner (Mar. 24, 1986)
- [1985 WL 669317](#) (Appellate Brief) Brief for Petitioner (Dec. 26, 1985)
- [1985 WL 669316](#) (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief for the Motor Vehicle Manufacturers Association and the Product Liability Advisory Council as Amici Curiae in Support of Petitioner (Dec. 23, 1985)
- [1985 WL 669318](#) (Appellate Brief) Brief for Respondent (Oct. Term 1985)

END OF DOCUMENT



Supreme Court of the United States
NATIONAL LABOR RELATIONS BOARD

v.
A. J. TOWER CO.
No. 60.

Argued Nov. 21, 1946.
Decided Dec. 23, 1946.

Petition by National Labor Relations Board against A. J. Tower Company to enforce a cease and desist order issued against respondent. The Circuit Court of Appeals set aside the order, 152 F.2d 275, and petitioner brings certiorari.

Reversed.

Mr. Justice JACKSON, dissenting.

On writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

West Headnotes

[1] Labor and Employment 1167
231Hk1167 Most Cited Cases

(Formerly 232Ak207.1 Labor Relations, 255k15(43) Master and Servant, 232Ak207)
Congress has intrusted the National Labor Relations Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employee. National Labor Relations Act, § § 8(5), 9(a, c), 29 U.S.C.A. § § 158(5), 159(a, c).

[2] Labor and Employment 1194
231Hk1194 Most Cited Cases

(Formerly 232Ak214 Labor Relations, 255k15(17) Master and Servant)
In establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives, the National Labor Relations Board must act so as to give effect to the principle of majority rule, and adopt such rules as will provide for the recording of votes accurately, efficiently and speedily. National Labor Relations Act, § § 8(5), 9(a, c), 29 U.S.C.A. § § 158(5), 159(a, c).

[3] Elections 237
144k237 Most Cited Cases

The principle of majority rule which governs elections does not foreclose practical adjustments designed to perfect the election machinery from the ever present dangers of abuse and fraud.

[4] Elections 223
144k223 Most Cited Cases

Generally, once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged.

[5] Administrative Law and Procedure 390.1
15Ak390.1 Most Cited Cases
(Formerly 15Ak390)

[5] Labor and Employment 1680
231Hk1680 Most Cited Cases

(Formerly 232Ak513 Labor Relations, 255k15(94) Master and Servant)
The rule of the National Labor Relations Board, with respect to collective bargaining elections, that challenges to the eligibility of voters be made prior to the actual casting of ballots is valid as in accord with the principles which Congress indicated should be used in securing a fair and free choice of collective bargaining representatives. National Labor Relations Act, § § 8(5), 9(a, c), 29 U.S.C.A. § § 158(5), 159(a, c).

[6] Labor and Employment 1195(1)
231Hk1195(1) Most Cited Cases

(Formerly 232Ak210.1 Labor Relations, 255k15(17) Master and Servant, 232Ak210)
Although it is an unfair labor practice for an employer to refuse to bargain with a union only if that union was chosen by a majority of the voting employees, the determination of whether in fact a majority voted for the union must be made in accordance with such formal rules of procedure as the National Labor Relations Board may find necessary to adopt in the sound exercise of its discretion. National Labor Relations Act, § § 8(5), 9(a, c), 29 U.S.C.A. § § 158(5), 159(a, c).

[7] Administrative Law and Procedure 390.1
15Ak390.1 Most Cited Cases
(Formerly 15Ak390)

[7] Labor and Employment 1666
231Hk1666 Most Cited Cases

(Formerly 232Ak214 Labor Relations,
255k15(17) Master and Servant)

[7] Labor and Employment  **1680**

231Hk1680 Most Cited Cases

(Formerly 232Ak513 Labor Relations,
255k15(94) Master and Servant)

The National Labor Relations Board rule prohibiting post-election challenges is one which the Board could adopt in the sound exercise of its discretion, and when the rule is applied properly, it cannot deprive the Board of jurisdiction to find an unlawful failure to bargain collectively, even where it subsequently is ascertainable that some of the votes cast were in fact ineligible and that the result of the election might have been different had the truth been known. National Labor Relations Act, § § 8(5), 9(a, c), 29 U.S.C.A. § § 158(5), 159(a, c).

[8] Labor and Employment  **1195(1)**

231Hk1195(1) Most Cited Cases

(Formerly 232Ak214 Labor Relations,
255k15(17) Master and Servant)

Where a collective bargaining election was conducted in accordance with the rules of the Labor Board, which included the policy of prohibiting post-election challenges, the board properly refused to permit the employer to attack the validity of the election by challenging the eligibility of a voter after the election. National Labor Relations Act, § § 8(5), 9(a, c), 29 U.S.C.A. § § 158(5), 159(a, c).

[9] Elections  **223**

144k223 Most Cited Cases

[9] Elections  **241**

144k241 Most Cited Cases

In electoral parlance, "objections" and "challenges" are two different things, in that objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly, and challenges concern the eligibility of prospective voters.

[10] Labor and Employment  **1926**

231Hk1926 Most Cited Cases

(Formerly 232Ak713 Labor Relations,
255k15(10) Master and Servant)

In the absence of any evidence that the representatives of the National Labor Relations Board discriminated against anti-union employees in preparing the eligibility list of voters at a collective bargaining election, or in raising timely eligibility issues, the Supreme Court could not say that the interests of those

employees were inadequately represented. National Labor Relations

Act, § § 8(5), 9(a, c), 29 U.S.C.A. § § 158(5), 159(a, c).

****325** Mr. ***325** Gerhard P. Van Arkel, of Washington, D.C., for petitioner.

Mr. John T. Noonan, of Boston, Mass., for respondent.

Mr. Justice MURPHY delivered the opinion of the Court.

The issue here concerns the procedure used in elections under the National Labor Relations Act [FN1] in which employees choose a statutory representative for purposes of collective bargaining. Specifically, we must determine the propriety of the National Labor Relations Board's refusal to accept an employer's post-election challenge to ***326** the eligibility of a voter who participated in a consent election.

FN1 49 Stat. 449, 29 U.S.C. s 151 et seq., 29 U.S.C.A. s 151 et seq.

The respondent and a union entered into an agreement to conduct an election by secret ballot on May 5, 1944, under the supervision of the Board's regional director, to determine whether the employees at respondent's Roxbury plant in the unit defined ****326** in the agreement desired to be represented by the union. The agreement was approved by the regional director and provided that the election was to be held 'in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board.'

The agreement set forth the qualifications for participation in the election. Only those who appeared on the pay-roll on April 21, 1944, were eligible; included were those employees who did not work at the time because they were ill, or on vacation, or temporarily laid off, or in the armed forces. The respondent had the duty of furnishing the regional director with an accurate list of the eligible voters, together with a list of the ineligible employees. [FN2] The list of eligible voters was duly submitted on May 1, 1944.

FN2 Among the ineligible persons were those who had quit or been discharged for cause and had not been rehired or reinstated prior to the date of the election.

The agreement further provided that both the union and the respondent could have observers at the polling places to assist in the handling of the election, to challenge the eligibility of voters and to verify the tally. If challenges were made and if they were determinative of the results of the election, the regional director was to investigate the challenges and issue a report thereon. All objections 'to the conduct of the ballot' or 'to a determination of representatives based on the results thereof' were to be filed with the regional director within five days after issuance of the 'Tally of Ballots.' If the regional director *327 sustained the objections, he had the power to void the results and order a new election. The determination of the regional director was to be final and binding upon any question, 'including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.' Cf. Article III, ss 10 and 12, of the Board's Rules and Regulations (Series 3, effective Nov. 26, 1943).

The balloting took place on May 5 in accordance with this agreement. After the ballots were counted, the union and the respondent signed a 'Tally of Ballots,' in which the regional director certified that, of the 230 valid votes counted, 116 were cast for the union and 114 against it, with one other ballot being challenged by the union. [FN3] Four days later, on May 9, respondent's counsel wrote the regional director that subsequent to the election 'it came to the attention of the management of the Company that Mrs. Jennie A. Kane, one of the persons who voted at the election, was not at the time an employee of the Company.' [FN4] The letter explained that Mrs. Kane was employed by respondent from March 16, 1943, through March 24, 1944, but that after the latter date she had never reported again for work and had never appeared at the plant except for purpose of voting on May 5. It *328 was admitted that the respondent, 'not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill, and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote.' The letter accordingly challenged Mrs. Kane's right to vote, as well as the ballot cast by her. A hearing was requested for the purpose of passing upon the one ballot challenged by the union. If that challenge were not sustained and the ballot proved to be a vote against the union, Mrs. Kane's **327 ballot would become material to the result of the election; on that condition, the respondent requested a hearing on its challenge to Mrs. Kane's vote.

[FN3] It was unnecessary to rule on the

challenged ballot since it could not affect the result of the election, even though the ballot proved to be against the union

[FN4] The letter recited that 'it has now come to their attention, however that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she 'could not continue to do heavy work of carrying bundles which was part of her job'. The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment.'

A hearing on the matters raised by this letter was held before the regional director. He subsequently made a report in which he found that respondent included Mrs. Kane's name on the list of eligible voters submitted on May 1 on the assumption that she was ill and had not quit her job; that respondent made no attempt between May 1 and May 5 to remove Mrs. Kane's name from the list, although prior to the election respondent received by mail a notice of Mrs. Kane's claim for unemployment compensation; that respondent's observers at the polls had not challenged Mrs. Kane when she voted in their presence; and that these observers certified before the ballots were counted that the election had been properly conducted. The regional director also found that the evidence was conflicting as to Mrs. Kane's actual status. [FN5] But he concluded that under the circumstances the respondent had *329 waived its right to challenge her vote or to object to the election on this ground. This determination made it unnecessary for him to rule on the ballot previously challenged by the union, since it could not affect the result. He thus found that the union had received a majority of the valid votes cast and was the exclusive representative of the employees in the appropriate unit.

[FN5] An agent of the Board interviewed Mrs. Kane and was told by her that: 'On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J.

Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think my application for unemployment benefits would be considered a termination from the Company. * * * On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself as an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.'

But the regional director pointed out that, despite this statement, subsequent investigation confirmed the fact that Mrs. Kane advised the Division of Employment Security on April 28, 1944, that she had left her employment with the respondent in March because of the heavy work in carrying bundles. See note 4, supra.

The respondent thereafter refused to bargain with the union in question. Upon a complaint issued by the Board, the respondent admitted its refusal but denied that the union had ever been designated by a majority of the employees in the appropriate unit. It asserted that the election of May 5 was inconclusive on the subject because if Mrs. Kane's ballot were subtracted from the union's total and if the ballot challenged by the union were opened upon overruling the challenge and proved to be against the union, the outcome of the election would be a tie vote. The Board, after the usual proceedings, held that it would not disturb the rulings of a regional director on questions arising out of a consent election 'unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious' and that no such grounds for disturbing the ruling were present in the instant case. As an alternative ground for its action, the Board held that the regional director's refusal under the circumstances to permit an attack on Mrs. Kane's status as a voter after the results *330 of the election had been announced 'is in complete accord with the established principles and policy of the Board'--which excluded post-election challenges 'because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result.' See also Matter of Norris, Inc., 63 N.L.R.B. 502, 512. The Board accordingly ordered respondent to cease and desist from its unfair labor practice and to take the affirmative action of bargaining collectively with the union. 60 N.L.R.B. 1414.

The First Circuit Court of Appeals, however, set aside

the Board's order. **328152 F.2d 275. It construed the Act as making it a jurisdictional prerequisite to a determination that an employer has committed the unfair labor practice of refusing to bargain collectively that the union with which he has refused to deal should have been chosen by a majority of those voting who were in fact employees. It held that since the vote challenged by the union may have been cast against it and since Mrs. Kane was not found to have been an employee on the crucial date, there may have been a tie vote and the Board was without jurisdiction to find the respondent guilty of a violation of s 8(5). We granted certiorari, 328 U.S. 827, 66 S.Ct. 1011, because of the importance of the matter in the administration of the Act and because of a conflict between the result below and that reached by the Sixth Circuit Court of Appeals in N.L.R.B. v. Capital Greyhound Lines, 140 F.2d 754.

[1][2] As we have noted before, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. Southern S.S. Co. v. National Labor Board, 316 U.S. 31, 37, 62 S.Ct. 886, 890, 86 L.Ed. 1246; National Labor Board v. Waterman S.S. Co., 309 U.S. 206, 226, 60 S.Ct. 493, 503, 84 L.Ed. 704; National Labor Board v. Falk Corporation, 308 U.S. 453, 458, 60 S.Ct. 307, 310, 84 L.Ed. 396. Section 9(c) of the Act authorizes the Board to 'Take a secret ballot of *331 employees, or utilize any other suitable method to ascertain such representatives.' In carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in s 9(a), a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.' S.Rep. No. 573, 74th Cong., 1st Sess., p. 13. It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.

[3] The principle of majority rule, however, does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud. Indeed, unless such adjustments are made, the democratic process may be perverted and the election may fail to reflect the will of the majority of the electorate. One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality. In political elections, this device often involves registration lists which are closed some time prior to

election day; all challenges as to registrants must be made during the intervening period or at the polls. Thereafter it is too late. The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election. To permit such challenges, it is said, would invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory claims by defeated candidates and 'keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with *332 the close of the polls.' Cooley, *Constitutional Limitations* (8th Ed., 1927), p. 1416.

[4][5] Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged. This rule is universally recognized as consistent with the democratic process. And it is generally followed in corporate elections. The Board's adoption of the rule in elections under the National Labor Relations Act is therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.

**329 Moreover, the rule in question is one that is peculiarly appropriate to the situations confronting the Board in these elections. In an atmosphere that may be charged with animosity, post-election challenges would tempt a losing union or an employer to make undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results. Such challenges would also extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the pay-roll list in the hope that they might escape challenge before voting, thereafter giving rise to a charge that the election was void because of their ineligibility and the possibility that they had voted with the majority and were a decisive factor. The privacy of the voting process, which is of great importance in the industrial world, would frequently be destroyed by post-election challenges. And voters would often incur union or employer disfavor through their reaction to the inquiries.

We are unable to say, therefore, that the Board's prohibition of post-election challenges is without justification in law or in reason. It gives a desirable and necessary finality to elections, yet affords all

interested parties a reasonable period in which to challenge the eligibility of *333 any voter. And an exception to the rule is recognized where the Board's agents or the parties benefiting from the Board's refusal to entertain the issue know of the voter's ineligibility and suppress the facts. [FN6] The Board thus appears to apply the prohibition fairly and equitably in light of the realities involved.

FN6 See Matter of Wayne Hale, 62 N.L.R.B. 1393; Matter of Beggs & Cobb, Inc., 62 N.L.R.B. 193.

[6][7] The reliance of the court below upon the asserted jurisdictional requirement was misplaced. It is true that it is an unfair labor practice for an employer to refuse to bargain with a union only if that union was chosen by a majority of the voting employees. But the determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion. The rule prohibiting post-election challenges is one of those rules. When it is applied properly, it cannot deprive the Board of jurisdiction to find an unlawful failure to bargain collectively. That is true even where it subsequently is ascertainable that some of the votes cast were in fact ineligible and that the result of the election might have been different had the truth previously been known. The rule does not pretend to be an absolute guarantee that only those votes will be counted which are in fact eligible. It is simply a justifiable and reasonable adjustment of the democratic process.

[8][9] There is no basis in the instant case for disregarding the Board's policy in this respect. The fact that the respondent may have been honestly mistaken as to the status of Mrs. Kane has no relevance whatever to the justification for the use of the policy. And nothing in the consent agreement constituted a waiver of the policy by the Board. On the contrary, the agreement expressly stated that the election was to be held in accordance with 'the customary *334 procedures and policies of the Board,' which would include the policy prohibiting post-election challenges. The provision as to the filing of objections 'to the conduct of the ballot' and 'to a determination of representatives based on the results thereof' within five days after issuance of the 'Tally of Ballots,' a provision which was quite separate from that relating to challenges, obviously has no application here. Objections and challenges are two different things in electoral parlance. Objections relate to the working of the election mechanism and to

the process of counting the ballots accurately and fairly. Challenges, on the other hand, concern the eligibility of prospective voters. The Board uses this clear distinction as a matter of policy and we are not free to disregard it. [FN7]

FN7 'The Board follows a policy of differentiating between objections to the conduct of an election and challenges (to) the eligibility of voters and it does not ordinarily permit challenges under the guise of objections after the election.' Matter of Norris, Inc., 63 N.L.R.B. 502, 512. Cf. Matter of Great Lakes Steel Corporation, 15 N.L.R.B. 510.

****330** [10] Neither the record in this case nor the past history of the policy against post-election challenges justifies an assumption that the interests of the anti-union employees in this election were inadequately protected. Due notice of the manner and conduct of the election was given to all employees; and, despite the lack of any affirmative provisions in the consent agreement, there was no indication that any of the employees were prohibited from examining the eligibility list or from challenging any prospective voter. Nor was there competent evidence that any anti-union employee made any objection, either before or after the election, to the procedure adopted or to the casting of any ballots. [FN8] Moreover, the representatives of the ***335** Board, as well as those of the respondent, were bound to perform their electoral functions on behalf of all employees, including those with anti-union sentiments. In the absence of any evidence that such representatives discriminated against the anti-union employees in preparing the eligibility list or in raising timely eligibility issues, we cannot say that the interests of those employees were inadequately represented.

FN8 The respondent's factory superintendent testified that an unidentified employee came to him and 'objected to the vote of this Jennie Kane' several days after the election and even longer after the receipt by respondent of the notice of Mrs. Kane's unemployment compensation claim, which had been mailed to respondent before the election. This testimony was admitted merely to show 'how the company became interested in the question' of Mrs. Kane's eligibility. The Board, of course, was not compelled to accept this testimony as proof of an objection to Mrs. Kane's vote by an anti-union employee or as an indication that the interests

of anti-union employees may have been inadequately represented.

Since we rest our decision solely on the propriety of the Board's policy against post-election challenges, it is unnecessary to discuss the effect to be given by the Board to the regional director's ruling that the respondent waived its right to challenge Mrs. Kane's vote or the effect to be given to the terms of the consent election agreement apart from the general policy.

It follows that the court below erred in refusing to enforce the Board's order in full.

Reversed.

Mr. Justice FRANKFURTER concurs in the result.

Mr. Justice JACKSON, dissenting.

If the only interests affected were the complaining employer and the victorious union, I should agree with the Court's decision. But there is a third and, as usual, a forgotten interest here--those employees who did not want to be represented by the union.

The election was held by agreement between the employer and the union which was seeking to organize the plant. The Company was to furnish a list of eligible ***336** voters. The Company and the union were each to have observers attend, with the right to challenge the voters. The agreement did not give anti-organization employees either observers or the right to challenge. The certified result of 116 union against 114 anti-union votes was reached by not counting a ballot which the union challenged and by counting the ballot which the Company now points out was probably invalid. Mrs. Kane's vote, no matter whether valid or invalid, is thus allowed to decide the election.

It is in evidence and undisputed that after the election, an employee-- presumably anti-union, from the circumstance that he was objecting--raised the question that Mrs. Kane, who was carried on the Company's eligible list because the Company believed she was absent for illness, had, in fact, left the employ of the Company with no intention to return. If that is true, she was not a qualified voter.

But because there was no challenge at the time her ballot was cast, the Court ****331** holds there can be no inquiry into its validity. Comparison with the practice at general public elections is specious, for in those

elections every citizen has a right of challenge and registration lists usually are made up and available in advance. No comparable safeguards for the employees opposed to the union appear to exist here, though both the employer and the union were protected.

The Court takes the position that although every other interest has affirmative protection, there is no necessity for similar affirmative protection to the anti-union employees. Despite the fact that both of the contracting parties were careful to provide such protection for themselves, the Court assumes it is unnecessary for the third interest. The Court says that in the absence of evidence it will assume that such interests were adequately represented, at the same time closing the door to hearing evidence *337 as to whether those interests were prejudiced unless those who are denied affirmative representation or challenge rights should have made affirmative objection before the wrong was consummated by casting the illegal ballot. And, of course, the members of such a minority have no standing to bring their problems either to the Board or to the Court. We hear of their grievance, if at all, only through its being identical with some complaint which the employer raises.

The Court fears that to permit inquiry into the validity of Mrs. Kane's vote would 'extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the payroll list' who would be challenged after the election in the hope of voiding an unwanted result. Of course, there are opportunities for manipulation of such a list, for collusion between employer and favored groups, for fraud, and for honest mistakes.

But if the Court is concerned to keep the elections pure, why close the door to proof of such corruption or mistake when it operates against an anti-union group, because it has not been challenged by one of the parties to it: to wit, the employer? In the usual election, it may be desirable to put an end to challenges at the time when the ballots become intermingled and indistinguishable. But to justify cutting off inquiry, it should appear that all persons interested in the election have had adequate opportunity to question the ballots cast. As long as no such provision is made for employees who are opposed to organization, I would protect their rights by allowing post-election challenges on such grounds as are urged here.

Of course the protection this gives is far from satisfactory. The challenge must be initiated by the parties the Board recognizes, the employer or the union. But there will be some instances in which their

interest coincides with that of the anti-union employees. On the other hand, I can scarcely think of a more perfect device for *338 encouraging unscrupulousness, than to invest it with finality against all inquiry either by the Board or the courts. Here half the employees are forced to accept union representation as the result of an election in which they were not allowed to protect the ballot, and those who were, failed to do so. If I really wanted to discourage fraud, collusion, and mistakes, and protect the integrity of elections and the rights of both minority and majority, I should hold that such elections can be looked into whenever irregularity appears to have affected the result.

329 U.S. 324, 67 S.Ct. 324, 91 L.Ed. 322, 19 L.R.R.M. (BNA) 2128, 11 Lab.Cas. P 51,234

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THE HONORABLE JOHN E. BRIDGES

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,

Intervenor-Respondent.

NO. 05-2-00027-3

CERTIFICATE OF SERVICE

The undersigned is a citizen of the United States and resident of the State of Washington, is over the age of eighteen and is not a party to the within action.

The following documents were caused to be served:

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1. Letter to Judge Bridges Regarding Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters;
2. Note for Motion;
3. Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters;
4. Declaration of William C. Rava in Support of Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters;
5. (Proposed) Order Granting Motion for Partial Summary Judgment on Petitioners' Belated Claim of Non-Citizen Voters; and
3. Certificate of Service.

These documents were served in the manner described below.

Thomas F. Ahearne E-Service Via E-Filing.com
Foster Pepper & Shefelman PLLC Via Electronic Mail
1111 Third Avenue, Suite 3400 Via Overnight Mail
Seattle, WA 98101-3299 Via U.S. Mail, 1st Class, Postage
Email: ahearne@foster.com Prepaid
Attorneys for Respondent Secretary of State Via Facsimile
Sam Reed

Jeffrey T. Even, Assistant Attorney General E-Service Via E-Filing.com
P.O. Box 4100 Via Electronic Mail
Olympia, WA 98504-0100 Via Overnight Mail
Email: jeffe@atg.wa.gov Via U.S. Mail, 1st Class, Postage
Attorneys for Respondent Secretary of State Prepaid
Sam Reed Via Facsimile

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Harry J.F. Korrell
Robert Maguire
Davis Wright Tremaine LLP
2600 Century Square, 1501 Fourth Avenue
Seattle, WA 98101
Email: robmaguire@dwt.com;
harrykorrell@dwt.com
Attorneys for Petitioners

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

Richard Shepard
John S. Mills
818 S. Yakima Avenue, Suite 200
Tacoma, WA 98405
Email: richard@shepardlawoffice.com
Attorneys for the Libertarian Party

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

Gary A. Reisen
Chelan County Prosecutor's Office
P.O. Box 2596
Wenatchee, WA 98807-2596
Email: Gary.Riesen@co.chelan.wa.us
*Attorneys for Respondent Chelan County
and Chelan County Auditor*

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

Timothy S. O'Neill, Klickitat County
Prosecuting Attorney
Shawn N. Anderson, Klickitat County
Prosecuting Attorney
205 S. Columbus Avenue, MS-CH-18
Goldendale, WA 98620
Email: timo@co.klickitat.wa.us
Attorneys for Respondent Klickitat County

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

Barnett N. Kalikow
Kalikow & Gusa, PLLC
1405 Harrison Ave NW, Suite 207
Olympia, WA 98502
Email: barnett.kalikow@gte.net
*Attorneys for Respondent Klickitat County
Auditor*

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

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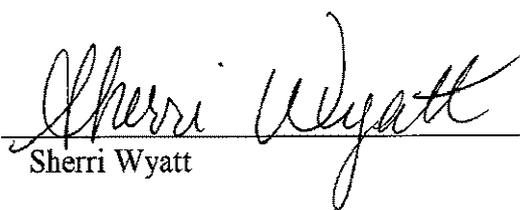
L. Michael Golden, Senior Dep. Pros. Atty.
Office of the Lewis County Prosecuting
Attorney
360 NW North Street
Chehalis, WA 98532-1900
Email: imgolden@co.lewis.wa.us
*Attorneys for Respondent Lewis County
Auditor*

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage
Prepaid
- Via Facsimile

Gordon Sivley
Michael C. Held
Snohomish County Prosecutors Office
2918 Colby, MS 504
Everett, WA 98201
Email: (gsivley@co.snohomish.wa.us;
mheld@co.snohomish.wa.us)
*Attorneys for Respondents Snohomish
County and Snohomish County Auditors*

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage
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I declare under penalty of perjury that the foregoing is true and correct, and that this
certificate was executed in Seattle, Washington on April 13, 2005.

By 
Sherri Wyatt