

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

Timothy Borders, et al.,
Petitioners,
v.
King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,
Respondents

No. 05-2-00027-3

**NOTE FOR MOTION ON
SPECIAL SETTING**

TO: THE CLERK OF THE COURT
AND TO: ALL PARTIES AND COUNSEL OF RECORD

NOTE FOR SPECIAL SETTING: Please note that this matter has been set before the
Honorable John E. Bridges on May 2, 2005, at 8:30 a.m.

NATURE OF HEARING: Petitioners' Motion in Limine to Exclude Evidence
Concerning Previously Rejected Ballots and Other "Offsetting Errors"

Dated this 13th day of April, 2005.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Petitioners

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

1 other problems and perhaps to consider other alleged offsetting errors.¹ This effort is
2 outside the scope of the election contest statute and contrary to previous rulings by this
3 Court and the Washington Supreme Court. Petitioners therefore bring this motion in
4 limine to exclude any evidence supporting this effort, such as evidence that previously
5 rejected ballots were wrongly rejected.²

6 *First*, this Court's dismissal of Petitioners' equal protection claims renders this
7 evidence irrelevant, and any effort by WSDCC to introduce such evidence disregards the
8 Court's order and directly contradicts the WSDCC's position and continuous refusal to
9 allow discovery on this issue. *Second*, the WSDCC's claims concerning ballots rejected
10 by county officials has already been dismissed by the Washington Supreme Court, which
11 ruled that it was not an error under the election contest statute for the counties to reject the
12 ballots at issue for signature mismatches. *Third*, the WSDCC waived any opportunity to
13 allege signature matching and other offsetting errors when it failed to serve a pleading
14 setting forth any claims or affirmative defenses, and when it refused to respond to
15 Petitioners' discovery. *Fourth*, admitting such evidence would set a dangerous precedent
16 for future election contests. If political parties can contest an election by claiming to

18 ¹ Offsetting errors related to *rejected* ballots and signature mismatch decisions by election officials is
19 distinguishable from another newly discovered error by King County, namely the failure to count valid
20 absentee ballots. In recent weeks, it has come to light that King County failed to count ballots that were
21 deemed *valid* prior to certification of the election results. See
http://www.metrokc.gov/elections/news/2005_04_2.htm; <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=ballots02m&date=20050402> The failure to count these ballots was
22 apparently an oversight by elections officials. Such error (an error that does not involve second guessing a
23 discretionary decision) is not the subject of this motion, and the parties may need to brief this issue further
24 after the parties have had a chance to conduct additional discovery.

25 ² At this time, Petitioners are aware of at least one type of objectionable evidence that the WSDCC intends to
26 pursue at trial, namely the evidence regarding alleged mistakes by counties in rejecting ballots due to
signature mismatches. However, as described in this brief, the WSDCC's failure to file any responsive
pleading when they intervened and their incomplete and evasive discovery responses render it impossible for
Petitioners to know what other types of related evidence the WSDCC intends to offer at trial. It is
Petitioners' position that all evidence purporting to challenge the discretionary decisions to reject ballots
made by county election officials should be excluded at trial. If the WSDCC identifies additional categories
of evidence or alleged offsetting errors, Petitioners may need to submit additional briefing or file additional
motions.

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1 disagree with the discretionary decisions made by elections officials regarding signatures
2 on provisional and absentee ballots, all future elections may involve widespread after-the-
3 fact ballot chases around the state.

4 II. STATEMENT OF FACTS

5 A. Claims and Evidence Before the Court in the Election Contest

6 Petitioners filed this election contest petition on January 7, 2005, alleging among
7 other claims, illegal votes and error, neglect, and misconduct by election officials.
8 Petitioners also asserted equal protection claims based on the inconsistent treatment of
9 signatures by county election officials evaluating the validity of provisional and absentee
10 ballots, and based on the rejection of ballots cast by lawful, registered voters. The
11 WSDCC challenged Petitioners' initial pleadings, moving to dismiss all causes of contest
12 on January 21, 2005. Although the Court allowed the election contest to proceed, it
13 dismissed Petitioners' equal protection claims based on allegations that the counties
14 wrongly rejected and were unwilling to revisit discretionary decisions about signature
15 mismatches and rejected provisional ballots – the very errors that the WSDCC now
16 appears ready to submit as offsetting errors. *See* February 18, 2005 Order Denying in Part
17 and Granting in Part Motions of Respondents and Intervenors.

18 B. The WSDCC's Plan to Present Evidence to Rehabilitate Previously 19 Rejected Provisional and Absentee Ballots

20 The parties have been engaged in the exchange of discovery since mid-January
21 2005. Petitioners have been providing the WSDCC with responsive documents on a
22 rolling basis, beginning February 22, 2005. Such productions have been in response to the
23 WSDCC's request that Petitioners produce all evidence of errors, neglect, and illegal votes
24 well in advance of the hearing date. Declaration of Amy Koziak ("Koziak Decl."), ¶1.

25 The WSDCC, however, has refused to provide Petitioners with responsive
26 documents or divulge the evidence it plans to set forth at trial regarding purported

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1 offsetting errors or votes, while reserving the right to assert specific evidence of offsetting
2 votes at a later date in the litigation. The WSDCC's response to discovery requests
3 regarding evidence of illegal votes, misconduct or errors was to direct Petitioners to a room
4 full of tens of thousands of pages of documents produced by counties in response to Public
5 Disclosure Act requests, without identifying to which of the Petitioners' specific discovery
6 requests the documents are responsive, as required by the Civil Rules. The WSDCC also
7 specifically refused to provide information related to its efforts to rehabilitate signatures or
8 resurrect previously rejected ballots in King and other counties throughout Washington.
9 See Koziak Decl., Ex. A (WSDCC's Answer to Interrogatory No. 21 and Request for
10 Production Nos. 5 and 6 in response to Petitioners' First Set of Discovery Requests). Yet
11 in a recent April 7, 2005 letter, counsel for the WSDCC stated that "to the extent the
12 WSDCC's investigation uncovers evidence that provisional or absentee ballots were
13 wrongly rejected by any county, it intends to argue that such votes should be counted."
14 See Koziak Decl., Ex. B (April 7, 2005 letter from WSDCC's counsel to Petitioners'
15 counsel). It thus now appears that the WSDCC intends to pursue claims regarding
16 signature mismatches and other alleged offsetting errors, although it has still not provided
17 documents or interrogatory answers explaining the factual bases for such claims.

18 Although the WSDCC remains evasive in responding to discovery from the
19 Petitioners and the Secretary of State, its position has been clearer in statements to the
20 media. For example, a March 18, 2005, Seattle Post-Intelligencer article quotes the
21 WSDCC's plan to research and revisit King County's decision to reject 4,432 provisional
22 ballots. See Koziak Decl., Ex. C (Gregory Roberts, *Democrats Still Looking for Votes –*
23 *Just in Case*, Seattle Post-Intelligencer, March 18, 2005). Based on the media stories and
24 evasive discovery responses, Petitioners now believe that the WSDCC is planning to
25 present evidence to challenge King County's decisions to reject thousands of ballots –
26

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1 perhaps by asking the Court to compare each provisional ballot envelope signature to each
2 voter registration signature for the more than 4,000 ballots. The WSDCC may also be
3 planning to present other evidence related to its disagreement with other discretionary
4 decisions by elections officials, but Petitioners are unable to identify specific additional
5 categories because they have no idea what specific evidence the WSDCC intends to use at
6 trial. Petitioners therefore bring this motion to exclude such evidence and to clarify the
7 limited scope of evidence appropriate for presentation by intervenors at trial.

8 III. ARGUMENT AND AUTHORITY

9 A. This Court Made This Evidence Irrelevant When It Dismissed 10 Petitioners' Equal Protection Claims

11 This Court made evidence of signature mismatches and disagreements about the
12 rejection of provisional ballots irrelevant to the issues in this proceeding when it dismissed
13 Petitioners' equal protection claims as to such ballots on February 18, 2005. Petitioners
14 originally challenged the rejection of hundreds of such ballots by county election officials,
15 alleging in their election contest petition that

16 Petitioners' rights to equal protection of the laws have been
17 violated by the inconsistent treatment of ballots wrongfully
18 rejected by Respondents, and the lawful, valid votes of
19 electors, including the petitioners, have been diluted by the
20 counting of invalid or illegal votes.

21 *See* Election Contest Petition, p. 4. The WSDCC argued that such claims should be
22 dismissed and the Court agreed. *See* WSDCC's Motion to Dismiss Causes of Contest;
23 February 18, 2005, Order Denying in Part and Granting in Part Motions of Respondents
24 and Intervenors.

25 Furthermore, the WSDCC relied on the dismissal of these claims when it refused to
26 produce documents related to the signature verification issues and provisional ballots. It
27 stated in its preliminary discovery responses that the Petitioners' request was beyond the
scope of permissible discovery and not reasonably calculated to lead to the discovery of

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1 admissible evidence because the Court dismissed such claims. *See* Koziak Decl., Ex. A
2 (WSDCC's Response to Interrogatory No. 21 and Request for Production Nos. 5 and 6 of
3 Petitioners' First Set of Interrogatories and Requests for Production). Despite this
4 response, the WSDCC persists in reserving the right to use such evidence at trial. Its
5 response to Interrogatory No. 21 (and similar language in its responses to Request for
6 Production Nos. 5 and 6) concludes with the statement that "the WSDCC's investigation is
7 ongoing and it will supplement its answer as appropriate." *Id.*

8 Petitioners pushed WSDCC for clarification of WSDCC's position during Rule 37
9 telephone conferences and an exchange of letters. In an April 7, 2005 letter to Petitioners'
10 counsel, the WSDCC stated for the first time that "to the extent the WSDCC's
11 investigation uncovers evidence that provisional or absentee ballots were wrongly rejected
12 by any county, it intends to argue that such votes should be counted." *See* Koziak Decl,
13 Ex. B (April 7, 2005 letter from WSDCC's counsel to Petitioners' counsel).

14 The WSDCC's apparent plan to submit evidence challenging the discretionary
15 decisions made by election officials with regard to provisional or absentee ballots is
16 contrary to the Court's order dismissing such claims from the lawsuit and the WSDCC's
17 own initial responses to discovery. The Court has already spent significant resources
18 reviewing these issues on the WSDCC's motion to dismiss causes of contest, and the
19 WSDCC should not be allowed to reintroduce the issues. Such evidence must be
20 excluded. Certainly if the Petitioners are barred from revisiting such discretionary
21 decisions, the WSDCC is, too. The trial must be a level playing field.

22 **B. The Washington Supreme Court Held That Discretionary Decisions by**
23 **County Elections Officials To Reject Ballots for Signature Problems**
24 **Were Not Error Under The Contest Statute**

25 Evidence and claims concerning rejected ballots are also immaterial to this contest
26 action in light of the decisions of the Washington Supreme Court *on these very same*

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1 *issues* during the recount litigation. In fact, this is now the third litigation since the 2004
2 General Election in which the parties litigated whether an election official has discretion to
3 review and make decisions about the validity of provisional and absentee ballots. The
4 Washington Supreme Court in two separate opinions – one dealing with the very same
5 ballots at issue – held that signature matching decisions for provisional and absentee
6 ballots are within the discretion of elections officials and that the Court should defer to
7 these officials’ judgment.

8 In *McDonald v. Reed*, the WSDCC filed an election contest petition alleging error
9 due to King County and other officials’ refusal to revisit discretionary and allegedly
10 erroneous signature matching decisions related to provisional and absentee ballots. The
11 WSDCC filed numerous affidavits from individuals and asserted that election officials had
12 made mistakes in comparing the ballot envelope signatures to the original voter
13 registration signatures and rejecting their ballots. In December 2004, the Washington
14 Supreme Court rejected the WSDCC’s claim that counties must revisit prior discretionary
15 decisions about signature mismatches and rejected the contention that it was error under
16 the contest statute for the counties to refuse to do so. *See McDonald v. Reed*, 153 Wn.2d
17 201 (2004). The Court found no wrongdoing or misconduct related to King County’s
18 discretionary decisions about provisional ballots when canvassing returns, despite the
19 WSDCC’s allegations of errors in the signature match decisions.

20 Moreover, later in December 2004, the Supreme Court again declined to interfere
21 with the discretionary decision-making by election officials when denying the Washington
22 State Republican Party’s motion to stop the recanvass of ballots with signature verification
23 problems in *WSRP v. King County Division of Records*, 153 Wn.2d 220 (2004). In this
24 second case, the Washington Supreme Court again deferred to the discretion of election
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1 officials and ruled that officials have the discretion to recanvass certain ballots in a recount
2 if County officials determine that an error had occurred.

3 Both decisions reflect the Court's deference to the discretionary decisions that
4 election officials must make when reviewing signatures on provisional and absentee
5 ballots. In his concurring opinion in *WSRP v. King County Division of Records*, Justice
6 Chambers noted that "[t]here is a certain amount of subjectivity inherent in the
7 legislatively established process of comparing signatures and counting absentee and
8 provisional ballots....The legislature, probably in recognition of this inherent subjectivity
9 has given local county election officials the authority and discretion to recanvass ballots or
10 voting devices until the last day to certify the election. Should election officials fail to
11 carry out their duties within the law, there are procedures for challenging the results." 153
12 Wn. 2d at 228.

13 The WSDCC has no evidence that election officials failed to carry out their
14 discretionary duties in the manner provided by law. Rather, the WSDCC simply disagrees
15 with the ultimate decisions regarding some of the rejected ballots. Because the
16 Washington Supreme Court, in an election contest filed by the WSDCC regarding this
17 election, has already rejected the WSDCC's argument that it was error for election officials
18 to reject provisional ballot signatures (apparently the same ones they intend to litigate
19 again here), the WSDCC's evidence and claims regarding previously rejected provisional
20 ballots must be excluded.

21 **C. WSDCC Failed to Plead Such Claims When Intervening and May Not**
22 **Now Assert Them.**

23 The only errors asserted in this election contest are those pled by Petitioners in their
24 election contest petition. If the WSDCC intended to raise allegations of error, misconduct,
25 or negligence, it should have filed a responsive pleading answering Petitioners' petition
26

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1 and asserting counterclaims or defenses.³ Civil Rule 24(c) requires that an intervening
2 party's motion to intervene must "be accompanied by a pleading setting forth the claim or
3 defense for which intervention is sought." CR 24(c). "The purpose of requiring an
4 intervenor to file a pleading is to place the other parties on notice of the claimant's position,
5 the nature and basis of the claim asserted, and the relief sought by the intervenor." *Dillard*
6 *v. City of Foley*, 166 F.R.D. 503, 506 (M.D. Ala. 1996) (interpreting the identical provision
7 in Federal Rule of Civil Procedure 24, and denying motion to intervene because it was not
8 accompanied by a pleading). Failure to file such a pleading is "not merely a technical lack
9 of compliance with the rules." *See Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 761
10 (2d Cir. 1968). A motion to intervene is itself not a pleading, and thus does not satisfy the
11 pleading requirement of Rule 24(c).⁴

12 Here, despite the requirements of Civil Rule 24(c), the WSDCC failed to plead the
13 claim it now wishes to pursue – or any other claims regarding allegedly offsetting errors in
14 King or other counties. The Court should not allow it to pursue claims that have never
15 been pled, just as defenses and claims not pled or raised by one of the original parties may
16 not be raised at trial. *See, e.g., Miotke v. City of Spokane*, 101 Wn.2d 307, 337 (1984);
17 *Dyson v. King County*, 61 Wn.App. 243, 245 (1991). The statutory deadline for filing an
18 election contest petition is now long since past. The WSDCC also failed to meet the 20-
19 day deadline under the Civil Rules for filing a responsive pleading asserting counterclaims
20 or affirmative defenses.

21 Although this alone should bar the WSDCC's claims, equitable reasons also
22 necessitate exclusion. Petitioners will suffer prejudice if such evidence is now admitted at

23
24 ³ A number of the County Respondents did file such responsive pleading, asserting such affirmative defenses.
See e.g., Response and Affirmative Defenses of Respondents Pierce County and Pat McCarthy, Pierce
County Auditor, dated January 14, 2005.

25 ⁴ Under Rule 7(a), the only documents that constitute a pleading are an answer, a reply to a counterclaim, an
26 answer to a cross claim, a third party complaint, and a third party answer. *See CR 7, see also Lybbert v.*
Grant County, 141 Wn.2d 29, 44 (2000).

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1 trial, particularly because the WSDCC has refused to turn over its evidence regarding these
2 issues during the course of discovery. It is now too late for the WSDCC to pursue
3 alternative theories or evidence, such as the rehabilitation of previously rejected ballots. If
4 the WSDCC has the right to set forth such evidence at trial despite this Court's and the
5 Supreme Court's decisions, so should the Petitioners – despite this Court's previous
6 dismissal of Petitioners' equal protection claims on the identical issue. Both sides would
7 then likely have to present evidence of hundreds and possibly thousands of allegedly
8 mistaken signature rejections and ask the Court to decide which were correct and which
9 were not, something the Washington Supreme Court has cautioned that Courts should not
10 do. *See McDonald v. Reed*, 153 Wn.2d 201, 204-05 (2004).

11 Finally, the WSDCC could not raise claims of offsetting ballots, even if it had
12 properly raised arguments of error or neglect by election officials. The election contest
13 statute only contemplates the offsetting of "illegal" votes under RCW 29A.68.110.
14 Nothing in the statute provides for offsetting mistake, errors, or neglect. *Compare* RCW
15 29A.68.011 and RCW 29A.68.080 *with* RCW 29A.68.110. A previously rejected
16 provisional ballot cannot possibly qualify as an *illegal* vote, because it was *never counted*
17 *as a vote in the first place*. Not only do the statutory procedural rules and the Civil Rules
18 now prevent such claims, but there is also no statutory mechanism to considering such
19 evidence under the contest statute because ballots rejected under the discretionary authority
20 of canvassing boards do not constitute illegal votes.

21 **D. Admitting Such Evidence Is Contrary to Public Policy and Establishes**
22 **a Dangerous Precedent for Future Election Contests**

23 To disregard the structure of the election contest statute and to allow courts to
24 revisit thousands of discretionary decisions made by county election officials to reject
25 ballots for signature match problems would set a dangerous precedent for future elections
26 and election contests. If a political party could contest an election based on claims of

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1 erroneous signature checking, any disagreement with an election official's discretionary
2 decision about any provisional or absentee ballots would give rise to an election contest.

3 If this type of claim could support an election contest, a party could attempt to
4 preserve an opportunity to contest an election simply by encouraging the widespread use of
5 provisional ballots by people not authorized to vote or operatives willing to cast multiple
6 provisional ballots as this would ensure that there were thousands of rejected provisional
7 ballots to litigate if the election is close.

8 Finally, not only are there public policy concerns related to reopening election
9 officials' discretionary decisions about previously rejected ballots, but it would be
10 impossible for a court to manage a trial of these issues. To evaluate WSDCC's claims (and
11 the corresponding claims by Petitioners, should these claims go forward), it appears the
12 Court would have to hear testimony from thousands of witnesses who disagree with a
13 county's decision to cancel their registration, reject their signature as a mismatch, and/or
14 reject their ballot as invalid. The Court may also likely be asked to pass on thousands of
15 signature mismatch decisions, now complained about by the WSDCC. This would
16 overburden any Court and make it impossible to administer any election contest.

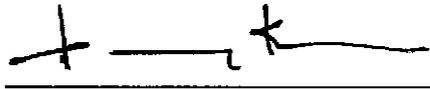
17 IV. CONCLUSION

18 For the reasons set forth above, Petitioners request that all evidence relating to
19 ballots rejected as a result of discretionary decisions such as signature comparisons be
20 excluded from the election contest proceedings. To the extent that the WSDCC raises
21 additional new categories of evidence relating to the discretionary decisions of election
22 officials, Petitioners may need to file additional motions to exclude such evidence as well
23 and should be entitled to present evidence of similar errors in discretionary decisions.

24
25 DATED this 13th day of April, 2005.

26
27 PETITIONERS' MOTION IN LIMINE TO EXCLUDE
RESURRECTED OR REHABILITATED PROVISIONAL
BALLOTS

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 

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

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PETITIONERS' MOTION IN LIMINE TO EXCLUDE
RESURRECTED OR REHABILITATED PROVISIONAL
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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 and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,
Respondents,
v.
Washington State Democratic Central
Committee,
Intervenor-Respondent,
v.
Libertarian Party of Washington State et al.,
Intervenor-Respondents.

No. 05-00027-3

**DECLARATION OF AMY
KOZIAK IN SUPPORT OF
PETITIONERS' MOTION IN
LIMINE TO EXCLUDE
EVIDENCE CONCERNING
PREVIOUSLY REJECTED
BALLOTS AND OTHER
"OFFSETTING ERRORS"**

AMY H. KOZIAK declares as follows:

I am an attorney at Davis Wright Tremaine LLP, attorneys of record for Timothy Borders et al., ("Petitioners"). I make the statements in this declaration based on personal knowledge, and if called and sworn as a witness in any proceeding, could and would testify competently thereto.

1. Petitioners provided their original responses to the WSDCC's discovery requests on February 22, 2005, and have continued to supplement such responses at the

1 request of the WSDCC. Specifically, the WSDCC requested that Petitioners produce all
2 evidence of errors, neglect, and illegal votes well in advance of the hearing date.

3 2. Attached as **Exhibit A** is a true and correct copy of WSDCC's Answer to
4 Interrogatory No. 21 and Request for Production Nos. 5 and 6 in response to Petitioners'
5 First Set of Discovery Requests (excerpted from the full set of discovery responses).

6 3. Attached as **Exhibit B** is a true and correct copy of the April 7, 2005 letter
7 from WSDCC's counsel to Petitioners' counsel regarding evidence of previously rejected
8 provisional or absentee ballots.

9 4. Attached as **Exhibit C** is a true and correct copy of the March 18, 2005
10 Seattle Post-Intelligencer by Gregory Roberts, *Democrats Still Looking for Votes – Just in*
11 *Case*, printed from the Seattle Post-Intelligencer website.

12 I declare under penalty of perjury under the laws of the State of Washington that
13 the foregoing is true and correct to the best of my knowledge and belief.

14
15 Executed at Seattle, Washington, this 13th day of April, 2005.

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18 _____
19 AMY H. KOZIAK
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EXHIBIT

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THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

TIMOTHY BORDERS, et al.,

Plaintiffs,

v.

KING COUNTY, et al.,

Defendants,

and

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,

Intervenor-Respondent.

NO. 05-2-00027-3

PETITIONER'S FIRST
INTERROGATORIES AND REQUESTS
FOR PRODUCTION TO
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE

**ANSWERS, RESPONSES &
OBJECTIONS**

TO: Intervenor-Respondent Washington State Democratic Central Committee
("WSDCC");

AND TO: Kevin J. Hamilton, Beth Colgan, and William C. Rava, Perkins Coie,
Attorneys for WSDCC.

ANSWERS, RESPONSES & OBJECTIONS
PETITIONER'S FIRST INTERROGATORIES AND
REQUESTS FOR PRODUCTION TO WSDC - 1

[15934-0006-000000/SE.050470.195]

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Fax: (206) 359-9000

1 voting in Washington and in another state, and (iv) by persons voting more than once in
2 Washington. If so, identify the documents and identify:
3

- 4
- 5 a. The person casting the vote and whether he or she was a felon, cast a
6 vote on behalf of a deceased person, voted in two or more states, or
7 voted more than once in Washington;
8
 - 9 b. The date that the county in which the person voted learned of the
10 person's status or conduct;
11
 - 12 c. Any facts indicating that the person voted in the Gubernatorial
13 Election;
14
 - 15 d. Any facts indicating which candidate the person voted for in the
16 Gubernatorial Election; and
17
 - 18 e. The precinct in which the vote was cast.
19

20
21 **ANSWER:** The WSDCC refers petitioners to the documents identified and
22 produced in response to Interrogatory Nos. 3, 5, 7 and 9. To the extent it identifies or
23 uncovers additional documents during discovery, the WSDCC will supplement its answer.
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29 **INTERROGATORY NO. 20:** Identify any communications you have had with any
30 person identified in response to the preceding interrogatory.
31

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33 **ANSWER:** The WSDCC objects to this request as duplicative of other requests, and
34 refers petitioners to its answers to Interrogatory Nos. 4, 6, 8 and 10, above.
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39 **INTERROGATORY NO. 21:** Identify all communications between you or anyone
40 acting on your behalf or in concert with you and persons whose absentee or provisional
41 ballots were initially rejected by any county because of a mismatched signature, no signature
42 on file, or no voter registration on file.
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1 **ANSWER:** To the extent this request relates to petitioners' equal protection claims
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3 relating to the submission of signature verification forms after November 16, 2004, the
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5 WSDCC objects to this request as beyond the scope of permissible discovery and not
6
7 reasonably calculated to lead to the discovery of admissible evidence. The Court has
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9 dismissed such claims. Otherwise, the WSDCC's investigation is ongoing and it will
10
11 supplement its answer as appropriate.

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14 **INTERROGATORY NO. 22:** Identify all documents recording, calculating,
15
16 showing, or analyzing any differences between (i) the total number of ballots cast in the
17
18 2004 General Election (and all recounts) and (ii) the number of ballots indicated as having
19
20 been voted for a gubernatorial candidate or excluded on some basis.
21

22 **ANSWER:** The WSDCC objects to this request to the extent it calls for the
23
24 production of documents protected by the attorney-client privilege and/or work-product
25
26 doctrine. The WSDCC refers petitioners to documents and information provided by the
27
28 various counties in response to discovery in this case and/or public records requests. To the
29
30 extent petitioners do not already have the information provided by the counties, the WSDCC
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32 will make the discovery responses and/or public records request responses available. To the
33
34 extent other non-privileged and responsive documents exist, the WSDCC will produce them.
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38 **INTERROGATORY NO. 23:** Referring to the Petition by Electors and Petition for
39
40 Writ of Mandamus and Other Relief attached as Exhibit A, please describe in detail the
41
42 factual basis for each of the contentions made in paragraphs 20, 29, 31, 32, 37, and 51 and
43
44 identify all documents supporting or otherwise relating to those allegations and all person
45
46 with knowledge of the factual basis for those allegations.
47

1 Observers or "voting protection team" members regarding the 2004 General Election or
2 Gubernatorial Election. The training given to or procedures used by such individuals has no
3 tendency to make any fact at issue in this action more or less likely. The WSDCC is not
4 producing documents in response to this request.
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10 **REQUEST FOR PRODUCTION NO. 5:** Produce all documents referring or
11 relating to persons whose absentee or provisional ballots were initially rejected by any
12 county because of a mismatched signature, no signature on file, or no voter registration of
13 file in the 2004 General Election.
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18 **RESPONSE:** To the extent this request relates to equal protection claims relating to
19 the submission of signature verification forms after November 16, 2004, the WSDCC
20 objects to this request as beyond the scope of permissible discovery and not reasonably
21 calculated to lead to the discovery of admissible evidence. The Court has dismissed such
22 claims. Otherwise, the WSDCC's investigation is ongoing and it will supplement its answer
23 as appropriate.
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32 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents shown to, given
33 to, or received from persons whose absentee or provisional ballots were initially rejected by
34 any county because of a mismatched signature, no signature on file, or no voter registration
35 on file in the 2004 General Election.
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40 **RESPONSE:** To the extent this request relates to equal protection claims relating to
41 the submission of signature verification forms after November 16, 2004, the WSDCC
42 objects to this request as beyond the scope of permissible discovery and not reasonably
43 calculated to lead to the discovery of admissible evidence. The Court has dismissed such
44
45
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47

1 claims. Otherwise, the WSDCC's investigation is ongoing and it will supplement its answer
2 as appropriate.
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7 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents containing,
8 reflecting, or referring to communications between David McDonald and Christine
9 Gregoire, Foster Pepper & Shefelman, or any person affiliated with those organizations
10 regarding the 2004 General Election or Gubernatorial Election.
11
12

13
14 **RESPONSE:** The WSDCC objects to this request as vague and potentially
15 overbroad in its reference to "all documents containing, reflecting, or referring to" the
16 identified communications. The WSDCC also objects to this request as beyond the scope of
17 permissible discovery and not reasonably calculated to lead to the discovery of admissible
18 evidence and seeking information protected as work product or by the attorney-client
19 privilege. With the exception of communications between Mr. McDonald and counsel for
20 the Secretary of State, as to which the WSDCC does not have any objections, the WSDCC is
21 not producing documents in response to this request.
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33 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents containing,
34 reflecting, or referring to communications between Jenny Durkan and Christine Gregoire or
35 Gregoire for Governor regarding the 2004 General Election or Gubernatorial Election.
36
37

38 **RESPONSE:** The WSDCC objects to this request as vague and potentially
39 overbroad in its reference to "all documents containing, reflecting, or referring to" the
40 identified communications. The WSDCC also objects to this request as beyond the scope of
41 permissible discovery and not reasonably calculated to lead to the discovery of admissible
42 evidence and seeking information protected as work product or by the attorney-client
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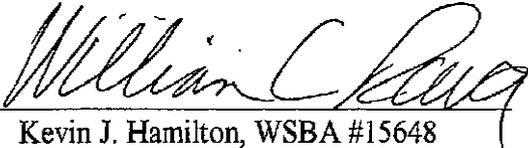
1 privilege. Further to an agreement between petitioners and the WSDCC, the WSDCC is not
2 producing documents in response to this request.
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6 **REQUEST FOR PRODUCTION NO. 9:** Please produce all documents
7 containing, reflecting, or referring to any communications between you and America
8 Coming Together ("ACT"), MoveOn.org, Western States Center, and any organizations
9
10
11 working to increase voter turnout or working to register voters.
12

13 **RESPONSE:** The WSDCC objects to this request as vague and potentially
14 overbroad in its reference to "all documents containing, reflecting, or referring to" the
15 identified communications. The WSDCC also objects to this request as beyond the scope of
16 permissible discovery and not reasonably calculated to lead to the discovery of admissible
17 evidence. To the extent such communications exist, they would have no tendency to make
18 any fact at issue in this action more or less likely. Further to an agreement between
19 petitioners and the WSDCC, the WSDCC is not producing documents in response to this
20 request.
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32 DATED: March 17, 2005.
33
34

35
36 **PERKINS COIE LLP**

37 By 
38 Kevin J. Hamilton, WSBA #15648
39 William C. Rava, WSBA #29948
40 Attorneys for the Washington State Democratic
41 Central Committee
42
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47

ANSWERS, RESPONSES & OBJECTIONS
PETITIONER'S FIRST INTERROGATORIES AND
REQUESTS FOR PRODUCTION TO WSDC - 28

[1.5934-0006-000000/SL050476.195]

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

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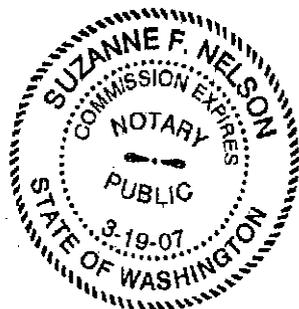
VERIFICATION

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Paul Berendt, being first duly sworn, upon oath, depose and states: That he/she an officer of the Washington State Democratic Central Committee in this lawsuit, that he has read the within and foregoing interrogatories and requests for production and answers thereto, knows the contents thereof, and believes the same to be true and correct to the best of his knowledge.

Paul Berendt

SUBSCRIBED AND SWORN to before me this 17th day of March 2005.



Suzanne F. Nelson
(Signature of Notary)

Suzanne F. Nelson
(Print or Stamp Name of Notary)
NOTARY PUBLIC in and for the State of
Washington, residing at Seattle
My Commission Expires: 3/19/07

EXHIBIT

B



1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
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April 7, 2005

VIA FACSIMILE

Amy H. Koziak, Esq.
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

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

Dear Amy:

I have and write in partial response to your April 6 letter regarding the WSDCC's discovery responses. I will respond more fully soon. As a professional courtesy, I again want to point out from the outset that most of what follows relates to King County, mirroring the focus of your discovery requests.

With respect to Interrogatory No. 13, Respondents have produced all communications requested in this interrogatory.

With respect to Interrogatory No. 18, the WSDCC has not yet identified illegal votes that it intends to present at trial, and therefore, no such list exists currently. The WSDCC has outstanding document requests to a number of counties who have not responded, or have not completely responded; we will likely be receiving additional responsive materials from those counties. As before, we will make such documents available for your inspection and copying. In addition, we are in the process of noting depositions that we expect will yield further responsive information. The WSDCC will supplement its response as required by the Rules and will comply with the recently issued scheduling order. Mindful of these obligations, it is our current intention to produce a list of illegal votes only after we have had an opportunity to vet the names.

[15934-0006-000000/SL050970.258]

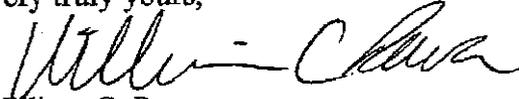
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Perkins Coie LP and Affiliates

Amy H. Koziak, Esq.
April 7, 2005
Page 2

With respect to Interrogatory No. 21 and RFP Nos. 5 and 6, Interrogatory No. 21 does not ask whether the WSDCC intends to "attempt to rehabilitate provisional ballots." Similarly RFP Nos. 5 and 6 do not ask for documents related to any such "attempts." The phrase first appeared in your March 24 letter and is vague and ambiguous. Nonetheless, to the extent the WSDCC's investigation uncovers evidence that provisional or absentee ballots were wrongly rejected by any county, it intends to argue that such votes should be counted. To the extent the WSDCC currently possesses any documents that might be responsive to these requests, we have already either produced them or made them available for inspection and copying. In addition, Petitioners received some arguably responsive documents directly from King County. To the extent the WSDCC has asked for additional documents that might be responsive to these requests from the counties, it has offered to enter into an agreement with Petitioners to copy each other on such requests. Petitioners have yet to respond to that request. To the extent the WSDCC comes into possession of such documents in the future, it will of course comply with its obligation to promptly supplement its answer.

Very truly yours,


William C. Rava

WCR/slb

EXHIBIT

C

SEATTLE POST-INTELLIGENCER

http://seattlepi.nwsourc.com/local/216525_ballots18.html

Democrats still looking for votes -- just in case

Provisional ballots tossed out in governor's race under scrutiny

Friday, March 18, 2005

By GREGORY ROBERTS
SEATTLE POST-INTELLIGENCER REPORTER

Even as Republicans are ferreting out any illegal votes they can find in the 2004 governor's election, Democrats continue looking to add any ballots that were wrongfully excluded by elections officials.

David McDonald, who is defending Democratic Gov. Christine Gregoire's 129-vote victory from a court challenge by Republican candidate Dino Rossi, said yesterday his side will ask King County elections officials why they tossed out some provisional ballots that apparently were filled out by legally registered voters.

"The thing that we've been doing almost all the time is trying to get people's legitimate votes counted," McDonald said of the wrangling over the election. "It seems to me the better exercise in democracy is to try to get people enfranchised, not disenfranchised."

But state Republican Party Chairman Chris Vance said that effort is an act of desperation.

"It just helps reinforce our case that this thing is so messed up that it's impossible to know who won the election," Vance said.

The Republicans' post-election research has focused on identifying felons who voted in violation of the state constitution, voters who cast two ballots and other illegalities. They have developed a list with more than 1,100 names of allegedly illegal voters and hope to use it in the court case.

The GOP assault has been directed largely at King County, which Gregoire carried by more than 150,000 votes.

Provisional ballots are issued to would-be voters on Election Day if their names do not appear on the roster when they show up at a polling place. Elections workers later check information the voter provides on a ballot envelope, and they count only those ballots cast by registered voters.

Nearly 33,000 provisional ballots were processed in King County in the November election, according to elections officials. Of those, 4,432 were thrown out for a variety of reasons, including mismatches with voter signatures on file or previous cancellations of voters' registrations.

The Democrats want to look at whether those 4,432 ballots were rejected appropriately, McDonald said. As a first step, he said, they're reviewing the cases of 208 voters whose ballots were excluded under the category "not registered, needed further research" as it appears on a post-election report, he said.

A preliminary check on about 10 of those names turned up five or six that seemed to match with names on a voter registration list, McDonald said.

King County Elections Superintendent Bill Huennekens said late yesterday that he would be surprised if a significant number of those 208 provisional voters could be positively identified on registration lists. Elections workers may judge a ballot improper for several reasons, he said, such as lack of a legible name or, for common names, absence of confirming information such as date of birth or address.

The provisional ballot envelopes are kept on file and can be re-examined, he said.

If valid votes were set aside because of errors by elections officials, McDonald said, the judge in the court case should be able to order them counted.

The good votes-bad votes exchange is part of the parties' positioning before the election trial in Chelan County Superior Court. Judge John Bridges has not set a trial date.

The Republicans have argued that if the number of improper votes exceeds the margin of victory, the result should be set aside. The judge in the case, John Bridges, has rejected that argument in pretrial hearings, saying the GOP needs to show that Gregoire apparently received enough improper votes to make the difference in the election.

But Bridges has not spelled out how Republicans may demonstrate that.

One argument the GOP has put forward is to apportion improper votes between the candidates according to the overall percentage each received in that electoral district, and then subtracting the results.

If that argument prevails, establishing the number of proper and improper votes could prove critical.

P-I reporter Gregory Roberts can be reached at 206-448-8022 or gregoryroberts@seattlepi.com

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1 3. On April 13, 2005, I caused the document listed below:

2 **Note for Motion for Special Setting**

3 **Petitioners' Motion in Limine to Exclude Evidence Concerning**
4 **Previously Rejected Ballots and Other "Offsetting Errors"**

5 **Declaration of Amy Koziak in Support**

6 **Proposed Order Granting Petitioners' Motion in Limine to Exclude**
7 **Evidence Concerning Previously Rejected Ballots and Other**
8 **"Offsetting Errors"**

9 to be filed with the Clerk of Chelan County Superior Court via Electronic Filing Legal
10 Services (E-Filing.com) which sent notification of such filing to the following persons,
11 with this Certificate to follow:

11 **Kevin Hamilton, Esq.**
12 Perkins Coie LLP
13 Attorneys for Washington State Democratic
14 Central Committee
15 1201 Third Avenue, Suite 4800
16 Seattle, WA 98101

11 **Thomas Ahearne**
12 For: Secretary of State Sam Reed
13 Foster Pepper & Shefelman
14 1111 Third Avenue, Suite 3400
15 Seattle WA 98101

15 **Dale M. Foreman**
16 Foreman, Arch, Dodge, Volyn &
17 Zimmerman P.S.
18 124 North Wenatchee Avenue, Suite A
19 P.O. Box 3125
20 Wenatchee WA 98807-3125

15 **Richard Shepard**
16 **John S. Mills**
17 For: Libertarians
18 Shepard Law Office, Inc.
19 818 S. Yakima Avenue, #200
20 Tacoma, WA 98405

19 **Gary Riesen**
20 Chelan County Prosecuting Attorney
21 PO Box 2596
22 Wenatchee WA 98807-2596

19 **Tim O'Neill**
20 Klickitat County Prosecuting Attorney
21 205 South Columbus Ave., MS-CH18
22 Goldendale WA 98620

22 **Barnett N. Kalikow, Esq.**
23 For: Klickitat County Auditor
24 Kalikow & Gusa PLLC
25 1405 Harrison Avenue NW, Suite 207
26 Olympia WA 98502

22 **L. Michael Golden**
23 Lewis County Senior Deputy Prosecuting
24 Attorney
25 345 West Main Street
26 Chehalis WA 98532

26 **Gorden Sivley**
27 **Michael C. Held**
28 Snohomish County Deputy Prosecuting
29 Attorneys

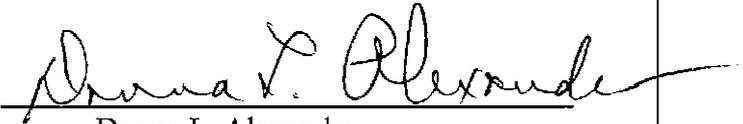
26 **Jeffrey T. Even, Asst. Attorney General**
27 For: Secretary of State Sam Reed
28 Attorney General's Office
29 PO Box 40100

1 2918 Colby Avenue, Suite 203
2 Everett WA 98201-4011

Olympia WA 98504-0100

3 I certify under penalty of perjury under the laws of the State of Washington that the
4 foregoing is true and correct.

5 DATED this 13th day of April, 2005, at Seattle, Washington.

6 
7 Donna L. Alexander

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Donna L. Alexander