

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

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

Petitioners,

v.

King County and Dean Logan, its Director of Records, Elections and Licensing Services, 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

**PETITIONERS' REPLY IN  
SUPPORT OF ITS MOTION TO  
STRIKE WSDCC'S REBUTTAL  
WITNESS LIST**

**I. INTRODUCTION**

Petitioners' move to strike WSDCC's Rebuttal Witness List because the list is untimely and inappropriate. The list is untimely because it was filed one week after the court imposed deadline. It is inappropriate because it does not identify true "rebuttal"

1 witnesses but rather witnesses providing testimony in support of the WSDCC's own case.  
2 For these reasons, the WSDCC's Rebuttal Witness List should be stricken.

## 3 II. DISCUSSION

4 As an initial matter, Petitioners fully agree that the Court has broad discretion in  
5 deciding whether to admit rebuttal evidence. But it is inappropriate for the WSDCC to call  
6 upon that discretion to excuse its failure to adhere to the Court's witness disclosure  
7 deadlines or smuggle primary witnesses into trial disguised as "rebuttal" witnesses.

8 The Court's pretrial scheduling order was not as murky as the WSDCC's Response  
9 might suggest. The pretrial scheduling order provides three specific witness identification  
10 dates: April 15, disclosure of witnesses by Petitioners; May 6, disclosure of witnesses by  
11 WSDCC; and May 13, disclosure of rebuttal witnesses. Contrary to the interpretation by  
12 WSDCC, the May 13, 2005 date refers to the deadline for rebuttal witness disclosure *by*  
13 *Petitioners*, not by WSDCC. Giving the schedule any other interpretation renders the  
14 schedule absurd. The WSDCC was aware of Petitioner's witnesses at the time it was  
15 required to identify its *own* witnesses on May 6. Granting the WSDCC an additional week  
16 – until May 13 – to identify "rebuttal" witness when the Petitioner's had not identified any  
17 witnesses in the interim (from May 6 to May 13) is illogical; the WSDCC's witnesses are  
18 not "rebutting" anything new or different from those it disclosed on May 6. Put  
19 differently, the WSDCC knew on April 15 all of Petitioner's witnesses, and it was required  
20 to identify *all* of its witnesses on May 6. The schedule was not intended to allow the  
21 WSDCC to sandbag and identify on May 13 witnesses who could have and should have  
22 been identified one week earlier. On this basis alone the WSDCC's entire list should be  
23 struck.

24 The WSDCC's own description of its first category "rebuttal" witnesses indicates  
25 that the witnesses were intended solely to support its case in chief. WSDCC concedes as  
26 much in its opposition to the motion to strike. WSDCC states:  
27

1 At the time WSDCC filed its Witness List . . . [it] did not  
2 know the name or names of the specific individuals with  
3 personal knowledge of the facts necessary to support  
4 WSDCC's claim of errors in King County. As discovery  
5 progressed in the week following the filing of WSDCC's  
6 initial witness list, WSDCC became aware of certain  
7 individuals who had personal knowledge to support these  
8 allegations. Therefore, the identical classification included  
9 in the Witness List was reproduced in the Rebuttal Witness  
10 List and WSDCC disclosed five fact witnesses who may  
11 testify regarding these allegations.

12 See WSDCC's Opposition at 3-4.

13 This passage confirms what Petitioners argued in their motion to strike – not only  
14 that the submission of witnesses was a week late, but that many of the witnesses  
15 designated by WSDCC are, in fact, *primary* witnesses.

16 Finally, it is clear from the witness descriptions of WSDCC's latter two witness  
17 groups that WSDCC has named fact witnesses as "rebuttal witnesses" to the theories of  
18 Petitioners' experts. The WSDCC describes both groups of individuals as persons "whose  
19 votes were not counted by King County," clearly designating the individuals as fact  
20 witnesses. Even if WSDCC's list had been submitted in a timely manner, such fact  
21 witnesses are not appropriate rebuttal witnesses to expert testimony, and should be  
22 stricken.

23 DATED this 20<sup>th</sup> day of May, 2005.

24 Davis Wright Tremaine LLP  
25 Attorneys for Petitioners

26 By  #35940  
27 Harry J. F. Korrell  
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Robert J. Maguire  
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1           3.     On May 20, 2005, I caused the documents listed below:

2                   **Petitioners' Reply in Support of its Motion to Strike WSDCC's**  
3                   **Rebuttal Witness List**

4                   **Certificate of Service**

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

8     **Kevin Hamilton, Esq.**  
9     Perkins Coie LLP  
10    Attorneys for Washington State Democratic  
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7 I certify under penalty of perjury under the laws of the State of Washington that the  
8 foregoing is true and correct.

9 DATED this 20<sup>th</sup> day of May, 2005, at Seattle, Washington.

10   
11 \_\_\_\_\_  
12 Donna L. Alexander