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May 19, 2005

The Honorable John E. Bridges
Chelan County Superior Court
401 Washington Street
Wenatchee, WA 98807

Re: Timothy Borders, et. al v. King County, et. al.
Chelan County Case No. 05-2-00027-3

Your Honor:

There is a telephonic hearing scheduled for tomorrow morning at 10:00 a.m. at which I intend to appear for the Lewis County Auditor, who remains a party to the case. It is my understanding that the Court issued citations to all 39 County Auditors to appear at the hearing on May 23, 2005, at 9:00 a.m. The Court's intention on issuing these citations appear to be unclear to several County Prosecuting Attorneys and remains unclear in my mind as well.

I request that the Court address the issue as to whether the Court intends to enforce the citations as issued or whether an additional subpoena or notice to attend trial is required to compel.

Sincerely yours,

L. Michael Golden
Sen. Dep. Pros. Atty.

LMG/jlk

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THE HONORABLE JOHN E. BRIDGES

STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

TIMOTHY BORDERS, et. al., Petitioners, v. KING COUNTY, et. al., Respondents and WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, Intervenor-Respondent.	NO. 05-2-00027-3 SECRETARY OF STATE'S RESPONSE TO PETITIONERS' MOTION TO STRIKE WSDCC'S REBUTTAL WITNESS LIST

COMES NOW Respondent, Sam Reed, as Secretary of State of the State of Washington (Secretary Reed or the Secretary), by and through the undersigned counsel, and responds as follows to Petitioners' Motion To Strike WSDCC's Rebuttal Witness List.

By their motion, petitioners ask this Court to strike the entire list of potential rebuttal witnesses offered by the Intervenor. Petitioners contend that such witnesses are not truly offered for the purpose of "rebuttal". Secretary Reed respectfully suggests that any determination as to whether testimony by these witnesses would properly qualify as "rebuttal"

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evidence should await the rebuttal stage of trial, for evaluation at that time in light of the evidence that may have been offered up to that time.

DATED this 19th day of May, 2005.

ROB MCKENNA
Attorney General

Maureen Hart, WSBA No. 7831
Solicitor General

/s/_____
Jeffrey T. Even, WSBA No. 20367
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STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

TIMOTHY BORDERS, et. al., Petitioners, v. KING COUNTY, et. al., Respondents, and WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, Intervenor-Respondent.	NO. 05-2-00027-3 SECRETARY OF STATE'S RESPONSE TO WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PETITIONERS' CLAIMS OF DUAL VOTES

COMES NOW Respondent, Sam Reed, as Secretary of State of the State of Washington ("Secretary Reed" or "the Secretary"), by and through the undersigned counsel, and responds as follows to the Washington State Democratic Central Committee's Motion for Partial Summary Judgment on Petitioners' Claims of Dual Votes ("Motion").

I. INTRODUCTION

The Democrat Intervenor's Motion calls upon this Court to determine whether, if a single voter casts two votes in the same election, only one such vote should be declared to be an "illegal vote" for purposes of an election contest, or whether both votes should be declared illegal. For the reasons set forth below, the Secretary respectfully concurs with the

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Intervenors that only one such vote is an "illegal vote" under our State's election contest statute.

In their respective pleadings, the Democrat Intervenors and Petitioners also reference the sufficiency of evidence that may be offered to prove that any particular voter voted twice in Washington's November 2004 general election. Motion at 4, 7; Petitioners' Brief in Response to WSDCC's Motion on Dual Votes at 2-6 ("Petitioners' Brief"). The Secretary respectfully concurs with Petitioners that the sufficiency of evidence should be determined at trial and not on this motion.

II. ARGUMENT

A. Voters May Cast A Single Vote In Any Washington Election, And Only The Second Or Subsequent Washington Vote is An "Illegal Vote" Under RCW 29A.68.020(5)

"Illegal votes" are listed by statute among the grounds upon which a voter may contest the results of an election. RCW 29A.68.020(5). The Legislature has defined "illegal votes" as including, "More than one vote cast by a single voter". RCW 29A.68.020(5)(a)(i). On this Motion, Democrat Intervenors contend that if a single voter casts more than one ballot in the same election, only *one* of the resulting votes is an "illegal vote" within the meaning of this statute. Motion at 5. Petitioners, by contrast, contend that *both* such votes should be deemed to be "legal votes". Petitioners' Brief at 6. The Secretary concurs with the Democrat Intervenors, with a limited exception discussed in part "B" below relating to ballots allegedly cast by the same voter in two different states.

State law establishes a framework for administering elections that is designed to detect instances in which a voter returns more than one ballot, with the objective of counting only one of them. The Legislature has specified that, "A registered voter who has requested an absentee ballot for a primary or special or general election but chooses to vote at the voter's precinct polling place in that primary or election shall cast a provisional ballot. The canvassing board shall not count the ballot if it finds that the voter has also voted by absentee

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ballot in that primary or election." RCW 29A.44.090. Similarly, the Secretary has adopted administrative rules governing provisional ballots, explaining that if "the auditor finds that an absentee voter who voted a provisional ballot at the polls has also voted an absentee ballot in that primary or election, the provisional ballot will not be counted." WAC 434-253-047(6). Counties are required to mark poll books in such a way that poll workers can determine whether a voter has been issued an absentee ballot and to issue provisional ballots (rather than regular polling place ballots) to such voters. WAC 434-253-043(2).

The clear objective of both the statute and the administrative rules is to permit voters to vote once, and only once. They establish a procedure designed to safeguard against the possibility that a voter might attempt to vote both by absentee and at the polls, specifying that the result in such a situation is to tabulate only one ballot cast by a particular voter.

The election contest statute must be construed similarly. During the election itself, election administrators are instructed to take steps designed to detect more than one ballot from an individual voter, specifying that one, and only one, such ballot is to be counted. RCW 29A.44.090; WAC 434-253-047. Having adopted this approach to the administration of the election, it would make no sense to conclude that if an election contest is filed, the court should invalidate *both* ballots. The court's task in an election contest is to determine whether any cause for that contest has been proven. RCW 29A.68.050 ("The court shall . . . determine such contested election by the rules of law and evidence".) It would make no sense for a different rule of law to apply to this court's review of a contested election than applied to the actions of election administrators when conducting the election in the first instance.

It therefore follows that when the Legislature defined "illegal votes" for purposes of a contest action as including "more than one vote cast by a single voter",[1] it did not establish that a ballot legally counted under RCW 29A.44.090 would become an illegal vote after a

[1] RCW 29A.68.020(5)(a)(i).

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contest action is filed. To reach the contrary conclusion would be to hold that a vote legally tabulated in the first instance becomes illegal when a contest action is filed.

As noted in the deposition testimony of Secretary Reed quoted in Intervenor's Motion, it is not unusual for a few voters to unintentionally return more than one ballot, such as instances in which a voter forgets returning an absentee and then votes a provisional ballot at the polls. Motion at 3-4 (quoting Rava Declaration, Ex. E, Deposition of Sam Reed at 125, ll. 3-7). No party to this action has alleged that a vote was illegal if the voter returned more than one ballot, but the county election officials detected the duplication and counted only one vote. The thrust of Petitioners' argument appears to be that a voter loses his or her right to cast a single ballot if, but only if, the election official fails to detect the return of more than one ballot.

The right to vote is constitutionally protected. *Brower v. State*, 137 Wn.2d 44, 68, 969 P.2d 42 (1998) ("The right to vote is fundamental"). The election contest statute does not indicate that any voter is to be denied this right. Even if the Legislature might have the option of determining that this right should be forfeited based on specific voter conduct,[2] the Legislature has not clearly expressed an intention of denying the right to vote *at all* based upon the return of more than one ballot. The Legislature has only clearly expressed an intention to invalidate a voter's second or subsequent ballot. RCW 29A.68.020(5)(a)(i). Given the constitutional nature of the right involved, a more clear statement of an intent to disenfranchise a voter is required.

B. The Validity Of Votes Cast By Voters Who Allegedly Voted In More Than One State Requires An Inquiry Into The Voter's Residence, Which Was Not Timely Pursued

If the voter casts two ballots in two different jurisdictions, this can also raise the question of whether the Washington ballot was legal (or illegal) and whether the non-

[2] *See, e.g., State v. Schmidt*, 143 Wn.2d 658, 681, 23 P.3d 462 (2001) (Madsen, J., concurring) (noting that the right to vote can be denied based upon felony conviction).

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Washington ballot was illegal (or legal) based on residency. The answer to this question logically depends upon determining in which jurisdiction the voter was legally qualified to vote. The constitutional qualifications for voting include a requirement that the voter reside within the jurisdiction. Const. art. VI, § 1. Logically, if a voter has cast a ballot in more than one state, he or she can (at most) be a legal resident of only one of them (at least assuming that the states operate from the same legal definition of "residence"). Since, as discussed above, Washington law treats only the second or subsequent vote by a voter who casts more than one ballot as an "illegal vote", it follows that if the voter was qualified to vote in Washington, the single Washington vote would be valid; the illegal vote would be the one cast in the other jurisdiction. The reverse is also true.

Since the burden of proof rests with the party challenging the vote in question, it further follows that in order to prove that the Washington ballot cast by a voter who votes in more than one state is an "illegal vote" under Washington's election contest statute, the challenger must prove that the voter is not a Washington resident. Absent evidence as to the voter's true residence, the challenging party would lack a factual basis upon which to support the challenge.[3]

The Democrat Intervenors contend that a vote cast in another state is irrelevant to the determination of whether a vote cast in Washington is an "illegal vote" under Washington's election contest statute. Motion at 7 (contending that "such a 'dual vote' . . . has no impact on an election for statewide office such as the Office of Governor"). Washington law does not turn such a blind eye to double voting. Intervenor's logic would suggest that a voter could potentially cast ballots in all fifty states without implicating any legitimate concern of any of

[3] It might also be argued that such a challenge is barred by RCW 29A.68.020(5)(b) unless the voter's registration was challenged prior to the election. This argument would be based upon the observation that, at least in part, the challenge would be based upon a determination of residence. The Court need not reach that issue unless or until presented with evidence supporting the contention that a voter proven to vote both in Washington and in another state actually resided in the other state.

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them. Rather, a state and its people have a clear interest in the integrity of its own elections and can and should guard against the dilution of votes by nonresidents. Accordingly, the Secretary respectfully submits that the inquiry depends upon determining the voter's correct state of residence, and the court should reject an analysis based upon the view that Washington has no interest in guarding against dual votes by nonresidents.

C. The Sufficiency Of Evidence Offered In Support Of A Contention That A Single Voter Cast More Than One Ballot Should Be Evaluated At Trial And Not On Pretrial Motion

While it is appropriate for this Court to consider and determine, before trial, the legal question of whether both votes, or only one vote, cast by an alleged dual voter would be an "illegal vote" under our state's election contest statute, the same cannot be said for determining the sufficiency of evidence before the evidence is offered. The Secretary accordingly concurs with Petitioners that the evaluation of the evidence they offer in support of a contention that some voters voted more than once should await next week's trial. Petitioners' Brief at 2-6.

This includes the evaluation of any evidence that Petitioners might offer regarding voters who allegedly improperly cast provisional ballots directly into tabulating equipment. Provisional ballots, unlike other ballots cast at the polling place, are to be returned to election officials for further evaluation prior to deciding whether to tabulate them. WAC 434-253-047 ("A provisional ballot cannot be counted unless the voter's name, signature, and the date of birth, if available, matches a voter registration record"). If Petitioners contend that a voter both cast a provisional ballot by feeding it directly into a tabulator and that the same voter also voted by other means, the court's evaluation of the claim would depend upon the evidence offered in its support. If, as the Democrat Intervenors suggest is likely, this evidence depends upon evidence of "voter crediting," then the issue previously addressed in this Court's May 2 ruling on "voting crediting" evidence would arise. *See* Motion at 4 (citing Rava Decl., Ex. G

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(Verbatim Report of Proceedings at 5)). The proper time to address the totality of Petitioners' evidence, however, would be when the evidence is offered.

III. CONCLUSION

For these reasons, the Court should hold that *one* vote cast by any voter proven at trial to have cast more than one vote for governor in Washington's 2004 general election is valid, and any second or subsequent vote is an "invalid vote" as our election contest statute is currently worded. The sufficiency of evidence offered in support of a contention that a single voter cast more than one such vote should be evaluated at trial and not on pretrial motion.

DATED this 19th day of May, 2005.

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STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

TIMOTHY BORDERS, et. al., Petitioners, v. KING COUNTY, et. al., Respondents and WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, Intervenor-Respondent.	NO. 05-2-00027-3 SECRETARY OF STATE'S RESPONSE TO PETITIONERS' MOTION TO COMPEL

COMES NOW Respondent, Sam Reed, as Secretary of State of the State of Washington ("Secretary Reed" or "the Secretary"), by and through the undersigned counsel, and responds as follows to Petitioners' Motion to Compel. By their Motion, Petitioners seek to compel the production of certain documents from King County.

Based upon the response filed by King County, the Secretary anticipates that this motion will be rendered moot, and thus no further response is required.

DATED this 19th day of May, 2005.

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