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THE HONORABLE T.W. SMALL
Noted for Hearing
Friday, January 21, 2005, 1:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

 Petitioners,

 v.

King County et al.,

 Respondents,

and

Washington State Democratic Central
Committee,

 Intervenor-Respondent.

NO. 05-2-00027-3

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE'S MOTION
FOR BRIEFING SCHEDULE AND
STAY OF PROCEEDINGS

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I. INTRODUCTION

Petitioners brought this Election Contest seeking a new special election for the position of Governor of the State of Washington. After the canvassing boards of all 39 counties certified their election returns, it was determined by the Secretary of State on November 30, 2004 that Petitioner Dino Rossi lost the election by 129 votes to Christine Gregoire. On January 11, 2005 the Legislature certified Ms. Gregoire's election and she will assume office January 12, 2005. Petitioners do not seek to prove that Mr. Rossi won the election for Governor. Rather, they seek to prove that the winner of the election cannot be determined. Petitioners apparently intend to engage in broad ranging discovery in an effort to find evidence that will support their contention. This discovery will necessarily burden the budgets and resources of county governments throughout the state and, in many cases, interfere with their ability to conduct their next scheduled elections on February 6, 2004.

The relief sought by Petitioners does not appear to be permitted by the Washington Constitution and does not appear to be a remedy that the Legislature has authorized in connection with election contests. The case Petitioners seek to prove does not meet the high bar that is required in order to win an election contest. In addition, because this election involves an executive branch office named in Article III of the Constitution and is elected by voters statewide, it does not appear that this Court has jurisdiction over an election contest involving the office. As a practical matter, given the nature and novelty of these issues that are presented by Petitioners' contest petition and the likelihood that one or more parties will appeal decisions made by this Court, the Supreme Court will be the final arbiter of the issues and the outcome of that Supreme Court action will determine to what extent, if any, this contest can and should proceed.

1 Before burdening the numerous respondents with extensive, potentially burdensome,
2 discovery and expedited procedures, the Court should consider addressing these
3 determinative, purely legal, issues before proceeding further with the case. Therefore, this
4 motion requests the Court (a) to establish a briefing schedule for the parties to address these
5 issues and (b) to stay all other aspects of the case pending final resolution of the issues by
6 the Supreme Court.
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12 II. SPECIFIC RELIEF REQUESTED

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15 Intervenor-Respondent requests that the Court stay Petitioners' Motion for Expedited
16 Discovery, and all further proceedings, until the Court has resolved the following
17 fundamental questions of law (together with any other threshold questions that the Court
18 deems appropriate):
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23 (1) The Constitution states: "Contested elections [for Governor] shall be decided by
24 the legislature in such manner as shall be determined by law." Washington Const., art. III,
25 § 4. Given this provision, is RCW 29A.68, *et seq.*, providing generally for the resolution of
26 election contests, a permissible delegation by the Legislature of authority to the judiciary as
27 applied to contests involving the office of the Governor?
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33 (2) If RCW 29A.68, *et seq.* is a permissible delegation, then 29A.68.020 requires that
34 RCW 29A.68.011 be followed in terms of initiating the action. RCW 29A.68.011 requires
35 that a contest be initiated by the filing of an affidavit of elector with "the appropriate court."
36 Is the Chelan County Superior Court the "appropriate court" for initiating a contest of a
37 constitutional statewide office or must the action be initiated in the Supreme Court, allowing
38 the Supreme Court to consolidate actions and direct further proceedings efficiently? (In this
39 regard it is significant to note that four *other* election contests relating to the Governor's
40 election have already been filed, three in the Supreme Court, and that the Supreme Court
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WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE'S MOTION FOR
BRIEFING SCHEDULE AND STAY OF
PROCEEDINGS - 2

[15934-0006/SL050120.038]

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1 Clerk has indicated that the Supreme Court will wait until the filing period for contests
2 expires before determining how to proceed with the contests.)
3

4 (3) RCW 29A.68, *et seq.* does not authorize the Court to order a new election as a
5 remedy in an election contest. Moreover, Article III, Section 1 of the Constitution requires
6 that legislators and the statewide officers be elected at the same time and place. Other
7 constitutional provisions are fundamentally inconsistent with the proposed and
8 unprecedented special election for Governor. In these circumstances, is the sole remedy
9 sought by Petitioners—a new election—within the Court's power to grant?
10

11 (4) Finally, RCW 29A.68.110 expressly requires that before an election can be set
12 aside it must be proven that illegal votes were cast and that after deducting any illegal votes
13 given to Christine Gregoire from her total vote and deducting any illegal votes given to Dino
14 Rossi from his total vote, the results of the election would be reversed. Given this limitation
15 on the Court's authority to set aside an election, does Petitioners' apparent intent only to
16 prove a series of administrative errors in the conduct of the election form a proper
17 foundation for an election contest under the statute, or does it indicate a de facto want of
18 prosecution warranting dismissal of the action?
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33 III. FACTUAL BACKGROUND

34 The counting of the ballots in Washington's 2004 gubernatorial election was
35 completed on December 30, 2004 when Secretary of State Sam Reed announced the tally of
36 the certified results from all 39 counties and declared Christine Gregoire the Governor-Elect.
37 On January 11, 2005, the Washington legislature certified the results of the election and
38 issued a Certificate of Election to Governor Gregoire, declaring her "duly elected to said
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1 office as appears from the official returns of said election as canvassed and certified in the
2 manner provided by law." Declaration of William C. Rava in Support of Washington State
3 Democratic Central Committee's Motion for Briefing Schedule and Stay of Proceedings and
4 Opposition to Petitioners' Motion for Expedited Discovery ("Rava Decl.") ¶ 2, Ex. A.
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9 Petitioners filed this election contest in Chelan County Superior Court on January 7,
10 2005, naming as respondents all 39 Washington counties, the counties' Auditors, King
11 County election officials, the Secretary of State, the Speaker of the Washington State House
12 of Representatives and the Lieutenant Governor. Petitioners ask the Court to invalidate the
13 certified results of the election, to remove Governor Gregoire from office, and to order the
14 Secretary of State and all 39 counties to conduct a new special election for the office of
15 Governor.
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22 There are, at present, four *other* election contests that have been filed in two *other*
23 courts in Washington over this election. Three election contest actions have been lodged
24 with the Supreme Court – two of which predated the filing of this election contest in this
25 Court and one of which was filed on January 10, 2005. Rava Decl. ¶ 3. The Washington
26 Democrats have been advised that the Supreme Court Clerk's Office has deferred action on
27 those contests until the close of the filing period for such election contests, apparently in the
28 interests of judicial efficiency. *Id.* One other election contest action was filed in Kitsap
29 County on January 10, 2005, where it is currently pending. *Id.* Although the Secretary of
30 State has appeared in that litigation, no further proceedings have occurred.
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IV. ARGUMENT AND AUTHORITY

A. A Stay of Proceedings Is Appropriate Pending Final Resolution of the Questions Set Forth Above.

This Court has the "inherent power to stay its proceedings where the interests of justice so requires." *King v. Olympic Pipeline*, 104 Wn. App. 338, 350 (2000). *See also Chambers v. Nasco, Inc.*, 501 U.S. 32, 43 (1991) (inherent powers of courts are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"). Factors favoring a stay include the temporary or limited nature of the stay and the potential for the stay to encourage judicial economy and protect the public interest. *See generally King*, 104 Wn. App. 338 (requiring the lower court, on remand, to consider the fact that the stay sought was limited). Each of those factors supports the WSDCC's request for a stay.

The requested stay is limited to the time required to resolve questions regarding the permissible scope of judicial authority in this contest. The Court's local rules allow for an expeditious five-day briefing schedule, *see* Local Rule 7(b)(1)(C), and the Court has the authority to set an appropriate briefing schedule that accommodates the broad range of parties before the Court *and* that takes into account the need for prompt resolution of these issues and this proceeding. Although it is likely that one or more of the parties may appeal decisions by this Court on these issues, the Washington Supreme Court has previously heard matters related to this election on an expedited basis. *See Rava Decl.* ¶ 4. Therefore, even if this Court and the Washington Supreme Court were to resolve the questions regarding jurisdiction, venue and remedy in favor of Petitioners, any stay should be brief. Second, a

1 stay favors both judicial economy and the public interest. Absent a stay, Respondents will
2 be subjected to litigation that may be mooted by a resolution of questions regarding the
3 permissible scope of judicial authority in this contest. *See generally* Opposition to
4 Expedited Discovery. Not only will this Court's time and the parties' time have been wasted,
5 State and county tax dollars also will have been expended unnecessarily. Under these
6 circumstances, a stay is appropriate.
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13 **V. CONCLUSION**

14 For the reasons set forth above, the WSDCC respectfully requests that the Court stay
15 this action pending resolution of these potentially dispositive issues.
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17 DATED: January 12, 2005.
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