THE HONORABLE T.W. SMALL
Noted for Hearing
Friday, January 14, 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 OPPOSITION TO PETITIONERS' MOTION FOR EXPEDITED DISCOVERY

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I. INTRODUCTION

Petitioners ask this Court to do what has never been done in the history of this State – overturn the results of a Governor's race and eject a sitting Governor from office. They do so with no proof of fraud or illegality – as required by the election contest statute, RCW 29A.68, *et seq*. Rather, they seek to use the Court as a forum to conduct discovery in the hopes that they can find proof. Petitioners seek broad discovery, on an expedited basis, from every county in the State and from numerous unnamed election officials across the State. The Court should deny Petitioners' Motion for Expedited Discovery ("Motion") (a) because it is based on the flawed assumption that parties to an election contest are entitled to the far-reaching discovery permitted under the Civil Rules and (b) because there are several fundamental predicate jurisdictional issues that the Court should address before subjecting a broad range of county and state officials to expensive and burdensome discovery.

First, as the Washington Supreme Court has repeatedly held, the rules that control election contests are *only* those rules set forth in the statutes authorizing the contest, RCW 29.68A, *et seq*. Those statutes set forth the manner and procedure for the tender of evidence. Notably, Petitioners fail to cite any authority from these statutes to support their Motion. The statutes do not contemplate the kind of broad fishing expedition sought by the Petitioners to prop up their otherwise unsupported allegations.[1]

Second, even if this Court were to read RCW 29.68, *et seq*. to permit some limited discovery in an election contest, the Court should stay Petitioners' Motion for expedited

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[1] For example, many of Petitioners allegations regarding illegal votes are precluded by RCW 29A.68.020(5)(b). This statute requires *pre-election* challenges to all improperly registered voters. RCW 29A.68.020(5)(b).

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discovery until the Court has resolved the fundamental questions of law applicable to this action that, if resolved against Petitioners, will make Petitioners intended discovery irrelevant. These issues include:

> (1) whether this Court, or any court, has jurisdiction over Petitioners' Election Contest given the Constitution's provision that "Contested elections for [Governor] shall be decided by the legislature in such manner as shall be determined by law." Art. III, § 4;
>
> (2) if this election contest may be considered by a court, whether this Court is the "appropriate court" in which an affidavit of elector must be filed to commence an election contest as required by RCW 29A.68.011, or whether a contest involving a statewide office must be initiated by filing an affidavit in the Supreme Court;
>
> (3) whether the various allegations alleged by the Petitioners are within the limited causes specified in RCW 29A.68.020 for which an elector is permitted to initiate an election contest and, if they are not, whether any discovery should be permitted on these issues; and,
>
> (4) whether the relief sought by Petitioners – an unprecedented new special election for Governor – is available under the Washington State Constitution or applicable state law.

Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC") is simultaneously filing with the Court its Motion for Briefing Schedule and Stay of Proceedings ("Motion for Briefing Schedule") which, if granted, will permit these fundamental issues to be quickly and fully resolved and, if necessary, reviewed by a higher court before the counties and parties are put to unnecessary expense. Intervenor-Respondent respectfully submits that until the Court has resolved these predicate – and fundamental – questions of law presented by the Petition, it would be unduly burdensome on the counties, and the taxpayers who pay the counties' bills, to subject every county and numerous election officials to potentially unnecessary, hasty, written discovery and depositions.

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II. RELIEF REQUESTED

Intervenor-Respondent WSDCC respectfully requests that the Court deny Petitioners' Motion for Expedited Discovery. Alternatively, WSDCC requests the Court to stay discovery and defer consideration of Petitioners' motion until the Court has resolved the jurisdictional and predicate legal questions identified in WSDCC's Motion for Briefing Schedule.[2]

III. FACTUAL BACKGROUND

Petitioners filed this election contest on January 7, 2005, seeking to overturn the results of the 2004 election for Washington Governor. The Washington Legislature has certified the results of the election, in which Governor Christine Gregoire prevailed. Declaration of William C. Rava ("Rava Decl.") ¶ 2, Ex. A.

Simultaneously with the filing of the contest, and before serving any of the many named Respondents, Petitioners moved to expedite discovery. Motion at 2. Petitioners have issued broad-ranging "interrogatories and requests for production" to at least one county to date (and apparently intend to serve others) and also "seek to depose certain County and State officials and their employees." Motion at 4-5; Rava Decl. ¶¶ 7-8, Ex. E. Petitioners assert broadly that "individuals have been investigating and reporting to [Petitioners] the specific mistakes, errors, and instances of neglect and wrongful conduct." These allegations have been widely asserted and often repeated in the media. Yet, neither the Election Contest Petition ("Petition") nor the Affidavit of Chris Vance in Support of Election Contest Petition ("Vance Affidavit") identify particular instances of fraud or neglect by a specific election

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[2] Under the Local Rules, Opposition to Petitioners' Motion is due today at noon. LR 7(b)(1)(C). WSDCC has filed this Opposition in order to comply with this rule, although the Court has not yet ruled on the WSDCC's stipulated Motion to Intervene. If the Court deems it necessary, the WSDCC will re-submit this Opposition if and when the Motion to Intervene is granted.

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official or voter. To the contrary, Petitioners themselves claim to need discovery in order to do so. Vance Affidavit ¶ 4; Motion at 2.

As of the date of this Opposition, of the forty-two named Respondents, which include auditors and election officials in every County in the State of Washington, less than a dozen have entered a Notice of Appearance. Rava Decl. ¶ 9. No notice of the hearing of the contest by any "appropriate court" has issued pursuant to RCW 29A.68.040. Yet, before these fundamental predicates are met, Petitioners ask the Court to "[c]ompel[] responses to its requests for production of documents and its interrogatories within 10 calendar days of service of such requests and interrogatories," and "leave to take depositions in this matter immediately on two days' notice to the deponent." Motion at 4.[3]

Meanwhile, both Petitioners and the WSDCC have already sought, via the Public Disclosure Act ("PDA"), certain documents related to the 2004 gubernatorial election from county auditors and election officials throughout the State. Rava Decl. ¶ 5. Several of these officials have responded that, because of the press of other matters including forthcoming special elections in their respective counties, they will be unable to respond to the PDA requests until mid-February or even March. *Id.* ¶ 5, Ex. D. This is well beyond the time Respondents seek for the close of discovery under their expedited schedule. Motion at 4 (written discovery completed by January 20, 2005 and depositions to be taken immediately on two days' notice). In a number of counties, arrangements for special elections in February are underway, making expedited discovery responses and shortened-notice

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[3] The discovery requests served by the Petitioners are extensive, encompassing thirty-three interrogatories, and eighteen requests for production. Rava Decl.¶ 7, Ex. E. If served on all thirty-nine counties, as Petitioners indicate in their letter to this Court that they may do, there would be 1,287 interrogatories pending and 702 requests for production, all to be answered in ten (10) days on the schedule Petitioners' request. *Id.* ¶¶ 7-8. Many of the individual requests appear on their face to be objectionable as burdensome or seeking protected voter information. *Id.*¶ 7, Ex. E.

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deposition of senior election officials even more problematic. Further, to the extent this Court allows discovery, counties may be forced to retain (and pay) outside counsel. It is in the public's interest to resolve predicate issues of law and jurisdiction, and to set the parameters of a proper challenge before requiring the public to finance this exercise.

IV. ARGUMENT AND AUTHORITY

A. Election Contests are Governed Exclusively by the Procedures Set forth in RCW 29A.68, *et seq.* and Are Not Governed by the Civil Rules

An election contest is a special proceeding, created by statute, and its procedures are strictly and exclusively governed by those statutes. *Becker v. Pierce*, 126 Wn.2d 11, 18 (1995) ("Early this century we clearly established that the right to contest an election 'rests solely upon, and is limited by, the provisions of the statute relative thereto.'") (quoting *Quigley v. Phelps*, 74 Wash. 73, 75 (1913)); *Hatfield v. Greco*, 87 Wn.2d 780, 782 (1976) ("The procedure involved herein is a special procedure provided by statute. The rule is that, when a remedy is purely statutory in character, the methods of procedure provided in the statute are exclusive and mandatory, and are to be strictly construed.") (interpreting appeal requirements under predecessor to RCW 29A.68.011); *Malinowski v. Tilley*, 147 Wash. 405, 407 (1928) ("[T]he right to hear and determine an election contest is not ordinarily a judicial function of the courts, and can be exercised by them *only when and to the extent which* the right is conferred by statute.") (emphasis added); *State ex rel. Quigley v. King County*, 71 Wash. 503, 506 (1913) ("The right to a contest such as here sought to be reviewed rests solely upon, *and is governed by*, the provisions of the particular statute providing therefor.") (emphasis added).[4] Parties in election contests simply are not entitled to the discovery

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[4] This longstanding Washington rule limiting the procedures in election contests to those specified in the governing statutes is in accord with commentary and authority from other jurisdictions that appropriately prevent election contests from being conducted in the same manner as

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available to civil litigants, and are limited to the procedures outlined in RCW 29A.68, *et seq.* for the tender of evidence. *State ex rel. Quigley*, 71 Wash. at 506.

The Civil Rules themselves reject the notion that special proceedings such as election contests permit the broad-ranging discovery allowed by CR 26 for civil actions. Petitioners provide a cursory citation to CR 1, and no other authority, for the proposition that election contests are governed by the Civil Rules. Motion at 6, n.2. But CR 1 itself notes that governance of the Civil Rules is "subject to the exceptions stated in rule 81," which bars the application of the Civil Rules "where inconsistent with rules or statutes applicable to special proceedings." CR 1; CR 81; *cf. Hatfield*, 87 Wn.2d at 342 (referring to an action under predecessor to RCW 29A.68.011 as a "special proceeding"). Because election contests are special proceedings given rise to only by statute, their rules are contained in RCW 29A.68 *et seq.*, and broad pre-hearing discovery is inconsistent with these statutes. *Id.* 87 Wn.2d at 342; *State ex rel. Quigley*, 71 Wash. at 506.

Nothing in RCW 29A.68 authorizes the extensive discovery sought by Petitioners. To the contrary, the rules in RCW 29A.68 contemplate testimonial evidence and presentation of documents from witnesses as needed by the court at trial, not pre-trial discovery to try to elicit

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garden-variety civil litigation. *See* 26 Am. Jur. 2d *Elections* § 391 (West 2005) ("Because the right to contest an election exists only under constitutional and statutory provisions, the procedure prescribed by statute or by the legislature must be followed . . . [t]he procedures prescribed for election contests are exclusive and the rules of civil procedure may not apply as election contests are special proceedings."); *McCastlain v. Elmore*, 340 Ark. 365, 368-69 (2000) ("The right to contest an election is purely statutory. Because election contests are special proceedings, the rules of civil procedure do not apply.") (noting that expedited deadlines for conducting and appealing election contest are designed to prevent "'fishing expeditions in the context of election contests'") (internal citations omitted). This rule limiting election contest procedures to those specified in the statute is buttressed by the general principle, relied on by Petitioners in previous legal proceedings in this election, that "[in election contests] the judiciary should exercise restraint in interfering in the elective process which is reserved to the people." *Dumas v. Gagner*, 137 Wn.2d 268, 283 (1999); Declaration of William C. Rava in Support of Motion to Intervene, ¶ 4, Exh. A (Petitioners' citation to *Dumas* in prior Supreme Court action).

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facts that Petitioners failed to provide in their Petition or affidavit of elector. RCW 29A.68.040 (clerk of the court shall issue citations "to appear at the time and place specified in the notice [to hear the election contest]"); RCW 29A.68.050 (court may issue subpoenas "to compel the attendance of the witnesses" to testify at the election contest "at the time and place designated to determine such contested election"). The rules in RCW 29A.68 are thus inconsistent with those in the Civil Rules authorizing written discovery and depositions prior to trial. CR 81.

In addition to respecting Washington law that requires RCW 29A.68 to govern the procedure for election contests, preventing the discovery sought by Petitioners also gives effect to the requirement that election contests have some factual proof *at the time of filing*. In *Quigley*, 74 Wash. at 81, the Supreme Court affirmed a lower court's refusal to assent to the plaintiff's request that the court produce and open ballot boxes from King County, where the plaintiff's election contest failed to provide evidence of fraud or illegality by election officers. The Court reasoned:

> An election contest is not an ordinary adversary proceeding. The public is concerned, and it is the public interest to which the courts will look in such a case rather than the interest of the particular contestants.
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> ....
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> It is certainly not asking too much of a person who by a sweeping wholesale charge of deliberate misconduct on the party of every election officer of his county seeks to consume weeks of the time of the court by a recount of all the ballots at the public expense to require him to *show in advance* some slight evidence of fraud or misconduct of such officers, reasonably calculated to overcome the universal prima facie presumption of the regularity and correctness of official action.

Id at 80-81 (emphasis added) (internal citations omitted). Petitioners' request for discovery in this contest is contrary to *Quigley*'s reasonable requirement that a plaintiff must file an election contest with sufficient factual proof to substantiate the contest, not troll for those facts later on. *Id.* at 81 (the court will not permit itself "upon a mere assertion of an impalpable suspicion, [to]

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be used as a drag-net with which to fish for evidence without any antecedent showing of the slightest circumstance tending to impeach the official count.").[5]

Petitioners' Motion makes no secret of the fact that, unless discovery issues, they cannot substantiate their vague allegations of misconduct. Motion at 2 ("Petitioners *anticipate that evidence obtained in discovery*...[will] render the true results of the election uncertain[,]") and 5 ("[Petitioners seek depositions of election officers] to develop evidence regarding the subjects covered in their discovery requests. *Information regarding these subjects is central to establishing the exact nature and extent of the unlawful votes*[.]") (emphases added). Sound policy, and more importantly Washington law, forbids the carefully limited election contest provisions to be swept aside to allow Petitioners to rummage for *post hoc* proof. To permit discovery in this action would encourage filing and discovery in future election contests where there was suspicion, but no proof, of misconduct or illegal votes. Washington's election contest provisions and controlling Supreme Court authority do not countenance such a result. *Quigley*, 74 Wash. at 80-81.

B. The Court Should In Any Event Stay Petitioners' Broad Discovery Requests Until It Has Resolved the Threshold Legal and Jurisdictional Issues Presented by the Petition.

Even if the Court were to locate in the election contest statutes a basis for some limited discovery, it would nevertheless be inappropriate to conduct the broad-reaching discovery requested by Petitioners on an expedited basis. Notably, Petitioners seek to commence immediately depositions of unnamed, and perhaps dozens of, election officials,

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[5] *See also Hill v. Howell*, 70 Wash. 603, 609 (1912) ("It will be remembered that no charges of fraudulent conduct or willful misbehavior are made or proven against any of the officers of the election who were guilty of the irregular conduct found by the commissioner.") (denying election contest).

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as well as compelling each county in the State to answer written interrogatories and to produce documents in only 10 days from service. They do so before even serving all parties, and when there are serious issues of jurisdiction and venue.

Moreover, as WSDCC's Motion for Briefing Schedule sets forth, the antecedent questions regarding jurisdiction and remedy may render unnecessary any discovery whatsoever. And, as Petitioners' own authority confirms, expedited discovery is inappropriate where parties to an action have not been served and appeared in the action. Finally, as a practical matter, the respondent counties may not be able to respond to Petitioners' discovery requests within the short time frame requested. Petitioners have served broad discovery requests on at least King County, while simultaneously serving public disclosure act requests on King and other counties that have, to date, resulted in the production of over nine banker boxes worth of responsive material. Rava Decl., ¶ 7.

Before the counties should be put to the burden of responding to these requests, the Court should address several predicate questions of law first. As more fully discussed in WSDCC's Motion for Briefing Schedule, there are at least four fundamental questions related to jurisdiction and remedy that should be resolved prior to this contest moving forward in any manner: (1) whether this Court, or any court, has subject matter jurisdiction over Petitioners' Election Contest given the Constitution's specific command that "Contested elections for [Governor] shall be decided by the legislature in such manner as shall be determined by law." Art. III, § 4; (2) if this election contest may be considered by any court, whether Petitioners' have filed their affidavit of elector in the "appropriate court" as required by RCW 29A.68.011; (3) whether the various allegations alleged by the petitioner are allegations of causes for an election contest as limited by RCW 29A.68.020 and, if not, are therefore not subject to any discovery; and, finally, (4) whether the relief sought by

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Petitioners – a new special election for Governor – is available under the Washington State Constitution and other applicable state law.

As it currently stands, there have been no less than *four other* election contests filed concerning this election – three directly in the Supreme Court and one in Kitsap County. Rava Decl. ¶ 3. The Supreme Court has deferred action on the three contests pending before it and the remaining contest (in Kitsap County) was been commenced only yesterday. *Id.* Before this Court proceeds, and certainly before it authorizes extraordinary expedited discovery, coordination of these overlapping election contests in three different venues should be addressed so that the matter is addressed comprehensively, consistently, and finally. Counties should not be subjected to overlapping demands from multiple courts, on the same issues, much less on an expedited basis.

Because these questions present jurisdictional issues, expedited discovery is not just imprudent – it is forbidden. *Okanogan Wilderness League v. Twisp*, 133 Wn.2d 769, 788 (1997) ("Where a court has no subject matter jurisdiction, the proceeding is void."). If this or some other Court does not have jurisdiction over this action, the burdensome discovery sought by Petitioners will be rendered moot and the likely substantial costs will have been imposed by counties throughout the State without purpose.

Second, as Petitioners' authority makes clear, a request for expedited discovery made at the outset of a case requires that "the adverse party shall be presumptively entitled to notice and an opportunity to be heard prior to any ruling thereon."[6] Here, Respondents are not subject to

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[6] *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D. Ariz. 2001) (denying request to expedite discovery for failure to properly serve and notify defendant); *Semitool v. Tokyo Electron*, 208 F.R.D. 273, 277 (2002) (noting good cause to expedite where "defendants have had notice of the instant motion and specific discovery sought for nearly a month"); Motion at 6 (citing cases). Of course, unlike this contest, *Yokohama Tire* and *Semitool* were ordinary civil actions where there was no question that the movants were entitled to discovery at some point.

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discovery at all, and are certainly not subject to expedited discovery before they have been properly served or appeared. Rava Decl. ¶ 9. As Petitioners concede, the election contest statute does not place this Court under any fixed deadline for issuance of the notice of hearing the contest, which must be filed in and come from the "appropriate court." RCW 29A.68.030; RCW 29A.68.040; Motion at 5-6. No immediate deadlines loom and it would be inappropriate to expedite proceedings at this early stage without the parties subject to that discovery have an opportunity to participate and be heard.[7] At a bare minimum, the Courts should schedule a status conference to hear from any Respondents that have been served and have appeared, to establish guidelines for the amount, timing and nature of discovery sought given the lack of authority for discovery in election contests and the burden on local governments – and thus the taxpayers.

Finally, it appears that many Respondents would not be able to respond to discovery on the expedited schedule that Petitioners seek. Rava Decl. ¶ 6. Respondents served their written discovery on January 11, 2005, and indicated they intend to continue to serve other counties. *Id.* ¶ 9. Responses to this discovery are due on January 20, 2005, under Petitioners' proposed schedule, which is well in advance of when many Respondents expect to respond to PDA requests sent before January 10. *Id.* ¶¶ 35-6, Exhs. B-D. Petitioners' discovery requests, meanwhile, are significantly broader than the PDA requests to which Respondents have already expressed difficulty responding to in any shortened time frame. *Id.* ¶¶ 5, 7. Petitioners' catch-all requests cannot be answered within the time frame requested, and despite

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[7] As WSDCC explains in its Motion for Briefing Schedule, it is amenable to whatever briefing schedule the Court determines is appropriate. Petitioners' interest in fast-tracking this contest, where the remedy sought is to scrap the valid votes of millions of Washington voters, is not controlling; the *public interest* controls. *Quigley*, 74 Wash. at 80 ("[I]t is the public interest to which the courts will look in such a case rather than the interest of the particular contestants.").

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Petitioners' unsupported assertion, an expedited schedule that does not permit the parties adequate time to respond and object does indeed prejudice Respondents.[8]

V. CONCLUSION

For the reasons set forth above, Respondents-Intervenor WSDCC respectfully submits that the Court should deny the Motion.

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[8] The Washington Constitution requires secrecy regarding ballots and voting. Wash. Const. Art. VI, § 6 ("The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot."). Respondents need a genuine opportunity to assess the validity of any requests for information by Petitioners, and to properly object, before engaging in what may be unconstitutional disgorgement of voter information.