

HONORABLE RICHARD A. JONES

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

WASHINGTON ELECTION INTEGRITY)
COALITION UNITED, a Washington)
State Nonprofit Corporation; BRETT)
SIMPSON; BONNIE GRIECO; JONETTE)
MOLYNEUX; ROSS MERRITT;)
TAMARA SHAW; HARLYN THOMPSON;))
KIMBERLEE ELBON; ROBERT WARD;)
CONSTANCE COOKE; DOREEN ROSE;)
SHIRLEY MOZENA; JAMES MOZENA;)
MICHELLE DAWSON; LINDSEY)
NICHOLS; JOSEPH KENT; ROXANNE)
PEARCE; DAVID MACHADO; JOSHUA)
BRADLEY; BENNETT ESRAEL; JAKE)
PARMER; RICH AUDETTE; MARIA)
BRUEMMER; JOSEPH GIBSON;)
ERIC HARGRAVE; WENDY)
KEELINE; PHILLIP HOGAN;)
MARILI HAAS; IKE HAAS; FRANK)
GMELIN; TRICIA SHOUP; JEN)
HOLBROOK; STEPHEN CLEMENTS;)
KIMBERLY ANDERSON; SUSAN)
AUDETTE,)

Plaintiffs,)

v.)

GREG KIMSEY, Clark County)
Auditor; CLARK COUNTY, and DOES)
1-30, inclusive,)

Defendants.)

Case No. 3:21-cv-05746-RAJ

WEICU’S OPPOSITION
TO DEFENDANTS’ MOTION
TO DISMISS

NOTE ON MOTION CALENDAR:
NOVEMBER 26, 2021

WEICU’S OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS

1 With full reservation of rights, and without waiver or submission to the personal, subject
2 matter jurisdiction and/or venue of this Court, Plaintiff Washington Election Integrity Coalition
3 United, a Washington State Nonprofit Corporation (“WEiCU”), submits the following opposition
4 to Clark County Defendants’ FRCP 12(b) Motion to Dismiss.
5

6 A. This Motion to Dismiss Should Be Stayed Pending the Hearing on WEiCU’s Motion to
7 Remand

8 Defendants’ motion to dismiss is premature. This Court does not have jurisdiction over
9 this action. WEiCU has a pending Motion to Remand noted for November 19, 2021. This action
10 brings state statutory claims under RCW 29A.68.013 (for wrongful acts or neglect of duty by
11 election officials) and RCW 42.56 (for a public records action) and was removed to Federal
12 Court under 28 U.S.C. §1441(a) with no citation to subsection §1441(c) which applies to cases
13 involving both state and federal claims, as is the case here.
14

15 As such, this Court does NOT have jurisdiction over WEiCU’s state filed statutory claim.
16 This Court of limited jurisdiction should NOT entertain motions to dismiss state-based actions
17 subject to a Motion to Remand. Without waiver, WEiCU respectfully submits the following
18 opposition so that this Court can further understand *why* the case should be remanded back to
19 Clark County Superior Court.
20

21 B. Clark County Auditor Was Properly Served In His Capacity as Clark County Auditor

22 As an initial defense, Defendants assert service of the summons and complaint on the
23 Clark County Auditor on September 17, 2021 was legally insufficient because Plaintiffs served
24 copies of the summons and complaint in this action on a deputy Election employee at the
25 Auditor’s Office. (Defendants’ Motion, p. 4, ll. 4-6.) The action is against the Clark County
26
27

1 Auditor in his official capacity as the elected Auditor for Clark County, and as such, service at
2 the Clark County Auditor’s Office was legally sufficient under state law. (RCW 4.28.080(1).)

3 C. WEiCU Has Standing to Bring a Public Records Action

4 WEiCU has standing under RCW 42.56.550 to bring a Public Records Action to compel
5 the production of public records:

6
7 Judicial review of agency actions.

8 (1) Upon the motion of any person having been denied an opportunity to
9 inspect or copy a public record by an agency, the superior court in the county in
10 which a record is maintained may require the responsible agency to show cause
11 why it has refused to allow inspection or copying of a specific public record or
12 class of records. The burden of proof shall be on the agency to establish that
13 refusal to permit public inspection and copying is in accordance with a statute that
14 exempts or prohibits disclosure in whole or in part of specific information or
15 records.

16 (RCW 42.56.550 (1).)

17 As alleged in the complaint, WEiCU issued a public records request to Defendants in
18 August 2021. (RCW 42.56, “PRR”; Verified Complaint, ¶ 30). The County denied one or more
19 of the requested documents in WEiCU’s PRR as exempt under RCW 42.56 citing RCW
20 29A.60.110 and/or *White v. Clark County*, 199 Wn.App. 929 (2017). (*Id.*) WEiCU has standing
21 to bring a public records action under RCW 42.56.550, and this motion to dismiss should be
22 denied.

23 D. WEiCU Has Stated a Public Records Act Claim

24 This action was filed on September 16, 2021 in Superior Court for Clark County, Case
25 No. 21-2-01775-06. Defendants removed the case to Federal Court, have not filed an answer,
26 and the action is subject to a Motion to Remand. As such, the Court has not obtained jurisdiction
27 for the PRA Claim, and the federal action is not at issue.

1 Under CR 12(b)(6), a complaint can be dismissed for "failure to state a claim upon which
2 relief can be granted" only if it appears beyond doubt that the plaintiff cannot prove any set of
3 facts which would justify recovery. (*Tenore v. AT&T*, 136 Wn.2d 322, 329-330 (1998).) On a
4 motion to dismiss for failure to state a claim, a plaintiff's allegations are presumed to be true and
5 a court may consider hypothetical facts not included in the record. (*Id.*) CR 12(b)(6) motions
6 should be granted "sparingly and with care" and "only in the unusual case in which plaintiff
7 includes allegations that show on the face of the complaint that there is some insuperable bar to
8 relief. (*Id.*)

9
10 WEiCU has pleaded the elements of a PRA claim, Defendants have not cited to any
11 element of a PRA claim missing from the complaint, and Defendants' motion should be denied.
12 (Verified Complaint, ¶¶ 28-35.)

13
14 E. Defendants May Not Seek Summary Judgment In Disguise

15 Under RCW 42.56.550(3), our Legislature has determined that judicial review of all
16 agency actions taken or challenged under the PRA shall be *de novo*:

17
18 Judicial review of all agency actions taken or challenged under RCW 42.56.030
19 through 42.56.520 shall be *de novo*. Courts shall take into account the policy of
20 this chapter that free and open examination of public records is in the public
21 interest, even though such examination may cause inconvenience or
22 embarrassment to public officials or others. Courts may examine any record in
23 camera in any proceeding brought under this section. The court may conduct a
24 hearing based solely on affidavits.

25 (RCW 42.56.550(3).)

26 Defendants want this Court to ignore the legislatively mandated *de novo* review of PRA
27 decisions and instead rely on *White v. Clark County*, 199 Wn.App. 929 (Div. II, 2017) to have a
28 Federal Court dismiss WEiCU's state-filed PRA, with prejudice, as a matter of law. (Motion, p.
18, ll. 18-22; p. 20, ll. 4-16.)

1 In *White v. Clark County, supra*, the Division 2 Appellate Court affirmed a trial court’s
2 denial of a PRA show cause motion and dismissal of a PRA action entered on grounds that
3 ballots are exempt from disclosure under an “other statute” exemption. (*White, supra*, at pp. 377,
4 381.) In affirming the denial of production, the *White* Court relied on Article VI, § 6 of the
5 Washington State Constitution which tasks the Legislature with requiring “absolute secrecy in
6 preparing and depositing . . . ballot[s]”.

8 However, in finding an “other statute exemption” to the production of ballots, the *White*
9 Court ignored RCW 29A.08.161 which expressly requires ballots cast in Washington State to be
10 *de-identified* so as to never tie back to any particular voter:

12 No record may be created or maintained by a state or local governmental agency
13 or a political organization that identifies a voter with the information marked on
the voter’s ballot

14 (RCW 29A.08.161.) The *White* case did not address RCW 29A.08.161. Under basic rules of
15 statutory construction, statutes pre-empt case law, and as such, there can be no “secret ballot”
16 exemption to production of already de-identified ballot public records. The ballots are de-
17 identified by law, thereby guaranteeing secrecy of the vote. (RCW 29A.08.161.)

19 The *de novo* review of the Defendants’ asserted exemption to production of public
20 records will be done by a judge of the Clark County Superior Court pursuant to WEiCU’s
21 Motion to Remand. The agency review should not be done by a federal district court judge about
22 which the statute is silent. WEiCU objects to any conversion of this FRCP 12(b)(6) motion to a
23 FRCP 56 motion, and reserves all rights, including rights to discovery in the state action.

25 F. Defendants Rely On a Statute That Expressly Allows For Production of Ballots

26 Defendants further seek dismissal of WEiCU’s PRA cause of action as a matter of law
27 citing RCW 29A.60.110. (Motion, p. 18, l. 22.) However, RCW 29A.60.110 *allows* for the

1 production of public records in the form of ballots even after the minimum 60-day retention
2 period after tabulation “by order of the superior court in a contest or election dispute”. (RCW
3 29A.60.110.) As such, Defendants have not asserted a statutory exemption to the production of
4 the requested documents, and their motion is baseless under state law.
5

6 G. RCW 29A.60.170 Does Not Provide for Court Ordered Election Challenges

7 Defendants contend WEiCU should have sought “a court order, pursuant to RCW
8 29A.60.170 to challenge the election” (Motion, p. 20, ll. 1.)

9 Contrary to this statement, RCW 29A.60.170 addresses: “List of observers- Counting
10 center, direction and observation of proceedings – Random check of counting equipment.”
11

12 Moreover, WEiCU is not seeking de-certification of the 2020 Election. (Verified
13 Complaint, ¶ 8.) Rather, WEiCU is seeking the production of public records.

14 H. This Action Must Be Remanded to Clark County Superior Court

15 Defendants seek to avoid production of public records by removing this case to Federal
16 Court and then relying on: 1) case law that ignores state law RCW 29A.08.161 requiring ballots
17 be *de-identified*; and, 2) a statute *permitting* the production of ballots. (RCW 29A.60.110.)
18

19 WEiCU has stated a valid claim for a PRA in its complaint filed in Clark County Superior
20 Court and is entitled to seek a Superior Court order for release of County public records as
21 expressly allowed by the Washington State Legislature.
22

23 ///

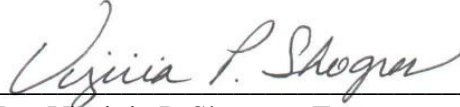
24 ///

25 ///

1 This matter should be REMANDED to Clark County Superior Court for production of
2 the requested public records, and Defendants' motion should be DENIED.

3 Respectfully submitted,

4 VIRGINIA P. SHOGREN, P.C.

5
6 

7 Dated: November 20, 2021

8 By: Virginia P. Shogren, Esq.
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13 Attorney for Plaintiff WEiCU
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27

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2021, I electronically filed the following with the Clerk of the Court using the CM/ECF system which will send notification the listed counsel of record:

WEICU'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Amanda Marie Migchelbrink
Counsel for Defendants

Kevin Hamilton
Reina Almon-Griffin
Nitika Arora
Amanda Beane
Counsel for Proposed Intervenor

And I hereby certify that I caused to be served the document via email provided by the following parties who are non CM/ECF participants:

Brett Simpson
Plaintiff, *Pro Se*

Bonnie Grieco
Plaintiff, *Pro Se*

Jonette Molyneux
Plaintiff, *Pro Se*

Ross Merritt
Plaintiff, *Pro Se*

Tamara Shaw
Plaintiff, *Pro Se*

Harlyn Thompson
Plaintiff, *Pro Se*

Kimberlee Elbon
Plaintiff, *Pro Se*

Robert Ward
Plaintiff, *Pro Se*

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1 Constance Cooke
2 Plaintiff, *Pro Se*

3 Doreen Rose
4 Plaintiff, *Pro Se*

5 Shirley Mozena
6 Plaintiff, *Pro Se*

7 James Mozena
8 Plaintiff, *Pro Se*

9 Michelle Dawson
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11 Lindsey Nichols
12 Plaintiff, *Pro Se*

13 Joseph Kent
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15 Roxanne Pearce
16 Plaintiff, *Pro Se*

17 David Machado
18 Plaintiff, *Pro Se*

19 Joshua Bradley
20 Plaintiff, *Pro Se*

21 Bennett Esrael
22 Plaintiff, *Pro Se*

23 Jake Parmer
24 Plaintiff, *Pro Se*

25 Rich Audette
26 Plaintiff, *Pro Se*

27 Maria Bruemmer
28 Plaintiff, *Pro Se*

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1 Eric Hargrave
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9 Ike Haas
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11 Frank Gmelin
12 Plaintiff, *Pro Se*

13 Tricia Shoup
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15 Jen Holbrook
16 Plaintiff, *Pro Se*

17 Stephen Clements
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19 Kimberly Anderson
20 Plaintiff, *Pro Se*

21 Susan Audette
22 Plaintiff, *Pro Se*

23 Dated: November 20, 2021

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