

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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.

No. 3:21-cv-05746-RAJ

DEFENDANTS' REPLY IN SUPPORT OF  
MOTION TO DISMISS

NOTE ON MOTION DOCKET: November 26,  
2021

1 Defendants, Clark County and Auditor Greg Kimsey (collectively, “Defendants”) respectfully  
2 submit this Reply in Support of their Motion to Dismiss as follows.

3 **INTRODUCTION**

4 Plaintiff Washington Election Integrity Coalition United’s (WEICU) response focuses on  
5 arguments that are nonsensical and are unsupported by statute, case law, and administrative  
6 rules. WEICU has still failed to show that the Defendants’ motion to dismiss is improper;  
7 therefore, this Court should grant it. Most of the individually named plaintiffs have filed a  
8 response to the motion to the dismiss or join in the response from WEICU. Per WDLCR 7(b)(2),  
9 if a party fails to respond to a motion, it is considered an admission that the motion has merit<sup>1</sup>.  
10 WEICU fails to present any argument that this court should not dismiss this case, as other courts  
11 across the country have. The *pro se* plaintiffs present no legal authority to support their  
12 conclusory statements in their response to the motion to dismiss and present little argument to  
13 support their claims. The claims in the complaint are baseless and unsupported by legal and  
14 equitable doctrines; therefore, the entire complaint should be dismissed.

15 **MEMORANDUM OF LAW**

16 **WEICU’s arguments**

17 **A. Plaintiffs’ motion for remand is without merit; therefore, the Defendants’ motion  
18 for dismissal is not premature.**

19 Plaintiffs attempt to avoid a ruling on the Defendants’ motion to dismiss by claiming the  
20 motion is premature due to their motion for remand to Clark County Superior Court. As  
21 described in detail in the Defendants’ response to Plaintiffs’ motion for remand, incorporated by  
22 reference, the Defendants’ notice of removal pursuant to 28 U.S.C. §1441 (a). *See* Docket No.  
23 25. The motion for remand was not for just the public records act (PRA) claims in the complaint  
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29 <sup>1</sup> Michelle Dawson and David Machado did not sign on the “joinder” of the opposition to the motion to dismiss.  
DEFENDANTS’ REPLY IN SUPPORT OF MOTION TO  
DISMISS - 2 of 11

1 but was instead for the entire action. This matter is properly before the federal court and is  
2 subject to its original and supplemental jurisdiction; therefore, the motion to dismiss should be  
3 granted.

4 **B. Plaintiffs have not cured deficient service on Auditor Greg Kimsey; therefore, He**  
5 **and all Claims Against Him Should be Dismissed.**

6 WEICU admits it did not properly serve the Clark County Auditor pursuant to state  
7 statutes governing service. Docket No. 29 at 2. Instead, WEICU argues that service was proper  
8 under RCW 4.28.050(1) because the action is against the Clark County Auditor in his official  
9 capacity. *Id.* at 2-3. Plaintiffs ignore that the statute they rely on applies to service on counties  
10 in the state instead of individuals. See RCW 4.28.080(1). Greg Kimsey was named individually  
11 as a defendant in the lawsuit; therefore, service must be perfected pursuant to RCW 4.28.080(16)  
12 by serving the defendant personally. Plaintiffs present no argument or evidence that they have  
13 done so; therefore, all of the claims against Greg Kimsey should be dismissed.

14 **C. Standing for a PRA claim.**

15 Defendants do not deny that WEICU, as the entity who made the records request at issue  
16 in this claim, have standing to raise the claim in Court. Defendants deny that any of the  
17 remaining Plaintiffs have standing to raise the PRA or any other claims since they did not also  
18 make similar requests for the ballots. Defendants also deny, as stated above, that Greg Kimsey  
19 was properly served.

20 **D. The Complaint Does Not State A Valid PRA Claim.**

21 WEICU argues it has plead the elements of a PRA claim; however, it fails to recognize  
22 that the specific documents it has requested are exempt from disclosure, warranting dismissal of  
23 those claims for the voted ballots as a matter of law. WEICU claims that because it is seeking  
24 the release of de-identified ballots, *White* and other cases do not apply, and Clark County  
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1 improperly denied its request for the ballots. Docket No. 29 at 5. WEICU ignores the applicable  
2 case law, statutes, and administrative rules governing the protection of voted ballots.

3 Plaintiff's claim that disclosure is required where nondisclosure is not necessary to  
4 protect privacy expressly has been rejected by Washington Courts because "RCW 29A.60.110  
5 and WAC 434-261-045 provide categorical exemptions, not conditional ones" so "ballots are  
6 exempt from production without qualification". *White v. Clark Cty.*, 199 Wn. App. 929, 934  
7 (*White III*) *rev. denied*, 189 Wn. 2d 1031 (2018). *See also White v. Clark Cty.*, 188 Wn. App.  
8 622, 627 (2015) *rev. denied*, 185 Wn. 2d 1009 (2016)(*White I*) (ballots are "exempt in their  
9 entirety from disclosure under the PRA"). Further, WEICU's reliance on RCW 29A.08.161 is  
10 misplaced because it supports, rather than undermines, precedent exempting ballots from PRA  
11 disclosure. That statute "addresses the same concerns for secrecy found in article VI, section 6  
12 of the Washington Constitution." *See White v. Wyman*, 4 Wn. App. 2d 1071 at \*5 (2018).  
13 Ensuring such secrecy is one of the reasons Washington precedent holds all ballots are exempt  
14 from PRA disclosure, even after being separated from the security envelopes that contain voter  
15 identification, because their release still "would risk revealing the identity of the individual  
16 voters" since "voters sometimes place identifying marks on ballots contrary to voting  
17 instructions, for example by signing their names when making corrections or by writing  
18 comments about their intent," as well as because "where there is low turnout in a small precinct,  
19 even a ballot devoid of identifying marks can be tied back to a voter by comparing it with voters  
20 credited with returning ballots on particular dates." *White v. Skagit Cty.*, 188 Wn. App. 886, 895  
21 (2015)(*White II*) *rev. denied*, 185 Wn. 2d 1009 (2016). The case law interpreting the statute as  
22 enacted by the legislature establishes grounds for dismissing WEICU's PRA claims.  
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24 Additionally, the Clark County Auditor is not an "agency" pursuant to the PRA; therefore, an  
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1 action under that statute against him is improper. *See* RCW 42.56.010(1), (3); RCW 42.56.520;  
2 RCW 42.56.550.

3 ***Pro Se* Plaintiff's Arguments**

4 **A. Plaintiffs have not properly served Greg Kimsey; therefore, he should be dismissed.**

5 As argued above, Plaintiffs individually named Greg Kimsey, the Clark County auditor, in  
6 this complaint and have failed to abide by state statutes regarding personal service of  
7 individually named defendants. None of the plaintiffs have provided any evidence they have  
8 properly served him; therefore, Auditor Kimsey should be dismissed as well as claims IV, V, VI,  
9 VII, VIII, IX, XI, XII, XIII.  
10

11 **B. Plaintiffs have failed to state a claim upon which relief can be granted.**

12 The *pro se* plaintiffs claim the action “most closely resembles an action for Declaratory  
13 Judgment” rather than a tort action. Apparently, the *pro se* plaintiffs wish to abandon any of  
14 their 42 U.S.C. §1983 claims and another other “negligent” claims that they appear to be raising  
15 in the complaints. *See Causes of Action* XIII, XI, VII, IV. They believe they may at some point  
16 potentially obtain evidence of some sort of tort from the Clark County Auditor; however, they  
17 have not alleged anything that would support their conclusion that those claims should remain in  
18 the lawsuit. A complaint must allege against each named defendant “enough facts to state a  
19 claim to relief that is plausible on its face” so as to “raise a right to relief above the speculative  
20 level . . .”. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 561-63, 578 (2007). A claim has  
21 “facial plausibility” when the party seeking relief “pleads *factual content* that allows the court to  
22 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*,  
23 (*emphasis added*).  
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1 **C. Plaintiffs agree they cannot raise a state constitutional claim.**

2 The *pro se* Plaintiffs agree that there is not a cause of action for state constitutional actions.  
3 Docket No. 31 at 4. It's not clear what they are contending regarding the state constitutional  
4 claims raised in the complaint. Because they agree there is not a cause of action for Washington  
5 Constitutional claims, those claims should be dismissed.  
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7 **D. Remaining arguments in Defendants' motion to dismiss.**

8 Defendants raised other arguments the *pro se* plaintiffs did not respond to or only provided a  
9 one-line, conclusory statement in response to. Specifically, the *pro se* plaintiffs did not respond  
10 to Defendants' arguments regarding standing, claims regarding vote manipulation, party  
11 preference, declaratory judgment, or injunctive relief.  
12

13 **CONCLUSION**

14 As shown above, WEICU's opposition to dismissal fails because it: 1) refuses to accept  
15 that the Federal Rules of Civil Procedure applies to civil actions after they are removed from  
16 state court; 2) claims ballots must be made available on demand under the PRA; 3) disregards  
17 precedent holding that RCW 29A.60.110 and WAC 434-261-045 provide categorical, not  
18 conditional exemptions from disclosure; 4) fails to acknowledge the basic rules regarding service  
19 of complaints against individually named defendants, and 5) ignores that Auditor Greg Kimsey is  
20 not subject to suit by WEICU and the PRA or any theory it has proposed. As a matter of law, all  
21 of the claims in the complaint warrant dismissal. The *pro se* plaintiffs failed to present any legal  
22 argument or anything other conclusory statements to support their claims that this Court should  
23 not dismiss the complaint. Defendants request the Court dismiss with prejudice, the complaint.  
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Dated November 24, 2021.

*s/ Amanda M. Migchelbrink*

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 24, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the CM/ECF Recipients and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

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*/s/ Nichole Carnes*

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