

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
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

RESPONSE TO WEICU'S MOTION TO
REMAND

1 COMES NOW Defendants Greg Kimsey, Clark County Auditor, and Clark County
2 (hereinafter “Defendants”), by and through their attorneys of record, ANTHONY GOLIK,
3 Prosecuting Attorney, and AMANDA M. MIGCHELBRINK, Deputy Prosecuting Attorney,
4 and file this Response to WASHINGTON ELECTION INTEGRITY COALITION
5 UNITED’S (hereinafter “WEICU” or “WEiCU”) Motion for Remand.

6 I. INTRODUCTION

7 On September 16, 2021, the office of the Clark County Auditor received this action a
8 “COMPLAINT FOR EQUAL PROTECTION; VIOLATION OF CIVIL RIGHTS ... TO
9 COMPEL BALLOT PRODUCTION.” *See* Complaint at 1 (Dkt. 1-1). The complaint named Clark
10 County Auditor Greg Kimsey and Clark County as Defendants and claimed the latter had violated
11 the individually named “Plaintiffs’ equal protection, due process and free speech rights under the
12 Washington State and United States Constitutions,” *Id.* at 2, that the “Auditor must be
13 preliminarily and permanently restrained” because “any additional elections conducted using the
14 Uncertified Voting System will be in further violation of state and federal law” and “Plaintiffs will
15 suffer irreparable injury in that their fundamental rights under the Washington State Constitution
16 and/or United States Constitution, and amendments, will be ... violated,” *Id.* at 5, including “US
17 CONSTITUTION AMENDMENTS I, XIV,” *id.* at 10, 11 – specifically “the individual’s right to
18 FREE SPEECH as depicted by the First Amendment of the Constitution of the United States of
19 America,” *id.*, and “rights under the fourteenth amendment to the United States Constitution,” *id.*
20 at 11 – as well as seeks “DAMAGES FOR CIVIL RIGHTS VIOLATIONS 42 USC §1983,
21 §1988,” *id.* at 13, an injunction and “a declaration that Auditor’s actions violated Plaintiffs’
22 Constitutional Rights to Equal Protection, Due Process, and/or Free Speech Under the Law (... US
23 Const. Amendments I and/or XIV).” *See id.* at 12.

24 Additionally, WEICU’s sole claim in the lawsuit was for a violation of the Washington
25 State Public Records Act. *Id.* at 7. However, it incorporated and alleged all of the Plaintiffs’
26 allegations and claims and stated: “In order to prove (or disprove) Plaintiffs’ allegations herein,

1 WEiCU brings this Public Records Act action to compel Defendants to provide access to public
 2 records from the Election for a full forensic audit.” *Id.* at 8. Furthermore, Plaintiffs’ rely on other
 3 *federal* cases to support their claim that the ballots should be released to conduct a forensic audit
 4 to prove or disprove the Plaintiffs’ allegations. *Id.* at 9.

5 Because these claims are alleged in the Complaint to arise under the Federal Constitution
 6 and Federal Statutes, Defendants filed a notice of removal to this Court on October 7, 2021,
 7 pursuant to 28 U.S.C. §1441(a). *See* Dkt. 1-1. On October 14, 2021, WEICU moved to strike the
 8 remand with a joinder of the pro se plaintiffs. Dkt. No. 12. The Court struck this motion and the
 9 joinder on October 15, 2021 because WEICU could not represent itself *pro se*. Dkt. No. 14.
 10 Additionally, none of the Plaintiffs abided by the Court’s motion order requiring parties to meet
 11 and confer prior to filing any motions¹. Dkt. No. 9, 12. After obtaining counsel, WEICU again
 12 filed on October 22, 2021; however, WEICU moved this Court to remand this matter to superior
 13 court, apparently because 28 U.S.C. §1441(c) prohibits removal to federal court in the first place.
 14 As shown below, the motion should be denied.

15 II. ANALYSIS

16 A. THE COMPLAINT WAS PROPERLY REMOVED TO FEDERAL COURT

17 WEICU claims removal to federal court was not proper because 28 U.S.C. §1441(c)
 18 prohibits removal because of the number of state constitutional and statutory allegations in the
 19 Complaint. Dkt. No. 16 at 2-3. It also argues that removal was improper because the seven
 20 different state law and constitutional law claims were somehow not within the supplemental
 21

22 ¹ WEICU requests this Court take judicial notice of the previously filed and stricken pleadings without providing
 23 any legal basis for this Court do so. Dkt. No. 16 at 2, fn. 1. It is not clear what WEICU is asking the Court to take
 24 judicial notice of because the statement is not specific. It simply stated: “WEICU respectfully requests that the Court
 25 take judicial notice of its original Motion to Strike and the Joinder Filed by Plaintiffs herein, incorporated herein by
 26 this reference.” *Id.* A court may not take judicial notice of any matter that is in dispute. Fed.R.Evid. 201; *Walker v.*
Woodford, 454 F. Supp. 2d 1007, 1022 (S.D. CA, 2006). The Court may take judicial notice of court documents
 only to show that a judicial proceeding occurred or was filed, but not the facts listed in the document. *Id.* Here, the
 documents WEICU is requesting this Court take judicial notice of were filed by pro se litigants that were violative of
 state law and did not comply with the Court’s requirements to meet and confer. Those pleadings were struck by the
 Court as being improperly filed; therefore, this Court should not take judicial notice of any of the pleadings filed in
 the original motion to strike.

1 jurisdiction of this Court and that the nature of the claims raised in the Complaint require
2 adjudication of the state law claims prior to making any determination of the federal claims. *Id.* at
3 3. Plaintiff fails to cite to any authority that requires any such finding to prove liability or damages
4 for 42 U.S.C. §1983 claims.

5 Although Plaintiff claims the Defendants’ notice of removal was improper; they fail to
6 recognize the long-standing law governing and allowing removal of complaints that contain
7 federal claims and state law claims. WEICU also fails to cite any cases that support its argument
8 that this case should be remanded to superior court.

9 First, 28 U.S.C. §1441(c) provides:

10 (1) If a civil action includes--

11 (A) a claim arising under the Constitution, laws, or treaties of the United States
(within the meaning of section 1331 of this title), and

12 (B) a claim *not* within the original or *supplemental jurisdiction* of the district
13 court or a claim that has been made nonremovable by statute,
the entire action may be removed if the action would be removable without the
14 inclusion of the claim described in subparagraph (B).

15 (2) Upon removal of an action described in paragraph (1), the district court shall *sever*
from the action all claims described in paragraph (1)(B) and shall remand the
16 severed claims to the State court from which the action was removed...

17 (Emphasis added). Here, this Court has original Federal Question jurisdiction over the Complaint
18 due to the alleged 42 U.S.C. §1983 damages, declaratory judgment, and injunctive relief claims
19 that are based on supposed violations of the United State Constitution because under 28 U.S.C.
20 §1331 “district courts *shall have original jurisdiction of all civil actions arising under the*
Constitution, laws, or treaties of the United States.” (Emphasis added). Thus, this Court also has
21 *supplemental jurisdiction* of the remaining claims for the same declaratory and injunctive relief
22 under state law because “the district courts shall have *supplemental jurisdiction over all other*
23 *claims* that are so related to claims in the action within such original jurisdiction that they form
24 part of the same case or controversy under Article III of the United States Constitution.” *See* 28
25 U.S.C. §1367 (Emphasis added). Accordingly, Plaintiff’s “civil action brought in a State court of
26 which the district courts of the United States have original jurisdiction” was properly “removed by

1 the defendant or the defendants, to the district court of the United States for the district and
2 division embracing the place where such action is pending.” *See* §1441(a).

3 Because under the above statutes this Court has *both* original jurisdiction over the federal
4 claims and supplemental jurisdiction over the related state claims, WEICU’s reliance on §1441(c)
5 to claim removal was improper is demonstrably wrong. *See* Dkt. 16 at 4. On its face, subsection
6 (c)(1)(b) of the latter statute only applies where the action “includes ... a claim not within the
7 original or supplemental jurisdiction of the district court” §1441(c)(1)(b). Further, even when
8 that subsection does apply, it expressly states “the entire action may be removed if the action
9 would be removable without the inclusion of the claim described in subparagraph (B),” *see* 28
10 U.S.C. §1441(c), and subsection (c)(2) then only provides for severance and remand of the “claims
11 described in paragraph (1)(B)” – i.e. claims “not within the original or supplemental jurisdiction of
12 the district court” *Id. See also Springdale Venture, LLC v. US WorldMeds, LLC*, 620 F. Supp.
13 2d 810 (W.D. Ky. 2009)(statute allowing court to “remand all matters in which State law
14 predominates,” conferred authority only to remand otherwise non-removable claims, rather than
15 whole case including properly removed claims arising under federal law); *Lujan v. Earthgrains*
16 *Baking Companies, Inc.*, 42 F. Supp. 2d 1219, 1221 (D.N.M. 1999)(denying remand of federal
17 civil rights claims because courts “have rejected the notion that 28 U.S.C. § 1441(c) now
18 authorizes remand of the federal question even when the state claims predominate.”) In short,
19 because the Court has original jurisdiction over the federal claims and supplemental jurisdiction
20 over the related state claims, Plaintiff WEICU has no claims capable of being remanded.

21 Second, as a matter of law:

22 [T]here is no authority for the proposition that this Court can or should remand
23 §1983 claims over which it has original jurisdiction, based on a plaintiff’s assertion
24 that the state law claims are more important. A plaintiff who asserts federal claims is
25 going to have his case removed under § 1331, and under §1367, this Court has
26 supplemental jurisdiction over related state law claims.

See Canyon Properties, LLC v. Pierce County, 3:19-cv-06168-RBL (W.D. Wash. January 10,

1 2020); *see also May v. Pierce County*, 3:19-cv-06167-RBL (W.D. Wa. January 10, 2020) (same);
2 *Kovalev v. Callahan Ward 12th St. LLC*, CV 21-2318, 2021 WL 2856511, at *2 (E.D. Pa. July 8,
3 2021)(“Even if Mr. Kovalev thinks that his state law claims are ‘more important,’ that does not
4 matter for purposes of federal question jurisdiction.”) Indeed, in cases like this where “jurisdiction
5 exists and was properly invoked, the Court has no discretion to remand.” *See Burnette v. Godshall*,
6 828 F. Supp. 1439, 1444 (N.D. Cal. 1993), *aff’d sub nom. Burnette v. Lockheed Missiles & Space*
7 *Co., Inc.*, 72 F.3d 766 (9th Cir. 1995)(*citing Carpenters S. California Admin. v. Majestic Housing*,
8 743 F.2d 1341, 1343 (9th Cir.1984))(emphasis added). This is so because “a district court’s
9 authority to remand a case derives from [28 U.S.C.] §1447(c),” and “a district court ‘exceed[s] its
10 authority in remanding on grounds not permitted by [§1447 (c)].”” *See Maniar v. F.D.I.C.*, 979
11 F.2d 782, 785 (9th Cir. 1992) (quoting *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336,
12 345 (1976), abrogated on other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)
13 (district court erred in remanding on the grounds that its docket was overcrowded since such
14 grounds are not contemplated in §1447(c)). *See, e.g., also In re City of Mobile*, 75 F.3d 605, 608
15 (11th Cir. 1996)(“we are not convinced that Congress ever intended to extend carte blanche
16 authority to district courts to revise the federal statutes governing removal by remanding cases on
17 grounds that seem justifiable to them but which are not recognized by the controlling
18 statute.”)(*quoting Thermtron*, 423 U.S. at 351).

19 Accordingly, the motion to remand the properly removed federal and state claims should be
20 denied. *See e.g. Brockman v. Merabank*, 40 F.3d 1013, 1017 (9th Cir. 1994)(because “original
21 jurisdiction is not discretionary,” a “district court could neither dismiss the entire case for lack of
22 jurisdiction nor remand it.”)(*citing Buchner v. FDIC*, 981 F.2d 816, 820 (5th Cir.1993)(declining
23 to authorize a remand under *Carnegie–Mellon University v. Cohill*, 484 U.S. 343 (1988) where
24 federal court had original jurisdiction over action); *Baker v. Kingsley*, 387 F.3d 649, 656–57 (7th
25 Cir.2004) (“[i]t is an abuse of discretion for a district court to remand a federal claim that is
26 properly before it”); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir.2002) (“a district court

1 has no discretion to remand a claim that states a federal question”).

2 **B. THIS COURT SHOULD EXERCISE ITS DISCRETION AND RETAIN THIS**
3 **CASE IN FEDERAL COURT.**

4 Additionally, although WEICU only raised a state law claim in the Complaint, this Court
5 should exercise its discretion and retain this case in federal court. In the Complaint, WEICU
6 specifically claims violations of the Public Records Act but also incorporates all of the other
7 allegations in the Complaint to support its public records violation claims. Compl. at 7. The
8 Defendants do not deny that the Public Records Act is a state law claim that does not have an
9 associated federal claim; However, Plaintiffs state they cannot prove their constitutional and
10 federal claims absent the public records they requested. *Id.* at 8. According to Plaintiffs, the
11 public records are central to the other claims alleged in the Complaint and the Court’s ruling on
12 the production thereof is necessary to prove the remainder of their claims. Therefore, these
13 claims are derived from a common nucleus of facts and remand is not appropriate. *See e.g.*
14 *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002)(District Court could exercise
15 supplemental subject matter jurisdiction involving party over whom there was no independent
16 basis for federal court jurisdiction, provided that claims formed but one constitutional case and
17 derived from common nucleus of operative fact.); *Watson v. Washington Dep't of Corr.*, C17-
18 5968-BHS-TLF, 2018 WL 7150488, at *9 (W.D. Wash. Nov. 15, 2018), report and
19 recommendation adopted sub nom. *Watson v. Washington State Dep't of Corr.*, C17-5968 BHS,
20 2019 WL 399070 (W.D. Wash. Jan. 31, 2019), *aff'd*, 812 Fed. Appx. 695 (9th Cir. 2020)(“In
21 practice, § 1367(a) requires only that the jurisdiction-invoking claim and the supplemental claim
22 have some loose factual connection.” 13D Wright & Miller, *Federal Practice and Procedure* §
23 3567.1 (3d ed. 2008). This Court's decision to exercise supplemental subject matter jurisdiction
24 involving a party over whom there is no independent basis for federal court jurisdiction is
25 discretionary. *Mendoza*, 301 F.3d at 1174; *see* 28 U.S.C. § 1367). The WEICU claims under the
26 state Public Records Act are so intertwined with the remaining federal and state claims that this

1 Court should exercise its discretion to maintain jurisdiction over those supplemental claims. As
2 the Plaintiffs have noted, they cannot prove the remainder of the claims without access to the
3 records WEICU sought in its records request. Apparently, they cannot know if their
4 constitutional rights have been violated without access to the ballots they are seeking.

5 A Court's discretion to exercise supplemental jurisdiction over state law claims is
6 determined by values of economy, convenience, fairness, and comity. *Acri v. Varian Associations,*
7 *Inc.*, 114 F.3d 999, 1001 (9th Cir., 1997). This discretion is exercised even if the federal claims in a
8 lawsuit have been terminated. *Roche v. John Hancock Mutual Life Insurance Co.*, 81 F.3d 249,
9 256-257 (1st Cir., 1996). *See also, Montano v. City of Chicago*, 375 F. Supp. 593, 601-602 (7th
10 Cir., 2004)(Court abused its discretion when it remanded a case that did not raise a novel state law
11 claim, the state law claims did not predominate over federal law claims, or the federal law claims
12 had not yet been dismissed and the decision to remand would result in more rather than less
13 litigation). Although WEICU argues that somehow the Court needs to determine the state law
14 claims prior to making any sort of ruling on federal claims, it cites nothing to support this
15 argument. To follow WEICU's logic, this Court would have to remand this matter to Clark County
16 Superior Court so it could determine the state law claims and then the matter could again be
17 removed to federal court for a determination of the §1983 claims. Essentially, this would result in
18 twice the work, which is not economical, efficient, or convenient. The Complaint includes state
19 and federal claims that arise out of the same set of facts and comes down to a basic question --
20 whether a forensic audit of the cast ballots in the Clark County 2020 General Election is
21 warranted. As Plaintiffs point out, this can only happen if the court grants WEICU's requested
22 relief of releasing the ballots. It is within the Court's discretion to exercise supplemental
23 jurisdiction over the state claims and in the interest of economy and convenience, this court should
24 maintain jurisdiction over all claims in the Complaint.

25 III. CONCLUSION

26 For the above stated reasons, Auditor Kimsey and Clark County respectfully request the

1 Court deny WEICU's motion to remand to state court and instead decide the County's pending
2 FRCP 12(b)(6) motion to dismiss the claims.

3 Respectfully submitted this 8th day of November 2021.

4
5 s/ Amanda M. Migchelbrink
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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I electronically filed the foregoing **Response to WEICU's Motion to Remand** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF registered participants:

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And I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants as indicated below:

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s/ Pamela Hamilton
 Pamela Hamilton, Paralegal