

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, )

Case No. 3:21-cv-05746

REPLY IN SUPPORT OF  
MOTION TO REMAND

28 U.S.C. §1447(c)

NOTE ON MOTION CALENDAR:  
NOVEMBER 19, 2021

Plaintiffs,

v.

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

Defendants.

REPLY IN SUPPORT OF MOTION TO REMAND

1 Plaintiff Washington Election Integrity Coalition United (“WEiCU”), without  
2 appearance, and with full reservation of rights, respectfully submits the following reply brief in  
3 support of its Motion to Remand this action to Clark County Superior Court. (28 U.S.C.  
4 §1447(c); 28 U.S.C. § 1441(c).)

5  
6 A. Removal Was Not Proper Under 28 U.S.C. § 1441(a)

7 Defendants concede this matter involves a mix of state and federal claims, but assert their  
8 removal of the action was proper under 28 U.S.C. § 1441(a). (Response, p. 2, l. 25 – p. 3, l. 2.)  
9 Contrary to this assertion, the Court must examine the claims in the complaint, and for  
10 complaints involving both federal law claims and state law claims, as is the case here, 28 U.S.C.  
11 §1441(c) governs.  
12

13 B. Defendants Have Not Cited to Authority Addressing 28 U.S.C. §1441(c) As Amended

14 In arguing an automatic connection between the state-law claims and the federal claims,  
15 Defendants do not appear to have cited to case law involving removal or remand under 28 U.S.C.  
16 §1441(c) as amended in 2011. (*See, e.g.*, Response, p. 5, l. 3- p. 7, l. 1 [citing cases from 2009,  
17 1999, 1993, 1995, 1984, 1996, 1996, 1993, 1988, 2004] .) This may be because the removal  
18 statute was amended in 2011 to specifically address the excessive expansion of Article III  
19 Jurisdiction over state law claims.  
20

21 Under the Federal Courts Jurisdiction and Venue Clarification Act of 2011, PL 112-63,  
22 December 7, 2011, 125 Stat 758, Congress removed the “discretion [to] remand all matters in  
23 which State law predominates” phrase from 28 U.S.C. § 1441(c) due to criticism from courts and  
24 commentators who believed that the old Section 1441(c) exceeded the boundaries of Article III  
25 jurisdiction. (*See, e.g., Thomas v. Shelton*, 740 F.2d 478, 483 (7<sup>th</sup> Cir. 1984) [removal jurisdiction  
26 over state law claims raises “constitutional questions”].)  
27

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1 This type of criticism prompted Congress to amend Section 1441(c) and preclude federal  
2 courts from adjudicating “separate and independent” state law claims. (H.R. Rep. No. 112-10, at  
3 12 (2011) [stating that new Section 1441(c)’s “sever-and-remand approach is intended to cure  
4 any constitutional problems”].) The amended statute effectively strips federal courts of  
5 jurisdiction over separate and independent state law claims:  
6

7 [U]nder the new Section 1441(c), state court litigants contemplating removal of  
8 an action involving state law claims potentially outside of federal jurisdiction  
9 must consider the possibility that if they remove, the state law claims will be  
remanded and they will face litigation in both state and federal court.

10 (Wrabley, Colin E., *Recent Amendments to Federal Removal Statutes Create New Possibilities  
11 and Potential Pitfalls for Litigators*, ReedSmith, 18 January 2012, pp. 2-3 [emphasis added].)

12 C. Severance and Remand Pursuant to 28 U.S.C. §1441(c)(2) Is Mandatory

13 Assuming, for purposes of argument only, that this Court finds removal under §1441(a)  
14 sufficient grounds for removal of cases involving a mix of state and federal claims, examination  
15 of 28 U.S.C. §1441(c) and related case law shows that severance and remand of the state-law  
16 based claims in this action is warranted. (*Genusa v. Asbestos Corp.*, 18 F.Supp.3d 773, 783-790  
17 (M.D. La. 2014) [motion to sever and remand under 28 U.S.C. §1441(c) granted]; *SJ Associated  
18 Pathologists PLLC v. Cigna Healthcare of Tex., Inc.* 964 F.3d 369, 373-374 (5<sup>th</sup> Cir. 2020)  
19 [district court judgment dismissing action vacated; state-law claims severed and remanded to  
20 state court]; *Kaylor v. Multi-Color Corp.* 488 F.Supp.3d 640, 644-644 (S.D. Ohio 2020) [“[a]  
21 straightforward reading of §1441(c) shows that Congress allowed for the parallel litigation of  
22 related claims in both state and federal courts.”].)

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1 The proper analysis is whether, and to what extent, Plaintiffs' claims: (1) are not within  
2 the court's original jurisdiction; (2) are not within the court's supplemental jurisdiction; or (3) are  
3 claims that have been made unremovable by statute. (*Genusa, supra*, at 783.)

4  
5 1) Plaintiffs' State-law Based Claims Are Not within This Court's Original  
6 Jurisdiction

7 As previously noted, this Court does not have original jurisdiction over seven (7) of the  
8 ten (10) causes of action in the complaint, as they were brought under state statutory law, namely,  
9 RCW Chapters 29A and 42.56. (Verified Complaint, ¶¶ 1-35.)

10  
11 2) Plaintiffs' State-law Claims Are Not within This Court's Supplemental  
12 Jurisdiction

13 In addition, this Court does not have supplemental jurisdiction over the seven (7) state  
14 statutory claims on multiple grounds. First, the causes of action under RCW 29A.68.013 may  
15 only be brought before: "Any justice of the supreme court, judge of the court of appeals, or judge  
16 of the superior court in the proper county. . . ." (RCW 29A.68.013.) Likewise, the cause of  
17 action under RCW 42.56 may only be brought before "the superior court in the county in which a  
18 record is maintained . . . ." (RCW 42.56.550.) This Federal Court does not have Article III  
19 supplemental jurisdiction over state-law claims that may only be brought before state court  
20 judges based on the express, plain language of the statutes. (RCW 29A.68.013, RCW 42.56.550.)

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22  
23 Second, even if this Court chooses to ignore the plain language of the state statutes,  
24 supplemental jurisdiction would not be permitted under 28 U.S.C. §1367(c) due to: 1) the novel  
25 and complex issues of state law involved (as evidenced, in part, by Defendants' multiple pending  
26 motions to dismiss and the intense desire for the Democratic Central Committee to intervene in  
27 all the actions); 2) the predominance of the state-law claims in the action; and/or, 3) other

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1 compelling reasons for declining jurisdiction, such as the removal statute mandating severance  
2 and remand. (28 U.S.C. §1441(c).)

3 D. The State-Law Claims Are Independent Because if Removed, There Would Be No  
4 Basis for the Remaining Federal Claims

5 Under 28 U.S.C. §1441(c), the Court must examine the claims in the complaint to  
6 determine whether removal is proper, and for complaints involving both federal law claims and  
7 state law claims, as is the case here, the entire action may be removed only if the action would be  
8 removable without the inclusion of the seven (7) state-law based claims:  
9

10 (c) Joinder of Federal Law Claims and State Law Claims.

11 (1) If a civil action includes –

12 (A) a claim arising under the Constitution, laws, or treaties of the  
13 United States . . . , and

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

18 (2) Upon removal of the action described in paragraph (1), the district court  
19 shall sever from the action all claims described in paragraph (1)(B) and shall  
20 remand the severed claims to the State court from which the action was  
21 removed. . . .

22 (28 U.S.C. §1441(c) [emphasis added].)

23 In this instance, the state claims are based in state law (*i.e.*, RCW 29A; RCW 42.56),  
24 assert independent process claims related to County-level election irregularities, seek production  
25 of County election public records, and form the entire evidentiary basis for the action.

26 As such, the state-law statutory claims are akin to the liability phase of the action, whereas  
27 the federal claims are akin to a damages phase. Without the ‘liability’ phase, there can be no  
28 ‘damages’ phase. The federal claims are only at issue if and when findings are reached under the

1 independent state claims. Consequently, at a minimum, the state statutory-based claims in this  
2 matter must be remanded pursuant to the plain language of 28 U.S.C. §1441(c).

3 E. The Court Does Not Have Discretion to Ignore 28 U.S.C. § 1441(c)

4 Defendants assert the Court has discretion to exercise supplemental jurisdiction over the  
5 independent state law claims under 28 U.S.C. § 1367. (Response, p. 7, l. 2 - p.8, l.24.)

6  
7 Defendants' reliance on 28 U.S.C. § 1367 is misplaced. 28 U.S.C. § 1367 is not a removal  
8 statute and does not give the Court automatic supplemental jurisdiction over a state claim; any  
9 such interpretation would render 28 U.S.C. §1441(c) meaningless and an affront to the  
10 Congressional amendments in 2011 specifically aimed at *limiting* Article III jurisdiction over  
11 independent state-law claims.  
12

13 As such, Defendants again want this Court to ignore 28 U.S.C. § 1441(c), which was  
14 specifically amended by Congress in 2011 to no longer provide federal courts with discretion to  
15 retain independent state law claims:

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

(28 U.S.C. §1441(c)(2) [emphasis added].)

21 Consistent with the express language of 28 U.S.C. §1441(c), this Court must, at a  
22 minimum, sever causes of action IV through X and remand them back to State Superior Court

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28 REPLY IN SUPPORT OF MOTION TO REMAND

1 for Clark County, Case No. 21-2-01775-06.

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Respectfully submitted,

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VIRGINIA P. SHOGREN, P.C.

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5 Dated: November 19, 2021



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By: Virginia P. Shogren, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 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:

REPLY IN SUPPORT OF MOTION TO REMAND

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  
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Harlyn Thompson  
Plaintiff, *Pro Se*

Kimberlee Elbon  
Plaintiff, *Pro Se*

Robert Ward  
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1 Constance Cooke  
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4 Plaintiff, *Pro Se*

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11 Lindsey Nichols  
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13 Joseph Kent  
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23 Dated: November 19, 2021

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