

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WASHINGTON ELECTION)	
INTEGRITY COALITION)	
UNITED, et al.,)	Washington State
)	Supreme Court Case
Plaintiffs,)	No. 102174-7
)	
vs.)	King County
)	Superior Court Case
JULIE WISE, et ano.,)	No. 21-2-12603-7 KNT
)	
Defendants.)	
)	

TRANSCRIPT OF PROCEEDINGS

VOL. 2

Friday, June 2, 2023

Transcribed from Audio Recording

HEARD BEFORE:

THE HONORABLE LEROY MCCULLOUGH
MALENG REGIONAL JUSTICE CENTER
401 Fourth Avenue North
Kent, Washington 98032

TRANSCRIBED BY: DOUGLAS ARMSTRONG, RPR

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I N D E X

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Summary Judgment
Court Adjourns
Reporter Certificate

Page
41
103
104

1 (Recording begins at 10:32 a.m.)

2 -----

3 THE COURT: Be seated, please.

4 Counsel on Zoom, are you able to hear the
5 Court?

6 ATTY. SHOGREN: Yes, Your Honor. Thank you.

7 ATTY. SUMMERS: Yes, Your Honor.

8 ATTY. HYATT: Yes, Your Honor.

9 THE COURT: Great. Then we are ready to
10 proceed in this matter of Washington Election Integrity
11 Coalition United vs. Wise and others. This is Judge
12 LeRoy McCullough presiding from Courtroom 4A of the
13 Regional Justice Center on Friday, June 22, 2023. We
14 are proceeding primarily by way of Zoom.

15 I'm going to ask the respective attorneys to
16 introduce themselves at this point, starting with the
17 plaintiff's counsel.

18 ATTY. SHOGREN: Thank you, Your Honor.
19 Virginia Shogren, Washington Election Integrity
20 Coalition United, acronym pronounced "we see you."

21 THE COURT: Thank you.

22 For the respondents?

23 ATTY. SUMMERS: Yes, Your Honor. Ann Summers
24 appearing on behalf of Defendants Director of Elections
25 Julie Wise and King County.

1 Also present at the hearing -- but I will be
2 speaking -- are my co-counsels, David Hackett and
3 Mari Isaacson.

4 THE COURT: Thank you. I see them on the
5 screen as well.

6 Any other attorneys representing anyone?

7 ATTY. HYATT: Good morning, Your Honor. This
8 is Heath Hyatt. I represent the intervenor defendant,
9 Washington State Democratic Central Committee.

10 THE COURT: And, Mr. Hyatt, did you submit
11 any written materials for today?

12 ATTY. HYATT: No, your Honor, we did not. We
13 were granted intervention just a couple of weeks ago,
14 and as part of our intervention, we indicated to the
15 Court that we would not be filing responsive briefing
16 to not upset the summary judgment proceedings.

17 THE COURT: All right. Thank you.

18 You may not be able to see, but there are
19 several people here in court. Usually, we ask the
20 gentlemen to remove their hats unless there is a
21 religious or a health reason, but I'm not going to be
22 "firm" firm about that. If you have to have it on, you
23 can do that, but ordinarily, we don't have the hats on
24 in court.

25 But for those of you that are on the screen,

1 there are several individuals present here in court.

2 Ms. Shogren, I believe you had requested that
3 you appear in person to make the argument for your
4 client. I'd indicated that in line with our protocol,
5 the civil cases are typically to be on Zoom.
6 Apparently, the word didn't get out. So we have some
7 people that are here present, and it's okay. You're
8 welcome, but I wanted to tell you on Zoom that we do
9 have some people that are here in court as well.

10 Now, those of you that are on Zoom, your
11 images are on the screen, and the people here in the
12 courtroom are able to see you, and presumably, they are
13 able to hear you as well.

14 Anything about logistics from either
15 attorney? All right. If not, then talk about a couple
16 of the other protocol issues.

17 Just a reminder that there are to be no
18 recordings of today's proceeding. There are to be no
19 photographs of any of the screens. That's against the
20 rules and against the protocol.

21 And the attorneys will be making the
22 presentations in the order that I will describe. It is
23 possible that the decision will be rendered today after
24 a brief recess. It's also possible that the Court,
25 depending on whether or not there are any twists and

1 turns to the argument, will delay the decision until
2 the Court has had an opportunity to further digest the
3 presentations.

4 I will tell the attorneys and all of you
5 present that there are a lot of pages that were
6 submitted, that the Court's reviewed the materials. We
7 have the declaratory judgment paperwork. We have the
8 order to show cause or the motion for an order to show
9 cause paperwork. We have the motion for summary
10 judgment.

11 And all of those materials have volumes of
12 paper, but that's okay. I want to compliment the
13 attorneys for the concise nature of the communications,
14 and I'm trusting that that will happen with respect to
15 the argument as well. That's what we're going to do.

16 Now, the first -- here's what I would
17 propose: first, that we receive the arguments on the
18 declaratory judgment. And, Ms. Shogren, you are
19 representing the plaintiffs in this case. So my
20 proposal would be that you be allowed to go first to
21 talk about your motion for a declaratory judgment. You
22 will stop there, and then I will hear from the
23 respondents' argument on that point.

24 We'll then proceed to the second argument,
25 which is the motion for a show-cause order. I will

1 receive both parties' argument on that.

2 The third argument will be on the summary
3 judgment, and then we proceed from there to you,
4 Ms. Summers, to lead the conversation there.

5 Any objection to that order?

6 ATTY. SHOGREN: No, Your Honor. Thank you.

7 ATTY. SUMMERS: No, Your Honor.

8 THE COURT: All right. And I think everybody
9 here in court understands what I'm saying. If there's
10 any questions that any of you have, ask me now because
11 once we get started, I'll be hearing from the lawyers,
12 and they'll be taking up most of my time.

13 Okay. There appear to be no questions, and
14 so, with that -- yes?

15 GALLERY COMMENT: Is the -- would Your Honor
16 be willing to hear any statements from the citizens or
17 anybody who wishes to speak?

18 THE COURT: I'm afraid not. It has to be
19 through the -- through the usual process.

20 GALLERY COMMENT: Thank you, sir.

21 THE COURT: But we are -- we welcome your
22 presence here today.

23 GALLERY COMMENT: Thank you.

24 THE COURT: Yes?

25 GALLERY COMMENT: Your Honor, just for

1 clarification, we are not allowed to take video. Are
2 we allowed to take audio? Is that a "no" too?

3 THE COURT: That's a "no."

4 GALLERY COMMENT: Okay. Thanks.

5 THE COURT: You can take notes, though.

6 GALLERY COMMENT: Got it.

7 THE COURT: As many handwritten notes as you
8 want.

9 GALLERY COMMENT: Got it. Thank you.

10 THE COURT: Okay. With that, Ms. Shogren,
11 let's start with you and your request for a declaratory
12 judgment relating to RCW 29A.08, I believe. So go
13 ahead.

14 ATTY. SHOGREN: Thank you, Your Honor.

15 Since the time WEICU filed its motion for
16 declaratory judgment, King County served an admission
17 in discovery, quote, that once returned ballots have
18 been separated from the ballot envelopes, the voter
19 cannot be identified, end quote. King County also
20 conceded in its response that tabulated ballots and
21 ballot images are anonymous once tabulated.

22 Based on the admission, this Court should
23 enter the declaratory judgment as requested so that the
24 parties can proceed with examination of now-admittedly
25 anonymous public records in the form of tabulated

1 Washington State ballots.

2 RCW 7.24.020 provides a person "whose rights
3 or other legal relations are affected by a statute may
4 have determined any question of construction or
5 validity arising under the statute and obtain a
6 declaration of rights, status, or other legal relations
7 thereunder."

8 King County continues to assert that
9 anonymous cast ballots may not be examined because of a
10 need to protect the secrecy of voters' ballots. King
11 County cannot have it both ways. Either cast ballots
12 are private and secret, or they constitute anonymous
13 public records.

14 The parties are diametrically opposed in
15 their positions, yet we now have an admission in
16 discovery by King County that directly supports WEICU's
17 request on this motion. Consistent with King County's
18 admission, this Court should decree the tabulated
19 Washington State ballots are anonymous public records
20 as described in RCW 29A.08.161. Thank you.

21 THE COURT: Thank you.

22 Ms. Summers?

23 ATTY. SUMMERS: Thank you, Your Honor.

24 King County has argued four independent bases
25 for this Court to reject the request for a declaratory

1 judgment. First and most fundamentally -- and I will
2 also be arguing this in regard to the motion for
3 summary judgment -- the complaint as to Plaintiff WEICU
4 has a fatal error. It was not signed by an attorney,
5 and WEICU is a nonprofit corporation that has no right
6 to self-representation.

7 Defendants cannot waive the requirement of
8 CR 11 that a pleading be signed by an attorney or a
9 party that has right to self-representation. There's
10 no authority for WEICU's argument that we have waived
11 this claim. We have brought no prior motion in this
12 court, and we have the right to consolidate all of our
13 arguments in a single dispositive motion for purposes
14 of judicial economy.

15 Based on this fatal error in the complaint
16 alone, WEICU's PRA cause of action or -- and motion for
17 declaratory judgment should be dismissed.

18 Now, in addition, even if this Court could
19 consider this complaint as to the PRA action, it did
20 not request any declaratory relief on behalf of
21 Plaintiff WEICU, and it certainly did not request
22 relief based on RCW 29A.08.161, as required by Civil
23 Rule 8.

24 Now, we have not particularly stringent
25 pleading requirements in this state, but we do have

1 requirements, and one requirement is that a complaint
2 state with specificity the relief that's requested.
3 Declaratory relief is a specific and separate type of
4 relief that's allowed under Uniform Declaratory
5 Judgments Act, and there's simply no basis in the
6 complaint for them bringing this basis for relief.

7 Third, WEICU lacks standing to seek
8 declaratory relief under the statute, RCW 29A.08.161,
9 because a party can only seek declaratory relief as to
10 a statute if they are within the zone of interests that
11 are intended to be protected by the statute. This
12 statute clearly protects voters' right to ballot
13 secrecy.

14 WEICU is a nonprofit corporation. They are
15 not a voter. They are not within the zone of interest
16 to be protected by this statute, and they are not
17 someone who can seek declaratory judgment under this
18 statute.

19 And, finally, based on the White cases that I
20 have detailed in length in my briefing, which come from
21 two different divisions of the courts of appeals, in
22 addition to recent legislative acquiescence clarifying
23 that the legislature intended to adopt the holdings of
24 the White cases, ballots are exempt from public
25 disclosure.

1 And so the meaning of 29A.08.161 is
2 completely irrelevant to WEICU's PRA claim and does not
3 present a justiciable controversy for this Court. This
4 is not -- declaring the meaning of 29A.08.161 would not
5 provide any effective relief to Plaintiff, and for that
6 reason, a declaratory judgment is improper. Thank you,
7 Your Honor.

8 THE COURT: Do you agree, Ms. Summers, that
9 the votes, once tabulated, are anonymous?

10 ATTY. SUMMERS: Yes. Unless -- well, the
11 only -- if someone were to, for some reason, write
12 their name on their ballot, it would not be anonymous,
13 but that normally does not happen.

14 THE COURT: The question of whether or not --
15 once returned ballots are separated, whether or not
16 they could be identified, is there any disagreement on
17 that point?

18 ATTY. SUMMERS: No.

19 THE COURT: So if you agree with that,
20 Ms. Summers, that essentially these are anonymous
21 ballots, your argument comes down to whether or not the
22 ultimate question -- that is to say by the cases of
23 White vs. Skagit County, White vs. Clark County, and
24 the others -- whether or not those cases basically
25 resolved the issue anyway; is that right?

1 ATTY. SUMMERS: Yes, Your Honor.

2 Can I just say that people seem to be putting
3 comments into the chat, which is distracting. I don't
4 know if the Court wants to speak to that. It can be
5 viewed by everyone.

6 Could you ask that question again? I'm
7 sorry.

8 THE COURT: Let me -- let me resolve this
9 chat issue. So even though some of you are online, you
10 are still in a virtual courtroom. If you were in a
11 courtroom, you would not be chatting. You would not be
12 distracting any of the attorneys or any of the parties.

13 So I'm asking you to govern yourselves with
14 that in mind. Do not use the chat in any way. If you
15 need to talk with someone, pick up the telephone and
16 call them, but do not invade this virtual courtroom
17 space with your personal opinions.

18 So my question to you, Ms. Summers, was in
19 light of the fact that you would agree that the votes
20 are anonymous once they are tabulated, that takes you
21 down to your basic argument about the White cases, that
22 the White vs. Skagit County, White vs. Clark County,
23 those cases basically resolve the issue in any event.
24 Is that what you're saying?

25 ATTY. SUMMERS: Yes, Your Honor. Exactly.

1 THE COURT: The plaintiff had indicated as it
2 pertains to CR 11, the nonsigning of the complaint by
3 an attorney, that the state or that the county had
4 basically gone along with this all the way up to
5 federal court and that at this point, it's very
6 interesting, according to Ms. Shogren, that you would
7 raise this issue. She didn't use the term "laches,"
8 but it's indicated that it's in the nature of an
9 estoppel.

10 What is the county's response to that
11 position?

12 ATTY. SUMMERS: Well, first of all, Your
13 Honor, we filed a notice of removal, but this is the
14 first motion we filed in this court.

15 The requirements of CR 11 are clear, should
16 be known to everyone. And, in fact, in other cases
17 that WEICU has filed in other counties, particularly
18 Lincoln County, part of the basis for the Lincoln
19 County Superior Court's dismissal was the lack of an
20 attorney filing -- let me just check to make sure that
21 is right -- the lack of an attorney signature on the
22 complaint. So, I mean, they've been on notice as to
23 this issue for a long time.

24 THE COURT: But nothing from you, per se?

25 ATTY. SUMMERS: No, Your Honor.

1 THE COURT: Okay. Rebuttal, Ms. Shogren?

2 ATTY. SHOGREN: Thank you, Your Honor.

3 I think it's very important for the Court to
4 understand that none of the White cases addressed the
5 ballot anonymity statute that we're talking about. I'm
6 not sure why that is the case, but they did not take
7 that statute into account. Those courts were very
8 focused on the concerns over voter secrecy related to
9 ballots, but they did not acknowledge the fact under
10 the election code that the ballots are rendered
11 anonymous by law once tabulated.

12 And the reason for that is when we conduct
13 elections, we conduct public elections. So we have to
14 publicly review the cast ballots in order to, you know,
15 add up the votes and arrive at election results.

16 THE COURT: And who's the "we"? Who's the
17 "we" that you're referring to?

18 ATTY. SHOGREN: The King County Elections
19 department personnel do review each ballot in person
20 before they are scanned into the system. That was
21 established at the deposition of Director Wise. And
22 then the ballots are tabulated for purposes of arriving
23 at election results.

24 So the secrecy that is described in the state
25 constitution, Article 6, Section 6, ends at the

1 depositing of a voter's ballot because past that
2 moment, the people, the government who represents the
3 people, must look at that ballot in order to arrive at
4 an election result. So the election code that renders
5 cast ballots anonymous is consistent with the state
6 constitution and consistent with the reality of public
7 elections.

8 THE COURT: Unless there's anything further
9 on that, I am not going to resolve the White vs. Skagit
10 County or the White vs. Clark County issue until later
11 in the proceeding. But with the exception of that, the
12 Court's ruling on the declaratory judgment is that the
13 state ballots are anonymous pursuant to 29A.08.161 and
14 related statutes.

15 I believe that even though there is no
16 challenge that the pleading was not signed by an
17 attorney, we do have to talk about whether or not that
18 is a fatal error. And we do have to talk about, under
19 Civil Rule 8, whether the complaint that didn't ask for
20 a declaratory judgment is fatal.

21 As it pertains to that second issue, I
22 believe that the rules would require liberal
23 interpretation. So I will not dismiss the motion for
24 the declaratory judgment based on Civil Rule 8. I do
25 believe that there is an arguable position that the

1 plaintiffs are concerned as a group of voters, even
2 though they're not individual voters.

3 So at this point, the motion for the
4 declaratory judgment is tentatively granted, but
5 subject to the Court's later ruling as it pertains to
6 the applicability to the White cases.

7 Let's move now to the second issue, the
8 motion to show cause. Back to you, Ms. Shogren.

9 ATTY. SHOGREN: Thank you.

10 King County has not met its burden on the
11 motion to show cause as to the Public Records Act
12 claim, Cause of Action 16. Under the Public Records
13 Act, the burden of proof shall be on the agency to
14 establish that refusal to permit public inspection and
15 copying is in accordance with a statute that exempts or
16 prohibits disclosure in whole or in part of specific
17 information or records.

18 Despite the passage of 21 months, King County
19 still has not cited to a single statute that exempts or
20 prohibits disclosure in whole or in part of the
21 specific records requested, either in the Public
22 Records Act itself or any other statute. King County
23 relies primarily on a ballot container statute,
24 RCW 29A.60.110, but that statute does not exempt or
25 prohibit disclosure, in whole or in part, any of the

1 records at issue. The ballot container statute
2 describes circumstances in which a ballot container may
3 be opened by the canvassing board, an entity not
4 involved in this action.

5 King County next relies on Article 6,
6 Section 6, of the Washington State Constitution, but
7 that section does not exempt or prohibit disclosure, in
8 whole or in part, any of the records at issue. The
9 absolute secrecy required by Section 6 ends with the
10 depositing of the ballot. That is because we have
11 public elections that require public disclosure and
12 counting of the votes on the ballots.

13 Public review of cast ballots is not
14 prohibited by the constitution. King County cannot
15 rely on a perversion of reality and the state
16 constitution to deny examination.

17 King County then tries to rely on a series of
18 case opinions, referred to as "the White opinions,"
19 which are not a statute that prohibits or exempts
20 disclosure. Case opinion is not a statute.

21 The White opinions never address
22 RCW 29A.08.161, the ballot anonymity statute rendering
23 tabulated ballots anonymous by law. The White courts
24 were concerned about violating voter secrecy or
25 privacy, but there can be no secrecy or privacy

1 concerns for records that are legally required to be
2 anonymous because they are reviewed as part of a public
3 election.

4 King County then tries to rely on Title 29A,
5 the entire election code as a whole. The entire
6 election code is not a statute that exempts or
7 prohibits disclosure. The entire election code
8 includes the ballot anonymity statute, which renders
9 cast ballots anonymous public records.

10 Implied exemptions, which is what happened in
11 the White cases, are not allowed under the Public
12 Records Act. One of the White cases has been sharply
13 criticized by that reason by a commenter in the
14 Washington State Bar Association's Public Records Act
15 Deskbook.

16 Finally, King County wants to rely on a
17 recent senate bill that it publicly supported, even
18 though to do so was inconsistent with 21 months' worth
19 of removals, denials, sanctions, threats, motions for
20 sanctions, counterclaims, and claims of frivolous
21 litigation. Senate Bill 5459 is not retroactive to
22 requests from September 2021 and only confirms that no
23 statutory exemption existed until May of 2023 for two
24 categories of records requested by WEICU.

25 SB 5459 does not prohibit disclosure of any

1 of the requested records. It does not affect the Lyft
2 factors required to be met before records may be
3 prohibited from examination under the Public Records
4 Act, RCW 42.56.540.

5 King County has not met its burden on this
6 motion to show cause as to any of the four categories
7 of records at issue. Under the Public Records Act,
8 since no exemption exists, King County must be ordered
9 to permit inspection of the records. There is no
10 choice under the law. Thank you.

11 THE COURT: Before I hear from the county,
12 you sort of dismissed the cases, White versus the two
13 counties. As I read the cases, Ms. Shogren, they
14 actually looked at what they call the interplay of 29A,
15 all the statutes. They looked at the interplay of the
16 statutes with the state constitution and some of the
17 other privacy concerns.

18 And those cases seem to suggest that when you
19 look at all of the -- all of that, there is something,
20 even though it's not a specific statutory exemption.
21 There is an exception that's been created by the
22 universe of statutes and other kinds of things that are
23 presented.

24 Do you believe that those two cases are
25 precedent?

1 ATTY. SHOGREN: No, Your Honor, I do not.

2 THE COURT: Why are they not precedent?

3 ATTY. SHOGREN: The White cases, first of
4 all, fail to take into account the ballot anonymity
5 statute. They did not address the fact under law,
6 election code law, that ballots are anonymous once
7 they're cast and tabulated.

8 Those cases also did not prohibit the
9 examination of any of the records that WEICU is looking
10 at. The court -- the courts in the White cases did not
11 examine the Lyft factors from the Lyft vs. City of
12 Seattle, Washington State Supreme Court case from 2018,
13 and so they do not prohibit the examination of any of
14 the records.

15 THE COURT: And let me interrupt you. The
16 Lyft cases had to do with what? What was the subject
17 matter?

18 ATTY. SHOGREN: It was trade secrets and
19 whether or not they could be prohibited from
20 examination. And what the Supreme Court --

21 THE COURT: So if we're talking about trade
22 secrets, is that in some way very different from a
23 person's ballot?

24 ATTY. SHOGREN: Actually, the ballots, since
25 they are anonymous by law, it's -- there is no grounds

1 to exempt them or prohibit them. Trade secrets have
2 even a higher level of secrecy attached to them,
3 whereas anonymous cast ballots should have zero secrecy
4 connotations attached to them.

5 The big-picture issue with the White cases is
6 that the courts stepped in and found an implied
7 exemption based on a Gestalt approach, and that is
8 specifically not allowed under Washington State Supreme
9 Court law. The case of Doe vs. Washington State Patrol
10 makes it very clear that the courts' role is not to
11 create exemptions, no matter how much they might want
12 to under some Gestalt approach.

13 There either has -- there either is a statute
14 that exempts or not. It's a black-and-white situation.
15 It's not a gray area where courts can step in and say,
16 "Well, you know, there's all these rules about how
17 ballots have to be secured, and this information has to
18 be locked away, and this has to be stored in a certain
19 way. So we're just going to assume that the
20 legislature wants to exempt these."

21 That's not how it works, and that's why the
22 Washington Bar Association Deskbook on the Public
23 Records Act, the commenter's section which we've
24 provided to the Court basically says anyone who
25 approaches the use of implied exemptions to the Public

1 Records Act should proceed with extreme caution. And
2 the commenter basically said those cases are somewhat
3 overruled by post Washington Supreme Court decisions
4 like Doe vs. Washington State Patrol that make it
5 extremely clear that courts just cannot go there.

6 THE COURT: And I'll come back to you in a
7 second after I hear from the -- from the state then on
8 this issue, but the final question for now is whether
9 or not either of the White cases were submitted for
10 review to the Washington State Supreme Court. And if,
11 so what was the result?

12 ATTY. SHOGREN: I'm not sure, but I believe
13 review was denied, at least as to one of them.

14 THE COURT: All right. We'll come back to
15 you.

16 Let me hear from you, Ms. Summers.

17 ATTY. SUMMERS: Thank you, Your Honor.

18 Well, first of all, we have the same argument
19 as to the CR 11. Again, seeking any relief based on a
20 complaint that has a fatal error is inappropriate.

21 But getting to the substance of the public
22 records claim, there's no evidence of any violation of
23 the Public Records Act here. King County provided the
24 adjudication records that were requested. There's no
25 dispute as to that. King County offered to redact and

1 scan ballot envelopes. That offer was declined.

2 There's no factual dispute as to that.

3 King County also offered to produce ballot
4 envelopes for physical inspection. That offer was
5 received, but no response was received from the
6 requester, and the request was closed. Again, there's
7 no dispute as to that. So that just leaves us to the
8 ballots themselves and the ballot images.

9 There are three White cases, two from
10 Division 2 and one from Division 1. Two of them were
11 from 2015. One was from 2017. Review was sought in
12 all three of them, and the Supreme Court denied review
13 in all three cases.

14 More importantly, the legislature, although
15 it made amendments to the Public Records Act, never did
16 anything that indicated its disagreement with the White
17 court's interpretation of the statutes surrounding
18 election records.

19 And then, just recently, in 2023, the
20 legislature passed a clarifying amendment to the PRA.
21 It is explicitly clarifying in that in Section 1 of
22 Senate Bill 5459, they state their legislative intent.
23 First, they note that requests for records containing
24 voter registration information, election data have
25 increased exponentially over the past several years,

1 and that they're passing this legislation intending to,
2 quote, clarify responsibilities for producing records.

3 When the legislature explicitly passes a
4 clarifying amendment, it is retroactive. It is
5 intended to indicate its agreement with prior case law,
6 which is exactly what the legislature did.

7 So there can really be no question that the
8 legislature agreed with the holdings of the White cases
9 as well as that the Supreme Court agreed with the
10 holding of the White cases by denying review. And the
11 holding of the White cases and now the new legislation
12 adopting those holdings make clear that ballots and
13 images of ballots are not subject to public disclosure.

14 Imagine if anyone could demand to take
15 custody of all the original ballots and all the ballot
16 images from an election, and the county simply had to
17 hand them over to the first requester with no controls
18 over what might happen to those ballots. That would
19 clearly violate both state law and federal law, state
20 law that requires secure storage of the ballots, and
21 that is explicitly at 29A.60.100. This says the
22 tabulated ballots must be kept in sealed containers and
23 can only be opened for specific purposes such as
24 recounts, random checks authorized by statute, or
25 conduct an audit that's authorized by statute. And, of

1 course, federal law and the Civil Rights Act of 1960
2 requires us to retain all those records for at least --
3 for 22 months, should there be any federal
4 investigations under the Civil Rights Act. So there's
5 just no support in Washington law that the first
6 requester can demand custody of all the ballots from an
7 election.

8 As the White cases found, the White cases
9 didn't create a common-law exemption to the Public
10 Records Act. The White cases examined all the election
11 statutes and the statutory scheme and found that, as
12 you say, the interplay between them indicated a
13 legislative intent to exempt ballots from public
14 inspection.

15 And that is entirely consistent with the
16 Public Records Act. It is entirely consistent. It is
17 interpretation of the statutes which is the role of the
18 courts, and particularly the appellate courts.

19 As to -- so as the White cases found, the
20 entire statutory scheme evidences an intent to make
21 only certain election records available to the public
22 and to maintain security of other records, particularly
23 ballots, which are the most important election records
24 that we have. And those are due to very compelling
25 state interests in both election security and election

1 finality.

2 The White cases are dispositive, as is the
3 recent legislation, which indicates, finally,
4 explicitly what was indicated implicitly before, was
5 the legislature acquiescence in the holding of the
6 White cases.

7 THE COURT: Thank you.

8 Let me round back to you, Mr. Hyatt, to give
9 you a chance to respond to both issues.

10 And then, Ms. Shogren, when I come back to
11 you, you'll have the opportunity to respond to
12 Mr. Hyatt's comments as well.

13 ATTY. HYATT: Thank you, Your Honor.

14 The intervenor defendants join in the
15 arguments made by King County and have nothing further
16 on the two issues that the Court has already discussed,
17 but with Your Honor's indulgence, we would appreciate
18 being heard briefly on the third issue that you would
19 like to address in this hearing.

20 THE COURT: And that is the summary judgment?

21 ATTY. HYATT: That's right. Thank you, Your
22 Honor.

23 THE COURT: Thank you.

24 So back to you, Ms. Shogren.

25 ATTY. SHOGREN: Thank you.

1 I am intrigued by King County's position that
2 the legislature passing law this year somehow
3 clarifying court cases automatically renders it
4 retroactive. I am not familiar with that concept, and
5 I do not think that that is an accurate statement at
6 all.

7 Last year, the legislature did pass a statute
8 amending the Public Records Act to exempt certain
9 election-related information, and in that statute, they
10 expressly said that it was -- it applied to any
11 requests that were still outstanding as of a certain
12 date. So it was retro -- it had retroactivity back to
13 a certain date, whereas the SB 5459 does not have any
14 such language in it.

15 And what the Court really needs to understand
16 is that the SB 5459 does not prohibit examination of
17 any records. There's a difference between exemptions
18 and prohibitions under the Public Records Act.
19 Exemptions happen at the agency level. Then, if
20 brought up to court and the agency still wants to
21 prohibit examination, it's incumbent upon the agency to
22 file a motion to prohibit examination under the Public
23 Records Act.

24 And that's where the Lyft case comes into
25 play as well. The Lyft case, the Supreme Court, in

1 2018, which postdates all of the White cases and the
2 review-denials on the White cases, said that if an
3 agency wants to prohibit examination, even of exempted
4 records, it's incumbent on the agency to bring the
5 motion under RCW 42.56.540 so that the -- so that the
6 judicial branch can undergo an analysis of whether the
7 records -- of whether release of the records would
8 clearly not be in the public interest and would
9 substantially and irreparably damage a person or vital
10 governmental functions.

11 So that is not happening here. And according
12 to the Lyft decision, Supreme Court 2018, that has to
13 happen before an agency can block access to records.
14 Setting aside all the exemptions, you have to look at
15 the prohibition issue. So, again, that's -- those are
16 the factors, the Lyft factors that the Court has to
17 consider before it can prohibit examination.

18 King County is requesting a permanent
19 injunction against WEICU from ever looking at ballot
20 records. And in order for the Court to decide that, it
21 must determine the Lyft factors.

22 Conveniently, King County has not brought
23 those issues to the Court's attention, probably because
24 those factors are very high. The standards are high
25 and very difficult to meet in a case where you're

1 looking to review anonymous records. These are
2 anonymous records.

3 So one other thing that really bothers me or
4 troubles me about King County's approach is that they
5 have this attitude that they can keep the records
6 behind locked doors for 21 months, but the public is
7 some sort of wild beast that can't be trusted to look
8 at their own records. That concept is offensive to the
9 public. The public has the right to review their
10 records.

11 The Public Records Act was passed by
12 initiative 50 years ago for a reason, and this is the
13 reason. The public has to be allowed to look at its
14 own public records to make sure that the government is
15 conducting elections in a free and equal manner, which
16 is guaranteed by the state constitution. If they
17 cannot review their own anonymous records, then they
18 cannot confirm that their rights are being upheld. So
19 thank you.

20 THE COURT: By having --

21 ATTY. SUMMERS: Your Honor -- Your Honor --
22 oh, I'm sorry.

23 THE COURT: Just a second.

24 ATTY. SUMMERS: I have additional authority
25 for the retroactivity of clarifying amendments, if

1 you'd like it.

2 THE COURT: I'll come back to you in a
3 minute.

4 With respect to the public being a wild beast
5 and so forth, you both have been very good about not
6 going -- including polemics. I appreciate that.

7 Is it possible that -- Ms. Shogren, that the
8 review of these ballots has been entrusted
9 legislatively to a particular agency and/or individual?
10 And is that -- is it possible that that's the check and
11 balance that the legislature had in mind? Is that at
12 all?

13 ATTY. SHOGREN: I don't think we can
14 speculate as to what the legislature has decided. I
15 think it comes down to the public right to review
16 public records.

17 And we can't step in and say, "Oh, you know,
18 that might be embarrassing to somebody." The Public
19 Records Act specifically says that embarrassment is not
20 a grounds to withhold records.

21 THE COURT: It does say that.

22 ATTY. SHOGREN: So all of this -- it does say
23 that. You cannot withhold -- you cannot withhold
24 records just because it might cause inconvenience or
25 embarrassment to public officials.

1 THE COURT: But let me interrupt you. That's
2 a -- that's a different question.

3 The question is if the legislature had in
4 mind that they wanted to have some checks and balances
5 here, did the legislature have an opportunity to
6 specify how those checks and balances would be put in
7 place? And if so, is it possible that the current
8 scheme is that legislature's view of what the checks
9 and balances are?

10 ATTY. SHOGREN: The checks and balances are
11 in the Public Records Act already.

12 THE COURT: Okay.

13 ATTY. SHOGREN: That's the -- that's our law.
14 Now, it was passed by the people. It wasn't passed by
15 the legislature, but as far as priority of legislation,
16 I think it would be fair to argue that the Public
17 Records Act preempts the state legislature acts on that
18 point.

19 If we don't have access as a society to our
20 own anonymous public records, then what is the point of
21 the Public Records Act? That is the check and balance
22 right there. The check and balance is that the people
23 have the right, the inherent right to review their own
24 records to ensure that the government is acting in
25 their best interests.

1 If we violate the Public Records Act, where
2 are we? We are left with nothing. We have no rights.
3 We have no ability to look at anonymous records, and we
4 are left in chaos.

5 THE COURT: Okay.

6 ATTY. SHOGREN: We need to be able to look at
7 our public records. That's what the people dictated 50
8 years ago, whether the current legislature wants to
9 exempt certain records.

10 The current legislature wants to carve out --
11 you know, carve up the Public Records Act until it's,
12 you know, so full of Swiss holes -- Swiss cheese holes
13 you can't, you know, get anything. But right now, what
14 we have is nonretroactive exemptions for two of the
15 four categories. That's it.

16 And the exemptions, even assuming the
17 exemptions apply to two of the four categories, that
18 doesn't prohibit examination. The Public Records Act
19 requires the Court to undergo the Lyft factor analysis
20 before even exempt records can be prohibited from
21 examination.

22 There is such a high bar, Your Honor, under
23 the --

24 THE COURT: I get it.

25 ATTY. SHOGREN: -- Public Records Act.

1 THE COURT: Let me -- let me ask --

2 ATTY. SHOGREN: Okay. All right.

3 THE COURT: Let me ask you a different
4 question going back to the CR 11. We kind of -- I kind
5 of glossed over it. Concerning the claim not being
6 signed by an attorney for a corporate body, one case
7 that was referenced by the county was Dutch Village vs.
8 Pelletti, 162 Wn. App.

9 What about that notion, Ms. Shogren, that a
10 corporate body cannot represent itself, but that it has
11 to be represented by an attorney? Could I have your
12 input on that?

13 ATTY. SHOGREN: Sure, Your Honor.

14 This is a PRA -- this complaint includes a
15 PRA cause of action, Public Records Act cause of
16 action, and WEICU was the requester for that request.
17 So it is, statutorily, a proper party to have brought
18 the complaint.

19 And King County is fully aware that WEICU
20 retained counsel at both the federal and state levels,
21 and it had no objection to WEICU signing the complaint
22 when it removed the action to federal court, a court of
23 limited jurisdiction in October '21. King County
24 asserted no CR 11 or signature objections as an
25 affirmative defense --

1 THE COURT: Did you ever --

2 ATTY. SHOGREN: -- either in federal --

3 THE COURT: Hold on for a minute. Did you
4 ever sign the complaint? Did you ever sign it?

5 ATTY. SHOGREN: No, Your Honor. I stepped in
6 as counsel for WEICU at the federal level. The federal
7 court --

8 THE COURT: And --

9 ATTY. SHOGREN: -- gave WEICU --

10 THE COURT: Hold on.

11 ATTY. SHOGREN: -- a certain amount of --

12 THE COURT: Hold on. So has any attorney
13 ever signed the complaint, yes or no?

14 ATTY. SHOGREN: No, Your Honor. I have
15 appeared on behalf of my client.

16 THE COURT: If no --

17 ATTY. SHOGREN: And the --

18 THE COURT: If no attorney has signed the
19 complaint, under the case of Dutch Village vs. Pelletti
20 and some of the other cases -- I think it's Pelletti.
21 I can't even. Under the -- under that case law and
22 under Civil Rule 11, what more specific response do you
23 have to the county's position that that's a fatal
24 error?

25 ATTY. SHOGREN: Well, Your Honor, at the

1 federal level, the federal court gave WEICU a certain
2 amount of time to retain counsel. The federal court
3 did not dismiss the action or threaten to dismiss the
4 action, only if it did not retain counsel within a
5 certain amount of time.

6 So WEICU did retain counsel, and there's been
7 no objections to my appearance at the federal level or
8 the state level. There was no affirmative defense
9 raised by King County regarding no attorney signature.
10 King County filed a Rule 11 motion in federal court
11 against all the parties, had no objection.

12 So by any standards, concerns regarding lack
13 of corporate representation were rendered moot when
14 WEICU retained counsel at both the federal and state
15 levels. King County answered the complaint. King
16 County asserted affirmative defenses, which did not
17 include a claim of no attorney signature.

18 King County also filed counterclaims against
19 WEICU on the Public Records Act cause of action. How
20 do you file a counterclaim against a party and then
21 turn around and claim, "Oh, that party should have
22 been, you know, represented earlier by counsel"?

23 You just -- there's got to be a point where
24 there's an estoppel, and I think we've -- we're past
25 that point in this case. We're 21 months into this

1 case, Your Honor.

2 THE COURT: I appreciate that.

3 Back to you, Ms. Summers.

4 ATTY. SUMMERS: Yes. Your Honor, the case I
5 would like to bring to your attention is Washington
6 Waste Systems vs. Clark County, 115 Wn.2d 74. And I
7 can provide this by email if you would like.

8 THE COURT: Yes.

9 ATTY. SUMMERS: That case held --

10 THE COURT: Please do. Send it by email to
11 everyone, to Ms. Shogren as well as to the Court.

12 ATTY. SUMMERS: I will.

13 That case held that curative statutes which
14 clarify older legislation without changing prior case
15 law presumably apply retroactivity. That's exactly
16 what happened here. The legislature passed a law that
17 was consistent with prior case law, explicitly stating
18 it was intending to clarify the duties under the Public
19 Records Act.

20 And that -- but it doesn't -- you know, the
21 new law doesn't have to apply retroactivity, Your
22 Honor, because the White cases had already interpreted
23 the statutes and held that the Public Records Act
24 exempted ballots from -- so that's a little bit of a
25 red herring. But I do think it's important for the

1 Court to realize that this was a clarifying amendment
2 that indicates legislative acquiescence, and were it
3 important, it would be applying retroactively.

4 You know, Ms. Shogren talks about the
5 public's rights, but, you know, once WEICU would take
6 custody of all the original ballots and ballot images,
7 then no one else would have the opportunity to see
8 those. So, you know, that's -- it goes to my argument
9 that the idea that a single requester can get custody
10 of all these vital election records to do whatever they
11 want with them to the exclusion of everyone else,
12 including elected officials and federal officials, is
13 just ridiculous. That's not what the Public Records
14 Act was intended to do.

15 And I think this Court, based on your
16 questions, you're exactly right. The entire
17 legislative scheme is a legislature trying to balance
18 election security and election finality with election
19 transparency. And through their election scheme, they
20 have specifically indicated where there are
21 opportunities for public observation and public
22 examination.

23 For example, the public has the right to see
24 the list of voters who were given ballots and voters
25 who returned ballots. The voter -- the public has the

1 right to come watch the processing. The public has the
2 right to watch the canvassing; in fact, it's
3 live-streamed on the internet. There are lots of
4 opportunities for public inspection of the election
5 process that the legislature has explicitly provided
6 for, but that doesn't mean everything in the election
7 process is open to public view because it can't be for
8 purposes of election security.

9 And the legislature has made that balancing.
10 It is the legislature's job to create that balancing
11 and to create legislation, and it's clear that the
12 legislature has never intended for original ballots or
13 ballot images to be subject to public disclosure and
14 handed over to the first requester.

15 THE COURT: Thank you.

16 Anything else from you, Ms. Shogren? The
17 person bringing the motion typically has the last
18 comment. So do you have a one-minute comment on this
19 show-cause issue before we go to the summary judgment?

20 ATTY. SHOGREN: Yes.

21 In response to Ms. Summers, the retroactivity
22 issue, she's trying to argue that SB 5459 is
23 retroactive. Even assuming that it were, the issue
24 that King County has is they have not moved the Court
25 to prohibit examination under the Public Records Act.

1 They're talking exemptions, and what the
2 Court needs to do is focus on prohibitions. There
3 could be 50 exemptions to records, but the Court is the
4 last say in whether or not examination is prohibited.
5 And they have not brought a motion to prohibit
6 examination under the Public Records Act, so this Court
7 cannot act on any request to prohibit examination.

8 As to the arguments of, you know, oh, it
9 would be just so much of a hassle, and, you know, what
10 if more than one person wants to see it, the way I read
11 those arguments is that these records are so important
12 that they don't want the public to see them, and yet
13 they get to see them, and they get to store them. So
14 it's really unclear to me. If someone wants to look at
15 records that are anonymous by law from an election that
16 was certified 21 months ago or, you know, many, many
17 months ago, what is the governmental interest that they
18 are trying to protect?

19 And that brings us, again, to the Lyft
20 factors. King County is trying to do an end run around
21 the Public Records Act, confusing the Court into
22 thinking that exemptions are the end of the story.
23 They are not. We have to look at two major factors
24 before the records can be prohibited from examination,
25 and they're ignoring those factors because the

1 standards are so high. So thank you.

2 THE COURT: Thank you. We're at 11:30,
3 almost. Thank you so much for the direct presentations
4 and for indulging the Court's questions.

5 We proceed now to Item 3 on the agenda, the
6 motion for summary judgment. Ms. Summers?

7 ATTY. SUMMERS: All right, Your Honor. Thank
8 you.

9 This case is unusual in several respects, but
10 there's one particular way in which I want to stress at
11 the outset here. It's that the pro se plaintiffs'
12 causes of action are wholly separate from WEICU's cause
13 of action. The pro se plaintiffs causes of action
14 involve claims related to the administration of the
15 November 2020 general election. WEICU -- who, based on
16 the evidence which I presented from their website,
17 appears to have recruited these pro se plaintiffs --
18 has not joined in those causes of action, but brings a
19 wholly separate single PRA cause of action.

20 Now, King County has not moved to sever the
21 plaintiffs, WEICU and the pro se plaintiffs, because we
22 feel it's important for the Court to view this lawsuit
23 in its full context. But I think it's also important
24 to stress that Ms. Shogren only represents WEICU, and
25 WEICU only has a PRA cause of action.

1 So King County would object in advance to any
2 arguments that she tries to advance today that go
3 beyond the PRA cause of action. And I would rely on
4 our briefing for the motion to strike both arguments
5 made by Ms. Shogren in her briefing and evidence
6 presented by her that go beyond the PRA cause of action
7 and appear to be presented on behalf of the pro se
8 plaintiffs, who Ms. Shogren does not represent.

9 Now, I was going to -- I'm going to address
10 the pro se causes of action first. The state is
11 arguing four bases for dismissal, all of which are
12 independent and sufficient in and of themselves.

13 The first, as all of the courts, both federal
14 and state, that have dismissed the other lawsuits that
15 were filed against other counties by pro se plaintiffs
16 recruited by WEICU have concluded, that those
17 plaintiffs lack standing. These voter -- these
18 plaintiffs are no different than any other voter in
19 King County, and there's plenty of election cases that
20 say a voter has to allege a particularized injury to
21 have standing that sets them apart from any other
22 voter. So standing is the first basis for dismissal.

23 The second basis for dismissal is they have
24 failed to comply with the election contest statute that
25 they purport to be proceeding under, which is

1 RCW 29A.68.013. That requires that an election contest
2 that's alleging misconduct or error be supported by an
3 affidavit based on personal knowledge that details what
4 election result is being challenged and why, and no
5 such affidavits were presented in this case.

6 Moreover, that statute requires that such a
7 contest be filed within ten days. And the other courts
8 that I just mentioned have also found that the
9 plaintiffs' causes of action in the other cases were
10 untimely under the statute.

11 Even without the statutory time bar, the
12 doctrine of laches should apply. Laches is an
13 equitable doctrine that courts especially apply in
14 election cases due to the need to resolve election
15 disputes very expeditiously, primarily so that elected
16 officials can take office and carry on the business on
17 government. Laches have barred lawsuits that are
18 brought just one month after election was certified.
19 This lawsuit was brought 11 months after certification,
20 and laches is clearly a doctrine that should apply in
21 this case.

22 Third, plaintiffs have -- pro se plaintiffs
23 have submitted no evidence that supports any of their
24 claims. They cannot rely on allegations in the
25 complaint. Even those are based on information belief

1 and didn't allege any specific facts to support their
2 claims of misconduct. This is not a 12(b)(6) motion.
3 This is a CR 56 motion, and it requires the plaintiff
4 to show that they have evidence to support their
5 claims, which has not been done here; in fact, the pro
6 se plaintiffs have presented nothing to this Court.

7 And, finally, to the extent that the pro se
8 plaintiffs request declaratory relief, there's no
9 justiciable controversy here as to the -- as to the
10 conduct of the November 2020 general election. The
11 entire matter is moot. This Court can grant no
12 effective relief. The requirements of the Uniform
13 Declaratory Judgments Act cannot be met here.

14 Turning to the separate, wholly separate
15 WEICU Public Records Act cause of action, I don't want
16 to waste the Court's time. I think we've pretty much
17 argued that to the extent with the prior motions.
18 Again, we're relying on the fatal error in CR 11.
19 They've had plenty of time to fix it. This -- we have
20 not waived it.

21 You know, parties can make alternative
22 arguments, and this is an alternative argument. And we
23 presented all our arguments for dismissal in a single
24 dispositive motion to this Court. We did not waive it
25 by prior motions. So -- and there's no authority that

1 CR -- the requirements of CR 11 can be waived.

2 As to one other thing I want to talk about is
3 the difference between an exemption applying and an
4 agency actively seeking injunctive relief from a court,
5 which is what, you know, happened here. Due to the
6 importance of election security, King County -- King
7 County took the extra step to seek actually declaratory
8 and injunctive relief from this Court. It's in our
9 counterclaims. We cite to the relevant PRA statute.

10 I don't know what Ms. Shogren's talking
11 about, about how we haven't brought a motion for an
12 injunction. We clearly have. It was in our
13 counterclaims. We've argued it in our briefing. We
14 asked this Court to declare what the court of appeals
15 and the legislature has already declared, and the
16 language is in our proposed order, but it's essentially
17 that the defendants cannot, as a matter of law, release
18 ballots or ballot images for public inspection.

19 Now, if a party -- now, if an exemption
20 applies, an exemption applies, and an agency can rely
21 on the exemption. If the agency wants to take the
22 extra step to seek injunctive relief from a court, then
23 the Lyft factors come in, and that is that the agency
24 has to show that disclosure is not in the public
25 interest and would damage a vital governmental

1 function.

2 I think that's easy to show here. We've
3 argued it. I mean, the White courts and the
4 legislature have essentially already made that
5 determination, that releasing ballots to the public is
6 not in the public interest and would damage a vital
7 governmental function, most importantly protecting
8 election records, to protect election security, and
9 also to provide election finality.

10 As I said, I feel like we've already kind of
11 covered this ground. So I don't want to waste the
12 Court's time, but I would be happy to entertain any
13 questions.

14 THE COURT: Thank you.

15 We'll go to you, Mr. Hyatt.

16 ATTY. HYATT: Thank you, Your Honor. I'll be
17 brief.

18 The intervenor defendants will join King
19 County's arguments as well, but I just wanted to
20 emphasize one of the points that Ms. Summers made, and
21 that is that the context here does matter. This is --
22 this lawsuit is an election contest, plain and simple.
23 The plaintiffs can dress it up. They can style it
24 however they want, but the result is clear, and what
25 they're seeking is clear: to discredit, decertify, and

1 throw out the November 2020 general election results.

2 They are time-barred from doing so. It's
3 very clear what the procedure is to challenge the
4 election. It's laid out in statute. They have not
5 followed that procedure, and it has long passed the
6 opportunity for them to challenge the November 2020
7 election, Your Honor.

8 This is virtually the same case and the same
9 lawsuit that has been brought repeatedly in Superior
10 Courts across Washington State. And it's the same type
11 of arguments and allegations being made across the
12 country, all of which have been routinely rejected.

13 The context here matters, Your Honor. The
14 point of this lawsuit and the arguments being made
15 today are to overturn the 2020 general election.

16 Aside from the statutory issues, Your Honor,
17 the plaintiffs and WEICU lack standing. This case is
18 clearly moot. The results have been certified. The
19 people who have been elected are now serving.

20 And, finally, Your Honor, the doctrine of
21 laches clearly controls and should apply here. Thank
22 you.

23 THE COURT: Thank you.

24 Ms. Shogren?

25 ATTY. SHOGREN: Thank you, Your Honor.

1 I'll just start by noting that I've heard
2 intervenor defendant say they're joining in the
3 arguments of King County defendants, and I'm sure the
4 Court has noted that the coplaintiffs filed a joinder
5 to join in the summary judgment motion opposition,
6 which I will now proceed to provide.

7 This action was jointly brought in 2021 by
8 individual plaintiffs and a nonprofit to resolve
9 election procedural irregularities in the 2020 general
10 election and to fix those problems for future
11 elections. The statutory claims address misconduct by
12 the director in using an uncertified voting system;
13 documented vote-flipping, additions, and deletions;
14 illegal party preference tracking; and ballot security
15 issues involving the use of loose zip ties on ballot
16 containers. The Public Records Act request was
17 initiated by the nonprofit, WEICU, and seeks records
18 relevant to the other causes of action incorporated by
19 reference into the PRA claim.

20 Summary judgment is appropriate only where
21 the pleadings, depositions, answers to interrogatories,
22 and admissions on file, together with the affidavits,
23 if any, show that there is no genuine issue as to
24 any material fact and that the moving party is entitled
25 to a judgment as a matter of law.

1 King County defendants filed a CR 56 motion
2 that reads more like a Civil Rule 12 motion. King
3 County has missed the boat. Summary judgment may be
4 granted only if there is no genuine issue of material
5 fact.

6 The parties in this matter are far apart, to
7 put it mildly. It's as if the parties are in separate
8 universes with separate realities. One side says
9 Director Wise used a federally uncertified system,
10 based on Election Assistance Commission publicly
11 available information and a whistleblower declaration.
12 Director Wise testified that all she needs to worry
13 about is whether the system is certified at the state
14 level.

15 One side documented massive vote swings and
16 vote-flipping in the official results for the election
17 and submitted a declaration outlining the evidence.
18 Director Wise testified at her deposition that that
19 never happened.

20 One side has shown voters' party preference
21 is being tracked in authenticated ballot reports,
22 contrary to election law. Director Wise testified that
23 party preference is only being tracked for a short
24 period of time, so it's okay.

25 One side says ballot security was compromised

1 because zip ties on container lids are being left
2 loose, facilitating easy removal for stuffing the
3 ballots and supported by video evidence showing loose
4 zip ties. Director Wise testified she wasn't privy to
5 the loose zip ties until recently, but, regardless,
6 there must be a certain amount of looseness on those
7 container lids.

8 One side says tabulated ballots are anonymous
9 as required by an election code statute and are subject
10 to examination under the Public Records Act. The other
11 side says tabulated ballots are secret and private to
12 the voters and can never be reviewed under the Public
13 Records Act. And WEICU has been prevented from
14 examining the public records that would help resolve
15 these disputed facts.

16 So the King County defendants are left
17 arguing that the joinder signed by the coplaintiffs is
18 somehow deficient. They want to strike evidence after
19 complaining of not having enough evidence. At the same
20 time, they haven't issued a single discovery request in
21 the action.

22 King County even wants to strike the
23 declaration of WEICU's director. If King County had
24 its way, WEICU would not be allowed to submit any
25 evidence in support of its own complaint.

1 King County has its head buried deep in the
2 sand. At the same time, it wants to assert a narrative
3 that is not subject to judicial notice; for example,
4 the November 2020 general election was, according to
5 experts, the most secure, verified, and transparent
6 election in American history. King County didn't
7 identify any expert witnesses in its primary witness
8 disclosure who could support this.

9 Or this one: The coordinated efforts to
10 flood the courts throughout the nation with these
11 frivolous claims against election officials has
12 constituted an unprecedented assault on American
13 democracy. Is WEICU responsible for suits in other
14 states?

15 And then there's this one: The only purpose
16 of plaintiffs' audit would be to fundraise and spread
17 misinformation about the November 2020 election.

18 If Director Wise is so worried about
19 misinformation, why -- why has she blocked access to
20 over 2.4 million public records since September 2021?
21 She testified that she was the one who made that
22 decision, and yet here we are, 21 months later,
23 patiently waiting for her to provide one shred of
24 evidence to corroborate her version of the facts.

25 Instead of providing the public records,

1 Director Wise has been working overtime to get
2 legislation passed this year to keep ballots and ballot
3 images behind her personal locked doors. She also
4 worked hard to make sure that the source code used to
5 supposedly tabulate our votes is off limits for 25
6 years.

7 Director Wise was the public figurehead for
8 King County Elections and for all the auditors around
9 the state for the senate bill this year that literally
10 proves WEICU's request was valid and has been pursued
11 in good faith, which brings us to the Public Records
12 Act claim. That cause of action may not be summarily
13 adjudicated under Civil Rule 56 because no statute
14 prohibits the inspection of original ballots, ballot
15 images, spoiled ballots, or returned-as-undeliverable
16 ballots.

17 King County has not filed a motion to
18 prohibit review of any of these records. Instead, it
19 has attempted an end run around the Public Records Act
20 via a Civil Rule 56 motion, which it can't do per the
21 statutes, as shown in the Lyft decision. The
22 Washington Supreme Court made it clear in the Lyft case
23 from 2018 that the provisions of the PRA which are
24 statutory preempt the civil rules. So where the Public
25 Records Act has standards for prohibiting examination

1 of records, they have to be followed.

2 The Court must apply the Lyft factors if the
3 government wants to prohibit the public from reviewing
4 its own anonymous cast ballot records. And as
5 explained in the Lyft decision, to prohibit disclosure,
6 this Court would have to find that examination of the
7 records would clearly not be in the public interest and
8 would substantially and irreparably damage a person or
9 vital governmental functions.

10 King County has not moved to prohibit
11 examination, probably because those standards are very
12 high. So what are they doing instead? They asked the
13 legislature to exempt some of the records, but Senate
14 Bill 5459 is not retroactive, does not prohibit
15 examination, and does not affect the Lyft factors under
16 the PRA for prohibiting examination.

17 In their reply brief, King County cites to
18 First Student for the proposition that legislative
19 action in regard to a statute without repudiating a
20 prior court interpretation of that statute is evidence
21 of legislative acquiescence, except that's not what the
22 case says. It says, quote, when an agency adopts a WAC
23 interpreting a statute, repeated reenactment of the
24 statute without repudiating the interpretation in the
25 WAC is evidence of legislative acquiescence, though it

1 was only a factor to be considered, end quote.

2 This concept that King County's clinging to,
3 that the legislature has acquiesced to the judicial
4 branch when it comes to ballot review, completely
5 ignores the Public Records Act as a whole. The
6 legislature passes the laws, and the judicial branch
7 construes the laws consistent with our state
8 constitution. The judicial branch does not enact laws,
9 nor does it enact statutory exemptions or prohibitions
10 under the Public Records Act.

11 Prohibition against the people's right to
12 examine anonymous records would contravene multiple
13 provisions of the Washington State Constitution. The
14 legislature presumably knew that when it didn't go so
15 far as to prohibit examination in Senate Bill 5459.
16 And King County presumably knows this, so it filed a
17 CR 56 motion that leads to Court to think an agency's
18 finding of an exemption is an end of the story under
19 the Public Records Act, which it is not.

20 King County's motion for summary judgment is
21 legally untenable any which way you look at it and must
22 be denied. If the Court sees a need for any additional
23 briefing on any issues, WEICU would be more than happy
24 to provide it. Thank you.

25 THE COURT: You indicate, Ms. Shogren, that

1 there's several different genuine issues of material
2 fact. I made a note. You said there was some evidence
3 of vote-flipping, party preference tracking, loose zip
4 ties, and that the method used was uncertified by
5 federal standards. Did I hear you correctly?

6 ATTY. SHOGREN: That is correct. That's a
7 good summation, Your Honor. Yes.

8 THE COURT: The response or, I should say,
9 the county's position, of course, is that under Civil
10 Rule 56, you can't just state that. You need to have
11 some admissible evidence by way of declaration or
12 otherwise under 56(e).

13 Do you have that information?

14 ATTY. SHOGREN: Yes, Your Honor. We
15 submitted evidence in support of our opposition. My
16 declaration has multiple exhibits to it. I can direct
17 the Court's attention to Exhibit D, for example.

18 THE COURT: All right. I --

19 ATTY. SHOGREN: The declaration of --

20 THE COURT: I'm at Exhibit D, declaration of
21 M-A-R-A-S.

22 ATTY. SHOGREN: Correct. Exhibit 3 to
23 Ms. Wise's deposition. Ms. Maras is an intelligence
24 agency contractor who implemented election operations,
25 both in the continental U.S. and outside the

1 continental U.S. for the Obama administration. And her
2 declaration details the lack of federal accreditation
3 by the voting system test laboratories assigned to
4 certify the systems used and Pro V&V being one of those
5 testing laboratories. Their accreditation expired
6 February 24, 2017. So at the time Pro V&V was
7 certifying the Clear Ballot system used by King County
8 in 2020, it was no longer accredited.

9 Ms. Maras goes into the details of why that's
10 so important. The testing laboratories are tasked by
11 federal law with making sure that the systems cannot be
12 unduly manipulated, in particular, making sure that the
13 hardware used in electronic systems cannot be easily
14 accessed. And so Ms. Maras goes through excruciating
15 detail. She -- you know, as a whistleblower, she took
16 great personal risk in issuing this declaration, but
17 she did it. So we have it. It explains how it's done
18 in United States and in other countries.

19 She also explains the fact that -- she goes
20 through the detail of the algorithms that are set
21 within the voting systems with predetermined results
22 and how the evidence from 2020 showed that there were
23 massive swings within the voting -- course of the votes
24 been shown over time. Sorry. It's not the right word,
25 but -- and that is indicative of an algorithm being

1 used. And that would be consistent with what WEICU was
2 seeing in the official records for the 2020 general
3 election.

4 She also, interestingly, says that as part of
5 these operations, the people on the ground have to make
6 sure that the ballot records, the paper records,
7 somewhat comport with the electronic records. So when
8 there's changes, unexpected changes have to be made,
9 then people on the ground are handling the ballot side.

10 And that ties into, potentially, the loose
11 zip tie issue with King County containers. The level
12 of opening of those containers is at least -- I don't
13 know if everyone can see that -- about two and a half
14 inches, easily accessible by a hand to reach in and
15 remove ballots or to insert ballots into the chain of
16 custody stream at King County.

17 So that is one example of evidence. Another
18 example would be --

19 THE COURT: That's fine.

20 And this is material to the question of
21 whether or not the ballots should be open to you
22 because of what now?

23 ATTY. SHOGREN: Exactly. That they --

24 THE COURT: It has to be -- so that some of
25 the nonlawyers will understand, you need more than just

1 a genuine issue of material -- a genuine issue of fact
2 or a dispute. It has to be material. It has to make a
3 difference.

4 So talk to me about why that's material,
5 using the illustration you just gave.

6 ATTY. SHOGREN: Thank you.

7 It's material as to the element under the
8 statute of whether an election official -- in this
9 case, the director -- engaged in a wrongful act or
10 neglect as it -- as it relates to elections.

11 So the director has a duty to provide secure
12 elections. She is the one who certifies. She goes
13 under oath and certifies the accuracy of the elections.

14 So the question is whether she engaged in
15 error, a wrongful act, or a neglect by allowing, for
16 example, the containers of ballots to have very loose
17 tops on them so that ballots could be inserted or
18 removed at will during the chain of custody prior to
19 tabulation. So it goes to the elements of the
20 misconduct under the statute.

21 THE COURT: Anything else?

22 ATTY. SHOGREN: Well, I could just explain
23 the relevancy of the records to the causes of action,
24 which might help the public as well.

25 Under Cause of Action 4, if the paper -- if

1 the paper records do not match the ballot images or the
2 electronic records, that would indicate use of an
3 uncertified system. Again, according to Ms. Maras'
4 declaration, the uncertified systems have trapdoors in
5 them that allow for electronic manipulation of the
6 results. So we want to be able to --

7 THE COURT: And how do you know -- how do you
8 know, assuming that's the case, that the manipulation
9 cuts one way or the other?

10 ATTY. SHOGREN: That's not our concern, Your
11 Honor. We're trying to just ensure that the election
12 is conducted properly. We're not trying to look at
13 any -- yeah. That's not within our purview.

14 So for --

15 THE COURT: All right.

16 ATTY. SHOGREN: -- cause of action --

17 THE COURT: Go ahead.

18 ATTY. SHOGREN: Okay. All right. For cause
19 of --

20 THE COURT: I need to -- I need to finish
21 this up so I can let you go.

22 ATTY. SHOGREN: Okay.

23 THE COURT: But make your last point quickly.

24 ATTY. SHOGREN: Okay. Cause of Action 7,
25 review of ballots and ballot images will help

1 corroborate the vote-flipping and deletions documented
2 by WEICU.

3 Cause of Action 10, if excess spoiled ballots
4 exhibit votes for particular candidates, that would
5 indicate tracking of ballots by party preference.

6 And Cause of Action 13, if official vote
7 totals contradict the records, that could be the result
8 of the removal or addition of ballots out of the
9 containers. So thank you.

10 THE COURT: All right. Thank you.

11 Back to the moving party. And let me go to
12 you, Mr. Hyatt, very quickly, if you have anything
13 before I give Ms. Summers the last comment.

14 ATTY. HYATT: Yes, Your Honor. I think your
15 question about material facts was the absolute right
16 question to ask, and what Ms. Shogren did not address
17 was how there are any material facts about the defenses
18 and arguments being raised. There may be some material
19 facts about the claims that she's asserting, but not
20 the defenses being raised.

21 There's no dispute of material facts that
22 they have failed to contest the election pursuant to
23 the statute, no material facts regarding the equitable
24 defense of laches, no dispute of material facts over
25 mootness, no dispute of material facts over standing.

1 So everything should be dismissed pursuant to CR 56
2 that the plaintiffs bring in this lawsuit. Thank you.

3 THE COURT: All right. Thank you.
4 Ms. Summers?

5 ATTY. SUMMERS: Thank you, Your Honor. I'll
6 be quick, and I appreciate your careful attention this
7 morning and to the briefing.

8 It is not ethical for Ms. Shogren to be
9 presenting argument or evidence on behalf of plaintiffs
10 that she has assiduously avoided representing, but
11 under CR 56(e), an adverse party to a summary judgment
12 must support their claims with affidavits based on
13 personal knowledge. There is no evidence presented by
14 any person with personal knowledge of anything that
15 happened in King County.

16 This Maras -- purported Maras affidavit, I --
17 the copy I had had the name of the declarant redacted
18 out in the signature. So I don't think we know who
19 that's from. Just because Ms. Shogren says it's this
20 person, Maras, doesn't make it so. It's certainly not
21 obvious. It's certainly not presented on the face of
22 the document.

23 THE COURT: Let me --

24 ATTY. SUMMERS: Moreover, that document --

25 THE COURT: Let me stop you there.

1 Ms. Shogren, my copy shows that the name at
2 the end is redacted as well -- Shogren. What does that
3 mean?

4 ATTY. SHOGREN: I believe it's because she is
5 a federal contractor, and her name was redacted. I
6 have been in touch with her counsel and have been given
7 express permission to use the declaration for all
8 purposes in this lawsuit.

9 THE COURT: All right.

10 And I see some chats here. I've asked you
11 not to do that because we're in a virtual courtroom.
12 Maybe someone logged on later, but the rule is do not
13 use the chat to be sending notices to anybody or
14 distracting the attorneys. If you feel you can't obey
15 that, you can feel free to disconnect.

16 Back to you, Ms. Summers.

17 ATTY. SUMMERS: Thank you.

18 I stand by my point that an anonymous
19 declaration is not competent evidence. Moreover, that
20 declaration has nothing to do with Washington State,
21 let alone King County, nor does the other declaration
22 have anything to do with any -- there's no evidence
23 from any person with personal knowledge as to any
24 irregularities that occurred in King County in the
25 November 2020 election.

1 The November 2020 election was properly
2 certified long ago. The results are final. There is
3 no legislative purpose for this action. The Court -- we
4 ask that the Court grant the defendants' motion for
5 summary judgment, dismiss all of the causes of action,
6 and, if the Court sees fit, to grant our request for
7 declaratory and injunctive relief. Thank you.

8 THE COURT: All right. Thank you.

9 So we're very close to the noon hour. I've
10 been privileged to receive the arguments from all of
11 the attorneys. Thank you so much. I am not going to
12 try to render a decision in three minutes.

13 What I would propose is that the bailiff
14 contact the respective parties to see if the parties
15 would be available to be online for a decision the
16 first part of next week. I do have some -- a few items
17 I want to go back and review based on what I've heard
18 here today.

19 Is there a day next week that the attorneys
20 are not available? We're not available Tuesday and
21 Wednesday, so either Monday or -- maybe Monday
22 afternoon.

23 ATTY. SHOGREN: I'm available Monday
24 afternoon, Your Honor.

25 ATTY. SUMMERS: I am not available Monday,

1 and I'm not available Tuesday, Your Honor.

2 THE COURT: I couldn't hear what you said
3 about Tuesday.

4 ATTY. SUMMERS: I am not available Tuesday,
5 but the Court already said that you were not available.

6 THE COURT: Tuesday and Wednesday would not
7 be -- we would not be working.

8 So, Mr. Hackett, are you available on Monday
9 afternoon?

10 ATTY. HACKETT: I am -- I am checking, Your
11 Honor. Just trying to get the right calendar up. And
12 yes, as long as it is not between 1:30 and 3:00. I can
13 try and get those meetings moved if I need to, however.

14 THE COURT: So you're available after 3:00.
15 Mr. Hyatt, are you available --

16 ATTY. HYATT: Yes.

17 THE COURT: -- Monday afternoon after 3:00?

18 ATTY. HYATT: Yes, Your Honor.

19 THE COURT: All right. So if you'll hold
20 3:00 p.m. as a tentative, staff will confirm that with
21 you.

22 We're going to recess here now with my thanks
23 to all of the attorneys and all of the participants.
24 Those of you that need more information, leave your
25 information, your contact information with Madam

1 Bailiff, and we will take it from there.

2 Thank you. That will conclude the matter for
3 today. Monday, 3:00.

4 ATTY. HYATT: Thank you, Your Honor.

5 ATTY. SHOGREN: Thank you, Your Honor.

6 ATTY. HACKETT: Thank you, Your Honor.

7 ATTY. SUMMERS: Thank you.

8 (Recording ends at 12:00 p.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, a Reporter and Washington Certified Court Reporter, hereby certify that the foregoing audio-recorded proceeding was transcribed under my direction; that the transcript of the proceeding is a full, true and correct transcript to the best of my ability; that I am neither attorney for nor a relative or employee of any of the parties to the action or any attorney or counsel employed by the parties hereto nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of August, 2023.

Douglas Armstrong, RPR

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