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Court of Appeals
Division I
State of Washington
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No. 85983-8

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

WASHINGTON ELECTION INTEGRITY COALITION UNITED, a Washington State Nonprofit,

Plaintiff/Counterclaim Defendant/Appellant,

DOUG BASLER, TIMOFEY SAMOYLENKO,
Pro se Plaintiffs/Appellants.,
v.
JULIE WISE, Director of King County Elections, KING COUNTY,

Defendants/Counterclaimants/Respondents,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE,

Intervenor-Defendant/Respondent.

REPLY BRIEF OF APPELLANT

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I.

OVERVIEW OF REPLY

King County's response brief gets an "A" grade for obfuscation, but unfortunately, does not assist this Court in determining the significant issues before it. WEICU submits this reply in an effort to help the Court see past the deluge of non-relevant argument and outright disinformation.

II.

A. WEICU Reply to 'Introduction'

King County's Introduction contains multiple subjective and argumentative statements that also are unsupported and lack citation to the record on review. For example, King County cites unnamed "experts" as having declared that the November 2020 Election ("Election") was "the most secure, verified, and transparent election in American history." This statement is unsupported. Even if true, the statement begs the question: if the Election was secure, verified, and transparent, *why* has King County steadfastly refused, for over *26 months*, to allow the

examination of the very records that would establish that the Election was, in fact, secure, verified and transparent? King County's conflicting position reveals a lack of a coherent case theory as has been demonstrated throughout this case, coalescing in the Respondents' Brief.

B. WEICU Reply to 'Issues Presented'

King County has identified five issues for its response brief. Issue 1 corresponds to Appellant's Issues 8, 13, 18 and 19. Issue 2 corresponds to Appellant's Issues 1, 2, 3, 4 and 5. Issue 3 regarding PRA compliance with regard to "non-exempt" records is inapplicable to this appeal. King County claimed an 'other statute' exemption as to each of the four categories of records at issue, namely, ballots, ballot images, spoiled ballots and returned (undeliverable) ballots. Issue 4 is inapplicable to Appellant's issues on review. King County did not seek cross-review relating to any rulings on its counterclaims. Issue 5 corresponds to Appellant's Issues 11, 12, 14, 15, 16, and 17.

King County's 'Issues Presented' do not address Appellant's Assignments of Error 6, 7, 9, or 10.

C. WEICU Reply to 'Statement of the Case'

King County's Statement of the Case contains numerous subjective and argumentative statements that are unsupported and without citation to the record on review. Starting with the header ("This Frivolous Lawsuit Was Filed to Sow Distrust in Elections for Profit and Political Gain"), King County's subjective argument is unsupported in the record and is inappropriate in an appellate brief. King County chose to not conduct discovery in the action and took no depositions.[1] CP 1-1144. Thus, King County has no basis in evidence for casting such aspersions, and those statements do not relate to the legal issues which this Court is tasked with reviewing.

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[1] WEICU, conversely, conducted both written and oral discovery, deposing Respondent Julie Wise on May 18, 2023. CP 799-902. At Ms. Wise's deposition, all appellants posed questions to Ms. Wise, while all respondents declined. CP 899, ll. 2-9.

King County *argues* in its "Statement of the Case" that Appellants "lack any factual basis for questioning the accuracy of the November 2020 election results". Resp. Brief, p. 5. In making this bold statement, King County conveniently ignores the fact that no plaintiffs are challenging election results. The statement also ignores the evidence provided to the trial court in opposition to summary judgment regarding election process concerns, *inter alia*: 1) the Verified Complaint filed September 9, 2021 (CP 1-27); 2) the Declaration of Terpsehore Maras dated November 29, 2020 (CP 739-776); 3) the Declaration of Tamborine Borrelli dated March 24, 2022 (CP 778-782); and, 4) the Deposition of Julie Wise dated May 18, 2023 (CP 799-902).

Because King County persists in asserting a lack of evidence to support the Verified Complaint, a brief overview of the Declaration of Terpsehore Maras is provided here.[2]

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[2] King County claims that "the [Maras] declaration presents nothing but unhinged election conspiracy theories. . . . " Resp.

Terpsehore Maras is an intelligence community contractor who has worked on election operations. CP 740, Maras Decl., ¶ 2. Maras describes the methods used to manipulate election processes both domestically and overseas, and in particular, how it was done for the US 2020 Election.

This proffered evidence goes to the disputed issues, *inter alia*, of King County's bad faith refusal to provide examination of records that could expose Election process irregularities (if any), and the issue of PRA penalties. CP 11, ¶ 50; CP 12, ¶ 54; CP 13, ¶ 56; RCW 42.56.550(4).

According to Maras, the inexpensive third party software used by all voting system vendors is a vulnerability because of the need for constant updates:

Brief, p. 43, fn. 8. The appropriate solution for King County would have been to depose Ms. Maras on the record rather than to make this conclusory statement.

23. The proprietary voting system software is done so and created with cost efficiency in mind and therefore relies on 3rd party software that is AVAILABLE and HOUSED on the HARDWARE. This is a vulnerability. Exporting system reporting using software like Crystal Reports, or PDF software allows for vulnerabilities with their constant updates.
24. As per the COTS hardware components that are fixed, and origin may be cloaked under proprietary information a major vulnerability exists since once again third-party support software is dynamic and requires FREQUENT updates. The hardware components of the computer components, and election machines that are COTS may have slight updates that can be overlooked as they may be like those designed that support the other third -party software. COTS origin is important and the US Intelligence Community report in 2018 verifies that.

CP 749.

The Voting System Test Laboratories ("VSTLs") need to be accredited when certifying systems because the VSTLs need to ensure there is no ability to access the tabulator data via backdoors in the system hardware. The cheap COTS (Commercial-Off-The-Shelf) software allows anonymous access to set values to achieve a desired goal under the guise of

'encryption':

37. The purpose of VSTL's being accredited and their importance in ensuring that there is no foreign interference/ bad actors accessing the tally data via backdoors in equipment software. The core software used by ALL SCYTL related Election Machine/Software manufacturers ensures "anonymity" .
38. Algorithms within the area of this "shuffling" to maintain anonymity allows for setting values to achieve a desired goal under the guise of "encryption" in the trap-door.
39. The actual use of trapdoor commitments in Bayer-Groth proofs demonstrate the implications for the verifiability factor. This means that no one can SEE what is going on during the process of the "shuffling" therefore even if you deploy an algorithms or manual scripts to fractionalize or distribute pooled votes to achieve the outcome you wish – you cannot prove they are doing it! See STUDY : "The use of trapdoor commitments in Bayer-Groth proofs and the implications for the verifiability of the Scytl-SwissPost Internet voting system"

* * *

107. The last PRO V& V EAC accreditation certificate (Item 8) of this declaration expired in February 2017 which means that the IV & V conducted by Michigan claiming that they were accredited is false.
108. The significance of VSTLs being accredited and examining the HARDWARE is key. COTS software updates are the avenues of entry.

CP 755, 768.

Trapdoors are used to change software algorithm parameters. Anyone with access through the trapdoor can take all the votes tabulated and give them to anyone else on the ballot that they want. If there are 1000 votes, an algorithm can

be programmed to distribute them among several races in any way deemed necessary:[3]

> 54. Scytl and Dominion have an agreement – only the two would know the parameters. This means that access is able to occur through backdoors in hardware if the parameters of the commitments are known in order to alter the range of the algorithm deployed to satisfy the outcome sought in the case of algorithm failure.
> 55. Trapdoor is a cryptotech term that describes a state of a program that knows the commitment parameters and therefore is able change the value of the commitments however it likes. In other words, Scytl or anyone that knows the commitment parameters can take all the votes and give them to any one they want. If they have a total of 1000 votes an algorithm can distribute them among all races as it deems necessary to achieve the goals it wants. (Case Study: Estonia)

CP 758.

A spike in the vote counts indicates use of an algorithm, indicating a pause, then an insert of a new algorithm. The spikes do not correspond to real-time inserts of large numbers of paper ballots. The algorithm kicks in independently, while

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[3] WEICU documented vote migration activity for the 2020 Election. CP 778-782 (Declaration of Tamborine Borrelli, Source: National Election Pool and WA Secretary of State official reporting).

physical ballots are being created by people to back up the block allocation:

74. Observing the elections, after a review of Michigan's data a spike of 54,199 votes to Biden. Because it is pushing and pulling and keeping a short distance between the 2 candidates; but then a spike, which is how an algorithm presents; - and this spike means there was a pause and an insert was made, where they insert an algorithm. Block spikes in votes for JOE BIDEN were NOT paper

ballots being fed or THUMB DRIVES. The algorithm block adjusted itself and the PEOPLE were creating the evidence to BACK UP the block allocation.

CP 763-764.

In the early morning of November 4, 2020, the algorithm stopped working, so another block allocation had to be done manually while all the systems shut down nationwide to avoid detection:

75. I have witnessed the same behavior of the election software in countries outside of the United States and within the United States. In -------, the elections conducted behaved in the same manner by allocating BLOCK votes to the candidate "chosen" to win.
76. Observing the data of the contested states (and others) the algorithm deployed is identical to that which was deployed in 2012 providing Barack Hussein Obama a block allocation to win the 2012 Presidential Elections.
77. The algorithm looks to have been set to give Joe Biden a 52% win even with an initial 50K+ vote block allocation was provided initially as tallying began (as in case of Arizona too). In the am of November 4, 2020 the algorithm stopped working, therefore another "block allocation" to remedy the failure of the algorithm. This was done manually as ALL the SYSTEMS shut down NATIONWIDE to avoid detection.

CP 764.[4]

Without the protection of an injunction in place[5], as required under the PRA, King County has prohibited examination of the ballot-related election records that might help expose any manipulation as described by Maras. CP 739-

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[4] Julie Wise was asked under oath whether there were any unusual problems with the 2020 general election, and she responded, "No." CP 860, ll. 2-4. Later in her deposition, Wise was asked: "Did King County Elections experience any election system problems of any nature on November 3, 2020?" to which Wise responded, "Not that I recall." CP 895, l. 23-896, l. 1.

[5] An injunction is, in effect, a declaration of immunity from the PRA's requirement to disclose.

776.

As part of King County's efforts to prohibit disclosure of the election records, King County "sought a permanent injunction precluding WEICU from obtaining ballots, ballot images and voter signatures on ballot envelopes." Resp. Brief, p. 6.

King County omits from this statement the fact that King County requested a permanent injunction against WEICU under RCW 42.56.540. It is the PRA statute that compels trial court analysis of two specific factors prior to prohibiting examination under the Act, which are stated within King County's own counterclaim:

> **V. COUNTERCLAIM – INJUNCTIVE RELIEF UNDER RCW 42.56.540**
>
> 23. King County Defendants re-allege paragraphs 1 through 19.
>
> 24. The release of ballots, ballot images and voter signatures on ballot envelopes to WEICU would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.
>
> 25. Such a release of ballots, ballot images and voter signatures on ballot envelopes would cause King County and its voters irreparable harm where any available legal remedies would be inadequate to redress that harm

CP 114.

The trial court struck the entire Maras Declaration; ignored making any of the required findings under RCW 42.56.540, and *simultaneously* ignored a joinder filed by co-plaintiffs in order to grant summary judgment to King County on all claims. CP 1028-1034.

King County argues that the trial court was justified in ignoring the co-plaintiffs' written joinder because supposedly a joinder in WEICU's opposition to summary judgment "makes no sense". Resp. Brief p. 8, fn. 4. To the contrary, co-plaintiffs' joinder[6] was in response to King County's single motion for summary judgment as to all claims, all counterclaims, and all parties.[7] CP 310-335.

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[6] CP 903-904.

[7] Respondent intervenor Washington State Democratic Central Committee ("WSDCC") relied on a joinder proffered by counsel during oral argument. RP Vol. II, p. 65, ll. 13-23; p. 84, l. 14 – p. 85, l. 23. The trial court seemingly *permitted* the oral joinder of an intervenor on the defense side of the aisle, while

The Notices of Appeal filed herein by the same co-plaintiffs also contain a notice of joinder. CP 1049-1078; CP 1079-1108; RAP 10.1(g). King County has not objected to either of those joinders.

Consequently, King County's representation in its "Statement of the Case" that appellants "have not submitted a brief" (p. 10) is clearly misleading at best. Brief of Appellant, filed October 18, 2023, Case No. 102174-7; CP 1050, ll. 11-15; CP 1080, ll. 11-15.

D. Reply to 'The Trial Court Properly Dismissed WEICU's PRA Claim Because It Was Not Signed by an Attorney.'

Civil Rule 15 provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been

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seemingly *ignoring* a written filed joinder made by co-plaintiffs. RP Vol. II, p. 85, l. 23 – p. 86, l. 6.

placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (emphasis added).

Civil Rule 70.1 provides that "[a]n attorney admitted to practice in this state may appear for a party by serving a notice of appearance."

RCW 42.56.550(1) provides, in part: "[u]pon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records." (emphasis added).

As its opening salvo and primary asserted non-error on appeal, King County devotes 8 pages of its brief (pp. 12-19) to the question of whether a trial court may strike a Public

Records Act cause of action on grounds that a corporate PRA requestor subsequently retains counsel.[8] Assignments of Error 8, 13, 18, 19.

The trial court's striking of the PRA claim, ostensibly on grounds that appearing counsel did not *sua sponte* re-file the original claim under counsel's signature, contradicts the plain language of the PRA granting standing and jurisdiction to any requestor. RCW 42.56.550(1). Moreover, none of the cases cited by King County in this section[9] addresses PRA claims, the

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[8] Respondent WSDCC did not address this ground for error in its Brief of Respondent filed November 17, 2023, which concedes the error.

[9] *Dutch Village Mall v. Pelletti,* 162 Wn.App. 531, 256 P.3d 1251 (2011); *Lloyd Enterprises, Inc. v. Longview Plumbing & Heat Co*., 91 Wn.App. 697, 958 P.2d 1035 (1998); *Biomed Comm, Inc. v. Dep't of Health, Bd of Pharm.,* 146 Wn.App. 929, 193 P.3d 1093 (2008); *Cottringer v. State, Dep't of Employment Sec.,* 162 Wn.App. 782, 257 P.3d 667 (2011); *Rowland v. California Men's Colony, Unit II Men's Advisory Council,* 506 U.S. 194 (1993); *Island County v. Cosmic Light Creations*, 1 Wn.App.2d 1016, 2017 WL 5291493 (2017) (unpublished).

statutory scheme of the PRA, or any set of facts in which a Court struck claims of a represented corporation.

King County seems to rely on the 1998 opinion in *Lloyd Enterprises, Inc. v. Longview Plumbing & Heating Co., Inc.,* 91 Wn.App. 697, 948 P.2d 1035. Resp. Brief, pp. 16-17. *Lloyd* involved the striking of *pro se* documents filed in response to a cross complaint and a second action, with the court granting 20 days leave to file an answer signed by an attorney. *Id.*, at 700. Default was entered only after the corporation failed to comply with the court's order to retain counsel. *Id.*

In contrast to *Lloyd*, the trial court here used Civil Rule 11 to dismiss a PRA claim of an already represented corporation with no leave granted to file an amended complaint. CP 1033, ll. 7-10.

Moreover, a 2021 opinion held that "[w]e decline to read the plain language of [a] statute to generate an absurd result, 'even if [we] must disregard unambiguous statutory language to do so.'" [internal cite omitted]. *K.M.P. v. Big Brother Big*

Sisters of Puget Sound, 16 Wn. App.2d 475, 483, 483 P.3d 119 (2021).

King County's lead argument illustrates the trial court's unwillingness to acknowledge the plain language of the Public Records Act and to instead follow a path *ultra vires* to the PRA. The trial court is not entitled to interpret the PRA to bar corporate requestors from filing suit using a reading of Civil Rule 11 that renders an absurd result. Counsel appearing in a PRA action (or any newly-appearing counsel in any action) is not required to *sua sponte* re-sign and re-file complaints going back in time.[10]

Even assuming, *arguendo*, that a lack of attorney signature rendered the complaint invalid and with no legal effect, then everything King County did in response to the filing must have been done in bad faith. CR 11. It would mean that

[10] Such a requirement would be fundamentally at odds with the flow of litigation dockets and the requirements for the filing of an amended complaint under Civil Rule 15.

every filing made by King County in this action was intended to mislead the court. *Id.* This is the absurd result that directly flows from King County's CR 11 argument.

Instead of seeking to quash the summons based on its assertion of an invalid complaint, King County chose to remove the complaint to federal court, asserting federal court jurisdiction. CP 28-66. Following remand, King County re-answered the complaint in state court and re-asserted *counterclaims* as to the PRA cause of action. CP 108-115. King County then sought dismissal of the PRA claim under Civil Rule 56. CP 310-335.

The record establishes that King County indisputably submitted to the jurisdiction of the state and federal courts with regard to WEICU's PRA claim. Yet now, King County wants this Court to declare the original complaint invalid *ab initio*. In doing so, King County exhibits a complete lack of a coherent case theory and exposes itself to sanctions for multiple Civil Rule 11 violations and heightened PRA penalties.

E. Reply to 'In the Alternative, the Trial Court Properly Dismissed WEICU's PRA Claim Because Washington Law Precludes Disclosure of Ballots, Ballot Images and Voter Signatures.'[11]

The trio of *White* cases argued at length by King County at pp. 22-26 of its brief has been superseded by Supreme Court and appellate precedent cited by WEICU in its opening brief. The *White* cases did not follow the PRA statutory scheme, and therefore, cannot constitute controlling precedent regarding the PRA.

The *White* decisions were published between 2015 and 2017.[12] Since that time, both the Supreme Court and appellate courts (including Division I of the Court of Appeals) have

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[11] King County confounds the briefing by raising the false issue of voter signatures throughout its Response Brief. Voter signatures were not requested or pursued by WEICU either at the administrative level or in its Motion to Show Cause. CP 304-309.

[12] *White I* (Division II) was published June 30, 2015; *White II* (Division I) was published July 13, 2015, and *White III* (Division II) was published July 25, 2017.

issued decisions clarifying the PROCESS that must be followed by courts when presented with a PRA claim. The correct PRA process is at direct odds with the process followed by the *White* courts and the trial court below.

The current (post-*White*) PRA process and principles are as follows:

1. The civil rules are NOT to be used to circumvent the express statutory provisions and higher standards of the PRA.[13]
2. Implied exemptions are NOT allowed. Any claimed exemption must be explicit.[14]
3. An explicit exemption does NOT equate to a prohibition of examination.[15]

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[13] *Lyft v. City of Seattle,* 190 Wash.2d 769, 773, 777-778, 784-786, 418 P.3d 102 (2018).

[14] *Doe v. Wash. State Patrol,* 185 Wash.2d 363, 372, 388, 374 P.2d 63 (2016).

[15] *Doe v. Seattle Police Dep't*., Case No. 83700-1-I slip opinion (Wash.App. 2023), at pp. 10-11.

4. If an agency wishes to keep records subject to an explicit exemption secret, it MUST seek court protection by seeking judicial relief under RCW 42.56.540[16].
5. There must be sufficient evidence of harm to justify permanent injunctive relief prohibiting examination.[17]

The primary reason for the above items is that all government records are presumed to be disclosable upon request. RCW 42.56.070(1); RCW 42.56.010(3), (4). Applying these fundamental rules of the road to the trio of past *White* cases, it becomes obvious that the *White* cases have been superseded by the more recent binding precedent out of Division I and the Supreme Court. [18]

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[16] *Doe v. Seattle Police Dep't.*, Case No. 83700-1-I slip opinion (Wash.App. 2023), at pp. 10-11.

[17] *Wash. Fed of State Employees v. State of Washington*, WA Supreme Court No. 101093-1, at p. 15 (August 24, 2023)

[18] The recent passage of Senate Bill 5459 (2023) does not help King County in its efforts to keep ballots secret. King County

The trial court clearly erred in adopting an implied exemption from the *White* cases, then using a civil rule to dismiss a PRA claim (treating the implied exemption as equivalent to prohibition) "as a matter of law" with *zero* findings or evidence to support a permanent injunction under RCW 42.56.540.

Like a child who is not getting his way, King County stomps its foot and stubbornly continues to assert that the *White* cases are "controlling state law." Resp. Brief, p. 20. To the contrary, the *PRA* is the controlling state law.

The PRA is a shining example of a very specific set of laws adopted by initiative that governments and subsequently

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argues, without any support, that Senate Bill 5459 constitutes the legislature's "[a]greement with the courts' interpretation of the PRA." Resp. Brief, p. 27. No evidence in the record supports this belief. SB 5459 exempts ballots at the administrative level, but does not prohibit ballot examination under RCW 42.56.540.

the courts MUST follow, as repeatedly and recently emphasized by this Court and our own Supreme Court.

It is critically important that the trial courts in this state understand that except for penalties there is no judicial option in equity with respect to the PRA. The PRA says what it says. Courts are bound to adhere to its express provisions, even where examination may cause inconvenience or embarrassment to public officials or others. RCW 42.56.550(3); RCW 42.56.030.

F. Reply to 'In the Alternative, the Trial Court Properly Dismissed WEICU's PRA Claim Because King County Elections Fully Complied with the PRA.'

King County next argues that because of its purported compliance with RCW 42.56.120(4) (regarding "Charges for copying"), that it is somehow now excused from complying with the other provisions of the PRA scheme. Resp. Brief, pp. 30-32. The orders on appeal are silent as to RCW 42.56.120(4).

King County seems to be arguing that because it barred WEICU from examining *signature* records on envelopes, that WEICU's decision not to proceed with ordering scanned copies of ballot envelopes (at a quoted cost in excess of *$240,000*) somehow constitutes a bar to the examination of *any* requested records. Resp. Brief, p. 32; CP 532.

There is no support in RCW 42.56.120(4) for this reading of the PRA. King County's feigned compliance with regard to one category of records (an offer to provide scanned envelopes at significant cost with no signatures to be revealed) does not amount to an exemption or permanent injunction barring inspection of other record categories.

King County cannot be relieved of its obligations under the PRA by offering partial (and meaningless) disclosure conditions as to one of several requested record categories. King County's unsupported interpretations of the PRA seem aimed at nothing more than a desire to maintain secret public election records.

G. Reply to 'The Trial Court Properly Granted King County and Director Wise's Request for Declaratory Relief.'

King County asserts that the trial court did not err in granting declaratory relief that King County "cannot as a matter of law disclose original, spoiled or returned ballots or images of those ballots. . . " Resp. Brief, p. 34, citing CP 1094 (emphasis added).

Similar to the trial court's misuse of the *civil rules* in violation of the PRA, a trial court also may not circumvent the specific requirements of the PRA via a "*declaration*" made "*as a matter of law*." RCW 42.56. A trial court may not unilaterally abrogate the specific requirements of the PRA involving court protection of records. RCW 42.56.540; *Lyft, supra,* at 777-778, 784-786; *Wash. State Patrol, supra,* at 372, 388; *Seattle Police Dep't*., *supra*, at pp. 10-11.

The trial court was keenly aware of the requirements of King County's counterclaim under RCW 42.56.540 via

pleadings[19] and during oral argument. RP Vol. II, p. 66, l. 24- p. 68, l. 2. Yet in its written order granting King County declaratory relief, the trial court ignored the PRA scheme, entered *zero* findings under RCW 42.56.540, declared an implied exemption "as a matter of law" and equated the exemption with injunctive relief. CP 1033, ll. 17-22 ("In regard to Defendants' Counterclaims seeking declaratory and injunctive relief . . . . [t]he Court finds as a matter of law ballots are exempt from public disclosure. The Court finds that [King County's counterclaim for][20] injunctive relief is unnecessary.").

In doing so, the trial court's behavior verged uncomfortably close to tyranny. The trial court's "declaration" altogether ignores the requirements of the PRA while *simultaneously* declaring a trial court's 'authority' to declare records prohibited from disclosure under the PRA "as a matter

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[19] CP 664-666.

[20] Bracketed words added for clarity.

of law". It is another example of the trial court's failure to follow the dictates of the PRA, and the disturbing willingness of King County to walk a trial court down a primrose path.

H. Reply to 'The Trial Court Did Not Grant an Injunction, and Thus Whether the Requirements for Injunctive Relief Pursuant to RCW 42.56.540 Were Met Is Not Before This Court.'

As found just a few months ago by a panel of this Court in *Doe v. Seattle Police Dep't*., Case No. 83700-1-I slip opinion (Wash. App. 2023), a records exemption under the PRA does not *ipso facto* equate to a *prohibition* of disclosure:

> [O]ur Supreme Court has held that "finding an exemption applies under the PRA does not ipso facto support issuing an injunction." *Lyft*, 190 Wn.2d at 786. Rather, for the disclosure of records to be precluded *due to a statutory exemption*, the court has held that the PRA's standard for injunctive relief **must also be met**. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009); *see also Soter v. Cowles Publ'g Co.,* 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (plurality opinion) ("[T]o impose the injunction contemplated by RCW 42.56.540, the trial court **must** find that a **specific** exemption applies ***and*** that disclosure would not be in the public interest

> and would substantially and irreparably damage a person or a vital government interest.").

Doe v. Seattle Police Dep't., Case No. 83700-1-I slip opinion (Wash. App. 2023), at pp. 10-11 (emphases added).[21]

In direct contravention of this Court's very recent determinations in *Seattle Police Dep't,* and with actual knowledge that this matter was transferred from the Supreme Court to the very same Court that issued the *Seattle Police Dep't* decision, King County doubles down.

King County continues to assert that an exemption under the PRA is equivalent to an injunctive prohibition of the disclosure of records: "[t]he trial court did not err in concluding that an injunction was not necessary because the records were exempt as a matter of law." Resp. Brief, p. 36. King County verges uncomfortably close to a Civil Rule 11 violation by

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[21] The 2023 Division I *Seattle Police Dep't* decision was cited and discussed in Appellant's Opening Brief, but is not discussed or even cited by any of the Respondents.

adamantly REFUSING to acknowledge the process required by the PRA and making a legal argument that shows a lack of the most basic research as required by CR 11.

King County urges this Court to lose sight of this Court's very own recently underscored distinction between exemptions at the administrative level (permitting an agency to withhold requested public records pending a government request for preliminary injunction to prohibit their release), and prohibition of release of public records (at the judicial level). *Seattle Police Dep't*. *supra*, at pp. 10-11.

King County invites this Court to affirm a trial court's finding that the PRA requirements for prohibition are "unnecessary". Resp. Brief, p. 36.

Notably, in making this argument, King County: 1) makes no mention of the 2023 *Seattle Police Dep't* decision; 2) provides no authority allowing a trial court to declare a

statutory counterclaim "unnecessary"[22]; and, 3) provides no authority granting a trial court the ability to outright ignore the requirement to enter findings under RCW 42.56.540.

King County NEVER withdrew or dismissed its RCW 42.56.540 counterclaim. To the contrary, King County sought an *affirmative* ruling for permanent injunctive relief. CP 333-334 ("Defendants' Request for . . . Injunctive Relief Should Be Granted"). As a result, King County is estopped from claiming that the trial court's error is now somehow "Not Before This Court". Resp. Brief, p. 35 (Heading for Section E.)

King County knows full well that it placed RCW 42.56.540 squarely before the federal court in its counterclaim. King County *re-filed* the counterclaim in state court on January 6, 2023 following remand. CP 114.

Given the existence of *Seattle Police Dep't*, it is a

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[22] "unnecessary" is defined as: "not required by the circumstances of the case." Black's Law Dictionary (5th ed. 1979).

mystery why King County would openly try to mislead this particular Court by attempting to equate a PRA exemption with automatic prohibition. They are not the same, and the PRA's standards for prohibition must be met for court protection of the ballot related records at issue on this appeal.

I. Reply to 'The Trial Court Properly Denied WEICU's Request for Declaratory Judgment Because Declaratory Relief Was Not Pled by WEICU, WEICU Lacked Standing, and the Meaning of RCW 29A.08.161 Was Not a Justiciable Controversy.'

King County's arguments in this section are entirely dis-jointed from the trial court's actual order denying WEICU's motion for declaratory relief. CP 1043-1047. The arguments are therefore not helpful to this Court. The trial court made no rulings on WEICU's motion for declaratory relief in relation to the causes of action in the original complaint, any lack of justiciable controversy, or any lack of standing, such as under *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*,

150 Wn.2d 791, 83 P.3d 419 (2004), discussed at length by King County. Resp. Brief, pp. 39-41.

Because this section is inapposite to the order on review, WEICU directs this Court's attention to WEICU's Assignment of Error 17 regarding whether the trial court erred in denying WEICU's motion for declaratory relief on grounds that the motion "would not terminate the uncertainty or controversy giving rise to the proceeding." Resp. Brief, p. 41; CP 1047, ll. 4-6.

King County asserts that "[t]he meaning of RCW 29A.08.161 [rendering ballots anonymous by law][23] simply had **no bearing** on WEICU's public records action." Resp. Brief, p. 41 (emphasis added).

Under Washington State election law, ballot records are anonymous by law and cannot be tied to a voter. RCW 29A.08.161. Based thereon, King County had no basis in fact or

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[23] Bracketed words added for clarity.

law to exempt ballot records from disclosure on voter 'secrecy' grounds, much less prohibit disclosure.[24]

Anonymous public records are available to the public. RCW 42.56. A finding that cast ballots constitute anonymous public records would have thus ended the controversy surrounding voter 'secrecy' and would have statutorily required the trial court to allow examination. *Id.*

In denying the motion, the trial court's rationale at the hearing held on June 5, 2023 was, *inter alia*, that the *White* cases rendered ballots exempt from disclosure as a matter of law, and that appellate opinion essentially trumps statutory law rendering ballots anonymous. RP Vol. 3, p. 122, l. 1 to p. 123, l.

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[24] King County *simultaneously* argues that the 'secrecy' provisions in Article VI, §6 of the Constitution apply forever to cast ballots, while at the same time, King County allows third party access via software viewing of ballots. CP 812, l. 12 to 813, l. 9; CP 816, ll. 17-22; CP 817, l. 22 to 818, l. 4 (ClearCount program belonging to ClearBallot vendor tabulates King County votes). King County has constructively waived any 'secrecy' requirements by providing ballot access to third parties.

13.

The trial court's rationale elevating superseded appellate opinions over a statute is flawed and ignores Constitutional separation of powers. Moreover, as discussed herein, the trial court's reliance on the *White* cases to constructively prohibit examination – particularly in the face of King County's pending counterclaim under RCW 42.56.540 - directly conflicts with the PRA and multiple post-*White* Supreme Court and Division I appellate decisions describing the correct process under the PRA.

The trial court is not in a position to ignore statutory law or precedent from the Supreme Court. Its unwillingness to apply statutory law to the facts before it, while elevating inapposite court opinions over statutory law, constituted clear error.

J. Reply to 'The Trial Court Properly Granted Summary Judgment to King County and Director Wise on the Elections Claims.'

The next nine pages of King County's brief conflict with its Motion to Strike Portions of Brief of Appellant, filed November 17, 2023. Resp. Brief, pp. 42-50. Showing little confidence in its own motion, King County chooses to "[n]onetheless" address the election process claims in its response brief.[25] Resp. Brief, p. 42.

Unfortunately, King County continues in this section to attempt to mislead this Court. It is not helpful to the appellate process, nor does it do justice to anyone.

King County wants this Court to fail to acknowledge the joinders filed by co-appellants at the trial court level (CP 903-904) and on appeal (CP 1049-1078; CP 1079-1108). RAP

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[25] WEICU answered King County's motion on November 27, 2023. WEICU incorporates by reference the entirety of that filing which includes a request for sanctions for having to respond. RAP 10.1(g).

10.1(g). This Court should decline King County's invitation to ignore joinders, which are routinely used by litigants to reduce costs and promote judicial economy. King County has not objected to the joinders, nor provided any authority upon which this Court could rely.

Simultaneously, King County accuses WEICU of not joining in other causes of action in its capacity as a co-plaintiff in a Verified Complaint. Resp. Brief, p. 42. King County has cited to no rule or case decision requiring co-plaintiffs to join in causes of action in a unified complaint. No such finding was sought at the trial court level. Once again, King County raises issues on appeal that it did not appeal and which do not relate to the trial court's orders on appeal.

King County segues to a lengthy and mostly unhelpful primer on election law and processes in a futile effort to re-cast the Verified Complaint as an 'election contest.' Resp. Brief, pp. 43-46. Information about canvassing boards and election observers does not assist this Court.

The record shows that plaintiffs expressly did NOT seek decertification of any race or measure in the Election. CP 3, ¶ 8 ("[P]laintiffs are not seeking de-certification of the Election"). No relief in the Verified Complaint seeks decertification of any race or measure for the Election. CP 17-19.

In granting summary judgment to King County, the trial court neither denied any request for decertification as to any race or measure for the Election, nor upheld any race or measure for the Election. CP 1028-1034. This is because no one can challenge any race or measure in an election more than 10 days past certification.

The Verified Complaint contains a plurality of mixed common law, statutory, and constitutional causes of action. CP 1-27. The complaint contains nothing about an election contest as to any race or measure.

King County shoots itself in the foot by arguing the significance of RCW 29A.68.030. Resp. Brief, pp. 48-49. That statute sets forth the requirements for providing detailed

information about the particular contestant, district, precinct, and office "being contested" under RCW 29A.68.013(3). Again, no claim in this action was brought under RCW 29A.68.013(3). CP 1-27. The 10-day limitations period for actions brought under RCW 29A.68.013(3) cannot apply to this action, as demonstrated by RCW 29A.68.030.[26]

The appellate process MUST be based in the record. CP 1-27. This Court should decline all invitations by King County to ignore the record or to adopt a version of reality that does not exist.

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[26] King County urges this Court to follow in Division III's footsteps to apply a 10 day limitations period to an action brought under *any* subsection of RCW 29A.68.013 as constituting an "election contest." *Washington Election Integrity Coalition United v. Schumacher* (slip opinion Sept. 12, 2023). A petition for review of Division III's ruling in *Schumacher* is pending. Review is warranted on grounds, *inter alia*, that election process claims brought under RCW 29A.68.013(1),(2) cannot constitute "election contests" because global election contests as to each race or measure on a ballot are not recognized by law.

K. Reply to 'Sanctions Against All Appellants Are Warranted.'

King County concludes its brief by urging this Court to declare that this appeal raises "no debatable issues upon which reasonable minds might differ", and that therefore, sanctions must be imposed. Resp. Brief, p. 51. By virtue, alone, of the length of King County's Respondents' Brief and the intense debate about these issues of heightened public import, King County's request should be denied.

In arguing for sanctions, King County shoots itself in the foot one last time. King County relies on information that is not in the record. Appendix to Resp. Brief, pp. 001-008. King County makes no request to this Court to take judicial notice or otherwise enter the information into the record under the Rules of Appellate Procedure. Resp. Brief, pp. 50-54.

On top of that, King County fails to show the relevance of the non-record documentation to the errors on appeal. King County unbelievably flaunts the Rules of Appellate Procedure

while *simultaneously* asking this Court for an award of sanctions using the very same Rules of Appellate Procedure.

III.

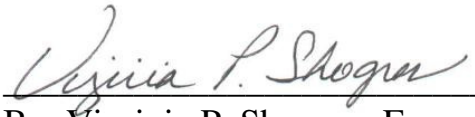
CONCLUSION

The trial court rulings should be reversed and the matter remanded.

Respectfully submitted this 13th day of December, 2023.

Per RAP 18.17(b), I hereby certify the number of words contained in this Reply Brief of Appellant is as follows: 5,782.

VIRGINIA P. SHOGREN, P.C.



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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in Division I of the Court of Appeals of the State of Washington and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

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