The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PAUL LEHTO, individually, JOHN WELLS, individually; Plaintiffs, vs. SEQUOIA VOTING SYSTEMS, INC. and SNOHOMISH COUNTY; Defendants.	NO. C05-0877 RSM **PLAINTIFFS' COMBINED MEMORANDUM IN RESPONSE TO THE MOTIONS TO DISMISS OR TO STRIKE FROM BOTH DEFENDANTS SEQUOIA AND SNOHOMISH COUNTY** **Noted on Motion Calendar: Friday, June 10, 2005**

Plaintiffs John Wells and Paul Richard Lehto, by and through their attorney, Randolph I. Gordon of GORDON EDMUNDS ELDER PLLC, hereby respond to Sequoia's Motion to Dismiss or, Alternatively, to Strike Portions of Complaint and Snohomish County's Motion to Dismiss in this single memorandum of law.

I. PROCEDURAL BACKGROUND.

This case was filed in King County Superior Court and a case schedule was issued on April 7, 2005. Notices of appearance were made by defendants Snohomish County and Sequoia Voting Systems, Inc. ("Sequoia") on April 22 and April 26, respectively. On April 29, 2005, Plaintiff counsel's Notice of Unavailability for the period of time from May 8, 2005 through June 1, 2005 was filed and served

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upon counsel for Sequoia; Snohomish County acknowledged receipt of the Notice of Unavailability on May 8, 2005. On May 11, 2005, plaintiffs' counsel received Notice to Adverse Party of Removal to Federal Court; on May 13, 2005, plaintiffs received Snohomish County's Joinder in Notice of Removal of Action.

On May 18, 2005, both defendants filed Motions to Dismiss.

This response is submitted in a good faith effort to address voluminous and overlength[1] motion pleadings submitted by defendants despite their having been earlier notified that plaintiffs' counsel was unavailable to respond to motions due, *inter alia*, to a multi-week jury trial in Thurston County, without intending to waive the relief sought in Plaintiffs' Motion to Continue filed separately. Plaintiffs contend such litigation tactics ought not to be permitted to deprive the court of full briefing respecting the issues presented by this case and that an extended briefing period is appropriate.

Plaintiffs will be filing a Motion for Remand shortly and believe that both judicial economy and substantive justice would be best served by delaying consideration of the Motions to Dismiss until the Motion for Remand is considered, as the latter bears upon this court's jurisdiction and how much, if any, of the case ought properly to remain before this Court. Plaintiffs, however, in an earnest effort

[1] United States District Court for the Western District of Washington CR 7 limits submissions in connection with motions to dismiss to twenty-four pages. Yet, Snohomish County seeks that the arguments of Sequoia "be adopted herein by reference and justify dismissal of Plaintiffs' claims against Snohomish County." [Snohomish County Motion to Dismiss, p. 8 f.n. 1]. Likewise, Sequoia joins in Snohomish County's Motion [Sequoia Motion to Dismiss, p. 2 f.n. 1], incorporates by reference the County's briefing [e.g. "See County's Motion to Dismiss for full discussion regarding statute of limitations," "See County's Motion for Dismiss for full discussion regarding Plaintiffs' lack of

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to respond to both motions, which incorporate one another by specific reference, and in an effort to be most helpful to the Court, will be responding with this single brief, which will not exceed the combined page limit for responding to the two motions to dismiss.

II. STANDARD OF REVIEW FOR MOTIONS TO DISMISS UNDER FRCP 12(b)(6).

As a general matter, the sufficiency of a complaint filed in federal court is governed by Rule 8 of the Federal Rules of Civil Procedure. Rule 8(a)2) provides that a complaint must set forth only "a short and plain statement of the claim showing that the pleader is entitled to relief." Given this "simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

This court reviews *de novo* a district court's decision regarding a motion to dismiss, pursuant to FRCP 12(b)(6), because the district court decision is based purely on the legal sufficiency of a plaintiff's case. Memphis, Tennessee Area Local, American Postal Workers Union, AFL-CIO v. City of Memphis, 86 Fed. Appx. 137, Slip Copy, 2004 WL 103000 (6th Cir. 2004); Barrett v. Harrington, 130 F.3d 246, 251 (6th Cir. 1997). Under the liberal notice pleading rules, a complaint need

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standing," at Sequoia's Motion to Dismiss, p. 6] and submits an additional pleading (Defendant Sequoia's Request for Judicial Notice).

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only put a party on notice of the claim being asserted against it to satisfy the federal rule requirement of stating a claim upon which relief can be granted. Fed.R.Civ.P. 8(a); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (holding that a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations). A complaint need not anticipate every defense and accordingly need not plead every response to a potential defense. Poe v. Haydon, 853 F.2d 418, 424 (6th Cir.1988) (stating that a civil rights plaintiff need not anticipate an affirmative defense which must be pleaded by the defendant). A court must construe the complaint in the light most favorable to the plaintiffs and accept as true all well-pleaded factual allegations. Cooper v. Parrish, 203 F.3d 937, 944 (6th Cir.2000).

III. DEFENDANTS MISUNDERSTAND THE ESSENTIAL CLAIMS IN THE COMPLAINT.

A. THE GRAVAMEN OF PLAINTIFFS' COMPLAINT.

Plaintiffs identified in their Complaint comprehensive, detailed and specific facts establishing individualized, particularized, and concrete injury to plaintiffs. They also identified alternative legal grounds justifying the relief sought. Plaintiffs will not undertake to recharacterize all of those claims here for reasons of economy and clarity. Nonetheless, the gravamen of Plaintiffs' Complaint may be set forth quite simply:

> ***May a government "outsource" [delegate] core governmental functions to a private company such that both the government and the private company are freed from the Constitutional and statutory limitations on their freedom of action as would be imposed upon the***

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government itself?

> ***Specifically, may Snohomish County delegate the conduct of its elections to Sequoia such that the transparency of elections is concealed beneath private claims of "trade secret" and proprietary information, elections are rendered inaccurate and unverifiable, plaintiffs are deprived of access to information to which they are entitled, thereby resulting in injury to plaintiffs?***

Plaintiffs have taken care in their Complaint to set out elements of the Constitutional and statutory scheme respecting the public's right to know and the right of each voter and citizen to an accurate, transparent, and verifiable electoral process.

This gravamen of plaintiff's Complaint is well-founded in law. As the Washington State Supreme Court held in South Center Joint Venture v. National Democratic Policy Committee, 113 Wash.2d 413, 780 P.2d 1282 (1989): "If private actors assume the role of the state by engaging in these governmental functions then they subject themselves to the same limitations on their freedom of action as would be imposed upon the state itself." In United Chiropractors of Washington , Inc. v. State, 90 Wash.2d 1, 578 P.2d 38 (1978), the Court held:

> We are equally concerned with the preservation of the 'essential concepts of a democratic society' when the power delegated is the authority to make appointments to a committee exercising governmental functions. The power to select those who make public decisions is too vital a part of our scheme of government to be delegated …."

The right to vote is, even more so, too vital to be delegated. As the United States Supreme Court held in Wesberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to

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vote is undermined."

RCW 42.30.010 sets forth a Legislative Declaration which forms an integral part of the public policy of Washington State, holding:

> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Article I, §19 of the Washington State Constitution provides: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The Supreme Court has held that Article I, Section 2 of the Constitution "gives persons qualified to vote a constitutional right to vote *and to have their votes counted*." *Wesberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964). It follows directly from the above that, under the Washington State Constitution, no power, civil or military, shall at any time interfere with the free and proper counting of the vote, in the absence of which the right of suffrage is rendered illusory.

Defendants, however, appear to misunderstand the magnitude of the issues at stake and, it seems, can barely bring themselves to acknowledge the Constitutional ramifications before them. Snohomish County, for instance, states:

> Although Plaintiffs allege twelve separate causes of action, all twelve seek the rescission of a contract between Snohomish County and Sequoia because it is violative of *some law* or public policy. [Citation omitted.] Accordingly, Plaintiffs' Complaint is really just a taxpayer suit presenting one claim: namely that the government's contract is illegal (based on twelve different sources of law) and should be avoided. [Motion, p. 5.][Emphasis added.]

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Ironically, although misunderstanding the basis of plaintiffs' standing and the remedies sought, discussed *infra* at III.C., Snohomish County is correct that many of the "causes of action" hold in common an assertion that the Contract, as applied, is Constitutionally and statutorily defective. What defendants miss, however, is an appreciation that this necessarily means that arguing on narrow and inconsistent grounds cannot cure the overarching Constitutional infirmities identified. For instance, of what matter is it whether trade secrets have been waived or not, where the vindication of Sequoia's desire for secrecy (even if not waived) unconstitutionally contravenes public's right to a transparent and verifiable election? Can an electoral regime which eliminates Constitutional requirements of reviewability, transparency, and verifiability of elections by the public, be defended simply by eliminating election officers and election boards and stating that the Open Meetings Act RCW 42.30 *et seq.* is inapplicable because all meetings have been replaced by secret electronic transactions?

Plaintiffs have both set forth clear legal grounds and sought appropriate remedies by seeking access to information specifically requested and denied to Plaintiff Lehto in furtherance of the Constitutional mandates and in mitigation of the specific damages sustained by both Plaintiffs Wells and Lehto as voters.

B. SPECIFIC INJURY SUSTAINED BY PLAINTIFFS.

The facts set forth in Plaintiffs' Complaint and the Report entitled "Election Irregularities in Snohomish County, Washington, General Election 2004" incorporated by reference into the Complaint must be taken as verities.

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Plaintiff Lehto has been specifically damaged by the contract's secrecy provisions because in the course of investigating and publishing regarding the electronic voting process, he has been denied any and all direct data on the operation of the counting process itself, despite his personal presence at the polls after closing on Election Day. Instead of the County sharing information about vote counting procedures, such information is now literally owned by Sequoia under the claim of trade secrecy – a property interest claim. Snohomish County, based upon its contract with Sequoia, justifies a lack of transparency in the election process by its provision to a private contractor, Sequoia, of a monopoly on the information respecting vote counting. Snohomish County actually pledged under ¶ 34 of its Contract with Sequoia to join with Sequoia to resist production of information Sequoia regards as proprietary. This uniquely impacts Lehto's ability to publish and complete papers on electronic voting, forcing him to undertake more expensive, time-consuming and circuitous routes using indirect data, and dilutes his fundamental right to vote as specifically alleged in the Complaint:

> 4.14 The denial of the ability to view, inspect, examine and have access to the above information and other observational and testing data and opportunities for meaning oversight of elections has damaged Plaintiff Lehto personally and directly in that he has been forced to obtain significantly more data of an indirect nature, such as subtotals for ballot propositions from each voting machine, in an attempt to do additional statistical analysis in significant part as a substitute for the denied information. In turn, this indirect method requires recruitment of extra volunteers for data entry and extra study, instead of interacting with the services of a volunteer expert on computer voting regarding the secret software. On information and belief, Lehto has also been denied direct copies of even the limited computer audit log files that have

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been released, with the County providing files in a .pdf form that strips the file of any meta-data such as editing information and much other forensically useful information, even though original file formats were specifically requested.

4.15 Because of the denial and withholding of information pursuant to the contract's trade secret and other provisions, Lehto has incurred damages in the form of additional financial expense to purchase and/or scan paper-based voting records, additional parking costs to visit the Auditor's office for this purpose, has incurred many hours of time and inconvenience, and has been frustrated in delayed in completing his work. Moreover, both Sequoia and Snohomish County, pursuant to the express contractual provision authorizing their mutual "cooperation" in defeating third party requests for discovery of information deemed by Sequoia to be "proprietary," have forced plaintiffs to commence this lawsuit to gain discovery to information bearing upon the free and meaningful exercise of their right to vote.

The Complaint alleges, at ¶ 5.14, that Paragraph 34 [Subpoena] of the Contract between Snohomish County and Sequoia provides that "[i]n the event that a subpoena or other legal process issued by a third party in any way concerning the Equipment or Related Services provided pursuant to this Agreement is served upon CONTRACTOR or COUNTY… [the parties] agree to cooperate with the other party in any lawful effort by the such other party to contest the legal validity of such subpoena or other legal process commenced by a third party." [Emphasis added.] This provision of the Complaint is one of a number of provisions whereby the Contract allies Snohomish County and Sequoia in protection of Sequoia's "trade secrets," at the expense of the public's right to know. Plaintiff Lehto was personally impacted by this contractual regime when his efforts to obtain information for his research were denied and rendered more

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cumbersome and expensive.

In addition, the Complaint specifically sets forth the reasonable basis upon which Plaintiffs believe that they have been specifically and personally injured by the dilution of each of their votes, including the information contained in the Report appended to the Complaint and incorporated therein and related statistical analyses establishing that such injury has almost certainly occurred:

> 4.17 On information and belief, substantiated by both voter reports and statistical analyses attached and incorporated into this Complaint, it appears that Sequoia machines may well record, modify and/or miscount previously recorded ballots. Consequently, plaintiffs Wells and Lehto have good reason to believe that their past and future votes are subject to unlawful dilution, unlawful miscalculation and that the meaningful exercise of their right to vote has been subject to interference. Plaintiffs have been denied the reliable verifiability provided by human observers and required by law, the Washington Constitution, and democratic traditions and practice.

For the purposes of these Motions, plaintiffs' specific allegations must be taken to be verities; these verities include, but are not limited to, particularized and direct financial injury from the interference with plaintiff Lehto's work, injury in fact arising from inability to obtain information, and dilution of the unique and individual vote of the plaintiffs. These injuries are "concrete and particularized," "actual or imminent," causally connected to and arising directly from Defendants' claim of secrecy and able to be redressed by this Court by, *inter alia*, requiring disclosure of the information requested by Plaintiff Lehto, but refused by Defendants. These injuries are actual and not merely speculative. As such, they meet all the standards required under Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62,

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112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Federal Election Com'n v. Akins, 524 U.S. 11, 25, 118 S. Ct. 1777 (1998) (Identifying the same three elements for standing: that there be a sufficiently "concrete" "injury in fact," that it be "fairly traceable" [causally connected] to the Defendants' actions, and that the courts can "redress" the "injury in fact.")

C. THE SPECIFIC INJURY ALLEGED PROVIDES PLAINTIFFS WITH STANDING.

Both Snohomish County (Motion, pp. 1, 2, 5, 7, 8, 9, 16-18) and Sequoia (Motion, pp. 1, 6) imply that plaintiffs lack standing because they have not pleaded "taxpayer" standing and because they are not parties to the Contract. They have failed to address plaintiffs' standing as voters and citizens and even the cases they *have* cited support plaintiffs being afforded standing here.[2] Snohomish County relies heavily on a line of inapposite state law cases involving disappointed bidders on public contracts. [County's Motion, pp. 17-18]. These cases, on review, however, support voter standing being granted to vindicate the sorts of claims put forth here.[3]

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[2] Snohomish County argues (Motion, pp. 15-16) that plaintiffs lack standing because they are a "stranger" to the Contract, but on page 17 cites Mincks v. Everett, 4 Wn. App. 68, 73, 480 P.2d 230 (1971) where a taxpayer who was not a party to the contract entered between a private party and the City of Everett is held to have standing: "[E]very taxpayer will be fairly presumed to be injured when a municipal corporation undertakes to enter an illegal contract." Clearly, being a taxpayer in Mincks and a voter in this case provide a basis for standing whether or not a party to a contract. Briefing suggesting a lack of standing to a nonparty to the Contract between Sequoia and Snohomish County are irrelevant where, as here, there is standing on the basis of being a voter and citizen.

[3] "Bidder standing" to challenge a contract award is limited on the grounds that the public policy of saving money through competitive bidding would not be served by allowing disappointed bidders to sue for damages. Dick Enterprises v. King County, 83 Wn. App. 566, 570, 922 P.2d 184 (1996) (citing Peerless Food Prods., Inc. v. State, 119 Wn. 2d 584, 591, 835 P.2d 1012 (1992)). Dick Enterprises held that taxpayers themselves would be the best litigants to vindicate the underlying purpose of the competitive bidding statutes to save taxpayer funds, and thus specifically approved of

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In Thorsted v. Gregoire, 841 F. Supp. 1068, 1072-74 (W.D. Wash. 1994), this Court recognized an expansive standing for voters as voters:

> The plaintiffs allege injury to their rights as voters and/or as candidates, and to their rights of free association and political expression. Some assert standing based upon harm to public projects that are being supported by certain incumbents. The latter category need not be analyzed because plaintiff Foley's standing as a member of Congress who plans to seek re-election, and the other plaintiffs' standing as registered voters,[4] are enough.
>
> The Supreme Court has listed three elements of standing to sue: the plaintiff must have suffered an "injury in fact" (an invasion of a legally-protected interest which is "concrete and particularized" and is "actual or imminent"); there must be a "causal connection" between the injury and the conduct complained of; and it must be "likely," and not merely "speculative," that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, ----, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).
>
> If one plaintiff has standing, it does not matter whether the others do. *Bowsher v. Synar,* 478 U.S. 714, 721, 106 S.Ct. 3181, 3185, 92 L.Ed.2d 583 (1986); *Watt v. Energy Action Educ. Found.,* 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981); *Arlington Heights v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 563 n. 9, 50 L.Ed.2d 450 (1977).
>
> In this case, however, the voter plaintiffs have standing as well. ...

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taxpayer standing over bidder standing holding: "the best way to ensure that lawsuits are brought in the public interest is to restrict standing to those whose rights are at stake – the taxpayers." Here, of course, the bidder standing line of cases cited by Snohomish and Sequoia are inapposite: (i) the Sequoia contract in question was never competitively bid at all, so "bidder standing" cases are inapplicable (in fact, Snohomish County's attorney in this case, Gordon Sivley, was personally involved sole sourcing to Sequoia, over the opposition of the then-existing voting supplies for Snohomish County, who wished to compete; *See* Decl. of Paul Lehto); (ii) consistent with Dick Enterprises, here the public interest is best served by granting standing to those whose rights are at stake – the voters.

[4] Both Plaintiffs Wells and Lehto have specifically alleged that they are "registered voters." Complaint, ¶¶ 2.1, 2.2. Note also that standing based upon harm to public projects, the Court concluded, did not require analysis; in other words, voter standing, not taxpayer standing, was appropriate.

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[T]hreatened injury is enough to confer standing; the plaintiffs are not required to wait until the injury has actually occurred. Babbitt [v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979)]; *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1515 (9th Cir.1992).

Courts have not been loathe to extend voter standing to vindicate voters' rights to protect the franchise.[5]

In Federal Election Com'n v. Akins, 524 U.S. 11, 21, 118 S. Ct. 1777 (1998), the United States Supreme court found standing for voters to challenge the Federal Election Commission's decision not to proceed against AIPAC [a public affairs committee] where voters had been unable to obtain information legally required to be made public:

> ***The "injury in fact" that respondents have suffered consists of their inability to obtain information***--lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures--that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public

[5] Thorsted v. Gregoire, 841 F. Supp. 1068, 1072-74 (W.D. Wash. 1994) provides additional authority: "The rights of voters and those of candidates are related and "do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Anderson v. Celebrezze,* 460 U.S. 780, 786, 103 S.Ct. 1564, 1568, 75 L.Ed.2d 547 (1983), *quoting Bullock v. Carter,* 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972). In *Anderson* and *Bullock,* the Court allowed suits by voter plaintiffs or intervenors challenging state ballot access requirements. The Ninth Circuit, interpreting *Anderson,* has upheld voter standing to challenge a candidate eligibility requirement since "basic constitutional rights of voters as well as those of candidates" are implicated. *Erum v. Cayetano,* 881 F.2d 689, 691 (9th Cir.1989), *citing Baker v. Carr,* 369 U.S. 186, 206, 82 S.Ct. 691, 704, 7 L.Ed.2d 663 (1962). The Circuit has also upheld a voter's standing to challenge a state election law write-in provision. *Burdick,* 927 F.2d at 472." The Supreme Court has held that a write-in opportunity "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson,* 460 U.S. at 799 n. 26, 103 S.Ct. at 1575 n. 26, *citing Lubin v. Panish,* 415 U.S. 709, 719 n. 5, 94 S.Ct. 1315, 1321 n. 5, 39 L.Ed.2d 702 (1974).

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> office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular. **Indeed, this Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.** *Public Citizen v. Department of Justice,* 491 U.S. 440, 449, 109 S.Ct. 2558, 2564, 105 L.Ed.2d 377 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"). See also *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373-374, 102 S.Ct. 1114, 1121-1122, 71 L.Ed.2d 214 (1982) (deprivation of information about housing availability constitutes "specific injury" permitting standing).

Plaintiff Lehto has specifically been denied access to information about the way the votes were counted and thwarted in his personal research. The Supreme Court in Federal Election Commission v. Akins, Id. at 24-25, held:

> We conclude that, similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.

Plaintiffs here have experienced a concrete, particularized, injury in fact, relating to the failure to provide information directly related to voting and arising under the Washington Constitution.

Saratoga County Chamber of Commerce Inc. v. Pataki, 275 A.D.2d 145, 156, 712 N.Y.S.2d 687 (2000) held: “Voter standing arises when the right to vote is eliminated or votes are diluted (*see, Rudder v. Pataki, supra,* at 281, 689 N.Y.S.2d 701, 711 N.E.2d 978; *see also, Schulz v. State of New York,* 84 N.Y.2d

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231, 240-241, 616 N.Y.S.2d 343, 639 N.E.2d 1140, *cert. denied* 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881)." Once again, despite the fact that dilution of votes is alleged on the face of the Complaint, defendants failed to apprise the court of voter standing based upon dilution. Saratoga also noted, at p. 154, that "A plaintiff has standing to maintain an action when that plaintiff has suffered an injury in fact and such injury falls within the zone of interests to be protected by the statute or constitutional provision involved (*see, Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 772-773, 570 N.Y.S.2d 778, 573 N.E.2d 1034)." That is precisely the case where, as here, the Constitutional right to vote is implicated, together with the strong policy in Washington respecting transparency and accountability of government.

Farris v. Munro, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) provides yet another basis for standing under Washington law: standing liberally granted to permit the adjudication of important issues or the vindication of rights of those less able to advance them. In Farris v. Munro, plaintiff did not have personal standing, but this court liberally found standing in order to allow the important issue of the constitutionality of the state lottery act to be resolved); *See also* Vovos v. Grant, 87 Wn.2d 697, 701, 555 P.2d 1343 (1976) (allowing public defender to raise an issue of public importance to juveniles who would have "difficulty . . . [in] vindicat[ing] their rights on their own").

Defendants efforts to deny standing, while failing to provide the Court with authority on point, are not well-taken.

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D. THE CLAIMS PRESENTED BY PLAINTIFFS ARE JUSTICIABLE.

Plaintiffs' Complaint alleges at ¶¶ 4.21 and 4.24 (by way of example only):

> 4.21 The allegations set forth in this Complaint for Declaratory Judgment, under all the circumstances, show that there is substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.
>
> 4.24 The allegations set forth herein, the facts and evidence to be adduced in proceedings before the court, and the unique and special nature of the right to vote, and the contractual requirement of the defendants to cooperate to oppose "by all lawful means" requests for information from citizens, establish that plaintiffs have effectively exhausted all lawful remedies within the existing organs of government charged with administering elections.

The Uniform Declaratory Judgments Act allows a party whose "rights, status or legal relations" are affected by a statute or contract to determine any question of construction or validity and to ask the court to determine the constitutionality or declare the rights of parties thereunder. RCW 7.24.010, .020 RCW; Superior Asphalt and Concrete Co. Inc. v. Washington Department of Labor & Industries, 121 Wn. App. 601, 605, 89 P.3d 316 (2004). Where, as here, there is an issue of broad overriding public import, the requirement that there be evidence of a justiciable controversy may be relaxed:

> [U]nless an issue is of broad overriding public import, the parties must present evidence of a justiciable controversy before the jurisdiction of a particular court may be invoked. *To-Ro Trade Shows v. Collins,* 144 Wash.2d 403, 411, 27 P.3d 1149 (2001).

Superior Asphalt and Concrete Co. Inc., at 605-606.

> A justiciable controversy is an actual, present, and existing dispute, or the mature seeds of one, which is distinguishable

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> from a possible, dormant, hypothetical, speculative, or moot disagreement. *To-Ro*, 144 Wash.2d at 411, 27 P.3d 1149. To be justiciable, a dispute must be between parties that have genuine and opposing interests, which are direct and substantial and not merely potential, theoretical, abstract, or academic; and a judicial determination of the dispute must be final and conclusive. *Id.* "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *Id.* The purpose of these requirements is to ensure the court will render a final decision on an actual dispute between opposing parties with a genuine stake in the court's decision. *Id.*

Superior Asphalt and Concrete Co. Inc., at 606.

Plaintiffs have presented a justiciable claim. "In any action under the Uniform Declaratory Judgments Act, the standing requirement tends to overlap the justiciable controversy requirement. [To-Ro Trade Shows v. Collins, 144 Wash.2d 403, 411 n. 5, 27 P.3d 1149 (2001)]" Superior Asphalt and Concrete Co. Inc., at 606.

Defendant Sequoia mischaracterizes the Plaintiffs' claim as "purely academic" and as being "declaratory relief concerning the 2004 election." [Sequoia's Motion, p. 8]. These descriptions do not control the Complaint as actually drafted. The evidence of inaccuracy as manifested in the 2004 election is not provided in an effort to belatedly undertake an election contest. That matter has already been concluded by a Chelan County Superior Court judge. The evidence provided by Plaintiffs' Complaint, however, taken as true, weighs heavily in the balancing test of Weber v. Shelley, *infra*, when considering the propriety of the electoral regime versus its impact on fundamental rights.

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Defendants mischaracterizations notwithstanding, Plaintiffs Lehto and Wells have specifically alleged actual, direct harm occasioned by the confidentiality provisions invoked by Sequoia and enforced by both Sequoia and Snohomish County against him. After repeated requests for the information, Mr. Lehto has exhausted his remedies.

IV. RESPONSE TO SYSTEMATIC ERRORS IN DEFENDANTS' MOTIONS.

A. Defendants Motions to Dismiss are Based on Five Key Mistakes.

Defendants' Motions to Dismiss are predicated upon five key mistaken assertions or willful misapprehensions respecting the nature of Plaintiffs' claims. Once this webwork of mischaracterization is swept aside, it becomes readily apparent that much of the argument and legal authority cited by defendants is simply beside the point. The following five corrections eliminate much of defendants' argument.

Correction 1: This is NOT an Election Contest.

Defendants Snohomish County (Motion pp. 1, 2, 9, 10-12) and Sequoia (Motion pp. 1, 2, 5-6, 8) mistakenly assert that Plaintiffs' claims are an election contest barred under the ten-day limitations period governing such contests. In fact, Plaintiffs assert no claim and seek no remedy under RCW 29A.68, governing contests of elections. Such a ground for dismissal is without basis in fact or law and mischaracterizes Plaintiffs' claims.

Correction 2: Plaintiffs are NOT Challenging Certification.

Defendants Snohomish County (Motion pp. 2, 7-8, 18-20) and Sequoia (Motion pp. 2, 3, 4-5, 8-10, 12) mistakenly assert that Plaintiffs' claims seek to challenge the Secretary of State's certification of the electronic voting machines.

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Although plaintiffs do believe that such certification was improvident both at the time and in light of subsequent performance issues, nowhere is there a claim seeking to overturn the Secretary of State's certification or any cause of action relying upon such a finding. Plaintiffs believe that defendants overstate the significance of such certification which, on its face, is "provisional" and which qualifies its approval for use: "approved for use in Washington State … *when used in compliance with* the procedures contained in this certification, accompanying Report and Findings, *and Washington State law*." [Defendant Sequoia's Request for Judicial Notice, Exh. A; emphasis added].[6] Overturning the Secretary of State's certification is neither a claim asserted by Plaintiffs, nor an issue dispositive of any claims; the Secretary of State is not a party to the contract between defendants, nor necessary to the adjudication of the issues arising under the Constitution presented. It follows that Secretary of State Sam Reed is not an indispensable party necessary to the maintenance of the litigation as contended by Snohomish County (Motion pp. 18-20).

Defendants place altogether too much reliance on a superficial reading of Weber v. Shelley, 347 F.3d 1101 (9th Cir. 2003) (*see, e.g.* Sequoia's Motion, pp. 12-13). Weber, it must be noted, is claim in which certification by the California Secretary of State was challenged. It has only limited bearing on this case arising under the Washington State Constitution and law and which does not challenge certification. A closer reading of Weber, however, reveals that it stands for the modest proposition that the courts ought to exercise restraint,

[6] Such a certification no more assures that the Voting System as operated passes Constitutional or statutory muster than a certification from the Supreme Court that one is qualified to engage in the practice of law in one's Bar certificate immunizes practitioners from professional negligence claims. Plaintiffs have, by separate pleading, filed Objections to Defendant Sequoia's Request for Judicial Notice in which Sequoia seeks to argue that the certain facts about the performance of its product are verities based upon the certification by the Secretary of State.

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deferring to elected officials charged with conducting elections, rather than thrusting themselves into the mechanics of conducting elections. Significantly, in Weber, at p. 1105, the Court of Appeals specifically found that "there is no indication that the AVC Edge System is inherently less accurate, or produces a vote count that is inherently less verifiable, than other systems." This is at odds with the allegations in Plaintiffs' Complaint, supported by detailed studies, all of which must be taken as verities for the purpose of these Motions to Dismiss.

Weber recognizes, id. at 1105, that: "It is a well established principle of constitutional law that the right to vote is fundamental, as it is preservative of all other rights. *See, e.g.,* Yick Wo v. Hopkins*,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Weber also recognizes, id. at 1106: "The difficulty is that *every* electoral law and regulation necessarily has *some* impact on the right to vote, yet to strike down every electoral regulation that has a minor impact on the right to vote would prevent states from performing the important regulatory task of ensuring that elections are fair and orderly." Weber proceeds to cite the balancing test established in Burdick v. Takushi, 504 U.S. 428, 433-434, 112 S. Ct. 2059 (D. Hawaii, 1992):

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the ... Fourteenth Amendment[ ] that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. Under this standard, the rigorous-ness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens ... Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law

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> provision imposes only reasonable, nondiscriminatory restrictions upon the ... Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions. *Id.* at 434, 112 S.Ct. 2059 [citations,internal quotes omitted]

The Burdick balancing test, as applied by Weber, in the face of the allegations of Plaintiffs taken as verities, and taking into account the "character and magnitude of the asserted injury" to Plaintiffs' Constitutional rights would result in a finding of a Constitutional violation based simply upon the inaccuracy of the Sequoia machines. Recall now, the allegations of Plaintiffs at ¶ 5.17:

> The character and magnitude of injury to plaintiffs and to the meaningful exercise of their right to vote and the franchise of the citizenry is such that customary deference to state regulation and regulators is inadequate and inappropriate to protect the people's basic rights, or to police the integrity of the elections that transfer power from the people to the government.

Far from supporting defendants' motions to dismiss, the balancing test of Weber requires that such motions be denied in light of the facts at issue and the requirement that all facts be construed in the light most favorable to Plaintiffs.

Correction 3: Defendants Both Cite to the Same Two Overruled and Inapposite Cases in Order to Lead this Court into the Error of Finding Plaintiffs Claims to be Barred under a Two Year Statute of Limitations Period or Laches.

Defendants argue that the Complaint in this case fails, claiming a public contract is immune from challenge after a two year limitation period or under laches. [Snohomish County Motion to Dismiss pp. 1, 2, 4, 8, 9-10, 12-14; Sequoia Motion to Dismiss pp. 2, 6]. Both defendants misrepresent the state of

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the law when they cite to the same two *overruled* and inapposite cases, Constable and Northern Grain,[7] in order to argue that claims upon a public contract are governed by a two-year "catch all "limitations period under RCW 4.16.130. In fact, defendants analogize to these cases by claiming that the contract in this case implicates a breach of official duty, apparently failing to review the very cases cited. The holdings in the two cases are predicated upon the notion that the claims in the two cases did not arise from contract at all[8], but from tortious breach of duty and upon an antiquated and currently rejected direct-indirect distinction between "trespass" and "[trespass on the] case." Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 718-719, 709 P.2d 793 (1985). Defendants' authority, even if had not been specifically overruled, is inapposite to any claim regarding a contract, public or otherwise.

In fact, RCW 4.16.080(2) properly governs and provides a three-year statute of limitations period for "any other injury to the person or rights of another

[7] Curiously, both Sequoia and Snohomish County cite to the same two cases, ***both of which have been expressly overruled on the point for which they were offered.*** Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 709 P.2d 793 (1985) specifically overruled both Constable v. Duke, 144 Wash. 263, 266, 257 P.637 (1927) and Northern Grain & Warehouse Co. v. Holst, 95 Wash. 312, 315, 163 Pac. 775 (1917) holding that the three-year statute of limitation, RCW 4.16.080(2), rather than two-year "catch-all" statute of limitation, RCW 4.16.130, applied to causes of action claiming both direct and indirect injuries to the person or rights of another not enumerated in other limitation sections. Neither case cites to RCW 4.16.130 (they cite to a predecessor Rem. Code §165) and RCW 4.16.130 does not even mention "public contracts." (These joint inaccurate citations to overruled and inapposite authority provide one more cogent justification for the continuance requested by plaintiffs, so that plaintiffs will have sufficient time within which to provide thorough briefing to this Court. It also reveals a troubling collaboration between Snohomish County and Sequoia.)

[8] RCW 4.16.040 provides a six-year limitation period for actions arising from written contracts; RCW 4.16.080(3) provides for a three-year limitation period for actions arising out of unwritten contracts. In order for the court to apply a two-year limitation period, it necessarily had to find that there was no

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not hereinafter enumerated." Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 709 P.2d 793 (1985) expressly and specifically overruled both cases, applied RCW 4.16.080(2) and held: "When there is uncertainty as to which statute of limitations governs, the longer statute will be applied. *Rose v. Rinaldi,* 654 F.2d 546 (9th Cir.1981); *Shew v. Coon Bay Loafers, Inc.,* 76 Wash.2d 40, 51, 455 P.2d 359 (1969)." The claims in this case arose within the last two years in any case, but even the contract whose constitutionality and legality (as applied) is at issue, was signed under three years ago.

Laches have been defined as an equitable bar, based on a lengthy neglect or omission to assert a right and resulting prejudice to an adverse party. Here, defendants have put forward no showing that plaintiffs delayed at all, that they neglected to promptly pursue any right based on injuries sustained in the 2004 general election, that they had any knowledge that they failed to act upon, or that defendants suffered any prejudice.

Correction 4: Defendants Confuse a Declaration Vindicating Constitutional Rights over Constitutionally Impermissible Contract Provisions with a Challenge to a Public Contract.

Leaving to one side the misleading authority suggesting a statute of limitations of two years, the defendants' motion reflects a misunderstanding of the essence of Plaintiffs' Complaint which concerns the vindication of plaintiffs rights and the supremacy of the Washington Constitution and statute over

liability arising from a contract. Defendants improperly cite to these cases as a basis for asserting a two-year limitations period applicable to government contracts.

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contrary contractual provisions, not a challenge to the public contract as a contract. Defendants' arguments go too far; consider this hypothetical:

> A contract entered between the County and a contractor provided that the County would prohibit any speech or publication critical of the contractor. Ten years later, a citizen unaware of the contract speaks out against the contractor and the County informs the citizen that such speech is prohibited. The citizen sues for a declaratory judgment to vindicate his Constitutional right of free speech and is informed that his suit will be dismissed on the ground that he has challenged a public contract entered more than two years before.

Do defendants contend that a citizen upholding his First Amendment right to free speech and seeking a declaration that the contractual provision *as applied* is unconstitutional and unenforceable is barred because the claim was not raised until more than two years after the public contract was signed (and eight years before the citizen spoke)? The Complaint forthrightly asserts claims under Washington State Constitution and law:

> 1.3 Based on the Constitutional, statutory, and public policy defects inherent in the Contract … Plaintiffs make the claims further enumerated below under the Uniform Declaratory Judgments Act [RCW 7.24.010 *et seq.*], asking for specific declarations respecting the legality of the Contract and its provisions, and for such other and further relief as may be necessary or proper.
>
> 1.4 Plaintiffs Wells and Lehto, as citizens and voters, object to provisions of the contract between Snohomish County and Sequoia Voting Systems, Inc. that are attempting to shield from the plaintiffs' view … the means and procedures by which votes are recorded, counted, tabulated, and reported. The primary objections raised by defendants for refusing to disclose this information are the "contractual obligations" of defendant Snohomish County to preserve the "trade secret," "confidential," or "proprietary" materials of defendant Sequoia. Plaintiffs contend, among other things, that the provisions of the Contract ought properly to be set aside based on well-established

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contractual, statutory, Constitutional and public policy grounds.

Thus, the question presented is not whether a public contract can only be challenged within two years of its execution, but whether Washington Constitution and law is powerless to protect its citizens' rights from specific damage caused thereafter.

Correction 5: Defendants Confuse the Date of the Contract being Entered with the Date the Injury to Plaintiffs Occurred.

Plaintiffs' damage claims are specific and personal to them. They did not arise at the time of the contract being entered but arose from the application of the Contract during and in the months following the 2004 general election. Under any version of the statute of limitations, harm to Plaintiffs accrued only recently with the denial of information justified by the contract provisions at issue.

V. CONCLUSION.

Defendants' Motions to Dismiss ought to be denied. They have failed to meet their burden. All allegations in the Complaint, including the appendices incorporated by reference therein, must be construed in the light most favorable to Plaintiffs. Plaintiffs renew their request for additional time to respond fully to the over-length submissions of Defendants filed during a time period when Plaintiffs' counsel had previously advised counsel of record in writing of his unavailability. The issues presented in this case are of critical public importance and their thoughtful adjudication ought not to be compromised by litigation tactics limiting the ability of counsel to respond fully. The citation by both counsel for Snohomish County and Sequoia to overruled authority and their collective failure to bring to the

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attention of the court controlling authority regarding, *inter alia*, the statutes of limitation and standing suggest a heightened need for additional briefing.

The evident collaboration between a governmental entity, Snohomish County, and a private contractor, Sequoia, in this case against citizens and voters ought, itself, to give one pause. The fundamental rights of Washington citizens are at stake and it is clear that their County government charged with the responsibility of enforcing voting laws are poorly situated to be their guardian where, as here, they have bound themselves contractually to support proprietary methods of counting the vote in opposition to the public's right to know.

Finally, this matter ought to be deferred for consideration until the Plaintiffs' motion for remand can be considered.

DATED this 6th day of June, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

1. Malcolm S. Harris @ mharris@hmwlaw.com; and
2. Andrew F. Pierce @ andrew@pierceshearer.com; and
3. Douglas J. Morrill @ dmorrill@co.snohomish.wa.us; and
4. Gordon W. Sivley @ gsivley@co.snohomish.wa.us

And I hereby certify that I sent the document by messenger service to the following non CM/ECF participants: Aaron Blake Lee (Harris, Mericle & Wakayama; 999 Third Ave., #3210, Seattle, WA 98104.

Dated at Bellevue, Washington this 6th day of June, 2005.

/s/ Randolph I. Gordon
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