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70710-8  
No. ~~88574-5~~  
SUPREME COURT OF THE STATE OF WASHINGTON

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MICHAEL CARLSON, JERROLD R. GONCE,  
JEFFREY BOSSLER, RICHARD PETERSON, MARC FORLENZA, and  
GREG AYERS,

Appellants

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,  
AND THE STATE OF WASHINGTON,

Respondents.

and

ELISABETH BYERS, ROBERT JARMAN, BRIAN MCCLERREN,  
JAMIE STEPHENS, LOVEL PRATT

Necessary Parties.

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**APPELLANTS' REPLY BRIEF**

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I. 36.32.020/.040

A. **Offending Sections Violate Substantive Due Process**

“No person shall be deprived of life, liberty, or property,  
without due process of law.”

*Washington Constitution, Article I, Section 3*

“nor shall any State deprive any person of life, liberty or property  
without due process of law”

*United States Constitution, XIV Amendment*

*the right of suffrage is a fundamental matter in a free and democratic society... 'the political franchise of voting' as 'a fundamental political right, ... Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. ... State legislatures are, historically, the fountainhead of representative government in this country... Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us... the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.*

*We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.*

*Reynolds v. Sims*, 377 U.S. 533, 568, 84 S. Ct. 1362, 1385, 12 L. Ed. 2d 506 (1964).

Appellants seek to invalidate the offending sections of the state law on substantive due process grounds. As the State pointed out, in a substantive due process challenge, the court must first determine the “nature of the right involved” *Amundrud v. Bd. of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006). The nature of the right involved here is the right to be treated equally and on par with other citizens to elect our representatives. Both the State and the County dismiss the Appellants arguments by flippantly stating everyone has the right to cast a vote. This avoids the voting dilution argument advanced repeatedly by Plaintiffs/Appellants throughout these proceedings. It *matters* to the electorate that the representative districts are unequal. If the playing field is truly level, there would either be three equally populated districts from which to elect the separate representatives, or one large district which elects three representatives. The current scheme is not level or fair to the voters. Tables prepared by Jeffrey Bossler, Plaintiff, showing the voting dilution are attached to this brief. (CP 134-142; see also CP456-463).

Because there is a fundamental right involved, the challenged sections of 36.32.020 and .040 must be strictly scrutinized. While it is true the Appellants urge this Court to adopt the test applied to a series of land use cases in this state to analyze whether the law has a legitimate public purpose, it is not true, as the county suggests, that the return to unequal districting with countywide voting “*would best serve the interest and the diverse needs of the citizens and help unify the county as a whole*”. This wholly unsupported claim is groundless. San Juan County operated for six

years under the 2005 Charter which equally divided the population into six districts with six legislative representatives. There is no evidence that there were any problems whatsoever during this time.

The bottom line is that when the challenged sections of the state law are scrutinized, there is no legitimate or rational reason for their continued existence. If the statute sections are applicable to SJC, they should be declared unconstitutional. If they do not, they apply to no county and serve no legitimate public purpose. Either way, they should be stricken.

**B. The County considered State Statutes RCW 36.32.020/040 to apply: the Charter expressly indicates that these statutes authorize the County's scheme.**

The State continues to argue that summary judgment in favor of the State is warranted since RCW 36.32.020 and .040 do not govern how elections are undertaken because San Juan County is a charter county and provides its own method of electing council members, which just happen to be identical to the methodology described in the state statute.

According to this theory, the State claims it is not liable because it has not promulgated the operable law, which interestingly, can apply to only one county in the state – San Juan County. The County more correctly points to the statute as “authorizing” the scheme under which the county operates. Proposition 1 specifically added the words “as authorized by

RCW 36.32.020". In fact, both the original Charter and the revised Charter, by their own words, are enabled by RCW 36.32.020 and .040. CP 000808.

In essence what we are left with is an "after you my dear alphonse" moment. The State points to the County and says, "it's not us, it's them" and the County points to the State and says, "they said it's OK." The result? Despite the fact that it operated with equal districting for 6 years, San Juan County is now the only county in the state which elects their legislators from districts with grossly disparate populations.

Appellants agree that there is some formalistic appeal to the State's argument, however even if summary judgment in favor of the State is correct, the Court must essentially review the constitutionality of the scheme proposed by 36.32.020/.040 as it has been adopted wholesale by the County. In other words, technical dismissal of the State as a party might be appropriate, but realistically, this should not change the nature of the Court's inquiry into the constitutionality of the statute at least to the extent it is vitiated by San Juan County. While perhaps not "technically" an enabling statute, the portion of 36.32.020/.040 that is of issue today is only *potentially* applicable to ONE county and ONE county has referenced "as authority for" their scheme – so, any decision evaluating the merits of the scheme necessarily is a commentary on the other.

## **II. Article II, Section 19**

“[n]o bill shall embrace more than one subject, and that shall be expressed in the title.”

### **A. The Nature of Freeholder and Charter Commissions Acts have been legislative**

The State concedes, “[t]he constitution thus confers broad authority, *equivalent to that of the legislature itself, upon counties adopting their own charters particularly as to the manner of electing local officials.*” Respondent State of Washington's Brief at 8, citing *State ex rel. Carroll v. King Cty.*, 78 Wn.2d 452, 457-458, 474 P.2d 877 (1970) and *Henry v. Thorne*, 92 Wn.2d 878, 800-81, 602 P.2d 354 (1979). In essence, this is exactly what Appellants are arguing when it comes to Article II, Section 19. The legislative function of Freeholders or CRC members is precisely the same as that of the Washington state legislature when it acts to promulgate statutes that describe the structure of county governments. Therefore the acts of the CRC, i.e. the crafting of the ballot measures, must be treated as a legislative act. In Robert Utter and Hugh Spitzer's *Treatise on the Washington State Constitution*, the authors write:

*“Because counties are the primary legal subdivision of the state, counties framing a charter have legislative*

*powers as broad as those of the state, but county actions may not contravene any constitutional provision or statute.”*

*The Washington State Constitution*, Second Edition, Robert F. Utter and Hugh D. Spitzer, *The Oxford Commentaries on the State Constitutions of the United States*, G. Alan Tarr, Series Editor, Oxford University Press, 2013.

This has been a long-standing conclusion. In 1980 this Court explicitly recognized this and stated:

In *Winkenwerder v. City of Yakima*, 52 Wash.2d 17, 28 P.2d 873 (1958), the court interpreted a similar provision which applies to certain cities. The court said at 622, 328 P.2d at 878: (T)he only limitation on the power of cities of the first class is that their action cannot contravene any constitutional provision or any legislative enactment. (Citations omitted.) . . . a city of the first class has as broad legislative powers as the state, except when restricted by enactments of the state legislature. We conclude that charter counties, correspondingly, have the same broad powers. *King Cnty. Council v. Pub. Disclosure Comm'n*, 93 Wash. 2d 559, 562-63, 611 P.2d 1227, 1229 (1980).

From the standpoint of legal theory, this makes complete and utter sense. Article XI, Section 4 allows the diversion of legislative authority from the legislature to the Freeholders or Charter Review Commission. It is a fundamental principle of legal theory that one cannot delegate more authority than one has. Even taking into account that the constitutional right to establish charter counties is not a power delegated by the legislature to the people, but rather an inherent right reserved by the

people, there is no indication that the people of Washington wished to exempt freeholders or CRC members from the usual constitutional restraints. In fact, the plain language of Article XI, Section 4 indeed recognizes that the powers of freeholders and the legislature are co-extensive and that the power of freeholders is subject to the same constitutional limits as confines the legislature. Again, the plain language of Section 4 requires this:

Any county may frame a "Home Rule"  
charter for its own government *subject to the  
Constitution and laws of this state.*

Washington Constitution, Article XI, Section 4.

The framers of our Washington Constitution meant what they said:

The Constitution is Mandatory unless by  
express words they are declared otherwise.

Washington Constitution, Article I, Section 29.

Clearly this confines the authority of the CRC not only to the broadest extent of permissible power, the constitution, but to the more restrictive and less inherent "laws of this state". It is time for this Court to give definitive guidance to the charter counties of Washington and hold that the common-sense, pro-democratic, pro-transparency "one-subject" and "subject-in-title" rules of Article II, Section 19, apply during the

formation and modification of a county's organic law whether or not the organic law is a product of the legislature or freeholders.

As this Court observed:

An exercise of the initiative power is an exercise of the reserved power of the people to legislate. *State ex rel. Heavey v. Murphy*, 138 Wash.2d 800, 808, 982 P.2d 611 (1999); *Belas v. Kiga*, 135 Wash.2d 913, 920, 959 P.2d 1037 (1998). ***In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute.*** *Wash. Fed'n of State Employees v. State*, 127 Wash.2d 544, 556, 901 P.2d 1028 (1995). ***The fact that the legislative body has the power to achieve a particular result does not necessarily render its action constitutional; it must follow constitutional procedures.*** *State ex rel. Living Servs., Inc. v. Thompson*, 95 Wash.2d 753, 755, 630 P.2d 925 (1981). The people acting in their legislative capacity are subject to constitutional mandates. *State ex rel. Heavey*, 138 Wash.2d at 808, 982 P.2d 611; *Gerberding v. Munro*, 134 Wash.2d 188, 196, 949 P.2d 1366 (1998); *Culliton v. Chase*, 174 Wash. 363, 373–74, 25 P.2d 81 (1933).

*Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 204, 11 P.3d 762, 779-80 (2000), opinion corrected, 27 P.3d 608 (2001). Emphasis supplied.

Appellants agree with the County's citation to *Ford v. Logan*, 79 Wn.2d 147, 155, 483 P.2d 1247 (1971), for the proposition that “*the act of amending or repealing the basic organic instrument of government is of a higher order than the mere enactment of the laws within the framework of*

*that structure.*” It is this distinction which does not compel the application Article II, Section 19 to purely local enactments.

Appellants disagree with the County's conclusion that *Ford v. Logan* stands for the proposition that “*if a charter review commission can propose to repeal an entire charter in a single proposition, it certainly can bundle amendments to an existing charter in one or more propositions, each of which is far less than a total repeal of the charter.*” Brief of the County at 10. Appellants are at a loss to see how this follows logically. Rather, Appellants would submit, that the wholesale repealing of an entire charter is a much less nuanced legislative act than the modification of a charter. A wholesale repeal is, in essence, a single subject – the complete abrogation of the law. Depending on circumstance, modifications of Charters might be correctly confined to “single-subjects” or impermissibly range over many subjects. Appellants submit that to the extent that the Appellees read *Ford v. Logan* as permitting multiple revisions on more than one subject to be included in a single ballot proposition is in error.

Appellants also find *Ford* instructive because it tells us how to survey the outer boundary of a county's legislative power. The Court stated:

“If the initiative power at the county level under a 'home rule' charter is to be expanded beyond its Article II limits, such expansion *must*

*find support in some other constitutional provision, for such charters are 'subject to the Constitution'".* The County and State have been silent and not pointed to any such “constitutional provision” which releases San Juan County from the requisites of Article II, Section 19, because there is no such provision.

Likewise the State and the County's reliance on the case of *City of Seattle v. Buchanan*, 90 Wn.2d 584, 607, 584 P.2d 918 (1978), for the proposition that Article II, Section 19, “applies only to the legislature”, is a complete red herring. The *Buchanan* majority opinion was roughly 25 pages long and the entire discussion of Section 19 in *Buchanan* was limited to the following passage:

In another case, *People v. Smith*, 246 Mich. 393, 224 N.W. 402 (1929), the legislature had passed an act which, according to its title, was designed to define and punish the crime of pandering. A challenge to the statute was waged upon the ground that the title was too narrow to include all of the conduct proscribed in the act. The court found that the word pandering was one of narrow meaning, within the common understanding. Therefore, it held, the title was not sufficient to meet the constitutional requirement that the subject matter of a bill be embraced within it. The principle involved in that case has no application here. Const. art. 2, s 19, applies only to the legislature, ***and it is not contended otherwise.***

*City of Seattle v. Buchanan*, 90 Wash. 2d 584, 607, 584 P.2d 918, 929 (1978). Emphasis supplied.

It is clear that the discussion of Section 19 in *Buchanan* was limited to distinguishing a case that the Court found not relevant to the issue before it. Moreover, as the Court noted in the italicized portion that the matter of the applicability of Section 19 was not even argued. That the County and the State place so much reliance on this snippet of dicta is emblematic of the weakness of their position. In the present case, it “is being contended otherwise”. Appellants ask this Court to confirm that Charter Counties, when proposing legislation that modify organic law be required to adhere to Article II, Section 19.

The modern trend is that Section 19 is not applied so restrictively. Judge Utter in his treatise notes: “[S]ection 19 applies to initiatives as well as legislative bills, *and specifically to an initiative's ballot title as voted on by the people rather than to the initiative title itself.*” Utter, *The Washington State Constitution* at 73.

The most recent rendition of the Court's decision on the applicability (rather than the functionality) of Section 19 occurred in *Washington Federation of State Employees v. State*, 127 Wash.2d 544, 901 P.2d 1028 (1995). There the Court addressed the somewhat faltering route through past cases to the present day recognition that Section 19 applies to initiatives:

Initially, the parties dispute whether Const. art. 2, § 19 applies to initiative measures. In 1951, the court held that Const. art. 2, § 19 does not apply to initiatives. *Senior Citizens League, Inc. v. Department of Social Sec.*, 38 Wash.2d 142, 172, 228 P.2d 478 (1951). A majority of the court, however, later rejected that holding in *Fritz v. Gorton*, 83 Wash.2d 275, 517 P.2d 911, appeal dismissed, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974), wherein six Justices concluded that the analysis in *Senior Citizens* was incorrect and that its holding should be overturned. *Fritz*, at 328–42, 517 P.2d

Justice Rosellini reasoned that amendment 7, which established the initiative right, was an amendment to Const. art. 2, which concerns legislative authority, and therefore the provisions of article 2, including section 19, are applicable to both the legislative and initiative processes. Simply stated, “[a] bill is a draft of a law to be enacted by the legislature or by the electors via the initiative process”. *Fritz*, at 330, 517 P.2d 911 (Rosellini, J., dissenting). He also pointed out that a majority of courts in other jurisdictions had held provisions similar to Const. art. 2, § 19 applicable to initiatives. *Fritz*, at 330–32, 517 P.2d 911 (Rosellini, J., dissenting).

Examining the bases for Const. art. 2, § 19, the dissent concluded the policies underlying the provision also apply to initiatives: to provide notice of the contents of the legislation, and to prevent hodgepodge or logrolling legislation. *Fritz*, at 332–33, 517 P.2d 911.

The requirement that all legislative proposals include no more than one subject is consistent with basic democratic principles. The requirement is designed to present clear legislative proposals to the legislature or the public and forestall the combining of issues so that ones with minimal public support

are not adopted merely because they are attached to popular proposals. *Fritz*, at 335, 517 P.2d 911 (Rosellini, J., dissenting). Further, the requirement forestalls combining two proposals, neither of which has majority support, as a tactic by legislators or initiative petitioners to obtain passage of both. *Fritz*, at 336, 517 P.2d 911 (Rosellini, J., dissenting).

*Washington Fed'n of State Employees v. State*, 127 Wash. 2d 544, 551-52, 901 P.2d 1028, 1032 (1995).

The question now before the Court is whether the Article II, Section 19 should apply to propositions to amend county charters presented to the voters. Given the Court was clearly moved by the public policy rationale behind the Article II, Section 19's application to initiatives, Appellants would submit that modification of the organic law of the county is a task that should likewise benefit from the protection of Section 19.

This conclusion is buttressed by the Court's recent treatment of constitutional guarantees in the context of popular initiatives in *Maleng v. King County Corrections Guild*, 150 Wn.2d 325 (2003). Like here, *Maleng* examined the constitutional circumstances surrounding a voter backed approval of amendment to the King County Charter that reduced the council size from 13 to 9. The *Maleng* court quoted the *Ford* Court:

This act of amending or repealing the basic organic instrument of government is of a higher order than the mere enactment of laws within the framework of that

organic structure. This distinction has been prudently and thoughtfully included in the structure of American constitutional government, for to permit direct action by a majority to change a basic form of government would enable any given majority to remove all protections from within constitutional frameworks.

*Maleng* at 331, quoting *Ford*, 79 Wash.2d at 155, 483 P.2d 1247 (1971).

In the present case, the CRC was empowered with the task of proposing amendments to our County Charter. The result of the poorly drafted, confusing text contained in the ballot title was the wholesale change of San Juan County's form of government. That wholesale change should be carefully scrutinized on constitutional grounds.

**B. Proposition 1 included multiple Subjects and Subjects not within the Ballot title.**

Appellants have extensively discussed the range of subjects that existed in the fine-print of Proposition 1 (and the inconsistencies between the fine print in the three propositions) and refer the Court to those prior discussions. In its responsive pleading, however, the County argues that Appellants have not correctly applied the test in *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 11 P.3d 762 (2000), that the ballot title is "general" and not "restrictive" and that the title merely

describes the “topic of 'charter amendments regarding the suitability of the charter for the county.’” Respondent County’s Brief at 16.

That the ballot title could be read as being “general” strains logic. Metaphysically, all subjects are subjects of larger subjects and capable of being described as part of a larger universe. The County's understanding of what constitutes a “general” title is so expansive as to swallow the distinction between “general” and “restrictive” thereby frustrating the common sense public policy rational for such a distinction. Suffice it to say that Appellants would submit that the Amalgamated Court's survey of titles found to be “general” will illustrate how, in fact, the title of Proposition 1 was “restrictive.”

The *Amalgamated* Court stated:

Examples of general titles are: An Act relating to violence prevention. *In re Boot*, 130 Wash.2d 553, 566, 925 P.2d 964, 971 (1996). An Act Relating to the amendment or repeal of statutes superseded by court rule. *State v. Howard*, 106 Wash.2d 39, 45, 722 P.2d 783 (1985). Shall campaign contributions be limited; public funding of state and local campaigns be prohibited; and campaign related activities be restricted? *Wash. Fed'n*, 127 Wash.2d at 555, 557, 901 P.2d 1028.[A]n act relating to capital projects.... O'Brien, 105 Wash.2d at 79–80, 711 P.2d 993. An Act relating to tort actions.... *Scott v. Cascade Structures*, 100 Wash.2d 537, 546, 673 P.2d 179 (1983). An Act Relating to Community Colleges.... *Wash. Educ. Ass'n v. State*, 97 Wash.2d 899, 906–07, 652 P.2d 1347 (1982). An Act Relating to the death penalty.... *State v.*

*Grisby*, 97 Wash.2d 493, 498, 647 P.2d 6 (1982). An Act Relating to industrial insurance.... *Wash. State Sch. Dirs. Ass'n v. Dep't of Labor & Indus.*, 82 Wash.2d 367, 371, 510 P.2d 818 (1973). An Act to provide an Insurance Code for the State of Washington; to regulate insurance companies and the insurance business; to provide for an Insurance Commissioner; to establish the office of State Fire Marshall; to provide penalties for the violation of the provisions of this act.... *Kueckelhan v. Fed. Old Line Ins. Co.*, 69 Wash.2d 392, 402, 418 P.2d 443 (1966). An Act Relating to revenue and taxation; increasing the motor vehicle fuel tax, the use fuel tax and motor license fees, gross weight fees, fees in lieu of gross weight fees, seating capacity fees, providing for the distribution of said revenue; establishing an urban aid account in the motor vehicle fund; establishing a Puget Sound reserve account; providing for the use of the urban aid account ...; authorizing investment of the Puget Sound reserve account.... *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wash.2d 28, 31-33, 377 P.2d 466 (1962). An Act authorizing the incorporation of mutual savings banks, defining their powers and duties, and prescribing penalties for violations hereof. *In re Peterson's Estate*, 182 Wash. 29, 33, 45 P.2d 45 (1935).

*Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 208, 11 P.3d 762, 781-82 (2000) opinion corrected, 27 P.3d 608 (2001).

By describing the title as covering essentially any topic of the “suitability of the charter for the county” the Respondents seek to designate the ballot title as a “general” title and thereby have the more relaxed standard which allows topics addressed merely to be rationally related to the “general” title. Appellants submit that a fair reading of

Proposition 1 can only lead one to believe that it is “restrictive”: It only puts the voter on notice that the proposition seeks to reduce the number of council members from 6 to 3, that they would reside in separate districts, but be nominated and elected at-large. First and foremost, it does not inform the electorate of the massive districting change accompanying the reduction of council from 6 to 3. As previously stated, the passage of Proposition 1 resulted in a wholesale change to County government. Unbeknownst to voters, the passage of the propositions threw the baby out with the bathwater. The separation of powers, the equal representation – all gone with the stroke of a pen. The voters hadn’t a clue what hit them.

A restrictive title “ ‘is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation.’ ” *State v. Broadaway*, 133 Wash.2d 118, 127, 942 P.2d 363 (1997) (quoting *Gruen v. State Tax Comm'n*, 35 Wash.2d 1, 23, 211 P.2d 651 (1949), overruled on other grounds by *State ex rel. State Fin. Comm. v. Martin*, 62 Wash.2d 645, 384 P.2d 833 (1963)). “ ‘A restrictive title expressly limits the scope of the act to that expressed in the title.’ ” *Amalgamated*, 142 Wash.2d at 210, 11 P.3d 762 (quoting *Broadaway*, 133 Wash.2d at 127, 942 P.2d 363). In general, violations of the single-subject rule are more readily found where a restrictive title is used. *Id.* at 211, 942 P.2d 363. Restrictive titles are not given the same liberal construction as general titles and “provisions which

are not fairly within such restricted title will not be given force.” *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash.2d at 26, 200 P.2d 467 (1948).

Like its survey of “general” titles the *Amalgamated* Court also listed restrictive titles:

“Shall criminals who are convicted of ‘most serious offenses’ on three occasions be sentenced to life in prison without parole?” *State v. Thorne*, 129 Wash.2d 736, 757, 921 P.2d 514 (1996)); “‘An act relating to the acquisition of property by public agencies....’” (*Daviscourt v. Peistrup*, 40 Wash.App. 433, 437, 698 P.2d 1093 (1985) (quoting Laws of 1971, 1st Ex.Sess., ch. 39)); “‘An act relating to the rights and disabilities of aliens with respect to land....’” (*DeCano*, 7 Wash.2d at 623, 110 P.2d 627). These examples indicate that restrictive titles tend to deal with issues that are subsets of an overarching subject. Thus, “[s]hall criminals who are convicted of ‘most serious offenses’ on three occasions be sentenced to life in prison without parole?” is aimed at a subset issue (three-time “most serious offense” offenders) of an overarching subject (criminal offenders generally).

*Amalgamated*, 142 Wash.2d at 209, 11 P.3d 762.

When titles are “restrictive” a two part test employed. The first step is to determine “whether there is a “rational unity” between the general subject and the incidental subdivisions.” *Citizens for Responsible Wildlife Management v. State*, 149 Wash.2d 622, 71 P.3d 644, (2003).

“[T]he true test of rational unity is “the existence of rational unity or not is determined by whether the matters within the body of the initiative are germane to the general title *and whether they are germane to one*

*another.*” *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash. 2d 622, 638, 71 P.3d 644, 653 (2003), quoting *City of Burien*, 144 Wash.2d at 826, 31 P.3d 659; *Amalgamated*, 142 Wash.2d at 209–10, 11 P.3d 762.

As Appellants discuss more later, since some of the proposed changes to the County Charter appeared in the fine-print of EACH proposition, it is much harder to argue that these provisions are rationally united to all the titles under which the provision appeared. Indeed, the fact that the provision could be voted “for” in one proposition and “against” in another indicate irrefutably that they are not particularly germane to each other. (Voters Pamphlet CP 334-363).

**C. Even if a “General” Title, Rational Unity Does Not Encompass All Modifications in Proposition 1.**

The title of an act complies with Art. II, § 19 if it gives notice which would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind.” *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 217, 11 P.3d 762, 786 (2000) opinion corrected, 27 P.3d 608 (Wash. 2001), citing *Wash. Fed'n*, 127 Wash.2d at 555, 901 P.2d 1028; *YMCA v. State*, 62 Wash.2d 504, 506, 383 P.2d 497 (1963); *Treffry v. Taylor*, 67 Wash.2d 487, 491, 408 P.2d 269 (1965). Assuming *aguedo* that the title is “general” and that therefore, “[a]ll that is required is that there be some “rational unity” between the

general subject and the incidental subdivisions.” *State v. Grisby*, at 498, 647 P.2d 6 (quoting *Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wash.2d 392, 403, 418 P.2d 443 (1966); see *Scott v. Cascade Structures*, 100 Wash.2d 537, 545, 673 P.2d 179 (1983), it is impossible to conclude that the alterations in Proposition 1 were rationally united.

Perhaps the best example of a lack of rational unity, in addition to the return to grossly unequally sized districts of course, is Proposition 1's alteration of the rules regarding what constitutes a vacancy and how vacancies are handled on the CRC in Sections 8.20 and 8.21. How can the title in Proposition 1 put the reader on notice that such changes are contemplated by Proposition 1? It does not, and cannot. How can we know if voters were motivated by Section 8.21 to cast their votes in favor or against the Proposition? We cannot. At its core, this is the problem with all the Propositions and exactly the reason why Article 2, Section 19 has been extended to cover voter initiative. Extending the coverage of Section 19 to the present case is not onerous and fosters good government.

#### **D. Inconsistencies in the Voter Pamphlet.**

Examination of the proposed text in Propositions 1, 2 and 3 reveal just how justifiably confused a voter reading the official Voters' Pamphlet could be. For example, the SAME SECTION, Section 3.20 propose ENTIRELY DIFFERENT MODIFICATIONS in the fine print of ALL

THREE propositions. All three Propositions passed. Which version is the law? It is impossible to say.

This was not an isolated to Section 3.20. Different versions were proposed in Sections 4.30, 4.31, 4.32, 4.33, 4.34, 4.60, 5.22, 5.30, 5.41, 7.20. All these versions passed. Which represents the will of the people? We simply do not and cannot know. (Voters Pamphlet CP 334-363).

The converse of this problem was also true. That is, in some sections all three propositions proposed IDENTICAL CHANGES to the same sections. The best examples of this are Section 8.20 and 8.31 discussed above which modified rules relating to the composition of, vacancies from, and when the CRC was to convene. Despite the fact that all three propositions passed, some voters must have voted for one proposition and against another. Therefore those voters were casting inconsistent votes with respect to Sections 8.20 and 8.21 and other sections which contained identical changes. In other words, voters voted for a proposed change in one proposition and against the change in another. This argument is not designed to highlight how embarrassingly sloppy the drafters language that appeared in the Voters' Pamphlet, rather it is intended to show how inevitably inconsistent votes were cast. Appellants would submit, that another salubrious benefit of Article 2,

Section 19 is that if such is followed, situations such as this could not occur.

**E. San Juan's Home-Grown Version of the Article II,  
Section 19: Section 8.31.**

Appellants have insisted since the inception of this lawsuit that San Juan County Charter Section 8.31 provides a wholly independent basis for invalidation of the Propositions. Former Section 8.31 states:

If more than one amendment is submitted on the same ballot they shall be submitted in such a manner that people may vote for or against the amendments separately; provided an amendment which embraces a single or inter-related subject may be submitted as a single proposition even though it is composed of changes to one or more articles.

Taking the first clause, it is clear from the above discussion that this did not occur. There were three propositions and 8.20 and 8.21 (for just one example) was bundled in all three propositions. Accordingly a voter who wanted to vote “yes” on Proposition 1, but “no” on Proposition 2 would not have been able to vote for or against Sections 8.20 and 8.21 consistently. This is not a theoretical matter, since the Propositions each passed with differing numbers of votes, it is clear as a matter of fact that some voters cast inconsistent votes with respect to the identical amendments that existed in at least two of the propositions. Accordingly, even were the Court not willing to nullify the election on Constitutional

grounds, Appellants would submit that a viable local alternative ground exists that warrant the invalidation of the election results.

**III. Appellants Response to Cross Appeal on Laches: 8.31.**

The County further suggest that Appellants waited too long to voice their objections with respect to their claim that Section 8.31 was violated and that they are barred by the doctrine of laches. The Superior Court correctly found that laches was no bar. Suffice it to say that the record shows that Appellants brought suit in Superior Court within days after the certification of the election in November 2012.

Application of the doctrine of laches to the case at bar is inequitable, improper, and a harsh remedy given the circumstances. The doctrine of laches, like most equitable doctrines, is to be applied with circumspection and as a means of administering justice. It is not to be employed as a barrier solely for the purpose of defeating meritorious claims grounded upon the plainest principles of common honesty. *Crodle v. Dodge*, 99 Wn. 121, 132, 168 P. 986 (1917).

Laches has two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 241, 88 P.3d 375 (2004). Respondents fail to establish that Appellant's delay was "inexcusable" and that prejudice to the

other party is so significant that it warrants the invocation of this “extraordinary remedy.”

**A. Inexcusable Delay.**

The doctrine of laches finds its origins in the maxim “equity aids the vigilant, not those who slumber on their rights.” *Crodle v. Dodge*, 99 Wn. 121 at 131, 168 P 986 (1917). Respondents have not established that Appellants “inexcusably” slept on their rights. Instead, the County highlights the facts of *LaVergne v. Boysen*, 82 Wn.2d 718, 513 P.2d 547 (1973) in an attempt to draw parallels, but fail to explain that *LaVergne* did not concern challenges to the “process” but the legitimacy of certain votes cast. *LaVergne*, 82 Wn.2d at 719. The differences continue: in *LaVergne*, the plaintiffs waited 79 days after the election before bringing suit, *Id.*, at 721; here, plaintiffs filed suit just 7 days after certification of the election, *Complaint for Declaratory and Injunctive Relief* at 1 (date stamped December 4, 2012). Also, and perhaps most importantly different is that in *LaVergne* plaintiffs waited *eight additional months* before taking any action to prosecute their suit, *LaVergne*, 82 Wn.2d at 721 (emphasis added); here, Plaintiffs have timely asserted their grievances and sought the speedy resolution of their claims by repeatedly requesting that this matter be put on an expedited docket, and that this matter be addressed and resolved with all deliberate speed. *Comp. for Decl. and Injunct. Relief*, at 15.

Where the plaintiffs in *LaVergne* may have slept on their rights and failed to timely prosecute their claims, in the case at bar Plaintiffs brought their claims as soon as possible and acted upon them with urgency.

Defendants *assume* that Plaintiffs were aware of this particular claim in June 2012 but offer no supporting evidence that Plaintiffs failed to assert their claim in a timely fashion. Plaintiffs were unaware of this particular claim until just before the filing of suit. In fact, the County in prior briefing has acknowledged that Plaintiffs may not have even been aware of these claims at any point from June 2012 through December 2012 highlighting that at no point during the formation of Propositions 1, 2, or 3 did Plaintiffs “notify[] the chair of the Charter Review Commission of their concerns, writ[e] letters or email of concern to the county prosecuting attorney, testify[] before the Charter Review Commission, ... county council or others.” *Def. Memo. re: Laches*, at 10. The fact that Plaintiffs did not voice opposition at an earlier date only shows that Plaintiffs were not even aware of this claim until it was filed. Despite the Defendants’ assertions that Plaintiffs should have been aware of these problems and raised them sooner, there is no cited authority imposing a duty on Plaintiffs to do so. Simply put, the required element of “inexcusable delay” is not present here. There was no delay in the filing of this claim. The invocation of laches is inappropriate under the circumstances and Plaintiffs should have an opportunity to be heard on the merits.

**B. Substantial Prejudice.**

To properly invoke the doctrine of laches Respondents must also establish that the inexcusable delay of asserting a claim will cause prejudice to the other party. *See, State ex rel. CAT*, supra. Even though Defendants have not established that an inexcusable delay has occurred, it is also clear that prejudice has not resulted from the assertion of this claim. Defendants' cited authority again presents factual circumstances that are wholly different from the case at bar. In *LaVergne* there were countless other third parties that would be prejudiced stemming from the *eight month* delay in the prosecution of plaintiff's claim. *LaVergne*, 82 Wn.2d at 722. Earlier in these proceedings, the County argued that the candidates for office would be extremely prejudiced if the spring 2013 elections were halted – the elections were not halted.

Appellants have always sought the most expeditious remedy possible and have even sought to enjoin the 2013 elections from occurring to limit any potential prejudices that may result while their claims are entertained by the courts. *See, Compl. For Decl. and Injunct. Relief*. The facts in *LaVergne* are not present here.

Defendant also underestimates this Court's equitable powers to order the reconstitution of the Charter Review Commission and to require that procedures for submission of a proposition comport with the relevant

provisions of the San Juan County Charter. As an equitable remedy the doctrine of laches is designed to advance fairness. To grant Respondents' request for the application of laches would result in greater prejudice than it prevents. Plaintiffs are entitled to a decision on the merits of their claims that every voter in San Juan County should have had a fair and noticed opportunity to cast the vote that they intended and that Propositions 1, 2, and 3; and that the ballot titles violate San Juan County's own 2005 Charter requirements. Precluding Plaintiffs claims under former Charter section 8.31 action under the guise of laches is inappropriate under the circumstances.

#### IV. Unequal Districting.

*"A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."*

*Washington Constitution, Article I, Section 32.*

##### A. **We must embrace the higher principals.**

Justice Utter points out in his book that Washington Courts have cited Article I, Section 32 as being a charge, admonition, or duty on the courts and the legislature to be mindful of their sovereign rights". *The Washington Constitution*, at page 58. "Clearly, it is but an admonition not only to the legislature but also to the courts to keep constantly in mind the

fundamentals of our republican form of government...” *Wheeler School District v. Hawley*, 18 Wn.2 37, 137 P.2d 1010 (1943).

One-man one-vote is a basic cornerstone of our democracy. It is a fundamental principle embodied in both the US Constitution as well as the Washington State Constitution. The second clause of the Fourteenth Amendment directs that representatives are to be apportioned among the states according to their respective numbers. Washington State recognizes the U.S. Constitution as the supreme law of the land. Wash. Const. Article I, Section 2. For most of the nation’s history, the U.S. Supreme Court had not imposed the one-man – one-vote requirement under the US Constitution to state elections. However, the Court eventually changed its position and determined that equal protection required that the apportionment of a state must be nearly as practical equal the population so that all votes will stand in same relation to one another regardless of where a person lives. *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 69 (1962); *The Washington State Constitution, Id.* at 89. In *Baker*, Plaintiffs sought a determination in federal court that the state apportionment of representatives was violative of the equal protection rights conferred under the 14<sup>th</sup> Amendment. Justice Brennan wrote the opinion:

The complaint concludes that ‘these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them

by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes.' They seek a declaration that the 1901 statute is unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it.

*Baker v. Carr*, 369 U.S. 186, 193-95, 82 S. Ct. 691, 697-98, 7 L. Ed. 2d 663 (1962).

Defendants in *Baker*, sought to dismiss the case, but the high court declined, standing on fundamental principals of government. Justice Clark, who concurred with the majority, examined the voting strengths of large and small counties and determined that the challenged Tennessee voting scheme was a “crazy quilt without rational basis”. *Baker*, 369 U.S. at 354. The *Baker* case is very similar to the case at bar, in which Appellants are also seeking a declaration that San Juan County’s new apportionment of districts denies the electorate the equal protection of the laws, by virtue of the debasement of their votes. The San Juan County current scheme of unequal districting, is without a rational basis. The return to unequal districting is a crazy quilt, with no rational basis.

Now we examine the argument at a local level: Washington State law generally requires equal districts, RCW 36.32.020. The only exception to this is the clause sought to be invalidated in this case. Thus the state law embraces the fundamental principal of equal protection embodied in the U.S. Constitution as well as the Washington State Constitution.

Both the County and the State, however, urge that the fundamental constitutional principals be cast aside, and affirm the passage of the Propositions because a majority voted for their passage. This overlooks the fact that Proposition 1 only passed because of the overwhelming landslide in the to-be-benefited much smaller Lopez/Shaw district. This is the crucial fact to keep in mind when evaluating each of the following arguments.

**B. Greater Constitutional Protection afforded Washington Citizens than under Federal Constitution: Strict-scrutiny applies.**

The State and the County spend time and effort examining a trio of federal cases which they suppose stand for the proposition that unequal residency districts are permissible under the federal constitution. *Fortson v. Dorsey*, 397 U.S. 433, 85 S.Ct. 498, 13 L.Ed. D 410 (1965), *Dusch v. Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed. 2S 656 (1967), and *Dallas Cnty. v. Reese*. 421 U.S. 477, 95 S.Ct. 1706, 33 L. Ed. 2D 312 (1975). To the extent that these cases are applicable, they establish the federal minimum. Washington courts have conferred greater protection to its citizens and it is these cases which show clearly that the scheme contemplated in Proposition 1 strays from realm permitted by this Court.

As Judge Utter explained in his Treatise, “[t]he decision [*Foster v. Sunnyside Valley Irrig. Dist.* 102 Wn.2d 395 (1984).] stated that the

Washington Constitution, unlike its federal counterpart, confers the right to 'free and equal' elections, thus giving more protection than the federal safeguard.” The County casts aside this decision in one lonely sentence claiming that *Foster* is distinguishable on its facts because there, the issue was the right of non landowners to vote in irrigation district elections. What Respondents so blithely dismiss is the analysis in the *Foster* decision and its requirement that laws that alter the **qualitative value** of a vote or access to candidacy is correctly examined under strict-scrutiny.

This history offers several principles applicable here. The right of all constitutionally qualified citizens to vote is fundamental to our representative form of government. In most instances any legislative act which qualifies this right must, under federal law, be based upon a compelling state interest and the state must demonstrate that no less restrictive measures are available to achieve this interest. *Reynolds v. Sims*, supra. The language of Const. art. 1, § 19 is not to be interpreted literally: “elections and voters may ... be regulated and property controlled”; in certain limited situations, the right to vote on an issue or for a representative may be confined to those persons directly affected by the issue or representative body. *State v. Wilson*, supra, 137 Wash. at 132–33, 241 P. 970.

The United States Supreme Court has departed from the strict one-person, one-vote rule of *Reynolds v. Sims*, supra, where the election of representatives in special purpose municipal districts is concerned. See *Salyer Land Co. v. Tulare Lk. Basin Water Storage Dist.*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811,

68 L.Ed.2d 150 (1981). *This is due to the limited governmental powers possessed and exercised by these districts and the disproportionate impact such districts frequently have upon a definable class living within their boundaries.*

*Foster v. Sunnyside Valley Irr. Dist.*, 102 Wash. 2d 395, 407-08, 687 P.2d 841, 848 (1984).

What we learn from *Foster*, is that not only has the Washington Supreme Court found more expansive protection of voter rights than their federal counterpart, but that disproportionate impacts are *only* allowable when the governmental body has “limited governmental powers” such as utility, fire and drainage districts, such as utility, fire and drainage districts. Counties, though, are the primary political subdivision of the State – they are not districts of limited governmental powers. Accordingly, any shelter that Respondents find in the federal cases is limited by the Washington's more expansive view. Respondents near exclusive reliance on federal cases is dubious.

Importantly, a number of Commissions in San Juan County are to be constituted of an equal number of representatives from each district. For example, Section 2.20.080 of the San Juan County Code provides:

The planning commission shall consist of nine members appointed by the chair of the County council, with approval of a majority of the County council; provided, that each member of the council shall submit to the chair a list of nominees residing in his/her council district and the chair shall make his/her appointments

from such lists so that as nearly as mathematically possible, each council district shall be equally represented on the commission (RCW 36.70.080).

In essence, what Proposition 1 has done is it has conferred greater representational clout to the smaller districts as they will have 1/3 of the planning commission members but just 1/6<sup>th</sup> the population. This is just one example of how Proposition 1 will allow the County to stray from the platonic ideal of representative democracy for which Washington strives.

Respondents urge rational basis review and state, [v]oting regulations are rarely subjected to strict scrutiny.” County's Brief at 45, citing the federal case of *Dudum v. Arntz*, 640 F.3d 1098 (2011), for the proposition. But this federal case is inconsistent with what Washington's Supreme Court has declared. Rather, the Washington Supreme Court stated:

Thus, because the right to vote has been recognized as fundamental for all citizens, restrictions on that right generally are subject to strict scrutiny, meaning they must be narrowly tailored to further compelling state interest.

*Madison v. State*, 161 Wash. 2d 85, 99, 163 P.3d 757, 767 (2007). Citations omitted.

**C. Article 1, Section 19 Guarantee of Free and Equal Elections is always applicable for general representative districts.**

The County seeks to limit the application of Article 1, Section 19 by citing to the recent case of *Euster v. State*, 171 Wash.2d 839, 259 P.3d 146 (2011). There, at issue, was whether “Article 1, Section 19 requires the one-person, one vote principal to apply to judicial elections.” *Id.* at 843. The Court in *Euster* was moved by the fact that the complaint was concerned with judicial elections not elections to a representative body. Thus the applicability of Article 1, Section 19 was curtailed. The Court stated:

The district court reasoned “[t]he primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents. But . . . [t]he State judiciary, unlike the legislature, is not the organ responsible for achieving representative government.”

*Euster v. State*, 171 Wash.2d 839, 843, 259 P.3d 146 (2011).

So reading *Foster* and *Euster* together, we can see this Court has found fit to extend Article 1, Section 19 much more readily in situations where representative, non-limited government districts are concerned.

In the case at bar, a citizen from Lopez has almost a three times greater chance of winding up on County Council than their counterpart from San Juan Island. Likewise, there is less of a chance that a primary be triggered in a district with fewer voters. This is not mere statistical speculation. It must be remembered that after the passage of Proposition 1

special elections were held to fill the the newly created council seats in Spring 2013. Top-two primaries were triggered for the more populated San Juan Island and Orcas Districts but not for the much smaller district of Shaw/Lopez. The effect of this is that voters were able to more effectively vet candidates from the larger districts but were denied such an opportunity in the smaller district. So perversely, fewer voters were able to observe the candidate from the smaller district. Appellants submit that the primary process is a fundamental part of the election machinery and it promotes transparency and good government. As the U.S. Supreme Court has required, “[a]ll *procedures* used by as State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.” *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969).

Throughout this litigation, Appellees seek refuge in the distinction between “voting” districts and “residency” districts. To be fair, there is some authority that indicates that this distinction between the type of district is of constitutional significance. *Story v. Anderson*, 93 Wn.2d 546, 611 P.2d 764 (1980). In *Story*, this Court identified that an election scheme that uses unequally sized voting districts for primaries is impermissible because confers disproportionate voting strength on residents of the smaller district. Respondents cling to the dicta in *Story*

that indicates that general primaries might act to sanitize the otherwise impermissible scheme founded on assymmetric district size. But until today, that case has not presented itself.

The question in today's case is not answered in *Story*, but instead is a question which has no direct precedent. What we ask the Court to determine today is whether the San Juan County voting scheme, i.e. district-wide primaries with candidates from unequal sized districts violates Article 1, Section 19.

## V. REMEDY

### A. **The County's Proposed Remedy for Violation of Article II, Section 19 (or SJCC 8.31); Flawed in Theory, Flawed in Fact.**

The County argues that invalidation is the wrong remedy in this case because “Proposition 1 has a severability clause in section 9.10.” In so far as such a clause exists, the County is correct, it states:

The **provisions** of this Charter are severable. If any provision should be declared unconstitutional or inapplicable, it shall not affect the constitutionality or applicability of any other provision of this Charter. Emphasis supplied.

What the Respondents miss, however, is that Appellants are not arguing that *any given provision* is invalid, but rather the method of enacting propositions were fundamentally flawed and therefore all

changes should be declared void. The argument is that the flawed ballot title did not correctly describe the contents of the Proposition, not that any one provision was flawed *per se*. Accordingly, for this matter alone, the severability clause does not provide the saving grace that the County wishes.

As discussed above it is impossible to know which of the various changes motivated a particular voter to vote for or against a proposition – Indeed, voters, when they voted, cast conflicting votes as some of the changes contemplated by the three propositions were in direct conflict with one another. Accordingly it is now impossible for the Court to second guess the will of the voter and use the severability clause to “clean-up” the proposition so that only one subject exists. The entire idea behind the single subject rule in Article II, Section 19 is to avoid the need for a severability clause. The use of the severability clause in an instance such as this would be tantamount to the invasion of the right of the electorate which is absolutely reserved to the people by Washington's Constitution.

Moreover, the fact that the County's position is that now the Propositions can be somehow cleaned up using severability demonstrates exactly how *inessential* the some of the proposed modifications are to foster the proposition.

**B. Alternate Remedy.**

Appellants, in their opening brief conclusion, acknowledged that the genie is out of the bottle. Appellants continue to seek a remedy which provides the least disruptive method of returning the county to equally sized voting districts, and allows the voters to cast a properly noticed vote on property framed ballot measures in future elections. This Court has the power to declare the Propositions placed on the November 2013 to be invalid and require the CRC to re-write the ballot measures in a coherent way that does not violate the one-subject rule contained in Article II, Section 19 and Charter Section 8.31. This Court has the power to invalidate the offending sections of RCW 36.32.020 and .040 on substantive due process grounds. This Court has equitable powers to sever the Charter provisions allowing unequal representation and require all future elections to require equal districting. This Court has the authority to issue an injunction restraining the Respondents San Juan County from conducting any further elections under the impermissible sections of the Charter.

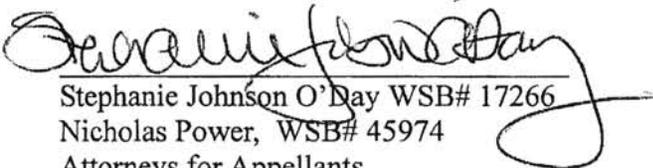
#### **VI. Conclusion.**

This case was brought originally by three citizens, on behalf of themselves and others similarly situated. These citizens were later joined by two sitting councilmen and a candidate. These individuals seek nothing more than to require San Juan County to frame ballot measures

fairly and ensure that elections in our county are free and equal, treating the voters in a nondisparate way. While the spring elections initiated by the CRC fall 2012 ballot measures have gone forward, the Plaintiffs/Appellants in this case continue to seek justice so that future governance of San Juan County will be fair to the electorate.

Certainly voters have the right under a Charter to create an alternate form of government. But that does not excuse the County from adhering to basic Constitutional Principles.

Respectfully submitted this 29<sup>th</sup> day of July, 2013.

  
Stephanie Johnson O'Day WSB# 17266  
Nicholas Power, WSB# 45974  
Attorneys for Appellants

1  
2  
3 **SUPERIOR COURT OF THE STATE OF WASHINGTON**  
4 **FOR SKAGIT COUNTY**

5 MICHAEL CARLSON, JERROLD )  
6 A. GONCE & JEFFREY BOSSLER, )

7 Plaintiffs, )

**Cause No. 12-2-02333-9**

8 SAN JUAN COUNTY, a political )  
9 Subdivision of the State of Washington, )  
10 and, THE STATE OF WASHINGTON, )

DECLARATION OF  
JEFFREY BOSSLER

11 Defendants. )  
12

13 Jeffrey Bossler, being first duly sworn on oath under the laws of the state of Washington,  
14 declares as follows:

15 I have been a resident of former District 4, the west side of Orcas Island since 1988.

16 I was elected as a Freeholder in 2004, along with 20 other individuals from the various  
17 districts in San Juan County. We were charged with performing an in-depth study / review of  
18 how San Juan County functioned or failed as a Code County, and to put forth, if need be, to the  
19 voters, a Home Rule County Charter which would address and correct existing problems and  
20 issues. Our task was, by its own nature, to be impartial and methodical, giving all points of view  
21 equal consideration.  
22

23 We Freeholders worked objectively for nearly a year. We recognized that the  
24 populations on the various islands have distinct and separate characteristics. Islands tend to  
25 operate with a strong sense of individuality and identity. We stayed away from political partisan  
26 agendas to focus solely on structural issues.  
27  
28

1 One of the greatest perceived problems with San Juan County had to do with  
2 representation – specifically – district voting strength and district representation within Board of  
3 County Commissioners (BoCC). Indeed, this issue of unequal districts had arisen several times  
4 before in San Juan County. As freeholders, it was incumbent upon us to explore the possibilities  
5 of resolving the issue once and for all, and I was one of two freeholders who dove directly into  
6 researching the TANGIBLE FACTS and potential solutions.  
7

8 As shown in the attached documents, these unequal districts were comprised of 1/6th,  
9 2/6ths, and 3/6ths of the population (Lopez 1/6, Orcas 1/3, and San Juan Island 1/2 respectively),  
10 while each unequal district was represented equally among the BoCC. While geography is a  
11 default part of districting, districts are drawn based on population.  
12

13 In regard to the unequal districts and the fact that the elections were AT-LARGE (and  
14 would be under said Propositions), pure and simple mathematics regarding the above will give  
15 both a lay person and an expert the exact same results:

- 16 • If you live on Lopez, **only one in every six** votes for “your” at-large  
17 commissioner comes from Lopez
- 18 • If you live on Orcas, only **two in every six** votes for “your” at-large  
19 commissioner comes from Orcas
- 20 • If you live on San Juan, only **three in every six** votes for “your” at-large  
21 commissioner comes from San Juan  
22

23  
24 Another way to look at this grossly unequal vote dilution is as follows:

- 25 • If you live on Lopez, there are **five** votes outside your district who could vote  
26 against your one in-district vote  
27  
28

- 1 • If you live on Orcas, there are **four** votes outside your district who could vote  
2 against two in-district votes
- 3 • If you live on San Juan, there are **three** votes outside your district who could vote  
4 against your three in-district votes

5 While the above two bulleted lists portray considerable vote dilution distributed UN-  
6 equally among the three districts, it should be noted that there are also inequalities of **district**  
7 **representation** within the legislative body as follows:

- 9 • Lopez is  $1/6^{\text{th}}$  of the population but is represented as  $1/3^{\text{rd}}$  of the legislative body
- 10 • Orcas is  $1/3^{\text{rd}}$  of the population and is represented as  $1/3^{\text{rd}}$  of the legislative body
- 11 • San Juan is  $1/2$  of the population but is represented as only  $1/3^{\text{rd}}$  of the legislative body

12 On the face of the statistics above, it makes no sense to believe inequalities of this  
13 magnitude have no ill affect upon the workings of the County and its citizens. Residency  
14 requirements which state that each representative must live in his or her district do nothing to  
15 “level the playing field” simply because in this AT-LARGE scheme (and all at large schemes),  
16 the same majority (50%+1) rules in all three districts. Additionally, in reviewing the bulleted  
17 numerical data above, how can anyone believe that when more votes for “your” representative  
18 come from outside “your” district; that “your” representative actually represents you?

19 At-large voting schemes in code counties persist because they dilute the vote equally. In  
20 the case of San Juan County, the former system and the return to it through said propositions  
21 represents gross inconsistencies inherent in UN-equal vote dilution. Additionally, since San Juan  
22 County remains a “Charter County”, it must be asked if UN-equal districts are allowable in  
23 CHARTER Counties. The in RCW 36.32.020 and RCW 36.32.040 that treated San Juan and  
24 Island County citizens differently from citizens of every other county in the State of Washington  
25  
26  
27  
28

1 with regard to voting representation was devised for CODE counties, NOT necessarily for  
2 CHARTER counties. It should be stated that Island County now has nearly equal districts.

3         Additionally, due to the unequal districts and the simple math explained above, each  
4 district has a varying chance of actually electing who they want (please refer to the first page of  
5 my attachment NOTE: It is important to have a color copy because the colors function as  
6 descriptors).  
7

8         The three charts running across the top of page one of my attachment indicate (among  
9 many other things) the following:

- 10         • An election held for a Lopez position with Lopez supporting their candidate by  
11             100% could still lose their desired candidate due to only tepid support in the other  
12             two districts for the opposition candidate
- 13         • An election with the exact by-district support for or against each candidate can  
14             easily result in a different outcome (winner/loser) depending on which district the  
15             election is being held for
- 16         • The exact same % of support per district totals a far different number of votes:  
17
  - 18                 ○ A simple unit of county-wide voters would average 600 people
  - 19                 ○ Within 600 people:
    - 20                         ▪ 100 would be from Lopez
    - 21                         ▪ 200 would be from Orcas
    - 22                         ▪ 300 would be from San Juan
  - 23                 ○ **50% support on Lopez = 50 people**
  - 24                 ○ **50% support on Orcas = 100 people**
  - 25                 ○ **50% support on San Juan = 150 people**
  - 26
  - 27
  - 28

1 None of the above is innuendo, but rather, these are the kinds of tangible numbers all  
2 counties and states consider in districting their areas of jurisdiction. We freeholders saw that San  
3 Juan County had an easy fix which would bring us into nearly equal districts, by creating 6  
4 districts (roughly described here as Lopez as the only whole main island district, Orcas easily  
5 split into two districts...east and west, and San Juan easily split into three districts...north, south,  
6 and Friday Harbor).

7  
8 Also significant was that the new districts generally kept island identities whole.

9 Moving on to the Charter Review Commission (CRC), their work spoke for itself. I will  
10 not spend time discussing this issue except to say that the CRC was populated mostly by people  
11 who simply could not accept the charter which included the six equal districts. While I would  
12 agree that the "mal intent" of the CRC is no reason to strike down their propositions, I believe it  
13 is important for those of legal qualifications to at least be aware of the CRC's belligerent and  
14 subjective approach from day-one.

15  
16 I must also add that the CRC and its supporters, along with their detractors, became  
17 embroiled in a heated media barrage of seemingly endless letters to the editors which had little or  
18 nothing to do with the key issues. Along with the fact that the CRC never communicated that we  
19 would be going back to unequal districts, and the multitude of other aspects of the said  
20 propositions (which I firmly believe are critically flawed), the voting public was simply mis-  
21 informed and confused. While again, this in and of itself may be no reason for legal action, this  
22 IS the basis for all the people now wondering why all the election signs are now up.

23  
24  
25 "LAY PERSONS" are the voting majority of this San Juan County and it is my very  
26 strong opinion generated by my daily experience that they were not only duped into something  
27 they did not understand, but because of the tangible numbers I submit above and in the attached  
28

1 charts and graphs, said propositions in this case do not meet the requirements of fairness.

2 Districts as unequal as this within an at-large scheme violate my right as a citizen, and violate the  
3 rights of all citizens of this San Juan County even if the damages are unknown by the people.

4 I would challenge anyone to disprove my numbers, or prove otherwise with charts of  
5 equal detail as my own, or even show me another county where districts are so unequal. So far I  
6 have only heard ambiguity from those who have failed to prove otherwise.  
7

8 The attached charts and graphs show not just how I personally am damaged, but how  
9 each district and each person in each district is damaged. These damages include, but are not  
10 limited to the following:

- 11       ▪ Unequally diluted district voting strength
- 12       ▪ Disproportionate representation within the legislative body
- 13       ▪ Disproportionate percent of support results due to unequal districts
- 14

15 There are many other issues revolving around the chaos of new elections in the  
16 “transition.” I believe the testimony of others and the rule of law will be sufficient regarding  
17 these other issues.  
18

19 I hope and pray that the court quickly strikes down the CRC’s Propositions 1 through 3,  
20 and also strikes down the provisions within RCW 36.32.020 and RCW 36.32.040 which treat  
21 San Juan County differently from all other counties in the State of Washington.  
22

23 

24  
25 

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Jeffrey Bossler

## SAN JUAN COUNTY, WA

A special exception was made in RCW 36.32.020 and 36.32.040 that treated San Juan County citizens differently from citizens of every other county with regard to voting representation, giving San Juan County the ability to have grossly unequal districts. While this right was granted in the last century in an attempt to mitigate difficulties related to equal districting, the populations of each island have grown since then and became distributed by district as shown in the blue headings below in the three charts.

The voting scheme was an "at-large" BOCC system with a requirement that each of the three commissioners reside within the district they are representing. This requirement, along with county-wide elections for each of the three commissioners, was supposed to neutralize the inequities inherent in the vastly unequal districts. Instead, the simple mathematical realities of such a system prove it is grossly unfair and in non-compliance with basic one-person-one-vote requirements and their founding ideals.

Please observe the information in the charts below, as they represent San Juan County's pre-Charter elections, as well as what the County would be returning to if SJC 2012 Proposition #1 is allowed to stand. A list of observations specific to the charts below is noted on the following page.

### FORMER BOCC SCHEME IN SJC AND PROPOSED RETURN BY PROP. #1 (Unequal vote dilution):

LOPEZ = 1/6 <sup>th</sup> pop.								ORCAS = 1/3 <sup>rd</sup> pop.								SAN JUAN = 1/2 pop.										
<b>OLD SJC BOCC THREE UNEQUAL AT-LARGE DISTRICTS:</b>																										
<i>Election for Lopez position with District #1 supporting the candidate indicated by the color green:</i>								<i>Election for Orcas position with Orcas supporting the candidate indicated by the color green:</i>								<i>Election for San Juan position with San Juan supporting the candidate indicated by the color green:</i>										
Below: <b>LOPEZ</b> supports green candidate		Below: Combined San Juan and Orcas support for candidates green and orange: <i>(There are 5 votes from Orcas/San Juan for every 1 vote from Lopez.)</i>						Below: <b>Orcas</b> supports green candidate		Below: Combined San Juan and Lopez support for candidates green and orange: <i>(There are 4 votes from San Juan/Lopez for every 2 votes from Orcas)</i>						Below: <b>San Juan</b> supports green candidate		Below: Combined Orcas and Lopez support for candidates green and orange: <i>(There are 3 votes from Orcas/Lopez for every 3 votes from San Juan)</i>								
		0%	10%	20%	30%	40%	50%	60%			0%	10%	20%	30%	40%	50%	60%			0%	10%	20%	30%	40%	50%	60%
		100%	90%	80%	70%	60%	50%	40%			100%	90%	80%	70%	60%	50%	40%			100%	90%	80%	70%	60%	50%	40%
0%	100%				250/350	300/250	350/250						280/320	320/280												
10%	90%				290/310	340/260							260/340	300/300	340/260											
20%	80%				260/320	330/270							280/320	320/280												
30%	70%				270/330	320/280							260/340	300/300	340/260											
40%	60%				260/340	310/290							280/320	320/280												
50%	50%				250/350	300/250	350/250						260/340	300/300	340/260											

#### CHARTS KEY AND NOTES:

Each chart above represents a county-wide election for that district's representative. In each election scenario, the district for which the election is being held supports the candidate shown in green.

**AREA INSIDE RED SQUARES**  
Show the likely results of the election given various support for the candidates from the three unequal districts combined. Note that the figures shown in fractions always show the district's choice green candidate on top, no matter if the candidate won or lost.

The green wedge-shaped areas within each of the red squares represent the chances of the district for which the at-large election is being held to actually get the candidate of their choice. It is easy to see the inequities inherent in this county election scheme.

Number of votes is based on a unit of 600 for simplicity and to match the common denominator of the districts.

## ITEMIZED PROBLEMS WITH THIS VOTING SCHEME:

### District Vote Dilution (to elect "your" representative):

BELOW: Unequal vote delusion per SJC Prop. #1 / 2012	
LOPEZ	....If you live on Lopez, <b>only 1 of every 6 votes</b> for your at-large commissioner <b>actually came from Lopez.</b>
ORCAS	...If you live on Orcas, <b>only 2 of every 6 votes</b> for your at-large commissioner <b>actually came from Orcas.</b>
SAN JUAN	..If you live San Juan, <b>only 3 of every 6 votes</b> for your at-large commissioner <b>actually came from San Juan.</b>

### SAME ELECTION / DIFFERENT RESULT

Using the charts on the previous page, it is easy to see that the exact same support structures can result in different outcomes depending on which district the at-large election is for. This is because numerically, the exact same percentage of support in one district adds up to a far different number of votes in another. For example, based on a county-wide unit of 600 voters, 50% support from Lopez = only 50 votes compared to 150 votes from San Juan for the same 50% support.

#### EXAMPLE:

A COUNTY-WIDE UNIT OF 600 VOTERS		
LOPEZ 100	ORCAS = 200	SAN JUAN = 300
50%	50%	50%

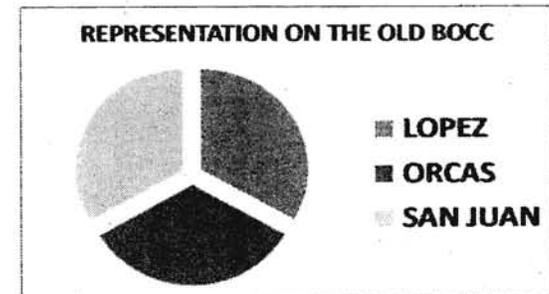
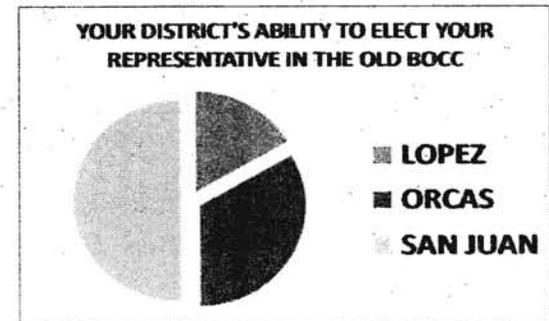
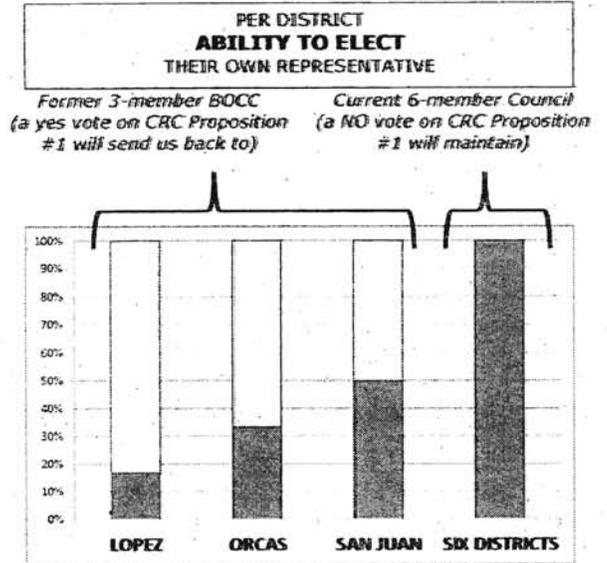
### REPRESENTATION DISTORTION IN THE LEGISLATIVE BODY

(in our past BOCC and again if Prop. #1 is allowed to stand)

- Lopez, being 1/6<sup>th</sup> of the population, is represented as 1/3<sup>rd</sup>
- Orcas, being 1/3<sup>rd</sup> of the population, is accurately represented
- San Juan, being 1/2 of the population, is being under-represented as only 1/3<sup>rd</sup> of the legislative body
- This collection of wrongs does not make anything right

### ELECTION CAMPAIGNS

Considering county-wide elections for grossly unequal districts brings up many serious questions as to loyalties and the inequities of campaign costs compared to constituencies, but these things are difficult to quantify.



As a voting citizen of this county for over 23 years and a former freeholder who understands the mechanics of our current Home Rule Charter, I am deeply concerned by the major faults that had been inherent in our former districting scheme and the ill-conceived return to it through SJC 2012 proposition #1.

While public debate was large and often heated, most was concerned with opinion and nuanced theory rather than the tangible facts as shown above.

Since the passage of our current Charter five years ago, we have proven that we can have nearly equal districts, given our complex geographical and demographic makeup, through the model shown here, which had done away with at-large voting and replaced it with district specific elections and equal districts.

Our Current Home Rule 6-member Council:					
Lopez 1/6 <sup>TH</sup>	Orcas 1 1/6 <sup>TH</sup>	Orcas 2 1/6 <sup>TH</sup>	SJ 1 1/6 <sup>TH</sup>	SJ 2 1/6 <sup>TH</sup>	SJ 3 1/6 <sup>TH</sup>
Your voting power within your own district is at 100%.					
1/6 <sup>th</sup>	Your district is equal to all others and is accurately represented by your district-specific vote. All Councilmembers are still accountable to the entire County through the Council.				

Both the legislative and administrative bodies of San Juan County have out-performed the BOCC form of governance of the past. Aside from my own opinions as to how our current Home Rule Charter will help us move firmly into the 21<sup>st</sup> century, I have no reason to believe that any other county in our nation would be allowed to – or would ask to be - as numerically gerrymandered as Proposition #1 would re-install. I ask that the exceptions inherent in RCW 36.32.020 and 36.32.040, which made the above inequities possible for San Juan County, be permanently struck down, along with Prop. #1, so that San Juan County shall function as any other county in the nation, compatible with the spirit and requirements of equal representation.

Jeffrey M Bossler, Orcas Island

## OFFICE RECEPTIONIST, CLERK

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**To:** Stephanie Johnson O'Day  
**Cc:** 'Randy Gaylord'; JeffE@ATG.WA.GOV; KirstinJ@atg.wa.gov  
**Subject:** RE: Scanned Doc From Stephanie Johnson O'Day Atty

Rec'd 7-29-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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From: Stephanie Johnson O'Day [<mailto:sjoday@rockisland.com>]  
Sent: Monday, July 29, 2013 4:13 PM  
To: OFFICE RECEPTIONIST, CLERK  
Cc: 'Randy Gaylord'; [JeffE@ATG.WA.GOV](mailto:JeffE@ATG.WA.GOV); [KirstinJ@atg.wa.gov](mailto:KirstinJ@atg.wa.gov)  
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Brief of Appellants  
Carlson et.al v. San Juan County et al.  
Cause No. 88574-5

Filed by Stephanie Johnson O'Day  
PO Box 2112  
Friday Harbor, WA 98250  
WSB# 17266

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From: [sjoday@rockisland.com](mailto:sjoday@rockisland.com) [<mailto:sjoday@rockisland.com>]  
Sent: Monday, July 29, 2013 3:59 PM  
To: [sjoday@rockisland.com](mailto:sjoday@rockisland.com)  
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Attached is a document for your review.

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