

SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN K. EUGSTER,

Appellant,

v.

STATE OF WASHINGTON;
WASHINGTON COURT OF
APPEALS and DIVISIONS I, II
and III, thereof,

Respondents.

ANSWER TO
STATEMENT OF
GROUNDS FOR
DIRECT REVIEW

I. NATURE OF CASE

This is a challenge to the manner in which the judges of the Washington State Court of Appeals are elected. The court of appeals is organized into three divisions, each serving a geographic region of the state. RCW 2.06.020. For purposes of electing the judges, each division in turn is divided into three districts, each of which consists of one or more counties. *Id.* The voters of each district elect one or more judges to the court. *Id.*

Appellant Stephen Eugster asserts that this method of electing judges is inconsistent with article I, section 19 of the state constitution's provisions relating to "free and equal" elections. Noting that the "population per judge" of the various districts electing court of appeals

judges is not mathematically equal, Eugster asserts (contrary to federal case law and without citing any state case precedent) that article I, section 19 requires that court of appeals judges be elected by constituencies that are mathematically equal in population.

The superior court for Thurston County denied Eugster's motion for partial summary judgment and granted the State's motion for dismissal. Eugster seeks direct review in this Court from the superior court's decision. Reluctantly, and primarily because it would be awkward for the court of appeals to deal with this case directly challenging the basis on which that court is organized, the State supports Eugster's motion for direct review.

II. ISSUE PRESENTED FOR REVIEW

Eugster states the issue presented for review as “[w]hether Wash. Const. art. I, § 9 . . . applies to election of judges to the Washington Court of Appeals.” Appellant's Statement of Grounds for Direct Review at 2. This is a misstatement of the true issue presented in the case. Of course article 1, section 19 “applies” to elections of judges in Washington, including judges of the court of appeals. It is theoretically possible that the Legislature could enact a law respecting the election of these judges that would violate article 1, section 19 and would have to be struck down.

The question is not whether article I, section 19 applies to judicial elections, but could be stated as follows:

Are the current laws providing for the election of judges to the Washington state court of appeals inconsistent with article I, section 19 of the state constitution?

III. DISCUSSION OF GROUNDS FOR DIRECT REVIEW

RAP 4.2 lists six possible grounds for direct review by this Court of a superior court decision. Appellant Eugster argues only one of these, and the other five clearly do not apply.¹ Eugster argues that Rule 4.2(a)(4) applies and that this is a “case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” Statement of Grounds for Direct Review at 3-8.

The State agrees with Eugster that the election of judges is an issue of broad public import, and that this case casts a shadow on one element of the operation of the Washington state court system. The State does not agree that the issues raised are particularly urgent, in that this challenge to

¹ There is no statute authorizing direct review in cases of this type, the trial court has not held a law to be unconstitutional, there are no conflicting or inconsistent decisions in this court or among the divisions of the court of appeals, and the death penalty is not involved in this case. Nor is this an action against a state officer in the nature of quo warranto, prohibition, injunction, or mandamus. *See* RAP 4.2. Originally, Eugster named all the individual judges of the court of appeals as defendants. The judges were subsequently dismissed on the State’s motion. Although appeals court judges are state officers, this action does not involve the powers and duties of the judges, and neither the individual judges nor the court of appeals as an institution could change the manner in which judges are elected.

the constitutionality of state law is a long shot based on the hope that this Court will overturn or ignore settled precedent and apply “one person, one vote” principles to the election of judges. At the federal level, the United States Supreme Court decided decades ago that the equal protection provisions in the United States Constitution do not require judges to be elected on a “one person, one vote” basis. *Wells v. Edwards*, 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973). The Supreme Court has shown no sign of reconsidering this holding. Noting this, Eugster invites this Court to reach a different conclusion by reading article I, section 19 of the state constitution as “more protective” than the equivalent language in the U.S. Constitution. Statement of Grounds for Direct Review at 4. The Court should decline the invitation.

This Court has not applied article 1, section 19, to any facts remotely approaching this case. This provision of the state constitution is used when the right of suffrage is involved, or some group of voters is excluded from participation in an election. The state courts have not often invalidated statutes based on article I, section 19. The rare examples include *City of Seattle v. State*, 103 Wn.2d 663, 694 P.2d 641 (1985) (invalidating statute allowing property owners in an area to block an annexation election); *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841 (1984) (finding it unconstitutional to exclude

certain landowners within an irrigation district from voting); and *Malim v. Benthien*, 114 Wash. 533, 196 P. 7 (1921) (invalidating a statute authorizing a diking district to impose assessments on property outside the district's boundaries). There is no category of voters excluded from participation in the election of judges to the court of appeals. Every Washington voter is entitled to participate in the election of one or more judges to the court. The statutes providing for the election of court of appeals judges do not implicate article I, section 19.

Furthermore, this Court has never applied "one person, one vote" principles to judicial elections, or suggested that they might apply. The leading state case in this area, *Story v. Anderson*, 93 Wn.2d 546, 611 P.2d 764 (1980), involved the election of county commissioners, who are legislative and executive officers, not judicial ones. In invalidating the statute at issue in *Story*, this Court did not mention article I, section 19 of the state constitution.

As important as the issue raised in this case is, it is hardly "urgent" in the sense that granting the relief request by Eugster would require this Court to ignore federal precedent and dramatically shift and broaden its interpretation of the cited section of the state constitution. The courts have not applied "one person, one vote" to judicial elections, and with good reason. Judges are not elected to "represent" the voters in a legislative

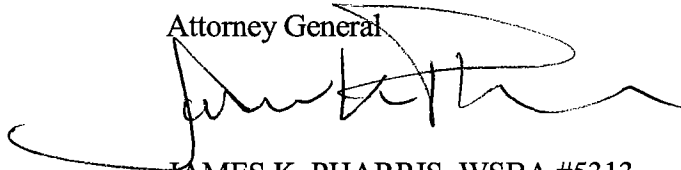
assembly, or to carry out the will of their constituents in administering and enforcing the laws. In conducting their duties, judges are not expected to apply the parochial concerns of the electorate, but to apply the law impartially. The rationale for requiring “equal representation” by voters, based strictly on population, simply does not apply to the election of judges.²

Given that this case is a quixotic attempt to overturn settled law, the State would ordinarily argue that this Court should deny direct review and refer the matter to the court of appeals, except that this case is a challenge to the manner in which the judges of the court of appeals are elected. Although the State does not agree with Eugster’s suggestion that the current court of appeals judges were not properly elected and therefore may not exercise their functions (Statement of Grounds for Direct Review at 7-8), or even that the judges would be required to recuse in this case, it would be awkward for the court of appeals to adjudicate a matter in which the basic organization of the court is at issue, and one side is arguing that the court itself is not properly constituted. In light of that fact, the State supports Eugster’s Motion for Direct Review.


² Eugster can cite only one case in support of his position. In *Blankenship v. Bartlett*, 681 S.E. 2d 759 (N.C. 2009), a closely divided Supreme Court of North Carolina invalidated a state statute creating grossly unequal districts within a single county for the purpose of electing superior court judges. The decision was based on North Carolina’s state equivalent of the federal “equal protection” clause.

RESPECTFULLY SUBMITTED this 12th day of April, 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "James K. Pharris", written over the printed name below.

JAMES K. PHARRIS, WSBA #5313

A handwritten signature in black ink, appearing to read "Anne E. Egeler", written over the printed name below.

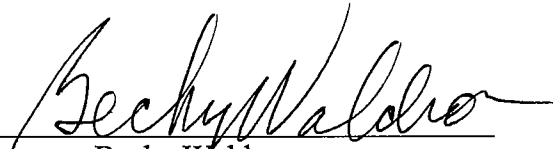
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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Answer to Statement of Grounds for Direct Review to be served on the following via e-mail and First Class United States Mail, postage prepaid:

Stephen Eugster
2418 W. Pacific Avenue
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eugster@steveeugster.com

DATED this 12th day of April, 2010.


Becky Waldron