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EXPEDITE
 No hearing set
 Hearing is set
Date: February 5, 2010
Time: 9:00 AM
Judge/Calendar: Judge Richard D. Hicks,
Motions – Summary Judgment

I certify I served this pleading on the attorneys of record
for defendants by U.S. mail first class postage
prepaid or by email on 12/29/09.

/s/ Stephen K. Eugster

Stephen K. Eugster, pro se, 12/29/09

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

STEPHEN K. EUGSTER,)
)
Plaintiff,)
)
vs.)
)
STATE OF WASHINGTON *et al.*)
)
Defendants.)
)
)

No. 09-2-02873-4

DECLARATION OF STEPHEN
K. EUGSTER IN SUPPORT OF
PLAINTIFF’S MOTION FOR
PARTIAL SUMMARY
JUDGMENT
December 28, 2009

Stephen K. Eugster under penalty of perjury under the law of the state of
Washington declares as follows:

1. He is over the age of 18 and competent to be a witness in these
proceedings.

***Declaration of Stephen K. Eugster in
Support of Motion for Partial
Declaratory Judgment - 1***

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1 2. He makes the declarations below based on his own personal knowledge.

2
3 3. Plaintiff is a citizen, taxpayer, and elector of the United States of
4 America and of the state of Washington, and, as a qualified voter, is entitled to
5 vote for judges of the Washington Court of Appeals, including the judges of the
6
7 Division I, Division II and Division III of the Washington Court of Appeals.

8 4. Plaintiff resides in the City of Spokane, Spokane County, state of
9
10 Washington and has so resided since the fall of 1977. Plaintiff has been a resident
11 of the state of Washington since the fall of 1967, though he came to the state in the
12 fall of 1966.

13
14 5. Defendant State of Washington is the State of Washington.

15 6. Defendant Washington Court of Appeals is the Washington appellate
16
17 court below the Washington Supreme Court created by Wash. Const. art. IV, § 30.

18 7. Defendant Washington Court of Appeals is denominated as having three
19
20 divisions, namely; Division I, Division II, and Division III.

21 8. The divisions are, *de facto*, separate appellate courts of the State of
22
23 Washington.

24 9. Defendants Judge Stephen Brown, Judge Kevin M. Korsmo, Judge
25
26 Teresa C. Kulik, Judge John A. Schultheis, and Judge Dennis J. Sweeney are the

27
28 ***Declaration of Stephen K. Eugster in
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1 judges currently elected as the judges of Division III of the Washington Court of
2 Appeals.
3

4 10. Defendants Judge Susan R. Agid, Judge Marlin J. Appelwick, Judge
5 Mary Kay Becker, Judge Ronald E. Cox, Judge Stephen J. Dwyer, Judge Anne
6 Ellington, Judge C. Kenneth Grosse, Judge Linda Lau, Judge J. Robert Leach, and
7 Judge Ann Schindler, are the judges currently elected as the judges of Division I
8 of the Washington Court of Appeals.
9
10

11 11. Defendants Judge David Armstrong, Judge C. C. Bridgewater, Judge
12 Elaine Houghton, Judge J. Robin Hunt, Judge Joel Penoyar, Judge Christine
13 Quinn-Brintnall and Judge Marywave Van Deren are the judges currently elected
14 as the judges of Division II of the Washington Court of Appeals.
15

16 12. Defendant judges reside within the state of Washington.
17

18 13. The action herein is brought against the individual defendant judges in
19 their official capacities.
20

21 14. This court has jurisdiction under the Washington Declaratory
22 Judgments Act, RCW Ch. 7.24.
23

24 15. Plaintiff seeks such declaratory judgment by the court with respect of
25 the facts, rights and claims and seeks other action or actions of the court to enforce
26
27

28 ***Declaration of Stephen K. Eugster in
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1 such declaratory judgments all pursuant to Washington Declaratory Judgment Act,
2 RCW Ch. 7.24 as may be proper to assure Plaintiff of his rights under and
3
4 pursuant to Wash. Const. art. IV, § 30, Wash. Const. art. I, § 19, and Wash. Const.
5 art. I, § 12, and which are now and have been for many years denied him by
6
7 Defendants and their predecessors in office, as the case may be, who have
8
9 complied with certain provisions of state of Washington statutes which violate
10 Wash. Const. art. IV, § 30, Wash. Const. art. I, § 19, and Wash. Const. art. I, § 12.

11 16. There are controversies between the Plaintiff and the Defendants as to
12 the matters set forth herein, the constitutional correctness of the current
13
14 Washington Court of Appeals system and the current election of judges to the
15 court, and the assertions of change sought herein by Plaintiff.

16 17. Plaintiff has no adequate remedy other than the judicial relief sought
17
18 herein.

19 18. Plaintiff has asked the Washington Attorney General to take action
20
21 regarding the matters asserted herein.

22 19. The Attorney General has declined to take action.

23 20. The venue of this court is appropriate under RCW 4.92.010.

24 21. Plaintiff, as a lawyer admitted to the Bar of the State of Washington,
25
26
27

1 has represented clients before the Washington Court of Appeals before each of the
2 divisions of the court, and in particular, Division III.
3

4 22. Plaintiff, as a litigant in his own right, has advanced numerous public
5 trust, public interest, and taxpayer cases which have been appealed to Division III
6 of Washington Court of Appeals and has argued cases primarily before Division
7 III, but also before Division I and Division II.
8

9 23. The Washington Court of Appeals was created by amendment to the
10 Constitution of the State of Washington. Amendment 50, 1967 Senate Joint
11 Resolution No. 6; see 1969 p 2975. Approved November 5, 1968. Wash. Const.
12 art. IV, § 30.
13
14

15 24. Washington Const. art. I, § 19 provides:

16 SECTION 19 FREEDOM OF ELECTIONS. All
17 Elections shall be free and equal, and no power, civil or
18 military, shall at any time interfere to prevent the free
19 exercise of the right of suffrage.

20 25. Washington Const. art. I, § 19 has been in effect at all times mentioned
21 herein.
22

23 26. Washington Const. art. I, § 12 provides:

24 SECTION 12 SPECIAL PRIVILEGES AND
25 IMMUNITIES PROHIBITED. No law shall be passed
26
27

28 ***Declaration of Stephen K. Eugster in
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Declaratory Judgment - 5***

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1 granting to any citizen, class of citizens, or corporation
2 other than municipal, privileges or immunities which
3 upon the same terms shall not equally belong to all
4 citizens, or corporations.

5 27. Washington Const. art. I, § 12 has been in effect at all times mentioned
6 herein.

7 28. In 1969, the Washington legislature adopted legislation pertaining to
8 the Court of Appeals. 1969 Ex. Sess. ch. 221. These laws, and amendments
9 thereto, were codified in RCW Ch. 2.06.
10

11 29. In the original legislation, specific terms used therein were defined.
12 This continues today. RCW 2.06.010 provides in pertinent part:
13

14 . . .

15 (3) "Court" means court of appeals.

16 (4) "Judge" means judge of the court of appeals.

17 (5) "Division" means a division of the court of appeals.

18 (6) "District" means a geographic subdivision of a division
19 from which judges of the court of appeals are elected.

20 30. The Washington Court of Appeals, by legislation and not by
21 constitutional mandate, is made up of three "divisions" known as Division I,
22 Division II and Division III.
23

24 31. Each division, by legislation and not by constitutional mandate, is
25
26
27

1 divided into three districts.

2
3 32. At the outset of the legislation regarding the Court of Appeals, the
4 judges elected to the divisions were allocated and elected as follows:

5 a. Two judges were elected from each of three districts in Division I.

6
7 b. One judge was elected from each of the three districts in Division
8 II, and,

9 c. One judge was elected from each of three districts in Division III.
10

11 33. Currently, the divisions and districts, and number of judges allocated to
12 districts, of the divisions of the Court of Appeals, are allocated as provided in
13 RCW 2.06.020 (as amended this past spring (1205-S.SL)) as follows:
14

15 The court shall have three divisions, one of which shall
16 be headquartered in Seattle, one of which shall be
17 headquartered in Spokane, and one of which shall be
18 headquartered in Tacoma:

19 (1) The first division shall have twelve judges from
20 three districts, as follows:

21 (a) District 1 shall consist of King county and shall have
22 eight judges;

23 (b) District 2 shall consist of Snohomish county and shall
24 have two judges; and

25 (c) District 3 shall consist of Island, San Juan, Skagit,
26 and Whatcom counties and shall have two judges.

27 (2) The second division shall have eight judges from the
28 following districts:

1 (a) District 1 shall consist of Pierce county and shall
2 have three judges;

3 (b) District 2 shall consist of Clallam, Grays Harbor,
4 Jefferson, Kitsap, Mason, and Thurston counties and shall have
5 three judges;¹

6 (c) District 3 shall consist of Clark, Cowlitz, Lewis, Pacific,
7 Skamania, and Wahkiakum counties and shall have two judges.

8 (3) The third division shall have five judges from the
9 following districts:

10 (a) District 1 shall consist of Ferry, Lincoln, Okanogan,
11 Pend Oreille, Spokane, and Stevens counties and shall have
12 two judges;

13 (b) District 2 shall consist of Adams, Asotin, Benton,
14 Columbia, Franklin, Garfield, Grant, Walla Walla, and
15 Whitman counties and shall have one judge;

16 (c) District 3 shall consist of Chelan, Douglas, Kittitas,
17 Klickitat, and Yakima counties and shall have two judges.

18 34. Each division has its own headquarters, filing system, court clerk, court
19 staff, court room, chief judge, and its own local court rules – its “General Orders.”

20 35. Cases are not appealed to the Court of Appeals in general.

21 36. Cases are appealed to the division of the Court of Appeals which
22 geographically includes the county in which the case to be appealed originated.

23 ¹ Note the amendment in 2009 for this district of Division 2 added a
24 judge to the district. The addition was only to become effective if the position
25 was funded. See Section 2 of (1205-S.SL)) Substitute House Bill 1205, 2009
26 Reg. Session., Chapter 77, Laws of 2009.

1 For example, cases appealed from the Spokane County Superior Court are
2 appealed to Division III of the Court of Appeals. Rules of Appellate Procedure,
3
4 RAP 4.1.

5 37. The legislature directed and caused each division to do its work as a
6
7 division court using panels of three judges selected from the judges elected to the
8
9 division from the districts of the division. The legislative direction is found in
10
11 RCW 2.06.040 which provides that “[t]he court shall sit in panels of three judges
12
13 and decisions shall be rendered by not less than a majority of the panel.”

14 38. Under RCW Ch. 2.06 there are no rules as to how selections of judges
15
16 to the case panels are to be made.

17 39. The Court of Appeals Administrative Rules (CAR) includes a rule,
18
19 however, which provides that the Chief Judge of each division is to make a fair
20
21 apportionment of the cases. CAR Rule 7 says “[t]he Chief Judge shall apportion
22
23 cases fairly among all judges of the division.”

24 40. There are no rules as to how CAR Rule 7 is to be implemented.

25 41. Each division has its own informal methods, or processes, for panel
26
27 selection:

28 ***Declaration of Stephen K. Eugster in
Support of Motion for Partial
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1 a. In Division I it is done this way:

2
3 1. All cases are assigned randomly, and in equal
4 numbers, to the 10 judges of our court. This statement
5 covers oral argument cases and non oral argument cases
6 set for decision on oral argument days. This process
7 produces 700 opinions per year.

8 2. In addition, each month 3 judges are assigned as a
9 "duty panel." One of the responsibilities of the judges so
10 assigned is to resolve simple cases (concession of error,
11 etc.) that need not be placed on a calendar. This process
12 produces 80 to 100 opinions per year.

13 Letter to Plaintiff from then Chief Judge Stephen J. Dwyer dated November
14 25, 2008.

15 b. In Division II it is done this way:

16 Appointments of pro tem judges are done on an "as
17 needed" basis and no apportionment is involved. We have
18 appointed pro tems to about three to four cases during the
19 last two years. With respect to the elected judges in this
20 division, cases are apportioned equally based on case
21 complexity. The judges rate cases based on complexity
22 during the screening process on new appeals. The
23 ACORDS system produces a report showing cases that
24 are ready for setting according to when all briefs are filed.
25 Using this report, I prepare a preliminary calendar that
26 randomly assigns an equal number of cases of equivalent
27 complexity to each judge sitting during a calendar period
28 or cycle. I submit the proposed calendar to the Chief
Judge for approval. Thereafter, changes are made only to

27 ***Declaration of Stephen K. Eugster in***
28 ***Support of Motion for Partial***
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1 accommodate conflicts or sudden illness or unavailability.

2 Letter to Plaintiff from David C. Ponzoha, Court Clerk, at the direction of
3
4 Chief Judge Marywave Van Deren, dated December 4, 2008.

5 c. In Division III it is done this way:

6
7 As Chief Judge of the Court of Appeals, the case
8 docketing process is done under my supervision. As
9 previously stated, the Judges of this Court consider many
10 factors when setting pending cases for hearing. Given
11 those factors as outlined in our letter to you of November
12 24, 2008, the cases are randomly set for hearing before
13 panels of three Judges. The cases are reviewed and the
14 three-Judge panel then conferences about the applicable
15 law and how the case should be decided. One Judge is
16 assigned to write the first draft of the opinion, which is
17 then circulated to the other panel members for review.
18 The other panel Judges are then free to make suggestions
19 or changes or in some cases, a Judge may choose to write
20 a dissenting opinion.

21 Letter to Plaintiff from then Chief Judge John A. Schultheis dated December
22 11, 2008.

23 42. The panel selection process in each division, is essentially *ad hoc*.

24 However, certain aspects of the processes are apparent and common:

- 25 a. The processes are designed to cause a sharing of the work;
26
27 b. The processes have nothing to do with the fact that judges are to be

28 ***Declaration of Stephen K. Eugster in
Support of Motion for Partial
Declaratory Judgment - 11***

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1 elected;

2
3 c. The processes do not address nor consider concerns for electoral
4 apportionment; and,

5 d. The processes have nothing to do with the fact that judges are to
6
7 exercise their power in contexts which allow for voter connection with the work in
8 which the judges engage.

9
10 43. The division of the Court of Appeals to which a case is appealed from a
11 trial court is, for the most part, the court of last resort of the state of Washington for
12 the vast number of cases appealed to the division of the Court of Appeals, to the
13 Court of Appeals.
14

15 44. A decision by a panel of a division of the Court of Appeals is a final
16 decision.
17

18 45. There is no appeal of the decision of a division panel (a) to a larger
19 grouping of judges of a the division or (b) to a grouping of judges of the Court of
20 Appeals beyond the division, to the judges of the Court of Appeals as a new panel
21 or as a whole.
22

23 46. That is to say, the division to which the case must of necessity have been
24
25
26

1 appealed to, and the division panel itself, not the division as a whole, and not the
2 Court of Appeals itself, is the court of last resort of the state of Washington for all
3 cases appealed except a minor few.
4

5 47. A party to a case decided by a division of the Court of Appeals may
6 petition for review of the case by the Washington State Supreme Court. RAP 13.1.
7 This is known as “discretionary review.” *Id.*
8

9 48. Petitions for review are not often granted by the Washington Supreme
10 Court.
11

12 49. Washington is a “common law” state.
13

14 50. That is to say, the laws governing the people include case law developed
15 by the courts as common law – law common to all, precedential law. Washington
16 law, RCW 4.04.010, provides:

17 The common law, so far as it is not inconsistent with the
18 Constitution and laws of the United States, or of the state
19 of Washington nor incompatible with the institutions and
20 condition of society in this state, shall be the rule of
21 decision in all the courts of this state.

22 51. The Washington legislature has delegated authority to the panels of the
23 divisions of the Court of Appeals to limit the evolution of the common law.
24

25 52. The legislature provided in RCW 2.06.040 that “[i]n the determination
26

27 ***Declaration of Stephen K. Eugster in***
28 ***Support of Motion for Partial***
Declaratory Judgment - 13

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1 of causes all decisions of the court shall be given in writing and the grounds of the
2 decisions shall be stated” and that “[a]ll decisions of the court having precedential
3 value shall be published as opinions of the court. Each panel shall determine
4 whether a decision of the court has sufficient precedential value to be published as
5 an opinion of the court. Decisions determined not to have precedential value shall
6 not be published.”
7

8
9
10 53. The General Rules for Washington courts (GR) – the rules applicable
11 to all courts -- provide that “[a] party may not cite as an authority an unpublished
12 opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are
13 those opinions not published in the Washington Appellate Reports.” GR 14.1(a).
14

15 54. In fact, if an unpublished opinion is used, the person who uses it may be
16 admonished and/or sanctioned by the court. *See, e.g., Dwyer v. J.I. Kislak*
17 *Mortgage Corp.*, 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000), *review denied*,
18 143 Wn.2d 1024 (2001); *Brooks Trust A V. Pacific Media*, 111 Wn. App. 393
19 (2002).
20
21

22 55. The state of Washington has a current population of about 6,558,800.
23 (Note, statistical information used in this paragraph and below comes from or is
24

1 generated from information provided by the Washington State Office of Financial
2 Management.)
3

4 56. The divisions are not apportioned according to population.

5 57. Rather, they were created using geographic criteria. RCW 2.06.020.
6

7 58. Likewise, the districts of a division are not apportioned according to
8 population; they too were created using geographic criteria. RCW 2.06.020.
9

10 59. The apportionment, if any, applies to the number of judges elected by
11 the population of a district of a division.

12 60. With respect of the following paragraphs I have performed some
13 calculations based upon information from the Washington Office of Financial
14 Management. I believe the calculations to be correct but there may be
15 miscalculations.
16
17

18 61. Approximately circa 2009, Division I, with 12 judges, has a population
19 of 2,984,700 -- 248,725 per judge; Division II, with 6 judges, has a population
20 2,157,200 -- 308,171 per judge; and, Division III, with 5 judges, has a population
21 of 1,445,700 -- 289,140 per judge.
22

23 62. There is considerable variation of judicial election apportionment of the
24
25
26

27 ***Declaration of Stephen K. Eugster in***
28 ***Support of Motion for Partial***
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1 districts within the divisions:

2 a. Division I has a per judge apportionment in its three districts as

3 follows:

4 i. District 1– 235,525 per judge,

5 ii. District 2 -- 348,300 per judge, and

6 iii. District 3 -- 201,950 per judge.

7 b. Division II has a per judge apportionment in its three districts as

8 follows:

9 i. District 1 – 268,467 per judge,

10 ii. District 2 -- 358,650 per judge,² and

11 iii. District 3 -- 270,733 per judge.

12 c. Division III has a per judge apportionment in its three districts as

13 follows:

14 i. District 1 – 286,850 per judge,

15 ² Note, however, with the funding of a third judge for District 2 of
16 Division II there would be a population per judge change. The position has yet
17 to be funded by the legislature.

1 ii. District 2 -- 467,500 per judge, and

2
3 iii. District 3 – 202,250 per judge.

4 63. The right to vote in Washington is subject to fair apportionment and
5 “[w]hether the right to vote is in fact so apportioned is subject to strict judicial
6 scrutiny.” *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 410, 687 P.2d
7 841 (1984).

8
9 64. The Washington Supreme Court has adopted an approach by which
10 apportionment is analyzed and judged. In *Story v. Anderson*, 93 Wn.2d 546, 553 -
11 54, 611 P.2d 764 (1980) the court considered the Island County district scheme for
12 the election of county commissioners. The court said:
13

14 In applying the one person, one vote analysis, the degree
15 of inequality of voter representation is measured by the
16 ratio of the largest district to the smallest and by the
17 combined percentage deviation from the average. *See,*
18 *e.g., Mahan v. Howell*, 410 U.S. 315, 35 L.Ed.2d 320, 93
19 S.Ct. 979 (1973).¹

20 In the footnote in the quoted material the *Story Court* pointed out exactly
21 how the measurement process worked.

22
23 (fn1) The ratio figure is obtained by simply comparing
24 the population of the largest district with that of the
25 smallest. The percentage deviation figure is obtained by

ascertaining first, the average size of the districts. The percentage by which the largest district is overpopulated and the percentage by which the smallest district is under the average are computed. These two figures are added together to yield the total deviation figure.

65. Here are some analyses of the ratios and percentage deviations wherein Plaintiff has attempted to apply the approach to population per representative methodology used in *Mahan v. Howell* again using information generated from statistics provided by the Washington State Office of Financial Management.

a. Statewide – using 2008 projected statistics.

Apportionment Statewide Statistics 2008			
2008	High District	Low District	State Average Per District
	487,500	201,950	273,283
Ratio	$487,500 / 201,950 = 2.41 \text{ to } 1$		
Percentage	$487,500 - 273,283 = 214,217$		
Deviation	$214,217 / 487,500 = .78$		
Calculation	$273,283 - 201,950 = 71,333$		
	$71,333 / 201,950 = .26$		
Percentage Deviation	$.78 + .26 = 1.04 \text{ or } 104\%$		

b. Statewide – using 2000 statistics.

Declaration of Stephen K. Eugster in Support of Motion for Partial Declaratory Judgment - 18

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Apportionment – Statewide Statistics 2000

2000	High District	Low District	State Average Per District
	405,880	177,720	245,283
Ratio	$405,880 / 177,720 = 2.28 \text{ to } 1$		
Percentage	$405,880 - 245,283 = 160,587$		
Deviation	$160,587 / 245,283 = .65$		
Calculation	$245,283 - 177,720 = 67,563$		
	$67,563 / 245,283 = .27$		
Percentage Deviation	$.65 + .27 = .92 \text{ or } 92\%$		

c. Division I – using 2008 statistics.

Apportionment Division I Statistics 2008

2008	High District	Low District	State Average Per District in Division I
	348,300	201,950	248,725
Ratio	$348,300 / 201,950 = 1.72 \text{ to } 1$		
Percentage	$348,300 - 248,725 = 146,598$		
Deviation	$146,598 / 248,725 = .59$		
Calculation	$248,725 - 201,950 = 46,775$		
	$46,775 / 201,950 = .23$		

Declaration of Stephen K. Eugster in Support of Motion for Partial Declaratory Judgment - 19

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Percentage Deviation	$.59 + .23 = .82$ or 82%
----------------------	--------------------------

d. Division III – using 2008 statistics.

Apportionment Division III Statistics 2008			
2008	High District	Low District	State Average Per District in Division III
	467,500	202,250	289,140
Ratio	$467,500 / 202,250 = 2.12$ to 1		
Percentage	$467,500 - 289,149 = 178,360$		
Deviation	$178,360 / 289,140 = .62$		
Calculation	$289,140 - 202,250 = 86,890$		
Percentage Deviation	$.62 + .43 = 1.05$ or 105%		

Signed at Spokane, Washington on December 28, 2009.

/s/ Stephen K. Eugster

Stephen K. Eugster

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Declaration of Stephen K. Eugster in Support of Motion for Partial Declaratory Judgment - 20

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