

1
2 EXPEDITE
3 No hearing set
4 Hearing is set
5 Date: February 5, 2010
6 Time: 9:00 AM
7 Judge/Calendar: Judge Richard D. Hicks,
8 Motions – Summary Judgment

I certify I served this pleading on the attorneys of record for defendants by U.S. mail first class postage prepaid and by email at the email addresses of the attorneys on 1/29/10.

/s/ Stephen K. Eugster

Stephen K. Eugster, pro se, 1/29/10

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

11 STEPHEN K. EUGSTER,)
12)
13 Plaintiff,)
14 vs.)
15 STATE OF WASHINGTON *et al.*,)
16)
17 Defendants.)

No. 09-2-02873-4

REPLY OF PLAINTIFF -
MOTION FOR PARTIAL
SUMMARY JUDGMENT

18
19 **I. ISSUE**

20 The parties agree that the single issue before the court at this time is
21 whether Wash. Const. art. I, § 19¹ applies to the election of judges to the
22 Washington Court of Appeals.
23

24 The parties are in agreement that there is only one Washington Court of

25

¹ “All Elections shall be free and equal, and no power, civil or military, shall at any time
26 interfere to prevent the free exercise of the right of suffrage.”

1 Appeals.

2
3 **II. ARGUMENT**

4 **A. The Case Is One of First Impression.**

5 This case is one of first impression. It is of no consequence that the issue
6 has not been decided yet.

7 A case of first impression in Washington is one which has not been decided
8 before. Such a case is one where there is no precedential authority to be found or
9 which can be cited. Such cases are, even more so, cases of first impression if there
10 is no, or scant authority, on the point from other jurisdictions. *E.g., State v.*
11 *Warren*, 165 Wn.2d 17, 33, 36 fn 8. 195 P.3d 940 (2008); *Salas v. Hi-tech*
12 *Erectors*, 143 Wn. App. 373, 378, 177 P.3d 769 (2008); and *State v. Grenning*,
13 142 Wn. App. 518, 531, 174 P.3d 706 (2008).

14
15 There is no authority in any jurisdiction concerning the application or non-
16 application of Wash. Const. art. I, § 19 to the election of judges to the Washington
17 Court of Appeals. There are no scholarly discussions of the issue in any law
18 journals. The only article written about the issue is the article written by plaintiff.
19 Stephen K. Eugster, *The Washington Court of Appeals: Fair and Equal Election*
20 *Rights Violated, An Opportunity for Judicial Improvement* (revised January 19,
21 2009).²

22 **B. The Constitution Says One Person One Vote Applies to the Election of**
23 **Judges to the Court of Appeals.**

24 Defendants would have the court interpret and construe Wash. Const. Art. I,
25

26 ² The article and the appendices to the article may found at [www.steveeugster.com-](http://www.steveeugster.com-washington_court_of_appeals.htm)
27 [/washington_court_of_appeals.htm](http://www.steveeugster.com-washington_court_of_appeals.htm).

1 § 19. Defendants would have the court say the meaning of the words used in the
2 section are ambiguous and therefore need construction.
3

4 They would have the court say that the term “election” as used in Art. I, §
5 19 means only the election of representatives who legislate or engage in executive
6 functions for government.
7

8 They would have the court say that the term “suffrage” as used in Art. I, §
9 19 means voting as to representatives who legislate or engage in executive
10 functions.
11

12 Wash. Const. Art. I, § 19 says this:

13
14 All Elections shall be free and equal, and no power, civil
15 or military, shall at any time interfere to prevent the free
16 exercise of the right of suffrage.

17 The first rule of constitutional construction is the rule that “[i]f a
18 constitutional provision is plain and unambiguous on its face, then no construction
19 or interpretation is necessary or permissible.” *Open Door Baptist Church v. Clark*
20 *County*, 140 Wn.2d 143, 875, 955 P.2d 33 (2000); *CLEAN v. State*, 130 Wn.2d
21 782, 826, 928 P.2d 1054 (1996); *Anderson v. Chapman*, 86 Wn.2d 189, 191, 543
22 P.2d 229 (1975).
23
24

25 The words used in the constitution must be afforded their common and
26 ordinary meaning. *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d
27

1 943 (1969). The “common and ordinary meaning” by which the constitutions must
2 be understood is a meaning they would have had to the vast majority of ordinary
3 voters who ratified the constitution in 1889. Robert F. Utter, *Freedom and*
4 *Diversity in a Federal System: Perspectives on State Constitutions and the*
5 *Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 510 (1984).
6
7

8 Where statutory language is "plain, free from ambiguity and devoid of
9 uncertainty, there is no room for construction because the legislative intention
10 derives solely from the language of the statute." *Bravo v. Dolsen Cos.*, 125 Wn.2d
11 745, 752, 888 P.2d 147 (1995) (quoting *Krystad v. Lau*, 65 Wn.2d 827, 844, 400
12 P.2d 72 (1965)).
13
14

15 In undertaking this plain language analysis, the court is to remain careful to
16 avoid “unlikely, absurd or strained” results. *Burton v. Lehman*, 153 Wn.2d 416,
17 423, 103 P.3d 1230 (2005) (quoting *State v. Stannard*, 109 Wn.2d 29, 36,
18 742 P.2d 1244 (1987)).
19
20

21 "Only where the legislative intent is not clear from the words of a statute
22 may the court `resort to extrinsic aids" *Berrocal v. Fernandez*, 155 Wn.2d
23 585, 590, 121 P.3d 82 (2005) quoting *Burton*, 153 Wn.2d at 423 (quoting *Biggs v.*
24 *Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992)).
25

26 Webster's Revised Unabridged Dictionary (1913 + 1828) defines the terms
27
28

1 “election” and “suffrage” as follows:

2 Election

- 3 1. The act of choosing; choice; selection.
- 4 2. The act of choosing a person to fill an office, or to
- 5 membership in a society, as by ballot, uplifted hands, or
- 6 viva voce; as, the election of a president or a mayor.

7 Suffrage:

- 8 1. A vote given in deciding a controverted question, or in
- 9 the choice of a man for an office or trust; the formal
- 10 expression of an opinion; assent; vote.

11 I ask your voices and your suffrages. Shak.

12

13 The common and ordinary meaning of “election” is this -- “an act or process

14 of electing,” “the fact of being elected” and “the right, power, or privilege of

15 making a choice.” MERRIAM-WEBSTER'S ONLINE DICTIONARY (11th ed., 2010).

16

17 In the American Heritage Dictionary election is defined as “[t]he act or

18 power of electing,” “[t]he fact of being elected,” and “[t]he right or ability to

19 make a choice.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE

20 (Online ed., 2010).

21

22 So, “elections” means acts of electing, acts of making a choice, of electing.

23

24 There is no exception to the act of electing which is built into this common term.

25

26 The term simply does not include any sort of qualifier as to the basic concept.

27

28 There is nothing in the common definition which says elections are limited to

Stephen K. Eugster
2418 W. Pacific Ave.
Spokane, WA 99201
(509) 990-9115 / Fax (866) 565-2341
eugster@steveeugster.com

1 certain kinds of elections and not others.

2 The same is true of the word “suffrage.” Suffrage has a commonly
3 understood and uncomplicated meaning. It means “a vote given in deciding a
4 controverted question or electing a person for an office or trust.” It means “the
5 right of voting.” It means “the exercise of such right.” MERRIAM-WEBSTER'S
6 ONLINE DICTIONARY (11th ed., 2010). It means “[t]he right or privilege of voting;
7 franchise,” it means “[t]he exercise of such a right.” Suffrage is “[a] vote cast in
8 deciding a disputed question or in electing a person to office.” AMERICAN
9 HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Online ed., 2010).

10 The court cannot delve into any sort of additional meanings of the term.
11 The court cannot, must not, speculate that there is some sort of exception to the
12 general and commonly understood term, suffrage.

13 The construction of Wash. Const. Art. I, § 19 is clear. Every election, every
14 act of suffrage, has to be “fair and equal.” There is no possibility it to be said that
15 here is ambiguity – there is no reason for construction. There is no possibility for
16 the court to say that the term “elections” or the term “suffrage” is limited to
17 certain kinds of election or suffrage.

18 **C. Why the Judges are Parties to this Case.**

1 The judges of the Court of Appeals have to be parties to this case. The
2 decision the court makes may involve the offices of the judges currently serving
3 on the court. The judges have a right to be involved and, of necessity, must be
4 involved. This is a declaratory judgment action. The court has authority to grant
5 further relief as necessary regarding the declaratory decision made. RCW
6 7.24.080.
7

8
9 CR 19(a) requires that a “person who is subject to service of process and
10 whose joinder will not deprive the court of jurisdiction . . . [must] be joined as a
11 party in the action if (1) in his absence complete relief cannot be accorded among
12 those already parties, or (2) he claims an interest relating to the subject of the
13 action and is so situated that the disposition of the action in his absence may (A)
14 as a practical matter impair or impede his ability to protect that interest or (B)
15 leave any of the persons already parties subject to a substantial risk of incurring
16 double, multiple, or otherwise inconsistent obligations by reason of his claimed
17 interest.”
18
19
20
21

22 CR 19(a) goes on to say that if such a person is not so joined “the court shall
23 order that he be made a party.”
24

25 Under the circumstances the judges must remain parties to the case. If they
26 refuse to be plaintiffs, “[they] may be made [defendants], or, in a proper case, . . .
27
28

1 involuntary [plaintiffs].” *Id.*

2
3 **III. CONCLUSION**

4 Wash. Const. art. I, § 19 provides that elections are to be fair and equal.
5 The Washington Supreme Court has held that fair and equal means that elections
6 are subject to fair apportionment rules of one person one vote. Washington Court
7 of Appeals judges are elected. Elections of Washington Court of Appeals judges
8 are subject to Art. I, § 19. The principles of one person one vote apply to the
9 election and election apportionment of judges of the Court of Appeals.
10
11

12 January 29, 2010.

13
14 Respectfully submitted,

15 /s/ Stephen K. Eugster

16 _____
17 Stephen K. Eugster, Pro Se