



1 The Respondent Secretary of State is our State's chief elections officer. He submits this  
2 short trial brief to make four basic points about the upcoming trial. Those points concern:

- 3 (1) the upcoming trial's context as an integral part of our State's overall election  
process;
- 4 (2) the interest that the Secretary of State will be advocating as a Respondent in that  
trial;
- 5 (3) the Secretary of State's position with respect to the fundamental legal framework  
6 governing that trial; and
- 7 (4) the Secretary of State's position with respect to resolving the factual issues in  
that trial.

8 **1. Putting The Upcoming Trial In Context:**  
9 **the six stages of this matter's post-election process.**

10 The post-election process for our State's 2004 gubernatorial election has gone through  
11 the six stages provided for by Washington law.

12 *First*, Washington law required our State's 39 counties to conduct an original count of  
13 the votes cast for the office of governor.<sup>1</sup> That original count produced a 261-vote victory for  
14 candidate Dino Rossi.

15 *Second*, Washington law required those 39 counties to conduct a machine recount  
16 because of the relatively small size of that victory margin.<sup>2</sup> That automatic recount produced a  
17 42-vote victory for candidate Dino Rossi.

18 *Third*, Washington law granted candidate Christine Gregoire's political party the right to  
19 demand a hand recount by those 39 counties.<sup>3</sup> The State Democratic party exercised that right.  
20 The resulting hand recount produced a 129-vote victory for candidate Gregoire (if this Court  
21 allows the hand recount result to stand). That 129-vote margin was out of a total of 2,812,676  
22 votes cast for the office of governor in the November 2004 election.

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24 <sup>1</sup> Chapter 29A.60 RCW. For example, RCW 29A.60.190 requires the canvassing board of each county to certify  
25 election results for that county, and RCW 29A.60.200 charges the county canvassing boards with the duty to  
"verify the results from the precincts and the absentee ballots."

26 <sup>2</sup> Chapter 29A.64 RCW and the previously noted Chapter 29A.60 RCW.

<sup>3</sup> Chapter 29A.64 RCW and the previously noted Chapter 29A.60 RCW.

1 *Fourth*, Washington law required those 39 counties to transmit their hand recount  
2 results to the Secretary of State, who was then required by our State Constitution to “deliver the  
3 same to the speaker of the house of representatives at the first meeting of the house thereafter”.<sup>4</sup>

4 *Fifth*, Washington law required the speaker of the house to open, publish, and declare  
5 those results in the presence of a majority of the members of both houses, and provided for the  
6 governor’s certificate of election being issued by the presiding officers of both houses (the  
7 Speaker of the House and President of the Senate).<sup>5</sup>

8 *Sixth*, Washington law granted every voter in our State the right to file an election  
9 contest challenging the validity of the hand recount result upon which that certificate of election  
10 was based.<sup>6</sup>

11 The Petitioners exercised that right, alleging that the number of votes lawfully cast for  
12 the office of governor was actually less than the previously noted 2,812,676 total, and that  
13 removing the unlawful votes within that 2,812,676 total results in candidate Rossi receiving the  
14 highest number of lawful votes. Resolving that claim will determine if the hand recount  
15 lawfully changed the election result from Rossi to Gregoire. It will also determine the total  
16 number of lawful votes cast for the office of governor in the 2004 general election – which is  
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19 <sup>4</sup> *Chapter 29A.64 RCW and the previously noted Chapter 29A.60 RCW. For example, RCW 29A.64.061*  
20 *requires county canvassing boards to certify an amended abstract showing the votes cast in each precinct for*  
21 *which the recount was conducted, and transmit a copy of those amended abstracts to the Secretary of State.*  
22 *Washington Constitution, Article III, §4 further mandates that: “The returns of every election for the officers*  
23 *named in the first section of this article [e.g., governor] shall be sealed up and transmitted to the seat of*  
24 *government by the returning officers, directed to the secretary of state, who shall deliver the same to the speaker of*  
25 *the house of representatives at the first meeting of the house thereafter, who shall open, publish and declare the*  
26 *result thereof in the presence of a majority of the members of both houses. The person having the highest number of*  
*votes shall be declared duly elected, and a certificate thereof shall be given to such person, signed by the presiding*  
*officers of both houses;....”*)

<sup>5</sup> *Washington Constitution, Article III, §4.*

<sup>6</sup> *Chapter 29A.68 RCW (the election contest statute). This last stage of the post-election process cannot*  
*commence until the Speaker of the House and President of the Senate have signed the certificate of election*  
*declaring a candidate elected. RCW 29A.68.020 (premised on a candidate being “declared elected” in order for a*  
*contest action to commence).*

1 important because that vote total will set the number of signatures needed for initiative and  
2 referendum petitions in our State for the upcoming 3 ½ years.<sup>7</sup>

3 It is important to remember that even though the upcoming trial is the last step in our  
4 State’s post-election process, it is not the least important step. To the contrary, the Petitioners’  
5 statutory right to file and pursue this contest action is an integral part of the post-election  
6 process provided by Washington law.

7 It is also important to remember that the statutory right being pursued in the upcoming  
8 trail is significant to more than just this isolated governor’s election. That statutory right is (and  
9 will in the future continue to be) significant to all elections across our State –from irrigation  
10 district commissioner to city mayor, from local fire district commissioner to school district  
11 commissioner, and all the other elected offices in between. The Respondent Secretary of State  
12 therefore respectfully requests that this Court keep the fuller context of Petitioners’ suit in mind  
13 as it formulates and issues its legal conclusions, evidentiary rulings, and factual findings in the  
14 course of the upcoming trial.

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23 <sup>7</sup> For initiative petitions, “the number of valid signatures of legal voters required shall be equal to eight  
24 percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of  
25 the text of the initiative measure with the secretary of state.” Washington Constitution, Article II, §1(a). For  
26 referendum petitions, “The number of valid signatures of registered voters required on a petition for referendum  
of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the  
office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with  
the secretary of state.” Washington Constitution, Article II, §1(b).

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2 **2. The Secretary State’s Interest At Trial As Our State’s Chief Elections Officer:**  
3 **advocate for the proper application of our State’s election contest statute**  
4 **- not for the “victory” of either gubernatorial candidate.**

5 In the narrow sense, this suit is a fight between the Republican-led Petitioners and the  
6 Democrat Intervenors over whose candidate was duly elected Governor last November.  
7 Although the Secretary of State is being sued a “Respondent” in this case, he is not advocating  
8 for one candidate or the other to win that fight.

9 The election contest statute being construed and applied in this case, however, extends to  
10 *all* elections in our State – statewide and local. And close elections, especially at the local level,  
11 are not an uncommon occurrence.

12 Thus, in the broader sense, the statutory interpretations, evidentiary rulings, and type of  
13 factual record that this trial produces – especially after this case’s inevitable review by our State  
14 Supreme Court – will resolve much more than just the 2004 governor’s race. It will as a  
15 practical matter determine the sixth step of the post-election process applied throughout all  
16 corners of our State for decades to come.

17 That is why, as our State’s chief elections officer, the Respondent Secretary of State has  
18 taken an active role in this case to advocate for a rational and workable interpretation of our  
19 State’s election contest statute, and advocate for a full and impartial trial of the evidence and  
20 facts legally relevant under that statute. The Respondent Secretary of State anticipates  
21 continuing that advocacy at trial.  
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2 **3. The Respondent Secretary Of State’s Position On The Law:  
the fundamental legal framework governing the upcoming trial.**

3 As the Secretary of State’s prior briefs have explained – and as this Court’s rulings to  
4 date have confirmed – our State’s election contest statute establishes a very straightforward  
5 legal framework for the upcoming trial.

6 That prior briefing – and this Court’s prior rulings – are not repeated here. But in short,  
7 they establish three fundamental legal principles to govern the upcoming trial:

- 8 1. Our election contest statute gives every voter the right to file an  
9 election contest suit – but our election contest statute does not negate  
10 the presumption that, until proven otherwise, the last count was the  
11 correct count for the determination of the election’s winner.
- 12 2. Rebutting that presumption requires the Petitioners to present clear and  
13 convincing evidence that it appears illegal votes and/or election  
14 official misconduct changed the outcome of the 2004 governor’s  
15 election.
- 16 3. That evidence can be direct or circumstantial. For example, it could be  
17 the testimony of 100 illegal felon voters identifying the candidates for  
18 whom each one of them voted (direct evidence), or expert testimony  
19 opining on the candidates for whom that block of 100 felon voters  
20 voted (circumstantial evidence). In both cases, such evidence is to be  
21 weighed and considered at trial as long as it satisfies generally  
22 applicable evidence rules such are ER 702 and *Frye*.<sup>8</sup>

23 Secondary legal issues will inevitably arise in the course of trial concerning discrete  
24 topics such as, for example, the consideration of provisional ballots or sufficiency of certain  
25 types of evidence. And in such instances, the Respondent Secretary of State will inform the  
26 Court of his position concerning those issues if their resolution may impact the proper or  
workable interpretation of our State’s election contest statute, or adversely affect the trial’s full  
consideration of facts legally relevant under that statute.

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<sup>8</sup> See, e.g., *State v. Woo*, 84 Wn.2d 472, 527 P.2d 271 (1974) (adopting the test established in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), to determine the admissibility of expert evidence); *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996) (holding that admissibility of expert evidence in Washington requires first that the evidence satisfy the “general acceptance” requirement under *Frye*, and second that the witness be an expert with information helpful to the trier of fact under ER 702); In re *Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003) (applying the *Frye* standard).

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2 **4. The Respondent Secretary Of State's Position On the Facts:  
3 identify the illegal/improper votes & for whom they were cast.**

4 This Court's pretrial Order<sup>9</sup> mandated the following with respect to the votes any party  
5 wishes to contest in the upcoming May 23 trial:

6 **2. Cutoff Date To Identify The Votes Being Contested.**

7 Each party shall submit a final list identifying every vote which that party  
8 claims was an illegal vote under RCW 29A.68.020(5), every lawful vote  
9 which that party claims was not counted due to conduct (election official  
10 error, etc.) under RCW 29A.68.020(1) and/or .011, and every unlawful  
11 vote which that party claims was counted due to conduct (election official  
12 error, etc.) under RCW 29A.68.020(1) and/or .011. That list shall include  
13 the following information for each vote which that party claims was illegal,  
14 was improperly counted, or was improperly not counted:

- 15 (i) To the extent known, the name, address, voter registration  
16 number, and date of birth of the person casting the vote;  
17 (ii) The County and precinct in which the vote was cast;  
18 (iii) The reason that party claims the vote was illegal, was  
19 improperly counted, or was improperly not counted (e.g., felon  
20 voter or unverified provisional ballot);  
21 (iv) The candidate for whom that party claims the vote was  
22 apparently cast; and  
23 (v) The type of evidence that party intends to use to show for  
24 whom the vote was apparently cast (e.g., proportionality  
25 analysis, voter testimony, etc.).

26 The Petitioners shall serve their final list on all counsel of record by  
April 15.

The Democrat intervenors shall submit their final list on all counsel of  
record by May 6.

<sup>9</sup> Order Regarding Pretrial Schedule, which confirmed this Court's rulings at the April 5 status conference, and was signed on April 15, 2005.

1 That pretrial Order established the foundation for a two-step factual inquiry at the  
2 May 23 trial, consisting of:

- 3 1. specifically identifying each illegal, improperly counted, and  
improperly not counted vote [subparts (i)-(iii) above], and then
- 4 2. establishing for whom those votes were cast [subparts (iv)-(v)].

5 The Respondent Secretary of State is not planning to belabor this trial by supplementing the  
6 Petitioners' and Democrats' voluminous submissions with separately presented fact evidence  
7 concerning the illegal/improper votes or the candidates for whom those votes were cast.

8 The Secretary of State does, however, plan to submit a dozen or so exhibits to confirm  
9 for the court record his role in the six step post-election process outlined in Section 1 of this  
10 brief.

11 And pursuant to his consistently reiterated position that this suit should be resolved upon  
12 a full consideration of the facts legally relevant under our election contest statute, the  
13 Respondent Secretary of State will also cross-examine the other parties' witnesses, and include  
14 cross-designations of deposition testimony and exhibits, when the Secretary of State concludes  
15 such cross-examination and cross-designation is needed for that full presentation of relevant  
16 facts and proper application of our State's election contest statute.

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2 **5. Closing.**

3 An election contest suit under our State’s election contest statute is the sixth (and final)  
4 possible step in our State’s post-election process.

5 Overturning the result established by the prior steps is not supposed to be easy.

6 But it is supposed to be possible. And the trial of this particular contest suit will, as a  
7 practical matter, establish the legal, evidentiary, and pragmatic rules that will govern the scope  
8 of that possibility in contest suits for all local and statewide elections across our State for the  
9 foreseeable future.

10 The Respondent Secretary of State’s goal during the upcoming trial will accordingly be  
11 to assist in establishing a focussed view of our State’s election contest law and a clear, complete  
12 record of the legally relevant facts. As our State’s chief elections officer, the Respondent  
13 Secretary of State will advocate for what he concludes is a rational and workable interpretation  
14 of our State’s election contest statute, and full development of the evidence and facts legally  
15 relevant under that statute, rather than advocating for the “victory” of the candidate advanced by  
16 the Republican Petitioners or the Democrat Intervenors.

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18 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of May, 2005.

19 **ROB McKENNA**  
20 **WASHINGTON ATTORNEY GENERAL**

Foster Pepper & Shefelman PLLC  
SPECIAL ASSISTANT ATTORNEYS GENERAL

21 Maureen Hart, Solicitor General

*[signed: Thomas F. Ahearne]*

22  
23 Jeffrey T. Even, WSBA No. 20237  
24 Attorneys for Respondent Secretary of State  
Sam Reed

Thomas F. Ahearne, WSBA No. 14844  
Hugh D. Spitzer, WSBA No. 5827  
Marco J. Magnano, WSBA No. 1293  
Attorneys for Respondent Secretary of State  
Sam Reed