

The Honorable John E. Bridges
Monday, May 2, 2005
8:30 a.m.

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

Timothy Borders, et al.,
Petitioners,
v.
King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,
Respondents,
v.
Washington State Democratic Central
Committee,
Intervenor-Respondent,
v.
Libertarian Party of Washington State et al.,
Intervenor-Respondents.

No. 05-2-00027-3

PETITIONERS' OPPOSITION TO
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S MOTION IN
LIMINE TO EXCLUDE
PETITIONERS' PROPOSED
ATTRIBUTION OF ILLEGAL
VOTES

I. INTRODUCTION

The Court should deny the Washington State Democratic Central Committee's ("WSDCC's") Motion in Limine to Exclude Petitioners' Proposed Attribution of Illegal Votes. The evidence in this action will demonstrate that there were *at least* 1,053 illegal votes cast in the November 2, 2004, gubernatorial election (and many other invalid ballots counted due to the errors, neglect, and misconduct of elections officials). If the illegal votes are apportioned between Mr. Rossi and Ms. Gregoire in any rational manner and

1 deducted from their totals, the Court will conclude that Mr. Rossi received more legal
2 votes than Ms. Gregoire.

3 II. FACTUAL BACKGROUND

4 The 2004 gubernatorial election was the closest in Washington history.¹ In the
5 original canvass of votes, Mr. Rossi received 1,371,414 votes, and Ms. Gregoire received
6 1,371,153 votes, giving Mr. Rossi a 261 vote victory. Following the machine recount, Mr.
7 Rossi received 1,372,484 votes and Ms. Gregoire 1,372,442 votes, with Mr. Rossi
8 retaining a 42 vote margin. After the manual recount, which is the least accurate way to
9 count votes, *see* Roy Saltmann, Nat'l Bureau of Stds. Pub., *Accuracy, Integrity, and*
10 *Security in Computerized Vote-Tallying* (1988), Ms. Gregoire was certified the victor with
11 1,373,361 votes to Mr. Rossi's 1,373,232 votes, a 129-vote margin. The growing number
12 of votes in each successive recount combined with credible allegations of misconduct by
13 and errors of election officials raised serious concerns about the integrity of the election
14 results. Petitioners thus filed a timely election contest under the Washington Election
15 Contest Statutes.

16 After Petitioners filed the contest, the WSDCC, *inter alia*, intervened and filed
17 several comprehensive motions to dismiss Petitioners' claims. The Court, in its February 4,
18 2005, Oral Opinion, denied nearly all the motions, granting only a portion of one motion to
19 dismiss that addressed equal protection claims and the motion to strike the request for the
20 Court to order a new election as soon as practicable. The Court then adopted Petitioners'
21 proposed orders in a February 18, 2005, Order and set deadlines for filing various papers in
22 an April 5, 2005, Order. Petitioners had until April 15, 2005, to disclose all illegal votes
23 and errors, but discovery does not end until May 20, 2005.

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26 ¹ To the best of Petitioners' knowledge, it is by percentage the closest gubernatorial race in
27 American history. *See* Report of Dr. Katz, at p. 2, attached to Petitioner's Witness
Disclosure as Ex. B to the Korrell Decl., filed April 15, 2005.

1 Petitioners have so far discovered that at least 1,053 illegal votes² were cast in the
2 2004 gubernatorial election: 879 illegal votes from felons, 53 illegal votes from deceased
3 “voters,” 5 illegal votes from persons who voted in multiple states, 22 illegal votes from
4 persons who voted twice in Washington, 2 illegal votes from non-citizens, and at least 92
5 from improperly cast and invalid provisional ballots. *See* Declaration of David Bowman
6 and attachments thereto comprising Petitioners’ Disclosure of Contested Votes, filed April
7 15, 2005. The vast majority of these illegal votes, 817, were cast in King County.
8 Moreover, the votes were overwhelmingly cast in precincts that favored Ms. Gregoire. Dr.
9 Jonathan N. Katz, Professor of Political Science, California Institute of Technology, and
10 Dr. Anthony Gill, Associate Professor of Political Science, University of Washington, have
11 conducted separate statistical analyses of the illegal votes. They have prepared reports
12 containing their findings and methodology, which are attached to Petitioner’s Witness
13 Disclosure as Exhibits A (Dr. Gill’s report) and B (Dr. Katz’s report) to the Declaration of
14 Harry Korrell. Drs. Katz and Gill are prepared to testify that if the illegal votes are
15 apportioned between Mr. Rossi and Ms. Gregoire, pursuant to criteria accepted by courts
16 in dozens of election contests, innumerable voting rights cases, and the academic
17 community, Mr. Rossi received more legal votes than Ms. Gregoire.

18 **III. PRELIMINARY STATEMENT**

19 With this motion, the WSDCC hopes to block the Court from adjudicating the
20 merits of Petitioners’ claims. Petitioners simply ask the Court to consider evidence of the
21 type and nature used throughout the nation in election contest actions. The expert statistical
22 analysis Petitioners will elicit at trial from Drs. Katz and Gill is admissible, first and
23 foremost, because expert testimony from Drs. Katz and Gill is relevant and will assist the
24 Court in determining for whom the illegal votes at issue in this action were cast. Necessary
25 concomitants of this testimony include the methodology behind vote apportionment in

26 ² This number will likely increase as discovery is completed.
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1 election and voting cases and an assessment of the circumstances surrounding different
2 categories of illegal votes.

3 Contrary to the WSDCC's assertions, this evidence is *not* speculative. The expert
4 testimony will explain why statistical apportionment *is less speculative* than testimony
5 from illegal voters. Each of these issues is relevant to the election contest, and the expert
6 testimony will assist the Court in determining facts and understanding issues present in the
7 action. The only way Petitioners' expert statistical analysis is not relevant is if the Court
8 rules that the huge number of illegal and invalid votes cast in the election *per se* requires
9 that the results be set aside. *See Foulkes v. Hayes*, 85 Wn.2d 629 (1975); *Gooch v.*
10 *Hendrix*, 5 Cal.4th 266 (1993).

11 The WSDCC has poured old wine into new bottles, converting much of their
12 unsuccessful motions to dismiss into the Motion in Limine. The WSDCC states over and
13 again that Petitioners' evidence on vote apportionment is "speculative" but never explains
14 why the testimony is speculative. The WSDCC conflates Petitioner's burden of proof
15 under the Washington Election Contest Statutes with Washington's evidentiary rules,
16 asking the Court to rule in advance that evidence Petitioners have yet to proffer, and the
17 Court has yet to consider, will not satisfy Petitioners' burden of proof. The WSDCC also
18 relies upon a strained and implausible construction of the Washington Election Contest
19 Statutes that ignores Washington Supreme Court precedent, highlights immaterial
20 distinctions between other states' contested election provisions and the Washington
21 Election Contest statutes, ignores the numerous cases across the nation using Petitioners'
22 approach, and thrusts on the Court a handful of old, badly-reasoned, or factually-
23 inapplicable non-Washington cases.

24 The WSDCC's argument that Petitioners must prove through individual voter
25 testimony for whom each illegal vote was cast is untenable. It is not supported by the
26 Washington Election Contest Statutes, and it would make election contests harder to prove
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1 when there are huge numbers of illegal votes than when there just a few. Contests would
2 be increasingly difficult with each illegal vote, a perverse result the Legislature could not
3 have intended in enacting the Election Contest Statutes. Under WSDCC's construction of
4 the statute, in cases where there are over a thousand illegal votes cast—like this election
5 contest—it would be impossible as a practical matter to successfully contest an election.
6 The Court must therefore deny the WSDCC's Motion in Limine and allow Petitioners to
7 present their case.

8 IV. ARGUMENT

9 A. Petitioners' Expert Testimony on how to Properly Apportion Votes is 10 Admissible Under the Rules of Evidence.

11 The Court should admit Drs. Gill and Katz's expert testimony on how to most
12 accurately adjust the number of votes each candidate received to eliminate the effect of
13 unlawfully-cast ballots because it is relevant and admissible. Evidence is relevant if it has
14 "any tendency to make the existence of any fact that is of consequence to the determination
15 of the action more probable or less probable than it would be without the evidence." Wash.
16 R. Evid. 401. Expert testimony is admissible if it will assist the Court in understanding the
17 evidence or determining facts at issue in the action. *See* Wash. R. Evid. 702.

18 Petitioners will demonstrate that there are a sufficient number of illegal votes to
19 cast in doubt the results of the 2004 gubernatorial election. Petitioners believe that the
20 1,053 illegal votes they have discovered so far are sufficient alone for the Court to declare
21 the results void, *see Foulkes v. Hayes*, 85 Wn.2d 636-37,³ in which case expert testimony

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23 ³ *Foulkes* is consistent with a widely accepted rule that when the number of disputed
24 ballots exceeds the margin of victory in an election, the court must set aside the election.
25 *See Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978); *Marks v. Stinson*, 19 F.3d 873,
26 887 (3d Cir. 1994); *Webb v. Bowden*, 124 Ark. 244 (Ark. 1916); *Mead v. Sheffield*, 278
27 Ga. 268, 273 (2004); *Howell v. Fears*, 275 Ga. 627, 628 (Ga. 2002); *Briscoe v. Between*
Consol. School District, 156 S.E. 654, 656 (1931); *Akizki v. Fong*, 51 Haw. 354 (1969);
Adkins v. Huckabay, 755 So.2d 206 (La. 2000); *McCavitt v. Registrars of Voters*, 385
Mass. 833, 849 (1982); *Ippolito v. James M. Power*, 22 N.Y. 2d 594, 598-99 (1968); *Hitt v.*

1 may not be required. Alternatively, the Court may decide to follow the lead of other states,
2 *see, e.g., Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978), *Huggins v. Superior Court*,
3 163 Ariz. 348 (1990); *Hileman v. McGinness*, 316 Ill. App.3d 868 (2000), and
4 proportionally reduce Mr. Rossi's and Ms. Gregoire's votes before determining whether
5 the result of the election is still in doubt.

6 If the Court chooses the latter path, Petitioners' expert statistical analysis will be
7 probative in properly apportioning the illegal votes. Petitioners will prove through expert
8 statistical analysis that if the illegal votes discovered in the course of the election contest
9 are apportioned to the individual candidates in a manner accepted by other states and
10 federal courts in contest cases as well as in countless voting rights and redistricting cases,
11 the evidence will clearly indicate that Mr. Rossi received more legal votes than Ms.
12 Gregoire. Indeed, If the Court does set aside the results solely on the basis of the large
13 number of illegal votes, the appropriate method for apportioning the illegal votes may
14 require expert testimony because "the subject matter is beyond the expertise of a lay
15 witness." 1 *Law of Evidence in Washington* § 702.04 (2004). Even if their testimony is not
16 required, Drs. Katz and Gill's expert statistical analysis of the illegal votes, and their

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18 *Tressler*, 4 Ohio St. 3d 174 (1983); *Helm v. State Election Bd.*, 589 P.2d 224 (Okla. 1979);
19 *Emery v. Robertson County Election Comm.*, 586 S.W.2d 103 (Tenn. 1979); *Hardeman v.*
20 *Thomas*, 208 Cal. App. 3d 153 (1989) (ordering new election where 17 contested votes
exceeded 16 vote margin of victory).

21 Courts across the country recognize that the interests and decisions of voters are
22 best protected by setting aside an election when the number of problematic ballots is large
23 and the margin of victory is small. *See Green v. Reyes*, 836 S.W.2d 203 (Tex. App. 1992)
24 (upholding trial court's voiding of election where 126 votes were unable to be attributed to
either candidate; trial court exercised its authority under the election code and ordered the
election void because the margin of victory was less than the number of unascertained
illegal votes); *compare Noble v. Ada County Elections Bd.*, 135 Idaho 495 (2000)
25 (evidence of 10 illegal ballots, where margin of victory was 51 votes, was insufficient to
show that illegal votes changed the result of the election); *cf. Creamer v. City of Anderson*,
26 124 S.E. 2d 788 (S.C. 1962) (73 illegal votes cast in special annexation election should *all*
be withdrawn from the winning side, which in effect reduced affirmative vote to below the
level necessary for approval of annexation).

1 explanation of the methodology used in this analysis, will assist the trial court in
2 determining the election contest.

3 **B. WSDCC's Objections to Katz and Gill Lack Merit.**

4 WSDCC's objection to Drs. Katz and Gill's expert testimony is two-pronged. First,
5 they argue that it "is speculative, it is based on chance, and it should be excluded."

6 WSDCC's Motion at 4. One of the theories underlying the reliability of pro rata
7 apportionment of illegal votes is that *post hoc* illegal voter testimony is *less certain* than
8 expert statistical analysis, much in the same way that eyewitness "identifications" are less
9 certain than fingerprint analysis. Expert statistical analysis is certainly less speculative than
10 expert testimony from "[a] graphoanalyst, one trained to determine personality traits from
11 handwriting," which the lower court in *Foulkes v. Hayes*, 85 Wn.2d 629, 631 (1975),
12 admitted and on which the court partially based its finding that the election should be set
13 aside.

14 This observation aside, WSDCC's assertion is incorrect. The efficacy and
15 reliability of expert statistical analysis in determining *post hoc* how votes were cast has
16 long been recognized by the United States Supreme Court. In *Thornburgh v. Gingles*, 478
17 U.S. 30, 53 n.20 (1986), the Supreme Court endorsed the use of expert statistical analysis
18 in determining the extent of polarized voting in a specific jurisdiction, noting that
19 statistical analysis is "standard in the literature." *See also Georgia v. Ashcroft*, 539 U.S.
20 461, 472 (2003) (stating that both parties in the action, Georgia and the United States,
21 submitted expert statistical testimony in support of their position). Expert statistical
22 analysis has since become commonplace in assessing the scope of racially polarized
23 voting. *See, e.g., Teague v. Attala Co.*, 92 F.3d 283, 290 (5th Cir. 1996) (reversing district
24 court that disregarded "the established acceptance of regression analysis as a standard
25 method for analyzing racially polarized voting"); *Harvell v. Blytheville Sch. Dist. #5*, 71
26 F.3d 1382 (8th Cir. 1995) (en banc); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d

1 1547 (11th Cir. 1987).⁴ The United States Court of Appeals for the Ninth Circuit is no
2 exception to this rule, using statistical data as an essential means of ascertaining voting
3 patterns. *See Old Person v. Cooney*, 230 F.3d 1113 (9th Cir. 2003); *Garza v. County of Los*
4 *Angeles*, 918 F.2d 763 (9th Cir. 1990).

5 The goal of the statistical analysis performed by Petitioners' experts in this case is
6 essentially the same as the goal of political science expert statistical testimony in voting
7 rights and redistricting cases: the experts analyze election results in specific precincts to
8 determine how a distinct group of individual voters in those precincts cast their ballots in a
9 particular race. *See Thornburgh*, 478 U.S. at 53. The United States Supreme Court does
10 not view this type of analysis, the inference of voting behavior from precinct results, as
11 speculative. *See, e.g., id.* at 53 n.20. A proportional reduction by its very nature includes a
12 statistical method for the proportional deduction. The WSDCC asks the Court to exclude
13 the very expert testimony on which the Court should base the proportional reduction.

14 Expert statistical analysis has likewise been accepted in other areas of law where a
15 *post hoc* assessment of operative intent is necessary for just adjudication of a plaintiff's
16 claim. *See Bernard Grofman, Editor's Introduction*, 18 P.S. 538, 540 (1985):

17 Over the past two decades, it has become increasingly common for social
18 scientists to provide courtroom testimony and affidavits in class action
19 litigation under Section 5 and (more recently) Section 2 of the Voting
20 Rights Act of 1965 . . . or under Title VII (employment discrimination) of
21 the Civil Rights Act of 1964; and in school desegregation suits and other
22 civil rights actions. In addition, social science testimony has been offered
23 on a wide range of other issues including the verdict effects of excluding
jurors unwilling to impose the death penalty, standards for deceptive
advertising, survey data on trademark infringement, likelihood of
recidivism, labor relations disputes, social psychological aspects of

24 ⁴ This finding has been explicitly acknowledged in the academic literature. *See, e.g.,*
25 Michael E. Solomine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U.
26 Mich. J.L. & Ref. 79, 116 (1996) (“[T]he facts presented in modern voting rights cases
27 often consist of sophisticated and complicated expert testimony, requiring findings of fact
to be grounded in statistics and mathematical models . . .”).

1 environmental safety, and sociolinguistic aspects of taped conversations
2 alleged to be incriminating.

3 Second, WSDCC's claim that "[a]dmission of Petitioners' proposed speculative
4 attribution is inconsistent with the high standard of proof needed to invalidate an election
5 under Washington law" is incoherent. WSDCC Motion at 5. It conflates Washington Rule
6 of Evidence 403's test about evidence's relative probative value with Petitioners' burden of
7 proof. Petitioners' expert testimony should be admitted because it is relevant and will
8 assist the Court. Expert statistical analysis is not unduly prejudicial. As described *supra*,
9 this type of evidence is routinely admitted by courts in many different types of cases, and
10 the Court will have no difficulty according the testimony its proper weight. *See Gulf States*
11 *Util. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981) (excluding evidence from
12 bench trial under Fed. R. Evid. 403, the analog to Wash. R. Evid. 403, is a "useless
13 procedure").

14 Insofar as this objection is actually about the burden of proof, the instant action
15 presents a particularly compelling case for the use of expert statistical analysis. As one
16 federal district court observed in the context of distinguishing voting patterns: "It would be
17 extremely difficult to interview every voter . . . and determine how each voted. . . .
18 Regression analysis allows the parties to surmount this proof-gathering burden by making
19 reasonably accurate estimates of . . . voting behavior from demographic data" *Reed*
20 *v. Town of Babylon*, 914 F. Supp. 843, 851 (E.D.N.Y. 1996).

21 This rationale applies equally to proportionally adjusting the votes in this action. It
22 would not only be difficult to interview every voter to determine how they voted, it would
23 be completely unreliable. The Washington Supreme Court in *Hill v. Howell*, 70 Wash. 603
24 (1912), a case on which the WSDCC greatly relies, quotes a treatise commenting on the
25 unreliability of illegal voters' testimony. *Id.* at 613 ("[I]t is generally impossible to arrive
26 at any greater certainty of result by resort to oral evidence . . ."). Each person who
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1 submitted an unlawful ballot would be forced to admit that they violated the law,⁵ and
2 would be presented the opportunity to “game the system” by testifying to the vote that best
3 achieved their political ends, rather than the vote they actually cast. In light of this
4 eventuality, any uncertainties regarding expert statistical analysis are far outweighed by the
5 uncertainty inherent in every other means available to the Court to deduce for whom the
6 unlawful ballots were cast. *See Huggins v. Sup. Ct.*, 163 Ariz. 348, 353 (1990) (“While
7 proration is imperfect, we lack the luxury of perfection. . . . First, proration spares the body
8 politic [] offensive voter compulsion Second, it permits us at least sometimes to avoid
9 the cost and delay of a second election Moreover, though proration leaves some doubt
10 that we have discovered the true winner, the other options fail to bring us nearer to that
11 mark.”). Expert statistical analysis is the best evidence that could be made available to the
12 Court. Drs. Katz and Gill’s expert testimony should accordingly be admitted into evidence.

13
14 **C. The Washington Election Contest Statutes Do Not Require that**
15 **Petitioners Demonstrate for whom Each Individual Illegal Vote was**
16 **Cast.**

17 **1. RCW 29A.68.110 does not Address the Admissibility of**
18 **Evidence in an Election Contest.**

19 The plain language of the Washington Election Contest Statutes and any reading of
20 them that captures the fundamental purpose behind Election Contest Statutes show that
21 Petitioners need not prove for whom each illegal vote was cast by direct testimony of the
22 illegal voters. RCW 29A.68.110 states that:

23 No election may be set aside on account of illegal votes, unless it appears
24 that an amount of illegal votes has been given to the person whose right is
25 being contested, that, if taken from that person, would reduce the number
26 of the person’s legal votes below the number of votes below the number of
27 votes given to some other person for the same office, after deducting

26 ⁵ In light of the illegal voters’ Fifth Amendment constitutional rights discussed *infra*, how
27 these individuals will be forced to testify is a mystery.

1 therefrom the illegal votes that may be shown to have been given to the
2 other person.

3 RCW 29A.68.110 has nothing to do with the admissibility of evidence of how to properly
4 apportion votes. It says nothing about what kind of proof is permissible or required. It
5 instead refers to the burden of proof that Petitioners must meet to successfully contest the
6 election “on account of illegal votes.” As discussed *supra*, Petitioners’ expert statistical
7 analysis is relevant to determining the “amount of illegal votes . . . given to the person
8 whose right is being contested” and whether eliminating the illegal votes would change the
9 election results. As such, RCW 29A.68.110 is an inappropriate basis for a motion in
10 limine.

11 **2. The Plain Language of RCW 29A.68.110 and other Election
12 Contest Statutes Precludes the WSDCC’s Construction of the
13 Statutes.**

14 Even if RCW 29A.68.110 did relate to the admissibility of Petitioners’ expert
15 statistical analysis of how best to apportion the illegal votes, the WSDCC’s construction of
16 the statute relies on a strained interpretation of the word “appears.” According to *Webster’s*
17 *Third New International Dictionary*, the dictionary to which the Washington Supreme
18 Court has referred almost exclusively in recent years, *e.g.*, *Burton v. Lehman*, 153 Wn.2d
19 416, 424 (2005); *Dep’t of Labor and Indus. v. Gongyin*, 2005 Wash. LEXIS 357, at *8-9
20 (No. 74908-6) (Apr. 7, 2005); *Wash. St. Grange v. Locke*, 153 Wn.2d 475, 495-96 (2005),
21 the third definition⁶ of appears is “to be taken as,” a definition synonymous with “look” or
22 “seem.” *Webster’s Third New International Dictionary* 103 (2002). This is the widely-
23 understood definition of “appears” which is used in the statute.⁷

24 ⁶ The first and second definitions involve “appears” as it relates to visual inputs and
25 making an appearance before an authoritative body. *See Webster’s Third New*
26 *International Dictionary* 103 (2002).

27 ⁷ *Webster’s Third New International Dictionary*, in the fourth definition, does include a
definition similar to the WSDCC’s preferred usage, “to be clear to the mind; be obvious or
evident.” *Id.* at 103. Even if this definition were correct, it would not be grounds for
excluding the expert statistical analysis. It would instead state the quantum of proof for
determining when “an amount of illegal votes has been given to the person whose right is

1 This construction of RCW 29A.68.110 is consistent not only with “appears” in
2 isolation in the statute, but with the “legislative intent of the statute as a whole.” *See, e.g.,*
3 *State v. Krall*, 125 Wn.2d 146, 148 (1994). Concerns about appearances are inherent in
4 election law, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (“Congress was justified in
5 concluding that the interest in safeguarding against *the appearance of impropriety* requires
6 that the opportunity for abuse inherent in the process of raising large monetary
7 contributions be eliminated.”) (emphasis added), and the assessment is also common to
8 Washington law. *See, e.g., State v. Thomas*, 121 Wn.2d 504, 511-12 (1993) (avoiding the
9 appearance of impropriety necessary in criminal procedure). In this context, the definition
10 of “appears” is opposite the WSDCC’s assertions—it is not a requirement of absolute
11 certainty.

12 These are not the only problems with the WSDCC’s strained construction of RCW
13 29A.68.110. It is a basic principle of statutory construction that “courts must interpret
14 statutes to give effect to all language used, rendering no portion meaningless or
15 superfluous.” *Judd v. AT&T*, 152 Wn.2d 195, 209 (2004) (citing *City of Seattle v. Dep’t of*
16 *Labor & Indus.*, 136 Wn.2d 693, 698 (1998)). Requiring the party contesting an election to
17 show with certainty for whom each individual illegal vote was cast would render the words
18 “it appears that” meaningless. WSDCC would have the court strike words out of the
19 statute, as by WSDCC’s reading, they have no meaning. There is no material difference
20 between a statute that says “No election may be set aside on account of illegal votes unless
21 it ~~appears that~~ an amount of illegal votes has been given to the person whose right is being

22
23 being contested.” RCW 29A.68.110. In that respect, for the reasons discussed *supra*, the
24 expert statistical evidence will constitute part of Petitioners’ evidence in meeting their
25 burden of proof. Therefore, even if the Court accepted the WSDCC’s interpretation of
26 “appears” in RCW 29A.68.110 to mean “obvious” or “evident,” it would not affect the
27 admissibility of Drs. Katz and Gill’s expert statistical analysis. A review of the expert
reports show that it is obvious and evident to Drs. Katz and Gill that absent illegal votes,
Mr. Rossi would have been certified the winner of the 2004 gubernatorial election, and
they will so testify.

1 contested” and “No election may be set aside on account of illegal votes unless it is
2 obviously or easily perceived that an amount of illegal votes has been given to the person
3 whose right is being contested.” The Court is not free to disregard the words chosen by the
4 legislature.

5 Petitioners’ construction of RCW 29A.68.110 is consistent with the Election
6 Contest Statutes as a whole. Had the legislature intended to require direct testimony from
7 illegal voters regarding how they cast their ballots, it certainly could have done so. It did
8 not. RCW 29A.68.100 requires that a contesting party provide “a written list of the number
9 of illegal votes and *by whom* given, that the contesting party intends to prove at trial”
10 (emphasis added). Applying the *inclusio unius est exclusio alterius* canon of statutory
11 construction, *see, e.g., State v. Sommerville*, 111 Wn.2d 524, 535 (1988), the absence from
12 the Contest Statutes of any reference to a requirement that Petitioners prove *for whom* a
13 vote was cast is dispositive. Similarly, while RCW 29A.68.110 provides for “testimony . . .
14 as to illegal votes,” it does not specify or limit by whom such testimony may be offered.⁸

15
16 **3. The WSDCC’s Construction of RCW 29A.68.110 Would**
17 **Frustrate the Washington Legislature’s Intent and Produce**
Absurd Results.

18 The Washington Election Contest Statutes are meant to govern statewide as well as
19 small-scale election contests.⁹ Consider how this election contest with a large number of
20 ballots cast would proceed if the Election Contest Statutes required testimony about how
21 each illegal vote was cast. Petitioners would be required to find all illegal voters, 1,053 at
22 the last tally (excepting, perhaps, the deceased “voters”). They would then have to

23 ⁸ Other election contest provisions, like RCW 29A.68.050 which grants the clerk subpoena
24 power, merely recognize that witnesses will testify at the election contest and give the
25 clerk the power to force them to appear if they will not do so willingly. It does not render
the subpoena power superfluous to admit at trial evidence other than testimony from
subpoenaed witnesses.

26 ⁹ In *Hill* there were under 2500 persons voting in a “general primary election” in an
27 election for “judge of the superior court” for two counties. 70 Wash. at 604-05.

1 subpoena the voters who will not willingly appear. Assuming all illegal voters can be
2 located and are were within the Court's subpoena power — an unrealistic assumption —
3 all of them would have to be willing to waive their Fifth Amendment right against self-
4 incrimination (neither Petitioners nor the Court could grant the illegal voters immunity)
5 and testify for whom they cast their ballot. *Huggins*, rejecting an argument similar to
6 WSDCC's here, aptly explains the futility of this approach:

7 Though an illegal voter might be motivated to maintain silence by a
8 genuine fear of criminal sanctions, a supporter of the challenger's
9 opponent might equally be motivated by the recognition that an invalid
10 vote against the challenger would likely be cancelled only if the voter
11 revealed how it was cast. . . . [I]t empowers partisans of the opposition to
12 frustrate an election challenge and preserve illegal votes by exercising
13 fifth amendment rights.

14 *Id.* at 350. The court concluded that pro rata apportionment by precinct was the only fair,
15 equitable, and workable approach for determining who received the most legal votes. *Id.* at
16 352-53.

17 If WSDCC is right, the Court would have to ascribe probity to the illegal voters, the
18 vast majority of whom are convicted felons, a group whose bad credibility has long been
19 recognized, *see, e.g.*, Wash. R. Evid. 609. The Court would have to accept this testimony
20 even though convicted felons, a group that the academic literature indicates strongly favor
21 the WSDCC, *see* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political*
22 *Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777
23 (2002), would have a strategic incentive not to testify truthfully.¹⁰ This construction of the
24 Election Contest Statutes would set the bar for election contests so high that a statewide
25 election contest could never succeed. Elections with thousands of illegal votes would be
26 harder to contest than those with just a few. This can not have been the Washington
27 legislature's intent in enacting the Election Contest Statutes. *See Gold Bar Citizens for*

¹⁰ Because each felon's vote will be deducted from the candidate for whom cast, the best way for a felon to support his or her candidate is to claim to have voted for the other.

1 *Good Gov't v. Whalen*, 99 Wn.2d 724, 728 (1983) (“[T]he general rule [is] that election
2 statutes are considered remedial and should be liberally construed.”); *State v. Stannard*,
3 109 Wn.2d 29, 36 (1987) (court must read statute to avoid “unlikely, absurd, or strained
4 results.”); *Huggins*, 163 Ariz., at 350 (“[I]t hardly seems fair that as the amount of illegal
5 voting escalates, the likelihood of redressing the wrong diminishes.”).

6
7 **D. WSDCC Misconstrues Washington Case Law Governing Election
8 Contests.**

9 **1. The WSDCC Misstates *Hill v. Howell*.**

10 The WSDCC contends that *Hill v. Howell* requires an election contestant to prove
11 for whom each illegal ballot was cast. It argues that *Hill* is the “law of the state” and
12 should not be “overruled.” However, an examination of *Hill* indicates that the WSDCC has
13 misconstrued the case in their Motion in Limine, incorrectly stating that it is binding
14 precedent, citing it as precedent for issues the Court never considered, ignoring *Hill*’s
15 explicitly limited applicability, and failing to analyze the evidence the Court considered
16 probative in determining for whom each illegal vote was cast.

17 The first fundamental problem with WSDCC’s reliance on *Hill* is that it is a
18 plurality decision. A plurality opinion is not binding precedent. *State v. Zakel*, 61 Wn.App.
19 805, 808-09 (1991); *Harris v. Drake*, 116 Wn.App. 261 (2001). Only four of the nine
20 sitting justices joined the opinion. Two concurred in the result only. Three dissenters
21 would have excluded the canvass of the votes from one of the challenged precincts,
22 thereby reversing the outcome of the election. While the dissenters state that they agree
23 with the majority view of “the other questions discussed,” 70 Wash. at 615 (Gose, J.,
24 dissenting), the question of allocation of an unidentified vote occurs in the discussion of
25 the challenged precinct. Thus, no “rule” can be discerned from *Hill*.

1 The second fundamental problem with WSDCC's reliance on *Hill* is that the court
2 never considered whether proportional deduction may be used to determine for whom
3 illegal ballots were cast, let alone let alone whether expert statistical analysis, which was
4 likely unavailable when *Hill* was decided, is admissible evidence. A lower court is bound
5 only by cases that actually consider a particular argument in deciding a case where
6 rejecting that particular argument is necessary to the higher court's adjudication of a case.
7 *See, e.g.,* D. H. Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of*
8 *Constitutional Questions*, 3 Harv. L. Rev. 125, 125 (1889) (defining "stare decisis" as "[a]
9 . . . decision . . . made after full argument *on a question of law fairly arising in a case and*
10 *necessary to its determination*, is an authority or binding precedent in the same court, or in
11 other courts of equal or lower rank within the same jurisdiction, in subsequent cases where
12 *the very point* is again presented.") (emphasis added).

13 Moreover, *Hill* acknowledges that a case may arise where it is impossible to
14 determine who prevailed in an election, and suggests that entire precincts may be thrown
15 out in that situation. *Hill* recognizes that while the person contesting an election must
16 generally "show for whom an [improper] elector voted," 70 Wash. at 610, in a situation
17 where "it is impossible . . . to arrive at any certain result whatsoever," a voter may
18 successfully contest an election without proving for whom each illegal vote was cast. *Id.* at
19 612.

20 Finally, *Hill*'s statement that "it was proper to show for whom the elector voted" is
21 not a statement that each illegal voter must testify for whom they voted. 70 Wash. at 610.
22 Consider the evidence *Hill* considered sufficiently probative to charge "against the vote
23 totals of an innocent candidate." WSDCC Motion at 10. One Casper Yesel's vote was
24 eliminated by the Court even though Yesel apparently testified that "he does not know
25 whom he voted for judge." 70 Wash. at 607, 613. The Supreme Court also almost certainly
26 approved hearsay evidence as to Yesel's vote, noting that "Casper Yesel stated to
27

1 Sigismund Krenzel . . . that he intended to vote for [contestee] but that he did not know for
2 whom he voted, but that he told the election judge he wanted to vote for [contestee].” *Id.* at
3 607. The Court eliminated the ballot of another voter, Jacob Dormaier, Sr., on the basis of
4 circumstantial, uncertain evidence that the judge of the precinct at which he voted
5 “instructed him how to mark his ballot, and was by the voter marked in such a way as to be
6 a vote for R.S. Steiner.” *Id.* at 607. However, as the lower court explicitly stated that
7 Dormaier could not “read the English language,” Dormaier’s only basis for knowing how
8 his ballot was actually cast was hearsay testimony about what the precinct judge told
9 him.¹¹

10 An evaluation of the evidence the Washington Supreme Court relied on in *Hill*
11 leads to only one conclusion: circumstantial evidence — sometimes very weak
12 circumstantial evidence — is admissible to prove for whom an illegal ballot was cast. If
13 hearsay evidence and illegal voter testimony explicitly stating that the voter does not know
14 for whom he voted is sufficient to “prove” for whom an elector voted, Petitioners’ expert
15 statistical analysis is more than sufficient to prove for whom the illegal votes at issue in the
16 instant contest were cast.

17 **2. The WSDCC Ignores Adverse Washington Supreme Court**
18 **Precedent.**

19 Even if the WSDCC had not misconstrued *Hill*, their reliance on the case ignores a
20 subsequent century of election law. In *Foulkes v. Hayes*, 85 Wn.2d 629 (1975), the
21 Washington Supreme Court noted that the purpose of the Washington Election Contest
22 Statutes was “to be a statutory recognition of the power of superior courts, acting within

23 _____
24 ¹¹ It is not totally clear from *Hill* that the precinct judge did not testify. As Dormaier is
25 named by the court but the precinct judge was not, and the Court never said that the
26 precinct judge testified (in contrast to one James Thomas Cooper, who entered particularly
27 attenuated hearsay evidence the Court rejected, *see id.* at 607-08), it can fairly be inferred
that this was based on hearsay evidence. If the Precinct Judge had testified, however, it
would not be testimony from the individual illegal voter.

1 their general equity jurisdiction, to intervene in cases of election fraud or wrongdoing.”
2 The *Foulkes* Court accordingly affirmed a trial court decision ordering a new election
3 where “it was impossible to tell exactly how many ballots had been fraudulently altered,
4 though the number specifically identified as tainted fell short of making up appellant’s
5 margin of victory.” 85 Wn.2d at 636-37.

6 *Foulkes* is an exemplar of the situation contemplated in *Hill*, where “the disregard
7 of the law has been so fundamental or so persistent and continuous that it is impossible . . .
8 to arrive at any certain result whatsoever.” *Hill*, 70 Wash. at 612-13. The *Foulkes* Court
9 was clearly aware of the Washington Supreme Court’s earlier decision in *Hill*, citing the
10 case in defining the term “illegal votes.” 85 Wn.2d at 634. However, in interpreting the
11 predecessor to RCW 29A.68.011, it obviously did not consider *Hill* a bar to throwing out
12 the election, despite not knowing for whom the invalid ballots were cast.

13 *Foulkes* was buttressed eight years later by *Gold Bar Citizens for Good*
14 *Government v. Whalen*, 99 Wn.2d 724 (1983). In *Gold Bar Citizens*, as will be done in the
15 instant action, the contestant produced a list of individuals who, despite being ineligible to
16 vote in the election, did so. The trial court erroneously sustained a motion in limine to
17 exclude the petitioner’s list of the illegal votes and voters. The Washington Supreme Court
18 reversed, holding that a trial court that excludes evidence of the illegal votes and voters
19 errs “if a certificate of election has been issued based on illegal voters.” *Id.* at 731. The
20 Court emphasized that those “who were eligible to vote had their ballots diluted by” the
21 unlawful voters. *Id.* at 730. The *Gold Bar Citizen* Court did not suggest that the election
22 contestant had to prove for whom the unlawful voters cast their ballots, and the remand
23 was explicitly based in part on the fact that there were more invalid votes than the margin
24 between the candidates. *Id.* at 730-31.

25 WSDCC’s claim that Petitioners must force individual illegal voters to testify for
26 whom they cast they cast their ballots also is inconsistent with the Washington Supreme
27

1 Court's decision in *Washington ex rel. Morgan v. Aalgaard*, 194 Wash. 574 (1938). In
2 *Morgan*, the Supreme Court (in a *quo warranto* suit) held that a trial court "erred in
3 holding that . . . three defective ballots should be counted for respondent, even though
4 three witnesses testified that they had cast these identical ballots and intended to vote for"
5 the respondent. *Id.* at 583. In so holding, the Court cited with approval *Anderson v.*
6 *Winfrey*, 85 Ky. 597 (1887), which stated that "[w]here an elector casts his vote by secret
7 ballot which is fatally defective, he ought not to be permitted to testify that he voted the
8 particular ballot and intended it for a particular candidate." *Morgan*, 194 Wash. at 582. The
9 Court deemed the ballots illegal and ordered them disregarded. While *Morgan* does not
10 squarely fit the facts of the instant case, it is a harsher rule because it disfranchised
11 innocent voters who were given defective ballots with only one candidate's name on it—
12 the one for whom they intended to vote. *See id.* at 578-79. If this testimony from innocent
13 voters who want to testify is inadmissible in an election contest, Petitioners may not be
14 required to introduce voter testimony from persons who were not even eligible to vote and
15 who could refuse to testify to avoid incriminating themselves.

16 **E. Proportional Vote Deduction is the Accepted Modern Rule for Deciding**
17 **Election Contests.**

18 The Court should, if it does not set aside the election solely on the basis of the
19 massive number of illegal votes cast in this action, pro rata deduct the illegal votes from
20 Mr. Rossi's and Ms. Gregoire's vote totals according to the precinct in which the illegal
21 votes were cast.

22 **1. Proportionally Deducting Illegal Votes is a Common Way to**
23 **Decide Election Contests Throughout the Country.**

24 While the Court would be correct if it ordered a new election because the huge
25 number of illegal and invalid votes cast and counted in the 2004 election dwarfs the current
26 129-vote difference between Mr. Rossi and Ms. Gregoire, *see Foulkes*, 85 Wn.2d 629
27 (1975), courts in other jurisdictions frequently use proportional deduction to determine for

1 whom illegal votes were cast. WSDCC's motion attempts to distinguish the many cases
2 Petitioners cited in their February 16, 2005, Response to Washington State Democratic
3 Central Committee's Proposed Order, arguing that different states' election contest statutes
4 have different language. Instead, WSDCC's motion only effectively emphasizes that
5 where, as here, the election contest statutes do not explicitly prohibit apportioning illegal
6 votes, it is the preferred method for doing so. *See, e.g., Finkelstein v. Stout*, 774 P.2d 786,
7 793 (Alaska 1989) ("If application of the proportional reduction formula would change the
8 provisional result... a new election should be held promptly."); *Flowers v. Kellar*, 322 Ill.
9 265, 269 (1926) (Where the evidence does not disclose the recipient of illegal votes, the
10 general rule is that such votes will be eliminated by dividing them between the candidates
11 in the proportions that the number cast for each bears to the total cast in the precinct.)
12 (emphasis added) (reaffirmed by *In re Durkin*, 299 Ill. App. 3d 192 (1998)).¹²

13 WSDCC acknowledges that California shares the exact language that an election
14 cannot be set aside unless it "appears" that the result would be different absent illegal
15 votes. WSDCC Motion at 14 n.5. Indeed, the California courts have explicitly endorsed
16 proportional deduction as the proper method for determining the allocation of illegal votes.
17 *See Russell v. McDowell*, 83 Cal. 70, 74 (Cal. 1890) ("In truth, a court *can do nothing*
18 *better*, in the absence of proof as to how illegal votes have been cast, than to make the
19 apportionment as was done in this case, or to throw out the precincts at which they have
20 been received . . .") (emphasis added); *Singletary v. Kelley*, 242 Cal. App. 2d 611, 613
21 (1966). In a desperate attempt to distinguish California jurisprudence, WSDCC cites *twice*
22 to a statement in *Russell* that proration "can never change the result of the election." *See*
23 WSDCC Motion at 14, 15. This quote is not the Court's statement of law; it is the Court's
24

25 ¹² Other cases proportionally deducting votes or explicitly approving of the practice
26 include *Qualkinbush v. Skubisz*, 2005 Ill. App. LEXIS 299 (Ill. App. Ct. 2005); *Grounds v.*
27 *Lawe*, 67 Ariz. 176, 185 (1948); *Appeal of Harner*, 62 Pa. D & C 56 (1948); *Briggs v.*
Ghrist, 28 S.D. 562, 570 (1912); *Ellis ex rel. Reynolds v. May*, 99 Mich. 538, 557 (1894).

1 restatement of the losing counsel's incorrect statement, specifically rejected in the same
2 paragraph. Acknowledging pro rata apportionment can favor the party contesting the
3 election, the Court says, "But what consequence would he [counsel] have us deduce from
4 this reasoning? ... In truth, a court can do nothing better, in the absence of proof as to how
5 illegal votes have been cast, than to make the apportionment as was done in this case, or to
6 throw out the precincts at which they have been received, on the ground of malconduct of
7 the election board." *Russell*, 83 Cal. At 73. Despite the WSDCC's contentions, in the state
8 with an election statute most similar to the Washington statutes, proration is the accepted
9 method of allocating illegal votes.

10 Moreover, *Huggins v. Superior Court*, 163 Ariz. 348, convincingly demonstrates
11 that pro rata deduction is the *only* viable method of conducting this election contest (apart
12 from setting it aside because invalid ballots far exceed the margin between the candidates).
13 The contestant in *Huggins* lost an election by eight votes, with sixteen votes illegally cast
14 (including an illegal vote from a disfranchised felon). The Court found not only that
15 requiring the contestant to prove for whom illegal each vote would place on the contestant
16 an inequitable burden, but that it was unworkable as a practical matter. Voters who cast
17 illegal ballots could deprive the Court of their true vote by exercising their fifth
18 amendment privilege against self-incrimination. *See id.* at 350. If they did testify, the Court
19 noted that the testimony would be inherently unreliable and might "actually empower[]
20 partisans of the opposition to frustrate an election challenge and preserve illegal votes by
21 exercising fifth amendment rights." *Id.*¹³

22 What the *Huggins* Court did not mention was the harm illegal voters could inflict
23 by lying about their vote. Numerous other courts, however, have acknowledged the

24 ¹³ Because proportional deduction of the illegal votes demonstrated that the challenger did
25 not win the election, the court in *Huggins* properly did not reach the issue of whether
26 proration could be used to change the election results. However, the court so convincingly
27 explains the merits of pro rata deduction of illegal votes that it is difficult to imagine the
Court accepting another system.

1 problems admitting the testimony of illegal voters causes. *See, e.g., McCavitt v. Registrars*
2 *of Voters*, 385 Mass. 833, 849 (1982) (“Indeed, it might be possible that an election could
3 be bought by the use of voter testimony.”); *Briscoe v. Between Consol. School Dist.*, 171
4 Ga. 820, 824 (1931) (“[I]t would . . . be dangerous to receive and rely upon the subsequent
5 statement of the voters as to their intentions, after it is ascertained precisely what effect
6 their votes would have upon the result.”); *Young v. Deming*, 33 P. 818, 820-21 (Utah 1893)
7 (“The temptation to actual fraud and corruption on the part of the candidates and their
8 political supporters is never so great as when it is known precisely how many votes it will
9 take to change the result... especially as the means of detecting perjury and falsehood is
10 not always at hand until after the wrong sought to be accomplished by it has become
11 successful, and the honest will of the people has been thwarted.”). If a person who cast an
12 illegal ballot lied about their vote, they would doubly-damage either Ms. Gregoire or Mr.
13 Rossi. For example, if an illegal voter who cast their ballot for Rossi testified that they
14 voted for Ms. Gregoire, the Court would deduct a vote from Ms. Gregoire, while
15 maintaining the illegal vote for Mr. Rossi.

16 **2. The Cases on which WSDCC Rely Cannot Withstand Close**
17 **Scrutiny.**

18 WSDCC distinguishes on irrelevant facts the many well-reasoned modern (and
19 older) cases Petitioners cited above and in their earlier-filed Opposition to the WSDCC’s
20 proposed orders, instead asking the Court to accept the reasoning of a handful of other
21 election contest cases, all decided more than forty years ago. These cases do not adequately
22 address the inherent unreliability of *post hoc* testimony from unlawful voters stating for
23 whom they voted, *see Huggins v. Sup. Ct.*, 163 Ariz. 348; they do not address the well-
24 founded academic basis of expert statistical analysis on proper vote apportionment, *see*
25 Katz Report and Gill Report; and the cases were decided before expert statistical analysis
26 became prevalent in litigation. *See Grofman, supra.*

1 For instance, *Delaware ex rel. Wahl v. Richards*, 44 Del. 566 (1949), is inapposite.
2 In *Wahl*, the Court did not reject out of hand the proportional deduction rule, it merely
3 stated that some courts “have adopted that rule,” but that the Court did “not regard it as
4 logical or satisfactory *under the facts presented*.” *Id.* at 581 (emphasis added). In *Wahl*, the
5 Superior Court (sitting as the Board of Canvass) proportionally deducted votes that were
6 *not actually illegal*, but which were in unsigned or improperly-signed envelopes. The
7 Delaware Supreme Court noted that state law required “[a]ll ballots cast at any election” be
8 counted “for the persons for whom they were intended, so far as such intention can be
9 ascertained therefrom.” *Id.* at 581. As such, the votes “should have been counted by the
10 Superior Court.” *Id.* The Court’s reference to the impropriety of the proportional deduction
11 rule under “the facts provided” in *Wahl* thus refers to a fact situation where *no illegal*
12 *ballots* were cast. It does not apply where *illegal votes* were cast and counted. Even if the
13 Court intended its statement about proportional deduction the way WSDCC insists, this
14 statement, made in passing on a hypothetical fact situation, would have been *obiter*
15 *dictum*,¹⁴ and would not bind a trial court, even in Delaware.

16 The WSDCC’s reliance on *Wilkinson v. McGill*, 192 Md. 387 (1949), is similarly
17 misplaced. In *Wilkinson*, the Court quotes “McCrary on Elections,”¹⁵ which states that
18 there are three options available to a court considering an election contest where the
19 number of illegal votes is sufficient to change the election’s outcome: void the election,
20 deduct the illegal votes from the contestee, or proportionally deduct the votes. *Id.* at 397.
21 However, the Court did not say anything further about proportionally deducting the votes
22 because the option made no sense in *Wilkinson*, which involved a one polling place
23 election. In an election with only one polling place, proportional deduction always results

24
25 ¹⁴ That the Court’s statement is *obiter* is reinforced by the *Wahl* dissent, which did not
26 mention proportional deduction but instead dissented on the basis that the votes were
27 illegal. 44 Del. at 581-93.

¹⁵ Relevant portions of this authority are submitted pursuant to LR 5.

1 in the same outcome as not deducting the votes. *E.g.*, *Huggins*, 163 Ariz. at 353 n.4
2 (“[P]roration can only work fairly where more than one district has undergone invalid
3 ballots. To make a prorated deduction of invalid ballots in a single district election would
4 functionally amount to ignoring the invalid votes.”).

5 *Wilkinson* undercuts the WSDCC’s contentions in another respect. Realizing the
6 difficulty an election contestant can have proving for whom an illegal vote is cast, the
7 Court in dicta stated that the contestant:

8 [M]ust prove, or at least attempt to prove, how the illegal voters voted. If
9 direct proof cannot be obtained from the illegal voters themselves, other
10 evidence of a circumstantial nature may be offered. In any event, there
11 must be an effort to produce this proof. If an effort is made, which proves
futile, and there is no way of producing proper evidence, it may be that the
safest procedure is to throw out the election

12 The *Wilkinson* Court thus realized that when obtaining testimony from illegal voters is
13 impossible, circumstantial evidence (like expert statistical analysis) is relevant and
14 ordering a new election can be a proper remedy.

15 Without *Wahl* and *Wilkinson*, WSDCC is left with only *Jaycox v. Varnum*, 226 P.
16 285 (Idaho 1924), and *State of Nebraska ex rel. Brogan v. Boehner*, 174 Neb. 689 (1963),
17 or, more accurately, their reliance on Halbert Paine’s nineteenth century treatise on
18 elections.¹⁶ Petitioners can also cite treatises, but from the twenty-first century, supporting
19 proportional deduction in the instant situation.

20 When the evidence does not disclose the recipient of illegal votes, such
21 votes should be eliminated by allocating them to the candidates in the
22 same proportion that each candidate received votes in the precincts where
23 the illegal votes were cast; this is the "proportion method" of allocating
24 illegal votes. Similarly, where the number of illegal votes is known, but
25 how those votes were cast is unknown, a proration may be applied to
determine whether the election should be set aside. In applying proration,
the number of illegal votes from each precinct is prorated to each
candidate according to the percentage of votes the candidate received in

26 _____
27 ¹⁶ Relevant portions of this authority are submitted pursuant to LR 5.

1 that precinct. Each candidate's share of illegal votes is then deducted from
2 one's vote total. If this exercise results in a reversal of the election results,
3 a new election must be held; if not, the original results will stand.

4 *E.g.*, 26 Am. Jur. 2d *Elections* § 357 (last updated November 2004) (citations omitted). Of
5 course, pro rata deduction is not a new concept in American election law. *See, e.g.*,
6 *Heyfron v. Mahoney*, 9 Mon. 497 (1890).

7 The WSDCC indicates that Paine's treatise was published in 1890. 1890 was a
8 milestone year for Washington elections, because it was the year in which the Washington
9 legislature adopted the secret ballot. *See Washington ex rel. Ewing v. Reeves*, 15 Wn.2d 75,
10 89 (1942) (Robinson, C.J., concurring in part) (noting that Washington adopted the
11 "Australian ballot" in 1890, and that the earliest statutes were "intended to apply only to
12 partisan candidates"). Most states adopted the secret ballot around this time. *See* L.E.
13 Frodman, *The Australian Ballot*, at ix ("The first Australian ballot law [in America] was
14 passed in February 1888 By [the elections of 1892], thirty-eight states had passed
15 Australian ballot laws in one form or another.").¹⁷ As such, Paine was writing from the
16 baseline of an electoral system in which the secret ballot was nearly non-existent. Without
17 the secret ballot, it arguably made sense to require an election contestant prove for whom
18 each illegal vote was cast. However, even contemporaneous scholars disagreed on this
19 point. *Compare* Paine, *supra*, with George W. McCrary, *A Treatise on the American Law*
20 *of Election* §§ 495-97 (Henry L. McCune, ed., 4th ed. 1897).¹⁸ This Court should not

21 ¹⁷ Relevant portions of this authority are submitted pursuant to LR 5.

22 ¹⁸ The final case the WSDCC cites in support of its position, *Brogan*, demonstrates this
23 conflict. The Court noted that "McCrary on Elections" says that "unless it be shown for
24 which candidate [the illegal votes] were cast, they are to be deducted from the whole vote
25 of the election division." *Id.* at 696. The Court then noted that "Paine on Elections" says
26 that "[t]here ought to be no arbitrary presumption of law, either that all the illegal votes
27 were cast by the political party in the majority, or that they were cast by different parties in
proportion to their number." *Id.* at 697-98. The Court's *ipse dixit* for choosing the "Paine
on Elections" rule was that the Court does "not believe that courts should adopt and apply
arbitrary rules which will determine elections upon the basis of chance." *Id.* at 698. This
statement is, of course, merely a restatement of "Paine on Elections." The Court never
explains why an election division apportionment is arbitrary, it gives no indication that it

1 follow or consider itself bound by Halbert Paine's nineteenth century views and should
2 instead follow the generally accepted analysis offered by Petitioners and the many cases
3 and modern treatises cited herein. The testimony of the Petitioners' experts will better
4 equip the court to judge the merits of this election contest.

5 **V. CONCLUSION**

6 For the foregoing reasons, the WSDCC's Motion in Limine to Exclude Petitioners'
7 Proposed Attribution of Illegal Votes should be denied.

8
9 DATED this 20th day of April, 2005.

10 Davis Wright Tremaine LLP
11 Attorneys for Petitioners

12
13 By 
14 Harry J.F. Korrell, WSBA #23173
15 Robert J. Maguire, WSBA #29909

16 By  (for)
17 E. Mark Braden
18 Baker & Hostetler, LLP

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25 _____
26 considered testimony, such as the Petitioners will proffer in the instant case, that
27 apportionment is not arbitrary, and it never even explains its basis for choosing "Paine on
Elections" over "McCrary on Elections." Flipping a coin between dueling treatises is not
reasoning and should not be deemed persuasive by the Court.



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April 20, 2005

VIA FEDERAL EXPRESS

Hon. John Bridges
Chelan County Superior Court
Department No. 3
401 Washington Street
Wenatchee, WA 98807

Re: Borders v. King County *et al.*,
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed please find out-of-state authorities referred to by Petitioners in their Opposition to WSDCC's Motion in Limine to Exclude Petitioners' Proposed Attribution of Illegal Votes. Due to the number of cases to be submitted, we are federal expressing the cases to the Court for arrival tomorrow, rather than file electronically.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in black ink, appearing to be 'H. Korrell'.

Harry Korrell

Enclosures

1 3. On April 20, 2005, I caused the documents listed below:

2 **Petitioners' Opposition to WSDCC's Motion in Limine to Exclude**
3 **Petitioners' Proposed Attribution of Illegal Votes**

4 **LR 5 Letter to the Honorable John Bridges with attachments of out-of-**
5 **state authorities**

6 to be filed with the Clerk of Chelan County Superior Court via Electronic Filing Legal
7 Services (E-Filing.com) which sent notification of such filing to the following persons,
8 with this Certificate to follow:

9 **Kevin Hamilton, Esq.**
10 Perkins Coie LLP
11 Attorneys for Washington State Democratic
12 Central Committee
13 1201 Third Avenue, Suite 4800
14 Seattle, WA 98101

15 **Thomas Ahearne**
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of April, 2005, at Seattle, Washington.


Donna L. Alexander