

1 WSDCC – has convincingly demonstrated that the various counties, but primarily King
2 County, counted well in excess of 3,000 illegal and invalid votes. Most or all of these
3 votes were not only illegal, but were also counted through the neglect or error of county
4 election officials, again primarily in King County. In light of the fact that the number of
5 indisputably invalid ballots so far exceeds the margin of victory, and that so many of the
6 illegal ballots were counted in heavily Democratic King County, this Court has no
7 alternative but to annul the issuance of the certificate of election to Christine Gregoire.
8 This is true under the standard of *Foulkes v. Hays*, 85 Wn.2d 629 (1975), under the
9 proportional reduction method used in 38 cases cited by Petitioners,¹ and under the
10 fundamental disregard standard of *Hill v. Howell*, 70 Wash. 603 (1912).

11 II. ARGUMENT

12 A. Proper Reconciliation of Ballots Received and Counted Is Fundamental 13 to the Fairness of an Election and to Ensuring the Accuracy of Election 14 Results.

15 Whether it is poll ballots, provisional ballots, or absentee ballots that are being
16 counted, the process of properly reconciling the number of voters, the number of ballots
17 received, and the number of ballots counted is fundamental to the conduct of a fair election
18 and to the issuance of the certificate of election to the proper candidate. If the audit and
19 reconciliation process is flawed, then the way is open for both error and fraud that can
20 affect the outcome of the election. Ballots will be counted that should not be counted
21 because cast improperly or cast by unregistered voters; and ballots will be lost or otherwise
22 disappear and will not be counted although they should be. All of these things happened,
23 and happened often, in this election, primarily in heavily Democratic King County.

24 Secretary of State Reed explained why it is important for a county to keep an audit
25 trail of the number of ballots counted:

26 ¹ See Exhibit A to Petitioners' Opposition To WSDCC's Motion to Exclude Expert
27 Testimony of Profs. Katz and Gill, filed May 20, 2005.

1 Again, it's your basic elections practice to not allow for the
2 stuffing of the ballot box by knowing how many, you know,
3 voters you had that cast a ballot compared to how many you
4 actually have within your ballot box.

5 Trial Transcript ("Tr.") 152. Mr. Reed specifically indicated that elections officials should
6 keep track of the number of absentee ballots returned, counted and rejected, as well as the
7 same information for provisional ballots. Tr. 153-54.

8 Again, you need to know how many ballots were returned
9 and returned to the absentees and how many you actually
10 had in your count to make sure that you didn't miss any.
11 Because one important internal control you have is to – you
12 know, the opposite of stuffing the ballot box is you can steal
13 ballots or something to try to change the outcome of an
14 election. So you need to make sure you have a correct
15 number.

16 Tr. 154.

17 So the fundamental process is that you know how many
18 ballots you have you look and see how many were counted,
19 and if they don't match, then you stop and you go back and
20 find out.

21 Tr. 160.

22 A. The reconciliation is knowing how many ballots were
23 cast at a polling site and how many were counted, how many
24 absentees you received and how many were counted or
25 rejected and how many provisional ballots you had and how
26 many were counted or rejected.

27 Q. And is this reconciliation a process that should occur
prior to the certification of the election returns?

A. Yes, it is.

Q. Is it an important process?

A. It is important, but I must say that it is one place where
counties have tended to cut corners sometimes when they are
in a real crunch in terms of the amount of time and
everything. But the Secretary of State's Office has always
taken the position that this is an absolutely – you know it's
absolutely critical that you do this.

Q. Why is it critical?

1 A. It's your one check you have to make sure you don't
2 have ballot box stuffing or removal of ballots.

3 Tr. 161. Secretary of State Reed deemed King County's failure to properly reconcile the
4 absentee ballots "appalling" and "totally unacceptable," given the "paramount" importance
5 of this audit check. Tr. 162-64. *See also* Tr. 274-78 (Evelyn Arnold), 509 (Nicole Way)
6 (tracking ballots received is necessary to prevent the addition of improper ballots), 1236-37
7 ("failing to represent to the canvassing board how that number was arrived at . . . was a
8 very serious mistake." It "was a conscious decision to represent a number that was not
9 fully disclosed. That's why I felt like that was a situation that crossed the line from
10 inadvertent.") (Nick Handy), 1363-67 (Bob Terwilliger).

11 Accurate reconciliations and audit trails are not merely good practice, they are the
12 law. WAC 434-253-204 requires that poll-site ballots "shall be reconciled" and that all
13 discrepancies must be investigated. The regulation identifies ten investigative measures
14 that, in the words of the regulation, constitute the "minimum" investigation, and requires
15 that each step in the reconciliation process be documented, completed, and presented to the
16 canvassing board before the election may be certified. WAC 434-240-270 governs the
17 maintenance of an audit trail with respect to absentee ballots. The regulation provides in
18 part:

19 Each county auditor shall maintain an audit trail with respect
20 to the processing of absentee ballots which *shall include*, but
21 shall not be limited to, the following:

22 . . .

23 (7) A reconciliation that all absentee ballots counted plus all
24 absentee ballots rejected is equal to the total number of
25 absentee ballots received.

26 WAC 434-240-270(7) (emphasis added).

27 **B. The "Positive Discrepancies" at King County Polling Places.**

The evidence offered at trial proved that in King County alone a *minimum* of 785
(348 identified in Exhibit 35 plus 437 identified in Exhibit 37) illegal votes were cast at

1 polling places by persons who obtained provisional ballots and then passed them through
2 the Accuvote machines without the verification required by law. In other cases,
3 individuals obtained ballots and cast them into the Accuvote machines without having
4 signed the poll book at all, either as a registered voter or as a voter obtaining a provisional
5 ballot.

6 Linda Sanchez testified in detail, by deposition designation and at trial, regarding
7 the manner in which polling place workers and the canvassing crew are to reconcile the
8 records of voting at each precinct. Every voter at a precinct must sign the poll book before
9 receiving a ballot. Voters who are registered in the precinct sign next to their printed
10 name. Registered voters mark their ballots and then put them in the Accuvote machine to
11 be tabulated. The Accuvote machine generates a tape showing among other things the
12 number of voters in each precinct whose ballots were counted by machine. If the Accuvote
13 machine won't accept a ballot, or if the voter does not want his or her ballot to be counted
14 by machine, the ballot goes into an "add-on" bin, to be counted at county headquarters.

15 Voters who are not registered in the precinct or who received an absentee ballot
16 sign in the provisional ballot section of the poll book. Voters who receive provisional
17 ballots are to mark their ballots and return them to the poll workers, who are to ensure that
18 the ballots are placed in properly marked provisional ballot outer envelopes, which are to
19 be placed in a separate bin. These ballots cannot be counted until election workers at
20 headquarters verify that the voter is in fact properly registered, and has not already voted.
21 WAC 434-253-047. As one measure to prevent double voting, regulations require that all
22 absentee ballots must be received and credited before provisional ballots are counted.
23 WAC 434-240-250.

24 In King County, it was the responsibility of the canvassing crews, under the
25 supervision of Linda Sanchez, to review the reconciliation materials and to ensure that both
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1 the provisional ballots and the poll ballots were properly accounted for. This canvassing is
2 part of the audit process that is critical to ensuring the integrity of the election process.

3 In the words of Linda Sanchez, it was a “difficult canvass.” Sanchez Dep., 89:15,
4 134:25-135:25. Many polling places weren’t balancing and were showing discrepancies
5 not within King County’s tolerance. Id., 89:14-18; 91:5. In particular, the poll worker
6 reconciliation efforts and the canvass results showed numerous instances in which votes
7 were counted in the Accuvote machine in excess of the number of voters signing the poll
8 books. Although Linda Sanchez and the canvassing crew were acutely aware of these
9 problems, and although she testified that she told Bill Huennekens before certification that
10 the number of errors in permitting provisional ballots to be tabulated in the Accuvote
11 machines was “significant,” id., 90:10-19, the canvassing crew made no effort to quantify
12 the extent of the errors before certification of the election, and did not attempt to quantify
13 the problem for the canvassing board prior to or at its November 17 meeting.
14 Id., 89:1-90:23.²

15 *After* certification, and after it became clear that the election would be contested,
16 King County did attempt to assess the magnitude of the problem, and produced (in March
17 2005, *see* Tr. 340) what has been admitted as Exhibit 36, the Polling Place Reconciliation
18 Summary. The “Plus/Minus” column in Exhibit 36 indicates precincts in which there were
19 “negative discrepancies” or “positive discrepancies.” Negative discrepancies are instances
20 in which the number of provisional ballots, add ons, and machine tabulated ballots is less
21 than the number of persons signing the poll book. There are innocent explanations for
22 negative discrepancies, primarily walk outs and crossover voters.³ The positive

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24 ² The canvass should have been even more difficult. Linda Sanchez testified at trial that
25 King County did not even attempt to investigate and account for discrepancies of +1 or -1.
26 This failure itself was a violation of WAC 434-262-204(3), which requires that “[a]ny
27 discrepancies [in poll site ballot reconciliation] *must* be investigated. Id. (emphasis added).

³ A walk out is a person who signs for and receives a ballot, then leaves the polling place
with the ballot rather than voting or returning it. A crossover vote occurs when a person

1 discrepancies are instances in which the number of provisional ballots, add ons, and
2 machine tabulated ballots is greater than the number of persons signing the poll book. A
3 positive discrepancy, then, is an instance in which someone has voted without signing the
4 poll book. The evidence showed that there is really only one explanation for a positive
5 discrepancy that is not an illegal vote, and that is a crossover vote. However, at polling
6 sites with no precincts with negative discrepancies, crossover votes are not a possibility.

7 The number of positive discrepancies in the "Plus/Minus" column of Exhibit 36
8 totals 1,155, nearly nine times the margin of Gregoire's victory. The evidence showed that
9 King County made two attempts – well after certification of the election – to understand
10 the scope and significance of these positive discrepancies. First, Bill Huennekens, Linda
11 Sanchez and the canvassing crews identified every instance they could locate in which poll
12 workers had indicated in some manner that they had observed or concluded that voters had
13 obtained provisional ballots and then illegally run them through the Accuvote machine.
14 They identified 348 such instances. Tr. 351; Ex. 36.⁴

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17 registered in one precinct receives and votes a ballot from a different precinct at the same
18 polling place.

19 ⁴ Mr. Huennekens and Linda Sanchez asked Colleen Kwan to review the poll books in
20 these precincts in order to credit voters with voting. She did so, creating the spreadsheet
21 that was admitted into evidence as Exhibit 35. She credited 252 persons with having
22 voted, by speculating that persons who signed the poll book in the provisional ballot
23 section might also have been the ones who passed the ballots through the Accuvote
24 machine. In fact, of course, once a ballot is separated from the provisional ballot envelope,
25 it is no longer possible to determine who cast it, and the ballot was cast illegally whether or
26 not cast by a registered voter. Linda Sanchez in her deposition testimony made clear that
27 once a provisional ballot had been counted in the Accuvote machine, there was no way to
determine who had cast it; the effort to connect a provisional ballot that was counted in the
Accuvote machine with a particular voter who signed the poll book was at best an
"educated guess." Sanchez Dep., 147:4-148:23. In general, of the provisional ballots that
were properly returned to King County headquarters for verification, only about 80% were
verified as coming from a person registered to vote in King County who had not cast
another ballot, and counted. Tr. 430.

1 Mr. Huennekens testified that he also identified “no label precincts,” that is,
2 precincts in which there were significant numbers of voters signing the poll book in the
3 provisional ballot section for whom no provisional ballot label was returned to King
4 County headquarters. Mr. Huennekens selected this group not because he thought the list
5 was exhaustive, but, as he testified, based on what he thought could be completed in a
6 certain period of time. Tr. 373. He did not attempt to investigate every discrepancy not
7 accounted for. Tr. 373-74. Mr. Huennekens instructed Colleen Kwan to prepare a second
8 spreadsheet quantifying these instances. Ms. Kwan identified 437 such instances, in which
9 a person signed the provisional ballot section of the poll book in a precinct, but for whom
10 no label appeared on that precinct’s provisional ballot label sheets. Tr. 374. The
11 conclusion Mr. Huennekens drew from these circumstances was that the provisional ballot
12 outer envelope was not returned to King County Election Headquarters. These were also
13 instances in which the Polling Place Reconciliation Summary, Exhibit 36, showed positive
14 discrepancies. King County concluded that they represented another 437 examples of
15 provisional ballots having been illegally run through the Accuvote machine at the precinct
16 polling sites. Tr. 377.

17 Mr. Huennekens testified that the universe of precincts that generated the 348
18 spreadsheet, Exhibit 35, is a distinct set of precincts from the universe of precincts out of
19 which he generated the 437 spreadsheet, Exhibit 37. King County has no explanation for
20 the difference of 370 between the total number of positive discrepancies, 1,155, and the
21 785 accounted for in the two spreadsheets. Some are instances in which the canvassers in
22 their notes recorded evidence of crossover voting. *See* Ex. 149. These notes seem to
23 account for far fewer than half of the remaining 370 discrepancies, however. Linda
24 Sanchez in her live testimony said that even after allowing for every ascertainable
25 explanation of the positive discrepancies (including the 348 and the 437 shown on Exhibits
26 35 and 37), and after assuming that negative discrepancies at precincts in a poll site could
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1 be set off against positive discrepancies at precincts in the same poll site, there were still
2 216 more ballots counted than signatures in the poll books.⁵ The canvassers' notes in
3 Exhibit 149 reinforce the fact that the problems of provisional ballots being counted in the
4 Accuvote machines was of very significant magnitude, as time after time, in precinct after
5 precinct, the canvassers noted instances of provisional ballots being counted in the
6 Accuvote machines.⁶

7 Mr. Huennekens testified that he knew well in advance of the November 2004
8 election that persons might attempt to cast provisional ballots through the Accuvote
9 machines, and that the provisional ballot voting process needed to be carefully monitored.
10 Among other things, the King County Citizens Elections Oversight Committee Report in
11 May 2004, Ex. 3, identified the problem, and predicted that the general election in 2004
12 would see an increase in the use of provisional ballots. *Id.* at 47 (Bates RC 009856). The
13 Report recommended one reasonably foolproof solution, i.e., color coding the provisional
14 ballots, to make it more obvious to an Accuvote judge when a voter was about to cast a
15 provisional ballot in the Accuvote machine, and, if ballots were nonetheless cast
16 improperly, to make it possible to identify such improperly cast ballots in the Accuvote
17 machine at the end of election day and to deduct those votes from the candidate totals.
18 Other counties used various methods such as making the provisional ballots a different size
19 or placing stickers on them so they could not be read by counting machines at polling
20 places. Evelyn Arnold testified, for example, that Chelan County does design provisional
21 ballots so that they cannot be inserted into poll site counting machines. Tr. 268-269. King
22 County did not adopt these easy prophylactics, and in fact adopted virtually no measures to
23 prevent provisional ballots from being cast in the Accuvote machines. Provisional ballots
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25 ⁵ See Ex. 36 at 83, center column; Ex. 16 at 4-5.

26 ⁶ Mr. Huennekens testified that some poll inspectors would not be asked back, due to
27 errors in permitting provisional ballots to be tabulated in the Accuvote machines.

1 and poll ballots were identical. Mr. Huennekens testified that he spoke to election workers
2 about the problem, and advised them to “crease” provisional ballots when handing them
3 out so that the Accuvote judge might see that a ballot about to be fed into the machine was
4 a provisional ballot. This suggested measure was obviously ineffective. Mr. Huennekens
5 testified that King County passed out about 33,000 provisional ballots on election day.
6 The evidence is that nearly 1 in 30 of these was cast directly into the Accuvote machine.

7 The tabulation of provisional ballots in the Accuvote machines in King County was
8 thus the consequence of easily preventable error and neglect. In addition, such votes are
9 plainly illegal. A vote is illegal if illegal when cast. *See Gold Bar Citizens for Good*
10 *Government v. Whalen*, 99 Wn.2d 724, 729 (1983) (quoting *Foulkes*, 85 Wn.2d at 634, and
11 internally citing *Bush v. Head*, 154 Cal. 277, 97 P. 512 (1908)). Provisional ballots
12 counted in the Accuvote machine are illegal at a minimum because they were not cast in
13 the manner provided by law, i.e., by returning them to the poll workers in an unmarked
14 security envelope and outer envelope so that they could be verified before being tabulated.
15 Other ballots counted in excess of poll book signatures are illegal because every poll or
16 provisional voter must sign the poll book before receiving a ballot, let alone before casting
17 one. *See* Petitioners’ Trial Brief at 20-26. In addition to being illegal, all of the
18 provisional ballots counted in Accuvote machines at the polls were counted as a result of
19 the misconduct of precinct election boards that did not follow instructions and allowed
20 provisional ballots to be counted without verifying that they were cast by registered voters.

21 **C. The 875 Extra Absentee Ballots.**

22 As discussed in Section II.A, election officials agree on the importance of audit
23 trails and other safeguards required by law to ensure the accuracy of vote tallies.
24 Reconciling the number of ballots received to the number of ballots counted and the
25 number of ballots rejected is necessary to ensure against both the addition of extra ballots
26 (intentionally or through inadvertence) and the exclusion of ballots (intentionally or
27

1 through inadvertence). Tr. 152-54, 160-164 (Sam Reed), 274-78 (Evelyn Arnold), 509
2 (Nicole Way), 1363-67 (Bob Terwilliger).

3 With respect to absentee ballots, WAC 434-240-270 mandates that an audit trail be
4 maintained, including a “reconciliation that all absentee ballots counted plus all absentee
5 ballots rejected is equal to the total number of absentee ballots received.”

6 WAC 434-240-270(7). “So the fundamental process is that you know how many ballots
7 you have you look and see how many were counted, and if they don’t match, then you stop
8 and you go back and you find out.” Tr. 160 (Sam Reed).

9 As King County Mail Ballot Supervisor Nicole Way testified, the DIMS system
10 should have provided a check on the number of absentee ballots returned to King County,
11 but King County officials were not able to reconcile using the DIMS system. Tr. 510-19.
12 Accordingly, after the election Ms. Way and her employees undertook to reconcile the
13 number of ballots counted against the number of absentee ballot voters whose votes had
14 been accepted. Tr. 523-24.

15 The data compiled by King County in connection with this effort is reflected in
16 Exhibits 279 and 299. These data indicate that King County *credited 564,206* absentee
17 voters.⁷ But King County had reported to the Secretary of State that it had *counted*

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19 ⁷ The WSDCC has attempted to argue that the data compiled by King County in order to
20 comply with WAC 434-240-270(7) should not be considered because it reflects “crediting”
21 of votes of a type that the Court had held would be insufficient to establish that an
22 individual felon had in fact voted. The reasons underlying the Court’s ruling with regard
23 to felons are not applicable here, however. As Nick Handy testified, the discussion of
24 crediting in his talking points that the Court relied on in its previous ruling does not apply
25 to absentee ballots. Tr. 1280-82 (“I agree with everything you’re saying in the absentee
26 ballot/provisional ballot environment. The crediting of the voter issue is really—that has
27 been controversial here relates more to the practice of crediting the poll votes”). Unlike
poll book crediting, absentee crediting must be completed before the election is certified
(see WAC 434-240-250, requiring absentee ballots to be credited before provisional ballots
are processed). The system used by King County to process absentee ballots causes a
voter to receive credit for voting once their absentee ballot bar code is scanned by the
vendor who processes the ballots, unless an elections worker affirmatively challenges the
ballot. The opportunities to mis-scan a poll book bar code that call poll voter crediting into
question do not exist with absentee ballots. The law requires that an absentee ballot cannot

1 565,014 absentee ballots, or 808 ballots in excess of the number it could show were cast
2 (and cast only once) by a registered voter. These figures are set forth in the demonstrative
3 exhibit discussed by Clark Bensen at pages 679-87 of the transcript. For the convenience
4 of the Court, a copy of that demonstrative exhibit is attached as Exhibit A hereto.

5 Ms. Way and Mr. Bensen discussed four known differences between the sources for these
6 numbers. Tr. 528-29, 683-84.⁸ After the four known differences were accounted for, a
7 discrepancy of 875 votes remained. In other words, King County counted 875 more
8 absentee ballots than there were legitimate absentee voters.

9 It is impossible to know what accounts for the 875 extra absentee ballots. It could
10 be the inadvertent counting of legitimate ballots more than once or other errors.⁹ Or, it
11 could result from intentional ballot box stuffing. As Mr. Bensen testified, describing King
12 County's own election data, Rossi received a very low percentage of votes in the five
13 precincts that had the greatest number of *counted* absentee ballots in excess of *credited*
14 absentee voters. At the same time, Rossi received a high percentage of the votes in those

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16 be counted until the signature is verified (RCW 29A.40.110(3)). The signature cannot be
17 verified until the ballot has been marked as returned in the DIMS system, which causes the
18 signature verification screen to appear. The default is for every returned ballot to result in
19 a voter credit, absent worker intervention. So, if errors occur, it is more likely they will
20 cause too many credits than too few.

21 ⁸ Two hundred fifty-one federal write-in ballots and 69 ballots cast by confidential voters
22 were counted but not reflected in the tally of 564,206 accepted ballots. Ninety-five
23 absentee ballots found in March 2005 and 292 late-rejected ballots were included in the
24 tally of 564,206 accepted ballots but were not counted. The WSDCC's Motion to Strike
25 Testimony of Clark Benson, at 5, tacitly concedes that three of these four adjustments are
26 appropriate and that King County therefore counted *at least* 583 more absentee ballots than
27 there were absentee voters.

⁹ Counsel for the WSDCC argued that the 875 ballots were "verified, matched, came from
a registered voter prior to counting." Tr. 1050. Even if one could be certain that this
statement were true, it would not preclude the circumstance of a verified, matched ballot
from a registered voter being counted multiple times. Nothing in evidence rules out the
possibility that invalid absentee ballots were simply introduced into the ballot stream at
any of several points as batches of ballots went through King County's processes.

1 precincts that had the greater number of *credited* absentee voters in excess of *counted*
2 absentee ballots. Tr. 696-701. In other words, where extra absentee ballots were added,
3 they tended to be in “Gregoire precincts.” Where absentee ballots should have been
4 counted but were missing, they tended to be in “Rossi precincts.” This is a disturbing
5 pattern, as everyone who was asked testified that any errors should be randomly
6 distributed. *E.g.*, Tr. 484 (Bill Huennekens), 1371-72 (Bob Terwilliger) (“Yes,
7 absolutely”).

8 While it may never be known exactly why King County counted 875 more absentee
9 ballots than there were absentee voters, what is known is that the extra 875 ballots were
10 illegal and invalid. If an extra vote occurred because of a legitimate ballot being counted
11 more than once, or because a voter cast multiple ballots, such a vote would be an illegal
12 vote under RCW 29A.68.020(5)(a)(i). If the extra vote came from a voter whose absentee
13 ballot was rejected, the rejection would have been because the ballot should not have been
14 counted for a number of reasons, *e.g.*, that the voter’s registration had been canceled, that
15 the voter did not sign the ballot as required by law, that there was no signature on file and
16 therefore that the voter was not properly registered, or that the signature on the ballot did
17 not match the signature in the registration file and, therefore, was presumably not that of
18 the voter to whom the ballot was sent. Obviously, if the ballots were introduced into the
19 stream of ballots by someone other than a lawful voter in an attempt to influence the
20 election, they would also be illegal and invalid.

21 Counting more absentee ballots than the number of existing legitimate absentee
22 voters is, moreover, the result of “error, wrongful act, or neglect” on the part of election
23 officials, for purposes of RCW 29A.68.011. These extra ballots should not have been
24 counted.

1 **D. Felons, Dead Voters and Multiple Voters.**

2 The evidence presented by both Petitioners and the WSDCC proves that vast
3 numbers of felons, multiple voters, and people casting votes in the name of dead persons
4 voted illegally in the 2004 general election.

5 Pursuant to ER 1006, Petitioners introduced eight separate exhibits that summarize
6 Petitioners' evidence proving that at least 789 ineligible felons, dead people, and multiple
7 voters voted in the 2004 general election. *See* Exs. 284-290, 306. These exhibits were
8 prepared by Dan Brady based on his review of hundreds of files and records (brought to
9 the court) and introduced during his testimony. Tr. 211-219, 942-43.¹⁰

10 First, Exhibits 285-289 accurately summarize the voluminous evidence that proves
11 that each person listed in the exhibits (1) voted in the 2004 general election; (2) was
12 convicted of a felony as an adult; (3) was not given a deferred sentence; and (4) has not
13 had his or her civil rights restored. Tr. 211-18. The Director of Elections for the State of
14 Washington, Nick Handy, specifically testified that a vote by a felon whose rights have not
15 been restored is "an illegal vote in the definition of the statute and in any other sense." *See*
16 Tr. 1245; RCW 29A.68.020(5)(a)(ii).

17 Second, Exhibit 290 summarizes the evidence that proves that illegal votes were
18 cast in the name of deceased voters in the 2004 general election. As Mr. Brady testified,
19 the records summarized in Exhibit 290 prove that a ballot was cast in the name of a
20 deceased voter. Tr. 218. This evidence includes a certified copy of a death certificate
21 "indicating that this voter died prior to that ballot being cast." *Id.* As Mr. Handy testified,
22 votes cast in the name of deceased persons are illegal votes within the meaning of the
23 election contest statute:

24 Q. Should a county count ballots cast in the name of the
25 deceased?

26 _____
27 ¹⁰ The WSDCC also has produced evidence of additional illegal votes cast by felons.

1 A. Not if they know it's in the name of the deceased. If
2 someone has put a signature on it that passes the signature
3 test and it comes in and it goes in the ballot box, it's going to
4 be counted and there's not any way to get it out. But if they
5 know it's from a deceased voter, it should not be counted.

6 Q. Would you call that an illegal vote?

7 A. I believe that's an illegal vote. I'm thinking the term of
8 art there, illegal vote in election contest.

9 Tr. 1263.

10 Third, Exhibit 306 lists voters in King County in whose name more than one ballot
11 was cast in the 2004 general election. Tr. 944. It can hardly be disputed that these too, are
12 illegal votes within the meaning of the statute. RCW 29A.68.020(5)(a)(i); Tr. 1263 (Nick
13 Handy).¹¹

14 **E. The Standard; Herein of *Foulkes v. Hays*, *Hill v. Howell*, and
15 *Proportionate Reduction*.**

16 In light of the evidence regarding the number of felon votes, the number of excess
17 poll votes, the number of excess absentee ballots, and the disturbing distribution of the
18 absentee vote discrepancies, this Court is compelled by *Foulkes v. Hays*, 85 Wn.2d 629,
19 732 P.2d 777 (1975), to annul the issuance of the certificate of election to Christine
20 Gregoire. Petitioners have previously briefed the effect of *Foulkes v. Hays* on this action,
21 see Petitioners' Trial Brief at 27-35, and the argument will not be repeated in detail here.

22 In summary:

23 ¹¹ On May 2, the Court required that parties alleging illegal votes show "to the extent [it]
24 can be established" whether the illegal voter marked the ballot to indicate a vote for a
25 gubernatorial candidate. The specific ballot cast by any one individual cannot now be
26 identified to determine whether such a mark is present. Because of this, Petitioners'
27 experts presented evidence showing the percentage of all ballots on which no vote for
governor was counted (or on which the vote as for Ruth Bennett or a write-in). See Gill
Supplemental Report, Trial Exh. 297, at 4; Katz Second Supplemental Report, Trial Exh.
296, at 1; testimony of Prof. Gill, Tr. 1889:21 – 1890:3; testimony of Prof. Katz, Tr.
881:16 – 882:25. That evidence is probative of whether ballots include a vote for
governor.

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- The Supreme Court in *Foulkes* explicitly held that the trial court, in an election contest, has the authority to set aside an election as a consequence of neglect, whether or not the contestant is able to prove that, but for the neglect, the contestant would have won the election. While the evidence in *Foulkes* suggested that someone had fraudulently altered ballots, the trial court did not rely on that fraud in fashioning a remedy, but rather concluded only that “the election officers had been guilty of ‘neglect of duty’ under RCW 29.04.030 [now RCW 29.A.68.011] in failing to properly safeguard the ballots from tampering.” *Foulkes*, 85 Wn.2d at 631-32.
 - *Foulkes* also expressly held that RCW 29.65.010 [now RCW 29A.68.020] does not provide an exclusive remedy. The Court held that RCW 29.04.030 [now RCW 29A.68.011] provides an alternative remedy available in every case of neglect or error, even when no remedy was available under what is now RCW 29A.68.020. *Foulkes* chose not to proceed under what is now RCW 29A.68.020 *et seq.* because the votes under consideration in *Foulkes* were not illegal – they had been legal when cast, but were subsequently altered. The Court instead afforded a remedy because election officials had been negligent in failing to secure the ballots, thus permitting someone to alter them.
 - *Foulkes* annulled the issuance of the election certificate even though the petitioner was unable to prove that he would have won the election absent the neglect of the election officials.
 - *Hill v. Howell*, 70 Wash. 603 (1912), offers no precedential authority for the proposition that an election contest must fail if the petitioner cannot demonstrate that he would have won the election in the absence of the neglect. The number of votes at issue was too few to have affected the result, and the Court in that case was able, because of the very few ballots at issue, to examine

1 individual voters regarding their qualifications to vote, and regarding how they
2 actually marked their ballots in the race in question. *Hill* does not discuss what
3 relief might have been appropriate if the evidence had shown that the number of
4 illegal votes substantially exceeded the margin of victory, such that the true
5 outcome of the election could not be known with any reasonable certainty.

6 *Hill v. Howell* specifically stated that the Court has the power to annul an election
7 under circumstances “which demonstrate beyond all reasonable doubt that the disregard of
8 the law has been so fundamental or so persistent and continuous that it is impossible to
9 distinguish what votes are lawful and what are unlawful, or to arrive at any certain result
10 whatever” *Hill*, 70 Wash. at 612-13.

11 This is that case. Here:

- 12 • All provisional ballots counted in precinct Accuvote machines were illegally
13 cast. The evidence is undisputed that there were at least 785 (348 plus 437),
14 such votes. Certainly the evidence is clear and convincing that these votes were
15 cast illegally through the Accuvote machine. The WSDCC offers only
16 speculation that they were not. King County is unable to account for at least
17 216 additional “positive discrepancies, and since these are instances in which a
18 vote was counted where no voter signed the poll book, these votes are also
19 illegal.
- 20 • Likewise, the law requires that absentee ballots be verified before they may be
21 counted. Again, the evidence is easily clear and convincing that at least 875
22 absentee ballots were counted in excess of those that were verified. The
23 discrepancy of 875 extra absentee ballots was made possible because of King
24 County’s failure to maintain an audit trail and its failure to provide an accurate
25 report to the canvassing board. The distribution of this discrepancy suggests a
26 disturbing bias.

- 1 • The Petitioners have offered evidence of at least 789 ballots cast by ineligible
2 felons, in the names of dead people and by multiple voters. The WSDCC has
3 introduced evidence of additional illegal votes by such voters.
4 • The 95 (now 96, according to Bill Huennekens’ testimony, Tr. 331) validated
5 absentee ballots not counted in the election and only recently discovered by
6 King County were predominantly from precincts in which Rossi won a majority
7 of the vote, and would have been counted if King County had followed the law.

8 According to Secretary of State Sam Reed, “the fundamental process is that you know
9 how many ballots you have, you look and see how many were counted, and if they don’t
10 match, then you stop and you go back and find out.” Tr. 160:15-18. *Accord*, WAC 434-
11 253-204 (requiring reconciliation of poll-site ballots); (WAC 434-240-270(7) (each county
12 auditor must maintain records showing that “all absentee ballots counted plus all absentee
13 ballots rejected is equal to the total number of absentee ballots received”). King County
14 has disregarded the law on a fundamental point regarding the integrity of elections. It is
15 not possible to fairly review the evidence and conclude anything other than, as the Court in
16 *Hill v. Howell* thought might someday be the case, “that it is impossible to distinguish what
17 votes are lawful and what are unlawful, or to arrive at any certain result whatever”
18 Even WSDCC expert Christopher Adolph conceded that “it is impossible” to determine
19 “whether or not Christine Gregoire got that certificate of election because she got the most
20 legal votes.” Tr. 1628-29. The certificate of election in this case therefore must be
21 annulled under both *Hill* and *Foulkes*.

22 In the alternative, Petitioners have offered testimony from Dr. Katz and Dr. Gill
23 that the proportional reduction model provides an appropriate means to account for the
24 illegal votes. Tr. 734-75, 848-55, 872-98 (Dr. Katz), 898-923 (Dr. Gill); *see also*
25 Tr. 1245-47 (Nick Handy) (circumstantial evidence to prove how illegal votes were cast is
26 “essential”). *See generally* Petitioners’ Trial Brief at 37-42; Petitioner’s Opposition to
27

1 WSDCC's Motion to Exclude Expert Testimony. While the WSDCC challenged the
2 admissibility of this expert testimony under *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923),
3 Petitioners have demonstrated that the testimony is admissible and persuasive.

4 As an initial matter, the *Frye* test is inapplicable to the testimony provided by
5 Dr. Katz and Dr. Gill. The *Frye* inquiry is unnecessary if "evidence does not involve new
6 methods of proof or new scientific principles." See *State v. Hayden*, 90 Wn. App. 100, 103
7 (1998). The methodology employed by both Petitioners' experts is well established in the
8 social sciences and has been used in election contests for well over a century. See, e.g., Tr.
9 750 (Dr. Katz) (stating that proportional reduction analysis is a "workhorse of modern
10 [statistics] and . . . a very ancient distribution that we use all the time in social sciences");
11 Exhibit A to Petitioners' Opposition to WSDCC's Motion to Exclude Expert Testimony;
12 McCrary on Elections 364-65 (3d ed. 1897). Indeed, courts have admitted both expert and
13 fact witness testimony as to the proportional reduction of illegal votes. See, e.g., *Marks v.*
14 *Stinson*, 1994 U.S. Dist. LEXIS 5273 (No. 93-6157) (E.D. Pa. April 26, 1994), *aff'd*, 37
15 F.3d 1487 (3d Cir. 1994); Exhibit A to Petitioners' Opposition to WSDCC's Motion to
16 Exclude Expert Testimony.

17 Second, even if the Petitioners' expert testimony were subject to the *Frye* analysis,
18 the testimony of Dr. Katz and Dr. Gill is admissible. As the Court stated, the question is
19 "whether the evidence being offered is based on established scientific methodology. This
20 involves both an accepted theory and a valid technique to implement that theory." Tr. 868.
21 The theory and technique employed by Dr. Katz and Dr. Gill, involving binomial and
22 multinomial statistical proportional reduction, are well accepted in the scientific
23 community. See Tr. 750, 848 (Dr. Katz); 916 (Dr. Gill). While the WSDCC contends that
24 there are questions as to whether felons vote consistent with others in their precinct,
25 Dr. Katz testified that there is indeed a correlation, Tr. 742, which supports application of
26 proportional reduction here.

1 Proportional reduction dictates that the certificate of election in this case must be
2 annulled, because when illegal votes are subtracted from each candidate using this widely
3 accepted method, Rossi received the highest number of legal votes.

4 **III. CONCLUSION**

5 For the foregoing reasons, Petitioners respectfully request that the Election Contest
6 Petition be granted and that the issuance of the Certificate of Election to Christine Gregoire
7 be annulled.

8 DATED this 3rd day of June, 2005.

9 Davis Wright Tremaine LLP
10 Attorneys for Petitioners

11 By *David M. Bourman, for*
12 Harry J. F. Korrell, WSBA #23173
13 Robert J. Maguire, WSBA #29909
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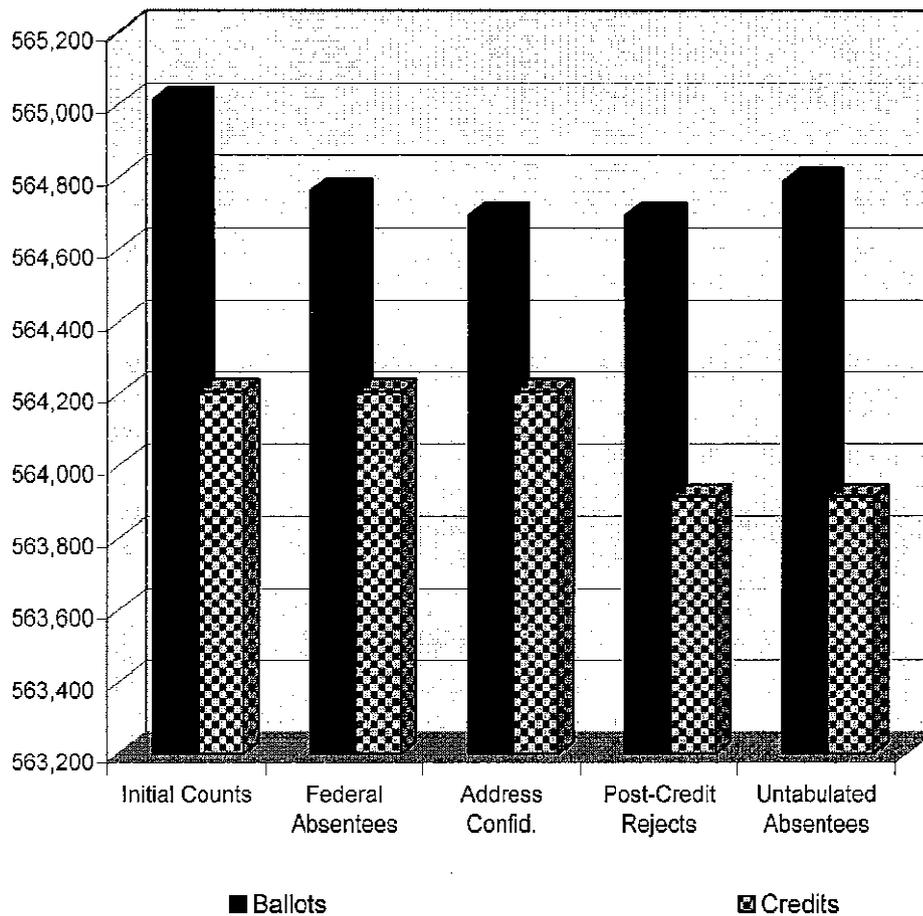
EXHIBIT A

King County Absentee Crediting, Overall Net Difference

How the Balance Sheet Changes Step-by-Step

Line STEP	Ballots	Change	Credits	Change	Diff (B-C)
1 Initial Counts	565,014		564,206		808
2 Federal Absentees	564,763	-251	564,206	0	557
3 Address Confid.	564,694	-69	564,206	0	488
4 Post-Credit Rejects	564,694	0	563,914	-292	780
5 Untabulated Absentees	564,789	95	563,914	0	875

Ballots-Credits by Adjustment Steps



Notes.

- A Difference is calculated as Ballots-Credits
- B A positive difference indicates extra ballots or missing credits.
- C A negative difference indicates missing ballots or extra credits.

Diff (B-C)	Ballots	Credits
808	565014	564206 Initial Counts
557	564763	564206 Federal Absentees
488	564694	564206 Address Confid.
780	564694	563914 Post-Credit Rejects
875	564789	563914 Untabulated Absentees

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

2 **Petitioners' Brief at Close of Evidence, and**

3 **Certificate of Service**

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

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9 Attorneys for Washington State Democratic
10 Central Committee
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7 I certify under penalty of perjury under the laws of the State of Washington that the
8 foregoing is true and correct.

9 DATED this 3rd day of June, 2005, at Seattle, Washington.

10 
11 _____
12 Margaret C. Sinnott