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2 Petitioners submit this trial brief in anticipation of the trial of this action, set to
3 commence on May 23, 2005.

4 I. INTRODUCTION

5 The basic facts are by now well known to the Court. Initial tabulations of the
6 ballots cast in Washington's general election on November 2, 2005 showed Dino Rossi to
7 have received the most votes for the office of Governor. Because the margin of Rossi's
8 election was less than 2,000 votes (out of some 2.9 million votes counted) and less than
9 one half of one percent of the total number of votes cast for the two candidates, the
10 Secretary of State ordered a mandatory machine recount pursuant to RCW 29A.64.021(a).
11 After the machine recount, Rossi led Gregoire by 42 votes statewide. Gregoire applied for
12 a manual recount pursuant to RCW 29A.64.011. The manual recount gave the election to
13 Gregoire by a margin of 129 votes.

14 The 39 counties certified their final election results to the Secretary of State during
15 December 2004, pursuant to RCW 29A.60.230 and WAC 434-262-080. The Secretary of
16 State transmitted the results to the Speaker of the House of Representatives pursuant to the
17 Wash. Const. art. III, § 4. On January 10, 2005, the presiding officers of both houses of
18 the legislature delivered a Certificate of Election to Gregoire. On January 7, 2005, the
19 Petitioners filed their Election Contest Petition and the first of numerous affidavits of
20 electors in accordance with RCW 29A.68.011 *et seq.*

21 The change in the election result in the manual recount was largely attributable to
22 changes in the results in King County, the largest and the most heavily Democratic county
23 in the state. According to the results of the initial count in King County, Gregoire received
24 59% of the votes cast for either Gregoire or Rossi. In the machine recount, King County
25 counted an additional 941 votes cast for the two candidates, of which King County counted
26 593, or 63%, for Gregoire. In the manual recount, King County counted another 537
27 additional ballots cast for the two candidates, of which King County counted 358, or

1 66.6%, for Gregoire. At each count, Gregoire's percentage of the newly discovered votes
2 increased.

3 Subsequent discovery has revealed that the counties, principally but not exclusively
4 King County, counted hundreds of votes cast by persons who were disqualified from
5 voting as felons, and a smaller but significant number of persons who voted twice, or who
6 voted using the voter names and registrations of persons who had died prior to the election.
7 Discovery has also confirmed what the press reports were indicating, that King County's
8 election processes, and its compliance with its processes, were grossly inadequate. Many
9 felons were permitted to vote. More than a thousand votes were cast by persons whom
10 King County had failed to ensure were qualified and registered voters, and whose identities
11 can not now be determined. These votes, like those of felons, double voters, and
12 "deceased" voters, were illegal.

13 King County officials have also testified that they knowingly falsified a critical
14 Mail Ballot Report that formed part of the basis for its certification of results to the
15 Secretary of State. King County officials stated on the report that the number of absentee
16 ballots received exactly equaled the number counted plus the number rejected, when in fact
17 they knew that they had not tracked the number received and that the number listed on the
18 report as received was merely the sum of those counted and those rejected. Long after
19 certification, and in fact many weeks after the commencement of this election contest,
20 King County was still discovering uncounted absentee ballots. Dean Logan, King
21 County's Director of Records, Elections and Licensing Services Division, has admitted the
22 effect of the flaws in King County's election processes:

23 Q. (By Mr. Maguire) Do you know whether the returns
24 in King County were accurate within 129 votes?

25 A. Can you repeat? The difference in votes was far
26 more than 129 in King County so --

27 Q. Right. But the question is do you know whether the
returns in King County were accurate within 129 votes?

1 King County discovered 95 absentee ballots that it had never opened or counted, primarily
2 from precincts that Rossi won, and Pierce County discovered an additional 64 such
3 uncounted ballots.

4 Neither Petitioners nor any other party will be able to offer evidence proving with
5 certainty, on a ballot by ballot basis, for which candidate these various illegal or
6 erroneously counted votes were cast. As a consequence, both Petitioners and the WSDCC
7 will (if necessary¹) offer expert testimony statistically analyzing the illegal or erroneously
8 counted votes on a precinct by precinct basis to determine the likely distribution of the
9 illegal or erroneous votes among the candidates, and then deducting from the total votes
10 for each candidate the illegal or erroneous votes shown to have been cast for each
11 candidate. Petitioners will ask the Court at the conclusion of the case to set aside the
12 issuance of the certification of election to Gregoire, on the ground that, after deduction of
13 illegal votes from both candidates, the evidence shows that Rossi received more legal votes
14 than Gregoire, and on the alternative ground that as a consequence of the errors, neglect,
15 omissions and misconduct of election officials, the true outcome of the general election for
16 the office of Governor cannot be known.

17 III. FACTS

18 A. Illegal Votes Cast by Identifiable Voters.

19 Petitioners will offer evidence proving that the county auditors together counted
20 some 800 illegal votes of identifiable voters.

21 1. Felon Voters.

22 The Constitution disqualifies any person from voting who has been convicted of an
23 infamous crime and whose civil rights have not been restored. Wash. Const. art. VI, § 3.
24 Petitioners will prove at trial that some 883 such persons voted in the general election.

25 ¹ In the view of Petitioners, the law requires that where election officials, through error,
26 neglect, omission or wrongful conduct, make it impossible to determine who actually
27 would have won the elections based solely on legal and properly counted votes, this Court
must vacate the issuance of the Certificate of Election.

1 Petitioners will offer evidence as to each voter, consisting variously of Judgment and
2 Sentence Reports, Convicted Felon Reports, criminal file docket entries, letters revoking
3 voter registrations, and certifications from the Secretary of State, the Indeterminate
4 Sentence Review Board, the Department of Corrections, the Office of the Governor, and
5 the Office of the Administrator of the Courts regarding the absence of evidence of a
6 restoration of civil rights. Petitioners are hopeful that much of this evidence will be
7 offered through stipulation.

8 **2. Persons Who Voted More Than Once.**

9 Petitioners will offer evidence of eight instances in which a voter cast more than
10 one vote in the general election. To prove these facts, Petitioners will offer the poll book
11 pages or provisional ballot or absentee ballot envelopes in each precinct in which the voter
12 in question cast votes.

13 **3. Persons Who Voted in the Name of a Deceased Person.**

14 Petitioners will offer evidence that 47 voters statewide voted in the name of a
15 person who, though perhaps properly registered at one time, was deceased on the date of
16 the general election. As proof, Petitioners will offer copies of the appropriate poll book
17 page or provisional or absentee ballot outer envelope, and a certified copy of the death
18 certificate for that voter.

19 **4. Other Categories of Identifiable Illegal Voter.**

20 Several voters voted in this election and in another state. In Lewis County, two
21 persons cast ballots in the name of other persons who were lawfully registered voters.

22 **B. Illegal Votes Cast by Persons Who Cannot Be Identified.**

23 As a consequence of the errors, omissions, neglect and misconduct of election
24 officials, some counties, but most prominently the director of King County Records,
25 Elections and Licensing Services, counted many hundreds of votes that were cast by
26 persons who never signed the poll books, and whose identity is unknown. With respect to
27

1 some of these votes, it is possible to speculate, based on poll book signatures, who might
2 have cast some of the votes. The testimony will show, however, that the counting of these
3 votes was the result of King County's failure to take simple precautions that would have
4 prevented the erroneous counts, and a widespread breakdown in compliance with the
5 statutory and administrative procedures that, if followed, would have assured that the
6 election results are reliable.

7 **1. The Process of Voting, Counting and Reconciliation.**

8 To appreciate the illegality of these excess or unknown votes, it is helpful to
9 understand the process of voting, counting and reconciliation on and after election day.
10 These processes are governed by detailed provisions of the Elections Code, Ch. 29A RCW,
11 and the Secretary of State's regulations governing elections, which appear at WAC
12 434-208 to -381.

13 **a. Poll Site Voting.**

14 Shortly before election day, the county auditor provides to each precinct a poll
15 book, which is in essence a list of the persons who were registered to vote in the precinct
16 as of the cut off date for registration for the election in question. RCW 29A.08.140; RCW
17 29A.44.110; WAC 434-253-020. The poll book also indicates which of the listed,
18 registered voters had requested an absentee ballot as of the day the poll book was prepared.
19 Under the Elections Code, every registered voter who appears at his or her precinct polling
20 place to vote on election day must sign the poll book next to his or her name. RCW
21 29A.44.210. The precinct election officer then tears the stub off of the next ballot in order,
22 issues the ballot to the voter, and writes the number of the ballot stub by the voter's name
23 in the poll book. The voter marks the ballot and, in King County, inserts the ballot into the
24 Accuvote machine. If the ballot is somehow spoiled before being counted, the precinct
25 election officer may issue a new ballot to the voter, but must retain the spoiled ballot. If
26 the Accuvote machine will not accept and count a marked ballot, or if a voter is unwilling
27

1 to use the Accuvote machine, the precinct election officer places this “uncounted ballot” in
2 a separate bin on the side of the Accuvote machine, to be counted later at the county’s
3 counting center. The number of persons signing the “registered voter” section of the poll
4 book (and the number of ballots issued to such voters) should equal the number of votes
5 counted in the Accuvote machine plus the uncounted ballots (also called “add-ons”) in the
6 add-on bin alongside the Accuvote machine.

7 **b. Provisional Ballots.**

8 Precinct election officials are required to provide a “provisional ballot” to any voter
9 who appears at a precinct to vote, but (a) whose name does not appear in the precinct poll
10 book, or (b) who is shown in the poll book as having requested an absentee ballot but who
11 now wishes to vote at the precinct poll site, or (c) who cannot provide identification if
12 identification is requested. RCW 29A.04.008(5); WAC 434-253-043.

13 A voter who wants to vote by provisional ballot prints his or her name and address
14 in a blank section of the poll book reserved for provisional ballot voters, and must sign the
15 poll book next to his or her printed name. WAC 434-253-043. The voter is then given a
16 provisional ballot, a security envelope, and a larger provisional ballot outer envelope. *Id.*
17 The voter may mark the ballot, and is then required (and should be instructed) to insert and
18 seal the marked ballot in the blank security envelope, to place the security envelope in the
19 outer envelope, and to return the provisional ballot to the precinct election officer. *Id.* The
20 precinct election officer is then to ensure that blank lines on the provisional ballot outer
21 envelope are filled in with the information necessary to enable the county subsequently to
22 verify the voter’s status: name, signature, address, date of birth, and other information.
23 WAC 434-253-045. In King County, the provisional ballot bears a peel-off label on which
24 the precinct election officer is to again write the name of the voter and the precinct number
25 at which the voter is voting. To ensure that provisional ballots are counted only if they are
26 cast by registered voters, the law requires the county auditor *before* counting the ballot to
27

1 investigate and verify that the voter is registered to vote and has not otherwise voted in the
2 election. The precinct election officer is therefore to place the provisional ballot in a
3 provisional ballot container, to await subsequent investigation and verification. The
4 container is separate from the container holding the machine counted ballots, and separate
5 from the container holding the “add-on” – *i.e.*, the marked but uncounted – regular poll
6 ballots.

7 The provisional ballot itself bears no indication of the identity of the voter. Once
8 the ballot is separated from the outer envelope, it cannot be retraced to any voter. It is
9 therefore critical that the marked ballot *not be separated from the outer envelope*, and that
10 the ballot *not be counted before completion of the process of investigation and verification*.
11 In particular, it is critical that the provisional ballot not be separated from the outer
12 envelope and counted at the polling place.

13 **c. Reconciliation.**

14 The process of reconciliation of the number of ballots issued, the number of voters
15 signing the poll books, and the number of votes cast is a critical part of the election,
16 because, as the Secretary of State has testified, it is the only protection against someone’s
17 stuffing the ballot box. When the polls close, the precinct election officers prepare ballot
18 accountability sheets, by which the precinct election officers are to reconcile the total
19 number of ballots issued with the number of signatures in the poll book, and with ballots
20 counted in the Accuvote machine, uncounted ballots, spoiled ballots, and the as yet
21 uncounted provisional ballots. WAC 434-262-203, -204. The precinct election officers
22 then deliver the poll books, the ballot accountability worksheets, uncounted ballots, spoiled
23 ballots, provisional ballots, the Accuvote tape and the counted ballots to the county
24 auditor’s canvassing center. One of the immediate tasks of the canvassers is to remove the
25 label from every provisional ballot outer envelope, and to affix the provisional ballot label
26 to a blank space on provisional ballot label sheets that have been preprinted for that
27

1 purpose. If the provisional ballot outer envelope does not have a label for some reason, the
2 canvassers write as much identifying information as possible in an empty label space, as a
3 surrogate for the label. The number of filled label spaces then should correspond to the
4 number of provisional ballots delivered from the precincts.

5 With respect to provisional ballots, election workers then compare the information
6 on the outer envelope to voter registration and voter crediting records. If after
7 investigation the election worker determines that the voter is registered and has not already
8 voted, the worker removes the security envelope from the outer envelope, removes the
9 ballot from the security envelope, and runs the ballot through a counting machine. The
10 regulations require the County to retain the provisional ballot outer envelopes. WAC 434-
11 253-049.

12 **d. Absentee Ballots.**

13 The law requires that each county issue an absentee ballot to each registered voter
14 requesting one. The county determines before mailing or issuing the ballot that the voter
15 requesting the ballot is registered. The county mails out or issues a ballot, a security
16 envelope, and an outer envelope on which is preprinted the voter's name, address, and
17 precinct number. The outer envelope also bears a preprinted ballot ID code that permits
18 the county, when the ballot is returned, to match the ballot with the voter's voter
19 registration number. The absentee voter marks the ballot, seals it in the security envelope,
20 seals the security envelope in the outer envelope, signs and dates the outer envelope, and
21 mails the envelope back to King County. WAC 434-240-190 to -200.

22 **2. King County Alone Counted More Than a Thousand Votes in**
23 **Excess of the Number of Persons Who Signed the Poll Books to**
24 **Cast Their Votes at the Precinct Poll Sites.**

25 The evidence will show that King County counted more than a thousand votes of
26 persons who should not have been permitted to vote at precinct poll sites. In numerous
27 precincts, the number of votes counted in the Accuvote machine was greater than the

1 number of persons signing the regular section of the poll book. King County's final
2 Polling Place Reconciliation Summary showed that in the precincts in which there was a
3 positive discrepancy – in which, in other words, the Accuvote machine counted more votes
4 (including add-ons) than there were registered voter signatures in the pertinent poll books –
5 the combined positive discrepancy was more than 1,100 votes. There were, in other
6 words, more than 1,100 more votes than there were corresponding voters.

7 One possible explanation for these excess votes was crossover voting. Generally,
8 several precincts share one polling place. It might sometimes happen that a voter who was
9 registered to vote and who signed the poll book in one precinct was given a ballot for a
10 different precinct in the same polling place. Poll workers did not often note that such an
11 event had occurred, however. Another possibility was that a voter who never signed a poll
12 book was nonetheless given a ballot. Still another was that persons who were not
13 registered in the precinct, or whom the poll books showed to have requested an absentee
14 ballot, were given provisional ballots, marked them, and then, in violation of the law (and
15 in violations of instructions given to them, if the precinct election officers were doing their
16 job) inserted the provisional ballots directly into the Accuvote machines. Such ballots
17 would have been counted in the Accuvote machine even though the persons were not then
18 lawfully permitted to vote, and would have been counted before King County could verify
19 that the persons casting the ballots were registered to vote and had not already voted.

20 Once the ballots in this situation were separated from the provisional ballot outer
21 envelope, it became impossible to know the identity of the person casting the ballot and
22 therefore impossible to verify that the person casting the ballot was registered and had not
23 already voted. Bill Huennekens, King County's Superintendent of Elections, was aware of
24 these discrepancies, and was aware that the King County canvassers were unable to
25 reconcile the voting records – that, in his words, it was a “difficult canvass” – but he did
26 not advise the canvassing board either of the magnitude of the discrepancies, or that the
27

1 canvassers were unable to reconcile them, before King County certified the election results
2 to the Secretary of State.

3 Belatedly, King County attempted to quantify the aggregate extent of the
4 discrepancies, and to identify who might have cast provisional ballots in the Accuvote
5 machine. The evidence at trial will show that some time after January 1, 2005 (long after
6 the manual recount, and probably after the issuance of the Certificate of Election) King
7 County officials prepared a spreadsheet listing 348 instances in which, in certain precincts,
8 poll workers or inspectors had indicated on the poll book covers or elsewhere that they
9 believed voters had improperly put provisional ballots through the Accuvote machine.
10 This information had been known to poll workers and to the King County canvassing crew
11 before King County certified its results to the Secretary of State, but no one had bothered
12 to aggregate the data. Still later, King County officials prepared a second spreadsheet,
13 derived from the inspection of data in a *different* set of precincts, in which, King County
14 speculated, the positive discrepancies might have been the result of voters casting
15 provisional ballots in the Accuvote machine. This second spreadsheet showed 437
16 instances in which voters might have put provisional ballots through the Accuvote
17 machines. By attempting to correlate these discrepancies with instances in which persons
18 had signed the provisional ballot section of the poll books, but for whom King County had
19 no provisional ballot envelope label, and therefore no provisional ballot outer envelope
20 returned from a person who had been issued a provisional ballot, King County attempted to
21 make a guess as to who might have run their provisional ballots through the Accuvote
22 machine. If these people were registered, King County credited them with having voted,²
23 although in fact it was not possible to know whether or not they had voted. In this

24 _____
25 ² WAC 434-253-060 requires the county auditor to credit all registered voters who receive
26 a ballot as having voted, irrespective of whether they actually cast the ballot. Voter
27 crediting is performed to prevent double voting and to comply with the law requiring that
the registration of a voter who fails to participate in a certain number of consecutive
elections be cancelled.

1 provisional ballot crediting process, however, King County discovered that some 180 of
2 the persons whom it speculated might have improperly run provisional ballots through the
3 Accuvote machine on election day were in fact not registered to vote, or were for some
4 other reason disqualified from voting, and that more than a hundred had already been
5 credited with having cast a ballot in the election.

6 Notwithstanding that King County did not prepare these spreadsheets until after the
7 issuance of the certificate of election, Bill Huennekens knew that these discrepancies
8 existed and that the discrepancies were significant before the initial certification of the
9 election on November 17, and long before King County certified the results of the hand
10 recount to the Secretary of State. Even though only 42 votes statewide separated the two
11 candidates at the conclusion of the machine recount, Mr. Huennekens did not report these
12 significant discrepancies to the King County canvassing board so that the canvassing board
13 could investigate and resolve them. Thus, King County certified returns that included
14 large numbers of illegally cast ballots – and Mr. Huennekens stayed silent. The Secretary
15 of State testified that he relied on canvassing boards to investigate and resolve
16 discrepancies in their counties prior to certifying their county returns, and that explanations
17 of discrepancies should be part of the reports given to the canvassing boards.

18 King County could have avoided this problem entirely through any number of
19 simple and expedient measures that either would have prevented provisional ballots from
20 being counted by the Accuvote machine or would have permitted the precinct election
21 officers or canvassing team to identify the provisional ballots that went through the
22 Accuvote machine and to deduct them from the appropriate vote totals. Perhaps the
23 simplest device would have been to print the provisional ballots on colored paper stock. If
24 at the end of election day the Accuvote machine contained colored ballots, those could
25 have been readily removed, and the votes shown on those ballots could have been deducted
26 from the vote totals before certification of the election results to the Secretary of State.

1 King County was in fact encouraged to adopt this procedure by the King County Citizens'
2 Oversight Committee (a special committee created as a result of previous problems in King
3 County's election administration), which prepared a report containing recommendations to
4 avoid problems that were foreseeable in elections. King County's election director knew
5 about the warnings and recommendations, but chose not to take the recommended steps to
6 prevent provisional ballots from being cast directly into the Accuvote machines.

7 **3. King County Counted 875 Absentee Ballots in Excess of Persons**
8 **Credited With Having Cast Absentee Ballots, and Knowingly**
9 **Concealed This Information From the Secretary of State.**

10 Absentee ballots are treated differently than provisional or regular poll site ballots,
11 and are credited differently. King County will only mail an absentee ballot to the address
12 of a voter who is registered and who requests an absentee ballot. Returned absentee ballots
13 are collected daily from the post office and are delivered to a vendor, PSI Group, Inc.,
14 which, in an automated process, scans the bar codes on the absentee envelopes, sorts the
15 envelopes into batches by legislative district, and for each batch produces a simple batch
16 data file identifying all of the Absentee Voter Identification (AVID) numbers of the ballots
17 in the batch. The batches and batch data files are then delivered to King County, which
18 assigns a batch number to each batch, and loads the data file into its computer system.
19 When the data is uploaded, the computer reports the number of ballots contained in the
20 electronic record of the batch. An election worker records that number on a batch slip as
21 the original count. The batch slip follows the batch through the process.

22 During the upload, the computer automatically matches the AVID number with the
23 voter's voter registration information in the King County database. The computer system
24 then automatically rejects some ballots based on certain criteria. King County workers
25 physically remove the rejected ballots from each batch. *All voters whose ballots are not*
26 *rejected at this stage are credited with having returned an absentee ballot* King County
27 workers sitting at computer screens then verify signatures, and sort into separate bins the

1 ballots which are unsigned, for which there is no signature on file, or if the signature on
2 file does not match the signature on the ballot. The verifiers record that number on the
3 batch slip as the number rejected and record the number accepted as well.

4 Ballots are then sent to the openers, who open the envelopes and remove the
5 ballots, which are separated from the absentee ballot outer envelopes. Ballots in good
6 condition are sent to be counted. Ballots that are damaged, too lightly marked, or marked
7 in a way that the Accuvote machines will not recognize are sent for enhancement or
8 duplication, and then sent separately to be counted. Ballots containing write-ins are also
9 removed and form a new batch. Other ballots are removed and sent to the canvassing
10 board for its consideration. Empty envelopes are also removed. The opener records on the
11 batch slip the number of ballots that fall within those categories and subtracts those
12 numbers from the amount the verifier indicated were accepted. The result is recorded on
13 the batch slip as the amount ready to tabulate.

14 The ballots are then given to a tabulator who places the ballots in an Accuvote
15 machine that counts the ballots. Ballots rejected by the Accuvote machine because they
16 were damaged, contained stray marks, or for any other reason are removed for duplication
17 or enhancement are sent to the canvassing board. The tabulator records on the batch slip
18 the number of ballots falling into each such category. The Accuvote machine then
19 produces a report indicating the number of ballots that were tabulated. The tabulator
20 records that number on the batch slip, too.

21 Evidence of these King County absentee ballots will show several things. First,
22 according to King County's records (both batch slips and electronic records), discrepancies
23 as to the number of ballots accounted for at each stage of the processing – verification,
24 opening, and tabulation – demonstrate a lack of control and management of absentee
25 ballots.

1 Second, the crediting of absentee voters is an automated process. A voter is
2 *automatically* credited with voting in any instance in which an absentee ballot is returned
3 and the electronic record is not manually marked with a challenge code (such as occurs
4 when a signature does not match during the verification process). Thus, the evidence will
5 show, the voter crediting data reliably indicates who voted valid absentees in the election.

6 Third, the evidence will show that King County officials counted *875 more*
7 absentee ballots than there were voters who were credited with having voted. There is no
8 explanation for these excess ballots other than that some ballots were counted that should
9 not have been. These ballots may have been from voters whose registrations had been
10 cancelled, or who did not sign their ballots, or who had no signature on file and were
11 therefore not properly registered. Or they may have been fraudulently cast votes. There is
12 no way to know what ballots were counted or how they got to the Accuvote machine.

13 Fourth, there is a pattern to the discrepancies in absentee crediting. Garth Fell,
14 King County's assistant superintendent of elections for ballot processing and delivery
15 (responsible for processing absentee ballots), testified that if there were any human errors
16 in the absentee crediting process, they should be random. In King County, however, the
17 precincts with the largest discrepancies show a pattern. The two precincts with the largest
18 positive discrepancy (more absentee ballots counted than voters credited with casting
19 absentee ballots) are precincts in which Rossi won only 22% of the vote. The two
20 precincts with the largest negative discrepancy (fewer absentee ballots counted than voters
21 credited with casting absentee ballots) are precincts in which Rossi received the majority
22 of votes. Fell could not explain any reason for the pattern.

23 Fifth, King County knew prior to its certification of its election results to the
24 Secretary of State that it could not account for the number of absentee ballots that had been
25 returned by voters. Nicole Way, King County's absentee ballot supervisor, has testified
26 that she and Mr. Fell, her supervisor, discussed the fact that they could not determine the
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1 number of absentee ballots returned. Although Fell and Way could not reconcile the
2 absentee ballots because they could not determine the true number of absentee ballots
3 returned, they prepared King County's Mail Ballot Report for the canvassing board
4 providing information that they knew was false. Rather than inform the canvassing board
5 of the serious discrepancies in their absentee ballot auditing, Fell and Way falsely reported
6 on the Mail Ballot Report that the number of ballots returned precisely equaled the number
7 of ballots counted plus the number rejected. Mr. Fell has testified that his supervisor, Bill
8 Huennekens, knew the report was false. They submitted the Mail Ballot Report to the
9 canvassing board on certification day as a report on which the canvassing board relied to
10 certify the returns from King County.

11 King County's falsification of the Mail Ballot Report is no small matter. About
12 566,000 of the 898,000 King County voters in the general election voted by absentee
13 ballot. In addition, if King County is unable to keep track of its absentee ballots, it
14 becomes a simple matter for anybody with access to a county Accuvote machine to stuff
15 the ballot box. Furthermore, the falsification of the Mail Ballot Report made it possible to
16 hide the fact that uncounted valid absentee ballots had been lost. Numerous King County
17 witnesses testified that in late March and early April of 2005, King County found
18 uncounted valid absentees from the November election. At least 95 such ballots were
19 found – most from precincts in King County in which Rossi received the majority of votes.
20 Because these ballots were neither counted nor rejected, if the Mail Ballot Report had
21 accurately indicated the total number of absentee ballots returned, the canvassing board
22 would have known prior to certification that there were unaccounted for absentee ballots.
23 The canvassing board would have had the opportunity to investigate, find, and count the
24 ballots prior to certification. Without a true accounting of the number of absentee ballots
25 returned – as is required by the law – ballots could be added or lost (as was the case with at
26 least 95 valid absentee ballots) and escape detection.

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IV. LEGAL ISSUES

A. Causes of Action.

Petitioners contest the election under two distinct but occasionally overlapping statutes: RCW 29A.68.011, and RCW 29A.68.020.

1. Claims Under RCW 29A.68.011.

RCW 29A.68.011 provides in pertinent part:

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court . . . shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act . . . and to do as the court orders or to show cause forthwith why the error should not be corrected . . . whenever it is made to appear to such justice or judge by affidavit of an elector that:

(1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or

(2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or

(3) The name of any person has been or is about to be wrongfully placed upon the ballots; or

(4) A *wrongful act* other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or

(5) Any *neglect of duty* on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur; or

(6) An *error or omission* has occurred or is about to occur in the issuance of a certificate of election.

RCW 29A.68.011 (emphasis added). RCW 29A.68.011 broadly authorizes the court to grant relief to prevent or correct errors whenever any election officer has performed a wrongful act or has engaged in any neglect of duty (subsections (4), (5)) or whenever an error or omission has occurred in the issuance of a certificate of election (subsection (6)).

1 The statute also gives the court a broad mandate for providing relief: the court may order
2 any person to “correct the error, desist from the wrongful act . . . and to do as the court
3 orders. . . .” *Id.*³

4 **2. Claims Under RCW 29A.68.020.**

5 Petitioners also bring this election contest pursuant to RCW 29A.68.020, which
6 provides in pertinent part:

7 Any registered voter may contest the right of any person
8 declared elected to an office to be issued a certificate of
election for any of the following causes:

9 (1) For misconduct on the part of any member of any
10 precinct election board involved therein; . . .

11 (5) On account of illegal votes.

12 (a) Illegal votes include but are not limited to the
following:

13 (i) More than one vote cast by a single voter;

14 (ii) A vote cast by a person disqualified under
15 Article VI, section 3 of the state Constitution.

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18 ³ RCW 29A.68.011 finds its antecedents in two statutes, RRS § 5202, and RRS § 5276,
19 both enacted in 1889. RRS § 5202 provided for the correction of errors on the ballots for
20 primary and nominating elections, and RRS § 5276 provided for correcting errors on the
21 general election ballot. Both applied only to county elections. In 1907, the Legislature
22 provided for mandatory primary elections, and applied the error statute to the correction of
23 errors in the primary election. In 1965 the Legislature combined the two statutes and
24 recodified the resulting statute as RCW 29.04.030, part of the chapter of the Elections
25 Code entitled “General Provisions.” This combination and recodification was meant to
26 consolidate and simplify the code, not to effect substantive changes. In 1971 the
27 Legislature added a reference to judges of the Court of Appeals. In 1973 the Legislature
added the language “other than as provided in subsections (1) and (3) of this section” to
subsections (2), (4), and (5), and added the limitations period for subsections (1) and (3) as
presently found in the first sentence of the final paragraph.

In 1977 the Legislature added subsection (6), and eliminated the restriction to
county elections, and added the limitations period for subsections (1), (3) and (6). The
statute as amended in 1977 was identical to the current RCW 29A.68.011.

In 2003, the Legislature recodified RCW 29.04.030 as RCW 29A.68.010, for the
first time codifying the statute in the Election Contest Chapter, along with RCW
29A.68.020 *et seq.* In 2004, the statute was recodified as RCW 29A.68.011, as a result of
the partial veto of the primary election act.

1 (b) Illegal votes do not include votes cast by
2 improperly registered voters who were not properly
3 challenged under RCW 29A.08.810 and 29A.08.820.

4 RCW 29A.68.020.

5 **B. The Votes of Which the Petitioners Complain Are Illegal Votes Within**
6 **the Meaning of RCW 29A.68.020(5).**

7 **1. Votes of Felons Are Illegal Votes Within the Meaning of**
8 **RCW 29A.68.020(5).**

9 This issue is not controversial. Felons whose rights have not been restored are
10 constitutionally disqualified from voting. Wash. Const. art. VI., § 3. Under RCW
11 29A.68.020(5)(ii), any vote cast by such a disqualified person is illegal. This Court ruled
12 in its order of February 18, 2005, based on its oral ruling of February 4, 2005, that felon
13 votes are illegal whether or not challenged before the election.

14 **2. Double Votes Are Illegal.**

15 This issue is likewise uncontroversial. As with felon voters, RCW 29A.68.020(5)
16 specifically provides that an illegal vote includes “[m]ore than one vote cast by a single
17 voter. . . .” And as with felon voters, the Court ruled that such votes are illegal whether or
18 not challenged in advance of the election.

19 The WSDCC has contended that where a voter has voted more than once, the Court
20 should only deduct one vote, not two. The WSDCC moved for summary judgment on this
21 issue, and Petitioners responded on May 18, 2005. *See* Petitioners’ Brief In Response To
22 WSDCC’s Motion On Dual Votes, filed May 18, 2005. That argument will not be
23 repeated here.

24 **3. Votes Cast in the Name of Deceased Persons Are Illegal Votes.**

25 Petitioners doubt that the WSDCC will contend that a vote cast in the name of a
26 deceased voter is not an illegal vote within the meaning of RCW 29A.68.020(5). A vote in
27 the name of a deceased person also remains an illegal vote under RCW 29A.68.020(5),
notwithstanding the (5)(b) exclusion for votes not challenged in advance of the election.

1 Petitioners do not allege that *deceased voters* voted illegally; obviously they did not,
2 because they were dead. Rather, Petitioners allege that *somebody fraudulently voted in the*
3 *name of a once registered but now deceased voter, and that election officers accepted and*
4 *counted that vote in error.* The exclusion of RCW 29A.68.020(5)(b) does not reach this
5 situation; it provides only that illegal votes do not include “votes cast by improperly
6 registered voters . . . who were not challenged” before the election. *Id.* (emphasis added).
7 The exclusion only requires, as a condition of contesting an election based on illegal votes,
8 that the *voter* be challenged, not that the registration of a voter who is dead be challenged
9 on the chance that someone will fraudulently cast a vote in that person’s name.⁴

10 **4. All Provisional Ballots Cast (or Potentially Cast) by**
11 **Unregistered Voters, or Cast Directly Into the Accuvote**
12 **Machines, Are Illegal Votes, and Were Counted as a Result of**
13 **Election Worker Error, Neglect or Misconduct.**

14 The Elections Code does not offer an exclusive definition of the term “illegal vote.”

15 RCW 29A.68.020 provides that

16 (a) Illegal votes include but are not limited to the following:

17 (i) More than one vote cast by a single voter;

18 (ii) A vote cast by a person disqualified under Article VI,
19 section 3 of the state Constitution.

20 RCW 29A.68.020(5)(a). This definition is by its own terms incomplete. In *Foulkes v.*

21 *Hays*, the Washington Supreme Court held that the term “illegal votes” means “votes ‘cast

22 ⁴ The WSDCC argument, if adopted, would essentially require that electors set up a
23 statewide mechanism to police the Auditors’ maintenance of a current list of registered
24 voters, by somehow locating information on who has died, and then formally challenging
25 each deceased voter’s registration, all on the chance that someone will fraudulently vote
26 using the deceased voters name, and that the election will be subject to an election contest.
27 The WSDCC has in the past asserted that this process would be practicable because
“public health records are matters of public record.” WSDCC Motion, at 19 ll. 41-43.
This tautological assertion is not helpful in determining what death records are in fact
available, a fact issue that would become relevant if one were to accept the WSDCC’s
strained application of subsection (b)(5) to fraudulent voting in the name of deceased
voters.

1 by persons not privileged to vote and votes not entitled to be counted because not cast in
2 the manner provided by law.” 85 Wn.2d 629, at 634 (1975).

3 Under *Foulkes*, a vote is illegal if illegal when cast. See *Gold Bar Citizens for*
4 *Good Government v. Whalen*, 99 Wn.2d 724, 729 (1983) (quoting *Foulkes*, 85 Wn.2d at
5 634, and internally citing *Bush v. Head*, 154 Cal. 277, 97 P. 512 (1908), in holding votes
6 cast by nonresidents to be illegal because not cast in manner provided by law); *Gooch v.*
7 *Hendrix*, 5 Cal. 4th 266, 851 P.2d 1321 (1993) (citing *Bush v. Head, supra*, for definition
8 of illegal votes as “votes which have not been *cast* in the manner provided by law,” and
9 holding that 930 absentee ballots collected and submitted by political organization were
10 illegal because cast in violation of two absentee ballot procedural statutes) (emphasis
11 added); *James v. Bartlett*, 359 N.C. 260, 267, 607 S.E.2d 638 (N.C. 2005) (holding
12 provisional ballots cast outside proper precinct were illegal under provisional ballot
13 procedural statute, because there was “no indication that . . . our state legislature’s intent in
14 passing [the statute] was to enable voters to *cast* valid ballots outside their precincts of
15 residence when such a vote would not otherwise be supported by state law”) (emphasis
16 added); *Matter of Municipal Election Held on May 10, 1994*, 139 N.J. 553, 557-58, 656
17 A.2d 5 (N.J. 1995) (holding that trial court properly excluded as illegal or invalid certain
18 write-in votes where voter failed to follow exact procedure for casting such vote). The
19 requirement that votes be cast in a manner provided by law has the purposes of hindering
20 election fraud and preserving the integrity of the ballot. See *Gooch*, 5 Cal. 4th at 278
21 (“preservation of the integrity of the election process is far more important in the long run
22 than the resolution of any one particular election”).

23 Provisional ballots cast in and counted by ballot counting devices at the precincts,
24 prior to investigation and verification of registration, are plainly illegal votes under the
25 Elections Code, whether or not it is possible to speculate that the provisional ballots might
26 have been fed through the ballot counting devices by persons who were in fact properly
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1 registered to vote. The issuance, casting and counting of provisional ballots are governed
2 by WAC 434-253-043 *et seq.*, regulations promulgated by the Secretary of State pursuant
3 to statutory authority. *See* RCW 29A.04.610. WAC 434-253-043(4) requires a voter, after
4 marking the ballot, to

5 . . . place the ballot in a security envelope, then place the
6 security envelope with the ballot in it in a provisional ballot
7 outer envelope and *return it to the precinct election official*.
8 The precinct election official shall ensure that the required
information is completed on the outer envelope and have the
voter sign it in the appropriate space, and place it in a secure
container.

9 *Id.* (emphasis added). WAC 434-253-047 then sets forth the investigation that the auditor
10 is to conduct *before* counting the ballot. Subsection -047 provides in essence that the
11 auditor may not count the ballot unless the voter (1) is registered (or was previously
12 registered and the registration was improperly cancelled) and (2) did not vote by absentee
13 ballot.

14 In every case in which a voter accepts a provisional ballot and then marks it and
15 puts it through the ballot counting device, the voter has voted illegally because the voter
16 has cast the ballot, and the precinct election official has permitted the ballot to be cast, in
17 violation of WAC 434-253-043(4). If the voter signed the poll book (a fact of which no
18 person may be sure) and if the auditor has no corresponding provisional ballot envelope,
19 one might guess that the person who signed the poll book cast one of the provisional
20 ballots into the ballot counting device, but it is merely a guess. Someone else may have
21 marked and cast the ballot. The person obtaining the ballot may even have taken the ballot
22 to a different precinct, where some third person may have cast it in the ballot counting
23 device without signing the poll book. The person obtaining the provisional ballot may
24 have decided not to vote at all; and any excess in ballots counted over persons identified as
25 having voted could then be attributed to *any* cause, including fraud.
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1 The illegality of provisional ballots cast in and counted by ballot counting devices
2 at the precincts, prior to investigation and verification of registration, resembles those
3 illegalities found in other jurisdictions where courts have held votes to be illegal if illegal
4 when cast. *See O'Neal v. Simpson*, 350 So. 2d 998, 1000-12 (Miss. 1977) (finding votes to
5 be illegal where officials helped non-disabled voters fill out ballots, because it deprived
6 candidates of the means for detecting fraud); *Glenn v. Gnau*, 251 Ky. 3, 6 (1933) (votes
7 cast outside voting booth without oath or showing of necessity required by election law
8 were illegal); *Adkins v. Huckabay*, 755 So. 2d 206 (La. 2000) (invalidating ballot when
9 voter failed to obtain signature of either notary or two witnesses as required by law);
10 *McCavitt v. Registrars of Voters*, 385 Mass. 833, 836 (1982) (facially valid absentee
11 ballots "cast by good faith voters" were illegal due to procedural mistakes, such as failure
12 to sign ballot in presence of notary); *Stebbins v. Gonzales*, 3 Cal. App. 4th 1138 (1992)
13 (voters' failure to sign identification envelope on absentee ballot rendered votes illegal
14 because not cast in the manner provided by law); *Stringer v. Lucas*, 608 So. 2d 1351, 1360
15 (Miss. 1992) (refusing to dismiss claim that absentee ballots should be invalidated because
16 lacking attester's certification); *Tiller v. Martinez*, 974 S.W.2d 769, 775 (Tex. App. 1998)
17 ("Votes are void and should not be counted if the evidence shows that procedural statutory
18 requirements were not followed in the casting of absentee ballots, even if the ballots were
19 rejected for signature discrepancy."). As with all of these types of votes, whenever a
20 provisional ballot is cast directly into a ballot counting device at a precinct, thus avoiding
21 the procedural and investigative safeguards set out above, the vote is illegal.
22

23 For all of the same reasons, the casting of a provisional ballot directly into the
24 precinct ballot counting devices is error. The WAC clearly imposes responsibilities on
25 both the voter and the precinct election officer. If the precinct election officer fails to
26 ensure the return of each provisional ballot issued to a voter, the proper recording of
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1 information on the outer ballot, and the proper delivery of the ballot for investigation and
2 verification, then the precinct election officer has neglected his or her duty, or has erred,
3 within the meaning of RCW 29A.68.011, or has engaged in an irregularity or improper
4 conduct with the meaning of RCW 29A.68.070.

5 **5. Votes Inexplicably Cast in Excess of the Number of Persons**
6 **Identified as Having Voted Are Illegal Votes.**

7 Even if one were to accept as true King County's speculation that 785 votes
8 counted in the Accuvote machines were cast by persons who obtained provisional ballots
9 from precinct election officers and then put them directly into the Accuvote machines,
10 there still remain some 300-400 votes counted in the Accuvote machine for which there is
11 no adequate explanation.

12 These votes are illegal votes because they were necessarily cast in violation of one
13 or more election statutes. Any of these votes cast by a person who was issued a
14 provisional ballot is illegal for the reasons set forth in the immediately preceding section of
15 this trial brief. Any of these votes cast by a person who did not receive a provisional ballot
16 is illegal because the person casting the vote did not sign the poll book, which is required
17 by statute.

18 Any person desiring to vote at any primary or election is
19 required to sign his or her name on the appropriate precinct
20 list of registered voters.

21 RCW 29A.44.210. The most important purpose of this mandatory procedure is obvious:
22 unless a person signs the poll book, election officials have absolutely no assurance that the
23 voter is either registered or qualified to vote, and has not already voted. The number of
24 signatures on the poll book is also one source of the calculation of the total number of
25 persons voting.

26 The WSDCC may argue that the system is not perfect, that innocent errors occur,
27 and that it is too much to expect that the number of persons recorded as having been

1 properly issued ballots will, after accounting for spoiled ballots, reconcile precisely with
2 the number of ballots counted at the precinct. Some of the errors postulated by the
3 WSDCC and by some county witnesses – poll site voter walkouts, for example – would
4 tend to have the effect of reducing the number of votes counted to a figure *lower than* the
5 number of persons who signed the poll book. The problem in King County is the reverse:
6 the number of counted ballots is *higher than* the number of persons who signed the poll
7 book. The issuance of ballots to person who have not signed the poll book is emphatically
8 not an innocent error; it is a fundamental impairment of the integrity of a system designed
9 to ensure that only qualified and registered voters vote, and that they each vote only once.

10
11 Courts in other jurisdictions have held that votes inexplicably cast in excess of the
12 number of persons identified as having voted are illegal votes. *See Wilkinson v. Queen*,
13 269 S.W.2d 223, 226 (Ky. 1954) (holding that statute requiring voter to sign comparative
14 signature book before he or she casts vote is both constitutional and mandatory) (internal
15 citations omitted); *Hayes v. Abney*, 186 Miss. 208, 188 So. 533 (1939) (ballots cast without
16 first signing poll book were illegal votes because they violated state Corrupt Practices
17 Act); *In re Lannon v. Ring*, 107 Minn. 453, 455, 120 N.W. 1082 (1909) (trial court erred in
18 counting extra ballot which exceeded number of voters who signed the poll book). The
19 ballots cast in excess of the number of registered voters who signed the poll books in the
20 2004 general election fall squarely within the type of votes disallowed as illegal by these
21 other jurisdictions.

22 That allowing such votes to be cast in excess of the number of persons who signed
23 the poll books constitutes error, neglect, or misconduct on the part of precinct election
24 officers seems self evident. The *Hayes* court said it well:

25
26 We think this section was outstanding and mandatory for the
27 prevention of fraud, and the preservation of the purity of the
ballot box. When this section is followed, there can be no
question as to who actually attended and voted in the

1 particular election. With it ignored, the door is left wide open
2 for frauds and the destruction of the will of those who
3 actually qualified and voted in the election.

4 188 So. at 536. The excess ballots in King County demonstrate how election officers left
5 the door wide open for a person to walk into a precinct, take a ballot, mark it, and put it
6 into the vote counter even if that person had already voted or was disqualified from voting.
7 No longer could that vote be removed from the ballot pool or identified with a particular
8 individual, yet it is illegal just the same.

9 **6. Absentee Ballots Counted in Excess of the Number of Voters
10 Credited With Having Voted by Absentee Ballot Are Illegal
11 Votes.**

12 It is not possible to know who cast the 875 absentee ballots that King County
13 counted in excess of voters credited with having so voted. It is possible to know, however,
14 that the votes were illegal. If a person returning an absentee ballot was not credited with
15 voting, it had to have been for one of several reasons: that the voter's registration had been
16 cancelled, that the voter did not sign the ballot as required by law, that there was no
17 signature on file and therefore that the voter was not properly registered, that the voter had
18 already voted, or that the signature on the ballot did not match the signature in the
19 registration file and therefore was presumptively not that of the voter to whom the ballot
20 was sent. In any of these cases, the absentee ballot was not cast in accordance with law
21 and is illegal for the reasons set forth in the preceding sections of this trial brief.

22 It is equally obvious that these votes were cast as a result of the errors, omissions,
23 neglect and misconduct of election officials. The Elections Code and the applicable WACs
24 require election officials to reconcile the absentee ballots received with the votes counted
25 or rejected, to ensure that each legal vote is counted, that to ensure that illegal votes are not
26 counted and that election fraud does not occur. *See* RCW 29A.40.110; WAC
27 434-240-270. The regulation provides in part:

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

1 . . .
2 (7) A reconciliation that all absentee ballots counted plus all
3 absentee ballots rejected is equal to the total number of
4 absentee ballots received.

5 WAC 434-240-270(7) (emphasis added). King County gave the impression of compliance
6 with this mandate, not by actually keeping track of the absentee ballots, but by consciously
7 deciding, at high levels within the Division of Records, Elections and Licensing Services,
8 to falsify the Mail Ballot Report, in order to give the canvassing board and the Secretary of
9 State the impression of accuracy, when there was none. King County's failure to comply
10 with the statutory and regulatory mandates occurred in connection with the tabulation of by
11 far the largest segment of the vote that it counted – the absentee ballots – thus
12 compounding the error, and creating ample opportunity for ballot box stuffing. This
13 intentional misconduct alone, without regard to any other fact in the case, justifies the
14 Court in annulling the issuance of the certificate of election under RCW 29A.68.011.

15 **C. The Court Is Required to Set Aside the Election if Error or Misconduct
16 Under RCW 29A.68.011 Leaves the True Outcome in Doubt.**

17 At the hearing on a number of motions before the Court on May 2, 2005, the Court
18 addressed an issue not specifically before it, that is, whether in order to prevail the
19 Petitioners must show the actual affect of the illegal votes on the outcome of the election.
20 The Court observed that the Petitioners' argument was persuasive, that is, that if the
21 Petitioners can prove that the number of illegal votes exceeded the margin of victory, then
22 the election should be set aside. The Court stated, however, that in its view the election
23 contest statutes require the Petitioners to show that the illegal votes or misconduct changed
24 the election results. The Court relied on RCW 29A.68.110 and -.070. The Court observed
25 in neither *Foulkes v. Hays*, 85 Wn.2d 629, 732 P.2d 777 (1975), nor *Hills v. Howell*, 70
26 Wash. 603, 127 P. 211 (1912), did the courts mention these two statutes, and further
27 observed that in both cases the courts relied on the existence of fraud to relax the
requirement that the contestant must show that the result was changed. The Court further

1 observed that the Petitioners here do not allege fraud, and that the Petitioners therefore
2 must show that the illegal votes changed the result of the election.

3 In the view of the Petitioners, there is ample evidence of fraud, and of the
4 opportunity for fraud, sufficient to give the Court, under any construction of the Elections
5 Code, authority to annul the election irrespective of proof of the identities of the candidates
6 for whom the illegal votes were cast. The Petitioners respectfully urge, however, that the
7 Court arrived at the conclusion without the benefit of complete briefing on the matter, and
8 that in fact under existing law in this state (and elsewhere), the Court has ample authority,
9 in the absence of proof of fraud, to order that an election be set aside based on either illegal
10 votes or more general misconduct, even when the election contestant is unable to prove for
11 whom each illegal or unaccounted for vote was cast.

12 First, the Washington Supreme Court in *Foulkes* explicitly held that the court in an
13 election contest has the authority to set aside an election as a consequence of neglect,
14 whether or not the contestant is able to prove that, but for the neglect, the contestant would
15 have won the election. In *Foulkes*, the county auditor, during the interim between the
16 original tabulation of the ballots and a recount, kept the ballots in canvas bags in a vault
17 that was accessible to several persons during working hours. Each bag was closed with a
18 padlock, but the county had left the keys in the padlock. In the face of conflicting expert
19 testimony, the trial court found that enough ballots had been altered between the original
20 tabulation and the recount to have potentially altered the outcome of the election. Because
21 of the potential alterations, which were in turn made possible because of the neglect of
22 election officials, the court set aside the election, and ordered a new election.

23 The trial court did not, however, rely on fraud in determining either to grant the
24 petition or to order a new election. The trial court concluded only that “the election
25 officers had been guilty of ‘neglect of duty’ under RCW 29.04.030 [now RCW
26 29A.68.011] in failing to properly safeguard the ballots from tampering.” *Foulkes*, 85
27

1 Wn.2d at 631-32. The trial court in its oral opinion found that “there was, in terms of the
2 statute, negligence on the part of the election officials that made the fraud possible.” *Id.*
3 at 632.

4 The disappointed candidate appealed, and the Supreme Court affirmed. The court
5 discussed the interpretation of the very same contest provisions at issue in this contest.
6 The appellant first challenged the power of the court to inquire into the conduct of
7 elections. The Supreme Court observed that RCW 29.04.030 (now codified at RCW
8 29A.68.011) provided statutory authority, but described the statute as

9 [a] statutory recognition of the powers of superior courts,
10 acting within their general equity jurisdiction, to intervene in
11 cases of election fraud or wrongdoing. *Such jurisdiction*
12 *would exist even without such recognition by virtue of a*
Const. art. IV, § 6, unless it were ‘by law vested exclusively
in some other court.’”

13 *Id.* at 632-33 (emphasis added). The court went on to hold that the authority to inquire into
14 the conduct of elections carries with it all the means to remedy whatever neglect may have
15 been discovered. “Where appropriate, these necessary and proper powers would include
16 the power to order a new election where no other remedy would adequately correct
17 distortions in election results caused by fraud or neglect.”

18 The appellants specifically argued that RCW 29.65.010 (*now RCW 29A.68.020*)
19 provided the exclusive remedy, as a subsequently enacted statute. The Supreme Court
20 rejected that notion as well:

21 Where the remedy provided in an election contest statute
22 does not apply to a particular challenge and is not made
23 exclusive, we have held that the power of a court to entertain
24 that action under another head of its jurisdiction is
25 unaffected.

26 *Id.* at 634. The court went on to observe:

27 In a situation such as the trial court found existed here, it
might be impossible to show by whom the ballots were
altered, though it is proven that the alteration took place. To
impose a requirement that an election contestant produce a
smoking gun to obtain relief in such circumstances would

1 deprive him of relief despite the clear merits of his claim that
2 the election was invalid. RCW 29.65.010 [*now*
3 RCW 29A.68.020] therefore did not apply, and the trial court
4 correctly proceeded under the alternative authority provided
5 it by RCW 29.04.030 [*now* RCW 29A.68.011].

6 *Id.* at 634-35.

7 Neither does *Hill v. Howell*, 70 Wash. 603, 609 (1912) stand for the proposition
8 that an election contest Petitioner must offer positive proof, in connection with a claim of
9 error under RCW 29A.68.011, that absent the error the Petitioner would have won the
10 election. In *Hill*, the Petitioner had lost the election by five votes. The Petitioner asserted
11 that six votes were illegal (including five allegedly cast by persons not qualified to vote),
12 and contended that all the votes from one precinct should be disregarded because the
13 precinct polling place closed earlier than permitted by statute. The court found that four
14 votes were illegal, and determined that three should be deducted from the total of the
15 successful candidate. The court declined to disregard the votes from the precinct that
16 closed early.

17 *Hill* has no precedential impact on the current case, for a number of reasons. First,
18 the *Hill* court never discussed what must be proven, or what relief was available, under the
19 predecessor to RCW 29A.68.011. The Petitioners asserted claims and the court decided
20 the case under Rem. & Bal. Code § 4942, which resembled the current RCW 29A.68.070
21 (or its county-office equivalent, RCW 29A.68.080):

22 With reference to general elections, it is provided by statute
23 (Rem. & Bal. Code, § 4942) that no irregularity or improper
24 conduct in the proceeding of the board of judges, or any of
25 them, shall be construed to amount to such malconduct as to
26 annul or set aside any election, unless the irregularity or
27 improper conduct shall have been such as to procure the
 person whose right to the office may be contested to be
 declared duly elected when he had not received the highest
 number of legal votes.

Hill, 70 Wash. at 608-09. Second, the Petitioner did not argue, and the court did not
 discuss, what relief might have been appropriate if the evidence had shown that the number
 of illegal votes, whether or not cast as a consequence of official error or misconduct,

1 substantially exceeded the margin of victory, such that the true outcome of the election
2 could not be known with any reasonable certainty. The court did observe, however, that
3 “the whole conduct of election officers may, although actual fraud not be apparent, amount
4 to such gross negligence and such a disregard of their official duties as to render the return
5 unintelligible or unworthy of credence.” *Id.* at 612. Ultimately, the court in *Hill* denied
6 the writ because there was only evidence of three votes being illegal, while the margin of
7 victory was five votes. It was thus impossible to conclude that the outcome would have
8 changed, no matter to whom the illegal vote was attributed. *Id.* at 613-14.

9 With respect to challenges under RCW 29A.68.011, -.020 or any other statute or
10 law, RCW 29A.68.110 and other similar provisions of the election contest statute seem
11 intended only to guard against the chance that a court might be inclined to annul an
12 election even if the evidence showed that the alleged irregularities could not possibly have
13 affected the outcome of the election. If it were the law that an election contest Petitioner
14 were required to prove that absent the illegal votes the candidate returned would have lost,
15 and another candidate would have won, then the election contest statutes would provide
16 the courts with the power to impose only one remedy, the declaration of the challenger as
17 having been duly elected. In fact, however, the statute gives the court the power of
18 “annulling and setting aside [the] election, according to the law and the right of the case.”
19 RCW 29A.68.060. Annulment is a remedy that is plainly appropriate only if the truly
20 elected candidate cannot be determined. In addition, the relief described as available to the
21 court for errors or misconduct under 29A.68.011 is broad and unlimited. RCW
22 29A.68.011 provides that the judge of a superior court

23 shall, by order, require any person charged with error,
24 wrongful act, or neglect to forthwith correct the error, desist
25 from the wrongful act, or perform the duty and to do as the
26 court orders. . . .

27 RCW 29A.68.011.

1 These same laws make no reference to fraud as giving the courts greater remedial
2 authority than in elections the results of which are infected by error, omission, neglect or
3 misconduct. Indeed, the only mention of fraud in any of the statutes at issue in this case is
4 in the section caption to RCW 29A.68.011 in the codified version of the statute. The
5 captions, however, “. . . do not constitute any part of the law.” RCW 29A.04.901.

6 The legislative history of the statutes suggests, in addition, that the legislature never
7 intended to tie the remedies in RCW 29A.68.070 and -.110 to the power granted to the
8 court in RCW 29A.68.011. RCW 29A.68.011 was originally enacted and was long
9 codified separately from RCW 29A.68.020 *et. seq.* See n.3 *supra*. In the codification as it
10 existed in 1975, when *Foulkes* was decided, the statute that is now RCW 29A.68.011 stood
11 alone in the General Provisions chapter of Title 29. It was only in 2003 that the legislature
12 recodified all provisions regarding election contests under the same chapter of Title 29A.

13 Courts in other states have annulled elections where irregularities irretrievably
14 obscured the true result of the election. See *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir.
15 1978) (ordering new election where “the closeness of the election was such that, given the
16 retroactive invalidation of a potentially controlling number of the votes cast, a new primary
17 was warranted”); *Gooch v. Hendrix*, 5 Cal. 4th 266 (1993) (ordering new election where
18 number of illegal votes appeared sufficient to change outcome of election); *McCavitt v.*
19 *Registrars of Voters*, 385 Mass. 833, 849 (1982) (“[W]henver the irregularity or illegality
20 of the election is such that the result of the election would be placed in doubt, then the
21 election must be set aside and the judge must order a new election.”); *Ippolito v. Power*, 22
22 N.Y.2d 594 (1968) (new election required where number of votes cast in excess of number
23 of voters who signed registration cards exceeded respondent’s margin of victory);
24 *Hardeman v. Thomas*, 208 Cal. App. 3d 153 (1989) (ordering new election where 17
25 contested votes exceeded 16 vote margin of victory); *Hill v. Tressler*, 4 Ohio St. 3d 174
26 (1983) (requiring new election where voting machine malfunction failed to register votes
27

1 within margin of victory); *Marks v. Stinson*, 19 F.3d 873, 887 (3rd Cir. 1994) (“[W]here
2 there is substantial wrongdoing in an election, the effects of which are not capable of
3 quantification but which render the apparent result an unreliable indicium of the will of the
4 electorate, courts have frequently declined to allow the apparent winner to exercise the
5 delegated power.”); *Howell v. Fears*, 275 Ga. 627, 628 (2002) (“It was not incumbent
6 upon [contestant] to show how the Precinct 9 voters would have voted if their ballots had
7 been regular. He only had to show that there were enough irregular ballots to place in
8 doubt the result. He succeeded in that task.”).⁵

9 As a matter of both law and policy, the decision of the voters is best protected by
10 ordering a revote or new election where unlawful votes exceed the margin of victory. In
11 *Gooch v. Hendrix*, 5 Cal. 4th 266 (1993), the court acknowledged that when illegal ballots
12 have been counted along with other ballots, “it cannot . . . be determined with
13 mathematical certainty how the illegal votes on the illegal ballots were cast.” *Id.* at 281.
14 When this calculation cannot be made, the Court cannot, pursuant to the statute, deduct the
15 illegal votes from the defendants to determine who received a majority of the lawful votes
16 cast for each office. *Id.* Courts should act to void an election where “illegal votes cannot
17 be attributed to any one candidate, but nevertheless ‘appear’ sufficient in number or effect
18 to have altered the outcome of the election.” *Id.* at 283. The court observed that while
19 technical errors that do not affect the result will not void an election “neither the policy nor
20 the rule has been invoked to uphold the election in the face of illegalities which affected

21 ⁵ In the analogous context of federal elections, the United States Congress has also
22 determined that a new election is required where vote contamination made it impossible to
23 determine a winner. “Declaring a vacancy in the seat is one of the options available to the
24 House of Representatives and is generally exercised when the House decides that the
25 contestant, while [he] has failed to justify his claim to the seat, has succeeded in so
26 impeaching the returns that the House believes it is the only alternative available to
27 determine the will of the electorate is to hold a new election.” H.R. Rep. No. 626, 92nd
Cong., 1st Sess., *Tunno v. Veysey* at 11 (internal citations omitted), *see also Deschler’s*
Precedents Ch. 9 § 49.1 at 509 H.R. Rep. No. 2255, 83rd Cong., 3rd Sess. *Ray v. Jenks*
(1938)), § 4714 at 495 (H.R. Rep. No. 334 73rd Cong., 2nd Sess. Kemp, Sanders
Investigation (1934)).

1 the result – a situation in which the will of the people may be thwarted by upholding an
2 election.” *Id.* at 284 (citations omitted); *see also Creamer v. City of Anderson*, 124 S.E.2d
3 788 (S.C. 1962) (holding that 73 votes in special annexation election were illegally cast,
4 and that they should all be withdrawn from the winning side in an election contest);
5 *Briscoe v. Between Consol. Sch. Dist.*, 156 S.E. 654, 656 (Ga. 1931) (election should be
6 voided assuming that challenged voters “had all voted against the result reached”);
7 *Maloney v. Collier*, 83 S.W. 667 (Tenn. 1904) (election would be void if the challenged
8 votes were enough to “change the result of the election in the county if all should be
9 treated as voting one way, which is the legal test applicable under the circumstances”).

10 Apportionment, while an option, is clearly an approach that is second best to the
11 remedy of a new election the results of which may be ascertained with certainty. In
12 contrast to the “element of chance” raised by allocation of votes by apportionment, the
13 proper remedy is to void the election to protect the integrity of the election:

14 [T]he rule that has been followed by this court for more than
15 a century and a half in cases involving election to public
16 office . . . is better calculated to safeguard the purity of
17 elections by sending the matter back to the people whenever
18 so many illegal votes have been cast that their deduction
19 from the winning side would affect the result, so that upon a
20 new election it may be determined with certainty which
21 candidate, or which side of the question, has received ‘the
22 greatest number of unquestionable votes.’

23 *Creamer v. Anderson*, 240 S.C. 118, 125 (1962).

24 In *Ippolito v. Power*, 22 N.Y. 2d 594 (N.Y. 1968), apportionment of the vote would
25 not have changed the results, because the percentage going to each candidate would have
26 split the disputed vote evenly and would not have overcome the 17-vote margin of victory.
27 Despite this, the court ordered a new election because “it does not strain the probabilities to
assume a likelihood that the questioned votes produced or could produce a change in the
result.” *Id.* at 598; *see also McCavitt*, 385 Mass. at 850 (declining to apportion votes
because it would require the court “to follow an arbitrary rule which is inconsistent with

1 the theory of a popularly elected representative government.”). As these other jurisdictions
2 agree, the interests and decisions of voters are best protected by a revote when the number
3 of problematic ballots is so large and the margin of victory so small.

4 Ultimately, perhaps the most persuasive argument in favor of annulment due to
5 uncertainty is the sheer numbers of illegal or questioned votes in this case. The final
6 margin of decision was 129 votes, out of more than 2.9 million cast. This is not a case,
7 like *Hill v. Howell*, for example, in which the margin was five votes, and in which about
8 that many votes were in question. Here the margin was 129 votes in the second recount,
9 the only tally that gave the election to Gregoire. The number of illegal votes or questioned
10 votes is in excess of three thousand, most of which were cast or counted in King County,
11 which went 57.66% for Gregoire, and 40.02% for Rossi. If the number of illegal votes
12 were 500,000, out of 2.9 million cast, there is no question how the Court would rule. And
13 if the number of questioned votes were 100, there is likewise no question how the Court
14 would rule. In this case, *Foulkes* permits and the circumstances demand that the Court
15 annul the election, whether or not the Court is persuaded that absent the errors Rossi would
16 have prevailed in the election.

17 **D. The Petitioners’ Burden Is Proof by a Preponderance of the Evidence,
18 Not by Clear and Convincing Evidence.**

19 Washington case law is clear that the burden of proof in election contest cases
20 where the Petitioner alleges neglect and error is “preponderance of the evidence.” *Foulkes*
21 *v. Hays*, 85 Wn.2d 629, 636 (1975) (where appellant alleged “neglect of duty,” expert
22 testimony “amounted to substantial evidence in support of the trial court’s holding that, by
23 *a preponderance of the evidence*, [n]eglect, not fraud, had been shown.”) (emphasis
24 added). Petitioners’ contest petition alleges neglect and error under RCW 29A.68.011, and
25 the *Foulkes* standard is directly on point. Thus, the appropriate standard for the Court to
26 apply at trial is preponderance of the evidence.⁶

27 ⁶ Although the Court made a preliminary ruling on the standard of proof at the May 2,

1 The position taken by the WSDCC in its motion in limine is contrary to
2 Washington Supreme Court decisions and cases from other jurisdictions. *Dumas v.*
3 *Gagner*, cited by the WSDCC for the proposition that the standard is “clear and
4 convincing,” is distinguishable. In *Dumas*, the court went on to state that “clearly invalid”
5 means that the contestant must demonstrate more than an “informality or irregularity in an
6 election which did not affect the result.” 137 Wn.2d 268, 283 (1999). The court did *not*
7 state that “clearly invalid” requires “clear and convincing” proof in every election contest
8 case, nor can such a proposition be inferred given *Foulkes v. Hays*.

9 Other jurisdictions require election contestants to prove election errors by a
10 preponderance of the evidence. *See, e.g., Kirk v. French*, 324 N.J. Super. 548, 552 (1998)
11 (where Petitioner alleged *inadvertently* rejected votes, “petitioner must present proofs by a
12 preponderance of the credible evidence.”) (emphasis added); *Walsh v. Rogillio*, 768 So. 2d
13 653, 656 (La. App. 2000) (“[t]he plaintiff in an election matter has the burden of proof by a
14 preponderance of the evidence.”); *In re Election of United States Representative for*
15 *Second Congressional Dist.*, 231 Conn. 602, 629 (1994) (where contestant alleged
16 irregularities and improper counting of ballots, proper burden of proof is by a
17 preponderance of the evidence). *See also* 29 C.J.S. Elections § 482. Where, as here,
18 Petitioners allege error and neglect, the appropriate burden of proof is preponderance of the
19 evidence, and the WSDCC offers no credible argument to the contrary.

20
21
22
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24
25
26 _____
27 2005 hearing on the motions in limine, it invited the parties to revisit the issue in later
briefing.

1 **E. Petitioners May Satisfy the Requirements of RCW 29A.68.070 (if**
2 **Applicable) Through the Use of Proportionate Deduction of Illegal**
3 **Votes.**

4 **1. Proportional Deduction May Constitute Clear and Convincing**
5 **Proof of the Number of Illegal Votes Each Candidate Received.**

6 Assuming *arguendo* Petitioners must proffer clear and convincing proof (rather
7 than the preponderance of proof) of the candidate for whom each illegal vote was cast,
8 Petitioners may use proportional deduction to meet their burden.⁷

9 Proportional deduction is circumstantial evidence of who received more votes in
10 the 2004 gubernatorial election. *See* Oral Op. 2/4/05 at 5; Secretary of State's Response on
11 Whether Expert Testimony Concerning Proportional Analysis is Barred by RCW 29A.68,
12 at 3-5. Circumstantial evidence can constitute clear and convincing proof of disputed
13 facts. *See, e.g., Miller v. Spokane Int'l Ry. Co.*, 82 Wash. 170, 175-76 (1914) ("Whilst
14 written instruments cannot be set aside, except upon clear and convincing evidence, and
15 the court so instructed, it is not to be forgotten that circumstantial evidence is often more
16 potent than direct evidence."); *Great Am. Ins. Co. v. K&W Log, Inc.*, 22 Wn. App. 468
17 (1979). Similarly, expert testimony may constitute clear and convincing proof. *See*
18 *Foulkes*, 85 Wn.2d at 646 ("The extensive expert testimony provided virtually the 'clear,
19 cogent and convincing' proof of impropriety appellant argues was necessitated by
20 respondent's allegation of fraud."); *In re Colyer*, 99 Wn.2d 114, 135-36 (1983). Courts
21 that have considered specifically whether expert statistical testimony may constitute clear
22 and convincing proof have answered affirmatively. *See, e.g., United States v. Alameh*, 341
23 F.3d 167, 172 (2d Cir. 2003) (statistical evidence may be used to meet clear and
24 convincing evidence standard for proving selective prosecution).⁸ It follows that

24 ⁷ Clear and convincing proof is more stringent than the preponderance of the evidence, but
25 it need not foreclose reasonable doubt. *See* Wash. Pattern Jury Instructions – Civil 21.00,
26 160.03; *see also Black's Law Dictionary* 596 (Bryan A. Garner ed., 8th ed. 2004)
27 ("Evidence indicating that the thing to be proved is highly probable or reasonably
28 certain.").

⁸ Expert statistical testimony may in some cases establish proof beyond a reasonable doubt.

1 Petitioners' expert testimony is capable of clearly and convincingly proving that Rossi
2 received more legal ballots than Gregoire or for whom the illegal votes were cast.

3 **2. Petitioners May Satisfy RCW 29A.68.110 by Proportional**
4 **Deduction of Votes.**

5 The Court has previously stated that "neither specifically has our state legislature,
6 nor our courts established any guidelines" governing the admissibility of evidence of
7 proportional deduction of illegal votes. Oral Op. 5/22/05 at 3. Petitioners' expert
8 testimony on proportional deduction of votes can satisfy RCW 29A.68.110's requirement
9 that an election contestant show "the illegal votes that . . . have been given to the other
10 person."

11 **a. Proportional Deduction Is an Accepted Means of**
12 **Determining for Whom Illegal Votes Have Been Cast.**

13 Numerous states deem proportional deduction of votes sufficient to overturn or
14 decide an election. In *Frese v. Camferdam*, 76 Ill. App. 3d 68 (1979), the court affirmed a
15 trial court decision *overturning the results of an election and seating an election contestant*
16 by proportional deducting illegal votes "in a ratio of each candidate's vote at a given
17 polling place to the total vote cast at that place with respect to the type of ballot cast." *See*
18 *also McNabb v. Hamilton*, 349 Ill. 209 (1932), *over'd on other grounds Waters v. Heaton*,
19 364 Ill. 150 (1936); *Ellis ex rel. Reynolds v. May*, 99 Mich. 538 (1894); *Heyfron v.*
20 *Mahoney*, 9 Mont. 497 (1890); *cf. O'Neal v. Shaw*, 248 Ill. App. 3d 632 (1993) (pleadings
21 that state proportional deduction of illegal votes would reverse results of election are
22 legally sufficient); *Ollman v. Kowalewski*, 238 Wis. 574 (1941) (proportionally deducting
23 excess votes and reversing results of election). In other cases, proportional deduction has
24 decided elections. *See Dirst v. McDonald*, 372 Ill. 498 (1939) (if illegal votes excluded
25 pursuant to witness testimony rather than proportionally deducted, election result would
26 have changed); *Rhyan v. Johnson*, 364 Ill. 35 (1936) (same). In addition to cases where

27

See, e.g., People v. Hill, 624 N.Y.S.2d 79, 80-81 (N.Y. 1995) (reversing conviction on
other grounds).

1 proportional deduction has led a court to decide or overturn an election, it has been held
2 appropriate (if not sufficient) in dozens of other cases. See Table affixed hereto as Exhibit
3 A.

4 Moreover, proportional deduction can be used to decide elections in which there
5 were many voters. The Illinois Supreme Court said that it would have used proportional
6 deduction to decide a gubernatorial election contest if the action were properly plead. See
7 *In re Contest of the Election for the Offices of Governor and Lieutenant Governor*, 93 Ill.
8 2d 463 (1983). Reasoning from the position that “a statewide contest differs from one on a
9 smaller geographic scale only in that many more precincts are involved,” *id.* at 481, the
10 Illinois Supreme Court dismissed a gubernatorial election contest because there were “no
11 facts alleged from which the court [could] determine the number of votes that should be
12 deducted from the total votes of [the] candidates,” *id.* at 489. Unlike the Illinois
13 contestants, Petitioners in the instant contest have sufficiently plead their case and are
14 prepared to demonstrate in which precincts the irregularities occurred and the illegal votes
15 were counted. Proportional deduction is likewise the U.S. House of Representatives’
16 accepted method for deciding election contests. “The general rule in the House for
17 deduction of illegal votes where it is impossible to determine for which candidate they
18 were counted requires reducing the total vote count in affected precincts in proportion to
19 the percentage of votes received by each candidate in each precinct to eliminate the
20 improper ballots from the vote count.” H.R. Rep. No. 416, 105th Cong., 2nd Sess., at 8
21 n.220 (1998) (majority view) (quotations omitted); *accord id.* at 1053-59 (minority view).
22 As such, the Court should use proportional deduction to decide the instant contest.

23 **b. Expert Statistical Analysis Has Been Used to Overturn**
24 **Election Results Where the Contestant Would Have**
25 **Prevailed “But for” Illegal Votes.**

26 Expert statistical testimony was used by a federal district court to overturn an
27 election canvass in *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994). *Marks* was a federal

1 civil rights action resulting from a Pennsylvania State Senate election in which one of the
2 candidates, William Stinson, colluded with the Philadelphia County Commissioners and
3 engaged in absentee ballot fraud. The federal district court issued a preliminary injunction,
4 the effect of which “was to require the decertification of the candidate previously declared
5 to be the winner and the certification of his opponent.” *Marks*, 19 F.3d at 875. The United
6 States Court of Appeals for the Third Circuit partially vacated the injunction, stating that
7 “the district court should not direct the certification of a candidate unless it finds, on the
8 basis of record evidence, that the designated candidate would have won the election but for
9 wrongdoing.” *Id.* at 889.⁹

10 On remand, the district court found that “but for” the absentee vote fraud, candidate
11 Marks would have prevailed.¹⁰ While the burden of proof in *Marks* was unique – “[w]hat
12 is required is evidence and an analysis that demonstrate that the district court’s remedy is
13 worthy of the confidence of the electorate,” *see* 19 F.3d at 889 n.14 – the burden was
14 almost certainly greater than a preponderance of the evidence. The court in making this
15 determination considered testimony from three expert statisticians. *See Marks v. Stinson*,
16 1994 U.S. Dist. LEXIS 5273 (No. 93-6157) (E.D. Pa. April 26, 1994). One expert,
17 Dr. Brian Sullivan, used proportional deduction virtually identical to Petitioners’ expert
18 testimony. *See id.* at *63-64. Dr. Sullivan also used a proportional deduction-type
19 approach to account for the possibility that certain illegal votes were recaptured under
20 Pennsylvania law. *See id.* at *66.¹¹ While the *Marks* court relied on both expert statistical

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22 ⁹ In ordering the remand, the Third Circuit cited *Curry v. Baker*, 802 F.2d 1302, 1313 (11th
23 Cir. 1986), which approved of a state political party’s use of expert opinion testimony from
24 political scientists in an election contest rather than requiring “voter-by-voter testimony.”
25 *See Marks*, 19 F.3d at 889 n.14.

26 ¹⁰ As the scope of the remand was only to determine which candidate had received more
27 legal votes, *Marks*’ unique procedural posture does not distinguish it from the instant
situation.

¹¹ Vote recapture refers to the possibility that “voters who cast illegal absentee ballot votes
would have gone to the polls or otherwise cast legal votes.” *Marks*, 1994 U.S. Dist. LEXIS
at *64.

1 testimony and other evidence in making its determination, the expert testimony was an
2 important part of its decision and was the only evidence sufficient to address the vote
3 recapture issue. The Third Circuit affirmed. *Marks v. Stinson*, 37 F.3d 1487 (3d Cir.
4 1994).

5 As in *Marks*, the Court must determine, *inter alia*, if “but for” the illegal votes the
6 outcome of the 2004 gubernatorial election would have differed. *Marks* was a more
7 difficult case for proportional deduction than the instant suit because the court accepted
8 statistical evidence not just about how to allocate illegal votes, but about how many illegal
9 votes were cast. The thousands of illegal votes at issue in the instant contest, more than the
10 total number of absentee ballots in *Marks* (legal and illegal), render expert statistical
11 testimony the only practical way to make the “but for” showing.

12 **3. Petitioners May Satisfy RCW 29A.070’s Requirement by**
13 **Proportional Deduction of Illegal Votes.**

14 If the election officials’ negligence is actionable, and RCW 29A.68.070 applies to
15 the instant contest, Petitioners may show that Gregoire did “not receive the highest number
16 of votes” by proportional deducting the illegal votes from Gregoire and Rossi’s totals.

17 RCW 29A.68.070 differs from RCW 29A.68.110 because the latter requires that an
18 election contestant show that illegal votes “have been given to the other person,” whereas
19 the former requires that the contestant, in addition to showing irregularities, show that the
20 putative victor “did not receive the highest number of legal votes.” Even if the Court does
21 not believe that Petitioners’ expert statistical testimony is sufficient to meet their burden of
22 proof under RCW 29A.68.110, RCW 29A.68.070 speaks of aggregate proof with an
23 emphasis on legality rather than illegality, *i.e.*, the “number of legal votes.” The
24 touchstone of an RCW 29A.68.070 claim is election officials’ misconduct, which can
25 manifest itself in many ways, of which illegal votes are only one species. An RCW
26 29A.68.110 contest does not require irregularities sufficient to state a claim under RCW
27 29A.68.070. If the same quantum of proof under RCW 29A.68.070 as RCW 29A.68.110

1 were required for the illegal votes (rather than the misconduct), the former would (for
2 illegal votes) incorrectly be subsumed in the latter. The two statutes are not coextensive,
3 and should not be so construed. Courts in numerous jurisdictions have held proportional
4 deduction the appropriate mechanism for eliminating the effects of illegal votes that cannot
5 be identified individually, *see supra* Part II.E.1.a, and this aggregate proof should satisfy
6 RCW 29A.68.070's materiality requirement.

7 Moreover, the Court may, under RCW 29A.68.070, order a new election if election
8 officials' neglect makes it impossible to determine whether Gregoire or Rossi received
9 more votes. In *Hill v. Howell*, 70 Wash. 603, 612-13 (1912), the Washington Supreme
10 Court stated that election returns may be disregarded if "it is impossible . . . to arrive at any
11 certain result whatsoever."¹² The court in *Green v. Reyes*, 836 S.W.2d 203 (Tex. Ct. App.
12 1992), faced an analogous situation. In *Green*, the court was unable to attribute 126 illegal
13 votes to either candidate "because the testimony of the voter was unable to be obtained or
14 the voter did not remember how he or she voted." *Id.* at 205. The court heard expert
15 testimony about how the votes should be apportioned, but decided the testimony was "too
16 unreliable to ascertain the true outcome," and accordingly ordered a new election. *Id.* at
17 206. The *Green* court did not assume error and order a new election merely because there
18 were more illegal votes than the margin of victory, which the court has indicated it will not
19 do. *See* Oral Op. 5/2/05 at 13. Instead, the *Green* court ordered a new election when it
20 because apparent that not only were there more illegal votes than the margin of victory, but
21 that it was impossible even for expert testimony to ascertain the election's result with a
22 sufficient degree of certainty. Similarly, if the election officials' negligence has rendered it
23 impossible for the Court to arrive at a certain outcome in the instant contest, the Court
24 should order a new election.

25
26 ¹² *Hill* was decided under Rem. & Bal. Code § 4942, the predecessor to RCW 29A.68.070.
27 While *Hill* is a plurality opinion that has been circumscribed by subsequent legal
developments, its statement about impossibility is pertinent to the instant contest.

1 **F. WSDCC Issues.**

2 The Petitioners anticipate that the WSDCC will argue that the Court should rule
3 that some 1700 provisional ballots cast in four eastern Washington counties are illegal
4 because the counties did not specifically compare the signatures on the provisional ballot
5 outer envelopes with the signatures in the county voter registration records, or made the
6 comparisons after certification of the election.

7 The Petitioners also anticipate that the WSDCC will argue that the Court should
8 count King County ballots in several categories where King County election workers, after
9 investigation, decided not to count the ballots. Specifically, Petitioners anticipate that the
10 WSDCC will argue that (a) King County should have counted some of a group of 622
11 provisional ballots even after King County's investigation showed that the voter
12 registrations had been cancelled; (b) King County should have counted 34 of some 208
13 provisional ballots where, after several reviews, the county could not confirm that the
14 ballots were cast by registered voters; and (c) that King County should count 123 "no
15 signature on file" absentee ballots despite the fact that registration records lacked the
16 signature required by RCW 29A.04.210.

17 **1. The 1700 Eastern Washington Ballots Are Not Illegal Ballots.**

18 The WSDCC may attempt to offer evidence that in four eastern Washington
19 counties, the county election officials counted a total of 1700 provisional ballots without
20 specifically comparing signatures. The evidence will show that the counties did in fact
21 check to verify that the voters were in fact currently registered to vote and had not
22 previously voted in the election. In addition, three of the counties later compared
23 signatures and found that all matched. Benton County declined to go back and check.

24 The short answer to the WSDCC's argument is that these ballots are not illegal. As
25 argued above, a ballot, to be illegal, must be illegal when cast. The voters who cast these
26 ballots cast them legally. In order to prevail on this argument, the WSDCC would be
27

1 required to prove that individual voters who cast these ballots in fact were not registered,
2 or had already voted. The WSDCC will have no such proof at trial.

3 **2. The 622 Provisional Ballots of Voters Whose Registration Had**
4 **Been Cancelled.**

5 “Only a registered voter shall be permitted to vote: (1) At any election held for the
6 purpose of electing persons to public office.” RCW 29A.04.210. Registration is
7 administered on a county-by-county basis. A person’s registration will be canceled when
8 it is determined the person is no longer entitled to vote in the county. *See generally* RCW
9 29A.08.350(7), 420, 510-610.

10 RCW 29A.08.625 establishes procedures to be followed when a voter whose
11 registration has been canceled appears at a polling place on election day and seeks to vote.
12 It provides, in pertinent part:

13 **29A.08.625: Voting by inactive or canceled voters.**

14 (2) A voter whose registration has been properly
15 canceled under this chapter shall vote a provisional ballot.
16 The voter shall mark the provisional ballot in secrecy, the
17 ballot placed in a security envelope, the security envelope
18 placed in a provisional ballot envelope, and the reasons for
19 the use of the provisional ballot noted.

20 (3) Upon receipt of such a voted provisional
21 ballot the auditor shall investigate the circumstances
22 surrounding the original cancellation. If he or she
23 determines that the cancellation was in error, the voter’s
24 registration must be immediately reinstated, and the voter’s
25 provisional ballot must be counted. If the original
26 cancellation was not in error, the voter must be afforded the
27 opportunity to reregister at his or her correct address, and the
voter’s provisional ballot must not be counted.

28 In connection with the 2004 general election, King County rejected 622 provisional ballots
29 because it determined that the voters’ registrations had been properly canceled. King
30 County has provided a list of the 622 voters, and identified the reason for the cancellation
31 of their registrations. The King County records show that the registrations had been
32 cancelled for a variety of reasons, including:

- 1 a. that the voter had requested cancellation of his or her registration;
- 2 b. that the Secretary of State had notified King County that the voter
- 3 had more recently registered to vote in another county;
- 4 c. that a clerk of a superior court had notified King County elections
- 5 officials that a jury summons sent to the voter's address had been returned as undeliverable
- 6 or that the voter had notified the jury commissioner in response to a jury summons that the
- 7 voter had moved to a different county;
- 8 d. that the voter had been convicted of a felony;
- 9 e. that the Bureau of Vital Statistics had received a death certificate for
- 10 the voter;
- 11 f. that a national change of address report showed that the voter had
- 12 moved outside of the county;
- 13 g. that the voter had not voted in two consecutive elections; and
- 14 h. that an absentee ballot sent to the voter had been returned as
- 15 undeliverable or as subject to forwarding to a new address outside the county.

16 It appears that WSDCC will contend that King County did not conduct a

17 sufficiently thorough investigation at the time the provisional ballots were cast and that if a

18 sufficient investigation had been conducted, some of the 622 cancellations would have

19 been found to be erroneous. Recent questioning in depositions also suggests that WSDCC

20 may contend, as to some of the proper cancellations, that King County should have

21 forwarded the provisional ballot to another county even if the voter had provided a King

22 County address on the provisional ballot envelope. We address each of these issues in

23 turn.

24 **a. Provisional Ballots in Conjunction With Cancelled**

25 **Registrations.**

26 RCW 29A.08.0625 requires that, upon receipt of a provisional ballot cast by a voter

27 whose registration has been canceled, "the auditor shall investigate the circumstances

1 surrounding the original cancellation.” As in all areas of the law, a requirement to conduct
2 an investigation calls for a reasonable investigation, not a perfect investigation.¹³ The
3 judgment of election officials regarding the scope of a reasonable investigation must be
4 given due respect. *See generally McDonald v. State*, 153 Wn.2d 201, 204-206 (2004);
5 *Vangor v. Munro*, 115 Wn.2d 536, 543 (1990) (acts of registration officers in certifying
6 genuine and spurious signatures on petitions are acts of authorized discretion).

7 The evidence here will show that King County officials did conduct reasonable
8 investigations of the 622 ballots and that their determinations that the registrations were
9 properly cancelled should be respected. Records of cancellations are maintained for two
10 years, pursuant to RCW 29A.08.540. King County personnel examined those records and
11 came to reasonable conclusions that the cancellations had been appropriate. WSDCC will
12 not be able to show that the investigations were inadequate.

13 It should also be noted that those who cast provisional ballots are notified, at the
14 time of submitting the provisional ballot, that they may access a free system (such as a
15 toll-free telephone number or website) and find out whether their ballot was counted and, if
16 not, why not. *See* WAC 434-253-048. Any of the 622 provisional voters in question could
17 have accessed either of the free systems King County offered, learned that their ballot was
18 not counted because their registration had been cancelled and, if they believed this
19 determination had been erroneous, contacted King County to have the error corrected prior
20 to certification of the vote.

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22
23 ¹³ *See, e.g., Singh v. Blue Cross/Blue Shield*, 308 F.3d 25, 43 (1st Cir. 2002) (investigation
24 under Healthcare Quality Improvement Act); *Ulreich v. Ameritech Cellular Comm., Inc.*,
25 1999 WL160838 (N.D. Ill. 1999) at *6 (“Title VII does not require an employer to conduct
26 a perfect investigation”); *In re Davis*, 152 Wn.2d 647, 734-743 (2004) (alleged ineffective
27 assistance of counsel); *Rizzuti v. Basin Travel Service*, 125 Wn. App. 602 (2005) (insurer’s
investigation of coverage); *Boes v. Bisiar*, 122 Wn. App. 569, 574 (2004) (service by
publication); *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 643 (2001) (qualified privilege
in defamation action).

1 The WSDCC will not be able to show that more than a handful of the cancelled
2 registrations were cancelled in error. During the course of the depositions, only one such
3 apparent error was brought forth, involving a situation in which two individuals had the
4 same name.

5 **b. Forwarding of Provisional Ballots.**

6 Late in the depositions, apparently as a result of having realized that nearly all of
7 the 622 registration cancellations in issue were proper, WSDCC's deposition questions
8 suggested that it would take a new tack, contending that King County should have
9 forwarded provisional ballots cast by individuals whose registrations had been properly
10 canceled to other counties.

11 WAC 434-253-047(5) provides:

12 (5) If the voter is a registered voter in another county or
13 state, the auditor shall forward the ballot and a corresponding
14 voter guide, or other means by which the ballot can be
15 interpreted including rotation if applicable, within five
16 working days after election day to the supervisor of elections
17 for the county for which the voter is resident. If the
18 provisional ballot envelope is not signed by the voter, a copy
19 of the poll book shall be included. If the county is not
20 known, it shall be forwarded to the secretary of state, or
21 counterpart, for the state in which the voter is resident.

18 The evidence will show that when the individual in question listed an out-of-King-County
19 address on his or her provisional ballot, King County did in fact forward the provisional
20 ballot to the appropriate county. In other circumstances, it was not possible to tell with any
21 certainty "[i]f the voter is a registered voter in another county."

22 During depositions, WSDCC attempted to rely on records prepared by the
23 Secretary of State identifying several individuals who did not indicate on their provisional
24 ballots that they were registered or had an address in another county, but who appeared to
25 have registered in more than one county at one time or another. King County personnel
26 testified, however, that it was not possible to tell from the cancellation records whether the
27 appearance of a name on the Secretary of State's list reflected a valid and current

1 registration in another county as of the November 2004 general election. Some of the
2 registrations listed for other counties were three years old. Carlos Webb, the Assistant
3 Collections Superintendent in charge of provisional ballots, testified that it would not have
4 been prudent to forward provisional ballots based on this information.

5 In any event, it is not sufficient to say that a provisional ballot should have been
6 forwarded to another county. WSDCC must also establish that the voter in question was
7 properly registered in the other county, that no other vote had already been cast by that
8 person in that county, and that election officials in the other county would have counted
9 the provisional ballot upon receipt. Thus far, WSDCC has proffered no evidence on these
10 points. In the absence of evidence, one can only speculate as to whether the individuals in
11 question, who did not provide any out-of-King-County address on their provisional ballot,
12 were properly registered in other counties that would have counted their votes.

13 **3. The "Needs Further Research" Ballots.**

14 In addition to confirming that the 622 registrations discussed in the previous
15 section were properly cancelled, King County's investigation of the provisional ballots
16 determined that 208 of the ballots appeared to have been cast by individuals who were not
17 registered King County voters, but for which workers hoped further research might lead to
18 a different determination. As of the date of certification, after multiple efforts by election
19 workers to determine whether they had been cast by registered voters, these ballots could
20 not be confirmed to have been cast by registered voters and therefore remained in the
21 "need further research" bin. The WSDCC has apparently selected 34 of these ballots
22 (perhaps by contacting the voters to determine if the voters cast their ballots for Gregoire)
23 and intends to argue that King County erred in not counting these ballots.

24 The selection of 34 of the ballots may represent a concession that proof of
25 registration is lacking with respect to the remaining ballots, or may represent the sort of
26 "cherry picking" that the Secretary of State opined was inappropriate when the issue of
27

1 offsetting errors was first briefed to this Court. Secretary of State's Response on Whether
2 Offsetting Errors are Allowed under RCW 29A.68 (April 20, 2005) at 2-3. WSDCC
3 should not be permitted now to selectively cherry pick a subset of the 208, presumably
4 only those they expect included votes for Gregoire, and then argue that only these votes
5 should be recounted. Selective recounting, particularly selective recounting of votes
6 chosen because of the way the vote is believed to have been cast, fundamentally impairs
7 the integrity of the recount process and of the election itself, whether the recount is
8 performed by county workers before certification, or by this Court afterward.

9 For WSDCC to prevail on these claims, it must satisfy three prerequisites:

10 1. That King County election officials, despite having made at least
11 two and as many as four attempts to investigate the votes in question, did not conduct a
12 reasonably sufficient investigation;

13 2. That, had a reasonable investigation been conducted, the voters in
14 question would have been found to have been registered; and

15 3. That if a registration had been found for the individual in question,
16 the signature on the provisional ballot would have matched the signature on the
17 registration.

18 4. That the individual had not already cast a ballot in the same election.

19 As noted above, the requirement of RCW 29.08.625 that election officials
20 investigate the circumstances surrounding provisional ballots requires a reasonable
21 investigation, not a perfect investigation. The evidence will show that King County
22 election officials conducted such an investigation here. Prior to certification, King County
23 election workers investigated each of the "needs further research" ballots at least twice,
24 and some as many as four times, and could not find sufficient evidence to determine that
25 the ballots had been cast by registered voters. Nor did any of the individuals in question
26 contact King County after checking either the website or the toll free telephone bank (parts
27

1 of the free access system that King County established pursuant to WAC 434-253-048) to
2 claim that they were registered voters. King County's decision not to count these ballots
3 was not neglect or error. King County processed the ballots in the manner required by law.

4 The WSDCC should not be heard to now argue, six months after the election, that
5 its judgment in hindsight is superior to that reached after the multiple investigations by the
6 King County election workers. This is particularly the case because it appears that the
7 WSDCC has thus far in depositions relied on a database that differs from the database as it
8 existed on election day and through certification. Immediately prior to election day, as is
9 its normal practice, King County "froze" the database of registered voters. After
10 December 28, 2004, King County updated its voter registration records to reflect new
11 registrations and changed information received during the preceding months. During the
12 recently concluded depositions, WSDCC relied on a version of the database that appeared
13 to have been created after changes had been made to the data, not the relevant database as
14 it existed at the time of the election and certification. Post-certification changes to the
15 database may not be used to attack the reasonableness of the investigation that informed
16 the certification.

17 Even if the two to four investigations of each of these ballots conducted by King
18 County election officials were deemed insufficient, if WSDCC cannot go further and
19 establish that the individuals in question were in fact registered, their votes cannot be
20 counted. Registration is a prerequisite to voting. RCW 29A.04.210. Petitioners expect the
21 evidence offered by WSDCC will show that few, if any, of the 34 ballots in question were
22 cast by registered voters.

23 Even if a registration were found that appeared to be for one of the individuals in
24 the "needs further research" category, "[a] provisional ballot cannot be counted unless the
25 voter's name, *signature*, and the date of birth, if available, matches a voter registration
26 record." WAC 434-253-047 (emphasis added). Thus, the signatures on the provisional
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1 ballot and registration must match before the ballot can be counted. Testimony at the
2 depositions indicated that at least one of the ballots being challenged by WSDCC lacks a
3 signature and that substantial doubts existed as to whether signatures on ballots and
4 registrations matched with respect to other ballots. Moreover, decisions by King County
5 personnel that the signatures on the ballots in question do not match are not open for
6 discussion at this time. WSDCC has disclaimed any intent “to challenge County election
7 officials’ discretionary decision making over signature mismatches.” WSDCC’s
8 Opposition to Petitioners’ Motion in Limine to Exclude Evidence Concerning Previously
9 Rejected Ballots and Other “Offsetting Errors” at 1.

10 Finally, a provisional ballot in the “needs further research” bin may not be counted
11 unless and until it is determined that the person who submitted it did not also cast another
12 ballot in either King County or another county. The WSDCC has thus far come forward
13 with no evidence on this point.

14 4. The “No Signature on File” Absentee Ballots.

15 Pursuant to RCW 29A.04.210 and RCW 29A.40.010, registration is a prerequisite
16 to casting an absentee ballot. RCW 29A.40.110(3) provides further that election officials
17 “shall verify that the voter’s signature on the return envelope [of an absentee ballot] is the
18 same as the signature of that voter in the registration files of the county,” and WAC
19 434-240-240 mandates that “an absentee ballot shall be counted only if: . . . (3) The
20 signature has been verified by the county canvassing board. . . .” (emphasis added).

21 From these provisions, it is clear that an absentee ballot may not be counted unless
22 the voter’s signatures on the ballot and the registration records match. The evidence will
23 show that King County rejected fewer than 170 absentee ballots because of the absence of
24 any registration signature on file. Petitioners anticipate that WSDCC will seek to induce
25 the Court to count 123 of these ballots. Again, Petitioners do not know the basis on which
26 WSDCC selected these 123, but it seems likely, in light of the WSDCC’s previous
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1 selective efforts to rehabilitate ballots, that the WSDCC has contacted these voters to
2 determine that they marked their absentee ballots for Gregoire.

3 The ballots in question do not lack matching registration signatures due to any lack
4 of effort on the part of King County. During the summer of 2004, Elections
5 Superintendent Bill Huennekens made it a priority to identify registrations lacking
6 signatures and to obtain signatures for those registrations. A large number of people were
7 assigned to this effort, both during the summer and in December, prior to certification of
8 the King County vote. These employees searched for signatures on registration records,
9 which are located in only five sources in four physical locations. During the summer, King
10 County wrote to the individuals for whom registrations on file lacked signatures and asked
11 them to update their records. If those individuals attempted to vote in the primary, King
12 County wrote to them again after the primary, repeating this request. When the individuals
13 in question mailed in absentee ballots for the general election, King County wrote to them
14 yet again and again requested that they update their records. *See McDonald v. Secretary of*
15 *State*, 153 Wn.2d 201, 205 (2004). Thus, these voters received at least two, and in some
16 cases three, requests to provide a signature on their registration record. If the voter had
17 responded with an updated signature prior to certification, their ballot would have been
18 counted. They were given multiple opportunities to ensure that they were properly
19 registered and that their vote would be counted. If certain selected voters are permitted to
20 update their registrations after certification, Petitioners should be permitted to provide
21 evidence of hundreds of ballots wrongfully rejected as a result of signature
22 miscomparisons.

23 Ultimately, however, no matter how much or how little effort King County devoted
24 to attempting to induce an individual to update his or her registration, that person's
25 absentee ballot "shall be counted only if" the "voter's signature on the return envelope is
26 the same as the signature of that voter in the registration files of the county." RCW
27

1 29A.40.110(3); WAC 434-240-240. If there is no signature in the registration files, the
2 vote may not be counted.

3 During discovery, the WSDCC issued a subpoena to the Department of Licensing
4 to obtain driver's license records for these 123 voters. Based on the WSDCC's deposition
5 questions, it appears that it will ask the Court to rehabilitate these ballots through
6 comparisons of the voter's signature on the absentee ballot with the signature that appears
7 in the voter's driver record. Comparison to driver's license records, however, does not
8 satisfy RCW 29A.40.110(3) and WAC 434-240-240. They require that the signature on
9 the ballot be "the same as the signature of the voter in the registration files of the county."
10 Absent a valid, signed registration, an individual may not vote, even if they may drive.

11 V. CONCLUSION

12 The evidence here is clear and convincing that, *at a minimum*, the true outcome of
13 this election, based on a true count of legal votes by qualified voters, cannot be known.
14 The evidence also establishes a clear likelihood, if not certainty, that in a properly held
15 election, Rossi would have received more votes than Gregoire. If justice is to be done in
16 the case, for Rossi, for the people of Washington, and for the integrity of this and future
17 elections, the issuance of the certificate of election in this case must be annulled.

18 DATED this 20th day of May, 2005.

19 Davis Wright Tremaine LLP
20 Attorneys for Petitioners

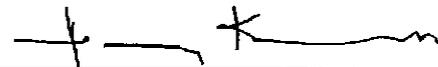
21
22 By 
23 Harry J.F. Korrell
24 WSBA #23173
25 Robert J. Maguire
26 WSBA #29909
27

Exhibit A

Election Contests Applying Proportional Deduction¹⁴

State	Cases	Type	Overturned or Decided ¹⁵
Alaska	<i>Finkelstein v. Stout</i> , 774 P.2d 786 (1989)	Recount	No
	<i>Hammond v. Hickel</i> , 588 P.2d 256 (1978)	Contest	No
Arizona	<i>Huggins v. Superior Court</i> , 163 Ariz. 348 (1990)	Contest	No
	<i>Clay v. Gilbert</i> , 160 Ariz. 335 (1989)	Contest	No
	<i>Grounds v. Lawe</i> , 67 Ariz. 176 (1948)	Contest	No
Illinois	<i>In re Durkin</i> , 299 Ill. App. 3d 192 (1998)	Contest	No
	<i>O'Neal v. Shaw</i> , 248 Ill. App. 3d 632 (1993)	Contest	Yes
	<i>People ex rel. Ciaccio v. Martin</i> , 220 Ill. App. 3d 89 (1991)	Contest	Yes
	<i>Gribble v. Willeford</i> , 190 Ill. App. 3d 610 (1989)	Contest	No
	<i>Jordan v. Officer</i> , 170 Ill. App. 3d 776 (1988)	Contest	No
	<i>Frese v. Camferdam</i> , 76 Ill. App. 3d 68 (1979)	Contest	Yes
	<i>Menssen v. Eureka Unit School Dist. No. 140</i> , 70 Ill. App. 3d 9 (1979)	Contest* ¹⁶	No
	<i>Whitsell v. Davis</i> , 67 Ill. App. 3d 962 (1978)	Contest	No
	<i>Leach v. Johnson</i> , 20 Ill. App. 3d 713 (1974)	Contest	No
	<i>Webb v. Benton Consol. High Sch. Dist. No. 103</i> , 130 Ill. App. 2d 824 (1970)	Contest*	No
	<i>Drolet v. Stentz</i> , 83 Ill. App. 2d 202 (1967)	Contest	No
	<i>Thornton v. Gardner</i> , 30 Ill. 2d 234 (1964)	Contest	No
	<i>Dirst v. McDonald</i> , 372 Ill. 498 (1939)	Contest	Yes
	<i>Boland v. La Salle</i> , 370 Ill. 387 (1938) ¹⁷	Contest*	Yes
	<i>Neff v. George</i> , 364 Ill. 306 (1936) ¹⁸	Contest	No
	<i>Rhyan v. Johnson</i> , 364 Ill. 35 (1936)	Contest	Yes
	<i>McNabb v. Hamilton</i> , 349 Ill. 209 (1932) ¹⁹	Contest	Yes
	<i>Stevenson v. Baker</i> , 347 Ill. 304 (1932)	Contest	Yes

¹⁴ The cases listed *infra* hold that proportional deduction is appropriate. The table does not include cases approving of proportional deduction in dicta.

¹⁵ "Overturned" means the appellate court's decision affirmed a lower court decision apportioning votes to reverse the outcome of an election or recount, where apportionment is necessary for reversal.

¹⁶ Cases marked with an asterisk involve referenda rather than candidates.

¹⁷ Overruled on other grounds.

¹⁸ Overruled on other grounds.

¹⁹ Overruled on other grounds.

State	Cases	Type	Overtured or Decided ¹⁵
	<i>Talbott v. Thompson</i> , 350 Ill. 86 (1932)	Contest	No
	<i>Flowers v. Kellar</i> , 322 Ill. 265 (1926)	Contest	No
	<i>Humphrey v. Perry</i> , 310 Ill. 373 (1923)	Contest	No
	<i>Choisser v. York</i> , 211 Ill. 56 (1904)	Contest	No
California	<i>Singletary v. Kelley</i> , 242 Cal. App. 2d 611 (1966)	Contest*	No
	<i>Russell v. McDowell</i> , 83 Cal. 70 (1890)	Contest	No
Kansas	<i>Parker v. Hughes</i> , 64 Kan. 216 (1902)	Contest	No
Tennessee	<i>Moore v. Sharp</i> , 98 Tenn. 491 (1896)	Contest	No
Michigan	<i>Gracey v. Grosse Pointe Farms Clerk</i> , 182 Mich. App. 193 (1989)	Contest	No
	<i>Attorney General ex rel. Miller v. Miller</i> , 266 Mich. 127 (1934)	Contest	No
	<i>Ellis ex rel. Reynolds v. May</i> , 99 Mich. 538 (1894)	Contest	Yes
Montana	<i>Gervais v. Rolfe</i> , 57 Mont. 209 (1920)	Contest	No
	<i>Heyfron v. Mahoney</i> , 9 Mont. 497 (1890)	Contest	Yes
Wisconsin	<i>Ollmann v. Kowalewski</i> , 238 Wis. 574 (1941)	Contest	Yes
North Dakota	<i>Drinkwater v. Nelson</i> , 48 N.D. 871 (1922)	Contest	No

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

2 **Petitioners' Trial Brief; 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:

7 **Kevin Hamilton, Esq.**
8 Perkins Coie LLP
9 Attorneys for Washington State Democratic
10 Central Committee
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12 Seattle, WA 98101

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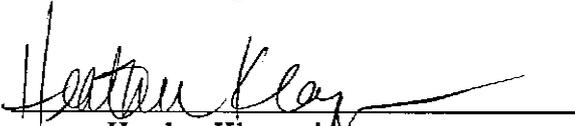
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4 Attorneys
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6 Everett WA 98201-4011

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 20th day of May, 2005, at Seattle, Washington.

10 
11 Heather Klapmeier