

1 The “Washington State Democratic Central Committee’s Motion For Partial Summary
2 Judgment On Petitioners’ Belated claim Of Non-Citizen Voters” raises a question of statutory
3 interpretation under our State’s election contest statute.

4 This is the Respondent Secretary of State’s Response.

5

6 **I. SUMMARY OF THIS RESPONSE**

7 Subsection .020(5)(b) of our State’s election contest statute provides that “illegal votes”
8 do not include votes cast by improperly registered voters who were not challenged before the
9 election. RCW 29A.68.020(5)(b).

10 Subsection .020(a) specifies two exceptions to that pre-election challenge requirement –
11 namely, the multiple-ballot and disenfranchised-felon voters which the parties have been
12 referring to in this election contest suit. RCW 29A.68.020(5)(a)(i) & (ii).

13 Non-citizen voters are not one of those two statutory exceptions. Therefore, under the
14 election contest statute as currently written, “illegal votes” do not include votes cast by
15 improperly registered non-citizens unless their registration was challenged before the election.
16 For that reason, the Democrats’ motion concerning this interpretation of the election contest
17 statute should be granted.

18

19

20

21

22

23

24

25

26

SECRETARY OF STATE’S RESPONSE RE:
PREVIOUSLY UNCHALLENGED “NON-CITIZEN” VOTES
UNDER OUR STATE’S ELECTION CONTEST STATUTE - 1

FOSILIR PLPPLR & SHILLLMAN PLLC
1111 1ST RD AVENUE, SUITE 3100
SEATTLE, WASHINGTON 98101-3299 ♦
206-417-4100

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

II. DISCUSSION

A. The Secretary Of State's Prior Interpretation Of Our Election Contest Statute In This Case.

Washington's election contest statute provides as follows:

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

* * * *

(5) On account of illegal votes.

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

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

(ii) A vote cast by a person disqualified under Article VI, section 3 of the state Constitution.¹

(b) Illegal votes do not include votes cast by improperly registered voters who were not properly challenged under RCW 29A.08.810 and 29A.08.820.²

Previously in this case, the Democrats noted that a felon disqualified under Article VI is, by definition, an "improperly registered voter". They also noted that the two statutes cited in subsection .020(5)(b) require registration challenges to be made before the election. They therefore argued that the disenfranchised-felon votes pled by the Petitioners were not "illegal votes" under the election contest statute since the improper registration of those voters was not challenged before the election.

The Respondent Secretary of State disagreed with that interpretation of our State's election contest statute. Instead, the Secretary of State explained the statute's *specific* provision including disenfranchised-felons should be harmonized with the statute's *general* provision excluding improperly registered voters who were not challenged before the election.

At the February 4 hearing in this case, the Secretary of State accordingly articulated his position with respect to the interpretation of "illegal votes" under RCW 29A.68.020(5) as follows:

¹ The full text of Article VI, §3 is set forth in Tab A (attached).

² The full text of these two registration challenge statutes is set forth in Tab A (attached).

1 First, with respect to illegal votes and section 020(5) and the votes of
2 felons, the Secretary of State's position is that .020(5)(a) *specifically*
3 includes the votes of felons as being illegal votes. You then look at
4 .020(5)(b) and it is a *general* exclusion with respect to the votes of voters
5 who are improperly registered that weren't challenged before the election.

6 The *specific* provision governs over the *general* provision, and the
7 Secretary of State's interpretation of .020 is therefore that all felon votes
8 are illegal votes regardless of whether they were challenged before or after
9 the election

10 Verbatim Report Of [February 4] Proceedings Excerpt, transcript page 3, line 15 -
11 transcript page 4, line 2 (punctuation corrected, emphasis added) (attached at Tab B).

12 This Court agreed with the Secretary of State's interpretation, and denied the
13 Democrats' dismissal arguments with respect to previously unchallenged felon voters.

14 **B. The Secretary Of State's Current Interpretation Of Our Election Contest Statute**
15 **In This Case Is Still The Same.**

16 The Respondent Secretary of State's current interpretation of our State's election contest
17 statute is the same as before: Subsection .020(5)(b) *generally* provides that "illegal votes" do
18 not include votes cast by improperly registered voters who were not challenged before the
19 election. Subsection .020(a) *specifically* provides two exceptions to that pre-election challenge
20 requirement: (i) multiple-ballot voters and (ii) disenfranchised-felon voters.³

21 Since non-citizen voters are not one of those two statutory exceptions, the election
22 contest statute as currently written does not include their votes as "illegal votes" unless their
23 registration was challenged before the election.

24 **III. CONCLUSION**

25 The Respondent Secretary of State believes the above interpretation is the correct
26 interpretation of our State's election contest statute as currently written. That interpretation is
also consistent with this Court's prior interpretation in this case. The Democrats' motion
concerning this aspect of the Washington election contest statute as currently written should be
accordingly be granted.

³ Article VI, §3 (Tab A attached) also includes "persons while they are judicially declared mentally incompetent", but the political parties have not raised that category of persons in this suit.

SECRETARY OF STATE'S RESPONSE RE:
PREVIOUSLY UNCHALLENGED "NON-CITIZEN" VOTES
UNDER OUR STATE'S ELECTION CONTEST STATUTE - 3

FOSILIR PLLPPLR & SIIILI LLMAN PLLC
1111 1ST RD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦
206-447-4400

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RESPECTFULLY SUBMITTED this 20th day of April, 2005.

ROB McKENNA
WASHINGTON ATTORNEY GENERAL

Foster Pepper & Shefelman PLLC
SPECIAL ASSISTANT ATTORNEYS GENERAL

Maureen Hart, Solicitor General

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

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

SECRETARY OF STATE'S RESPONSE RE:
PREVIOUSLY UNCHALLENGED "NON-CITIZEN" VOTES
UNDER OUR STATE'S ELECTION CONTEST STATUTE - 4

FOSTER PEPPER & SHEFELMAN PLLC
1111 FIRST AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦
206-417-4400

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TAB A

[Provisions cited in election contest statute subsection 020(5)]

Article VI, §3 of our State Constitution [cited in RCW 29A.68.020(5)(a)]:

Who Disqualified.

All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise.”

RCW 29A.08.810 [cited in RCW 29A.68.020(5)(b)]:

Initiation.

Registration of a person as a voter is presumptive evidence of his or her right to vote at any primary or election, general or special. A person’s right to vote may be challenged at the polls only by a precinct judge or inspector. A challenge may be made only upon the belief or knowledge of the challenging officer that the voter is unqualified. The challenge must be supported by evidence or testimony given to the county canvassing board under RCW 29A.08.280 and may not be based on unsupported allegations or allegations by anonymous third parties. The identity of the challenger, and any third person involved in the challenge, shall be public record and shall be announced at the time the challenge is made.

Challenges initiated by a registered voter must be filed not later than the day before any primary or election, general or special, at the office of the appropriate county auditor. A challenged voter may properly transfer or reregister until three days before the primary or election, general or special, by applying personally to the county auditor. Challenges may also be initiated by the office of the county prosecuting attorney and must be filed in the same manner as challenges initiated by a registered voter.

RCW 29A.08.820 [cited in RCW 29A.68.020(5)(b)]:

Voting by person challenged—Burden of proof, procedures.

When the right of a person has been challenged under RCW 29A.08.810 or RCW 29A.08.830(2), the challenged person shall be permitted to vote a ballot which shall be placed in a sealed envelope separate from other voted ballots. In precincts where voting machines are used, any person whose right to vote is challenged under RCW 29A.08.810 or RCW 29A.08.830(2) shall be furnished a paper ballot, which shall be placed in a sealed envelope after being marked. Included with the challenged ballot shall be (1) an affidavit filed under RCW 29A.08.830 challenging the person’s right to vote or (2) an affidavit signed by the precinct election officer and any third party involved in the officer’s challenge and stating the reasons the voter is being challenged. The sealed ballots of challenged voters shall be transmitted at the close of the election to

SECRETARY OF STATE’S RESPONSE RE:
PREVIOUSLY UNCHALLENGED “NON-CITIZEN” VOTES
UNDER OUR STATE’S ELECTION CONTEST STATUTE - 5

FOSTER LLP & SHILLMAN PLLC
1111 FIRST AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦
206-417-4100

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

the canvassing board or other authority charged by law with canvassing the returns of the particular primary or election. The county auditor shall notify the challenger and the challenged voter, by certified mail, of the time and place at which the county canvassing board will meet to rule on challenged ballots. If the challenge is made by a precinct election officer under RCW 29A.08.810, the officer must appear in person before the board unless he or she has received written authorization from the canvassing board to submit an affidavit supporting the challenge. If the challenging officer has based his or her challenge upon evidence provided by a third party, that third party must appear with the challenging officer before the canvassing board, unless he or she has received written authorization from the canvassing board to submit an affidavit supporting the challenge. If the challenge is filed under RCW 29A.08.830, the challenger must either appear in person before the board or submit an affidavit supporting the challenge. The challenging party must prove to the canvassing board by clear and convincing evidence that the challenged voter's registration is improper. If the challenging party fails to meet this burden, the challenged ballot shall be accepted as valid and counted. The canvassing board shall give the challenged voter the opportunity to present testimony, either in person or by affidavit, and evidence to the canvassing board before making their determination. All challenged ballots must be determined no later than the time of canvassing for the particular primary or election. The decision of the canvassing board or other authority charged by law with canvassing the returns shall be final. Challenges of absentee ballots shall be determined according to under RCW 29A.40.140.

SECRETARY OF STATE'S RESPONSE RE:
PREVIOUSLY UNCHALLENGED "NON-CITIZEN" VOTES
UNDER OUR STATE'S ELECTION CONTEST STATUTE - 6

FOSTER PLEPLER & SHILLERMAN PLLC
1111 1ST RD AVENUE, SUITE 3100
SEATTLE, WASHINGTON 98101-3299 ♦
206-447-4400

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TAB B

[Transcript excerpt from February 4 Hearing in this case]

SECRETARY OF STATE'S RESPONSE RE:
PREVIOUSLY UNCHALLENGED "NON-CITIZEN" VOTES
UNDER OUR STATE'S ELECTION CONTEST STATUTE - 7

FOSTER PLEPLER & SILLILMAN PLLC
1111 1ST RD AVENUE, SUITE 3100
SEATTLE, WASHINGTON 98101-3299 ♦
206-447-4400