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II. CONCLUSIONS OF LAW31

1 The above-entitled action came on for non-jury trial before the Honorable John E.
2 Bridges, Judge of the Chelan County Superior Court, on May 23 – June 3, 2005. The parties
3 were represented at trial by counsel as follows:
4

5
6 Petitioners were represented at trial by counsel Harry J.F. Korrell and Robert J.
7 Maguire of Davis Wright Tremaine LLP, Mark Braden, and Dale M. Foreman. Intervenor-
8 Respondent Washington State Democratic Central Committee ("WSDCC) was represented
9 at trial by counsel Kevin J. Hamilton and David J. Burman of Perkins Coie LLP, Jenny A.
10 Durkan, and Russell J. Speidel. Respondent Secretary of State was represented at trial by
11 Jeffrey Even of the Office of the Attorney General and Thomas F. Ahearne of Foster Pepper
12 & Shefelman PLLC, Special Assistant Attorney General.
13
14

15 Respondent Chelan County was represented at trial by Gary A. Reisen. Respondent
16 Snohomish County was represented at trial by Gordon Sivley and Michael Held.
17

18 Respondent Klickitat County and its Auditor were represented at trial by Timothy O'Neill
19 and Barnett N. Kalikow. Respondent Lewis County Auditor was represented at trial by L.
20 Michael Golden. Intervenor-Respondent the Libertarian Party was represented at trial by
21 Richard Shepard and John S. Mills.
22

23 Having considered the testimony and evidence adduced at trial, the exhibits admitted
24 into evidence, the briefs and memoranda submitted by all the parties, and the arguments of
25 counsel, the Court now makes the following Findings of Fact and Conclusions of Law:
26
27

28 I. FINDINGS OF FACT

29 A. The November 2004 Election for the Office of Governor – 30 Counts, Recounts, and Certification

31 1. The general election for the Office of Governor of Washington was held on
32 November 2, 2004.
33
34
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1 2. The gubernatorial candidates were Christine Gregoire (Democrat), Dino
2
3 Rossi (Republican), and Ruth Bennett (Libertarian).

4 3. On November 17, the counties completed their initial tabulation of votes and
5
6 out of the over 2.8 million votes counted, only 261 votes separated the two leading
7
8 candidates – Christine Gregoire and Dino Rossi, with Mr. Rossi in the lead.

9
10 4. Because the margin separating the candidates was less than one-half of one
11
12 percent of the total votes cast, the Secretary of State ordered the mandatory recount required
13
14 by RCW 29A.64.021. The Secretary decided to conduct the mandatory recount as a
15
16 machine recount.

17
18 5. On November 30, after receiving certified recount returns from all 39
19
20 counties, Secretary Reed announced the result of the mandatory recount, which indicated
21
22 that Mr. Rossi's lead was 42 votes.

23
24 6. On December 3, WSDCC requested a hand recount pursuant to RCW
25
26 29A.64.011.

27
28 7. On December 23, the last of the 39 counties certified the manual recount
29
30 results in their jurisdictions. On December 30, Secretary of State Sam Reed announced the
31
32 result of the manual recount and declared that Christine Gregoire was the winner of the 2004
33
34 gubernatorial election by a margin of 129 votes. In other words, the hand recount changed
35
36 the result of the election.

37
38 8. Secretary Reed delivered the certified county returns to the Speaker of the
39
40 House of Representatives on the first day of the new legislative session, January 10, 2005.

41
42 9. On January 11, 2005, the Legislature voted to accept the returns. Pursuant to
43
44 Article III, section IV, of the Washington Constitution, the Speaker of the House of the
45
46 Representatives and the President of the Senate declared Christine Gregoire duly elected as
47

1 Washington's Governor and presented Governor Gregoire with a certificate of election,
2 dated January 11, 2005.
3

4
5 **B. The Election Contest Petition**
6

7 10. On January 7, 2005, the Rossi for Governor campaign and seven voters
8
9 (Timothy Borders, Thomas Canterbury, Paul Elvig, Maggie Ferris, Tom Huff, Edward
10 Monaghan, and Christopher Vance) filed a Petition in this Court contesting the issuance of a
11 certificate of election to Christine Gregoire as Governor of Washington.
12

13
14
15 11. The Petition claimed that the true result of the election was "uncertain and
16 likely unknowable." Because Petitioners believed that "the true results cannot be
17 ascertained," they sought "a new election [to] occur promptly."
18

19
20
21 12. The Election Contest Petition named 81 parties as respondents that
22
23 Petitioners "charged with error": the 39 counties of the State Washington; the chief
24 elections official from each of those counties; the Secretary of State, Sam Reed; the Speaker
25 of the Washington State House of Representatives, Frank Chopp; and the Lieutenant
26 Governor and President of the Washington State Senate, Brad Owen.
27

28
29
30 13. The Petition contested the right of Christine Gregoire to be issued a
31
32 certificate of election on account of illegal votes, as set forth in RCW 29A.68.020(5); and on
33 account of "errors, omissions, mistakes, neglect and other wrongful acts" by the 39 counties,
34 the 39 chief election officials, the Secretary of State, the Speaker and the Lieutenant-
35 Governor, as set forth in RCW 29A.68.011(4) and (5).
36
37

38
39
40 14. The Petition did not assert fraud by any election official.
41

42
43 15. The Petition alleged that it is "impossible to determine which gubernatorial
44 candidate received the greatest number of legitimate votes."
45
46
47

1 16. Petitioners sought: an order (a) declaring the election null and void; (b)
2
3 setting the election aside; (c) declaring that any certification of the results of the election and
4
5 any certificate of election issued as a result of the election are also void; and (d) directing
6
7 that a new election be conducted as soon as practicable.
8

9 **C. Affidavits in Support of Election Contest Petition**

10 17. Petitioners filed one affidavit (of Chris Vance) on January 7, 2005, in support
11
12 of the Election Contest Petition.
13

14 18. Subsequent to January 7, Petitioners filed various additional affidavits in
15
16 support of their Election Contest Petition. Some of these affidavits were filed after
17
18 January 21, 2005.
19

20 19. On February 4, 2005, this Court ruled that the election contest statute
21
22 required that any affidavits be submitted no later than ten days after the Certificate of
23
24 Election was issued and, thus, that the affidavits submitted after January 21 were untimely
25
26 and stricken.
27

28 **D. Changes in the Parties and Claims – Intervention, Stay, and Dismissal**

29 20. On January 12, 2005, the Court granted WSDCC's motion to intervene as a
30
31 party in the election contest. Petitioners stipulated that WSDCC should be permitted to
32
33 intervene, and no party opposed or otherwise objected to WSDCC's motion to intervene.
34
35

36 21. On January 12, the Court granted the oral motion of the Libertarian Party of
37
38 Washington State to intervene as a party in the election contest. No party opposed or
39
40 otherwise objected to the Libertarian Party's motion to intervene.
41

42 22. On January 20, Petitioners stipulated to stay the proceedings and agreed not
43
44 to attempt service of process against respondents House Speaker Chopp and Senate
45
46 President Owen during the legislative session.
47

1 23. On February 4, the Court dismissed all of the counties and county auditors as
2
3 respondents in the case, but permitted any county or county auditor to choose to remain as a
4
5 party to the case.

6 24. The following opted to remain as parties to the contest: Chelan County,
7
8 Snohomish County, Klickitat County and its Auditor, and the Lewis County Auditor.
9

10 25. On February 4, 2005, the Court dismissed Petitioners' equal protection
11
12 claims.
13

14 26. On February 4, 2005, the Court also dismissed Petitioners' request for an
15
16 order "directing that a new election be conducted as soon as practicable."
17

18 27. On April 5, 2005, the Court held a status conference. Petitioners requested a
19
20 trial date in May, arguing that such a trial date was necessary in order to permit an appeal to
21
22 be heard by the Supreme Court, if it chose, before June 30. The Court granted Petitioners'
23
24 request for a May trial, set a hearing date and briefing schedule of motions related to the
25
26 trial, and issued a schedule to govern final disclosures in this case. In particular, the Court
27
28 set cutoff dates for each party to submit to the other parties a final list identifying with
29
30 specificity the illegal votes, including the identity of the person alleged to have cast each
31
32 illegal vote, and election official errors being contested.
33

34 28. Pursuant to RCW 29A.68.100, the Court required each party to disclose in its
35
36 list each vote asserted to be illegal under RCW 29A.68.020(5); each vote asserted to be
37
38 lawful but not counted due to election official error under RCW 29A.68.020(1) and/or .011;
39
40 and each vote asserted to be unlawful but counted due to election official error under RCW
41
42 29A.68.020(1) and/or .011.
43
44
45
46
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1 29. At Petitioners' request, the Court set a May 23 trial date and required,
2
3 pursuant to RCW 29A.68.100, that Petitioners disclose their final list of illegal votes and
4
5 election official errors on April 15, and that WSDCC disclose its final list on May 6.
6

7 **F. Petitioners' Final List of Illegal Votes and Election Official Error**
8

9 30. On April 15, Petitioners disclosed their final list of illegal votes and election
10
11 official errors. The disclosure did not allege fraud by any election official.
12

13 31. First, Petitioners claimed as illegal votes under RCW 29A.68.020(5), and as
14
15 unlawful votes counted due to election official errors, 946 ballots from 11 counties that
16
17 Petitioners alleged were cast by convicted felons whose civil rights had not been restored
18
19 prior to voting. Petitioners identified the names of these 946 alleged voters; 726 of them
20
21 allegedly voted in King County.
22

23 32. Second, Petitioners claimed as illegal votes under RCW 29A.68.020(5), and
24
25 as unlawful votes counted due to election official errors, 53 ballots allegedly cast in the
26
27 name of deceased persons. Petitioners did not identify the names of persons who cast these
28
29 ballots, but identified the deceased individuals in whose name the ballots were allegedly cast
30
31 and the counties in which the ballots were allegedly cast King (39 votes), Pierce (9 votes),
32
33 Snohomish (4 votes), and Thurston (1 vote).
34

35 33. Third, Petitioners claimed as illegal votes under RCW 29A.68.020(5), and as
36
37 unlawful votes counted due to election official errors, 2 ballots allegedly cast by non-U.S.
38
39 citizens.¹
40

41 34. Fourth, Petitioners claimed as illegal votes under RCW 29A.68.020(5), and
42
43 as unlawful votes counted due to election official errors, 22 ballots that Petitioners alleged
44
45

46
47

¹ On May 2, the Court dismissed these claims on summary judgment.

1 were cast by 11 people who voted twice in the 2004 general election in Washington.

2
3 Petitioners identified the names of the 11 "dual in-state" voters and the counties in which
4 they voted: King (10 of the 11 voters) and Chelan (the 11th).²

5
6
7 35. Fifth, Petitioners claimed as illegal votes under RCW 29A.68.020(5), and as
8 unlawful votes counted due to election official errors, 5 ballots that Petitioners alleged were
9 cast by 5 people who cast a single ballot in the 2004 general election in Washington and
10 also voted in another state. Petitioners identified the names of the 5 "dual multi-state" voters
11 and the counties in which they voted: King (4 of the 5 voters) and Kitsap (the 5th).³

12
13
14
15
16 36. Sixth, Petitioners claimed as illegal votes ("[b]ecause they were improperly
17 cast"), and as unlawful votes counted due to election official errors, 348 provisional ballots
18 counted by King County without first being verified as required by WAC 434-253-047.
19 Petitioners identified the 317 people who allegedly cast 317 of these 348 ballots. Petitioners
20 did not identify the people who allegedly cast the remaining 31 ballots. Petitioners also
21 referred to "King County's statement that . . . 92 [of the 348] were cast by voters who were
22 not registered or were credited with voting another ballot." Petitioners also identified certain
23 precincts within King County "where provisional ballots were or may have been improperly
24 cast into tabulators on election day," but provided no information regarding who, if anyone,
25 had cast any such ballots improperly.

26
27
28
29 37. Seventh, Petitioners claimed as illegal votes, and as unlawful votes counted
30 due to election official errors, 77 provisional ballots "improperly cast and counted" in Pierce
31 County without first being verified pursuant to WAC 434-253-047. Petitioners did not

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² On May 13, WSDCC filed a motion for summary judgment with respect to these claims.

³ On May 13, WSDCC filed a motion for summary judgment with respect to these claims.

1 identify who cast the 77 ballots, did not identify the precincts in which these votes were cast,
2
3 and did not identify the precincts in which the people casting the ballots reside.

4
5 38. Eighth, Petitioners claimed as illegal votes, and as unlawful votes counted
6
7 due to election official errors, ballots counted in excess of the number of lawfully
8
9 registered voters who voted (216 poll ballots and 313 absentee ballots in King County, and
10
11 135 ballots in Pierce County). Petitioners did not identify the people who allegedly cast any
12
13 of the ballots they claimed to be unlawful, did not identify the circumstances or precincts in
14
15 which these ballots were cast, and did not identify the type of ballots at issue in Pierce
16
17 County (poll, absentee, or provisional ballot).

18
19 39. Ninth, Petitioners claimed as lawful votes not counted due to election official
20
21 error 223 ballots rejected by election officials because the signature on the ballot envelope
22
23 did not match the signature in the registration record of the voter to whom the ballot was
24
25 issued. Petitioners identified the names and addresses of these 223 voters, but did not
26
27 identify the counties that allegedly refused to count these ballots.

28
29 40. Tenth, Petitioners claimed as votes that were not counted certain ballots
30
31 reportedly discovered after certification of the election. Petitioners identified the counties
32
33 that reported the discovery of these allegedly absentee ballots (93 in King County, 14 in
34
35 Pierce County, and 3 in Snohomish County). Petitioners identified the precincts in which
36
37 the names on the ballots were registered in King County, but did not do so with respect to
38
39 the ballots in Pierce or Snohomish County. Petitioners did not identify the names of
40
41 the voters whose votes were not counted. Petitioners did not specifically identify these
42
43 ballots as lawful ballots that should have been counted, and stated that they were not "in a
44
45 position to assert whether these votes should now be tabulated."
46
47

1 41. Eleventh, Petitioners claimed as election official error the opening of
2
3 "hundreds" of provisional ballots before they were rejected. Petitioners stated that they were
4
5 not "in a position to assert whether these are lawful votes or unlawful votes." Petitioners did
6
7 not identify the particular ballots involved and where they would have been counted (i.e.,
8
9 which county or precinct) if not rejected.

10 42. Finally, Petitioners claimed as unlawful votes counted due to election official
11
12 errors, two absentee ballots cast by individuals other than the lawfully registered voters to
13
14 whom these ballots were sent. Petitioners noted that these "may also be illegal votes
15
16 because they were improperly cast." Petitioners identified the names of the registered voters
17
18 to whom these ballots were sent, Petitioner Edward Monaghan and his wife, Janice, of
19
20 Lewis County.
21

22
23 **G. WSDCC's Final List of Offsetting Illegal Votes and Election Official**
24 **Error**

25
26 43. On May 6, WSDCC disclosed its final list of illegal votes and election
27
28 official errors.

29
30 44. First, WSDCC claimed as illegal votes 743 ballots from 35 counties that
31
32 WSDCC alleged were cast by convicted felons whose civil rights had not been restored prior
33
34 to voting. WSDCC identified the names of these 743 alleged voters. Also on May 6, in a
35
36 supplemental disclosure, WSDCC claimed as illegal votes 51 additional ballots that
37
38 WSDCC alleged were cast by convicted felons whose civil rights had not been restored prior
39
40 to voting. WSDCC identified the names of these 51 voters and the counties in which
41
42 they voted.

43
44 45. Second, WSDCC claimed as illegal votes the ballots of 1,889 voters whose
45
46 provisional ballots were counted by election officials who did not first complete the
47

1 signature verification required by WAC 434-253-047. WSDCC identified the people who
2
3 cast these 1899 ballots and the 14 counties in which they voted.

4 46. Third, WSDCC claimed lawful votes not counted by King County because of
5
6 error or neglect by election officials in three different sub-categories.
7

8 47. King County did not count approximately 34 lawful provisional ballots cast
9
10 by registered voters because it failed to timely canvass the ballots or to timely process voter
11
12 registrations given to King County (which ballots King County election officials referred to
13
14 as "needs further research"). WSDCC identified the names of the voters who cast these
15
16 ballots.
17

18 48. King County did not count approximately 123 lawful absentee ballots timely
19
20 returned by registered voters because King County lost their voter registrations, though it
21
22 was able to determine that the voters had in fact given such materials to King County in a
23
24 timely fashion (which ballots King County election officials referred to as "NSOF" for "no
25
26 signature on file") WSDCC identified the names of the voters who cast these ballots.
27

28 49. King County did not count approximately 622 lawful provisional ballots,
29
30 which King County timely received, found a notation in its computer system that the voter's
31
32 registration apparently had been cancelled, and then failed to complete its canvass of the
33
34 provisional ballot by conducting the investigation required by RCW 29A.08.625(3) into the
35
36 circumstances of the original cancellation in order to determine whether or not the
37
38 cancellation was in error. WSDCC identified the names of the voters who cast these ballots.
39

40 50. WSDCC identified as illegal votes the votes of 6 Pierce County voters who
41
42 were excluded from the elective franchise on account of mental incompetence pursuant to
43
44 Wash. Const. Art. VI, § 3. WSDCC identified the names of these 6 voters.
45
46
47

1 **H. Witnesses Called at Trial**

2
3 51. At trial, the following fact witnesses were called and gave live testimony:
4
5 _____

6
7 52. The following fact witnesses gave testimony by deposition, with portions of
8
9 the deposition transcripts designated by the parties: _____

10
11 53. The following expert witnesses were called and gave live testimony:
12
13 Petitioners' experts Anthony Gill and Jonathan Katz,⁴ and WSDCC's experts, Mark
14
15 Hancock and Christopher Adolph.

16
17 **I. Exhibits Admitted Into Evidence at Trial**

18
19 54. At trial, the following exhibits were introduced and admitted into evidence:
20
21 Exhibits ____ - ____.

22
23 **J. Findings Regarding Petitioners' Illegal Votes Claims**

24
25 **a. Failure to Comply With RCW 29A.68.100**

26
27 55. With respect to the following claims of illegal votes, Petitioners failed to
28
29 timely provide information required by the Court's pre-trial scheduling order and also failed
30
31 to provide a list of the illegal votes and "by whom given" at least three days before trial as
32
33 required by RCW 29A.68.100:

- 34
35 i. 53 ballots allegedly cast in the name of deceased voters as mentioned
36
37 in paragraph 32 above;
38
39 ii. 31 provisional ballots allegedly cast by voters who were not
40
41 registered, as mentioned in paragraph 36 above;
42
43
44
45
46
47

⁴ On May 17, WSDCC filed a motion to exclude Petitioners' experts from testifying.

1 58. As to the other persons on their April 15 list of illegal felon voters,
2
3 Petitioners stipulated with WSDCC that Petitioners lacked sufficient evidence to establish
4
5 the first five elements as to many of the persons on that list. As to the remainder not
6
7 resolved by stipulation, the Court finds that Petitioners failed to prove one or more of the
8
9 first five elements as set forth on Exhibit B attached hereto.

10
11 59. As to the sixth element, even as to those felons that Petitioners proved cast a
12
13 ballot in the 2004 election, Petitioners presented no credible evidence that any of these
14
15 individuals in fact marked their ballots in the gubernatorial election and for whom they cast
16
17 their ballots. The Court finds that Petitioners have failed to prove that any of these felons
18
19 cast a vote for any of the gubernatorial candidates in 2004 and accordingly no adjustment in
20
21 any candidates totals should be made on account of these ballots, except as noted in the next
22
23 paragraph.

24
25 60. Of the felons that Petitioners proved cast ballots in the 2004 general election,
26
27 the Court received credible testimony from ___ of them who indicated that they voted for
28
29 Rossi in the election. All of these individuals are registered in precincts that Governor
30
31 Gregoire won. If a proportionate reduction method were applied to their votes, the majority
32
33 of each of their votes would be deemed to have been cast in favor of Governor Gregoire
34
35 despite their testimony to the contrary. The Court finds that each of these votes was an
36
37 illegal vote which must be deducted from Mr. Rossi's total. The Court also concludes that
38
39 this testimony shows that proportionate reduction does not establish, by clear and
40
41 convincing evidence, how any voter voted his or her ballot.

42
43 61. Of the felons that Petitioners proved cast ballots in the 2004 general election,
44
45 the Court received credible testimony from one individual that he voted for the Libertarian
46
47 candidate, Bennett. WSDCC established that this individual lived in a precinct that

1 Governor Gregoire won. The Court concludes that this is further evidence that
2 proportionate reduction does not establish, by clear and convincing evidence, how an
3 individual actually voted in the gubernatorial election.
4
5

6 62. Except as set forth in the preceding two paragraphs, with respect to each of
7 the above voters set forth in Exhibits A-D, neither party provided any evidence of how, or if,
8 the voters voted in the Governor's race other than to refer to the formula calculations
9 proposed by Petitioners in connection with proportionate reduction.
10
11
12

13 63. WSDCC proved the first five elements with respect to the ___ felons listed
14 on Exhibit C attached hereto. The Court finds that each of these felons cast an illegal ballot
15 in the 2004 general election.
16
17
18

19 64. As to the other persons on their May 6 list of illegal felon voters, WSDCC
20 stipulated with Petitioners that WSDCC lacked sufficient evidence to establish the first five
21 elements as to certain of the persons on that list. As to the remainder not resolved by
22 stipulation, the Court finds that WSDCC failed to prove one or more of the first five
23 elements as set forth on Exhibit D attached hereto.
24
25
26

27 65. WSDCC also proved that ___ individuals in Pierce County voted despite being
28 excluded from the elective franchise on account of mental incompetence pursuant to Wash.
29 Const. Art. VI, § 3. These individuals are identified on Exhibit E attached hereto.
30
31
32

33 **c. Findings on Illegal Votes Allegedly Cast in the Name of**
34 **Deceased Persons**
35
36

37 66. Petitioners failed to prove who cast any of the 53 ballots allegedly cast in the
38 name of deceased persons.
39
40
41

42 67. Of the 53 votes allegedly cast in the name of deceased persons, Petitioners
43 proved that ballots were actually issued to and returned by anyone in the name of ___ of the
44
45
46
47

1 53 people. (The names of the deceased persons in whose names illegal votes were cast, if
2 any, are identified on Exhibit F.)
3

4
5 68. Petitioners failed to prove in which precinct these illegal voters (if any were
6 proved) reside.
7

8
9 69. In addition, Petitioners failed to prove that any of these unnamed individuals
10 who cast a ballot in the 2004 general election marked the ballot in the gubernatorial election
11 and for whom they cast their ballot in the name of the deceased persons.
12

13
14 70. With respect to each of the above votes, neither party provided any evidence
15 of how, or if, the voters voted in the Governor's race other than to refer to the formula
16 calculations proposed by Petitioners in connection with proportionate reduction.
17

18
19
20
21 **d. Findings on Illegal Votes Allegedly Cast by "Dual Voters"**
22

23 71. Of the 11 individuals on Petitioners' final list who allegedly cast more than
24 one ballot in the 2004 general election in Washington, Petitioners failed to prove that any of
25 these individuals were not registered voters in the State of Washington.
26

27
28 72. Of these 11 individuals, Petitioners proved that ___ of them actually cast two
29 ballots in the 2004 general election in Washington. (These individuals, if any, are identified
30 on Exhibit G.)
31

32
33 73. The Court finds that, as to these ___ individuals, the first ballot that they cast
34 was valid, but the second was illegal.
35

36
37 74. As to all of the 11 individuals, Petitioners failed to prove that any of these
38 individuals marked the ballot in the gubernatorial election and for whom they cast their
39 ballots.
40

41
42 75. Petitioners failed to timely disclose that anyone other than the 11 individuals
43 listed on their April 15th list allegedly cast more than one ballot in the 2004 general election
44
45
46
47

1 in Washington. In addition, Petitioners failed to prove that any of the individuals disclosed
2 for the first time on May 18, 2005 actually cast two ballots in the 2004 general election in
3 Washington.
4
5

6
7 76. Of the five individuals who allegedly cast a single ballot in the 2004 general
8 election in Washington and cast another ballot in another state, Petitioners proved that ____
9 of them actually did so and that their ballots in both states were counted. (These individuals,
10 if any, are identified on Exhibit H.)
11
12

13
14
15 77. Petitioners failed to challenge the Washington registration, on or prior to the
16 date of the 2004 general election in Washington, of the five voters that Petitioners alleged to
17 have cast a single ballot in the general election in Washington and cast a ballot in another
18 state.
19
20

21
22
23 78. Petitioners failed to prove that the Washington registration for these allegedly
24 "dual multi-state" voters was invalid.
25

26
27 79. Petitioners failed to prove that any of the alleged "dual voters" (whether in-
28 state or multi-state) in fact marked a ballot in the gubernatorial election and for whom they
29 cast their ballots.
30
31

32
33 80. With respect to each of the votes allegedly cast by a "dual voter," neither
34 party provided any evidence of how, or if, the voters voted in the Governor's race other than
35 to refer to the formula calculations proposed by Petitioners in connection with proportionate
36 reduction.
37
38

39
40
41 **e. Findings Regarding Allegedly Improperly Cast Provisional**
42 **Ballots**
43

44 81. A provisional ballot may be cast in Washington by anyone, whether the voter
45 actually resides in Washington or in Florida. Except to the extent that the provisional ballot
46
47

1 is connected to a registered voter, there is no basis for assuming that the ballot was cast by
2 an individual living in any particular precinct or county or among people with any particular
3 set of shared values or interests. Because the voters of this State voted for Governor
4 Gregoire and Mr. Rossi in virtually identical numbers, the Court finds that, in the absence of
5 information about the particular voter who cast a provisional ballot, there is no basis – even
6 under a proportionate reduction theory – for believing such a ballot was voted for any
7 particular candidate or even any candidate at all in the Governor's race. In the absence of
8 such information, the Court finds that such a ballot is, as a practical matter, the same as a
9 lawful vote and had no effect on the outcome of the race.
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18 82. As to Petitioners' claims regarding 77 provisional ballots allegedly
19 improperly cast in Pierce County, Petitioners failed to prove who actually cast any of these
20 ballots and failed to prove the precincts in which the persons casting these ballots reside.
21 The very nature of a provisional ballot is that it may be cast in a precinct or county other
22 than that in which the voter actually resides.
23
24
25
26
27

28 83. As to Petitioners' claims regarding these 77 provisional ballots in Pierce
29 County, Petitioners also failed to prove that any of these individuals marked the ballot in the
30 gubernatorial election and failed to prove for whom they cast their ballots.
31
32
33

34 84. As to Petitioners' claims regarding 348 provisional ballots allegedly
35 improperly cast in King County, Petitioners failed to prove who actually cast these ballots.
36
37

38 85. As to all of the 348, Petitioners failed to prove the precincts in which the
39 persons casting these ballots reside. And as to all of the 348, Petitioners failed to prove that
40 any of these individuals marked the ballot in the gubernatorial election and for whom they
41 cast their ballot.
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1 86. Of these 348, the Court finds that at least 252 of them were cast by
2
3 registered voters who were properly registered to vote.

4 87. But even as to the remaining 65 ballots (348 less 31 less 252) (and even if
5
6 Petitioners had disclosed the names of all the people who allegedly cast these provisional
7
8 ballots improperly), this claim regarding provisional ballots still fails for lack of proof.
9

10 88. Petitioners presented no evidence that any provisional ballots were in fact
11
12 cast into Accuvote machines improperly. No polling place inspectors testified that they
13
14 observed such ballots being placed improperly through the Accuvote machines, and no poll
15
16 books or other admissible contemporaneous records were offered that documented any
17
18 irregularities.
19

20 89. Instead, Petitioners' claim regarding "improperly cast" provisional ballots
21
22 counted by King and Pierce Counties rested on faulty assumptions and inferences based on
23
24 inadmissible hearsay, accounting discrepancies, and crediting discrepancies. None of these
25
26 amounted to clear and convincing evidence that any of the votes was improperly counted for
27
28 either of the candidates involved in this election contest.
29

30 90. To the extent that Petitioners prove that any provisional ballots were
31
32 improperly cast and counted, those votes are identified on Exhibit I.
33

34
35 **f. Findings on More Ballots Than Voters Claim**
36

37 91. Petitioners failed to timely provide the names of the voters who cast the 216
38
39 poll ballots and 313 absentee ballots that King County allegedly counted in excess of the
40
41 number of lawfully registered voters who actually voted.

42 92. Petitioners failed to present any direct admissible evidence – such as poll
43
44 book pages or ballot envelopes – to support their allegation that King County counted more
45
46 ballots than the number of lawfully registered voters who actually voted. Instead,
47

1 Petitioners relied solely on the type of post-election created "crediting" records that do not
2 bear upon the authenticity of the election.
3

4
5 93. There are multiple reasons, almost all of them innocent, why a credit record
6 may not accurately reflect whether a voter did or did not vote. It is not possible to conclude,
7 clearly and convincingly, that a ballot has been counted erroneously or improperly, based
8 solely upon the voter credit record and Petitioners did not provide sufficient corroborating
9 evidence of their theory to warrant a finding that any ballot had been counted erroneously.
10

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15 94. There are circumstance in which any given precinct, taken in isolation, may
16 record more ballots as having been counted from that precinct than were apparently issued
17 to voters registered in that precinct. Most of these circumstances are innocent and do not
18 reflect any error or misconduct by voter or election officials. It is not possible to conclude,
19 clearly and convincingly, that a ballot has been counted improperly based solely upon a
20 comparison of the number of ballots apparently issued in a particular precinct to the number
21 of ballots recorded as having been counted in that precinct. Petitioners did not provide
22 sufficient corroborating evidence of their theory to warrant a finding that any ballot had
23 been counted in any precinct in excess of the number of ballots that could properly have
24 been counted in that precinct.
25
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34
35 95. Petitioners did not allege fraud in this Contest and Petitioners presented, at
36 most, innocent record-keeping errors by King County. Petitioners presented no evidence of
37 fraud by any election official, candidate, or political party.
38
39

40
41 96. As to all of the votes that Petitioners claim were counted by King County in
42 excess of the number of lawfully registered voters who actually voted, Petitioners failed to
43 prove that any of these individuals marked the ballot in the gubernatorial election and for
44 whom they cast their ballots.
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1 97. Petitioners provided no evidence that "but for" these alleged errors Christine
2 Gregoire would not have had the highest number of lawful votes for Governor.
3
4

5 **g. Findings on Illegal Votes Allegedly Related to Votes Cast**
6 **in the Name of Petition Monaghan and His Wife**
7

8 98. Petitioners failed to prove who cast the ballots cast in the name of Petitioner
9 Edward Monaghan and his wife, Janice Monaghan, and failed to prove the precinct in which
10 those illegal voters reside.
11
12

13 99. Petitioners failed to prove that the voters who allegedly cast the ballots in the
14 name of Petitioner Monaghan and his wife marked their ballots in the gubernatorial election
15 and for whom they cast their ballots.
16
17
18

19 **h. Findings on Miscellaneous Alleged Illegal Ballots**
20

21 100. Petitioners failed to timely disclose with the required specificity their claim
22 that 785 provisional ballots were "improperly" counted in King County. Indeed, Petitioners
23 did not even disclose the names of those they alleged had cast these ballots until May 18.
24
25
26

27 101. Petitioners failed to prove that any of these 785 ballots were improperly
28 counted by King County. Petitioners failed to prove the precinct in which these provisional
29 ballot voters reside. And Petitioners failed to prove that any of these individuals marked the
30 ballot in the gubernatorial election and for whom they cast their ballots.
31
32
33
34

35 102. Petitioners failed to timely disclose their claim of "up to 1,156 provisional
36 ballots improperly cast and counted" in King County, as Petitioners disclosed this allegation
37 for the first time on May 18.
38
39
40

41 103. Petitioners failed to prove that any of these 1,156 provisional ballots were
42 improperly counted by King County. Petitioners failed to prove the precinct in which these
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1 provisional ballot voters reside. And Petitioners failed to prove that any of these individuals
2 marked the ballot in the gubernatorial election and for whom they cast their ballots.

3
4 104. None of the provisional ballots discussed above had any material effect on
5 the results of the Governor's election.
6

7
8
9 **K. Findings Regarding Election Official Errors**

10
11 **a. Findings on Error Allegedly Related to Illegal Votes by**
12 **Convicted Felons**

13
14 105. Petitioners failed to prove that any election official failed to comply with his
15 or her statutory duty to cancel the voter registration of persons convicted of a felony after
16 the election official received notice of the felony convictions.
17

18
19
20 **b. Findings on Error Allegedly Related to Votes Cast in the**
21 **Name of Deceased Persons**

22
23 106. Petitioners failed to prove that any election official failed to comply with his
24 or her statutory duty to cancel the voter registration of deceased persons after the election
25 official received notice of the persons' deaths.
26

27
28
29 **c. Findings on Error Allegedly Related to "Dual Voters"**

30
31 107. Petitioners failed to prove that any election official failed to comply with his
32 or her statutory duty in connection with any of Petitioners' alleged duplicate votes.
33

34
35 108. Of the 11 individuals that Petitioners alleged cast more than one ballot in the
36 2004 general election in Washington, Petitioners proved that ___ of these individuals had
37 more than one registration in Washington and proved that, as to ___ of these individuals,
38 election officials actually counted both ballots that they cast.
39

40
41 109. Of the five individuals that Petitioners alleged cast a single ballot in the 2004
42 general election in Washington and another ballot in another state, Petitioners failed to prove
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1 that any election official in Washington failed to carry out his or her statutory duty with
2 respect to these votes, or even knew or had to reason to know that these individuals were
3 registered to vote in another state.
4
5

6
7 **d. Findings on Error Allegedly Related to Provisional Ballots**
8

9 110. As the Court explained above in the section regarding Petitioners' related
10 illegal votes claim, a provisional ballot may be cast in Washington by anyone, whether
11 the voter actually resides in Washington or in Florida. Except to the extent that the
12 provisional ballot is connected to a registered voter, there is no basis for assuming that the
13 ballot was cast by an individual living in any particular precinct or county or among people
14 with any particular set of shared values or interests. Because the voters of this State voted
15 for Governor Gregoire and Mr. Rossi in virtually identical numbers, the Court finds that, in
16 the absence of information about the particular voter who cast a provisional ballot, there is
17 no basis – even under a proportionate reduction theory – for believing such a ballot
18 was voted for any particular candidate or even any candidate at all in the Governor's race. In
19 the absence of such information, the Court finds that such a ballot is, as a practical matter,
20 the same as a lawful vote and had no effect on the outcome of the race.
21
22

23 111. As to Petitioners' claims regarding 77 provisional ballots allegedly
24 improperly cast in Pierce County, Petitioners failed to prove who actually cast any of these
25 ballots and failed to prove the precincts or county in which the persons casting these ballots
26 reside. Petitioners also failed to clearly and convincingly that any such ballots were cast and
27 counted as a result of an error or neglect by an election official.
28
29

30 112. As to Petitioners' claims regarding these 77 provisional ballots in Pierce
31 County, Petitioners also failed to prove that any of these individuals marked the ballot in the
32 gubernatorial election and failed to prove for whom they cast their ballots.
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1 113. As to Petitioners' claims regarding 348 provisional ballots allegedly
2 improperly cast in King County, Petitioners failed to prove who actually cast these ballots.
3

4 114. As to all of the 348, Petitioners failed to prove the precinct or county in
5 which the persons casting these ballots reside. And as to all of the 348, Petitioners failed to
6 prove that any of these individuals marked the ballot in the gubernatorial election and for
7 whom they cast their ballot. Petitioners failed to prove clearly and convincingly that any
8 such ballots were cast and counted as a result of an error or neglect by an election official.
9

10 115. Of these 348, the Court finds that at least 252 of them were cast by
11 registered voters who were properly registered to vote.
12

13 116. But even as to the remaining 65 ballots (348 less 31 less 252) (and even if
14 Petitioners had disclosed the names of all the people who allegedly cast these provisional
15 ballots improperly), this claim regarding provisional ballots still fails for lack of proof.
16

17 117. Petitioners presented no evidence that any provisional ballots in King or
18 Pierce County were in fact cast into Accuvote machines improperly. No polling place
19 inspectors testified that they observed such ballots being placed improperly through the
20 Accuvote machines, and no poll books or other contemporaneous records were offered that
21 might have documented any irregularities.
22

23 118. Instead, Petitioners' claim regarding "improperly cast" provisional ballots
24 counted by King and Pierce Counties rested on faulty assumptions and inferences, and
25 inadmissible hearsay created during after-the-fact efforts to reconcile various crediting
26 discrepancies. None of these amounted to clear and convincing evidence that any of
27 the votes was improperly counted for either of the candidates involved in this election
28 contest.
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1 119. Although it is certainly possible that an election official in King County may
2 have made a mistake regarding a provisional ballot, it is equally possible that these
3 provisional ballots were cast by voters who misunderstood their instructions. Petitioners
4 failed to prove that any "improper casting" of provisional ballots in King or Pierce County
5 was caused by election official error or neglect.
6
7
8
9

10 **e. Findings on Error Allegedly Related to More Ballots Than**
11 **Voters Claim**
12

13 120. Petitioners failed to present direct admissible evidence – such as poll book
14 pages or ballot envelopes – which could have been used to prove, if true, that King County
15 counted more ballots than the number of lawfully registered voters who actually voted.
16
17

18 121. The evidence necessary to prove this claim was available to Petitioners, but it
19 was not presented to the Court.
20
21

22 122. Instead, Petitioners relied on the type of post-election created "crediting"
23 records that do not bear upon the authenticity of the election. In particular, Petitioners
24 presented a mass of conflicting spreadsheets, handwritten "batch slips" and examples of
25 crediting mistakes.
26
27

28 123. Petitioners presented, at most, innocent record-keeping errors by King
29 County. Petitioners presented no evidence that any such errors were material to the result of
30 the election. And Petitioners presented no evidence of fraud by any election official within
31 King County.
32
33

34 124. As the Court explained above on Petitioners' related illegal votes claim, there
35 are multiple reasons, almost all of them innocent, why a credit record may not accurately
36 reflect whether a voter did or did not vote. It is not possible to conclude, clearly and
37 convincingly, that a ballot has been counted erroneously or improperly, based solely upon
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1 the voter credit record and Petitioners did not provide sufficient corroborating evidence of
2 their theory to warrant a finding that any ballot had been counted erroneously.
3

4
5 125. There are circumstance in which any given precinct, taken in isolation, may
6 record more ballots as having been counted from that precinct than were apparently issued
7 to voters registered in that precinct. Most of these circumstances are innocent and do not
8 reflect any error or misconduct by voter or election officials. It is not possible to conclude,
9 clearly and convincingly, that a ballot has been counted improperly based solely upon a
10 comparison of the number of ballots apparently issued in a particular precinct to the number
11 of ballots recorded as having been counted in that precinct. Petitioners did not provide
12 sufficient corroborating evidence of their theory to warrant a finding that any ballot had
13 been counted in any precinct in excess of the number of ballots that could properly have
14 been counted in that precinct.
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25 126. Petitioners provided no evidence that "but for" these alleged errors Christine
26 Gregoire would not have had the highest number of lawful votes for Governor.
27

28
29 **f. Findings on Error Allegedly Related to Signature Matches**
30

31 127. Petitioners failed to present any evidence of election official error regarding
32 the ballots rejected by election officials because the signature on the ballot envelope did not
33 match the signature in the registration record of the voter to whom the ballot was issued.
34 Petitioners also failed to prove the counties that allegedly refused to count these ballots.
35
36
37

38
39 128. Moreover, Petitioners' claim regarding the failure to correct signature
40 matches is foreclosed by *McDonald v. Reed*, 153 Wn.2d 201 (2004), in which the Supreme
41 Court concluded that November 16, 2004, the day before certification, was the deadline to
42 submit affidavits with signatures in an attempt to rehabilitate rejected absentee ballots, and
43 that this deadline was lawful.
44
45
46
47

1 **g. Findings on Error Allegedly Related to the Failure to**
2 **Count Recently Discovered Ballots**

3
4 129. Election officials in King, Pierce, and Snohomish Counties found uncounted
5 ballots while they were searching through boxes of what they thought were absentee
6 ballot envelopes in order to comply with subpoenas issued by the parties in this case.
7

8
9 130. Most of these ballots were found in unsecured archival boxes in the Mail
10 Ballot Operations Satellite warehouse facility in King County.
11

12 131. During the original canvass of this election, King County had confronted a
13 number of similar situations and the bi-partisan King County Canvassing Board declined to
14 count the ballots given the lack of security. For the same reason, the Court declines to count
15 these ballots.
16
17
18
19
20

21
22 **h. Findings on Error Allegedly Related to the Opening of**
23 **Provisional Ballots Before Rejecting Them**

24
25 132. Petitioners failed to prove the number of provisional ballots allegedly opened
26 by election officials before they were rejected. Petitioners also failed to prove how this
27 occurrence (if any) was material to the result of the election.
28
29

30
31 **i. Findings on Error Allegedly Related to Votes Cast in the**
32 **Name of Petition Monaghan and his Wife**

33
34 133. Petitioners failed to prove that any votes cast in the name of Edward and
35 Janice Monaghan were caused by election official error.
36
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1 **L. Findings Regarding WSDCC's Evidence of Election Official Error**

2
3 **a. Errors in Numerous Counties Regarding Provisional**
4 **Ballots**

5
6 134. WSDCC proved that 1,899 ballots from 14 counties in Washington were
7
8 counted prior to the signature verification required by WAC 434-253-047. The individuals
9
10 who cast these ballots are identified on Exhibit J.

11
12 **b. Error in King County Regarding "Research Needed"**
13 **Ballots**

14
15 135. At the time of the certification of the election, King County had not yet
16
17 counted 208 provisional ballots for which election officials had not found registration
18
19 records.

20
21 136. WSDCC proved that King County election officials erred in failing to count
22
23 the provisional ballots of a total of ___ individuals, who are identified on Exhibit K.

24
25 137. WSDCC proved that, as to the individuals listed on Exhibit K, their ballots
26
27 were not counted because of election official error.

28
29 **c. Error in King County Regarding "No Signature on File"**
30 **Ballots**

31
32 138. In December 2004, King County discovered that it had improperly set aside
33
34 735 absentee ballots for which it could not find electronic images of the registered voters'
35
36 signatures.

37
38 139. After the Washington Supreme Court held that King County had the authority
39
40 to correct its error in failing to count them initially, King County was able to find only 576
41
42 of the original registration records. King County election officials erred in losing or
43
44 misplacing the rest of these registration records.
45
46
47

1 140. WSDCC proved that, as to the 47 individuals identified on Exhibit L, the
2 signatures on the provisional ballot envelopes would have matched the signatures on the
3 original registration records lost by King County, based on testimony from the King County
4 election official who did the signature comparison for the 576.
5
6
7

8 141. WSDCC proved that, as to the individuals listed on Exhibit L, their ballots
9 were not counted because of election official error.
10
11

12 **d. Error in King County Regarding Cancelled Registrations**

13 142. King County rejected 622 provisional ballots because King County's
14 registration records showed that these voters' registrations had been cancelled.
15
16
17

18 143. King County election officials knew that these voters had moved to another
19 county in the State of Washington. King County election officials erred in failing to forward
20 the ballots of these individuals to the counties to which these individuals had moved.
21
22
23

24 144. WSDCC proved that, as to the 6 individuals listed on Exhibit M, these voters
25 were registered where they told King County that they were moving, that these individuals
26 did not cast a ballot in their new county of residence, and that the signature on their
27 provisional ballot envelope matched the signature on their registration record in their new
28 county.
29
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34 145. WSDCC proved that, as to the individuals listed on Exhibit M, their ballots
35 were not counted because of election official error.
36
37

38 **M. Findings Regarding Expert Testimony and the Application of**
39 **Proportionate Reduction**
40

41 146. The Court finds that the data on which Petitioners' experts, Professors Gill
42 and Katz, relied was not a complete census of illegal votes, nor was it a random or scientific
43 sample of illegal votes within the State of Washington. In particular, Petitioners' data was
44
45
46
47

1 overly weighted to include allegedly illegal votes from King County, particularly in
2
3 precincts in which Governor Gregoire prevailed.

4
5 147. The Court finds that the statistical methods used in the reports of Professors
6
7 Gill and Katz depend on an assumption that determines the outcome they obtain. In
8
9 particular, they depend on the assumption that illegal voters in a precinct vote for a
10
11 candidate with a probability equal to the overall distribution of votes in the precinct among
12
13 candidates.

14
15 148. The Court finds that the assumption relied upon by Professors Gill and Katz
16
17 has not been generally accepted in their field of science.

18
19 149. The Court finds that the assumption relied upon by Professors Gill and Katz
20
21 was an unaccepted use of the method of ecological inference. In particular, Professors Gill
22
23 and Katz committed what is referred to as the "ecological fallacy" in making inferences
24
25 about a particular individual's voting behavior using only information about the average
26
27 behavior of groups (in this case, voters assigned to particular precincts).

28
29 150. The Court finds that the assumption relied upon by Professors Gill and Katz
30
31 is not supported by the evidence. Election results vary significantly from one similar
32
33 precinct to another, from one election to another in the same precinct, and among different
34
35 candidates of the same party in the same precinct. Felons and others who vote illegally are
36
37 not necessarily the same as others in the precinct.

38
39 151. The only voters who testified at trial gave credible testimony that they voted
40
41 for Rossi or Bennett, yet the proportionate reduction method advocated by Petitioners and
42
43 their experts would have deducted these votes from Governor Gregoire's total because these
44
45 individuals lived in Gregoire-leaning precincts.
46
47

1 to be directory only, and even though not followed precisely, will not render an election
2 void."⁶
3

4
5 2. Petitioners filed this election contest, and they bear the burden of proof.
6
7 Their burden of proof is to prove by clear and convincing evidence that illegal votes and
8
9 election official error materially changed the result in the gubernatorial election.⁷
10

11 3. Petitioners also bear the burden of establishing that the election of Christine
12
13 Gregoire as Governor was clearly invalid.⁸
14

15 4. The clear and convincing standard reflects the extraordinary nature of relief
16
17 that Petitioners seek – to unseat a sitting Governor.⁹
18

19 5. Petitioners, quite clearly, have not met their burden. They have not satisfied
20
21 even the lower preponderance standard.
22

23 6. It is not enough to show that an error occurred. It is not enough to show that
24
25 129 or more errors occurred or that 129 or more illegal votes were cast. Election officials
26
27
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36
37 ⁶ *Dumas v. Gagner*, 137 Wn.2d 268, 283 (1999).
38

39 ⁷ See RCW 29A.68.070; RCW 29.68.110; see also RCW 29A.08.020 (to invalidate voter
40 registration challenger must prove by "clear and convincing evidence that the challenged voter's
41 registration is improper.").
42

43 ⁸ *Dumas*, 137 Wn.2d at 283; see also *In re Contested Election of Schoessler*, 140 Wn.2d
44 368, 383 (2000) (same).
45

46 ⁹ *Dumas*, 137 Wn.2d at 283; *Hill v. Howell*, 70 Wash. 603, 613 (1912) ("[a]n election
47 honestly conducted under the forms of law ought generally to stand[.]").

1 and the certificate of election are entitled to a presumption of regularity. Petitioners failed to
2
3 rebut that presumption.¹⁰

4
5 7. As to Petitioners' claims of illegal votes, Petitioners failed to prove that an
6
7 amount of illegal votes was given to Governor Gregoire that, if taken from her, would
8
9 reduce the number of Governor Gregoire's legal votes below the number of votes given to
10
11 Dino Rossi, after deducting from Rossi's total the number of illegal votes that were given to
12
13 him.¹¹

14
15 8. As to Petitioners' claims of election official error, Petitioners failed to prove
16
17 that any election official error was sufficient as to procure Governor Gregoire to be declared
18
19 duly elected.¹²

20
21 9. The Election Contest Petition is hereby dismissed with prejudice.

22
23 DATED this _____ day of ____, 2005.

24
25
26
27 _____
28 John E. Bridges
29 Chelan County Superior Court Judge

30 Presented by:
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¹⁰ *Quigley v. Phelps*, 74 Wash. 73, 77 (1913) ("Every presumption is in favor of the faithful performance of official duty."); RCW 29A.08.810 (registration presumptive evidence of ability to vote).

¹¹ RCW 29A.68.110.

¹² RCW 29A.68.070.

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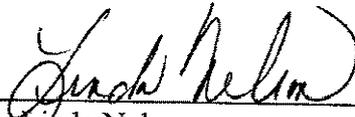
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38 I declare under penalty of perjury that the foregoing is true and correct, and that this
39 certificate was executed in Seattle, Washington on May 19, 2005.
40
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42
43
44 By 
45 Linda Nelson
46
47