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I. INTRODUCTION

This is an election contest filed by Petitioners to accomplish what no election contestant has ever done in Washington's history – oust a sitting Governor from office. Petitioners have not alleged any fraud in the 2004 election, they have not named Governor Gregoire or anyone representing her as a participant in any alleged misconduct, and they do not claim to be able to show with certainty that Dino Rossi actually received the highest number of legal votes. Yet they ask this Court for staggering relief; they want a judicial decree telling the citizens of Washington who their governor is.

But as this Court has already recognized, along with numerous other courts in Washington, Petitioners cannot accomplish their unprecedented goal unless they clearly and convincingly show that Mr. Rossi received the highest number of legal votes. They must prove that the 2004 election result was clearly invalid. As the evidence adduced already shows, however, they cannot do this. The Petitioners are not entitled to the relief they seek and at the conclusion of Petitioners' case this Court should do as the Secretary of State and the Legislature did several months ago – affirm Governor Gregoire as the winner of the 2004 gubernatorial election.

II. STATEMENT OF EVIDENCE

A. The November 2004 Election.

The general election for the Office of Governor of Washington was held on November 2, 2004. The gubernatorial candidates were Christine Gregoire (Democrat), Dino Rossi (Republican), and Ruth Bennett (Libertarian). On November 17, the counties completed their initial tabulation of votes and out of the over 2.8 million votes counted, only 261 votes separated the two leading candidates – Christine Gregoire and Dino Rossi, with

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Mr. Rossi in the lead. Because the margin separating the candidates was less than one-half of one percent of the total votes cast, the Secretary of State ordered the mandatory recount required by RCW 29A.64.021. On November 30, after receiving certified recount returns from all 39 counties, Secretary Reed announced the result of the mandatory recount, which indicated that Mr. Rossi's lead was only 42 votes.

On December 3, WSDCC requested a hand recount pursuant to RCW 29A.64. On December 23, the last of the 39 counties certified the manual recount results in their jurisdictions. On December 30, Secretary of State Sam Reed announced the result of the manual recount and declared that Christine Gregoire was the winner of the 2004 gubernatorial election by a margin of 129 votes. Secretary Reed delivered the certified county returns to the Speaker of the House of Representatives on the first day of the new legislative session, January 10, 2005. On January 11, the Legislature voted to accept the returns. Pursuant to Article IV, section III, of the Washington Constitution, the Speaker of the House of the Representatives and the President of the Senate declared Christine Gregoire "duly elected" as Washington's Governor and presented Governor Gregoire with a certificate of election, dated January 11, 2005.

B. The Election Contest Petition.

On January 7, the Rossi for Governor campaign and seven voters (Timothy Borders, Thomas Canterbury, Paul Elvig, Maggie Ferris, Tom Huff, Edward Monaghan, and Christopher Vance) filed an Election Contest Petition ("Petition") in this Court contesting the results of the 2004 gubernatorial election. The Petition claimed that the true result of the election was "uncertain and likely unknowable." Petition at 2. Because Petitioners believed that "the true results cannot be ascertained," they sought "a new election [to] occur promptly." *Id.* at 2-3.

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The Petition contested the right of Christine Gregoire to be issued a certificate of election on account of illegal votes and alleged "errors, omissions, mistakes, neglect and other wrongful acts" by the 39 counties, the 39 chief election officials, the Secretary of State, the Speaker and the Lieutenant-Governor. The Petition did not assert fraud by any election official.

The Petition alleged that it is "impossible to determine which gubernatorial candidate received the greatest number of legitimate votes." Petition at 4. The Petition sought: an order (a) declaring the election null and void; (b) setting the election aside; (c) declaring that any certification of the results of the election and any certificate of election issued as a result of the election are also void; and (d) directing that a new election be conducted as soon as practicable. *Id.* at 10.

C. The Parties.

Petitioners filed one affidavit (of Chris Vance) on January 7, in support of the Petition. Subsequent to January 7, Petitioners filed various additional affidavits in support of their Petition, some filed after January 21, 2005. On February 4, this Court ruled that the election contest statute required that any affidavits be submitted no later than ten days after the Certificate of Election was issued and, thus, that the affidavits submitted after January 21 were untimely and were stricken.

The Petition named 81 parties as respondents that Petitioners "charged with error": the 39 counties of the State Washington; the chief elections official from each of those counties; the Secretary of State, Sam Reed; the Speaker of the Washington State House of Representatives, Frank Chopp; and the Lieutenant Governor and President of the Washington State Senate, Brad Owen.

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On January 12, the Court granted WSDCC's motion to intervene as a party in the election contest and granted the oral motion of the Libertarian Party of Washington State to intervene. On February 4, the Court dismissed all of the counties and county auditors as respondents in the case, but permitted any county or county auditor to remain as a party to the case. The following opted to remain as parties to the contest: Chelan County, Snohomish County, Klickitat County and its Auditor, and the Lewis County Auditor. Petitioners stipulated to stay the action against Speaker Chopp and Lieutenant Governor Owen.

D. Narrowing of Petitioners' Claims.

On February 4, the Court dismissed Petitioners' equal protection claims. On February 4, the Court also dismissed Petitioners' request for an order "directing that a new election be conducted as soon as practicable."

On April 5, the Court held a status conference. Petitioners requested a trial date in May, arguing that such a trial date was necessary in order to permit an appeal to be heard by the Supreme Court, if it chose, before June 30. The Court granted Petitioners' request for a May trial, set a hearing date and briefing schedule of motions related to the trial, and issued a schedule to govern final disclosures in the case. In particular, the Court set cutoff dates for each party to submit to the other parties "a final list identifying [a] every vote which that party claims was an illegal vote under RCW 29A.68.020(5), [b] every lawful vote which that party claims was not counted due to conduct (election official error, etc.) under RCW 29A.68.020(1) and/or .011, and [c] every unlawful vote which that party claims was counted due to conduct (election official error, etc.) under RCW 29A.68.020(1) and/or .011." Order of April 18, 2005, at 2.

2 The Order required, pursuant to RCW 29A.68.100, that the "final list" contain "the
3 following information for each vote which the party claims was illegal, improperly counted,
4 or was improperly not counted:
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- 6
- 7 (i) To the extent known, the name, address, voter registration
8 number, and date of birth of the person casting the vote;
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- 10 (ii) The County and precinct in which the vote was cast;
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- 12 (iii) The reason that party claims the vote was illegal, was
13 improperly counted, or was improperly not counted (e.g. felon voter
14 or unverified provisional ballot);
15
- 16 (iv) The candidate for whom that party claims the vote was
17 apparently cast; and
18
- 19 (v) The type of evidence that party intends to use to show for
20 whom the vote was apparently cast (e.g. proportionality analysis,
21 voter testimony, etc.).
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24 Pursuant to RCW 29A.68.100, the Court required Petitioners to disclose their final list of
25 illegal votes and election official errors on April 15 and required WSDCC to disclose its
26 final list on May 6.
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31 III. PETITIONERS' CLAIMS

32 A. Petitioners' Final List of Illegal Votes and Election Official Errors.

33 On April 15, as required by Court Order, the Petitioners disclosed their final list of
34 illegal votes and election official errors. Listed below are the categories of illegal votes and
35 errors on that list that remain in the case as of the time of filing of this brief:
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- 38 • First, Petitioners identified as illegal votes under RCW
39 29A.68.020(5), and as unlawful votes counted due to election
40 official errors, 946 ballots that Petitioners alleged were cast by
41 convicted felons from 11 counties.
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- Second, Petitioners claimed as illegal votes under RCW 29A.68.020(5), and as unlawful votes counted due to election official errors, 53 ballots allegedly cast in the name of deceased persons. *Petitioners did not identify the names of persons who cast these ballots.*
- Third, Petitioners claimed as illegal votes under RCW 29A.68.020(5), and as unlawful votes counted due to election official errors, 22 ballots that Petitioners alleged were cast by 11 people who voted twice in the 2004 general election in Washington.¹
- Fourth, Petitioners claimed as illegal votes under RCW 29A.68.020(5), and as unlawful votes counted due to election official errors, 5 ballots that Petitioners alleged were cast by 5 people who cast a single ballot in the 2004 general election in Washington and also voted in another state.
- Fifth, Petitioners claimed as illegal votes ("[b]ecause they were improperly cast"), and as unlawful votes counted due to election official errors, 348 provisional ballots counted by King County without first being verified as required by WAC 434-253-047. *Petitioners identified the 317 people who allegedly cast 317 of these 348 voters. Petitioners did not identify the people who allegedly cast the remaining 31 ballots. Petitioners also identified certain precincts within King County "where provisional ballots were or may have been improperly cast into tabulators on election day," but Petitioners provided no information regarding who, if anyone, had cast such ballots improperly.*

¹ On May 13, WSDCC filed a motion for summary judgment with respect to Petitioners' claims of both "dual in-state" and "dual multi-state" voters. The Court granted that motion, in part, on May 20, finding that "[o]ne vote cast by any voter proven at trial to have cast more than one vote for governor in Washington's 2004 general election is valid and that any second or subsequent vote is an 'invalid vote' under Washington State's election contest statute, provided that all such votes were cast within the state of Washington." Order of May 20, 2005. The Court reserved final ruling with respect to the multi-state dual voter claims, but did rule that Petitioners "must prove that [any multi-state] voter was not a Washington resident."

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- Sixth, Petitioners claimed as illegal votes, and as unlawful votes counted due to election official errors, 77 provisional ballots "improperly cast and counted" in Pierce County without first being verified pursuant to WAC 434-253-047. *Petitioners did not identify who cast the 77 ballots, did not identify the precincts in which these votes were cast, and did not identify the precincts in which the people casting the ballots reside.*
- Seventh, Petitioners claimed as illegal votes, and as unlawful votes counted due to election official errors, ballots counted in excess of the number of lawfully registered voters who voted (216 poll ballots and 313 absentee ballots in King County, and 135 ballots in Pierce County). *Petitioners did not identify the people who allegedly cast any of the ballots they claimed to be unlawful, did not identify the circumstances or precincts in which these ballots were cast, and did not identify the type of ballots at issue in Pierce County (poll, absentee, or provisional ballot).*
- Eighth, Petitioners claimed as lawful votes not counted due to election official error 223 ballots rejected by election officials. Petitioners identified the names and addresses of these 223 voters, but did not identify the counties that allegedly refused to count these ballots.
- Ninth, Petitioners claimed as votes that were not counted certain ballots reportedly discovered after certification of the election. Petitioners did not specifically identify these ballots as lawful ballots that should have been counted, or the names of the voters, and stated that they were not "in a position to assert whether these votes should now be tabulated."
- Tenth, Petitioners claimed as election official error the opening of "hundreds" of provisional ballots before they were rejected. Petitioners stated that they were not "in a position to assert whether these are lawful votes or unlawful votes."
- Finally, Petitioners claimed as unlawful votes counted due to election official errors, two absentee ballots cast by individuals other than the lawfully registered voters to whom

these ballots were sent. *Petitioners did not identify the people who are alleged to have cast these ballots.*

As reflected above, for several of these claims (whether phrased as an "election official error" claim or as an "illegal vote" claim), Petitioners failed to comply with the Court's scheduling order and RCW 29A.68.100, which required them to timely identify the names of the voters who allegedly cast these voters (i.e., Petitioners did not provide names for: the 53 ballots cast in the name of deceased voters; 31 provisional ballots cast by non-registered voters; 77 provisional ballots improperly cast in Pierce County; 664 ballots of various types cast in excess of the number of registered voters who received ballots).

These claims are barred by the plain terms of this Court's April 18, 2005, Order (establishing the "cutoff date to identify the votes being contested"). Claims for which full and complete disclosure was not timely made are barred, whether advanced as:

(a) an "illegal vote" claim under RCW 29A.68.020(5), or

....

(c) as an unlawful vote which that party claims was counted due to conduct (election official error, etc.) under RCW 29A.68.020(1) and/or .011." Order of April 18, 2005, at 2.

This was, in fact, precisely the ground on which the Court rejected on May 20, 2005, the belated effort by Petitioners to advance several hundred previously undisclosed "illegal vote" claims. The Court held that, having failed to comply with the Court's April 15, 2005, Order, the Petitioners were barred from presenting any testimony concerning those belatedly disclosed "illegal votes."

The claims are, moreover, equally barred by RCW 29A.68.100, which commands that "[n]o testimony may be received as to any illegal votes unless the party contesting the election delivers to the opposite party, at least three days before trial, a written list of the

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2 number of illegal votes *and by whom given*, that the contesting party intends to prove at trial.
3 *No testimony may be received as to any illegal vote, except as to such as are specified in the*
4 *list.*" RCW 29A.68.100. That statutory prohibition applies to any votes alleged to be illegal
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6 – whether because cast by a voter not qualified to cast a ballot, or because the ballot was
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8 "not cast in the manner provided by law." *Foulkes v. Hayes*, 85 Wn.2d 629, 634 (1975).
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10 The statute, of course, cannot be avoided by recharacterizing the claim as one for
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12 "election official error." Such claims, as the Court expressly held on February 5, 2005, are
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14 governed by RCW 29A.68.070. That statute provides that "[n]o irregularity or improper
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16 conduct in the proceeding of any election board or any member of the election board
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18 amounts to such malconduct as to annul or set aside any election unless the irregularity or
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20 improper conduct was such as to procure the person whose right to the office may be
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22 contested, to be declared duly election *although the person did not receive the highest*
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24 *number of legal votes.*" (Emphasis added). Unless proven to be "illegal," all votes cast are
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26 presumed to be "legal" votes. Thus, to prevail on a claim of election official error premised
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28 on an allegation that illegal votes were counted improperly (such as Petitioners' claims that
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30 provisional ballots were improperly tabulated prior to verification), Petitioners must comply
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32 with RCW 29A.68.100. (This was, of course, the entire purpose for the structure of the
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34 Court's April 18, 2005 Order). Having failed to do so with respect to the claims identified
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36 above, they are barred as a matter of law by the terms of RCW 29A.68.100.
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39 **B. Petitioners' Claims are Factually and Legally Deficient.**
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41 The burden of proof in election contests is appropriately very heavy and that burden
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43 falls squarely on Petitioners' shoulders. Our Supreme Court has repeatedly stated that a
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45 petitioner in an election contest must show that the election was "clearly invalid." *Dumas v.*
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47 *Gagner*, 137 Wn.2d 268, 283 (1999); *see also In re Contested Election of Schoessler*, 140

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Wn.2d 368, 383 (2000) (same). Consistent with Washington election law, this Court ruled
that a clear and convincing standard applies to the evidence in this election contest.
Verbatim Report of Proceedings, Court's May 2, 2005 Oral Decision at 11 ("[W]hat is the
burden of proof . . . it's clear and convincing."); *see also* RCW 29A.08.020 (to invalidate
voter registration challenger must prove by "clear and convincing evidence that the
challenged voter's registration is improper."). Given the reluctance of courts to hold
elections invalid, *see Schoessler*, 140 Wn.2d at 383 ("[T]he judiciary should exercise
restraint in interfering with the elective process which is reserved to the people in the state
Constitution."), the standard is appropriately high. This Court, echoing the holdings of the
Supreme Court, has already held that these standards will apply in this contest and it will be
up to Petitioners to meet them.

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The burden of proof, this Court concludes, rests with the party
contesting the election and that burden of proof does not shift. The
reasons the burden of proof does not shift is grounded in both our case
law as well as our statutes, and the Court, of course, as are counsel,
we're all mindful that the courts of this state presume the certified
results of an election to be valid *unless the contrary is clearly
established. And unless an election is clearly invalid, when the
people have spoken their verdict should not be disturbed by the
courts.*

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Verbatim Report of Proceedings, Court's May 2, 2005 Oral Decision at 8 (emphasis added).
The evidence that Petitioners intend to present at trial will not meet these weighty standards.

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**1. Petitioners' Claims Regarding Illegal Votes Will Not Clearly and
Convincingly Show that the 2004 Election is Clearly Invalid.**

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The election statutes contain specific and discrete provisions setting forth the
requirements for testimony regarding illegal votes.

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No testimony may be received as to any illegal votes unless the party
contesting the election delivers to the opposite party, at least three

2 days before trial, a written list of the number of illegal votes and *by*
3 *whom given*, that the contesting party intends to prove at the trial. *No*
4 *testimony may be received as to any illegal votes, except as to such as*
5 *are specified in the list.*

6 RCW 29A.68.100 (emphasis added). As the statute makes clear, unless a contestant has
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8 identified a voter who cast an alleged illegal vote, no testimony will be heard regarding that
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10 vote. If this requirement is complied with, the contestant must still prove that those illegal
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12 votes actually changed the outcome of the election.
13

14 No election may be set aside on account of illegal votes, unless it
15 appears that an amount of illegal votes has been given to the person
16 whose right is being contested, that, if taken from that person, would
17 reduce the number of the person's legal votes below the number of
18 votes given to some other person for the same office, after deducting
19 therefrom the illegal votes *that may be shown to have been given to*
20 *the other person.*
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22 RCW 29A.68.110 (emphasis added). And, as discussed above, these statutory requirements
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24 must be satisfied with "clear and convincing" evidence, not just alluded to with general
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26 categories of evidence. Petitioners' contest ultimately must fail because even where they can
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28 prove a vote is illegal, have identified the voter who cast it, and properly disclosed the vote
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30 on April 15, they cannot prove that Governor Gregoire received that vote.
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33 Petitioners' April 15 final list identifies a wide variety of purported illegal votes, but
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35 Petitioners' claims regarding these votes are flawed for two related reasons. First, for many
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37 of these votes Petitioners will be unable to adduce evidence to show that the vote is actually
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39 illegal and that Petitioners properly disclosed that vote and who cast it. Second, Petitioners
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41 will not, and indeed do not even intend, to show that the voter actually cast a vote for
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43 governor or which candidate received that vote, making it impossible for this Court to
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45 determine who received "the highest number of legal votes." RCW 29A.68.050. Aware of
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this deficiency, Petitioners purport to be able to prove through expert testimony what they will fail to show with direct evidence. But their expert testimony is inadmissible, and even if admitted, it does nothing to prove for whom the alleged illegal votes were cast.

For felon voters in particular, who constitute the bulk of Petitioners' alleged illegal votes, Petitioners' proof will be deficient to show that the votes identified on their April 15 list are actually illegal votes. In its May 2, 2005 pre-trial rulings, this Court determined that, with respect to votes cast by felons, Petitioners must show six related elements to establish those votes as illegal.

To the extent that both the petitioners as well as the intervenors seek clarification as to the evidence which must be established to demonstrate that an illegal felon voted, the Court instructs that the following elements should be established to the extent that these elements can be established. One, that the individual was convicted as an adult and was not adjudicated as a juvenile. Number two, that the individual was convicted of a felony, not a misdemeanor or a gross misdemeanor. Number three, that the individual was not given a deferred sentence. Number four, that the individual has not had his or her civil rights restored in one of the five ways described by the Secretary of State. Number five, that the individual cast a ballot in the 2004 general election and, number six, that they marked the ballot to indicate a vote for a gubernatorial candidate.

Verbatim Report of Proceedings, Court's May 2, 2005 Oral Decision at 8. While Petitioners may be able to prove the first five elements for some of the alleged illegal felon votes, there will be no competent evidence to show that any of these voters "marked the ballot to indicate a vote for a gubernatorial candidate," let alone which candidate the ballot may have been marked for. As the Court admonished, the difficulty in establishing this sixth element does not relieve Petitioners of their obligation to present all evidence available to prove it. *Id.* at 11 ("I recognize that and it just may be simply impossible to come up with all of these elements I've referred to and particularly element number six. I'm simply indicating you

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folks should come up with all that you have."). Without that critical proof, Petitioners will fail to show that the votes are illegal or that they were cast in the governor's race, and so will not show if those votes "have been given to the other person" in order to deduct them from Governor Gregoire's lawful total. RCW 29A.68.110.² The same deficiency of proof – a failure to show that the voter voted for governor and which candidate they voted for – will be true for Petitioners' remaining categories of illegal votes (deceased voters, unregistered voters, prematurely fed provisional ballots, ballots cast in excess of the number of lawfully registered voters).

What is true for every illegal vote alleged by Petitioners, and is fatal to their contest, is that they cannot offer any credible or admissible evidence to prove that these illegal voters actually cast a vote for governor or which candidate they cast it for. In an effort to bridge the gap between simple identification of categories of alleged illegal voters, and actual proof that specific voters cast ballots for Governor Gregoire in the 2004 election, Petitioners intend to introduce the testimony of political science professors Anthony M. Gill and Jonathan M. Katz.³ But, as WSDCC's Motion to Exclude Expert Testimony sets forth, the testimony of these experts falls woefully short of the standards for expert testimony under *Frye* and ER 702 and it does not show or even purport to show which candidate received alleged illegal votes. The experts constructed a self-fulfilling statistical prophecy engineered by Petitioners to create the illusion of a Rossi victory: (1) the experts assumed

² The only direct testimony on this point will be provided, if necessary, by WSDCC, who intends to offer voter witnesses that will testify that they cast votes for Mr. Rossi.

³ Petitioners' claim that they can show who won the 2004 election is at odds with their Petition, where they told the Court that it was "impossible to determine which gubernatorial candidate received the greatest number of legitimate votes." Petition at 4.

2 without any support from academic literature or statistical method that illegal voters voted in
3 the exact same percentages as legal voters from the same precinct, and; (2) applied that
4 assumption to an incomplete and non-random sample of illegal votes chosen by Petitioners.
5 This is not reliable or admissible expert testimony. *State v. Russell*, 125 Wn.2d 24, 51-52
6 (1994); ER 702.
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10 Even if this Court were willing to rest the entire decision of whether the 2004
11 election was clearly invalid on the unscientific opinions of two professors, neither of
12 Petitioners' experts reached that conclusion. To the contrary, Petitioners' experts both
13 testified that do not know who won the 2004 election and can't answer that question for this
14 Court with certainty. ("Q: You haven't actually been warranting to the Court that you can
15 predict what actually happened in the real world; correct? A: That is correct.") (Gill 181:3-
16 5); ("There's uncertainty. I don't know for certain how anyone voted") (describing his
17 analysis as a "best guess") (Katz 26:1-2; 89:12). A guess is not clear, and a guess is not
18 convincing.
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28 Proof for these remaining categories of illegal votes will also be insufficient in
29 additional ways:
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- 32 • **Deceased Voters.** At the risk of stating the obvious, the deceased
33 persons Petitioners identified did not cast votes in the 2004 election.
34 But Petitioners have failed to identify who actually cast those votes in
35 their stead. Because RCW 29A.68.100 requires identification of "by
36 whom" the illegal vote was given, no testimony can be received for
37 these votes.
38
- 39 • **Dual Voters.** For the "dual voters," (voters who cast more than one
40 ballot), the Court has already dismissed these claims to the extent that
41 they seek to reject *both* ballots cast by such individuals, effectively
42 halving Petitioners' list in this category. *See* Order Granting in Part
43 and Denying in Part WSDCC's Motion for Summary Judgment on
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Petitioners' Claims of Dual Votes. WSDCC also understands that
Petitioners have now withdrawn all but *three* of these claims.

- **Premature Provisional Ballots.** For the improperly cast provisional ballots, many of these votes were cast by registered voters, and for the remainder that may not have been, there will be no poll worker testimony or documentary evidence to show that these provisional ballots were improperly fed through Accuvote machines. For 31 of the remaining 348 ballots that fall within this category from King County and *every one* of the 77 ballots that fall within this category from Pierce County, Petitioners have not identified who cast them.
- **Voter Crediting Discrepancies.** Last, despite this Court's ruling that "the process of crediting voters with having voted is a post-election administrative exercise that this Court determines does not bear upon the authenticity of election results," Petitioners still maintain illegal vote claims with respect to votes cast in excess of the number of voters reflected in registration records. Verbatim Report of Proceedings, Court's May 2, 2005 Oral Decision at 5. Petitioners can prove nothing more than, perhaps, imperfect record keeping with this claim. And for many of these votes, Petitioners have once again failed to comply with RCW 29A.68.100's requirement that the contestant identify who cast the vote.

Again, what remains of Petitioners' evidence after these failures of proof will not provide this Court with the "clear and convincing" showing needed to determine who received these illegal votes or even whether the votes were actually illegal. RCW 29A.68.110.

2. Petitioners' Claims Regarding Election Official Error Will Not Clearly and Convincingly Show that the 2004 Election is Clearly Invalid.

The existence of an illegal vote is not prima facie proof, much less clear and convincing proof, that an election official has committed an error. Proof that a particular election official failed to comply with a specific legal duty is proof of election official error. Nonetheless, many of Petitioners' claims regarding illegal votes are recycled in their Petition as claims of election official error. *Compare, e.g.* Petition VI.A.3 (characterizing felon

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2 votes as "election official error" under RCW 29A.68.050) *with* Petition VI.B.9-10
3 (characterizing the same votes illegal votes under RCW 29A.68.090 and .110). So it stands
4 as little surprise that Petitioners' proof here will also fail to meet the standard of
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6 RCW 29.68.070 regarding election official error, which requires Petitioners to prove that
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8 Governor Gregoire "did not receive the highest number of legal votes."
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10 At the outset, as noted above, claims premised on an allegation that election official
11 errors allowed "illegal votes" to be counted must have been properly disclosed pursuant to
12 the April 15 "final list" disclosure deadline. To the extent that they were not properly and
13 timely disclosed, those claims are firmly foreclosed and may not be resurrected by sleight of
14 hand recharacterization.
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20 Moreover, Petitioners want this Court to conclude that, in effect, the presence of an
21 illegal vote in the 2004 election raises some presumption that an election official committed
22 an error. But the presumption regarding an election official's discharge of his or her duties
23 is the opposite – Washington courts presume that election officials have faithfully performed
24 their duties unless the contestant proves otherwise. *Quigley v. Phelps*, 74 Wash. 73, 77
25 (1913) ("Every presumption is in favor of the faithful performance of official duty."). Even
26 if Petitioners show that an official erred, they still must clearly and convincingly show that
27 the error resulted in a change in the outcome of the election. RCW 29A.68.070; *Moyer v.*
28 *Van De Vanter*, 12 Wash. 377, 385 (1895) (upon showing that election official failed to
29 comply with legal duties, but no showing of affected outcome, election contest fails).
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40 Petitioners cannot prove the factual predicate – that a specific election official failed
41 to comply with a specific statutory duty – needed to arrive at the next step of determining
42 whether that error resulted in Governor Gregoire receiving more votes than Mr. Rossi. For
43 example, for alleged felon votes reconstituted as "errors," Petitioners will not prove that
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2 election officials failed to comply with a statutory duty to remove those felons from the
3 voting rolls after receiving notice of their convictions. Rather, they will hold up purported
4 felon votes and ask this Court to make the inferential leap to fill in that proof for them –
5 without providing testimony from specific election officials that received notices of
6 convictions and then failed to remove that felon from the rolls. As this Court noted,
7 however, the presumptions regarding the conduct of elections cut against Petitioners' felon
8 voter claims they characterize as "error." Verbatim Report of Proceedings, Court's May 2,
9 2005 Oral Decision at 8 ("[W]e're all mindful that the courts of this state presume the
10 certified results of an election to be valid unless the contrary is clearly established."); *Moyer*,
11 12 Wash. at 385. Petitioners want this Court to do more than evaluate their evidence of
12 error; they want this Court to provide it.

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There are similar failures of proof for Petitioners' remaining "error" claims, where their evidence will not rebut the presumption of regularity afforded to election officials:

- **Misfed Provisional Ballots.** Petitioners will ask this Court to assume that an election official erred by allowing provisional ballots to be fed into Accuvote machines. But they will not offer the testimony from poll workers at specific polling places who saw these provisional ballots being fed into voting machines. It is equally likely that provisional ballots not accounted for in reconciliation records were cast by voters who misunderstood their instructions. Many of the provisional ballots Petitioners' complain of (252 out of 348) were cast by registered voters.
- **Alleged Accounting Discrepancies.** Relying on voter reconciliation records that this Court has already characterized as "a post-election administrative exercise," the Petitioners want this Court to assume that these discrepancies are positive proof that an election official erred on election day. Again, there will be no admissible evidence – drawn from election official testimony or poll books or other contemporaneous records – that particular ballots were received in excess of persons who actually voted.

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- **Deceased Voters.** Petitioners will not show that election officials received actual notice of a specific persons' death and then failed to comply with a duty to remove that person from the voter rolls.
- **Dual Voters.** Petitioners will not present any evidence that an election official knew, or had reason to know, that a particular voter was a resident of and had voted in another state, or had voted in another precinct or polling place in Washington.
- **Signature Matching Errors.** Petitioners contend that 223 ballots were improperly rejected by election officials because of signature issues, but will not prove that it was error to reject these ballots.
- **Recently Discovered Ballots.** Certain counties found uncounted ballots during their efforts to respond to subpoenas in this case, but because these ballots have not been properly secured since the election, it is not error to fail to count them now. WAC 434-240-290 ("Following the tabulation of absentee ballots, they shall be kept in sealed containers and in secure storage[.]").

None of these sundry errors alleged by Petitioners will be supported by sufficient proof to clearly and convincingly rebut the presumption of regularity afforded to election officials.

Quigley, 74 Wash. at 77. Nor will these claims of error allow this Court to conclude that the outcome of the 2004 election would have clearly fallen in favor of Mr. Rossi absent the errors. RCW 29A.68.070; *Moyer*, 12 Wash. at 385.

C. At the Conclusion of Petitioners' Case, the Court Should Dismiss the Contest.

Petitioners' case will not provide this Court with the clear and convincing evidence it needs to determine that the 2004 election was clearly invalid, and so once Petitioners rest their case this Court should dismiss the action. CR 41(b)(3) provides:

After the plaintiff, in an action tried to the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not

2 granted, may move for a dismissal on the ground that upon the facts
3 and the law the plaintiff has shown no right to relief.

4 In reviewing the case for dismissal under CR 41(b)(3), the Court may either (1) accept the
5 plaintiff's evidence and rule as a matter of law, or (2) weigh the evidence and enter findings
6 of fact, conclusions of law, and judgment of dismissal. *Seattle-First Nat'l Bank v. Hawk*, 17
7 Wn.App. 251, 253 (1977). A trial court's decision to dismiss a plaintiff's case at the close of
8 evidence is only overturned for a manifest abuse of discretion. *McCandlish Electric, Inc. v.*
9 *Will Construction Co.*, 107 Wn.App. 93 (2001) (affirming trial court's dismissal under
10 CR 41(b)(3)). A trial is within its discretion to dismiss under CR 41(b)(3) unless doing so is
11 "manifestly unreasonable or based on untenable grounds or reasons." *Thomas-Kerr v.*
12 *Brown*, 114 Wn.App. 554, 557-58 (2002).

13 At the conclusion of Petitioners' case, dismissal will be appropriate either on the law
14 or upon a weighing of Petitioners' proof. Even if, for example, the Court were to consider
15 Petitioners' experts' conclusions regarding who received alleged illegal votes credible, those
16 experts did not conclude that Mr. Rossi received the highest number of legal votes and so as
17 a matter of law this Court could conclude that Petitioners had failed to satisfy the
18 requirements of RCW 29A.68.050 and .110. More pointedly, once the Court weighs
19 Petitioners' evidence, the only conclusion to be drawn from that evidence will be that
20 Petitioners have failed to present clear and convincing proof that the 2004 election was
21 clearly invalid. Petitioners' patchwork of alleged illegal votes (many untimely or
22 incompletely disclosed), and assumed but not proven election official errors (many of which
23 are also untimely and incompletely disclosed) will not show that Petitioners have a right to
24 their requested relief. CR 41(b)(3).

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IV. OFFSETTING ILLEGAL VOTES AND ELECTION OFFICIAL ERRORS ASSERTED BY WSDCC

WSDCC is confident that, at the close of Petitioners' case, there will be insufficient proof to show that the 2004 election was clearly invalid and to demonstrate clearly and convincingly that Mr. Rossi was the true winner of the election. Nonetheless, WSDCC is prepared to present its own evidence of illegal votes and election official error if that evidence is necessary. Although the Petitioners would prefer that the Court rely solely on their cherry picked collection of illegal votes and errors, the contest statute requires that all evidence is heard. RCW 29A.68.050. ("After hearing the *proofs and allegations of the parties*, the court shall pronounce judgment in the premises[.]") (emphasis added); Verbatim Report of Proceedings, Court's May 2, 2005 Oral Decision at 15 ("the provisions of our election contest statute require the effect of illegal votes and election contest errors on both the winner and the runner-up be considered in order to fully address which candidate received the highest number of lawfully cast votes.").

In the course of discovery WSDCC found illegal votes that were not identified by Petitioners in any of their disclosures, and that offset the illegal votes Petitioners did identify. WSDCC collected this illegal vote data from a far greater number of counties than Petitioners, and ultimately identified nearly 800 felons that cast ballots in the November 2004 election. WSDCC will present the proof at trial necessary to satisfy five of the six requirements identified by the Court to prove that the voter is indeed a felon. Verbatim Report of Proceedings, Court's May 2, 2005 Oral Decision at 8. Like Petitioners, however, there will not be direct proof to show whether these voters cast a vote for governor and if so which candidate these voters voted for. But to the extent that this Court adopts the "methodology" urged by Petitioners' experts, when WSDCC's pool of identified illegal votes

2 is included in the analysis, it will show that Governor Gregoire still would have prevailed in
3 the 2004 election. Similarly, in counties that favored Mr. Rossi, over 1,800 provisional
4 ballots were fed directly into voting machines without the necessary signature verification
5 required by WAC 434-235-047, and are therefore illegal votes. Again, if the Court adopts
6 the assumptions of Petitioners' experts regarding how these votes should be deducted, the
7 net result will be that Governor Gregoire remains the victor of the 2004 gubernatorial
8 election.
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14 Likewise, WSDCC has identified election official errors that led to numerous lawful
15 votes not being counted in King County. WSDCC will prove that the following legal voters'
16 votes were not counted because: (1) King County failed to timely process voter registrations
17 and so did not properly match the registration to at least four lawfully cast provisional
18 ballots; (2) 47 lawful absentee ballots were rejected by King County because the County lost
19 or misplaced the registration data for those voters; (3) 16 provisional ballots were rejected
20 premised on an erroneous notation in a computer file that the voters' registrations had been
21 cancelled, but King County officials neglected to perform the necessary investigation
22 require by RCW 29A.08.625(3). WSDCC will present testimony from actual voters to hear
23 how the voters disenfranchised by these errors voted, and will present deposition testimony
24 from King County election workers that confirms an error was made in rejecting these
25 ballots. Again, these errors will offset the errors alleged by Petitioners, and will show that
26 Petitioners have not proven clearly and convincingly that Mr. Rossi won the 2004 election.
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41 V. CONCLUSION

42 For the reasons set forth above, the evidence to be presented at trial will show that
43 Governor Gregoire was validly elected and that Petitioners will fail in their attempt to prove
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that illegal votes or election official errors changed the result of the 2004 gubernatorial election.

DATED: May 20, 2005.

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The following documents were caused to be served:

1. WSDCC's Trial Brief; and
2. Certificate of Service.

These documents were served in the manner described below.

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I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed in Seattle, Washington on May 20, 2005.

By Rebecca J. Gregory
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