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I. INTRODUCTION

Article III, § 4 of the Washington Constitution establishes a simple proposition regarding election contests for the office of Governor – "contested elections for such officers shall be decided by the legislature in such manner as shall be determined by law." The constitutional grant of authority to the Legislature to determine contested elections for Governor is neither discretionary nor permissive. Our Constitution mandates that contested elections "shall be decided by the legislature." WASH. CONST. art. III, § 4. Accordingly, this Court lacks subject matter jurisdiction to hear any petition contesting the outcome of an election for Governor.

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II. RELIEF REQUESTED

Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC") respectfully requests that the Court grant its Motion to Dismiss for Lack of Subject Matter Jurisdiction.

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III. ISSUE PRESENTED

Whether this Court lacks subject matter jurisdiction over an election contest when the Washington Constitution mandates that the Legislature has sole authority to determine election contests for the office of Governor.

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IV. FACTUAL BACKGROUND

On December 30, 2004, Secretary of State Sam Reed certified Christine Gregoire as the winner of the 2004 election for Washington Governor. Declaration of William C. Rava ("Rava Decl.") ¶ 3, Ex. B. Governor Gregoire was certified the winner of the election after a manual recount determined that she had received 129 more votes than her opponent, Dino Rossi. Rava Decl. ¶ 2, Ex. A.

1 Following Secretary Reed's certification of the results, Secretary Reed delivered the
2 certified returns to the Speaker of the House of Representatives on the first day of the new
3 legislative session, January 10, 2005. In turn, the Speaker of the House of Representatives
4 and the President of the Senate declared Governor Gregoire "duly elected" and presented a
5 certificate of election to her. *See* WASH. CONST. art. III, § 4; Rava Decl. ¶ 4, Ex. C.
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11 **V. ARGUMENT AND AUTHORITY**
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13 This Court lacks subject matter jurisdiction to hear election contests for the office of
14 Governor because the Washington Constitution vests that power exclusively in the
15 Legislature. Contested elections for the office of Governor "shall be decided by the
16 legislature in such manner as shall be determined by law." WASH. CONST. art. III, § 4. This
17 grant is specific and exclusive. It is neither discretionary nor permissive. It, like similar
18 provisions in many other states' constitutions, dedicates this question to a political body.
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24 The election contest statute, RCW 29A.68 *et seq.*, cannot grant authority to a court to
25 decide a contest of an election for Governor. Article III, § 4 of the Constitution mandates
26 that the Legislature "shall" be the body that decides any contest according to the procedures
27 and rules it establishes by law. Accordingly, although RCW 29A.68 *et seq.* may determine
28 the standards that govern a contest, it cannot change the forum for that decision from the
29 Legislature to the Judiciary. Further, any other general jurisdictional grant to the Judiciary
30 cannot overcome this specific and exclusive grant to decide election contests for Governor.
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39 **A. Article III, § 4 of the Washington Constitution Commits Contests in**
40 **Elections for Governor to the Legislature.**
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42 Article III, § 4 of the Washington Constitution grants the Legislature exclusive
43 jurisdiction to hear and decide election contests arising out of elections for statewide
44 executive officers. This conclusion is fully supported by the text and history of the
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1 Constitution, as well as the decisions of courts in other states with similar constitutional
2 provisions.
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5 **1. The Text of Article III, § 4 Mandates That the Legislature Is the**
6 **Body That Decides All Contested Elections for Governor.**
7

8 "When interpreting constitutional provisions, [Washington courts] look first to the
9 plain language of the text and will accord it its reasonable interpretation." *Wash. Water Jet*
10 *Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477 (2004); *see also Young v. Clark*, 149
11 Wn.2d 130, 133 (2003) ("Where the language of the constitution is clear, the words used
12 therein should be given their plain meaning.") (internal quotation marks and citation
13 omitted); *Malyon v. Pierce County*, 131 Wn.2d 779, 799 (1997) ("Appropriate constitutional
14 analysis begins with the text and, for most purposes, should end there as well."). On its face,
15 the text of Article III, § 4 vests exclusive jurisdiction for election contests in the Legislature.
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18 Article III of the Washington Constitution creates the executive branch of our State
19 government. The relevant sections of this Article provide:
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22 SECTION 1 EXECUTIVE DEPARTMENT. The executive
23 department shall consist of a governor, lieutenant governor, secretary
24 of state, treasurer, auditor, attorney general, superintendent of public
25 instruction, and a commissioner of public lands, who shall be
26 severally chosen by the qualified electors of the state at the same time
27 and place of voting as for the members of the legislature.
28

29 SECTION 2 GOVERNOR, TERM OF OFFICE. The supreme
30 executive power of this state shall be vested in a governor, who shall
31 hold his office for a term of four years, and until his successor is
32 elected and qualified.
33

34 SECTION 3 OTHER EXECUTIVE OFFICERS, TERM OF OFFICE.
35 The lieutenant governor, secretary of state, treasurer, auditor, attorney
36 general, superintendent of public instruction, and commissioner of
37 public lands, shall hold their offices for four years respectively, and
38 until their successors are elected and qualified.
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1 SECTION 4 RETURNS OF ELECTION, CANVASS, ETC. The
2 returns of every election *for the officers named in the first Section of*
3 *this Article* shall be sealed up and transmitted to the seat of
4 government by the returning officers, directed to the secretary of
5 state, who shall deliver the same to the speaker of the house of
6 representatives at the first meeting of the house thereafter, who shall
7 open, publish and declare the result thereof in the presence of a
8 majority of the members of both houses. The person having the
9 highest number of votes shall be declared duly elected, and a
10 certificate thereof shall be given to such person, signed by the
11 presiding officers of both houses; but if any two or more shall be
12 highest and equal in votes for the same office, one of them shall be
13 chosen by the joint vote of both houses. *Contested elections for such*
14 *officers shall be decided by the legislature in such manner as shall be*
15 *determined by law.* The terms of all officers named in Section one of
16 this Article shall commence on the second Monday in January after
17 their election until otherwise provided by law.
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21 (emphases added).
22

23 Article III, § 4 of the Washington Constitution answers two important questions
24 either ignored or obfuscated by Petitioners: "Which body may decide an election contest for
25 Governor?" and "How shall the contest be determined?" These questions are the core of any
26 textual analysis of Article III, § 4.
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30 The text of Article III, § 4 is unambiguous. The legislature decides election contests
31 for the office of Governor. The clause "shall be decided" is modified by the phrase "by the
32 legislature." Through this sentence, the Constitution imposes a mandatory duty on only one
33 branch of government – the Legislature. This is the only plausible answer to the question of
34 which body may decide an election contest for Governor. *See Wash. State Labor Council v.*
35 *Reed*, 149 Wn.2d 48, 55 (2003) (stating that duties created through the word "shall" are
36 mandatory). Article III, § 4 further provides that the manner for deciding the contest shall
37 be determined by law. This is the answer to the question of how the contest should be
38 decided.
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1 In this sentence structure, the core concept that contests "shall be decided by the
2 legislature" stands alone and is unmodified by any other phrase in the sentence. *See*
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4 *Malyon*, 131 Wn.2d at 799 (stating that when considering the plain meaning of a
5
6 constitutional provision, "[t]he text necessarily includes the words themselves, their
7
8 grammatical relationship to one another, as well as their context"). The core of Article III,
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10 § 4 is clear – election contests "shall be decided by the legislature." By bringing a contest in
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12 court in reliance on the statutory election contest provisions, Petitioners would have the
13
14 Court rewrite this section of the Constitution and ask the Judiciary to usurp the Legislature's
15
16 constitutional role. In essence, Petitioners ask that this Court remove the words "by the
17
18 legislature" from the sentence as it currently reads and place them, if anywhere, at the end of
19
20 the sentence, like this: "Contested elections for such officers shall be decided ~~by the~~
21
22 legislature in such manner as shall be determined by law by the legislature." But that is not
23
24 how the framers drafted our Constitution.
25

26
27 The Arkansas Supreme Court discussed a possible attempt to rewrite or misinterpret
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29 its similar constitutional provision, "Contested elections shall likewise be determined by
30
31 both houses of the general assembly in such manner as is or may hereafter be prescribed by
32
33 law." *State ex rel. Brooks v. Baxter*, 29 Ark. 173, 184, 1874 WL 1156, at *6 (1874). There,
34
35 the legislature had established the manner and method for such contests by statute. *Id.* The
36
37 Court foreclosed any argument that the legislature's authority to determine the *manner* of a
38
39 contest might somehow give the legislature the ability to delegate its duty to hear the
40
41 contest:
42

43 But without any law to regulate the proceedings in such case before
44 the general assembly, the jurisdiction of the case would remain there,
45 if it is exclusive. The mere failure on the part of the legislature to
46 provide a mode of conducting the trial would no more oust the
47 jurisdiction than a failure to establish laws governing actions before

1 justices of the peace or probate courts, would destroy their
2 constitutional jurisdiction, and give the power to bestow it somewhere
3 else, by a simple enactment. Constitutions would be worth but little,
4 if they could be thus evaded.
5

6 *Id.*

7
8 Similarly, the plain text of the Washington Constitution commits to the Legislature
9 exclusive jurisdiction to decide election contests for statewide offices, and the exclusive
10 nature of the Legislature's jurisdiction is not affected by the presence or absence of statutes
11 establishing the manner or mode of such contests.
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16 **2. Our Constitutional History Confirms That the Legislature Has**
17 **Exclusive Jurisdiction to Decide Contested Elections for**
18 **Governor.**
19

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21 It is not necessary to look further because plain words do not require construction.
22
23 *See Wash. Econ. Dev. Fin. Auth. v. Grimm*, 119 Wn.2d 738, 748-49 (1992) ("We will not
24 construe or interpret a constitutional provision that is plain or unambiguous."); *State ex rel.*
25 *Anderson v. Chapman*, 86 Wn.2d 189, 191 (1975) ("The first rule of constitutional
26 construction which we should consider is the rule that if a constitutional provision is plain
27 and unambiguous on its face, then no construction or interpretation is necessary or
28 permissible."
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35 Here, however, Washington's constitutional history confirms that Article III, § 4
36 requires that the Legislature, not the Judiciary, decide contested elections for statewide
37 offices. After being drafted by a committee, Article III, including § 4, was presented to the
38 Convention sitting as a Committee of the Entirety for debate and questions on July 25, 1889.
39
40 *The Journal of the Washington State Constitutional Convention, 1889* 565 (Beverly Paulik
41 Rosenow ed., 1962). Theodore Stiles, a Republican lawyer from Tacoma, *id.* at 485, "asked
42 if contests weren't decided through the courts," *id.* at 565. The chair of the committee that
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1 drafted Article III, Allen Weir, also a Republican, *id.* at 489, 559, replied "that these partisan
2 contests should be determined by the Legislature," *id.* at 565. Thus, the constitutional
3 history confirms that Article III, § 4 vests the Legislature with exclusive jurisdiction to hear
4 and determine election contests for statewide executive officers.
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9 **3. Courts in States with Similar Constitutional Provisions Interpret
10 Those Provisions to Vest Exclusive Jurisdiction in the Legislature.**
11

12 The courts of other states with similar constitutional provisions regarding election
13 contests have unanimously concluded that the Legislature has exclusive jurisdiction and that
14 the courts lack subject matter jurisdiction over such contests.
15
16

17 For example, Article VI, § 19 of the Arkansas Constitution of 1868 provided that for
18 statewide executive officers, "contested elections shall likewise be determined by both
19 houses of the general assembly in such manner as is or may hereafter be prescribed by
20 law."¹ The Arkansas Supreme Court held that this clause vests exclusive jurisdiction in the
21 general assembly. *State ex rel. Brooks v. Baxter*, 28 Ark. 129, 134-35, 1873 WL 998 at *4-5
22 (1873). Moreover, the court held that its jurisdiction to issue writs did not give it subject
23 matter jurisdiction over a disputed general election for lieutenant governor. *Id.*
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32 In Indiana, Article V, § 6 of the Indiana Constitution reads, "contested elections for
33 Governor or Lieutenant Governor, shall be determined by the General Assembly, in such
34 manner as may be prescribed by law." There too, the Indiana Supreme Court held that this
35 clause vests exclusive jurisdiction in the general assembly and that the courts lacked subject
36 matter jurisdiction to hear a writ regarding the office of lieutenant governor. *Robertson v.*
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45 ¹ In the current Arkansas Constitution, this provision appears as Article VI, § 4, which reads:
46 "Contested elections . . . shall be determined by the members of both houses of the General
47 Assembly, in joint session; who shall have exclusive jurisdiction in trying and determining the same,
except as hereinafter provided in the case of special elections"

1 *State ex rel. Smith*, 109 Ind. 79, 10 N.E. 582, 588, 599, 600, 606, 612 (1887) (all five
2 justices arriving at same subject matter jurisdiction holding in independent opinions).
3

4 The North Carolina Constitution also contains a similar provision regarding election
5 contests for statewide executive offices: "A contested election for any office established by
6 Article III of this Constitution shall be determined by joint ballot of both houses of the
7 General Assembly in the manner prescribed by law." N.C. CONST. art. VI, § 5. Litigation of
8 an election contest regarding an office established by Article III of the North Carolina
9 Constitution – the office of Superintendent of Public Instruction – is currently pending in the
10 North Carolina Supreme Court. In that case, the winner of the election (notably, a
11 Republican) has made the exact same jurisdictional argument that WSDCC is raising in this
12 motion: "Subject matter jurisdiction does not lie with the Supreme Court in a contested
13 election for an office created in Article III of the North Carolina Constitution." Brief of
14 Intervenor-Defendants, Respondent June S. Atkinson, and Respondent John Parks, *James et*
15 *al. v. Bartlett et al.*, No. 602PA04-2, Supreme Court of North Carolina, at 5-16 (filed
16 January 13, 2005); *see id.* at 9-13 (citing cases from other states that "have similar
17 constitutional provisions that place subject matter jurisdiction over election contests for
18 statewide office in the legislature or general assembly"). Rava Decl. ¶ 5, Ex. D.
19

20 Considering similar constitutional provisions, the supreme courts of Alabama,
21 Kentucky, and Texas have stated the same rule. *See Roe v. Mobile County Appointment Bd.*,
22 676 So. 2d 1206, 1218 (Ala. 1995) (per curiam) ("No court, state or federal, has jurisdiction
23 to hear evidence in an election contest for a statewide election . . ."), *overruled in part on*
24 *other grounds by Williamson v. Indianapolis Life Ins. Co.*, 741 So. 2d 1057, 1059 (Ala.
25 1999); *Taylor v. Beckham*, 108 Ky. 278, 56 S.W. 177, 177 (1900) (stating that "the general
26 assembly, . . . under the constitution, is the tribunal to determine contests for [governor and
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1 lieutenant governor]"); *Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1012, 1016 (1924)
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3 (stating that contests for statewide executive officers "may be determined only by both
4
5 houses of the Legislature in joint session").²
6

7 **B. Washington's Statutory Election Contest Provisions Do Not Give This**
8 **Court Jurisdiction.**
9

10 Contrary to Petitioners' assertions, Washington's statutory election contest provisions
11
12 in RCW 29A.68 *et seq.* do not give this Court jurisdiction over this matter. A statute cannot
13
14 be interpreted or applied in a way that would violate the Constitution. *See Yelle v. Kramer*,
15
16 83 Wn.2d 464, 472 (1974) (stating that laws should be construed so that the resulting
17
18 interpretation is constitutional). Because, as discussed above, the Constitution entrusts
19
20 election contests for statewide executive officers to the Legislature, the election contest
21
22 statute cannot be construed to apply to contests arising out of elections for these officers.
23
24 Any other construction would render the election contest statutes unconstitutional.

25
26 Nor can RCW 29A.68 *et seq.* be interpreted as delegating the exclusive legislative
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28 function of deciding election contests for statewide officers to the Judiciary. Such an
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30 assertion fails to recognize the Washington Constitution as the supreme source of state law
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32 and is unsupported by Washington separation of powers jurisprudence or rulings in other
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34 states. It also conflicts with the Legislature's own position regarding the exclusivity of its
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36 jurisdiction over contests for statewide officers as expressed at the only prior time in our
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38 State's history that an election for Governor was contested.
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46 ² Tennessee, Pennsylvania and Oregon have constitutional provisions similar to Article III,
47 § 4 in Washington's Constitution, but these states' appellate courts have not yet interpreted the provisions.

1 **1. Deciding a Contested Election for Governor Is an Exclusive**
2 **Legislative Function and Is Not Constitutionally Delegable.**
3

4 The Legislature's power to *decide* election contests is not only exclusive, it is also
5 nondelegable. RCW 29A.68 *et seq.* may be a permissible delegation of the Legislature's
6 power to regulate elections generally, *see State ex rel. Shepard v. Superior Court*, 60 Wash.
7 370, 372 (1910), but it is unconstitutional if extended in conflict with more specific and
8 relevant sections of the Washington Constitution. "The legislature may not grant this Court
9 authority to perform a function that is reserved exclusively to the legislature by the
10 Constitution." *Sackett v. Santelli*, 146 Wn.2d 498, 504 (2002).
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18 Purported delegations of required functions or duties are different from delegations
19 of powers. In *Sackett*, the appellant contested the delegation by the Legislature to the
20 Judiciary of the power to make rules regarding implied waiver of the right to a jury trial. *Id.*
21 at 500. The Court allowed the delegation and held that Article I, § 21, which provides that
22 the Legislature "may" provide for waiver of a jury trial, addressed a "power" of the
23 Legislature and "not a grant of exclusive authority." *Id.* at 505.
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30 In contrast, the Supreme Court has rejected attempted delegations of mandatory
31 legislative duties. For example, Article IV, § 10 provides that "[t]he Legislature shall
32 determine the number of justices of the peace to be elected and shall proscribe by law the
33 powers, duties, and jurisdiction of the justices of the peace." This Article is more than just a
34 grant of power to act. Rather, it establishes a mandatory function and a constitutional
35 obligation stronger than the mere power or discretion to act. It is a "specific mandate . . . too
36 clear for interpretation. It unequivocally places the *duty* of fixing the number of justices of
37 the peace upon the legislature exclusively, and leaves no room for the applicability of the
38 doctrine of permissive delegation of legislative authority." *Manus v. Superior Court*, 44
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1 Wn.2d 893, 895 (1954) (emphasis added); *see also State ex rel. Kurtz v. Pratt*, 45 Wn.2d
2
3 151, 155 (1954).³ As in *Manus*, the Article III, § 4 clause, "shall be decided by the
4
5 legislature," mandates that the Legislature perform a duty. The duty *to decide* in Article III,
6
7 § 4 is as clear, unequivocal, and nondelegable as the duty at issue in *Manus*. It is more than
8
9 the power or discretion to act, but instead it requires that, if there is a decision to be made
10
11 regarding an election contest for Governor, the decision must be made by the Legislature.
12

13 As Washington does in Article II, § 8 of its Constitution, many states require that
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15 each house of the legislature or general assembly be the judge of its members' qualifications
16
17 and elections. The courts in those states have uniformly held election contest statutes to be
18
19 unconstitutional delegations of exclusive legislative duties when applied to legislative races.
20
21 *See In Re McGee*, 36 Cal. 2d 592, 595, 226 P.2d 1, 3 (1951); *Dinan v. Swig*, 223 Mass. 516,
22
23 517, 112 N.E. 91, 92 (1916) ("The grant of power is comprehensive, full, and complete. It is
24
25 necessarily exclusive . . ."); *Harden v. Garret*, 483 So. 2d 409, 411 (Fla. 1986); *Kennedy v.*
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27 *Chittenden*, 142 Vt. 397, 399, 457 A.2d 626, 627 (1983); *State ex rel. Redon v. Spearing*, 31
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29 La. Ann. 122, 123, 1879 WL 7224, at *2 (La. 1879); *Reif v. Barrett*, 355 Ill. 104, 126-27,
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31 188 N.E. 889, 899 (1933), *overruled in part on other grounds by Thorpe v. Mahin*, 43 Ill. 2d
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33 36, 45, 250 N.E.2d 633, 637 (1969). Similarly, RCW 29A.68 *et seq.*, if applied to an
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35 election contest over the office of Governor, is an unconstitutional delegation.
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42 ³ In *Kurtz*, the Court held that the Legislature's attempted delegation of a mandatory duty
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44 was unconstitutional. The Court also stated, because *Kurtz* petitioned for a pre-election change in
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46 the ballot, that the statute for correcting pre-certification errors by election officials, now
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RCW 29A.68.011(1)-(5), was a proper exercise of legislative power as applied to a race for justice of
the peace. 45 Wn.2d at 156. However, the Court did not have occasion in *Kurtz* to consider whether
the statute was a permissible delegation as applied to either (a) post-election contests of general
elections or (b) contests regarding statewide officers.

1 **2. The Legislature Has Recognized the Exclusive Nature of Its**
2 **Power to Determine Contests of an Election for Governor.**
3

4 In 1941, the Washington Legislature recognized and accepted its exclusive
5
6 jurisdiction over election contests for the office of Governor. Wash. S. Journal 29-33
7
8 (Jan. 14, 1941). Governor-Elect Langlie had won the election by a narrow margin. Before
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10 he was certified or sworn in, members of the other party contested his election in the
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12 Legislature, claiming they had evidence that the election results were procured by fraud. *Id.*
13
14 at 30. The Notice of Election Contest stated:

15
16 That whereas under and by virtue of authority of the Constitution of
17 the State of Washington the matter of election contests for all
18 executive officers, and therefore for Governor, has been exclusively
19 lodged with the Legislature as a special judicial body to jointly hear
20 and determine such contests.
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23 *Id.* at 30. The Legislature held a joint session, in which it sat "jointly as a judicial body to
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25 hear and determine election contests." *Id.* On a roll call vote of both houses the Legislature
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27 rejected a motion to refer the contest to a special joint committee for investigation, denying
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29 the contest. *Id.* at 31.

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31 Thus, at the only prior time an election for Governor has been contested in our
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33 State's history, the Legislature explicitly recognized its exclusive jurisdiction over contests
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35 for that office and upheld its duty to decide contested elections for Article III, § 1 officers.
36

37 **3. Reading RCW 29A.68 et seq. as a Delegation of the Legislature's**
38 **Jurisdiction to Decide Election Contests for Statewide Officers**
39 **Would Conflict with Other Constitutional Provisions.**
40

41 An additional reason why RCW 29A.68 et seq. cannot be interpreted as a delegation
42
43 of the Legislature's authority to decide election contests for statewide offices is that such an
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45 interpretation would conflict with other provisions of the Constitution. *See Yelle*, 83 Wn.2d
46
47 at 472 (stating that laws should be construed so that the resulting interpretation is

1 constitutional). The Speaker of the House of Representatives has constitutional duties under
2 Article III, § 4 to accept from the Secretary of State the returns of the general election "at the
3 first meeting of the House thereafter," and to "open, publish and declare the result thereof in
4 the presence of a majority of the members of both houses." WASH. CONST. art. III, § 4.
5
6 "The person having the highest number of votes shall be declared duly elected, and a
7 certificate thereof shall be given to such person, signed by the presiding officers of both
8 houses; but if any two or more shall be highest and equal in votes for the same office, one of
9 them shall be chosen by the joint vote of both houses." *Id.* Thus, the Speaker of the House
10 of Representatives has the duty to accept the results of the election and to issue the
11 Certificate of Election, signed by the Speaker and the President of the Senate, to the person
12 with the highest number of votes for an Article III, § 1 office.
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14

15
16 In a contest over the election for Governor, the Speaker's issuance of the certificate
17 of election is the act at issue. Yet, Article II, § 16 provides that "members of the Legislature
18 . . . shall not be subject to any civil process during the session of the Legislature, nor for
19 15 days next before the commencement of each session." This constitutional immunity from
20 service of process prevents the Speaker of the House of Representatives from being served
21 during the time an election contest for the office of Governor could be made under RCW
22 29A.68.011(6).⁴ With this immunity in place, the Speaker could not be a party to such an
23 action, could not be ordered to appear under RCW 29A.68.040 or RCW 29A.68.050, and
24 arguably could not be made subject to any order from the Court regarding the certificate of
25 election.
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46 ⁴ In this action, Petitioners named the Speaker of the House and the President of the Senate
47 as Respondents. Pet. at 1, 3. WSDCC understands that these officers have not accepted service of
process. Rava Decl. ¶ 7.

1 **4. The Cases Cited by Petitioners Do Not Give This Court**
2 **Jurisdiction.**
3

4 Petitioners assert that this Court has jurisdiction on the basis of two cases, *Foulkes v.*
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6 *Hays*, 85 Wn.2d 629 (1975), and *Becker v. County of Pierce*, 126 Wn.2d 11 (1995). Pet. at
7
8 4-5. However, neither case vests jurisdiction in this Court.
9

10 In *Foulkes*, the superior court exercised jurisdiction to hear consolidated statutory
11 actions involving a contest and a separate claim of wrongful and neglectful acts on the part
12 of election officials during a recount. The action was brought pursuant to the election
13 contest statute, which was then codified at RCW 29.65.010 and is now RCW 29A.68.020,
14 and also the statute for pre-certification correction of errors on the part of elections officials,
15 which was then codified at RCW 29.04.030 and is now RCW 29A.68.011(1)-(5). The
16 Washington Supreme Court held that the petitioner's claims were outside the scope of the
17 election contest statute because the claim related to ballots that had been fraudulently altered
18 after being cast and counted but before the required recount. *Id.* at 634. The facts did not
19 show any votes by persons not qualified to vote. *Id.* Regarding the pre-certification error-
20 correcting statute, the Court noted that the statute has "broad language and murky legislative
21 history." *Id.* at 632-33. The Court concluded that the error-correcting statute recognized the
22 general equity jurisdiction of the courts "to intervene in cases of election fraud or
23 wrongdoing" when the election contest statute did not apply. *Id.*
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38 *Foulkes* was a contest of a county commissioner's election. *Id.* at 630. For such
39 races, no provision of the Constitution specifies how and in which tribunal a contest must be
40 brought. Instead, the Constitution gives the Legislature broad power to enact laws
41 governing county commissioner elections. *See* WASH. CONST. art. II, § 5 (stating that the
42 "legislature, by general and uniform laws, shall provide for the election in the several
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1 counties of boards of county commissioners"). Thus, in *Foulkes* the Court was able to hold
2 that the error-correcting statute gave courts power to hear contests in such races without
3 running afoul of a constitutional provision governing the same subject. The same would not
4 be true if this Court were to rely on the election statutes to hear Petitioners' contest.⁵
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8 Petitioners' claim to equity jurisdiction regarding the Governor's election conflicts with
9 Article III, § 4 in a way that the *Foulkes* Court never addressed. *Foulkes* was a mid-recount
10 dispute over a county commissioner's election that should not be extended to the general
11 election for Governor because to do so would conflict with the Constitution.⁶
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17 The other case relied upon by Petitioners, *Becker v. County of Pierce*, 126 Wn.2d 11
18 (1995), also does not support the Court having jurisdiction over this contest. In the
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25 ⁵ During the manual recount in this election, WSDCC brought an action on the basis of the
26 error-correcting statute, RCW 29A.68.011(4) and (5). See *McDonald v. Sec'y of State Reed*, ____
27 P.3d ____, 2004 WL 2937796 (Wash. Dec. 14, 2004). That action was not an election contest. An
28 election contest asserts that a candidate does not have the right to be declared elected to an office.
29 See *Becker v. County of Pierce*, 126 Wn.2d 11, 20 (1995) (holding that an action seeking to set aside
30 an election is an election contest); *Dumas v. Gagner*, 137 Wn.2d 268, 282 (1999) (stating that the
31 Court "focuse[s] on the relief sought, that is setting aside an election, to determine whether [an]
32 action constitute[s] an election contest"); *Foulkes*, 85 Wn.2d at 633-34 (stating that election contests
33 may be brought via proceedings other than the true election contest statute, when such proceedings
34 are otherwise available). WSDCC's prior action was not an election contest because it did not
35 contest any candidate's right to be declared elected. The action sought an order directing that, as part
36 of the then-upcoming recount of the election, counties recanvass ballots. In contrast, Petitioners'
37 action is a contest in name and substance. It is entitled an "Election Contest Petition" and it begins:
38 "This is an action contesting the 2004 election for the Office of Governor." Pet. at 1, 2. The Petition
39 further states that Petitioners "contest the election and the right of Christine Gregoire to be issued a
40 certificate of election for the office of Governor." Pet. at 3. Petitioners' portrayal of WSDCC's
41 earlier lawsuit brought under RCW 29A.68.011(4) and (5) as an election contest, see Pets.' Opp'n to
42 WSDCC's Mot. for Briefing Schedule & Stay of Proceedings at 5 n.2, inartfully fails to distinguish
43 between the pre-certification correction of errors and an election contest.
44

45
46 ⁶ Further, Petitioners' contest relates to votes cast by unqualified voters. It is therefore
47 within the purview of the election contest statute and, even if *Foulkes* were to apply, would have to
be decided under the election contest statute, not the pre-certification error-correcting statute.

1 September 1992 primary election, Brian Sonntag and Nina Becker were Democratic
2 candidates for State Auditor. *Becker*, 126 Wn.2d at 13. At the time of the election,
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4 Mr. Sonntag was the Pierce County Auditor. *Id.* He won the primary election and went on
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6 to win the general election for State Auditor. *Id.* More than one year after the general
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8 election, Ms. Becker filed a declaratory judgment action asserting that Mr. Sonntag had
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10 violated what was then RCW 29.62.030 (part of the canvassing statute) by failing to recuse
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12 himself from supervising the canvassing in his own primary and general election. *Id.* at 14.
13
14 The trial court dismissed the action on the merits, holding that Mr. Sonntag had not violated
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16 the canvassing statute.
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19 The Supreme Court affirmed, agreeing with the trial court's reasoning. *Id.* at 16-17.
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21 It also considered Mr. Sonntag's alternative argument, raised for the first time on appeal, that
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23 Ms. Becker's declaratory judgment action was really an untimely election contest under the
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25 statute then codified at RCW 29.65.010. *Id.* at 18. At the time, this election contest statute
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27 specified that a challenge "must be filed not later than three days after the primary election
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29 results are certified or not later than ten days following the issuance of the Certificate of
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31 Election." *Id.* at 20. The Supreme Court held that Ms. Becker's declaratory judgment action
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33 was an election contest and was untimely. *Id.* at 21. In holding that Ms. Becker's primary
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35 election contest action was time-barred, the Supreme Court did not need to reach the issue of
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37 whether it had jurisdiction to hear a general election contest involving a constitutional office
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39 and there is no indication that it considered the issue.

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41 *Becker* does not confer jurisdiction on this Court to hear an election contest for the
42
43 office of Governor. First, and most importantly, the parties in *Becker* did not raise, and the
44
45 Court did not address, the issue of Article III, § 4. A case is not authority for issues not
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47 considered. *See Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816,

1 824 (1994) ("In cases where a legal theory is not discussed in the opinion, that case is not
2 controlling on a future case where the legal theory is properly raised."); *In re Elec.*
3
4 *Lightwave, Inc.*, 123 Wn.2d 530, 541 (1994) ("We do not rely on cases that fail to
5 specifically raise or decide an issue."). This rule is particularly important when the issue is a
6 constitutional one. It would be improper and inappropriate to treat *Becker* as a de facto,
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8 constitutional one. It would be improper and inappropriate to treat *Becker* as a de facto,
9
10 silent holding on an important question of constitutional law concerning the relationship
11 between two branches of government.
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15 Second, to the extent *Becker* may have any bearing on this issue, it should be limited
16 to contests of primary elections. The constitutional grant of jurisdiction to the Legislature to
17 decide election contests for Governor applies on its face only to the general election (which
18 makes sense because the Legislature is not typically in session at the time of primary
19 elections but is in session when new executive officers take office).⁷ Ms. Becker lost the
20 primary election, and her whole case flowed from that loss. The appeal too was centered on
21 the primary and was not briefed as a review of the general election. *See* Brief of Respondent
22 at 16-18, *Becker v. County of Pierce*, 126 Wn.2d 11 (1995) (No. 61553-5) (appellant Becker
23 knew or should have known of her grievance after the primary election and was thereby
24 barred by the statute's 3-day primary contest timeline); Brief of Amicus Curiae at 13,
25 *Becker v. County of Pierce*, 126 Wn.2d 11 (1995) (No. 61553-5). *See* Rava Decl. ¶ 6, Ex. E.
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42 ⁷ In addition, partisan primary elections are conducted primarily for the benefit of political
43 parties, which have the constitutional right to ensure that only party members vote for party
44 candidates. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 577 (2000). It makes little sense, and
45 would violate the United States Constitution, *see id.*, for members of another political party sitting in
46 the Legislature to decide a contested partisan primary election. These concerns support *Becker* as a
47 primary election case, but do not supplant the Article III, § 4 mandatory duty placed upon the
Legislature in contests for Governor.

1 Cases regarding primary election contests for members of the Legislature support
2 reading *Becker* as a primary election case. As for statewide executive offices, the
3
4 Constitution grants the Legislature exclusive jurisdiction to hear election contests of its
5
6 members. WASH. CONST. art. II, § 8 ("Each house shall be the judge of the election, returns
7
8 and qualifications of its own members. . . ."). However, the Supreme Court has held that
9
10 this constitutional grant of exclusive jurisdiction to the Legislature does not extend to
11
12 primary elections, which can be contested in court following the generally applicable
13
14 statutory procedures. *See State ex rel. McAvoy v. Gilliam*, 60 Wash. 420, 422-23 (1910).⁸
15

16
17 In sum, the textual language, constitutional history, and cases from other states all
18
19 show that jurisdiction over election contests for statewide executive offices is vested
20
21 exclusively in the Legislature. This constitutional imperative – that election contests "shall
22
23 be decided by the legislature" – should not be supplanted by *Becker* or *Foulkes*.
24

25 **C. The General Grant of Jurisdiction in Article IV, § 6 of the Washington**
26 **Constitution Does Not Give This Court Jurisdiction.**
27

28 Finally, the residual, general grant of jurisdiction to the superior courts set forth in
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30 Article IV, § 6 of the Constitution does not give this Court jurisdiction over this action. This
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32 section states: "The superior court shall also have original jurisdiction in all cases and of all
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37 ⁸ Even if this Court interprets *Becker* and RCW 29A.68 *et seq.* as granting jurisdiction over
38 the election contest for Governor, *Becker* establishes that an election contest is a special proceeding,
39 created by statute, and its procedures are strictly and exclusively governed by those statutes. *Becker*,
40 126 Wn.2d at 18 ("Early this century we clearly established that the right to contest an election 'rests
41 solely upon, and is limited by, the provisions of the statute relative thereto.'") (quoting *Quigley v.*
42 *Phelps*, 74 Wash. 73, 75 (1913)). This narrow and precise approach to election contests is firmly
43 established in Washington. "Election contests are governed by several general principles. Chief
44 among them is the principle, long followed by this Court, that the judiciary should exercise restraint
45 in interfering with the elective process which is reserved to the people in the state constitution.
46 Unless an election is clearly invalid, when the people have spoken, their verdict should not be
47 disturbed by the courts." *Dumas v. Gagner*, 137 Wn. 2d 268, 283 (1999) (internal quotation marks
omitted).

1 proceedings in which jurisdiction shall not have been by law vested exclusively in some
2 other court." WASH. CONST. art. IV, § 6. In *Foulkes*, the Court held that the general equity
3 jurisdiction conferred by this provision gave the Court the power to hear an election contest
4 over a county commissioner that fell outside the scope of the election contest statutes. 85
5 Wn.2d at 631-33. However, here, unlike in *Foulkes*, a specific provision of the
6 Constitution – Article III, § 4 – governs the precise situation at hand. This specific
7 provision takes precedence over the general grant of jurisdiction in Article IV, § 6.
8

9
10 The Constitution should be interpreted in a manner that gives effect to all its
11 provisions and harmonizes any potential conflict between provisions. *See Wash. Econ. Dev.*
12 *Fin. Auth. v. Grimm*, 119 Wn.2d 738, 746 (1992) ("[C]onstitutional provisions should be
13 construed so that no clause, sentence or word shall be superfluous, void, or
14 insignificant. . . ."); *State v. Parmenter*, 50 Wash. 164, 178 (1908) ("It is our duty to adopt
15 such construction [of the Constitution] as will most nearly harmonize all provisions in the
16 section, with the evident chief purpose sought to be accomplished."). Article III, § 4
17 specifically states what should happen in an election contest for a statewide executive
18 officer: the contest "shall" be decided by the Legislature. In contrast, the residual grant of
19 jurisdiction in Article IV, § 6, the Article that creates the Judiciary, is general and makes no
20 reference to election contests at all, let alone contests for statewide executive officers.
21 When a constitutional provision provides a rule specifically for a certain situation, that rule,
22 rather than any general background rules, must be applied. *See Parmenter*, 50 Wash. at 178.
23

24
25 If this Court were to exercise jurisdiction to determine an election contest for a
26 statewide executive officer on the basis of Article IV, § 6, there would be an unalterable
27 conflict between that section and Article III, § 4 of the Constitution. It could lead to
28 conflicting decisions from this Court and the Legislature as to which candidate had actually
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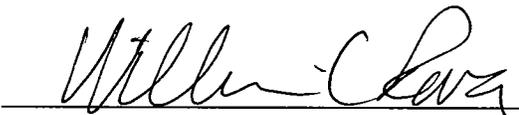
1 won the election. There would be no way to resolve the conflict because the two branches
2 of government are coordinate and equal and each are entitled to make final pronouncements
3 on decisions entrusted to them by the Constitution. In a similar case, the Arkansas Supreme
4 Court explained that this problem would result because the judiciary and the political branch
5 are "of equal dignity and power, [and] the mandates of each must be obeyed." *Brooks*, 28
6 Ark. at 138, 1873 WL at *5. The court did not hesitate to conclude that the potential for this
7 problem was intolerable and that no one could "for [even] a moment, suppose the framers of
8 the constitution" intended such a result. *Id.* To avoid such a conflict, Article IV, § 6 must
9 be interpreted not to apply in circumstances governed by Article III, § 4.
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19 **VI. CONCLUSION**

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21 For the reasons set forth above, the Court should grant the Motion to Dismiss for
22 Lack of Subject Matter Jurisdiction.
23

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25 DATED: January 20, 2005.
26

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