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I. INTRODUCTION

Petitioners ask this Court to do what has never been done in the history of this State – overturn the results of a Governor's race and eject a sitting Governor from office. The Election Contest Petition specifically asks the Court to "issue an order . . . directing that a new election be conducted as soon as practicable." Petition at 10. Assuming that the Judiciary has jurisdiction to decide an election contest for the Office of Governor and assuming that this Court is "the appropriate court" to hear this contest,¹ this Court lacks authority to grant Petitioners' unprecedented request for a special election for Governor. Neither the Constitution, nor the election contest statute, nor the Court's equity jurisdiction provides for this extraordinary remedy.

II. RELIEF REQUESTED

Intervenor-Respondent WSDCC respectfully requests that the Court grant WSDCC's Motion to Strike Petitioners' Requested Relief.

III. ISSUE PRESENTED

Whether Petitioners' requested relief, the ordering of a new special election for Governor, should be stricken because it is unavailable under the Constitution, the election contest statute, or the Court's general equity jurisdiction.

IV. FACTUAL BACKGROUND

On December 30, 2004, Washington 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.") ¶ 2, Ex. A. Governor Gregoire was certified the winner of

¹ Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC") addresses the issues of jurisdiction and venue in concurrently filed motions to dismiss.

1 the election after a manual recount determined that she had received 129 more votes than her
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3 opponent, Dino Rossi. *Id.*

4
5 Following Secretary Reed's December 30, 2004 certification of the results, Secretary
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7 Reed delivered the certified returns to the Speaker of the House of Representatives on the
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9 first day of the new legislative session, January 10, 2005. Rava Decl. ¶ 2. In turn, the
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11 Speaker of the House of Representatives and the President of the Senate declared Governor
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13 Gregoire "duly elected" and presented "a certificate thereof," WASH. CONST. art. III, § 4, to
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15 Governor Gregoire. Rava Decl. ¶ 2, Ex. A.

16
17 On January 7, 2005, representatives of the losing candidate in the Governor's race,
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19 Rossi for Governor Campaign, and six Washington electors filed an Election Contest
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21 Petition ("Petition") in this Court. Petitioners, invoking judicial "plenary powers, and other
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23 applicable law" asked this Court to void Governor Gregoire's election and "order that a new
24
25 election be conducted as soon as practicable." Petition at 4, 10 (requesting an order
26
27 "directing that a new election be conducted as soon as practicable"); *see also* Affidavit of
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29 Chris Vance in Support of Election Contest Petition ¶ 12. Mr. Rossi himself, prior to the
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31 filing of the Petition and in statements afterwards, has insisted that the remedy he is seeking
32
33 is a new election for governor. Rava Decl. ¶ 3, Ex. B at 3 ("But the only remedy I've
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35 asked—and that I've told the lawyers to ask for—*there's only one remedy I want, and that is*
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37 *a revote.*") (emphasis added).² *See also id.* ¶ 4, Ex. C (quoting Mr. Rossi).

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45 ² Although Petitioners note in a recent filing that they also seek to have the election nullified
46 and set aside, and the Certificate of Election voided, the new special election for governor is the
47 ultimate remedy that Petitioners are seeking in this contest. Petitioners' Opposition to WSDCC's
Motion for Briefing Schedule and Stay of Proceedings at 7-8, n.3 (referring to all remedies sought).

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V. ARGUMENT AND AUTHORITY

The Washington Constitution, Washington case law, and cases from other courts all confirm that Petitioners' desired remedy – an unprecedented new special election for Governor – is not an available remedy. No Washington court has ever ordered a special election for a statewide officer. Throughout the Washington Constitution, limitations are placed on the manner for election of statewide officers, particularly the office of Governor. WASH. CONST. art. II, § 5; art. III, §§ 1, 2, 4, 10. These constitutional limitations all run contrary to the notion that the Court may order a special election, a "do-over" of the general election held last November. The limited Supreme Court authority on elections for statewide officers confirms that those officers must be elected at the general election held every four years, not in court-ordered special elections. *Fish v. Howell*, 59 Wash. 492, 498 (1910) ("care was taken to fix not only the terms of the several state officers, but the time at which they were elected."). Moreover, a court's equitable power does not extend so far as to permit the grant of an unconstitutional remedy. Petitioners' special election remedy, a remedy Petitioners requested because they lack proof that Governor Gregoire did not receive more votes than Mr. Rossi, is unconstitutional and cannot be granted.

The WSDCC asks that this Court strike from the Petition the request for a new special election as an available form of relief. Alternatively, WSDCC requests that the Court rule that the Petition, because of the unavailability of the requested relief, does not raise a claim "upon which relief can be granted" and must be dismissed under CR 12(b)(6).

A. Petitioners' Request for a Statewide Special Election is Unconstitutional.

Petitioners' requested remedy – a statewide special election for Governor to be held "as soon as practicable" – is in direct conflict with the text and structure of the Constitution and is therefore not available as a form of relief. Several specific and carefully tailored

1 provisions of the Constitution dictate the time and manner for the general election to select
2 the governor. All of those provisions preclude Petitioners' call for a court order to hold a
3 special election to "do-over" the November 2004 general election sometime this spring.
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7 **1. The Washington Constitution Contains Mandatory Requirements**
8 **for the Manner in Which the Governor Will be Elected.**
9

10 By its own terms, the text of the Constitution is mandatory. WASH. CONST., art. I,
11 § 29 ("The provisions of this Constitution are mandatory, unless by express words they are
12 declared to be otherwise."). Courts are thus obedient to the words of the Constitution.
13
14 *Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477 (2004) ("When
15 interpreting constitutional provisions, [Washington courts] look first to the plain language of
16 the text and will accord it its reasonable interpretation."); *see also Young v. Clark*, 149
17 Wn.2d 130, 133 (2003) ("Where the language of the constitution is clear, the words used
18 therein should be given their plain meaning.") (internal quotation marks and citation
19 omitted); *Malyon v. Pierce County*, 131 Wn.2d 779, 799 (1997) ("Appropriate constitutional
20 analysis begins with the text and, for most purposes, should end there as well."). Against
21 this backdrop of textual constitutional construction, and armed only with an appeal to equity,
22 Petitioners contend that a court-ordered special election for Washington governor is an
23 available remedy. The Constitution says otherwise.
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28 First, Petitioners' remedy runs afoul of constitutional language dictating that the
29 governor be elected at the same time as other statewide executive officers and members of
30 the Legislature. Article III, section 1 provides in full:
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42 The executive department shall consist of a governor, lieutenant
43 governor, secretary of state, treasurer, auditor, attorney general,
44 superintendent of public instruction, and a commissioner of public
45 lands, who shall be severally chosen at the same time and place of
46 voting as for members of the legislature.
47

1 "The language of [this] section is mandatory." *State v. Womack*, 4 Wash. 19, 26 (1892).

2 Presumably, the Court will not order any legislators, the lieutenant governor, the secretary of
3 state, or others to stand for re-election. Unless they do, however, re-doing the 2004 election
4 for the office of governor is plainly contrary to the text of the Constitution. Although the
5 next general election is November 2005, the next general election at which legislators will
6 stand for election is November 2006. It would require amending the Constitution for the
7 governor to be elected separately from the legislators and other Article III, section 1 officers,
8 and even then that election could not take place until November 2006.
9

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11 Second, constitutional provisions establish the time for conducting an election for
12 governor and the term of office that are inconsistent with Petitioners' requested remedy. As
13 mentioned above, the office of governor stands for election at the same time as members of
14 the Legislature. The Constitution requires that these elections

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16 [S]hall be on the first Tuesday after the first Monday in November,
17 unless otherwise changed by law.
18

19 Petitioners ask for a new special election for governor to be held "as soon as practicable."
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21 Petition at 4; Rava Decl. ¶ 4, Ex. C. Petitioners' remedy is therefore contrary to Article II,
22 section 5. This remedy would also violate Article III, § 4 which provides:
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25 The terms of all officers named in section one of this article shall
26 commence on the second Monday in January after their election until
27 otherwise provided by law.
28

29 WASH CONST., art II, § 5. The Petitioners' requested special election would place a governor
30 in office sometime in the spring of 2005, not on the second Monday in January. Moreover,
31 a governor elected in March or April 2005 would have to serve until March or April 2009, in
32 order to comport with the constitutional requirement that the governor "shall hold his office
33 for a term of four years, and until his successor is elected and qualified." WASH. CONST.,
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1 art. III, § 2. Thus, a governor elected under the Petitioners' scheme would not be elected at
2 the constitutionally required time, would not take office on the constitutionally required date
3 and would not serve for the constitutionally required term. The constitutional provisions for
4 the election of governor are not mere administrative conveniences; like all constitutional
5 language these words are "mandatory." WASH. CONST., art. I, § 29.
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10 Third, the Constitution has a specific provision, Article III, § 10, dictating what
11 occurs if a person "regularly elected to the office of governor" does not take office or is
12 removed from office. This provision lists which state officer would succeed to the office of
13 governor instead of the person regularly elected, and it says that person holds office until "a
14 governor be elected and qualified; and if a vacancy occur more than thirty days before the
15 next *general election* occurring within two years after the commencement of the term, a
16 person shall be elected at *such election* to fill the office of governor for the remainder of the
17 unexpired term." *Id.* (emphasis added). Thus, if a situation arises in which there needs to be
18 an election for governor at any time other than the regular election every four years, the
19 election must still be at a general election, which occur in November. It would conflict with
20 Article III, § 10 to order a special election for governor "as soon as practicable" and in the
21 manner Petitioners request. Consistent with these constitutional requirements, the
22 Washington Supreme Court held in *Fish v. Howell*, 59 Wash. at 498, that vacancy in
23 statewide executive offices such as the Secretary of State can only occur at a general
24 election. *Id.* (refusing to read Constitution in manner to fill vacancy where it "would be in
25 effect a special election in so far as the office of Secretary of State is concerned."").
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43 Finally, the provisions of the election code governing general and special elections
44 do not allow the governor to be elected in the manner Petitioners seek. RCW 29A.04.320(1)
45 sets the dates and time for general elections. The office of governor is specifically excluded
46
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1 from the list of officers that may be elected at statewide general elections occurring in odd
2 numbered years. RCW 29A.04.320(1)(c) (permitting election of executive officers under
3 Article III, §§ 16, 17, 19, 20-23, but excluding the office of Governor). Moreover, the code
4 defines a "special election" as "any election that is *not* a general election and may be held in
5 conjunction with a general election or primary." RCW 29A.04.175 (emphasis added).
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10 There simply cannot be a "special election" for governor, when the constitution mandates
11 that the office be filled at the general election. Wash. Const., art. III, § 10.
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15 **2. Cases from Other States Confirm that Constitutional Rules Limit**
16 **the Way in Which a Governor may be Elected.**
17

18 There is a notable lack of case law approving court-created election remedies for
19 statewide officers. The Georgia Supreme Court held that a governor cannot be elected in a
20 manner inconsistent with the language of a state constitution. *Jones v. Fortson*, 223 Ga. 7,
21 16 (1967). In *Jones v. Fortson*, the petitioners sought to compel the Secretary of State to
22 conduct a statewide runoff for the governor's race, where neither candidate had received a
23 majority of the votes. *Id.* at 9. The Secretary of State refused to order a runoff, insisting
24 that, contrary to what was contained in statutory law, the Georgia Constitution required that
25 the runoff be held in the Georgia legislature. *Id.* at 9-10. Noting that "a [constitutional]
26 provision which expressly prescribes the manner or doing a particular thing is exclusive in
27 that regard and impliedly prohibits performance in a substantially different manner," the
28 court held that the provisions of the election code indicating that the runoff be conducted by
29 general vote were subordinate to the constitutional provisions, and dismissed the petition.
30 *Id.* at 13, 16 (quoting 16 C.J.S. Constitutional Law, § 70)). *See also Laverty v. Cochran*,
31 271 N.W. 354, 358 (Neb. 1937) (constitutional provisions regarding removal of
32 constitutional officers must be followed).
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1 Petitioners' requested relief, as the relief requested in *Jones v. Fortson*, conflicts with
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3 the Constitution's plain language establishing the manner in which the governor may be
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5 elected and the time she takes and holds office. Petitioners, perhaps aware of the
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7 constitutional infirmity of their position, rely instead on this Court's equity powers to grant
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9 them their requested relief. But this Court's equity powers do not permit the creation of a
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11 remedy in disobedience to the Constitution.

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13 **B. Petitioners' Request for a Statewide Special Election is not Permitted by**
14 **Washington's Election Contest Statutes.**

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16 "Early this century [the Supreme Court] clearly established that the right to contest
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18 an election 'rests solely upon, and is limited by, the provisions of the statute relative
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20 thereto.'" *Becker v. Pierce County*, 126 Wn.2d 11, 18 (1995) (quoting *Quigley v. Phelps*, 74
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22 Wash. 73, 75 (1913)). The Washington election contest statutes, quite simply, do not
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24 provide for a Court to order a new election. These statutes, upon significant proof that the
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26 contestant received the highest number of legal votes, permit a court to "declare [a] person
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28 duly elected." RCW 29A.68.050. What they do not do, implicitly or explicitly, is permit a
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30 Court to engage the machinery of the Executive and Legislative branches by ordering a new
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32 election to take place.

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34 The statutes explicitly identify the remedies available in an election contest, upon
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36 sufficient proof that the contestant is entitled to those remedies. A court, under
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38 RCW 29A.68.050, may pronounce a judgment "either confirming or annulling and setting
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40 aside such election, according to the law and right of the case." On sufficient proof that the
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42 contestant "has the highest number of legal votes," the Court may "declare such person duly
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44 elected." *See also* RCW 29A.68.110, RCW 29A.68.120 (court may "set aside" an election).
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46 These are the *only* remedies allowed under statute.
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1 The Petitioners state that the election contest statute contains authority for this Court
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3 to order a statewide special election, but in doing so rely only on the language of
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5 RCW 29A.68.011, which says that an election official must "do as the court orders" to
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7 correct the purported errors. Reply to WSDCC's Opposition and Supplemental Opposition
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9 to Petitioners' Motion for Expedited Discovery at 5. The Legislature, however, was clearly
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11 aware of how to frame and identify remedies under the election contest statutes. Given that
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13 election contests are "limited by the provisions of the statute relative thereto," it is untenable
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15 to conclude that the Legislature intended, through their silence, to empower Courts with a
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17 remedy broader than all the remedies the Legislature *did* identify. *Becker*, 126 Wn.2d at 18.

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19 Ordering a new special election, which would write into the election contest statutes
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21 a substantial power not contained there, would also violate Article III, § 10 of the
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23 Washington Constitution. In past circumstances where the office of governor was vacated
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25 during the term, the Court properly looked to the Constitution, not its inherent powers. For
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27 example, in *State v. McBride*, the Supreme Court considered whether the death of the
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29 governor created a vacancy in the office requiring a new election and whether the lieutenant
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31 governor's assumption of the governor's office created a vacancy in that office requiring a
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33 new election. 29 Wash. 335, 336-340 (1902). The court held that neither office was vacant
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35 because the Constitution expressly provided that the lieutenant governor filled both. Under
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37 the circumstances, a new election was not required, nor is one required – or permitted –
38
39 here. *See also Thomas v. State Bd. of Elections*, 256 N.C. 401, 407 (1962) (holding that
40
41 constitutional provision governing election for governor prevented vacancy to be filled by
42
43 election).

1 **C. Petitioners' Request for a Statewide Special Election is not Permitted by**
2 **Equity.**
3

4 The Petition asserts that *Foulkes v. Hays*, 85 Wn.2d 629 (1973), vests this Court with
5
6 "plenary power" to order a new election for Governor. Petition at 4-5. But *Foulkes*, which
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8 concerned only county officials, does *not* hold that a court may mandate a statewide special
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10 election for governor. As Petitioners' own authority suggests, and a careful analysis of
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12 *Foulkes* confirms, RCW 29A.68.011 does not provide for a new special election as an
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14 available remedy under the contest statutes, it simply provides for correction of proven
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16 election official error. If Petitioners are unable to prove facts needed to obtain the remedies
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18 available under the election contest statutes at RCW 29A.68.020 *et seq.*, they are not entitled
19
20 to appeal to equity for a new remedy invoked on lesser proof.³
21

22 *Foulkes* did not involve an election contest for a statewide officer. *Foulkes*, 85
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24 Wn.2d 630. Rather, the petitioner, Foulkes, sought to set aside the results of a recount for
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26 Adams County Commissioner, on the basis that ballots counted in the recount were
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28 tampered with after the initial count. *Id.* at 630-631. Unlike this contest, however, elections
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30 of county commissioners are not subject to the same constitutional restrictions that are
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32 placed on the election of governors. *See* Part V.A.1., *infra*. When ruling that it had the
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36 ³ Petitioners elsewhere cite *Blanchard v. Golden Age Brewing*, 188 Wash. 396, 405-06
37 (1936) for the proposition that courts have broad equitable powers, regardless of statute. Petitioners'
38 Opposition to WSDCC's Motion to Stay at 8. *Blanchard*, however, involved an attempt by the
39 legislature to strip the court's jurisdiction over certain cases governed by equity. In contrast, election
40 contests are creatures of statutory law, not equity. *Hatfield v. Greco*, 87 Wn.2d 780, 782 (1976)
41 ("The procedure involved herein is a special procedure provided by statute."). If anything,
42 *Blanchard* undermines the extraordinary relief sought here, through its repeated admonition that the
43 respective constituent branches of government must not encroach on the prerogatives of their sister
44 branches. *Blanchard*, 188 Wash. at 404 ("It is also essential to the successful working of this system
45 that the persons intrusted with power in any one of these branches shall not be permitted to encroach
46 upon the powers confided to the others, but that each shall by the law of its creation be limited to the
47 exercise of the powers appropriate to its own department and no other.") (quoting *Kilbourn v.*
Thompson, 103 U.S. 168, 190 (1880)).

1 authority to order a new election, then, the *Foulkes* Court was not faced with the same array
2 of constitutional restrictions that prevent the remedy Petitioners seek here. *Id.*
3

4 The holding in *Foulkes* is further limited because it was decided under the
5 predecessor to the elections error correction statute RCW 29.04.030, now codified at
6 29A.68.011, which was later held by the Washington Supreme Court to exclude the power
7 to invalidate elections.⁴ *Id.* at 632 (determining whether courts could "order new elections
8 to correct improprieties therein under RCW 29.04.030"). In *Becker v County of Pierce*,
9 decided by the Court after *Foulkes*, the Court held that RCW 29.04.030 does *not* include the
10 power to declare elections invalid, which is a predicate to ordering a new election. *Becker*,
11 126 Wn.2d 11, 20-21 (for claims under RCW 29A.04.030 "invalidation of the election, the
12 relief that [petitioner] seeks, is not a possible result. Under that statute, the *only* relief that a
13 court may afford is to order that the offending person 'forthwith correct the error, desist from
14 the wrongful act, or perform the [neglected] duty and to do as the court orders'" (emphasis
15 added) (quoting predecessor to RCW 29A.68.011, RCW 29.04.030). Petitioners purport to
16 present their contest under RCW 29A.68.011 and the decisions in *Foulkes* and *Becker*,
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Petition at 4-5, but as *Becker* makes clear, the invalidation of an election is not a remedy that
is available under most provisions of RCW 29A.68.011.⁵ *Becker*, 126 Wn.2d at 20-21.

4 The election contest statute RCW 29.65.010, now codified at RCW 29A.68.020, was
determined to be inapplicable to the claim raised by *Foulkes*. *Id.* at 634 ("the trial court correctly
ruled that RCW 29.65.010 did not apply to respondent *Foulkes*' claim").

⁵ At the time *Foulkes* was decided subsection (6) of RCW 29A.68.011, which allows
correction of an error "in the issuance of a certificate of election," did not exist. To the extent that
Petitioners rely on this subsection of RCW 29A.68.011 as the basis for their contest, any available
remedy would be limited to those set forth in the election contest statutes codified at
RCW 29A.68.020, which also explicitly refers to the right "to contest the right of any person
declared elected to an office to be issued a certificate of election." Proceeding under RCW
29A.68.020, of course, requires that Petitioners prove that illegal votes cast in the election or
misconduct by election officials was sufficient to change the result of the election before they are

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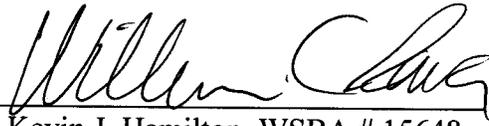
VI. CONCLUSION

Petitioners seek an extraordinary and unprecedented remedy. For the reasons set forth above, the Court should grant the Motion to Strike Petitioners' Requested Relief.

DATED: January 20, 2005.

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entitled to any remedy. RCW 29A.68.050, RCW 29A.68.110. Even then, the election statutes contain no provision for the Court to order a new special election.