The Honorable John Bridges

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, et al., Petitioners, v. King County and Dean Logan, its Director of Records, Elections and Licensing Services, et al., Respondents. v. Washington State Democratic Central Committee, Intervenor-Respondent, v. Libertarian Party of Washington State et al., Intervenor-Respondents.	No. 05-2-00027-3 **PETITIONERS' OPPOSITION TO DEMOCRATIC PARTY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

I. INTRODUCTION

"Election officials are not allowed to engage in wrongful acts or neglect their duties; if they do, this Court has not only the authority but the duty to act to provide a remedy. RCW 29A.68.011." Those are the words of the Washington State Democratic Central Committee ("Democratic Party") in a brief to the Washington Supreme Court in

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December 2004 regarding the very same election that is at issue in this case.[1] Now, the Democratic Party flip-flops and disingenuously argues that the courts lack the authority to hear a case under RCW 29A.68.011 *et seq.* It had it right the first time. The Courts have the authority and duty to conduct election contests.

The Legislature, as authorized by the Washington State Constitution, has expressly conferred jurisdiction on this and other courts of the State of Washington to hear and determine election contests, and Washington courts have accepted jurisdiction and adjudicated numerous election contests on their merits – including an election contest involving a statewide executive officer. To accept the Democratic Party's latest position on jurisdiction would disregard the plain language of the Constitution and the contest statute; disregard Supreme Court precedent; and require the Court to find beyond a reasonable doubt that the contest statute is unconstitutional. That is asking too much. The law is settled. The Democratic Party was right in December. The courts have jurisdiction to handle proceedings under RCW 29A.68.011 *et seq.*

II. ARGUMENT AND AUTHORITY

The Legislature enacted a statute that governs *all* election contests, now codified under RCW 29A.68. That statute provides that all such election contests should be brought in any of the Supreme Court, the Court of Appeals, or one of the Superior Courts of this state. RCW 29A.68.011. The Legislature has modified and recodified the election contest statute on numerous occasions without narrowing or limiting the scope of the elected offices to which these contest provisions apply. The Washington Supreme Court has applied this statute twice in the last ten years to elections for statewide offices, including once in this gubernatorial election within the last few months. *McDonald v.*

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[1] *See* Declaration of Robert J. Maguire in Opposition to Democratic Party's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Maguire Decl."), Ex. A, Petitioners' Amended Response Brief in Opposition to Respondent Franklin County Auditor's Motion to Dismiss Petition by Electors and Petition for Writ of Mandamus and Other Relief dated December 9, 2004 at 5-6; *see also* Maguire Decl., Ex. B, Petition by Electors and Petition for Writ of Mandamus and Other Relief filed with the Supreme Court by the Democratic Party and dated December 3, 2004 at 4, ¶ 13 ("Jurisdiction is proper under RCW 29A.68.011.").

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Sec'y of State, --- Wn.2d ---, 2004 WL 2937796 (Wash. S. Ct. Dec. 14, 2004) (November 2004 gubernatorial general election); *Becker v. Pierce County*, 126 Wn.2d 11 (1995) (September 1992 primary for State Auditor). The Democratic Party itself filed a gubernatorial election contest in the *McDonald* case under the same statutory election contest provision it now challenges. The authority is consistent and confirms that Petitioners' election contest was filed in the proper forum in accordance with RCW 29A.68. The Chelan County Superior Court has subject matter jurisdiction over this matter.[2]

A. The Language of Article III, Section 4 of the Washington Constitution Is Clear and Unambiguous.

The Legislature, as authorized by the Washington State Constitution, has expressly conferred jurisdiction on this and other courts of the State of Washington to hear and determine election contests. Article III, Section 4 of the Constitution addresses election contests for "the officers named in the first Section" of Article III. Officers "named in the first Section" include, among others, the governor and state auditor. Section 4 provides that "[c]ontested elections for such officers shall be decided by the legislature ***in such manner as shall be determined by law***" (emphasis added). The language, "in such manner as shall be determined by law" allows the Legislature to delegate its powers to the judicial branch through the adoption of statutory law.

The Democratic Party's interpretation of Article III, Section 4 is counter to two of the most fundamental canons of statutory construction. First, it ignores the plain language of the provision. "We will not add to or subtract from the clear language of a statute even

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[2] Petitioners contend that the motion to dismiss lacks any basis in law and that the judicial branch is the appropriate branch for election contests, as required by a constitutional statute duly enacted by the Legislature. *See* RCW 29A.68. Recognizing the inherent risks of an adverse ruling that exist in all litigation, even when the law appears clear, Petitioners submitted on January 21, 2005, an election contest petition to the Legislature to preserve their ability to litigate a contest on the merits should this Court interpret the law to hold that the contest statute is unconstitutional. S*ee* Maguire Decl., Ex. C, Petition by Electors and Cover Letter, submitted to the Legislature on January 21, 2005. Petitioners maintain that this Court, where they initiated the election contest, is not only the appropriate entity, but is the required entity in which to litigate an election contest.

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if we believe the Legislature intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the statute rational." *State v. Watson*, 146 Wn.2d 947, 955 (2002). Article III, Section 4 says that contested elections shall be determined "by law." Because legislatures act pursuant to internal rules, not by laws, had the framers of the Constitution intended to vest jurisdiction in the Legislature, they would have said "by rule." Black's Law Dictionary (8th ed. 2004) defines "law" as "the body of rules, standards, and principles ***that the courts of a particular jurisdiction apply*** in deciding controversies brought before them," *id.* at 900 (emphasis added), whereas a "rule" is defined "as a regulation governing a court's or ***an agency's internal procedures***." *Id.* at 1357 (emphasis added). "[I]n the absence of a statutory definition this court will give the term its plain and ordinary meaning ascertained from a standard dictionary." *Watson*, 146 Wn.2d at 954. This Court should give the words of the Constitution their plain meaning. They allow the Legislature to create laws setting forth the manner of election contests. Nothing in the language prohibits the statutory procedures set forth in the election contest statute.

Moreover, the Democratic Party's interpretation would actually render part of the Constitution's language superfluous, in violation of another essential canon of statutory construction that holds that a court is "required, when possible, to give effect to every word, clause and sentence of a statute. No part should be deemed inoperative or superfluous unless the result of obvious mistake or error." *Cox v. Helenius*, 103 Wn.2d 383, 387-88 (1985). The Democratic Party's interpretation of Article III, Section 4 would render meaningless the words "in such a manner as shall be determined by law." It reads the provision as "contested elections for such officers shall be decided by the legislature. ~~in such a manner as shall be determined by law~~." Under the Democratic Party's interpretation, the provision would mean the same with or without the words "in such a manner as shall be determined by law." With or without those words, the Democratic Party contends that the provision means only that the Legislature is authorized to create its

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own internal rules and procedures for determining the manner of election contests. Such a reading fails to give the required effect to the additional phrase. The Court cannot simply delete this phrase at the Democratic Party's demand. Instead, when weight is given to the plain meaning of all the words in the statute, as these canons require, it is clear that the framers intended for the Legislature to pass a "law," which it did in 29A.68, *et seq.*, to govern the conduct of courts in hearing election contests. *See generally Davis v. Gibbs*, 39 Wn.2d 481, 483 (1951)("[w]here no contrary intention appears in a statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent"). That action is plainly constitutional and grants this Court jurisdiction to hear the contest.

A reading of the plain meaning of other portions of Article III, Section 4 buttresses the notion that an election contest for an Article III, Section 1 officer may be decided by some entity other than the Legislature. In particular, in the sentence in Article III, Section 4 immediately preceding the sentence at issue in this case, the Section provides that in the event of a tie election, the winner "shall be chosen by the joint vote of both houses." The sentence governing election contests refers instead to the "legislature," bringing with it the separate roles of each house in passing legislation, and the role of the executive in approving it, rather then the combined body sitting in a judicial or semi-juridical capacity as occurs to determine a tie. The framers could have used the same language in addressing the manner of election contests and written that election contests should also be decided "by the joint vote of both houses," but they did not.[3] Instead, they use different language and gave the Legislature the power to determine by law the manner of election contests.

[3] Arkansas, a jurisdiction relied upon by the Democratic Party, provides an example of such language in a constitution. Unlike Washington's Constitution, Arkansas' provided in 1868 that in the event of a tie between candidates, "one of them shall be chosen ***by joint vote of both houses***. Contested elections ***shall likewise be determined*** by both houses of the general assembly in such manner as is or may hereafter be prescribed by law." *Baxter v. Brooks*, 29 Ark. 173, 184 (Ark. 1874) (emphasis added). The absence of similar language in Washington's Constitution suggests that the Washington Constitution has a different meaning. *Compare also with* N.C. Const. Art. VI, sec. 5 ("[A] contested election for any office established by Article III of this Constitution shall be determined ***by joint ballot of both houses of the General Assembly*** in the manner prescribed by law.") (emphasis added).

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See Carver v. Bond/Fayette/Effingham Regional Bd. of School Trustees, 586 N.E.2d 1273, 1276 (Ill. 1992) ("When the legislature uses certain language in one part of a statute and different language in another, we may assume different meanings were intended.").

The differing language of Article II, Section 8 concerning the manner of determining qualifications of legislators provides a useful contrast, further demonstrating Petitioners' interpretation of Article III, Section 4. In Article II, Section 8, the Legislature "shall be the judge" of the qualifications of its members. While resolution of contests regarding membership in the Legislature is plainly a judicial function, the State Constitution squarely and expressly vests that specific judicial power with the Legislature. "In exercising the power to judge the qualifications of its members, each body of the state legislature acts as a judicial tribunal. The people, through the constitution, granted this particular judicial power exclusively in that house of the legislature to which the candidate is and an aspirant." *State ex rel. Boze v. Superior Court*, 15 Wn.2d 147, 148 (1942) (citation omitted). Unlike Article II, Section 8, Article III, Section 4 does not grant judicial power to the Legislature to be the "judge." Instead, it authorizes the Legislature to delegate that function with respect to Article III, Section 1 officers.

Exercising its powers under the Constitution, the Legislature has enacted RCW 29A.68. That chapter is the "law" that the Legislature has decided shall provide the manner of determining election contests in this State. And that chapter vests jurisdiction to correct election-related errors and misconduct in "[a]ny justice of the supreme court, judge of the court of appeals, or judge of the superior court." RCW 29A.68.011. As the Supreme Court has recognized, this provision is "a statutory recognition of the power of superior courts, acting within their general equity jurisdiction, to intervene in cases of election fraud or wrongdoing." *Foulkes v. Hays*, 85 Wn.2d 629, 632 (1975).

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B. The Legislature's Authority Over Article III Election Contests Is Delegable and Nonexclusive.

The Legislature's authority over the gubernatorial election contest is nonexclusive and is delegable to the Judiciary. The Washington Legislature has unequivocally spoken on this issue by enacting RCW 29A.68, and that decision to delegate the handling of election contest provisions is presumptively valid. *See State ex rel. Kurtz v. Pratt*, 45 Wn.2d 151, 156-57 (1954) (recognizing that the Legislature "is unquestionably authorized by the constitution to provide for the proper conduct of elections" and that the predecessor to RCW 29A.68.011 was therefore "a proper exercise of legislative power"); *see also Island County v. State,* 135 Wn.2d 141, 146-147 (noting that statutes enacted by the Legislature are presumed valid). Unless a constitutional provision contains a clear limitation on legislative power, the Legislature may pass laws on a subject freely. "All doubts as to whether or not a state legislature had the power to pass a given enactment must be resolved in favor of the legislature." *In re Bartz,* 47 Wn.2d 161, 163 (1955) (citing *Union High School District No. 1 v. Taxpayers of Union High School District No. 1*, 26 Wn.2d 1 (1946)). To prevail, the Democratic Party has the burden of proving beyond a reasonable doubt that the statute is an unconstitutional delegation of power, yet its arguments in support of this difficult proposition are without any merit, let alone sufficient to meet this heavy burden.

First, as the Democratic Party concedes, legislative delegation of some powers to the courts through the creation of statutory law is permissible. *See Carstens v. DeSellem*, 82 Wash. 643 (1914) ("The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."); *State ex rel. Shepard v. Superior Court*, 60 Wash. 370, 372 (1910) ("All laws passed by the co-ordinate branch of the government and approved by the executive are presumed to be constitutional, and courts will not conjure theories to overturn and overthrow the solemn declarations of the legislative body.").

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Second, there is no conflict between the Constitution and extension of power to the judiciary because the phrase, "in such manner as shall be determined by law" provides that the jurisdiction is not exclusive. The Legislature is only prohibited from delegating "its purely legislative functions," and powers not exclusively vested in the Legislature should be viewed as "coextensive between the legislature and the courts." *Sackett v. Santilli*, 146 Wn.2d 498, 506 (2002). The authority to determine the validity of an election is *not* a pure legislative function. Washington courts regularly decide such proceedings and even the Democratic Party concedes that the courts are the proper forums for local election contests. It makes good sense to have election contests in the impartial and non-partisan courts rather than in the legislature. The Legislature is not equipped for the judicial fact-finding function required in election contests. *See* Declaration of Thomas M. Goff, Jr. (collecting recent legislator comments indicating that the courts are the preferred forum for election contests). Such trials cannot be considered a "pure legislative function." *See McWhorter v. Dorr*, 57 W. Va. 608, 613 (W. Va. 1905) (determining that a special tribunal established by the legislature to review election contests exercised neither purely legislative nor judicial functions and that such distinctions are "wholly impracticable").

Though the Legislature can make rules regarding the conduct of election contests, the authority to do so is a delegable legislative function. *See State v. Superior Court*, 148 Wash. 1 (1928) (holding that power of Legislature to make rules for courts did not mean that such rulemaking was a legislative function that could not be exercised by courts). The Court cautioned against calling any power "legislative" simply because it could be exercised by the Legislature.

> Not all acts performed by a legislature are strictly legislative in character. A failure to recognize this distinction often gives rise to the belief that one of our law making bodies has abdicated its duty, and attempted to transfer its legislative mantle to the shoulders of another body, not legislative, thereby subverting the purpose of its creation and denying the people of the commonwealth the right to have the laws which govern them enacted by their duly chosen representatives.

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Id. at 5.

The Democratic Party argues that *Manus v. Snohomish Cty. Justice Court Dist. Comm.*, 44 Wn.2d 893, 895 (1954), is significant because it held that certain legislative powers related to justices of the peace were nondelegable and exclusive to the Legislature. The constitutional language reached by the court in *Manus*, however, is not similar to the language of Article III, Section 4 at issue here. Constitutional Amendment 28, at issue in *Manus*, granted the Legislature two types of powers with regard to justices of the peace: "[t]he legislature ***shall*** determine the number of justices of the peace to be elected **and** ***shall*** prescribe ***by law*** the powers, duties and jurisdiction of the justices of the peace." *See id.* at 895 (emphasis added; quoting Amendment 28). The first half of the sentence (the power to determine the number of justices) does not contain the modifying phrase "by law" – or anything similar. The *Manus* court determined that such language provided to the Legislature the exclusive power to determine the number of justices of the peace and, therefore, any delegation of that authority was unconstitutional. The court did not, however, analyze or render a decision on the second half of the sentence (the authority to prescribe ***by law*** the powers, duties and jurisdiction), because the statute challenged in *Manus* did not purport to involve such powers, duties and jurisdiction. If the court had addressed the second part of the sentence, the case might have some bearing on the issue before this Court. It does not, however. *Manus* is simply off point.[4]

Third, other language in the Washington Constitution parallels the election contest provisions and confirms the conclusion that the words "as determined by law" allow the Legislature to delegate to the judiciary or other branch. The phrase "determined by law" is analogous to "prescribed by law." In *Yelle v. Bishop*, 55 Wn.2d 1081 (1959), the court interpreted Article III, Section 20, which addresses the duties of the State Auditor, another

[4] The Democratic Party attempts to distinguish *State ex rel. Kurtz v. Pratt*, 45 Wn.2d 151 (1954), another case analyzing the first half of Amendment 28, using the same arguments as it did with *Manus*. Again, the Constitutional language that conflicted with the statutory provision did not contain the language "by law" which is at issue in this case and which indicates a delegable power. Furthermore, the Court in *Kurtz* expressly held that the election contest statute was a "proper exercise of legislative power." *Id.* at 156-57.

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Article III, Section 1 officer. Section 20 states that "[t]he auditor shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith ***as may be prescribed by law***" (emphasis added). In analyzing the constitutionality of a statute that limited the State Auditor's powers, the court noted that "in view of the affirmative direction that the powers and duties of the state auditor shall be as prescribed by law, it cannot reasonably be concluded that Art. III, §§1 and 20 were intended as a limitation upon the powers of the legislature." *Yelle*, 55 Wn.2d at 297. Instead, the language "as may be prescribed by law" meant that the Legislature was free to enact statutes that limited the auditor's powers or that would even abolish the office of the Article III, Section 1 office of Auditor. Here, the analogous language "as shall be determined by law" similarly provides the authority for the Legislature to enact statutes such as RCW 29A.68.

Fourth, the out-of-state cases cited by the Democratic Party do not support the argument that the Washington Legislature cannot delegate its authority over *gubernatorial* election contests. These cases only address challenges to the eligibility of a candidate to run for a *legislative* office or election contests involving candidates running for the *legislature*. These out-of-state courts held that various legislatures cannot delegate the authority to judge the qualifications and elections ***of their own members***. These cases say nothing about whether jurisdiction over an election contest involving an executive branch office is delegable.[5]

Fifth, the Democratic Party inaccurately states that the Legislature has taken the position that it has exclusive jurisdiction over election contests for statewide offices. The

[5] *See In re McGee*, 36 Cal. 2d 592, 594-95 (1951) (holding that "the assembly is made the exclusive judge of the eligibility" ***of its own members*** and cannot delegate ***that*** jurisdiction) (emphasis added); *Dinan v. Swig*, 223 Mass. 516, 518-19 (1916) (noting that the legislature cannot delegate the authority to settle controversies related to the election and qualification of its own members); *Kennedy v. Chittenden*, 142 Vt. 397, 399 (1983) ("[T]he provisions...***insofar as they relate to elections to the House of Representatives***, are an improper delegation of legislative powers.") (emphasis added); *Harden v. Garrett*, 483 So.2d 409, 411 (1986) (noting that legislature is the sole judge of the qualifications, elections, and returns of its own member); *State ex rel. Redon v. Spearing*, 31 La. Ann. 122, 123 (1879) (applying provision of constitution providing for contested elections for representatives).

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characterization of the proceedings regarding the 1940 Governor's election is profoundly misleading.

On January 14, 1941, the Legislature convened a joint session in order to certify the results of the 1940 state elections. At that session, a "Protest to Election Return" was submitted, alleging various irregularities in the election process, asking for a recount, and asking the Legislature to forego certifying Arthur Langlie as Governor-Elect "until this contest has been fully heard and determined." 1941 S. Journal at 31. A member moved for referral of the notice to a special joint committee for investigation and requested that the committee report back the next morning. A roll call on the motion to refer the notice was taken, the motion failed to pass, and the election certificates were issued. *Id.* at 31-32.

Contrary to the Democratic Party's assertions, the Legislature did not sit "jointly as a judicial body to hear and determine election contests;" the language cited by the Democratic Party is from the text of the "Protest to Election Return" and not from the Legislature. The "Protest to Election Return" was not adopted by the legislators themselves. *Id.* at 30. Indeed, the Legislature did not hear any arguments (other than a reading of the "Protest to Election Return"), did not examine any witnesses, and did not see any exhibits. The Legislature did not "explicitly recognize[] its exclusive jurisdiction over contests" for the Governor's office; the issue was not even mentioned.[6] Finally, the Legislature did not "deny[] the contest," as the Democratic Party suggests; it merely declined to refer the matter to a joint committee, and did not discuss its reasons for doing so. Indeed, it may well have declined to hear the matter because it felt that the courts were

[6] It is difficult to reconcile the Democratic Party's arguments on this point with its arguments regarding the jurisdictional significance of *Becker v. Pierce County*, 126 Wn.2d 11 (1995). *See* Democratic Party's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 15-17. On the one hand, the Democratic Party asserts that the filing of a "Protest to Election Return" with the Legislature in 1941 demonstrates exclusive jurisdiction of the Legislature even though the Legislature did not decide the merits of the "Protest to Election Return." *See id.* at 12. On the other hand, the Democratic Party argues that the Supreme Court's decision of an election contest for an Article III, Section 1 officer does not demonstrate that the Supreme Court has jurisdiction over election contests, even though, as the Democratic Party states, the "trial court dismissed the action on the merits" and the "Supreme Court affirmed." *See id.* at 16. Plainly, *Becker* makes a stronger case for the Court's jurisdiction over election contests than the 1941 "Protest to Election Return" does for the supposed exclusive jurisdiction of the Legislature.

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a more appropriate forum for such contests. The Democratic Party's characterization of the 1941 vote is inaccurate and misleading.

Sixth, the current Legislature (including both Democrat and Republican legislators) agrees that the courts are the proper branch to handle election contests. During the recent floor debate on HCR 4402 Amendment 1, a consideration of the timing of the Legislature's certification of Christine Gregoire as Governor-Elect, a number of legislators from both parties expressed their understanding of the proper process. Declaration of Christopher Hanzeli, Ex. A (Statements from Senators Hargrove, Kline and Brown). Senator Hargrove (D-24th Dist.) noted that:

> [w]e have in the constitution, as you suggested, 'contested elections for such offices shall be decided by the legislature in such a manner as determined by law.' And there is a law, a contested elections law...then a suit can be brought and those discrepancies can be challenged in front of a court of law with a trial instead of delaying all the work we're doing down here and turning the legislature into the court of law.

Id. Senator Kline (D-37th Dist.) agreed:

> I want to also start by commending the party organization that you belong to. First, for having chosen a statutory way, the way that this legislature, that our predecessors, set out for resolving this issue, rather than bringing it to a partisan body, ourselves, it will go to the courts, a non-partisan body, and it will be resolved probably by the supreme court, in the end.

Id. Senator Brown, Democratic Majority Leader (D-3rd Dist.) warned of the problems inherent in the Legislature deciding a partisan election:

> Our duty is spelled out under the constitution...It does further state that under a contested election 'that this shall be decided by the legislature in such manner as shall be determined by law' not by a new process, by law, and we have a law, a contested election law... we have a duty to uphold the constitution and laws by taking on the appropriate role and not by adopting a new role. We don't have a compelling reason to delay. Problems that have been raised can and are being raised in the appropriate venues. As I stated before, for we to take any other action we would be making it up as we go along. People have said, 'but we don't know about this particular incident or that particular incident', not only that but we do not have a process under law in order for us to judge that. How would we accept

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> evidence? Would we vote on every case, deciding on whether that person's vote did or did not count? Were we to delay for two weeks who's to say what would occur in terms of the normal operations of our systems? Who's to say if our deliberations were to result in a different conclusion then that of the judiciary branch! Talk about undermining confidence of the public in our system! Us, taking it upon ourselves to make the decision, take over the process, and decide as we go along could greatly undermine confidence in our process and we all know it.

Id. In addition to the floor debates, numerous legislators – including many who were in office when the election contest statute was re-codified and therefore presumably have some insight into the purpose and intent of the contest statute – have expressed opinions in emails and statements to constituents, and many legislators (both Democrats and Republicans) agree that the power to decide election contests was properly delegated to the courts.[7] The statements by members of the current Washington Legislature confirm Petitioners' position. This election contest belongs in the courts.

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[7] Numerous Democratic Legislators have made public comments in support of this election contest remaining in the courts. The current legislators acknowledge that the Legislature is not equipped for deciding election contests, and perhaps more importantly, acknowledge that the Legislature properly delegated such authority to the courts. *See* Declaration of Thomas M. Goff, Jr., collecting recent statements by legislators, including the following Democrats: **Rep. Pat Sullivan** ("the impartial courts should look into the allegations, not the partisan Legislature. . . The Rossi campaign has filed their action in Superior Court and the Supreme Court will undoubtedly take up this issue. I will abide by and support the court's decision after they have carefully and impartially reviewed this case."); **Rep. Shay Schual-Berke** ("The Legislature is not an adjudicative body . . . it is most appropriate that it be investigated and assessed by a court of law."); **Sen. Marilyn Rasmussen** ("We do have a contested elections law, and the law directs us to follow a process through the courts. By law, the judiciary is the most appropriate forum for a contested election."); **Rep. Mary Helen Roberts** ("Neither political party should encourage legislative meddling in an election because the outcome was not what some wanted. That would be an unfortunate precedent to establish."); **Rep. Brian Sullivan** ("The courts should decide this issue . . . ."); **Rep. Derek Kilmer** ("I feel strongly that the judicial system should be the primary arbiter of determining whether the law has been followed."); **Rep. Zack Hudgins** ("If there is a problem with an election, the remedy should be sought in the courts as the law states."); **Sen. Rosemary McAuliffe** ("It is in the courts, where it should be . . . ."); **Rep. Mark L. Ericks** ("The final step is for the election to be "legally contested" in the Supreme Court, which I believe will now occur. This is where the final decision should reside . . . ."); **Rep. Larry Springer** ("The Republicans filed a lawsuit in Superior Court and I firmly believe it would be imprudent, and a very bad precedent, for a highly partisan body like the legislature to intervene before the court system has rendered a verdict."); **Rep. Deb Wallace** ("The court system will now consider the evidence and decide if the election of Governor was done appropriately. This is the election process set out by state law."); **Rep. Dawn Morrell** ("The courts are the place to make these arguments, not the legislature."); **Rep Phyllis Kenney** ("The final option for Dino Rossi is to contest the election results in the State Superior Court. This is where the final decision resides.").

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C. To Accept the Democratic Party's Interpretation of the Statute Requires this Court to Determine Beyond a Reasonable Doubt that the Statute is an Unconstitutional Delegation.

Notwithstanding the plain language of the Constitution, the language of the contest statute, and Washington cases involving election contests, the Democratic Party argues that it would be unconstitutional for the Legislature to delegate to the judiciary the power to resolve election contests. In other words, the Democratic Party now argues that the election contest statute is unconstitutional, but the Democratic Party cannot meet the very high burden necessary to strike down a statute as unconstitutional. Statutes are of course presumed constitutional and the party challenging a statute must prove the statute's unconstitutionality "***beyond a reasonable doubt.***" *See Island County v. State,* 135 Wn.2d 141, 146-147 (1998) ("[W]here the constitutionality of a statute is challenged . . . a statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt."); *see also* 11 Am. Jur. *Constitutional Law* § 128 ("It is an elementary principle of constitutional law, universally accepted, that, where the validity of a statute is assailed, there is a presumption of the constitutionality of the legislative enactment unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt.").

The "beyond a reasonable doubt" standard requires the challenging party to "convince the court that there is ***no*** reasonable doubt that this statute violates the constitution." *Island County,* 135 Wn.2d. at 147 (emphasis added). The reason for the high standard is that the judiciary has "respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution." *Id.* The Court must "assume that the Legislature considered the constitutionality of its enactments and afford some deference to that judgment." *Id.* Finally, courts presume statutes are constitutional because "the Legislature speaks for the people, and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution." *Id.*

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The plain language of the Constitution does not demonstrate beyond a reasonable doubt that election contests may only be determined by the Legislature. To the contrary, the plain meaning indicates that the Legislature is authorized to delegate the judicial function of determining an election contest. Similarly, one cannot reasonably assert that the delegation is unconstitutional beyond a reasonable doubt where the Supreme Court has repeatedly handled election contests, including regarding an Article III, Section 1 officer. The Democratic Party simply cannot meet the high burden of challenging the statute's constitutionality; therefore, this Court has subject matter jurisdiction under the statute.

D. Washington Courts Have Exercised Jurisdiction Over Election Contests for Article III, Section 1 Officers.

As a result of the Legislature's delegation of authority through RCW 29A.68, Washington courts have accepted jurisdiction and adjudicated numerous election contests on their merits – including a contest for another Article III, Section 1 office. *See Becker v. Pierce County*, 126 Wn.2d 11, 15 (1995) (considering on the merits an election contest involving the Article III, Section 1 office of auditor); *see also McDonald v. Sec'y of State*, --- Wn.2d ---, 2004 WL 2937796 (Wash. S. Ct. Dec. 14, 2004); *accord, Washington State Republican Party v. King County Div. of Records*, --- Wn.2d ---, 2004 WL 3016346 (Wash. S. Ct. Dec 22, 2004) (Chamber, J. concurring) ("Should election officials fail to carry out their duties within the law; there are procedures for challenging the results. See Ch. 29A.68 RCW."); *see also Foulkes v. Hays*, 85 Wn.2d 629 (1975) (recognizing the "power of superior courts, acting within their general equity jurisdiction, to intervene in cases of election fraud or wrongdoing").

All election contests are within the purview of the judicial branch, including contests over statewide races. Subject matter jurisdiction may be raised by either party or by the court *sua sponte*. *State v. Superior Court of Clark County*, 105 Wash. 167, 169-70 (1919). Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it. *Skagit Surveyors and Eng'rs, LLC*

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