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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

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

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

## 15 II. ARGUMENT AND AUTHORITY

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

24  
25 <sup>1</sup> See Declaration of Robert J. Maguire in Opposition to Democratic Party’s Motion to Dismiss for Lack of  
26 Subject Matter Jurisdiction (“Maguire Decl.”), Ex. A, Petitioners’ Amended Response Brief in Opposition to  
27 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.”).

1 *Sec'y of State*, --- Wn.2d ---, 2004 WL 2937796 (Wash. S. Ct. Dec. 14, 2004) (November  
2 2004 gubernatorial general election); *Becker v. Pierce County*, 126 Wn.2d 11 (1995)  
3 (September 1992 primary for State Auditor). The Democratic Party itself filed a  
4 gubernatorial election contest in the *McDonald* case under the same statutory election  
5 contest provision it now challenges. The authority is consistent and confirms that  
6 Petitioners' election contest was filed in the proper forum in accordance with RCW  
7 29A.68. The Chelan County Superior Court has subject matter jurisdiction over this  
8 matter.<sup>2</sup>

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

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

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

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23 <sup>2</sup> Petitioners contend that the motion to dismiss lacks any basis in law and that the judicial branch is the  
24 appropriate branch for election contests, as required by a constitutional statute duly enacted by the  
25 Legislature. See RCW 29A.68. Recognizing the inherent risks of an adverse ruling that exist in all litigation,  
26 even when the law appears clear, Petitioners submitted on January 21, 2005, an election contest petition to  
27 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. See 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.

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

16 Moreover, the Democratic Party’s interpretation would actually render part of the  
17 Constitution’s language superfluous, in violation of another essential canon of statutory  
18 construction that holds that a court is “required, when possible, to give effect to every  
19 word, clause and sentence of a statute. No part should be deemed inoperative or  
20 superfluous unless the result of obvious mistake or error.” *Cox v. Helenius*, 103 Wn.2d  
21 383, 387-88 (1985). The Democratic Party’s interpretation of Article III, Section 4 would  
22 render meaningless the words “in such a manner as shall be determined by law.” It reads  
23 the provision as “contested elections for such officers shall be decided by the legislature. ~~in~~  
24 ~~such a manner as shall be determined by law.~~” Under the Democratic Party’s  
25 interpretation, the provision would mean the same with or without the words “in such a  
26 manner as shall be determined by law.” With or without those words, the Democratic  
27 Party contends that the provision means only that the Legislature is authorized to create its

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

11 A reading of the plain meaning of other portions of Article III, Section 4 buttresses  
12 the notion that an election contest for an Article III, Section 1 officer may be decided by  
13 some entity other than the Legislature. In particular, in the sentence in Article III, Section  
14 4 immediately preceding the sentence at issue in this case, the Section provides that in the  
15 event of a tie election, the winner "shall be chosen by the joint vote of both houses." The  
16 sentence governing election contests refers instead to the "legislature," bringing with it the  
17 separate roles of each house in passing legislation, and the role of the executive in  
18 approving it, rather than the combined body sitting in a judicial or semi-judicial capacity  
19 as occurs to determine a tie. The framers could have used the same language in addressing  
20 the manner of election contests and written that election contests should also be decided  
21 "by the joint vote of both houses," but they did not.<sup>3</sup> Instead, they use different language  
22 and gave the Legislature the power to determine by law the manner of election contests.

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23 <sup>3</sup> Arkansas, a jurisdiction relied upon by the Democratic Party, provides an example of such language in a  
24 constitution. Unlike Washington's Constitution, Arkansas' provided in 1868 that in the event of a tie  
25 between candidates, "one of them shall be chosen *by joint vote of both houses*. Contested elections *shall*  
26 *likewise be determined* by both houses of the general assembly in such manner as is or may hereafter be  
27 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).

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

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

17 Exercising its powers under the Constitution, the Legislature has enacted RCW  
18 29A.68. That chapter is the “law” that the Legislature has decided shall provide the  
19 manner of determining election contests in this State. And that chapter vests jurisdiction to  
20 correct election-related errors and misconduct in “[a]ny justice of the supreme court, judge  
21 of the court of appeals, or judge of the superior court.” RCW 29A.68.011. As the  
22 Supreme Court has recognized, this provision is “a statutory recognition of the power of  
23 superior courts, acting within their general equity jurisdiction, to intervene in cases of  
24 election fraud or wrongdoing.” *Foulkes v. Hays*, 85 Wn.2d 629, 632 (1975).

1           **B.     The Legislature’s Authority Over Article III Election Contests Is**  
2           **Delegable and Nonexclusive.**

3           The Legislature’s authority over the gubernatorial election contest is nonexclusive  
4           and is delegable to the Judiciary. The Washington Legislature has unequivocally spoken  
5           on this issue by enacting RCW 29A.68, and that decision to delegate the handling of  
6           election contest provisions is presumptively valid. *See State ex rel. Kurtz v. Pratt*, 45  
7           Wn.2d 151, 156-57 (1954) (recognizing that the Legislature “is unquestionably authorized  
8           by the constitution to provide for the proper conduct of elections” and that the predecessor  
9           to RCW 29A.68.011 was therefore “a proper exercise of legislative power”); *see also*  
10          *Island County v. State*, 135 Wn.2d 141, 146-147 (noting that statutes enacted by the  
11          Legislature are presumed valid). Unless a constitutional provision contains a clear  
12          limitation on legislative power, the Legislature may pass laws on a subject freely. “All  
13          doubts as to whether or not a state legislature had the power to pass a given enactment  
14          must be resolved in favor of the legislature.” *In re Bartz*, 47 Wn.2d 161, 163 (1955)  
15          (citing *Union High School District No. 1 v. Taxpayers of Union High School District No.*  
16          *1*, 26 Wn.2d 1 (1946)). To prevail, the Democratic Party has the burden of proving beyond  
17          a reasonable doubt that the statute is an unconstitutional delegation of power, yet its  
18          arguments in support of this difficult proposition are without any merit, let alone sufficient  
19          to meet this heavy burden.

20          **First**, as the Democratic Party concedes, legislative delegation of some powers to  
21          the courts through the creation of statutory law is permissible. *See Carstens v. DeSellem*,  
22          82 Wash. 643 (1914) (“The legislature cannot delegate its power to make a law; but it can  
23          make a law to delegate a power to determine some fact or state of things upon which the  
24          law makes, or intends to make, its own action depend.”); *State ex rel. Shepard v. Superior*  
25          *Court*, 60 Wash. 370, 372 (1910) (“All laws passed by the co-ordinate branch of the  
26          government and approved by the executive are presumed to be constitutional, and courts  
27          will not conjure theories to overturn and overthrow the solemn declarations of the  
28          legislative body.”).

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

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

23           Not all acts performed by a legislature are strictly legislative  
24 in character. A failure to recognize this distinction often  
25 gives rise to the belief that one of our law making bodies has  
26 abdicated its duty, and attempted to transfer its legislative  
27 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.

1 *Id.* at 5.

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

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

25 <sup>4</sup> The Democratic Party attempts to distinguish *State ex rel. Kurtz v. Pratt*, 45 Wn.2d 151 (1954), another  
26 case analyzing the first half of Amendment 28, using the same arguments as it did with *Manus*. Again, the  
27 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.

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

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

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

23 <sup>5</sup> See *In re McGee*, 36 Cal. 2d 592, 594-95 (1951) (holding that “the assembly is made the exclusive judge of  
24 the eligibility” *of its own members* and cannot delegate *that* jurisdiction) (emphasis added); *Dinan v. Swig*,  
25 223 Mass. 516, 518-19 (1916) (noting that the legislature cannot delegate the authority to settle controversies  
26 related to the election and qualification of its own members); *Kennedy v. Chittenden*, 142 Vt. 397, 399 (1983)  
27 (“[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. Spearling*, 31 La. Ann. 122, 123 (1879) (applying provision of constitution providing for contested  
elections for representatives).

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

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

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

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22 <sup>6</sup> It is difficult to reconcile the Democratic Party's arguments on this point with its arguments regarding the  
23 jurisdictional significance of *Becker v. Pierce County*, 126 Wn.2d 11 (1995). See Democratic Party's Motion  
24 to Dismiss for Lack of Subject Matter Jurisdiction at 15-17. On the one hand, the Democratic Party asserts  
25 that the filing of a "Protest to Election Return" with the Legislature in 1941 demonstrates exclusive  
26 jurisdiction of the Legislature even though the Legislature did not decide the merits of the "Protest to  
27 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.

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

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

10 [w]e have in the constitution, as you suggested, 'contested  
11 elections for such offices shall be decided by the legislature  
12 in such a manner as determined by law.' And there is a law,  
13 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.

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

15 I want to also start by commending the party organization  
16 that you belong to. First, for having chosen a statutory way,  
17 the way that this legislature, that our predecessors, set out for  
18 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.

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

21 Our duty is spelled out under the constitution...It does  
22 further state that under a contested election 'that this shall be  
23 decided by the legislature in such manner as shall be  
24 determined by law' not by a new process, by law, and we  
25 have a law, a contested election law... we have a duty to  
26 uphold the constitution and laws by taking on the appropriate  
27 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

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

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

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18 <sup>7</sup> Numerous Democratic Legislators have made public comments in support of this election contest  
19 remaining in the courts. The current legislators acknowledge that the Legislature is not equipped for  
20 deciding election contests, and perhaps more importantly, acknowledge that the Legislature properly  
21 delegated such authority to the courts. *See* Declaration of Thomas M. Goff, Jr., collecting recent statements  
22 by legislators, including the following Democrats: **Rep. Pat Sullivan** (“the impartial courts should look into  
23 the allegations, not the partisan Legislature. . . The Rossi campaign has filed their action in Superior Court  
24 and the Supreme Court will undoubtedly take up this issue. I will abide by and support the court’s decision  
25 after they have carefully and impartially reviewed this case.”); **Rep. Shay Schual-Berke** (“The Legislature is  
26 not an adjudicative body . . . it is most appropriate that it be investigated and assessed by a court of law.”);  
27 **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.”).

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

4                   Notwithstanding the plain language of the Constitution, the language of the contest  
5                   statute, and Washington cases involving election contests, the Democratic Party argues that  
6                   it would be unconstitutional for the Legislature to delegate to the judiciary the power to  
7                   resolve election contests. In other words, the Democratic Party now argues that the  
8                   election contest statute is unconstitutional, but the Democratic Party cannot meet the very  
9                   high burden necessary to strike down a statute as unconstitutional. Statutes are of course  
10                  presumed constitutional and the party challenging a statute must prove the statute’s  
11                  unconstitutionality “*beyond a reasonable doubt.*” See *Island County v. State*, 135 Wn.2d  
12                  141, 146-147 (1998) (“[W]here the constitutionality of a statute is challenged . . . a statute  
13                  is presumed to be constitutional and the burden is on the party challenging the statute to  
14                  prove its unconstitutionality beyond a reasonable doubt.”); see also 11 Am. Jur.  
15                  *Constitutional Law* § 128 (“It is an elementary principle of constitutional law, universally  
16                  accepted, that, where the validity of a statute is assailed, there is a presumption of the  
17                  constitutionality of the legislative enactment unless its repugnancy to the constitution  
18                  clearly appears or is made to appear beyond a reasonable doubt.”).

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

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

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

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

23 *All* election contests are within the purview of the judicial branch, including  
24 contests over statewide races. Subject matter jurisdiction may be raised by either party or  
25 by the court *sua sponte*. *State v. Superior Court of Clark County*, 105 Wash. 167, 169-70  
26 (1919). Lack of jurisdiction over the subject matter renders the superior court powerless to  
27 pass on the merits of the controversy brought before it. *Skagit Surveyors and Eng'rs, LLC*

1 *v. Friends of Skagit County*, 135 Wn.2d 542, 556 (1998). Because the court ruled on the  
2 merits of an Article III, Section 1 election contest in *Becker*, it is reasonable to assume that  
3 the Court recognized that it had subject matter jurisdiction over the election contest.

4 In *Becker*, the Washington Supreme Court determined that the complaint for  
5 declaratory relief was an election contest and decided that the election contest was time-  
6 barred under the election contest statute. *Becker* demonstrates that the Washington  
7 Supreme Court has implicitly recognized that the legislature has properly delegated the  
8 authority to review election contests to the judicial branch under the election contest  
9 statute, RCW 29A.68, formerly RCW 29.65.

10 The Democratic Party argues that because the Supreme Court ruled that the contest  
11 was time barred under the contest statute's timing requirements, it did not have to reach the  
12 issue of subject matter jurisdiction. But of course, the court would not have applied the  
13 time limitations provided under the election contest statute unless it had already concluded  
14 that the statute applied to the election contest and that it had subject matter jurisdiction to  
15 address election contests for Article III, Section 1 officers. The very fact that the court  
16 reached the issue of the timeliness of *Becker*'s election confirms that the court  
17 acknowledged jurisdiction.

18 The Democratic Party's attempt to distinguish *Becker* because it involved a primary  
19 election is weak. The Washington Supreme Court has recognized that the judicial branch  
20 has subject matter jurisdiction over general election contests in addition to primary election  
21 contests. *Foulkes v. Hays*, 85 Wn.2d 629, 632 (1975) (evaluating allegations of neglect by  
22 elections officials that allowed votes to be altered during recount of results of general  
23 election under 29.65.010). Without citing the actual language from Article III, Section 4,  
24 or providing further analysis, the Democratic Party claims that the language allegedly  
25 providing the Legislature exclusive authority to review election contests, "on its face" only  
26 applies to general elections. However, the language at issue merely states "[c]ontested  
27 elections for such officers shall be decided by the legislature in such manner as shall be

1 determined by law.” The constitutional provision makes no distinction between general  
2 and primary elections, and there is no credible argument for distinguishing the *Becker* case  
3 on those grounds.

4 **E. The Democratic Party Conceded That This Court Has Subject Matter**  
5 **Jurisdiction in Earlier Litigation Over this Gubernatorial Election**

6 Not only has the Washington Supreme Court applied the election contest provisions  
7 to statewide offices as provided for in RCW 29A.68, but the Democratic Party actually  
8 filed a case under the election contest statute in this same gubernatorial race *and* urged the  
9 Washington Supreme Court to retain jurisdiction over the case when faced with a motion  
10 to dismiss. *See McDonald v. Sec’y of State*, --- Wn.2d ---, 2004 WL 2937796 (Wash. S.  
11 Ct. Dec. 14, 2004). In *McDonald*, the Democratic Party argued that RCW 29A.68, which  
12 is titled “Contesting An Election,” provided the Supreme Court “not only the authority but  
13 the duty to act to provide a remedy” for wrongful or neglectful conduct by election  
14 officials. *See* Petitioner’s Amended Response Brief in Opposition to Respondent Franklin  
15 County Auditor’s Motion to Dismiss Petition by Electors and Petition for Writ of  
16 Mandamus and Other Relief at 6, filed in *McDonald*, --- Wn.2d ---, 2004 WL 2937796  
17 (Wash. S. Ct. Dec. 14, 2004). Now the Democratic Party argues the courts lack subject  
18 matter jurisdiction over a petition similarly brought under RCW 29A.68.011.<sup>8</sup>

19 The Democratic Party’s current position on jurisdiction disregards the plain  
20 language of RCW 29A.68, reverses its previous position, and requires the Superior Court  
21 to declare the statute unconstitutional. As evidenced by the recent Washington Supreme

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22 <sup>8</sup> The Democratic Party’s attempt to draw an artificial distinction between an “error-correcting” action and an  
23 election contest finds no support in the language of the election contest statute. The statute provides that  
24 “[a]ll election contests must proceed under RCW 29A.68.010.” RCW 29A.68.020. The Legislature repealed  
25 RCW 29A.68.010 in 2004 and replaced it with RCW 29A.68.011, the very provision over which the  
26 Democratic Party has previously conceded the judicial branch has jurisdiction. RCWA.68.010, *repealed by*  
27 *Laws of 2004, ch. 271, §193, eff. June 10, 2004*. Petitioners have pled an election contest under RCW  
29A.68.011 *et seq.* and specifically pled that “[b]ecause of the errors, omissions, misconduct, neglect, and  
other wrongful acts of respondent election officials, petitioners contest the election and the right of Christine  
Gregoire to be issued a certificate of election for the office of Governor.” Election Contest Petition at 3.  
Therefore, Petitioners have pled that this court has jurisdiction under the same “error-correcting” provision  
that the Democratic Party relied upon in *McDonald*.

1 Court cases, the statute applies to all election contests, including statewide offices such as  
2 the election of Washington's governor, and the language of the statute directs electors to  
3 bring such contests to the courts. For this Court to now hold that the judiciary does not  
4 have subject matter jurisdiction requires a declaration that the election contest statute is  
5 unconstitutional. This challenge demands the highest burden of proof in civil litigation,  
6 and the Democratic Party is nowhere close to meeting this exacting burden.

7 **F. The Democratic Party Does Not Have Any Authority Demonstrating**  
8 **that the Court Lacks Jurisdiction.**

9 **1. The Minimal Legislative History Provided By the Democratic**  
10 **Party Is Not Persuasive.**

11 The Democratic Party's use of legislative history is unpersuasive. First, legislative  
12 history should only be examined when the statute or provision is ambiguous on its face.  
13 *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463, 469 (2004). As previously  
14 discussed, Article III, Section 4 unambiguously permits the Legislature to create laws  
15 governing the manner in which election contests shall be determined, and to delegate its  
16 power over such contests to the judiciary. Second, the legislative history cited by the  
17 Democratic Party is minimal: based on a single statement by a single state legislator, as  
18 expressed in a modern summary of a single newspaper article written in 1889. *Cf.*  
19 Declaration of Thomas M. Goff, Jr. (collecting recent comments by legislators supporting  
20 resolution of this contest by the courts rather than the Legislature); Declaration of  
21 Christopher Hanzeli, Ex. A (excerpts of recent legislative debate regarding  
22 appropriateness of courts deciding election contests). Even assuming that this brief  
23 summary of one exchange is an accurate and complete rendition of the legislator's words  
24 (an optimistic assumption, at best), the comments of a single legislator are generally  
25 considered inadequate to establish legislative intent. *In re F.D. Processing, Inc.*, 119  
26 Wn.2d 452, 461 (1992) (holding legislator's comments regarding processor preparer lien  
27 and exclusion of dairy products from farm products in statute inadequate to establish  
legislative intent).

1           Given the lack of Washington authority in support of its position, the Democratic  
2 Party has resorted to case law from other jurisdictions and tangential arguments to try to  
3 create new law in this area that is contrary to Washington law. As described in the  
4 following section, the examples relied upon from other jurisdictions do not support the  
5 Democratic Party's arguments.

6                   **2.     The Out-of-State Cases Cited by The Democratic Party Are**  
7                   **Distinguishable and Lack Persuasive Authority.**

8           The out-of-state cases cited by the Democratic Party do not have any bearing on  
9 how this Court should interpret the constitutional provision at issue and the statutory  
10 scheme passed by the Washington Legislature implementing that provision. These cases  
11 merely *restate* a truism in state election contests for executive offices: in some states the  
12 Legislature conducts contests, and in others, the courts do so. *See Developments in the*  
13 *Law of Elections*, 88 Harv. L. Rev. 1298, 1304-1305 (1975) (“[C]ontests of state executive  
14 officers are conducted with almost equal frequency in courts and state legislatures.”).

15           Unlike Washington's framework, the cases cited by the Democrats all involve  
16 either constitutional provisions expressly requiring that the legislature determine election  
17 contests, or legislative enactments expressly requiring that the legislature, and the  
18 legislature only, exercise jurisdiction over these cases. *See e.g. Dickson v. Strickland*, 265  
19 S.W. 1012, 1016 (Tex. 1924) (quoting Texas Constitution Article IV, Section 3, under  
20 which “[c]ontested elections for either of said offices [including Governor] shall be  
21 determined by both houses of the legislature in *joint session*”) (emphasis added); *Baxter v.*  
22 *Brooks*, 29 Ark. 173, 191 (1874) (“State law enacted at the time made clear that the  
23 Legislature retained control of gubernatorial election contests.”); *Robertson v. State ex rel.*  
24 *Smith*, 109 Ind. 79, 92 (1887) (noting that the General Assembly provided by statute “for  
25 the organization of a committee, *to be selected from the members of both houses*, before  
26 which the contest is to be carried on”)<sup>9</sup> (emphasis added); *Roe v. Mobile County*

27           <sup>9</sup> The Democratic Party's reliance on this case is questionable since the court's holding related only to

1 *Appointment Bd.*, 676 So.2d 1206 (Ala. 1995), *overruled on other grounds*, *Williamson v.*  
2 *Indianapolis Life Ins. Co.*, 741 So.2d 1057 (Ala. 1999) (noting that statute at issue, Ala.  
3 Code § 17-15-6, provided that “[n]o jurisdiction exists in or shall be exercised by any  
4 judge, court or officer exercising chancery powers to entertain any proceeding for  
5 ascertaining the legality, conduct or results of any election, except so far as authority to do  
6 so shall be specially and specifically enumerated and set down by statute”) (cited in related  
7 opinion in *Roe v. Alabama*, 43 F.3d 574, 582 (11th Cir. 1995)); *Taylor v. Beckham*, 56  
8 S.W. 177, 178 (Ky. Ct. App. 1900) (observing that the contest provision passed by the  
9 Legislature “provides that on the third day after the organization of the General Assembly  
10 a board shall be chosen by lot, and have power to send for persons and papers. Its decision  
11 shall be reported to the two Houses, and the General Assembly shall then determine the  
12 contests.”). Moreover, the Democratic Party cites *no* case where the legislature’s  
13 delegation of the contest power to a court was found unconstitutional.

14 For example, their brief mischaracterizes an 1874 case about the need for a rogue  
15 lower court to follow statutory commands, case precedent, and direct orders from the state  
16 supreme court, to argue that this court cannot have jurisdiction in this case. In *Baxter v.*  
17 *Brooks*, 29 Ark. 173 (Ark. 1874), the losing candidate for Governor of Arkansas, Joseph  
18 Brooks, properly petitioned the legislature for a contest pursuant to a state statute  
19 providing that “[a]ll contested elections of governor shall be decided by joint vote of both  
20 houses of the general assembly, and in such joint meeting, the president of the senate shall  
21 preside.” *Id.* at 191. The Arkansas legislature rejected the petition contest by a vote of 63-  
22 9. *Id.* The losing candidate then appealed to the Supreme Court, which rejected his claim.

23  
24 jurisdiction over the person, not to subject matter jurisdiction under the state constitution. As the court itself  
25 noted, “It is enough for the decision of this case to affirm that there was no jurisdiction over the person of the  
26 appellant. It is not necessary, *nor, indeed, proper*, to decide any other questions other than those of  
27 jurisdiction [over the person].” *Robertson*, 109 Ind. 79 at 84 (emphasis added). The Democratic Party’s  
references to the case are to concurring opinions rather than to the opinion of the court which reached only  
the issue of personal jurisdiction. Regardless, however, Indiana’s statutory provisions are distinguishable  
from Washington’s in that Indiana’s statutes expressly provide for the causes and mode of contests in the  
legislature.

PETITIONERS’ OPPOSITION TO MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION - 20

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1 Brooks then sued in a friendly circuit court, which rendered judgment in his favor.  
2 Judgment in hand, and with the aid of armed men, Brooks then forcibly ejected the elected  
3 winner and took possession of the Governor's office. *Id.* at 192. The Supreme Court of  
4 Arkansas properly ruled that the lower court exceeded its jurisdiction by hearing the case.

5 Moreover, the language at issue in the Arkansas Constitution, though similar on its  
6 face, differs in an important respect from Washington's. Article VI, Section 19 of the  
7 1868 Constitution provided that if two or more candidates had equal number of votes "one  
8 of them shall be chosen *by joint vote of both houses*. Contested elections *shall likewise be*  
9 *determined* by both houses of the general assembly in such manner as is or may hereafter  
10 be prescribed by law." *Id.* at 183 (emphasis added). The provision, read in full, thus  
11 requires that an election contest be decided in the same manner as a tie vote—by joint vote  
12 of both houses of the legislature. Furthermore, a provision in the 1874 Constitution, which  
13 had taken effect at the time the case was decided, provided explicitly that "[c]ontested  
14 elections for Governor... shall be determined by the members of both houses of the  
15 General Assembly, in joint session; *who shall have exclusive jurisdiction in trying and*  
16 *determining the same.*" Ark. Const. Art. VI, sec. 4. (emphasis added). Thus, the  
17 Constitution and the relevant statutory provisions demonstrate, as the court correctly  
18 decided, that jurisdiction for an election contest could not properly lie in the Arkansas  
19 courts.

20 **3. The Democratic Party's Brief Ignores Other Out-of-State Cases**  
21 **and Constitutions Supporting the Washington Legislature's**  
22 **Decision to Cede Authority to Conduct Election Contests to the**  
23 **Courts**

23 Conversely, the unambiguous and authoritative decision by the Washington  
24 Legislature to delegate election contests to the courts with procedures established "by law"  
25 *is* validated by other courts and other legislatures. For example, the Supreme Court of  
26 West Virginia held that, when the constitution gives the Legislature discretion to determine  
27 the manner for conducting an election contest, it is entirely *appropriate* for the Legislature

1 to cede authority to conduct the contest to the courts. The West Virginia Constitution  
2 provides that “The legislature shall prescribe the manner of conducting and making returns  
3 of elections, and of determining contested elections.” W. Va. Const. Art. IV, sec. 11.

4 Adjudicating an election contest under this provision, the Supreme Court of West Virginia  
5 found that “[u]nder this section, the Legislature has power to confer upon the courts, or  
6 upon quasi judicial tribunals, or upon inferior legislative tribunals, or may itself retain  
7 jurisdiction to hear and determine election contests.” *McWhorter v. Dorr*, 57 W. Va. 608,  
8 609-610 (W.Va. 1905). The case favorably cites a treatise stating the rule at issue in this  
9 case:

10 In the absence of Constitutional inhibitions, the Legislature  
11 has power to declare the certificate of election conclusive, in  
12 all cases. It may or may not authorize a contest. If a contest  
13 be authorized, the mode of contest and of trial will rest  
14 absolutely in the legislative discretion. The Legislature has  
15 full power to determine what tribunal shall hear and  
16 determine the contest, and *may confer the jurisdiction upon*  
17 *one of the ordinary judicial tribunals* or upon a judge  
18 thereof, or upon any other officer, and may or may not  
19 authorize a trial by jury.

20 *Id.* at 610. (emphasis added).

21 The actions of other states demonstrate that the language in Washington’s  
22 Constitution allows the Legislature to make the choice regarding how election contests will  
23 be conducted. Oregon’s Constitution provides that “[c]ontested Elections for Governor  
24 shall be determined by the Legislative Assembly in such manner as may be prescribed by  
25 law.” Ore. Const. Art. V, sec. 6. The Oregon Legislature chose to conduct contests in the  
26 same manner as Washington, providing that they should be filed in the Circuit Court. *See*  
27 O.R.S. §§ 258.036 *et seq.*, 258.055 (“The circuit court shall hear and determine the  
proceeding without a jury and shall issue written findings of law and fact.”). In contrast,  
Tennessee, which also has a constitutional contest provision similar to Washington’s,  
provides that contests over gubernatorial elections should proceed before the Legislature.<sup>10</sup>

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<sup>10</sup> The Democratic Party asserts in its brief that Pennsylvania has language similar to Washington’s contest  
PETITIONERS’ OPPOSITION TO MOTION TO DISMISS  
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1 The choices made by these legislatures conclusively demonstrate that Washington's  
2 Constitution allows the Legislature to either retain the contest authority for itself, or to  
3 delegate that authority to the courts. Having made that choice, this Court should not act in  
4 a way that would invalidate Washington's Constitution and, implicitly, others around the  
5 country.

6 **4. The Legislature's Exclusive Jurisdiction Over Election Returns  
7 for Its Own Members is Irrelevant.**

8 The fact that the Constitution has reserved to the Legislature the exclusive power to  
9 be the final judge of the general election returns of its own members is irrelevant. The  
10 Democratic Party argues that because Article II of the Washington Constitution preserves  
11 the right of the Legislature to be final arbiter of contested elections involving its own  
12 members, it must have similarly meant to do so with regard to Article III, Section 1  
13 officers. However, an examination of the two relevant constitutional provisions supports  
14 exactly the opposite conclusion.

15 The relevant language in Article II provides that "[e]ach house shall be the judge of  
16 the election, returns and qualifications of its own members...." Wash. Const. Art. II, sec.  
17 8. If the framers had intended to similarly reserve the power to decide Article III elections  
18 to the Legislature, they would have drafted similar or identical language, such as "[e]ach

19 \_\_\_\_\_  
20 statute. WSDCC Brief at 9 n.2. However, that provision provides that "[c]ontested elections shall be  
21 determined *by a committee, to be selected from both Houses of the General Assembly*, and formed and  
22 regulated in such manner as shall be directed by law." Pa. Const. Art. 4, sec. 2 (emphasis added). This  
23 provision plainly vests jurisdiction in a legislative committee. Similarly, the Democratic Party points to the  
24 litigation in North Carolina to suggest that this Court's jurisdiction is a legitimate point of contention.  
25 However, the North Carolina statute provides that "a contested election for any office established by Article  
26 III of this Constitution shall be determined *by joint ballot of both houses of the General Assembly* in the  
27 manner prescribed by law." N.C. Const. Art. VI, sec. 5 (emphasis added). The language is readily  
distinguishable from Washington's. Additionally, the Democratic Party misstates two facts about the case.  
First, June Atkinson has not yet been declared the winner of the race. And though the WSDCC takes delight  
in pointing out that she is "notably" a Republican, she is in fact, more notably, a Democrat. WSDCC Brief at  
8. Perhaps more notable than WSDCC's mistaken characterization of political affiliation in that case, the  
issue *remains undecided*. See Amicus Curiae Brief of Steven Troxler, *James et al. v. Bartlett et al.*, No.  
602PA04-2, Supreme Court of North Carolina, at 3-4 (filed January 13, 2005) (arguing that the statutory  
provision enacted pursuant to Art. VI, sec. 5, and containing identical language to that constitutional  
provision, precluded General Assembly from deciding election contest *in the absence of a tie vote*).

1 house shall be the judge of the election, returns and qualifications of [insert list of Article  
2 III officers].” This language is not found in Article III; rather, the relevant provision states  
3 that “[c]ontested elections for such officers shall be decided by the legislature *in such*  
4 *manner as shall be determined by law.*” Wash. Const. Art. III, sec. 4 (emphasis added).  
5 Such a marked departure from Article II can only be explained by an intent to provide the  
6 Legislature with the delegable power to decide elections. *See supra* at Section II.A; *see*  
7 *also Wash. Econ. Dev. Fin. Auth. v. Grimm*, 119 Wn.2d 738, 746 (1992) (“We have,  
8 however, consistently stated that statutes or constitutional provisions should be construed  
9 so that no clause, sentence or word shall be superfluous, void, or insignificant.”); *Carver v.*  
10 *Bond/Fayette/Effingham Regional Bd. Of School Trustees*, 586 N.E.2d 1273, 1276 (Ill.  
11 1992) (“When the legislature uses certain language in one part of a statute and different  
12 language in another, we may assume different meanings were intended.”).

13 **5. Article II, Section 16 Does Not Preclude the Court’s Jurisdiction**  
14 **Over an Election Contest.**

15 The Democratic Party claims that Washington Constitution Article II, Section 16,  
16 which immunizes sitting legislators from service of process, makes it impossible for any  
17 court to take jurisdiction over a state-wide election contest. This is incorrect and not a bar  
18 to this Court’s jurisdiction over a contest involving the Executive Branch. In fact, the  
19 Supreme Court’s reading of Article II, Section 16 suggests that even immunity for  
20 legislators would not be appropriate in the present situation. In *Seamans v. Walgren*, 82  
21 Wn.2d 771 (1973), the Supreme Court cited other state courts holding that “such  
22 immunities are designed to benefit the public by protecting legislators against compelled  
23 distraction and interference during the session” and that “[t]he idea back of the  
24 constitutional provision was to protect the legislators from the trouble, worry and  
25 inconvenience of court proceedings during the session, and for a certain time before and  
26 after, so that the State could have their undivided time and attention in public affairs.” *Id.*  
27 at 774. Just as with these states, held the court, Washington’s “immunity was granted by

1 our constitution to protect the legislators from distraction.” *Id.* In this matter, however,  
2 Petitioners are not urging a course that would distract legislators from their duties; rather,  
3 they seek to bring legislators into this election contest in order to ensure that they *perform*  
4 their duties, as required by the court. The Democratic Party may not on the one hand argue  
5 that election contests are the intrinsic duty of the state Legislature, while on the other hand  
6 simultaneously asserting that involvement in such a contest would distract legislators from  
7 their work.

8 Furthermore, the election contest statute indicates that the legislators are not  
9 necessary parties to a contest. If the Court sets aside the election, and a timely appeal is  
10 not filed, “the certificate of issue shall be thereby rendered void.” RCW 29A.68.120. In  
11 other words, the certificate of election in a statewide contest will be rendered void by  
12 operation of law, regardless of whether the legislators are parties to the contest. Therefore,  
13 Article II, Section 16 has no bearing on the scope of the election contest statute.

#### 14 **6. Jurisdiction Is Also Appropriate Under Article IV, Section 6.**

15 Finally, the Democratic Party argues that Wash. Const. Article IV, Section 6, which  
16 vests original jurisdiction in “all cases and of all proceedings in which jurisdiction shall not  
17 have been by law vested exclusively in some other court,” does not apply and, even if it  
18 does, that this article and Washington Constitution Article III, Section 4 conflict. Both  
19 assertions fail.

20 *First*, the Democratic Party’s position fails to give full effect to *Foulkes v. Hays*, 85  
21 Wn.2d 629 (1975). *Foulkes* affirmed the general power of the courts over election contests  
22 and specifically, “the power of superior courts, acting within their general equity  
23 jurisdiction, to intervene in cases of election fraud or wrongdoing.” *Id.* at 632. Article III,  
24 Section 4 of the Washington Constitution does *not* give the legislature exclusive  
25 jurisdiction. *Cf.* Ark. Const. Art. VI, sec. 4 (1874) (“Contested elections for Governor ...  
26 shall be determined by the members of both houses of the General Assembly ... who shall  
27 have *exclusive* jurisdiction in trying and determining the same.”) (emphasis added).

1 Moreover, the legislature *provided* a remedy for election contests for state officers  
2 pursuant to Article III, Section 4 by enacting RCW 29A.68.011. *Cf. Baxter v. Brooks*, 29  
3 Ark. 173, 191 (1974) (holding that state law *enacted at the time* made clear that the  
4 legislature retained control of gubernatorial election contests); *Robertson v. State ex rel.*  
5 *Smith*, 109 Ind. 79, 92 (1897) (noting that General Assembly provided for organization of a  
6 committee before which election contest could be heard); *Roe v. Mobile County*  
7 *Appointment Bd.*, 676 So. 2d 1206 (Ala. 1995) (noting statute at issue explicitly provided  
8 that no court could exercise jurisdiction over election contest except *by statute*), *overruled*  
9 *on other grounds*, *Williamson v. Indianapolis Life Ins. Co.*, 741 So.2d 1057 (Ala. 1999).  
10 Even assuming that the legislature did not provide this remedy in RCW 29A.68.011, this  
11 Court may hear contests outside the purview of that provision in light of the lack of  
12 limiting language in Article III, Section 4, and as *Foulkes* suggests.

13 Second, Washington Constitution Article IV, Section 6 confers a “broad grant of  
14 jurisdiction on the superior courts,” and exceptions to this grant will be narrowly  
15 construed. *In re Marriage of Major*, 71 Wn. App. 531, 534 (1993). Where the legislature  
16 does not indicate an intent to limit jurisdiction, this Court must construe a statute as  
17 containing none. *Id.* Here, the plain language of RCW 29A.68.011 in no way purports to  
18 limit or exclude contests for the office of Governor from its provisions. *See State ex rel.*  
19 *Blake v. Morris*, 14 Wash. 262, 263 (1896) (holding that where statute does not  
20 *unequivocally* exclude jurisdiction, court may entertain proceeding under Washington  
21 Constitution Article IV, Section 6); *Dudley v. Superior Court*, 13 Cal. App. 271, 274  
22 (1910) (“The jurisdiction of the superior court to hear and determine election contests is  
23 *included* within the jurisdiction conferred upon the superior court by section 5, article 6, of  
24 the Constitution; said proceeding being special and the jurisdiction in relation to which is  
25 not otherwise provided by statute.”) (emphasis added).

26 Indeed, this is precisely the reason why Article III, Section 4 and Article IV,  
27 Section 6 do not conflict: pursuant to its authority under Article III, Section 4, the

PETITIONERS’ OPPOSITION TO MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION - 26

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1 Washington legislature enacted RCW 29A.68.011. It did not *inadvertently forget* to  
2 exclude the office of Governor from that section; if it had included such language, the  
3 assertion by the Democratic Party that the legislature's power in that regard was  
4 "exclusive" under Article III, Section 4 would be more tenable. *See McWhorter v. Dorr*,  
5 57 W.Va. 608, 609-10 (1905) ("The legislature has full power to determine what tribunal  
6 shall hear and determine the contest."). Furthermore, even if this Court assumes *arguendo*  
7 that RCW 29A.68.011 does not apply to this proceeding, Article III, Section 4 *still*  
8 contains no limiting language (as, for example, the language contained in the 1874  
9 Arkansas Constitution) that would preclude this Court from exercising its jurisdiction  
10 under Article IV, Section 6. *See also Foulkes v. Hays, supra.*

11 To support its conclusion that this Court does not have jurisdiction, the Democratic  
12 Party necessarily must rely on several unjustified assumptions. It must assume, with  
13 virtually no explanation, that Article III, Section 4 contains limiting language that prevents  
14 the Legislature from delegating to this Court the power to decide election contests. It must  
15 assume in the alternative that this same constitutional provision contains limiting language  
16 that prevents this Court from deciding this contest pursuant to its broad authority under  
17 Article IV, Section 6. It also must assume that the Legislature has not already provided  
18 this Court with the authority to decide this contest under RCW 29A.68.011, and  
19 consequently, it necessarily must assume that the reason the Legislature did not exclude  
20 contested elections for Governor from this provision was merely bad drafting. Finally, it  
21 must read the phantom words "except for election contests involving state officers" into  
22 RCW 29A.68.011, words which are not, and have never been, there.

### 23 III. CONCLUSION

24 This Court's jurisdiction is demonstrated by the plain meaning of the Constitution,  
25 the plain meaning of the election contest statute, and Washington Supreme Court  
26 precedent. The Democratic Party's motion to dismiss for lack of subject matter  
27 jurisdiction should be denied and the Court should proceed to the merits of this contest.

PETITIONERS' OPPOSITION TO MOTION TO DISMISS  
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DATED this 26th day of January, 2005.

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