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I. SUMMARY OF ARGUMENT

Petitioners seek extraordinary – indeed, unprecedented – relief: removing a sitting Governor from office and a newly-invented, court-directed "special election," all on the basis of a potpourri of vague and unsupported allegations of administrative errors by election officials and potential mistakes or misconduct, often unintentional, by individual voters. This is plainly *insufficient*. Despite a veritable deluge of paper, the actual allegations upon a close examination utterly fail to establish the daunting grounds required for an election contest in Washington. Accordingly, WSDCC respectfully submits this motion – and those filed by the county respondents – should be granted and the case dismissed.

Petitioners generally allege that a number of felons and non-residents were improperly registered and as a result of that improper registration have received and voted "illegal" ballots. Nowhere, however, do Petitioners allege that these alleged illegal votes cast by improperly registered voters have been challenged as required by RCW 29A.68.020(5)(b). In fact, Petitioners candidly admit that they cannot prove, and apparently do not even intend to attempt to prove, the required elements to prevail in an election contest on such grounds. But the election contest statute reflects a clear public policy decision is that it is far better to prevent the casting of an improper ballot in the first instance than it is to locate and eliminate the miscast ballot after the fact. The plain terms of that statute are fatal to Petitioners' claims.

Petitioners also allege after the fact discrepancies between the numbers of votes tallied and the numbers of voters who have subsequently been given "credit" for voting. But the credits for voting issued after the election are not part of the ballot security and

1 authentication system and, however colorful such allegations might be in the press, are not
2 relevant to this election contest. Petitioners artfully do not allege that any significant
3 number of ballots were in fact issued to voters improperly; rather, they allege only that the
4 post-election record keeping is not yet correct. There is no basis in the law for presuming
5 that the secondary data entry that leads to voter credits is more accurate than the
6 contemporaneous records and reconciliation reports that were made election night under the
7 watchful eyes of bi-partisan representatives, or that any ballot was issued to, and cast by, an
8 unregistered voter.
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Petitioners allege that some provisional ballots were counted before election officials
verified that the ballots had been given to registered voters. Provisional ballots, however,
are required by law to be counted in the absence of clear and convincing evidence that the
recipient was not qualified.

What is *missing* from the petition is equally notable. There is no allegation that there
was any fraud or wrongdoing by election officials or that Governor Gregoire, her campaign,
her party, or county election officials participated in election fraud or wrongdoing. There is
no allegation that the challenged problems were unique in type or volume to this election.
Petitioners have missed their opportunity to challenge mistakes or misconduct in a timely
fashion, or have already made the challenges in other courts and lost. Perhaps most
important, there is no indication that the outcome of the election would have been any
different in the absence of the problems alleged by Petitioners. The Petition itself
acknowledges that Petitioners cannot prove that the outcome would have been different if
the mistakes and misconduct had not occurred. Indeed, published reports indicate that, of
those voters who allegedly voted unlawfully and who have identified for whom they voted,
most in fact voted for the losing candidate. Mr. Rossi.

1 Nonetheless, Petitioners seek the "drastic, if not staggering" relief of setting aside an
2 election and removing a sitting Governor. *Soules v. Kauaians for Nukoli Campaign Comm.*,
3 849 F.2d 1176, 1180 (9th Cir. 1988). For good reason, the Legislature has imposed
4 daunting hurdles before any such remedy can be even considered. Indeed, courts have
5 repeatedly declared their hesitancy to interfere in the selection of officials of other branches
6 of government, to create instability by removing a sitting official, or to invalidate the efforts
7 of millions of lawful voters. The unprecedented remedy of a new special election sought by
8 Petitioners not only finds no support in the election contest statute, but would unlink the
9 gubernatorial election from the vote on the presidency and other important offices, losing
10 the high turnout that the constitutional framers sought by requiring that timing, and could
11 allow voters who were not eligible in the original election (due, for example, to age and
12 residency) to change the outcome.
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14

15 The election contest provisions of the statute understandably set strict and formidable
16 standards for election contests and courts have repeatedly emphasized – and enforced –
17 those limitations. The structure of the election code – the transparency of the election
18 process, the roles given to parties to monitor that process as it goes along, and the error-
19 correction provisions to intercept or timely correct mistakes – all are intended to *avoid*
20 election contests. Such contests are allowed to address only limited, outcome-determinative
21 problems, and are not intended to make the courts into super canvassing boards with roving
22 investigative authority.
23
24

25 Because the mistakes and misconduct alleged here are the type that occur to some
26 degree in every election, if they are grounds for contest, and if Petitioners need only show
27 that the total number of potentially affected votes is larger than the margin, then protracted
28 post-election litigation, engulfing county and state election officials in expensive court
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1 proceedings, and court-ordered "revotes," will become commonplace. Candidates and
2 parties will have far less incentive to monitor the process and correct errors before they
3 become final, and *every incentive* to wait and see if they lose, sitting on evidence of
4 correctable problems before certification, and then to engage in months of post-election
5 efforts to uncover mistakes, good faith and otherwise, and to ask for a new special election.
6 That is exactly what the Petitioners did here. Efforts surely should be made to correct the
7 administrative errors identified by Petitioners for upcoming elections (to the extent not
8 *already* addressed by statutory amendments that became effective in 2006) and to punish
9 any misconduct, but Petitioners should not be allowed to create new – and decidedly ill-
10 advised – rights to set aside elections.

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Petitioners do not pretend to satisfy the strict standards for setting aside an election
that are embedded in the election contest framework set out in RCW 29A.68.011(6) and
RCW 29A.68.020-.120. Instead they argue that voters seeking to set aside elections can
simply ignore the law's requirements and merely accumulate a series of good faith errors by
election officials to justify their claim. With all due respect, this is not Washington's law
and it never has been. Petitioners' argument should be rejected.

II. ARGUMENT

A. Petitioners' Burden Is Heavy and Specific.

Petitioners not only bear the burden of proof, *see* RCW 29A.68.050 (court "may
dismiss the proceedings if the statement of the cause or causes of contest is insufficient");
In re Contested Election of Schoessler, 140 Wn.2d 368, 383 (2000), but must show that the
election is clearly invalid ("overwhelming evidence established before the trial court"). *Id.*
at 383, 395; *Dumas v. Gagner*, 137 Wn.2d 268, 283 (1999). Further, Petitioners must
overcome both the presumption that election officers complied with their duties in an honest

1 and careful manner and that the returns are valid, *see Quigley v. Phelps*, 74 Wash. 73, 75
2 (1913), and the presumption of the right to vote created by registration. *See*
3
4 RCW 29A.08.810 ("Registration of a person as a voter is presumptive evidence of his or her
5
6 right to vote at any primary or election, general or special."). Petitioners must do more than
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8 speculate about the possible impact of the challenged conduct on the outcome.
9
10 RCW 29A.68.070, .080, and .110. It is not enough to show that the election was historically
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12 close (which it was), *Vacco v. Spitzer*, 179 Misc.2d 584, 585-86, 685 N.Y.S.2d 583 (N.Y.
13
14 Sup. 1998) (closest election in state's history), or that there were mistakes and individual
15
16 voter misconduct (which there always are). Petitioners must prove that ballots cast in the
17
18 Governor's race were illegal as defined by RCW 29A.68.020(5) and that in light of the
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20 candidate for whom they were cast they changed the certified outcome. RCW 29A.68.110.
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23 The Office of the Secretary of State has emphasized the presumptions that stand
24
25 against a petitioner in an election contest. In *Becker v. County of Pierce*, the Secretary
26
27 argued that "[c]ourts should employ every reasonable presumption in favor of sustaining a
28
29 contested election." Brief of Amicus Curiae at 11, *Becker v. County of Pierce*, 126 Wn.2d
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31 11 (1995) (No. 61553-5) (internal quotations omitted) (quoting *Knight v. State Bd. of*
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33 *Canvassers*, 374 S.E.2d 685, 686 (S.C. 1988)). (The brief is attached as Appendix A.) The
34
35 Secretary cited *Chumney v. Craig*, 805 S.W.2d 864 (Tex. App. 1991), for the principles that
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37 "election results should be upheld unless there is clear and convincing evidence of an
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39 erroneous result" and that there is a "presumption that election officials have done their duty
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1 in conducting an election, and the contestant has a heavy burden of overcoming the
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3 presumption." Brief of Amicus Curiae at 11, *Becker*, 126 Wn.2d 11.¹

4
5 Petitioners argue that the appropriate legal standard for this Motion is CR 12(b)(6)
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7 though they point to numerous post-filing declarations in an effort to prop up their defective
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9 petition and affidavits of electors. Pets.' Mem. in Opp'n to Wash. State Democratic Cent.
10
11 Comm.'s Mot. to Dismiss Causes of Contest ("Opp'n") at 4. To the extent that CR 12(b)(6)
12
13 is found to apply by the Court, the Court must apply that general rule in context, and an
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15 election contest is a unique proceeding in our legal system. An election contest is not
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17 initiated based on a notice pleading. The law requires that it be initiated by means of sworn
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19 testimony based on personal knowledge stating with sufficient certainty that grounds for the
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21 setting aside of an election, as specified in RCW 29A.68.020, exist. RCW 29A.68.030. The
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23 election contest statute itself requires an examination of the sufficiency in the allegations.
24
25 RCW 29A.68.050. The Court thus must test Petitioners' allegations against the legal
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27 standards articulated in the election contest statute, and in light of the presumptions and
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29 burdens recognized by the courts. The affidavits that Petitioners have filed, filled with
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31 hearsay, speculation, and possibilities, rather plainly fall short of those standards.

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41 ¹ Indeed, perhaps an even more apt citation for these principles would have been to our own
42 Court's holdings. Our Supreme Court has emphasized that "[a]n election honestly conducted under
43 the forms of law ought generally to stand, notwithstanding individual electors may have been
44 deprived of their votes, or unqualified voters been allowed to participate. . . . [I]t is generally
45 impossible to arrive at any greater certainty of result by resort to oral evidence. Public policy is best
46 served by allowed the election to stand, and trusting to a strict enforcement of the criminal laws for
47 greater security against the like irregularities and wrongs in the future." *Hill v. Howell*, 70 Wash.
603, 613 (1912).

1 **B. Petitioners' Election Contest Is Governed by RCW 29A.68.020, .070,**
2 **.080, .090, and .110.**

3
4 **1. Petitioners Cannot Seek to Overturn a Certificate of Election in**
5 **an Election Contest Under RCW 29A.68.011(4)-(5).**

6
7 Despite the statutory language, history, and judicial interpretation of
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9 RCW Chapter 29A.68, Petitioners breezily dismiss the distinction in the statute between
10 those provisions that allow courts to generally intercept or correct errors or neglect by
11 election officials and those that allow a court to overturn a certificate of election or set aside
12 an election and that govern allegations of "illegal votes." Petitioners rely upon the
13 Sections (4) and (5) of RCW 29A.68.011. Those sections reflect a public policy of
14 encouraging the correction of errors, in advance, at a time when it is efficient and convenient
15 to do so, but once an election has been certified contestants cannot avoid the standards of
16 the more specific provisions that authorize, in limited circumstances only, the setting aside
17 of an election. RCW 29A.68.011(6), .020, and .030 expressly address challenges to "a
18 certificate of election." RCW 29A.68.070 expressly addresses efforts "to annul or set aside
19 any election." And RCW 29A.68.090, .100, and .110 expressly govern allegations of
20 "illegal votes." Section (6) is the only Section in RCW 29A.68.011 that applies to election
21 contests. *See Becker v. County of Pierce*, 126 Wn.2d 11, 20 (1995).

22
23 The inapplicability here of Sections (4) and (5) is clear in the legislative history, a
24 history which Petitioners studiously ignore in their Opposition. RCW 29A.68.011(1)-(5)
25 (which apply to errors other than certification of an election) differ in origin from section (6)
26 and from the contest requirements set forth in RCW 29A.68.020-.120. This latter group of
27 statutes, RCW 29A.68.020-.120 (a recodification of former RCW 29.65.010-.130) have
28 always appeared together in the "Contest" chapter of the election code and are based on
29 Rem. Rev. Stat. §§ 5366-5382 and Code of 1881 §§ 3105-3123. In contrast, the structure
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1 and placement of the other error-correcting provisions have changed, but were eventually
2 enacted in form similar to their current form in RCW 29.04.030.²
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5 In 1977, the Legislature made several changes to the contest and error-correction
6 statutes. It added time limits and Section (6), regarding certification errors, to
7 RCW 29.04.030. Session Laws, 1977, ch. 361, § 3. It also amended RCW 29.65.010 to
8 specify that all election contests should "proceed under RCW 29.04.030." *Id.* § 101. In
9 2003, the Legislature recodified RCW 29.04.030 and 29.65.010-.130 as RCW 29A.68.010-
10 .130, placing the error-correcting provisions at the beginning of the contest chapter for the
11 first time (RCW 29A.68.010).³ Session Laws, 2003, ch. 111, §§ 1701-1712, 2401. This
12 history reveals the relationship between RCW 29A.68.011 and the remainder of
13 Chapter 29A.68. Sections (1)-(5) allow review of a broad array of election official errors
14 before a certificate of election is issued. (For example, WSDCC brought its pre-certification
15 court action under RCW 29A.68.011(4)). Section 6, in contrast, applies to election contests,
16 which are governed by the remainder of Chapter 29A.68, as reflected in the different
17 deadlines established in the unnumbered last paragraph of RCW 29A.68.011 and in the
18 cross-reference in RCW 29A.68.030 not to all of RCW 29A.68.011 but only to Section 6.
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38 ² Until the 1950s, Washington had two error-correcting statutes, one for errors or omissions
39 in the publication of names of candidates nominated for office or in the printing of ballots, Rem.
40 Rev. Stat. § 5276, and one for errors or omissions in the printing of ballots or any wrongful or
41 neglectful act of an election official relating to a primary, Rem. Rev. Stat. § 5202. The Legislature
42 combined these two statutes, expanded to reach other types of errors, as RCW 29.04.030.
43 Subsections (1) to (5) of current RCW 29A.68.011 track the five subsections of RCW 29.04.030.
44

45 ³ In 2004, while amending the election statutes in response to decisions from the United
46 States Supreme Court regarding open primaries, the Legislature recodified RCW 29A.68.010 as
47 RCW 29A.68.011. Session Laws, 2004, ch. 271, §§ 182, 193.

1 The Supreme Court has emphasized the distinction between pre-certification
2 correction of errors and election contests:
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5 [I]f Becker were limiting her claim for relief to that provided by
6 RCW 29.04.030(4) [recodified as RCW 29A.68.011(4)] alone,
7 *invalidation of the election, the relief she seeks, is not a possible*
8 *result.* Under that statute, the *only* relief that a court may afford is to
9 order that the offending person "forthwith correct the error, desist
10 from the wrongful act, or perform the [neglected] duty and to do as
11 the court orders."
12

13
14 *Becker*, 126 Wn.2d at 20 (citing RCW 29.04.030(4), recodified as RCW 29A.68.011(4))

15 (emphasis added). Petitioners brush this language aside as "dicta within dicta." Opp'n at 7.

16
17 But the Court in *Becker* carefully noted that the applicability of the election contest and error
18 correction statutes was a "significant" issue, and the opinion is certainly not advisory. *Id.*

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20 at 19. And even if dicta, only the Supreme Court itself should reconsider it, and there is no
21 doubt that that Court will have an opportunity to do so in this case.
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25 As Petitioners note, the *Becker* Court did not mention *Foulkes* as controlling or
26 limiting its ruling, but that omission does not somehow make *Foulkes* applicable here, to the
27 very situation addressed in *Becker*.⁴ Moreover, the Supreme Court relied upon this portion
28 of *Becker* in *Dumas v. Gagner*, 137 Wn.2d 268 (1999). There, the Court focused on the
29 relief sought by a petitioner to determine whether the action constituted an election contest
30 under the predecessor of RCW 29A.68.020 or whether the predecessor of RCW 29A.68.011
31 applied. *Id.* at 281-82. Thus, *Becker* is the controlling law.
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46 ⁴ *In re Matter of Davis*, 67 Wn. App. 1, 6 (1992) (where subsequent Supreme Court
47 decisions depart from a holding from an earlier case, court may consider the prior holding overruled
sub silentio).

1 The distinction between RCW 29A.68.011(1)-(5) and the remainder of
2 Chapter 29A.68 addressing efforts to overturn election results makes good sense. It serves
3 to encourage court actions over election official errors to be brought *prior to* certification
4 and often before the error or neglect has affected the process. And it reserves election
5 contests for only a limited list of outcome-determinative errors. *Hill*, 70 Wash. at 612-13
6 ("Where an election appears to have been fairly and honest conducted, it will not be
7 invalidated by mere irregularities which are not shown to have affected the result, for, in the
8 absence of fraud, the courts are disposed to give effect to elections when possible. And it
9 has even been held that gross irregularities not amounting to fraud do not vitiate an
10 election."). As noted by the Secretary of State, "[c]ourts universally recognize the strong
11 public policy favoring stability and finality of election results." Brief of Amicus Curiae at 7,
12 *Becker*, 126 Wn.2d 11. To construe RCW 29A.68.011(4)-(5) so as to vitiate all the specific
13 requirements and high burdens applicable in Chapter 29A.68 to efforts to set aside certified
14 election results would fly in the face of this public policy.
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Petitioners should not be allowed to proceed on claims that should have been but
were not raised before certification. The WSRP and Rossi for Governor Campaign had
observers at every point in this election process. State law not only allowed that but called
for it, as, for example, in the staffing of precincts on election day. *See, e.g.*,
RCW 29A.44.410 & .420. If Republican observers saw wrongdoing, they should have
addressed it at the time (not furtively recording it for a possible post-election contest, if and
only if, their candidate lost the election). In fact, to the extent that such claims were raised
earlier in this dispute, they have already been rejected. For example, in its third-party
complaint in *Washington State Democratic Central Committee v. King County*, King County
Superior Court No. 04-2-36048-0 SEA, the WSRP challenged King County's provisional

1 ballot signature verification process on equal protection, due process, and state statutory
2 grounds. See Supp. Decl. of William C. Rava in Supp. of WSDCC's Mots. to Dismiss
3 ("Supp. Rava Decl."), Ex. C. Although the claim was rejected on the merits, the WSRP is
4 currently seeking appellate review in the Washington Court of Appeals. The party also filed
5 a pre-certification federal case challenging King County's practices in determining voter
6 intent and in enhancing ballots but abandoned it after being denied a temporary restraining
7 order due to an insufficient factual showing. Supp. Rava Decl., Ex. D. The WSRP similarly
8 made an expedited pre-certification challenge to King County's decision to correct its failure
9 to verify signatures on a group of absentee ballots and addressed some of these very same
10 alleged violations before the Supreme Court. *Washington State Republican Party v. King*
11 *County, et al.*, 103 P.3d 725 (Wash. 2004). And it participated in the pre-certification case
12 in which the Supreme Court unanimously *rejected* the argument by the WSDCC that
13 provisional and absentee signature verification materials should be considered even if
14 submitted after the November 16 deadline.⁵ *McDonald*, 103 P.3d 722.⁶

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⁵ WAC 434-240-235 requires that signature verification documents for unsigned absentee ballots be submitted "not later than the day before the certification of the primary or election." Here, all 39 counties certified their initial results by November 17, 2004, as required under RCW 29A.60.190. By contrast, the WSRP and Petitioners did not submit any of the signature correction documents until long after that date. See Decl. of Michael Sheridan in Supp. of Election Contest Pet. ¶ 3 (declarations and affidavits submitted to Asotin, Chelan, Clallam, Clark, Douglas, Franklin, Grant, Grays Harbor, Island, Jefferson, King, Kittitas, Lewis, Mason Pierce, Snohomish, Thurston, Whatcom and Yakima Counties after *Dec. 22, 2004*); see also Aff. of James H. Stevens ¶ 3 (Asotin County; *Dec. 27, 2004*); Aff. of David Cummins Pet. ¶ 3 (Clallam County; *Dec. 27, 2004*); Aff. of Josephine Funes Wentzel ¶ 3 (Clark County; *Dec. 20, 2004*); Aff. of Bill Boughton ¶ 3 (Douglas County; *Dec. 27, 2004*); Aff. of Timothy Kovis ¶ 3 (Franklin County; *Dec. 29, 2004*); Aff. of Thomas E. Dent ¶ 3 (Grant County; *Dec. 28, 2004*); Aff. of Jill Lagergren ¶ 3 (Grays Harbor; *Dec. 23, 2004*); Aff. of Edel Sokol ¶ 3 (Jefferson County; *Dec. 23, 2004*); Aff. of Travis L. Sines ¶ 3 (Snohomish County; *Dec. 23, 2004*); Aff. of Debra J. Swecker ¶ 3 (Thurston County; *Dec. 23, 2004*); Aff. of Dana Quam ¶ 3 (Whatcom County; *Dec. 23, 2004*).

1 **2. The Grounds For An Election Contest Enumerated In**
2 **RCW 29A.68.020 Are Exclusive.**
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4 RCW 29A.68.011(6) does not confer any substantive rights; rather, it is subject to
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6 the standards for election contests set out in the remainder of Chapter 29A.68. Under the
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8 plain language of RCW 29A.68.020, the list of causes upon which a contest can be based is
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10 exclusive; all election contests are limited to these specific causes. In their Opposition,
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12 Petitioners do not address the various Washington authorities that limit the grounds to those
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14 specifically enumerated in the statute. *See Becker*, 126 Wn.2d at 18 (stating that "the
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16 Legislature has enacted statutes defining the right and means to contest the results of an
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18 election" and therefore ruling out claim that did not fall within election contest); *Quigley*, 74
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20 Wash. at 75 ("The right to a contest such as here presented rests solely upon, and is limited
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22 by, the provisions of the statute relative thereto."); *Murphy v. City of Spokane*, 64 Wash.
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24 681, 684 (1911) (finding that rules governing elections are "directory merely" and will not
25
26 render an election void unless "the statute expressly declares any particular act to be
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28 essential to the validity of the election"); *State ex rel. Mills v. Beeler*, 149 Wash. 473, 475
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30 (1928) ("The right of the court to hear and determine [an election contest] must be found in
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32 the statute. Beyond the power given by the statute the court has no jurisdiction in election
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34 contests.").

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36 Petitioners argue that "if the Legislature had intended for election contests to be
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38 possible only under the causes listed in RCW 29A.68.020, it surely would have said so."
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40 Opp'n at 9. But, especially given the case law limiting election contests, the Legislature *did*

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44 ⁶ Thus, the Supreme Court has already rejected any claim based on the allegation in the
45 Simpson affidavit (and other similar affidavits as to other counties) that Chelan County should not
46 have excluded four voters because they provided verification materials in December. Such exclusion
47 would not qualify as an "illegal vote" under RCW 29A.68.020 in any event.

1 say so by providing a very detailed and limited list and not adding a catch-all provision or
2 otherwise suggesting that the list was not exclusive.⁷ Indeed, some other states do include a
3 "catch-all" section that allows a contest for any other cause which shows that another
4 candidate was legally elected.⁸ The absence of such a provision in our election contest
5 statute is telling and determinative. And, in a contest involving a statewide executive office,
6 where the Court can only adjudicate the dispute to the extent the Legislature is found to have
7 delegated to the Court the Legislature's constitutional duty to do so, Petitioners should not
8 be permitted to proceed with an election contest for any grounds not specified in the
9 delegation.
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19 **3. Petitioners' Equal Protection Allegations Cannot Expand the**
20 **Grounds for an Election Contest.**
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22 Petitioners' equal protection allegations add nothing to their specific allegations of
23 mistakes or misconduct. The alleged mistakes or misconduct must fall within the
24 enumeration of RCW 29A.68.020, and the allegation that unenumerated mistakes or
25 misconduct varied by county does not expand the enumerated grounds. Moreover, the very
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33 ⁷ Pursuant to the Washington Constitution, the Legislature was granted exclusive authority to
34 decide election contests in the Governor's race. Petitioners contend that this Court nevertheless has
35 jurisdiction because the Legislature delegated its authority in RCW 29A.68. If, however, RCW
36 29A.68 et seq. was a proper delegation of authority, as Petitioners claim, Courts may only proceed
37 within the boundaries expressly set forth in the delegating statute.
38

39 ⁸ See, e.g., ALASKA STAT. § 15.20.540 (2004) ("any corrupt practice defined by law
40 sufficient to change the results of the election"); IDAHO CODE §§ 34-2001, 34-2101 (2004) ("[f]or
41 any cause which shows that another person was legally elected"); IOWA CODE § 57.1 (2004) ("[a]ny
42 other cause or allegation which, if sustained, would show that a person other than the incumbent was
43 the person duly elected to the office in question . . ."); NEB. REV. STAT. § 32-1101 (2004) ("[f]or
44 any other cause which shows that another person was legally elected"); N.J. REV. STAT. § 19:29-1
45 (2004) ("[f]or any other cause which shows that another was the person legally elected"); UTAH
46 CODE ANN. § 20A-4-402 (2004) ("for any other cause that shows that another person was legally
47 elected").

1 petition here demonstrates the wisdom of the public policy distinction between (a) election
2 contests and (b) error correction that does not require setting aside an election under
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4 RCW 29A.68.011(4)-(5). All of Petitioners' equal protection allegations should have been
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6 asserted under .011(1)-(5) *before* certification (and some in fact were, in federal court in
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8 Seattle, as discussed above). Indeed, the Secretary of State made exactly this point in
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10 *Becker*, arguing:

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13 Given the harsh consequences of invalidating an election, Ms. Becker
14 could and should have pressed her claims prior to the general election.
15 Strict timeliness is essential, given "the strong public policy favoring
16 the stability and finality of election results." *Donaghey v. Attorney*
17 *General*, 584 P.2d 557, 559 (Ariz. 1978). Belated challenges could
18 seriously harm the public interest by interfering with the effective
19 performance of the duties of office and "seriously erode the stability
20 of state and local governments. . . ." *Id.*
21

22
23 Brief of Amicus Curiae at 14, *Becker*, 126 Wn.2d 11.

24
25 Petitioners' reliance on *Bush v. Gore*, 531 U.S. 98 (2000), for the proposition that
26 these equal protection claims belong in an election contest is misguided. *See* Opp'n at 28.
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28 Of course, *Bush* defined equal protection violations with respect to the evaluation of ballots
29 among and within various counties in the 2000 presidential election. 531 U.S. at 106. But
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31 *Bush* involved a challenge to the recount procedures used by certain counties in Florida, and
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33 was brought *during* that recount, not after certification. Nothing in *Bush* establishes a
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35 federal constitutional requirement that states amend their election contest statutes to allow
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37 post-certification and post-inauguration adjudication of violations of the sort that Petitioners
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39 allege.⁹
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46 ⁹ In fact, the Supreme Court in *McDonald*, summarily rejected similar equal protection
47 arguments advanced by the WSDCC. 103 P.3d at 723.

1 **4. Petitioners Must Prove A Change in the Result of the Election.**

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3 In light of the broad public policy supporting finality in elections, the Legislature
4 sensibly chose to require contestants to show that misconduct and illegal votes changed the
5 result of the election. In arguing to the contrary, Petitioners largely ignore the most relevant
6 statements regarding this point – the election contest statutes themselves. With regard to
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10 misconduct, RCW 29A.68.070 provides:
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12 No irregularity or improper conduct in the proceedings of any election
13 board or any member of the board amounts to such malconduct as to
14 annul or set aside any election unless the irregularity or improper
15 conduct was such as to procure the person whose right to the office
16 may be contested, to be declared duly elected although the person did
17 not receive the highest number of legal votes.
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21 Similarly, with regard to illegal votes, RCW 29A.68.110 provides:
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23 No election may be set aside on account of illegal votes, unless it
24 appears that an amount of illegal votes has been given to the person
25 whose right is being contested, that, if taken from that person, would
26 reduce the number of the person's legal votes below the number of
27 votes given to some other person for the same office, after deducting
28 therefrom the illegal votes that may be shown to have been given to
29 the other person.
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32 These statements make clear that to prove misconduct or illegal votes, a contestant must
33 prove that they would change the result of the election.
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36 Moreover, the statutes provide further requirements for illegal votes:
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38 No testimony may be received as to any illegal votes unless the party
39 contesting the election delivers to the opposite party, at least three
40 days before trial, written list of the number of illegal votes and *by*
41 *whom given*, that the contesting party intends to prove at the trial. No
42 testimony may be received as to any illegal votes, except as to such as
43 are specified in the list.
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1 RCW 29A.68.100 (emphasis added). Petitioners must submit the name of each "illegal"
2 voter. Petitioners cannot rest on mere inconsistencies, irregularities, or general
3 discrepancies. Their Petition does exactly that, however, and their affidavits do not include
4 the required personal knowledge of hardly any illegal votes cast in favor of Governor
5 Gregoire, much less enough to change the outcome.
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10 The Secretary of State, silent here as to WSDCC's reading of the statute in this
11 regard, agreed in *Becker* that an election contest petitioner must prove that the results would
12 have changed:
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17 Courts should "employ every reasonable presumption in favor of
18 sustaining a contested election and . . . mere technical irregularities or
19 illegalities are insufficient to set aside an election unless the errors
20 actually appear to have affected the result of the election.
21

22 Brief of Amicus Curiae at 11, *Becker*, 126 Wn.2d 11.
23

24 Petitioners argue that RCW 29A.68.110 is only intended "to guard against the chance
25 that a court might be inclined to annul an election even if the evidence showed that the
26 alleged irregularities could not possibly have affected the outcome of the election," Opp'n
27 at 23, but provides no support for this bald effort to wither this critical limitation into utter
28 surplusage. Given the long history of judicial wariness to changing elections, such an
29 instruction to the court would hardly be necessary. *See, e.g., Schoessler*, 140 Wn.2d 368,
30 383 (2000) ("Chief among [the principles governing election contests] is the principle that
31 the judiciary should exercise restraint in interfering with the elective process . . ."). If the
32 alleged errors "could not possibly have effected the outcome," by definition all election
33 contests would fail. A statutory admonition is hardly necessary to make that clear.
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44 Further, the cases cited by Petitioners in support of their argument that courts may
45 set aside an election even in the *absence* of proof that the alleged errors affected the
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1 outcome are largely irrelevant. All but one are from other states. The controlling language
2 in Washington is, of course, the Washington statutes. And the Washington Legislature's
3 requirement that actionable misconduct or illegal votes change the result of an election
4 reflects a deliberate policy choice.¹⁰ Many other states have made this same choice, and
5 include similar provisions in their election contest statutes.¹¹ Others have statutes that
6 expressly allow elections to be overturned when results cannot be ascertained.¹²
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12 The controlling Washington case supports, moreover, makes it clear that, under
13 *Washington* law, an election contest petitioner must establish that the errors affected the
14 outcome. In *Hill v. Howell*, 70 Wash. 603 (1912), the Supreme Court addressed numerous
15 issues regarding misconduct and illegal votes, and did so in ways fatal to the claims here.
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24 ¹⁰ Indeed, even a comparison of the provisions of misconduct and illegal votes to the other
25 grounds enumerated in RCW 29A.68.020 reflects this choice. For instance, the Legislature did not
26 require that bribery on the part of a candidate actually have changed a result. *See*
27 RCW 29A.68.020(4) (reflecting a choice that *any* bribery or *attempt* at bribery, even if irrelevant to
28 the outcome of the election, should disqualify a candidate).
29

30 ¹¹ *E.g.*, ALASKA STAT. § 15.20.540 (2004); IDAHO CODE §§ 34-2001, 34-2101 (2004); IOWA
31 CODE §§ 57.1, 57.4 (2004); NEB. REV. STAT. § 32-1101; NEV. REV. STAT. § 293.410 (2004); N.J.
32 REV. STAT. § 19:29-1 (2004) (illegal votes "sufficient to change result"); UTAH CODE ANN. § 20A-4-
33 402 (2004). Some state provisions that are identical in substance to RCW 29A.68.110. *See, e.g.*,
34 ALA. CODE § 17-15-20 (2004); DEL. CODE ANN. tit. 15, §§ 5942, 5943 (2004); MONT CODE ANN.
35 § 13-36-202 (2003); N.D. CENT. CODE § 16.1-16-08(6)(b); OR. REV. STAT. § 258.026 (2004).
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38 ¹² *E.g.*, HAW. REV. STAT. § 11-174.5 (judgment may invalidate election on grounds "that a
39 correct result cannot be ascertained because of a mistake or fraud on the part of the precinct
40 officials"); FLA. STAT. ch. 102.168 (2004) (misconduct or illegal votes sufficient to change or place
41 in doubt the result of the election); GA. CODE ANN. § 21-2-522 (2004) (misconduct or illegal votes
42 sufficient to change or place in doubt the result of the election); KY. REV. STAT. ANN. § 120.065
43 (Banks-Baldwin 2004) ("fraud, intimidation, bribery or violence in the conduct of the [primary]
44 election that neither contestant nor constestee can be adjudged to have been fairly nominated");
45 OKLA. STAT. tit. 26, § 8-120 (2004) (in contest of primary, sufficient to prove "that it is impossible
46 to determine with mathematical certainty which candidate is entitled to be certified as the party's
47 nominee").

1 There, Petitioner Sam Hill sought to overturn or set aside the election of R.S. Steiner for the
2 office of Superior Court judge. *Id.* at 604. Hill alleged numerous illegalities and instances
3 of misconduct, and with respect to *every* allegation, the Court required a showing of for
4 whom the elector voted. *Id.* The election in *Hill* involved a difference of just five votes, and
5 Hill proved that there were six illegal votes or votes potentially affected by instances of
6 misconduct. However, the petitioner could only attribute three of those votes to Steiner, and
7 therefore the court dismissed the contest.¹³ Under Petitioners' reading of the Washington
8 election contest statutes, the petitioner in *Hill* would have been able to overturn the election
9 simply by proving the existence of the six instances of illegal votes or misconduct. But the
10 Court held the petitioner in *Hill* to the higher standard required by Washington law – that the
11 contestor must prove for whom each elector voted. As a result, the contest in *Hill* failed.
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22 *Foulkes v. Hays*, 85 Wn.2d 629 (1975), is the only Washington case cited by
23 Petitioners in support of the proposition that all they need to prove is that "the number of
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29 ¹³ Petitioners erroneously argue that in *Hill* there were only three illegal votes, and therefore
30 they could not possibly have affected the result. But in fact there were at least eight allegedly illegal
31 votes at issue and six that the Court agreed were illegal or affected by the early closure. First, Hill
32 alleged that one irregular vote, by "Elector Tapley" was improperly placed in the ballot box by the
33 precinct election officers. *Id.* at 610. But because there was no evidence of which candidate Tapley
34 voted for, his vote was counted, and not held against either candidate. *Id.* at 611. Second, the
35 evidence showed that three different electors attempted to vote after the precinct election officers had
36 closed the polls early. *Id.* Only one of the electors testified that he would have voted for Hill. *Id.*
37 The vote for Hill was counted for purposes of the election contest, but the other two electors were
38 not counted. *Id.* Next, the Court addressed four electors who were alleged to have been ineligible to
39 vote due to illiteracy. *Id.* at 613. The Court determined that two of such voters, Dormaier and Yesel,
40 were unqualified to vote and voted for Steiner, and therefore subtracted those votes from his total.
41 *Id.* Finally, the Court found that there was insufficient evidence as to one elector, Cooper, who
42 arguably was not qualified due to residency. *Id.* at 614. Thus, after the Court's findings, one vote
43 was given to candidate Hill and two votes were deducted from candidate Steiner. *Id.* Thus, there
44 were *six* illegal votes at issue (Tapley, three electors arriving at the polls after early closure;
45 Dormaier; Yesel; and Cooper) but only *three* (one elector arriving at the polls after early closure;
46 Dormaier; and Yesel) that could be attributed to a candidate.
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1 disputed ballots exceeds the margin of victory in an election contest." Opp'n at 24. *Foulkes*,
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3 however, supports the opposite – that the election contest statute requires that Petitioners in
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5 these circumstances show how each disputed ballot was counted. There, the Court noted
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7 that the election contest statute "requires a person alleging illegal voting in a statutory
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9 election contest to provide the court with the names of those who cast them." *Foulkes*, 85
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11 Wn.2d at 634 (citing predecessor of RCW 29A.68.100). *Foulkes* involved the proven
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13 fraudulent alteration of ballots during the counting process – after they had been legally
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15 voted – that effectively prevented a real recount of the ballots. *Id.* at 634-35. Here, the
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17 ballots were counted pursuant to law the maximum three times allowed.¹⁴ The final result –
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19 however unpopular with Petitioners – was determined by bipartisan canvassing boards
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21 across the State with no allegation of fraudulent alteration.

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23 Petitioners seek support from decisions of some other state courts interpreting other
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25 statutes.¹⁵ but in an election contest about Washington's Governor, Washington cases and
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27 statutes control. And Washington is hardly alone.¹⁶ At best, there is a conflict of decision
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32 ¹⁴ RCW 29A.64.070 (votes "may not be recounted and the results recertified more than
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34 twice.").

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36 ¹⁵ Many of the cases cited by Petitioners are in states with statutes that specifically allow an
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38 election to be invalidated because the correct result cannot be determined. *See Howell v. Fears*, 571
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40 S.E.2d 392, 392 (Ga. 2002) (statute provides that election may be contested for misconduct, fraud or
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42 irregularity "sufficient to change or place in doubt the result" of the election); *Ippolito v. Power*, 22
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44 N.Y.2d 594, 596 (N.Y. App. 1968) (statute provides that court may direct new election where
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46 irregularities "render impossible a determination as to who rightfully was . . . elected").
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49 ¹⁶ *See, e.g., Mehrens v. Election Canvassing Bd. of Douglas County*, 278 N.W. 252, 254
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51 (Neb. 1938) (failure to identify candidates for whom the illegal votes were cast in an election contest
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53 was "fatal defect"); *Application of Murphy*, 243 A.2d 832, 834 (N.J. Super. 1968) ("We hold that in
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55 such circumstances an election may not be voided, as it was here, merely on a showing that the
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57 successful candidate's majority was smaller than the number of illegal votes cast, without any
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59 attempt by the contestant to show for whom the illegal votes were cast."); *In re Contested Election of*

1 among the states regarding the necessary showing of misconduct or illegality in an election
2 contest. But the Supreme Court identified and eschewed this conflict in the very case
3 establishing strict election contest standards, holding that the Court was "enjoined by our
4 own statutes and sanctioned by the decisions of this court hereinbefore rendered." *Hill*, 70
5 Wash. at 614.
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10 Petitioners' Election Contest Petition acknowledges that, having waited until *after*
11 the election to raise issues, there "is [now] apparently no way to retrieve any [of the ballots
12 cast] from the pool of ballots counted so as to determine the correct number of valid votes
13 for each candidate such that the true results of the election are uncertain and unknowable."
14 Pet. ¶ VI.B.7.; *see also* Pet. at 2 (stating that "the true result of the election [is] uncertain and
15 likely unknowable" and adding that the "true results cannot be ascertained"). Petitioners do
16 not dispute this in any way in their Opposition. *See generally* Opp'n at 23-27. Of course,
17 this is a problem of Petitioners' own making, by their failure to act when there was still time
18 to correct the problems, as discussed further below. In any event, because Petitioners have
19 affirmatively disavowed an essential element of proof in an election contest, the Court must
20 dismiss their Petition.
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33 **5. Petitioners Must Show That Any "Illegal Votes" Were**
34 **Challenged in a Timely Fashion Prior to the Contest.**
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36 RCW 29A.68.020(5)(b) provides that in an election contest "illegal votes do *not*
37 include votes cast by improperly registered voters who were not properly challenged under
38 RCW 29A.08.810 and 29A.08.820." Prior to 1983, Washington statutes had no such
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44 *Transfer of Sugar Creek Local Sch. Dist.*, 185 N.E.2d 809, 815 (Ohio Super. 1962) (discussing
45 provision in Ohio statute that requires a witness to testify regarding for whom he voted);
46 *Beauregard v. Gunnison City et al.*, 160 P. 815, 819 (Utah 1916) ("But merely to show that [certain
47 voters] voted illegally would not necessarily change the result of the election.").

1 requirement that election contest claims of illegal votes could be made only as to voters
2 whose qualifications were challenged in a timely fashion. The omission was noted in *Gold*
3 *Bar Citizens for Good Gov't v. Whalen*, 99 Wn.2d 724, 731 (1983), upon which Petitioners
4 erroneously rely. The Legislature prospectively corrected the omission after the trial court
5 decision and while *Gold Bar* was pending in the Supreme Court.¹⁷ See Session Laws 1st Ex.
6 Sess., 1983, ch. 30, § 6. The amendment added what is now RCW 29A.68.020(5), which
7 expands "illegal votes" in Subsection (a) but requires in (b) that election contest petitions
8 based on votes cast by voters who should not be on the registration rolls must show timely
9 challenges to those voters' registrations. The challenge can be brought by any registered
10 voter or a prosecuting attorney. RCW 29A.08.810. The challenger must prove by "clear
11 and convincing evidence that the challenged voter's registration is improper." RCW
12 29A.08.020.

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25 In the same act, the Legislature made it *easier* to challenge a registration *prior* to the
26 election. Session Laws 1st Ex. Sess., 1983, ch. 30, §§ 1-5. Previously, challenges due to
27 residency had to be made 60 days prior to an election. *Gold Bar*, 99 Wn.2d at 726-27. The
28 Legislature allowed precinct election officers to challenge a person's right to vote at the polls
29 for any reason. Session Laws 1st Ex. Sess., 1983, ch. 30, § 2. Further, it allowed registered
30 voters to challenge a person's right to vote due to residency only seven days in advance and
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¹⁷ Indeed, a memorandum regarding the amendments to the Senate Committee on Local Government notes that "[p]ursuant to a constituent inquiry regarding a contested general election held on Nov. 3, 1981 in Gold Bar, Washington, Senator Woody has developed proposed legislation clearing up confusion between the provisions for contested elections and registration challenges." Memorandum from Mel Sorensen, Legal Assistant, to Senate Committee on Local Government at 1 (March 4, 1983) (on file with the Washington State Archives). The Final Legislative Bill Report noted that "[c]onsiderable confusion exists over whether an election contest may be based upon improperly registered voter who vote without being challenged." Final Legislative Bill Rep. SSB 3520 at 1 (on file with the Washington State Archives).

1 for any other reason at the polls. *Id.* Finally, the Legislature added a new section that
2 required challenged voters to be permitted to vote by provisional ballot. *Id.* That section
3 also established procedures requiring a challenging party to prove their challenge, by clear
4 and convincing evidence, before the canvassing board. *Id.* And it provided that the decision
5 of the canvassing board "shall be final." *Id.*; see RCW 29A.08.820.
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10 It is neither difficult nor surprising to discern the purpose behind these amendments.
11 The amendments plainly reflect a policy choice by the Legislature to require that any
12 challenges to a voter's qualifications to register and vote occur *before* an election, as part of
13 a process that allows the vote to be kept separate until "finally" ruled upon by the canvassing
14 board, and not for the first time after an election in an election contest when ballots have
15 been commingled. To encourage use of the new procedures, the plain language of the
16 statute excludes from an election contest all votes cast by improperly registered voters who
17 were not properly challenged, regardless of whether information was available that would
18 have allowed a pre-election challenge (and as far as WSDCC can tell everything Petitioners
19 are now arguing certainly could have been addressed by election day).¹⁸ Thus, illegal vote
20 allegations based on citizenship, residency, age, felon status, mental competency, and death
21 must show that a timely challenge was made in accordance with RCW 29.08.810-.820.
22 Finality of elections and efficient resolution of summary election contest proceedings are
23 promoted by this legislative framework.
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43 ¹⁸ Indeed, the WSRP and its representatives raised many legislation issues and concerns
44 about voter fraud prior to the election, resolved at least those concerns they raised, and repeatedly
45 praised the very King County election officials they now condemn. See, e.g., Rava Decl., Ex. G
46 ("[T]hanks Dean. I don't know how you stay on top of so much, but your ability to do so, increases
47 my confidence in KC R&E exponentially.").

1 Petitioners urge the Court to read limitations into the language of RCW
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3 29A.68.020(5)(b). While the statute excludes "votes cast by improperly registered voters
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5 who were not properly challenged," RCW 29A.68.020(5)(b), Petitioners would have the
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7 Court interpret that section as if it read to exclude "improperly registered voters if it were
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9 *convenient* to make a timely challenge." *See* Opp'n at 15. Petitioners provide no support for
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11 this limitation, which is contrary to the plain language of the statute and to the legislative
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13 policy choice.

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15 **C. Petitioners Claims Regarding Deceased Voters Must Fail.**

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17 Petitioners have not established even *prima facie* evidence that their allegations
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19 related to deceased voters involve fraudulent votes, as they continue to assert, nor can they
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21 establish for whom these votes were cast.

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23 First, Petitioners assert that because deceased electors were "credited" with voting, it
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25 necessarily follows that "somebody fraudulently voted in the name of a properly registered
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27 by now deceased voter." Opp'n at 18. This faulty logic is insufficient to establish fraud;
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29 fraud is, of course, hardly the *only* explanation for the credit of deceased electors with
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31 voting. For instance, where a deceased elector is credited with voting, another elector
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33 (voting legally) may have accidentally signed the wrong line (the deceased elector's line) on
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35 the poll book, causing the deceased elector to be erroneously credited for voting. Similarly,
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37 an election official may have entered the wrong name for credit, a process that in some
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39 counties is done by individually entering hundreds of thousands of individual voter codes.
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41 To the extent that this would be an "error" by an election official, it would certainly not be
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43 fraudulent and would be harmless, as it would not have had any impact on the count of the
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45 ballots.
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1 Second, Petitioners fail entirely to prove – or even to attempt to prove – for whom
2 these votes were cast. But it is undisputed that neither candidate was responsible for the
3 casting of these ballots (if it in fact occurred). In such cases, the error cannot be charged to
4 either. As the Supreme Court has held:
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9 If this was an illegal vote, it was proper to show for whom the elector
10 voted, and since the fact is not shown, *it must be treated between the*
11 *parties as a legitimate vote.* Neither of the candidates were
12 responsible for the manner in which the vote got into the ballot box,
13 and, *both being innocent of wrongdoing, it would be an injustice to*
14 *charge the error to either of them.*
15

16 *Hill*, 70 Wash. at 610-11 (emphasis added).
17

18 **D. Petitioners Claims Regarding Felons Must Fail.**
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20 In their Opposition, Petitioners devote three pages of briefing to the
21 disenfranchisement of felons. WSDCC does not dispute that the Constitution
22 disenfranchises felons. However, the limitation on election contests articulated in
23 RCW 29A.68.020(5)(b) certainly does not "enfranchise" felons and is not contrary to the
24 Constitution. RCW 29A.68.020(5)(b) does not authorize voting by felons but it does define
25 and carefully limit the grounds for an election contest by a candidate who loses. The
26 Legislature is not required to provide for a contest at all and it is within its discretion to limit
27 the grounds for contest as it chooses. WASH. CONST. art. III § 4. Putting aside the daily
28 barrage of misleading press releases, in their actual affidavits here Petitioners at most
29 suggest that there are felons who are registered, though generally not necessarily that they
30 voted. Petitioners do *not* allege that these individuals were challenged in a timely fashion or
31 that a majority in excess of 129 voted for Governor Gregoire. This is insufficient as a matter
32 of law.
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1 By Petitioners' own reasoning, felons whose civil rights had not been restored should
2 not have been registered (or their registrations should have been cancelled upon notification
3 to the county of the conviction) and, if they were, were – by definition – "improperly
4 registered voters." By its terms, RCW 29A.68.020(5)(b) applies: "Illegal votes do not
5 include votes cast by improperly registered voters who were not properly challenged under
6 RCW 29A.087.810 and 29A.08.820." Because Petitioners admittedly cannot demonstrate,
7 and do not even intend to attempt to demonstrate, that they "properly challenged" such
8 voters, their claim on this score necessarily fails.
9

10 The Secretary of State's reading of RCW 29A.08.020(5)(a) and (b) similarly defies a
11 simple reading of the statute and must be rejected. Section 5(a) states "[i]llegal votes
12 include but are not limited to the following. . . ." In other words, it encompasses any vote
13 that can be defined as "illegal" for purposes of an election contest. Section 5(b) then limits
14 any such "illegal vote" for election contest purposes to exclude votes cast by any voter
15 whose registration was improper, unless the registration was challenged before the election
16 pursuant to RCW 29A.08.810 and .820. To accept the Secretary's interpretation of
17 RCW 29A.08.020(5), this Court must rewrite the law to exclude felons from either the pre-
18 election challenge statutes, or the statutory limitation on which illegal votes are the proper
19 basis for an election challenge. The Legislature did not make such exceptions and the Court
20 should decline the invitation to create such exceptions now.
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38 **E. Petitioners Claims Regarding Provisional Ballot Voters Must Fail.**

39 Petitioners correctly assert that the registration status of a person receiving a
40 provisional ballot has been timely challenged because their name is not in the poll book at
41 the location at which they sought to vote. This does not mean that the person was not, in
42 fact, a legally registered voter. Registered voters who are issued absentee ballots but then
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1 choose to vote at the polls and registered voters who vote at a location other than their
2 precinct are issued provisional ballots. RCW 29A.44.090. Indeed, even the fact of an
3 express challenge does not establish the fact that the ballot, if cast, would be an illegal vote.
4
5 Many voters who were lawfully registered, had not requested an absentee ballot, and who
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7 were trying to vote at their registered precinct were required to take provisional ballots due
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9 to out-of-date records or administrative errors. There is most certainly no presumption that a
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11 challenged vote is an illegal vote. In fact, the presumption is to the *contrary* and must be
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13 overcome by *clear and convincing evidence*, not innuendo. RCW 29A.08.820; *see also*
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15 RCW 29A.08.810.¹⁹ Indeed, of the 348 ballots that Petitioners claim were illegally cast in
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17 King County, the County already has apparently confirmed that at least 250 were from
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19 legally registered voters. *See* Supp. Rava. Decl. Ex. E. Disenfranchising these voters due to
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21 of an unintentional error by a polling place official is contrary to the established public
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23 policy of the state. *See, Hill*, 70 Wash. at 613 ("An election honestly conducted under the
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25 forms of law ought generally to stand.") (quoting *Cooley's Con. Lim.* (7th Ed.) 934).
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29 In any event, these claims do not belong in a post-certification challenge. Petitioners
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31 were entitled to observers at every polling place. If unverified provisional ballots were
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33 being counted, Petitioners should have objected at the time. Petitioners raised this objection
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35 to WSDCC's petition in *McDonald* before the Supreme Court in December 2004, arguing
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40 ¹⁹ RCW 29A.08.810 provides, in part, that "[a] challenge made be made only upon the belief
41 or knowledge of the challenging officer that the voter is unqualified. The challenge must be support
42 by evidence or testimony given to the county canvassing board under RCW 29A.08.820 and may not
43 be based on unsupported allegations or allegations by anonymous third parties." RCW 29A.08.820,
44 in turn, provides in relevant part that "[t]he challenging party must prove to the canvassing board *by*
45 *clear and convincing evidence* that the challenged voter's registration is improper. If the challenging
46 party fails to meet this burden, *the challenged ballot shall be accepted as valid and counted.*"
47 (emphasis added). The decision of the canvassing board "shall be final." *Id.*

1 that "[c]onsidering the intense scrutiny and numerous lawsuits filed during this election,
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3 Petitioners certainly had knowledge of the procedures they now challenge." Supp. Rava
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5 Decl. Ex. A, at 33. While authoring those words, Petitioners had the knowledge that it
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7 claims now – that some provisional ballots had been deposited into ballot boxes contrary to
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9 Washington election law but chose not to raise the issue.

10
11 **F. Petitioners' Claims Regarding Misconduct Must Fail.**

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13 Petitioners claim that their Petition alleges "misconduct" by "precinct election
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15 boards" under RCW 29A.68.020(1). This language might well extend to the collection and
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17 tabulation of ballots at central counting centers, but Petitioners have not set forth any claims
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19 with the specificity needed to overcome the presumption that election officials performed
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21 their duties under Washington election law in the 2004 election or the presumption of
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23 regularity of the returns. *See Quigley*, 74 Wash. at 75. Thus, whether limited to precinct
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25 election officers, or more broadly including counting center and similar election workers,
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27 Petitioners' claims in any event fail.

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29 Indeed, Petitioners' general allegations of "discrepancies" do not even come close to
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31 the specificity required under the statute. They must allege, and support with an affidavit
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33 based on personal knowledge, the particular causes of their contest "with sufficient
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35 certainty." RCW 29A.68.030. Given the presumption that officers have followed their
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37 statutory duties, *Quigley*, 74 Wash. at 75, Petitioners' claim that these "discrepancies" give
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39 rise to an election contest must fail without any evidence attributing them to some error or
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41 illegal votes. *See generally Vacco*, 685 N.Y.S.2d at 586-87 (petitioner alleging evidence of
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43 noncitizen and nonexistent voters did not make sufficient showing of irregularity to sustain
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45 election contest).

1 In their Opposition, Petitioners allege that permitting felons to vote and permitting
2 deceased voters to vote constituted "misconduct" as well as "illegal votes" under
3 RCW 29A.68.020. See Opp'n at 22. But county auditors, who do have a duty to issue
4 ballots to registered voters and to avoid erroneously canceling voter registrations, do not
5 have an obligation to "purge" all felons and deceased electors from their voter registration
6 records. Rather, with regard to deceased electors, the registrar of statistics sends a list of all
7 death certificates issued for persons residing in a particular county to that county's auditor.
8 RCW 29A.08.510. The auditor then cancels the registrations of deceased voters on that list.
9 *Id.* Similarly, upon entry of a judgment of conviction for a felony, the clerk of court shall
10 send a notice to the county auditor in the county of the defendant's residence.
11 RCW 10.64.021. Upon receiving such a notice, the county auditor must cancel the
12 registration. RCW 29A.08.520. This process, however, does not account for felons who
13 move to different counties after their convictions or who are registered under a name that is
14 different than the name under which they were convicted, nor does it account for deceased
15 electors who had not updated their addresses.²⁰ The county auditors would not have any
16 knowledge of those convictions or deaths, absent a challenge to those registrations under
17 RCW 29A.08.810 *et seq.* Given the presumption that the election officers followed their
18 duties, *Quigley*, 74 Wash. at 75, and the lack of any allegations of specific instances where
19 they did not do so, Petitioners claims must fail.
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45 ²⁰ Such voters would have to be challenged under RCW 29A.08.810 and .820, by a
46 registered voter, precinct election officer, or the county's Prosecuting Attorney.
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1 **G. Petitioners' Claims Regarding Double Voting Must Fail.**

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3 Finally, Petitioners contend that discrepancies between the number of votes counted
4 and the number of voters given credit for voting must mean that some voters voted twice.
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6 But the records created well after the election by county auditors to "credit" voters with
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8 voting were not intended to be an audit of this type. Whether those post-hoc records are
9
10 correct or not is irrelevant. Washington law prohibits the issuance of a ballot to unregistered
11
12 voters and petitioners have *no* evidence that any such ballots were issued to, much less voted
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14 by, unregistered or illegal voters. Discrepancies based on post-election "voter crediting"
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16 records prove nothing and allegations of such discrepancies are insufficient to support an
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18 election contest.
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21 **III. CONCLUSION**

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23 For the reasons set forth above, the Court should grant the Motion to Dismiss Certain
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25 Grounds and Causes for Election Contest.

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27 DATED: [January 31, 2005](#).

28
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