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I. SUMMARY OF ARGUMENT

Contrary to Petitioners' assertion, Washington State Democratic Central Committee ("WSDCC") has not previously filed an election contest in this matter and has never agreed that the Judiciary has jurisdiction over contested general elections for Article III, § 1 officers. The plain language of Article III, § 4 requires that contested elections for Governor must be decided by the Legislature. Decisions from courts in other states with similar constitutional provisions confirm that Washington's Legislature has exclusive jurisdiction over this election contest. Regardless of whether the Legislature now wishes it did not have this jurisdiction, and regardless of whether the Court believes that it might make more sense for the Judiciary to decide this election contest, the framers provided the framework that the Judiciary and the Legislature must follow. Accordingly, the Court should dismiss the Election Contest Petition for lack of subject matter jurisdiction.

II. ARGUMENT AND AUTHORITY

In its Motion, WSDCC argued that the Court lacked jurisdiction to decide this election contest because the plain language of the Constitution vests exclusive jurisdiction over such election contests in the Legislature. In any case in which lack of subject matter jurisdiction is raised, the first question before the Court may proceed is whether there is a constitutional or statutory basis for the Court's jurisdiction.¹ As Petitioners recognize, "[l]ack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy before it." Opposition at 15 (citing *Skagit Surveyors v. Eng'rs*,

¹ Petitioners seek to turn that principle on its head, asserting that WSDCC has to prove beyond a reasonable doubt that the election contest statute is unconstitutional before the Court could conclude that it lacks jurisdiction. Petitioners' Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Opposition") at 7, 14.

1 *LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556 (1998)). Although it can be a
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3 "delicate exercise" for the court to determine whether the Constitution has committed a
4
5 particular matter to another branch of government, it is "the responsibility of this Court as
6
7 ultimate interpreter of the Constitution." *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 504
8
9 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)).

10
11 **A. WSDCC's Prior Action in the Supreme Court in 2004 Was Not an**
12 **"Election Contest."**

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14 Petitioners argue that WSDCC "reverse[d] its previous position" regarding whether
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16 the courts have jurisdiction to decide a general election contest for a statewide executive
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18 office. Opposition at 17. This is flat wrong. WSDCC has never initiated such a contest in
19
20 court nor has it ever argued that courts have subject matter jurisdiction over such contests.
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22 Petitioners point to the December 2004 case of *McDonald v. Secretary of State*, 103 P.3d
23
24 722 (2004), brought by WSDCC and individual petitioners. In that case, brought pursuant to
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26 RCW 29A.68.011(4) and (5), WSDCC and the other petitioners sought a pre-certification
27
28 order directing that counties recanvass ballots as part of the then-upcoming manual recount.
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30 Maguire Decl., Ex. B at 20-21. *McDonald v. Secretary of State* was not an election contest
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32 because it did not contest any candidate's right to be declared elected, nor did it ask that any
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34 certificate of election be set aside. Washington's cases distinguish between post-certification
35
36 "election contests" and pre-certification actions to prevent or correct errors. As the Supreme
37
38 Court concluded in *Becker v. County of Pierce*, 126 Wn.2d 11, 20 (1995), and re-
39
40 emphasized in *Dumas v. Gagner*, 137 Wn.2d 268, 282 (1999), the Court "focus[es] on the
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42 relief sought, that is, setting aside an election, to determine whether the action constituted an
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44 election contest" – regardless of whether the petitioner characterizes the action as an
45
46 "election contest" or not.
47

1 That WSDCC identified RCW 29A.68.011 as the jurisdictional basis for its prior
2 action is irrelevant. As a result of the Legislature's 1977 amendments to the election
3 statutes, RCW 29A.68.011 provides a jurisdictional basis for pre-certification error-
4 correcting actions (RCW 29A.68.011(1)-(5)), as well as contests of the issuance of a
5 certificate of election in connection with offices other than Article III, § 1
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10 (RCW 29A.68.011(6) ("An error or omission has occurred or is about to occur in the
11 issuance of a certificate of election.")). WSDCC of course did not assert subsection (6) as
12 authority for the Court's jurisdiction in its prior action because its claim did not concern the
13 issuance of a certificate of election. WSDCC asserted subsections (4) and (5), the
14 provisions for pre-certification correction of error, just as Petitioners could and should have
15 done regarding their now untimely challenges to voter registrations.
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23 Indeed, the only "flip-flops" by any party to this case are by Petitioners, who, in
24 *McDonald v. Secretary of State*, expressly argued to the Court that WSDCC's action was
25 barred by laches. Supplemental Declaration of William C. Rava in Support of WSDCC's
26 Motions to Dismiss ("Rava Decl.") ¶ 2, Ex. A at 31-34. Petitioners now seek to ignore the
27 requirements of RCW 29A.68.020(5)(b) and – nearly three months after election day –
28 challenge the registrations of hundreds of voters. In their latest "flip-flop," Petitioners filed
29 an election contest in the Legislature one day after receiving WSDCC's Motion to Dismiss
30 for lack of subject matter jurisdiction. *See* Opposition at 3 n.2.
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39 **B. The Plain Language of Article III, § 4 Requires the Legislature to Decide**
40 **Election Contests Over Statewide Executive Offices.**
41

42 The parties agree that whether any court has subject matter jurisdiction over this
43 election contest turns on the following sentence in Article III, § 4 of the Constitution:
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1 Contested elections for such officers [including Governor] shall be
2 decided by the legislature in such manner as shall be determined by
3 law.
4

5 *Id.* The parties further agree on the fundamental canons for construing this language: courts
6 should give the words their plain meaning and should not render any language superfluous.
7 While giving lip service to these canons, Petitioners would have this Court gut Article III,
8 § 4 of its plain meaning that the Legislature, not the Judiciary, shall decide contested
9 elections for statewide executive offices, such as the office of Governor.
10

11 Although obvious, it bears repeating that § 4 of Article III of the Washington
12 Constitution provides that this election contest "shall be decided by the legislature." It does
13 not say "decided by the courts." In drafting the Constitution, the framers could have left out
14 the phrase, "decided by the legislature," if their intent was to have future legislation govern
15 which body was to decide a contested election for statewide office. The framers could have
16 written the Constitution to say that "Contested elections for such officers shall be decided in
17 such manner as shall be determined by law," but that is not what the Constitution says.
18

19 Not only does Petitioners' strained interpretation of Article III, § 4 gloss over the
20 words, "shall be decided by the legislature," but Petitioners offer an overly narrow reading
21 of the words "by law" and "the legislature." Citing a dictionary, Petitioners contend that
22 "legislatures act pursuant to internal rules, not by laws," so the framers could not have
23 intended to confer jurisdiction on the Legislature to decide election contests unless they had
24 said "by rule." Opposition at 4. The Legislature acts pursuant to both rules and laws and, in
25 fact, the Legislature has enacted a law governing the manner in which it decides election
26 contests. *See* RCW 44.04.100 (contest of election over member of legislature). Petitioners
27 also suggest that the framers' use of the words "the legislature" instead of "both houses" (as
28 was used in another provision of Article III, § 4) means that the framers were not referring
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1 to "the combined body." Opposition at 5. This is incorrect. Article II, § 1 of the
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3 Constitution defines the term, "the legislature": "The legislative authority of the state of
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5 Washington shall be vested in the legislature, consisting of a senate and house of
6
7 representatives, which shall be called the legislature of the state of Washington" As
8
9 "the legislature" by definition consists of both the House and the Senate, the Constitution's
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11 reference to "the legislature" in Article III, § 4 necessarily includes both bodies.

12
13 Petitioners' textual argument also mischaracterizes WSDCC's reading of the phrase,
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15 "in such manner as shall be determined by law." WSDCC is not reading that language out
16
17 of the Constitution. As explained in its Motion to Dismiss, this provision means that the
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19 Legislature shall determine the standards, not the forum, that govern an election contest over
20
21 a statewide office. It is undisputed that the Legislature has determined the standards for
22
23 setting aside an election in RCW 29A.68 *et seq.* The dispute between the parties here relates
24
25 to the forum for making the decision according to those standards. The mandatory
26
27 language, "contested elections for such officers shall be decided by the legislature," makes it
28
29 clear that the Legislature may not change the forum for the decision from the Legislature to
30
31 the Judiciary. If the framers had wanted to provide the Legislature with the option of
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33 retaining or delegating jurisdiction to decide election contests for statewide executive
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35 offices, they could have said so. But the Constitution does not state that "election contests
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37 for such offices *may* be decided by the legislature or, if the legislature delegates this
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39 authority, by the courts." To reach the result suggested by Petitioners, the Court would have
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41 to add to or subtract from the clear language of Article III, § 4 of the Constitution, which the
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43 Court may not do under the very canons of construction relied upon by Petitioners.²

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² For the same reason, the Court should not construe Article II, § 8 as a limitation on the
authority vested by the Constitution in the Legislature in Article III, § 4. That the framers provided

1 By contrast, the Secretary of State agrees with WSDCC that the Constitution granted
2 the Legislature exclusive jurisdiction over election contests for statewide executive offices.
3
4 Secretary of State's Response to WSDCC's Motion to Dismiss for Lack of Subject Matter
5 Jurisdiction ("Response") at 5. Where the Secretary differs from WSDCC is in his view that
6 the Legislature could, and in 1977 did, transfer that jurisdiction to the Judiciary. The
7
8 Secretary argues that the phrase "as shall be determined by law" gave the Legislature power
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10 to delegate the exclusive jurisdiction that the framers had assigned to the Legislature, but
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12 that (at least until 1977) the Legislature had not exercised this power to reallocate powers
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14 among the three branches of government. Thus, the Secretary concedes that the election
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16 contest over the 1940 Governor's election was correctly considered by the Legislature
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18 because in his view the Legislature was the only available forum that had jurisdiction. As
19
20 noted in the 1941 election contest petition, the Legislature had "exclusive" jurisdiction over
21
22 the contest under the Constitution. Wash. S. Journal 30 (Jan. 14, 1941). It is not relevant
23
24 whether the Legislature heard arguments or examined witnesses; the election contest was
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26 brought in and dismissed by the Legislature. Petitioners' suggestion that the Legislature
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28 "may well have declined to hear the matter because it felt that the courts were a more
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30 appropriate forum for such contests" is complete speculation, unsupported by any historical
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32 evidence.³ Opposition at 11-12.
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39 that "[e]ach house shall be the judge of the election, returns and qualifications of its own members,"
40 Article II, § 8, does not lessen the grant of constitutional authority to the Legislature to decide
41 election contests regarding executive offices.
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44 ³ In terms of history, in 1949, another election contest petition for a statewide executive
45 office was filed in the Legislature. *See* Wash. H. Journal 22-23 (Jan. 11, 1949) (petition of contest
46 over office of Commissioner of Public Lands following vote difference of 1,492 votes). As in 1941,
47 the Legislature did not refer the petition to the courts and, as in 1941, the Legislature did not grant
the petition.

1 WSDCC disagrees with the Secretary's assertion, made without any textual exegesis,
2 that "in such manner as shall be determined by law" provides the Legislature with the
3 authority to determine which body could decide these election contests. Response at 3.
4 Like Petitioners, the Secretary of State would have this Court rewrite Article III, § 4 and
5 have the Judiciary usurp the Legislature's constitutional role.
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10 If the Court agrees with WSDCC and Petitioners that the language of Article III, § 4
11 is unambiguous, the Court need not consult the constitutional history.⁴ If the Court
12 determines that the language is ambiguous and consults the constitutional history, that
13 history supports WSDCC. Even using the slightly different language provided by the
14 Secretary of State's historical research,⁵ the chair of the committee that drafted Article III
15 (Mr. Allen Weir) stated that he "thought these particular cases of contested elections ought
16 to be decided by the legislature." Response at 4. Neither Petitioners nor the Secretary of
17 State has provided any evidence of constitutional history to the contrary. Instead, the
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29 ⁴ Perhaps inadvertently, Petitioners refer to the constitutional history as "legislative history"
30 and to canons of "statutory construction," not "constitutional construction," in their argument as to
31 the meaning of the Constitution. Opposition at 3, 18.
32

33 ⁵ Petitioners and the Secretary of State call into question the authoritativeness of the source
34 of the constitutional history relied on by WSDCC. Opposition at 18; Response at 4. The book cited
35 by WSDCC, *The Journal of the Washington State Constitutional Convention, 1889* (Beverly Paulik
36 Rosenow ed., 1962), compiles and synthesizes the remaining contemporary sources because the
37 shorthand notes of Washington's constitutional debates were never transcribed and were
38 subsequently lost. Rosenow at vii. The preface explains that because there are no transcripts "and
39 since no James Madison has been found, whose notes can supplement more completely those that
40 have been lost, there seems no alternative but to use press reports as far as they go." *Id.* The editor,
41 Ms. Rosenow, relies on the *Oregonian* newspaper, cited by the Secretary of State, in addition to
42 other sources. *Id.* at 931. An electronic search reveals that the Washington Supreme Court has cited
43 Ms. Rosenow's book as a source of constitutional history in no less than 44 published decisions. The
44 Supreme Court has cited the *Oregonian* newspaper, relied on by the Secretary of State, in seven
45 published decisions, and in six of those decisions it also cited Ms. Rosenow's book. The Supreme
46 Court's repeated citations to Ms. Rosenow's book are sufficient to establish its reliability and
47 authoritativeness.

1 Secretary attempts to use Mr. Weir's statement to suggest that contested elections "*could be*
2 . . . decided by the legislature," *id.* (emphasis added), which interpretation contradicts the
3 plain language of the Constitution that election contests "*shall be* decided by the legislature,"
4 WASH. CONST. art. III, § 4 (emphasis added). In sum, the limited constitutional history
5 available is consistent with the Constitution's plain language that election contests over
6 statewide executive offices "shall be decided by the legislature."
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13 **C. Decisions from Courts in Other States with Similar Constitutional**
14 **Provisions Confirm That the Legislature Has Exclusive Jurisdiction over**
15 **This Election Contest.**
16

17 In its Motion, WSDCC provided the Court with numerous examples of other courts
18 that held that provisions similar to Washington's Constitution vested exclusive jurisdiction
19 in the legislature to decide election contests over statewide executive offices. Petitioners
20 and the Secretary of State attempt to distinguish these cases to no avail. For example,
21 Petitioners assert that some of these cases are distinguishable because they involve
22 "constitutional provisions expressly requiring that the legislature determine election
23 contests." Opposition at 19. True, but this does not help Petitioners because Washington's
24 Constitution also expressly requires that the Legislature shall decide election contests. Thus,
25 cases such as *Robertson v. State ex rel. Smith*, 109 Ind. 79, 10 N.E. 582 (1887) and *State ex*
26 *rel. Brooks v. Baxter*, 28 Ark. 129 (1873), among others cited in the Motion at 7-9, support
27 WSDCC's interpretation of Article III, § 4.
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39 For example, in *Robertson*, the Indiana Supreme Court concluded that it lacked
40 subject matter jurisdiction over an election contest for the office of lieutenant governor
41 given the following language in Indiana's Constitution: "Contest elections for governor or
42 lieutenant governor shall be determined by the general assembly in such manner as may be
43 prescribed by law." 10 N.E. at 612. The Indiana Supreme Court concluded that this
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1 language "invests the general assembly with judicial power to hear and determine contested
2 elections for governor and lieutenant governor; and to the extent, and no further, that such
3 powers are thereby granted, they diminish the general grant of judicial powers to the judicial
4 department proper." *Id.* (Zollars, J., op.).⁶
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9 Petitioners also accuse WSDCC of mischaracterizing the decision regarding the 1872
10 election for Governor of Arkansas. Opposition at 20. To clarify, there were two Arkansas
11 Supreme Court decisions regarding this election, both of which WSDCC cited in its Motion.
12 Motion at 5, 7 (citing *State ex rel. Brooks v. Baxter*, 28 Ark. 129 (1873) and *State ex rel.*
13 *Brooks v. Baxter*, 29 Ark. 173 (1874)). Petitioners choose to address the 1874 case, while
14 the Secretary of State addresses the 1873 case. Opposition at 20-21; Response at 10-11.
15 The 1873 case is directly on point, as the sitting Governor (Mr. Baxter) questioned "the
16 jurisdiction of the court, and its authority to determine the proposed issue, whether or not
17 Mr. Baxter was the elected and qualified governor of Arkansas." 28 Ark. at 131. Mr.
18 Baxter's jurisdictional argument was based on Article VI, § 19 of the Arkansas Constitution
19 of 1868, which provided that for statewide executive officers, "[c]ontested elections shall
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36 ⁶ Petitioners criticize WSDCC for relying only on concurring opinions in this case.
37 Opposition at 19-20, n.9. The Indiana Supreme Court decision is an unusual case in which the initial
38 opinion for the Court was a 3-2 decision that the Court lacked personal jurisdiction over the
39 defendant, *compare* 10 N.E. at 584-85, 599, 609 (opinions by Justices Elliott, Niblack, and Zollars)
40 *with id.* at 587, 599 (opinions by Justices Mitchell and Howk), but all five Justices on the Court –
41 including the Chief Justice who authored the initial opinion for the Court – concluded that the Court
42 lacked subject matter jurisdiction over the election contest for the office of lieutenant governor,
43 given the plain language of the Indiana Constitution. *Id.* at 588, 599, 600, 606, 612. Notably, the
44 Chief Justice confessed in his "concurring" opinion that he was initially inclined to believe "that it is
45 better and safer that such controversies as this should be settled by some other tribunal than the
46 legislature, but, while still impressed with that belief, *I am compelled to yield to the settled rules of*
47 *the law, and the clear words of the Constitution.*" *Id.* at 603 (emphasis added).

1 likewise be determined by both houses of the general assembly in such manner as is or may
2 hereafter be prescribed by law." *Id.* at 135.
3

4 The Arkansas Supreme Court concluded that in this constitutional provision, "the
5 whole question is settled," including "if the election is contested, how it shall be determined
6 . . . and thus fixing the tribunal to try this issue, and no where intimating that the high
7 prerogative of deciding this question should belong to any other tribunal. . . ." *Id.* (emphasis
8 added). The Secretary of State attempts to distinguish this case as not addressing "the
9 question of whether a legislature such as Washington's can grant jurisdiction over election
10 contests to the courts." But that is not the operative question; the question is whether the
11 plain meaning of Washington's Constitution confers exclusive jurisdiction on the
12 Legislature. As to very similar constitutional language, the Arkansas Supreme Court
13 answered that question as follows:
14

15 Under this constitution, the determination of the question as to
16 whether a person exercising the office of governor has been duly
17 elected or not, is *vested exclusively* in the general assembly of the
18 state, and neither this or any other state court has jurisdiction to try a
19 suit in relation to such contest
20

21 *Id.* at 139 (emphasis added).
22

23 Unlike the 1873 case, which was filed in the Arkansas Supreme Court in the first
24 instance, the 1874 decision by the Arkansas Supreme Court was a review of a state circuit
25 court decision in favor of the challenger, Mr. Brooks. *Baxter v. Brooks*, 29 Ark. at 176. On
26 appeal, the Arkansas Supreme Court concluded that the circuit court lacked subject matter
27 jurisdiction over the election contest and quashed the underlying judgment. *Id.* at 202; *see*
28 *also id.* at 185 ("If this court had even erred in the first instance, its decision became law of
29 the case, which could never be disturbed or overruled in this case."). By failing to address
30 the first decision by the Arkansas Supreme Court in this contest, Petitioners would have this
31

1 Court believe that the Arkansas case turned on "a provision *in the 1874 Constitution*, which
2 had taken effect at the time the case was decided," Opposition at 21 (emphasis added), but of
3 course, that provision had not taken effect when the court concluded in 1873 that the
4 Legislature had exclusive jurisdiction to hear the election contest for the office of governor.
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WSDCC's non-Washington cases do not reflect merely the "truism" that "in some states the Legislature conducts contests, and in others, the courts do so." Opposition at 19. Rather, these cases show that the words of the Constitution matter. If a state Constitution provides that the Legislature "shall decide" certain election contests, the Legislature decides those contests; if the Constitution is not so explicit – either as to the Legislature's jurisdiction or to the particular office – the courts may decide the election contest. Article III, § 4 of Washington's Constitution clearly commits contests in elections for Governor to the Legislature, so the courts lack subject matter jurisdiction over this type of contest.⁷

By contrast, the only non-Washington case cited by Petitioners is easily distinguishable because the constitution at issue in that case did not contain the requirement that election contests "shall be decided by the legislature." See Opposition at 22 (citing *McWhorter v. Dorr*, 57 W. Va. 608, 609-10, 50 S.E. 838, 839 (1905) (state constitution provided merely that "[t]he Legislature shall prescribe the manner of conducting and making returns of elections and of determining contested elections")).

⁷ Petitioners are wrong in suggesting that WSDCC "conceded" that "the courts are the proper forums for local election contests." Opposition at 8. A court is the proper forum for a local election contest in Washington because our Constitution does not provide that the Legislature shall decide local election contests. The Secretary of State recognizes this distinction. Response at 3.

1 **D. The Legislature May Not Delegate and Has Not Delegated Its Duty to**
2 **Decide General Election Contests for Statewide Executive Offices.**
3

4 Petitioners and the Secretary of State argue that the Legislature may delegate its
5 authority to decide election contests for statewide executive offices. This issue turns on the
6 plain meaning of Article III, § 4, which is addressed above. The phrase "in such manner as
7 shall be determined by law" refers to the procedure and substance used by the Legislature to
8 make the decision and does not give the Legislature the power to allow another body to
9 decide the question. *Manus v. Snohomish County Justice Court District Committee*, 44
10 Wn.2d 893 (1954), is not distinguishable as Petitioners and the Secretary assert.

11
12 Amendment 28 to our Constitution states: "The legislature shall determine the number of
13 justices of the peace to be elected and shall prescribe by law the powers, duties and
14 jurisdiction of the justices of the peace" In *Manus*, the Court held that the Legislature
15 could not delegate its duty to determine the number of justices:
16

17
18 A discussion of the standards under which delegation of legislative
19 authority is permissible, is not called for in this case. The specific
20 mandate of the twenty-eighth amendment to the constitution of the
21 state of Washington is too clear for interpretation. It unequivocally
22 places the duty of fixing the number of justices of the peace upon the
23 legislature exclusively, and leaves no room for the applicability of the
24 doctrine of permissive delegation of legislative authority.
25

26
27 44 Wn.2d at 895. That the 28th Amendment does not include "in such manner as shall be
28 determined by law" is a distinction without a difference because that phrase only relates to
29 the *manner* in which the Legislature decides the question, not *which body* has the power to
30 decide the question.⁸
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⁸ Petitioners' description of *Sackett v. Santilli*, 146 Wn.2d 498 (2002), is incorrect. *Sackett* notes that pure legislative functions are non-delegable, but it does not state, as Petitioners suggest,

1 However, even if the Legislature could delegate its authority to decide such election
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3 contests, it has not done so.⁹ Petitioners argue that the Legislature has made an
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5 "unambiguous and authoritative decision" to delegate its power to decide election contests
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7 for statewide executive offices. Opposition at 21. They refer generally to the Legislature's
8
9 "enactment" of RCW 29A.68.011 or even the whole chapter, RCW 29A.68.
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11 RCW 29A.68.011 has been cobbled together over time from various statutory precursors
12
13 and has been reenacted and recodified on more than one occasion. Its original statutory
14
15 precursors undeniably did not apply to general election contests for statewide officers. *See*
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17 *Rem. Rev. Stat. § 5202* (errors relating to primaries); *§ 5276* (errors in printing ballots).
18
19 Petitioners do not state which "enactment" is the one that they think constitutes a
20
21 delegation.¹⁰ The Secretary of State's argument is more specific, pointing to a 1977
22
23 amendment to the statute that is now RCW 29A.68.020. But this amendment, on which the
24
25 Secretary of State's entire argument rests, cannot constitute a delegation.

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27 Prior to 1977, Washington's election contest statutes undisputedly did not apply to
28
29 statewide executive offices. At that time, the statutes that are now RCW 29A.68.020-.120
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that these are the "only" non-delegable functions. Opposition at 8; *see also Sackett*, 146 Wn.2d at
505.

⁹ WSDCC is not arguing that the election contest statute is, on its face, unconstitutional. WSDCC submits that the statute must be interpreted as not applying to contests of statewide executive officers to avoid constitutional problems. *See High Tide Seafoods v. State*, 106 Wn.2d 695, 698 (1986) ("A statute, if possible, should be construed to be constitutional.").

¹⁰ Petitioners' citation to *State ex rel. Kurtz v. Pratt*, 45 Wn.2d 151 (1954) also is of no help to them. In that case, the Court stated that the error-correcting statute, now RCW 29A.68.011, was a proper exercise of legislative power, but the case did not involve a statewide executive officer. 45 Wn.2d at 156. *Kurtz* sheds no light on whether it is constitutional to apply the election statutes to a contest of a statewide executive officer.

1 were codified as RCW 29.65.010-.130.¹¹ According to these statutes, a registered voter
2 could "contest the right of any person declared elected to an office to be exercised in the
3 county, district or precinct of his residence for any of the following causes."
4

5
6 RCW 29.65.010 (1976).
7

8
9 In 1977, the Legislature amended the election statutes primarily to improve the
10 security and reliability and consistency of the three voting systems in use at the time, paper
11 ballots, punch cards, and voting machines. Laws of 1977, 1st Ex. Sess., ch. 361, §§ 1-100.
12 It also amended RCW 29.65.010 to read that a registered voter "may contest the right of any
13 person declared elected to an office to be issued a certificate of election for any of the
14 following causes." *Id.* § 101.¹² And it made various other changes to the procedural aspects
15 of the contest statutes, such as providing for the same procedures to apply to contests and to
16 actions to correct other errors. *Id.* §§ 101-104.
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25 The amendment to RCW 29.65.010 is not a delegation of the Legislature's
26 constitutional duty to decide election contests of statewide executive offices. One would
27 expect that if the Legislature decided to delegate a duty held since statehood and exercised
28 twice, it might make some mention of it. However, the amendment contains no explicit
29 indication that it reaches these offices. The legislative history contains no indication that the
30 Legislature intended the statute to reach these offices. While focusing primarily on other
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41 ¹¹ These statutes have existed, in relatively similar form, since statehood. *See* Rem. Rev.
42 Stat. §§ 5366-5382; Code of 1881 §§ 3105-3123.
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44 ¹² Vestiges of the former language remain in other contest statutes. RCW 29A.68.030,
45 formerly RCW 29.65.020, states that the elector's affidavit that initiates a contest should set forth that
46 the elector is "a registered voter in the county, district or precinct, as the case may be, in which the
47 office is to be exercised." RCW 29A.68.080, formerly RCW 29.65.070, also states that it applies to
"an office exercised in and for a county."

1 aspects of the bill, the legislative history states that the amendments were intended to
2 "clarif[y]" the "procedure" for election contests, S. Const. & Elections Comm., Analysis as
3 of Apr. 4, 1977 for S.B. 2034, hardly an indication that the Legislature intended to make a
4 sweeping change of constitutional import as to which body could decide a contested election
5 for an office as important as Governor. Further, the section digest contained in the Senate
6 Committee File states that the amendment to RCW 29.65.010 would "[p]ermit any
7 registered voter to contest the issuance of a certificate of elections." S. Comm. File Section
8 Digest at 13. Thus, the most plausible explanation for the amendment is that the Legislature
9 intended to eliminate a restriction on who could bring a contest, not which offices could be
10 contested in court.

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21 But the Court need not come to any definitive conclusion on the Legislature's goal in
22 amending RCW 29.65.010. What is important is that the legislative history reveals no
23 indication that the Legislature intended, through this "clarif[ying]" section of a bill that
24 primarily addressed other issues, to devolve a duty entrusted to it by the Constitution onto
25 the Judiciary. Before the Court can construe a law involving issues of broad public import
26 (i.e., who will be the Governor and who will decide that question) as a delegation of a duty
27 specifically entrusted to the Legislature by our Constitution, there should be some evidence
28 that the Legislature actually intended to delegate the duty. *Cf. Greene v. McElroy*, 360 U.S.
29 474, 506 (1959) (stating that "acquiescence or implied ratification" were insufficient "to
30 show delegation of authority to take actions within the area of questionable
31 constitutionality" and explaining that "[w]ithout explicit action by lawmakers, decisions of
32 great constitutional import and effect would be relegated by default to administrators who,
33 under our system of government, are not endowed with authority to decide them").
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1 An express indication that the Legislature intended to delegate is especially
2 necessary here, because "the right to hear and determine an election contest is not ordinarily
3 a judicial function of the courts, and can be exercised by them only when and to the extent
4 the right is conferred by statute." *Malinowski v. Tilley*, 147 Wash. 405, 407 (1928); *see also*
5 *Becker v. County of Pierce*, 126 Wn.2d 11, 18 (1995) ("Early this century we clearly
6 established that the right to contest an election 'rests solely upon, and is limited by, the
7 provisions of the statute relative thereto.") (quoting *Quigley v. Phelps*, 74 Wash. 73, 75
8 (1913)); *State ex rel. Mills v. Beeler*, 149 Wash. 473, 475 (1928) ("The court has no inherent
9 jurisdiction to hear election contests, and such a proceeding is not according to the course of
10 the common law. The right of the court to hear and determine such a matter if it exists must
11 be found in the statute. Beyond the power given by the statute the court has no jurisdiction
12 in election contests.") (citing *Whitten v. Silverman*, 105 Wash. 238 (1919); *State ex rel.*
13 *Ransom v. McPherson*, 128 Wash. 265 (1924); *Malinowski*, 147 Wash. 405).

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27 **E. Statements by Legislators Regarding Their Interpretation of the**
28 **Constitution or Previously Enacted Statutes Have No Weight.**

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30 There remains no doubt that courts are the final arbiter of the Constitution. *See, e.g.,*
31 *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 504 (1978) ("[I]nterpretation and construction of
32 the constitution are exclusively judicial functions."). As the United States Supreme Court
33 and the Washington Supreme Court have repeatedly stated, "[i]t is emphatically the province
34 and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1
35 Cranch) 137, 176, 2 L. Ed. 60 (1803) (quoted in *e.g., Wash. State Republican Party v. King*
36 *County Division of Records*, __ Wn.2d __, 103 P.3d 725, 728 (Chambers, J., concurring).
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38 Once a court determines that an issue involves the interpretation of the Constitution, "the
39 legislature must subsequently act within the confines of the judicial interpretation," even if
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1 the interpretation is at odds with that provided by the Executive or the Legislature. *Seattle*
2 *Sch. Dist.*, 90 Wn.2d at 505, 508. Accordingly, it is irrelevant that many individual
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4 members of the Legislature believe that "the Washington Constitution permitted the
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6 Legislature to decide to provide the *courts* with jurisdiction to hear statutory election
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8 contests such as this one." Response at 8.
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11 The individual legislators' statements are irrelevant as a matter of constitutional
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13 construction and statutory interpretation. Petitioners and the Secretary attempt to use
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15 statements by legislators in 2005 as to the meaning of a law enacted in 1977 and amended in
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17 subsequent years. But "it is counterintuitive . . . to believe that the purpose of a later
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19 Congress comprised of different members and addressing different problems can be imputed
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21 back in time to the Congress that enacted the [law in question]." *Doe v. Chao*, 306 F.3d
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23 170, 178 n.2 (4th Cir. 2002), *aff'd*, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122
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25 (2004), *cited in In re Pers. Restraint of Jones*, 121 Wn. App. 859, 866 n.32, n.33 (2004)
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27 (citing numerous state and federal cases). Petitioners have not attempted to provide
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29 statements by members of the 1977 Legislature that drafted the election contest statute from
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31 which Petitioners and the Secretary assert that the Court has jurisdiction, although even if
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33 they had, these statements would be equally inadmissible. *See Woodson v. State*, 95 Wn.2d
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35 257, 264 (1980) (concluding that court could not consider affidavits from members of the
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37 1959 legislature as to the meaning of a particular law).¹³
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42 ¹³ Indeed, if the Court must defer to the opinions of the legislators reflected in Petitioners'
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44 Opposition, then the Court would be compelled to conclude that the proper venue for this contest is
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46 the Supreme Court (statements by Rep. Mary Helen Roberts, Rep. Brian Sullivan, and Rep. Mark
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48 Ericks), *see* Goff Declaration in Support of Election Contest Petition at 12, 15, 24; a "re-vote" is not
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50 allowed (statement by Rep. Zach Hudgins: "There is no re-vote contingency in the state statu[t]e for
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52 a close election."), *id.* at 19; and the "crediting lists" highlighted by Petitioners have no bearing on
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54 whether it was a valid election (statement by Rep. Schual-Berke), *id.* at 6.

1 Notably, Petitioners cite no authority in support of their argument that current
2 legislators' interpretation of the Constitution or previously enacted statutes should have
3 some bearing on this Court's interpretation. Opposition at 12-13. The Secretary's only
4 authority in support of his similar argument is a citation to *Sackett v. Santilli*, 146 Wn.2d
5 498, 508 (2002) (quoting *State ex rel. Foster-Wyman Lumber v. Superior Court*, 148 Wash.
6 1 (1928)). Neither *Sackett* nor *Foster-Wyman Lumber* has anything whatsoever to say about
7 the significance of comments by individual legislators.
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15 **F. Neither *Becker* Nor *Foulkes* Nor Article IV, § 6 of the Washington**
16 **Constitution Give This Court Jurisdiction.**
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18 Petitioners continue to rely on *Becker* and *Foulkes*, but neither establishes that this
19 Court has jurisdiction over this matter.
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21
22 In *Becker*, the question of the constitutionality of a court deciding a general election
23 contest for a statewide officer was not raised, addressed, or decided. Petitioners half-
24 heartedly assert that because courts have the duty to examine their own subject matter
25 jurisdiction, it is "reasonable to assume" that the *Becker* Court on its own considered and
26 resolved this constitutional question, without asking for any briefing from the parties and
27 without deeming the issue worthy of mention in its opinion. Opposition at 16. That is not
28 the rule, as the cases cited in WSDCC's Motion make clear.
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36 Further, *Becker* concerned a primary election. A consideration of the constitutional
37 framework and case law regarding contests of members of the Legislature reveals the
38 significance of this aspect of *Becker*. Petitioners and WSDCC agree that under Article II,
39 § 8 of the Constitution, the Legislature has exclusive jurisdiction to decide contests of
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1 general elections for its members. Opposition at 23.¹⁴ Notwithstanding this exclusive
2 jurisdiction, contests and other actions challenging primaries for members of the Legislature
3 may be brought in court. *See, e.g., State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 561
4 (1966); *State ex rel. O'Neil v. Todd*, 45 Wn.2d 206, 208 (1954); *State ex rel. Mills v. Beeler*,
5 149 Wash. 473, 475 (1928); *State ex rel. McAvoy v. Gilliam*, 60 Wash. 420, 423 (1910).
6
7 Other states follow this rule as well. *See Dubuque*, 68 Wn.2d at 563 (collecting cases). The
8 same distinction exists for federal legislators. *See* 2 U.S.C. § 381(1) (providing that contests
9 over general elections for federal legislators should be brought in Congress but not
10 extending that rule to primaries).
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The cases hold that courts have jurisdiction not because Article II, § 8 (or the similar provisions in other jurisdictions) grants concurrent jurisdiction, as the Secretary suggests, Response at 8-10, or because of a "delegation" of power, but because the substantive difference between primary and general elections renders the constitutional provisions simply inapplicable. A primary is the procedure whereby a *party* nominates its *candidate* for the general election. Because a primary is the means whereby a party's nominees are chosen, rather than the means whereby the voters choose who will represent and govern them, the constitutional provisions relating to contests of the individual ultimately elected to office are simply inapplicable. *See O'Neil*, 45 Wn.2d at 208 (stating that as to the "method of nominating candidates for public office . . . [,] § 8, Art. II, of the constitution does not apply"); *see also Dubuque*, 68 Wn.2d at 561 (stating that it could hear a challenge to primaries for legislators *without deciding* whether the houses of the Legislature are "the

¹⁴ The Secretary states that jurisdiction under Article II, § 8 is concurrent, but he cites *no* cases in which a court considered a general election contest of a member of the Legislature. Response at 8-10.

1 Exclusive judges of the election, qualifications and returns of their own Members, for the
2 question is not now before us"). This distinction makes perfect sense, as WSDCC noted in
3 its Motion and as the United States Supreme Court recognized in its recent opinion
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5 prohibiting blanket primaries. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 577
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7 (2000); Motion at 17 n.7.
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11 Thus, the distinction between primary and general elections for members of the
12 Legislature is well defined and well established, and the courts may exercise jurisdiction
13 over primary election contests for legislators because such actions *fall completely outside*
14 the scope of the grant of jurisdiction in Article II, § 8, not because that jurisdiction is
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16 "concurrent" or delegable.
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21 The same distinction applies to elections of statewide executive officers. In fact, the
22 Washington Supreme Court recognized this distinction long ago, well before the supposed
23 delegation in 1977 identified by the Secretary of State. In *State ex rel. Reynolds v. Howell*,
24 70 Wash. 467, 470-71 (1912), the Court granted a writ to prohibit the state canvassing board
25 from certifying a sitting judge as the candidate selected in the primary to appear on the
26 general election ballot *for the office of Governor* because the candidate was not eligible for
27 office. This practice is entirely consistent with Article III, § 4's plain meaning that contested
28 general elections must be decided by the Legislature. Article III, § 4 does not use the word
29 "general" in reference to election contests. But before it mentions election contests, it sets
30 forth the entire process whereby an election is held, the results are certified and transmitted
31 to the Legislature, and the Legislature then declares the results. None of these steps happen
32 during a primary election, and thus on its face Article III, § 4 does not apply to primaries.
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44 Yet Petitioners and the Secretary assert that these cases support their position. They
45 attempt to argue that because the courts may hear election contests arising out of *primaries*
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1 for *legislators*, the courts may hear election contests arising out of the *general election* for
2 *statewide executive officers*.¹⁵ Petitioners and the Secretary completely miss the logical
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4 implication of these cases, which in fact support WSDCC. The constitutional framework for
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6 contests of legislators and statewide executive offices is the same: these contests are
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8 entrusted to the Legislature. Notwithstanding this grant of jurisdiction, courts may hear
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10 contests arising out of primaries *because of the substantive difference between a primary*
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12 *and a general election*. Thus, because *Becker* concerned a primary election, the Court's
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14 exercise of jurisdiction was consistent with both Article III, § 4 and settled law and has no
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16 bearing or import on the question of whether courts may hear contests of general elections
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18 for statewide executive officers.
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21 *Foulkes* also does not support this Court's exercise of jurisdiction over this case. The
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23 Secretary does not cite *Foulkes* in its Response, but Petitioners continue to argue that
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25 *Foulkes* is relevant to the question of whether this Court has jurisdiction. Opposition at 25-
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27 26. It is not. *Foulkes* concerned a county commissioner, not a statewide executive officer.
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29 The Court had no occasion to consider Article III, § 4. *Foulkes* also predates the 1977
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31 amendment to the contest statutes that, according to the Secretary, constitutes a delegation.
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33 To the extent jurisdiction in *Foulkes* was based on Article IV, § 6, the general grant of
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35 jurisdiction to the superior courts, it is distinguishable. That provision of the Constitution is
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46 ¹⁵ Directly after noting the "grave danger to our democratic institutions" cited by the
47 Secretary, Response at 5, the Court in *Dubuque* reaffirmed that it was not addressing whether the
Legislature's jurisdiction was exclusive. 68 Wn.2d at 561 n.5.

1 a general, residual grant of jurisdiction. If it vested jurisdiction in the courts for this type of
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3 contest, it would wipe away Article III, § 4 and render it meaningless.¹⁶
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5 **III. CONCLUSION**

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7 Even if the Court agrees with Petitioners that the Judiciary would be better suited to
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9 decide this election contest than the partisan Legislature, that is not what the framers
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11 decided. Because the Constitution vests exclusive jurisdiction in the Legislature, the Court
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13 should dismiss the Election Contest Petition for lack of subject matter jurisdiction.
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15 DATED: [January 31, 2005](#).

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45 ¹⁶ As even the Secretary appears to agree, Response at 3-5, to the extent any court has
46 jurisdiction over this matter, it must come from a delegation from the Legislature. Therefore,
47 statutes enacted by the Legislature, not other general provisions in the Constitution, are the only
possible source of jurisdiction for this Court.