

CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
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27
28
29
30
31
32
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34
35
36
37
38
39
40
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42
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44
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47

I. SUMMARY OF ARGUMENT 1

II. ARGUMENT AND AUTHORITY..... 2

 A. There Is No Constitutional or Legislative Authority for a New
 Statewide Special Election. 2

 1. The Constitution Prohibits a New Special Election for
 Governor. 2

 2. The Election Contest Statutes Prohibit a New Special Election
 for Governor. 5

 B. There Is No Equitable or Common Law Authority for a New
 Statewide Special Election. 8

 C. Policy Considerations Weigh Strongly Against Conducting a New
 Statewide Special Election. 10

III. CONCLUSION..... 12

1
2
3
4
5
6
7
8
9
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11
12
13
14
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16
17
18
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20
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44
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TABLE OF AUTHORITIES

Cases

Becker v. County of Pierce, 126 Wn.2d 11 (1995)..... 6, 7, 9, 10

Castillo v. Texas, 404 S.W.2d 97 (Tex. Civ. App. 1966)..... 8

DeBow v. McNeil, 127 Wash. 157 (1923) 3, 4

Dumas v. Granger, 137 Wn.2d 268 (1999)..... 7

Fish v. Howell, 59 Wash. 492 (1910) 3, 4

Foulkes v. Hays, 85 Wn.2d 629 (1975) 8, 9

Huggins v. Superior Court, 163 Ariz. 348 (1990)..... 10

Hill v. Howell, 70 Wash. 613 (1912)..... 12

In re Contested Election of Schoessler, 140 Wn.2d 368 (2000)..... 11

Malinowski v. Tilley, 147 Wash. 405 (1928)..... 6, 9

Public Citizen v. Zell Miller, 813 F. Supp. 821 (N.D. Ga. 1993)..... 8

Quigley v. Phelps, 74 Wash. 73 (1913) 6

Reid v. Dalton, 100 P.3d 349 (Wash. Ct. App. 2004) 9

State ex rel. Mills v. Beeler, 149 Wash. 473 (1928) 6, 9

State ex rel. Ransom v. McPherson, 128 Wash. 265 (1924) 6

State ex rel. Rummens v. King County, 160 Wash. 520 (1931)..... 4

State ex rel. Sampson v. Superior Court, 71 Wash. 484 (1913)..... 4

Stephanus v. Anderson, 613 P.2d 533 (Wash. App. 1980)..... 2

Valentini v. Rockefeller, 292 F. Supp. 851 (W.D.N.Y. 1969)..... 4

Whitten v. Silverman, 105 Wash. 238 (1919) 6

Statutes

1
2
3 Haw. Rev. Stat. § 11-174.5(b) (West 2005) 5
4
5 Idaho Code § 34-2021 (Michie 2004) 5
6
7 Kan. Stat. Ann. § 25-1448 (West 2005) 5
8
9 Mo. Ann. Stat. § 115.593 (West 2005)..... 5
10
11 Okla. Stat. Ann. tit. 26 § 8-122 (West 2005)..... 6
12
13 RCW 29.62.080 11
14
15 RCW 29.65.020 11
16
17 RCW 29.68.050 11
18
19 RCW 29A.04.073 5
20
21 RCW 29A.04.175 4, 5
22
23 RCW 29A.04.321(1)(c) 3, 4
24
25 RCW 29A.04.321(5)..... 5
26
27 RCW 29A.60.221 11
28
29 RCW 29A.64.070 7
30
31 RCW 29A.68.011 5, 8
32
33 RCW 29A.68.011 (1)-(5)..... 9
34
35 RCW 29A.68.020 8
36
37 RCW 29A.68.020(2)..... 11
38
39 RCW 29A.68.050 2, 11
40
41 RCW 29A.68.080 5, 11
42
43 RCW 29A.68.110 5
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RCW.29A.04.321(1)(c) 3
Rem. Rev. Stat. § 5349 11
Tex. Elec. Code Ann. § 232.041 (West 2005)..... 6

Constitutional Provisions

WASH. CONST. art. II, § 15..... 4
WASH. CONST. art. II, § 5..... 2
WASH. CONST. art. III, § 1 3, 4, 8
WASH. CONST. art. III, § 10 2, 3, 4, 11
WASH. CONST. art. III, § 4 7
WASH. CONST. art. III, § 5 3
WASH. CONST. art. XI, § 6..... 3

Other Authorities

Developments in the Law: Elections, 88 Harv. L. Rev. 1298 (1975)..... 10
Laws of 1961, ch. 130, § 13..... 11

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SUMMARY OF ARGUMENT

At the conclusion of briefing on whether this Court may order a new special election for Governor, it is undisputed between Washington State Democratic Central Committee ("WSDCC"), Petitioners, and the Secretary of State that:

- (1) The Constitution determines when a Governor must be elected to fill a vacancy in office.¹
- (2) Washington's election contest statutes provide specific remedies, and do not provide that a court may order a new election.²
- (3) No Washington case exists in which a court resolved an election contest by ordering a new statewide election for any Article I, § 3 executive officer.
- (4) In fact, no authority from any other state has been provided to this Court evidencing a court's power to order a new election for Governor as a result of an election contest.

Petitioners nevertheless urge that this Court, in one sweep of its pen, can oust the current Governor from office, and force 39 counties to spend taxpayer dollars on a new election for Governor on whatever date the Court deems appropriate and pursuant to whatever filing and candidate restrictions the Court deems appropriate. There is no authority for this Court to order such an election. The Constitution prohibits Petitioners'

¹ WSDCC's Motion to Strike Petitioners' Requested Relief ("Motion") at 3-4; Petitioners' Opposition to WSDCC's Motion to Strike ("Opposition") at 9; Secretary of State's Response to WSDCC's Motion to Strike ("Response") at 2.

² Motion at 8; Opposition at 3; Response at 2.

1 special election remedy and, the WSDCC respectfully submits, the remedy request should
2
3 be stricken from the Petition as a form of relief that cannot be granted.³
4

5 I. ARGUMENT AND AUTHORITY

6 7 A. There Is No Constitutional or Legislative Authority for a New Statewide 8 Special Election. 9

10 1. The Constitution Prohibits a New Special Election for Governor. 11

12 Even if Petitioners meet the high standards set forth in the election contest statutes to
13 set aside Governor Gregoire's election, Article. III, § 10 of the Constitution does not permit
14 the resulting vacancy in the Governor's office to be filled "as soon as practicable." Instead, it
15 requires filling a vacancy in the office at "the next general election." Concurrently, Article
16 III, § 1 requires that executive officers, including the Governor, "shall be severally chosen at
17 the same time and place of voting for members of the legislature." Members of the
18 Legislature do not stand for election until November 2006. WASH. CONST. art. II, § 5
19 ("members of the house of representatives shall be elected biennially"). The Secretary of
20 State agrees with the WSDCC that Article III, § 10 requires this result – the Governor's office
21 is to be "filled by election at a *regular general election* pursuant to this section." Response at
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37 ³ Washington law permits motions to strike to remove substantive, but legally erroneous,
38 materials from a party's pleadings. *See Stephanus v. Anderson*, 613 P.2d 533, 535 (Wash. App.
39 1980) (affirming trial court's ruling striking legally improper affirmative defense from pleadings).
40 Whatever additional power the Court needs to strike this remedy is supplied by RCW 29A.68.050
41 which allows the Court to "dismiss the proceedings if the statement of the cause or causes of the
42 contest is insufficient." As explained in WSDCC's related briefing, Petitioners also are not entitled
43 to any of the remedies that they seek under the election contest statutes; this Motion addresses the
44 specific request that this Court order a new election. Petition at 4, 10. Petitioners have maintained
45 elsewhere that this is the "only remedy" the really seek in this action and the issue merits disposition
46 at the outset of the case. *See* Declaration of William C. Rava in Support of WSDCC's Motion to
47 Strike Petitioners' Requested Relief ¶ 2, Ex. B ("But the only remedy I've asked – and that I've told
lawyers to ask for – there's only one remedy that I want, and that is a revote.") (quoting Mr. Rossi).

1 3 (emphasis added). The next regular general election is November 2006 and is therefore the
2 earliest time a constitutionally permissible new special election for Governor could be held.⁴
3

4 *Fish v. Howell*, 59 Wash. 492, 499 (1910), confirms the simple proposition that
5 when the Washington Constitution sets forth the time and manner for conducting an
6 election, the Constitution must be followed. ("[N]either the Constitution nor the statutes of
7 this state authorize the election of any officer of the executive department at the next
8 election, or at any election held in a so-called off year.")⁵ The case relied on by Petitioners,
9 *DeBow v. McNeil*, 127 Wash. 157 (1923), does not limit this aspect of the *Fish* decision; it
10 explicitly *affirms* it. In *DeBow*, the Court quoted *Fish* to support its conclusion that WASH.
11 CONST. art. XI, § 6, which calls for vacancies in county officials to be filled in the next
12 general election, means "in the next regular biennial election occurring after the vacancy
13 occurred." 127 Wash. at 162. Article III, § 10 mandates that a vacancy in the Governor's
14 office is filled in the "next general election," and here that means November 2006.
15

16 Moreover, the amendment to Article III, § 10 adopted in 1910 and touted by
17 Petitioners does not affect the analysis. Opposition at 10. Before that amendment the
18 Constitution had *no* provision to fill vacancies in the Governor's office prior to the completion
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⁴ An election held in November 2006 would nevertheless require legislation to address the requirement in Article III, § 1 that the election for Governor must be conducted at the same time as the election for other constitutional executive officers.

⁵ It is certainly true (as Petitioners note) that RCW 29A.04.321(1)(c) identifies certain Article III offices, such as lieutenant governor, secretary of state, state auditor, and others, where vacancies may to be filled in off-year special elections. *Id.* ("the election of state and county officers for the remainder of any unexpired terms of offices created by or *whose duties are described in . . . Article III, sections 16, 17, 19, 20, 21, 22, and 23[.]*") (emphasis added). But the Governor, whose duties are described in Article III, section 5, is *not included* in the list of Article III officers in RCW.29A.04.321(1)(c), and certainly is *not* subject to election in an off-year under this statute. *See* WASH. CONST. art. III, § 5 (entitled "General Duties of Governor").

1 of the full four year term; now such vacancies are filled at the next general election. WASH.
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3 CONST. art. III, § 10. The holding of *Fish*, reaffirmed in *DeBow*, requires adherence to the
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5 Constitution's provisions for the time and manner for conducting elections; it remains settled
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7 law and is undisturbed by the amendment to § 10. *See also Valentini v. Rockefeller*, 292 F.
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9 Supp. 851, 860 (W.D.N.Y. 1969) (upholding New York law that did not permit filling
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11 vacancy in U.S. Senator's office in odd-numbered year, noting "that the inconvenience and
12
13 expense to the state of this procedure [off-year elections] outweighed any advantages to be
14
15 derived from having a more prompt vacancy election than is now required by [law]").

16
17 Petitioners go on to contend that Article II, § 15 and RCW 29A.04.321(1)(c) silently
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19 amend Articles III, §§ 1 and 10 by permitting general elections for legislators to be held in
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21 November 2005. Opposition at 13. Both Article II, § 15 and RCW 29A.04.321(1)(c),
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23 however, by their express terms address elections to fill *vacancies* in certain offices that are
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25 not within the ambit of Article III, § 10 (i.e., legislative and local partisan office, federal
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27 offices and judicial offices), and do not set times for general elections for those offices.
28
29 Article II, § 15 (titled "Vacancies in legislature and in partisan county elective office")
30
31 (referring to "vacancy" or "vacated" thirteen times); RCW 29A.04.321(1)(c) ("the election of
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33 state and county officers for the remainder of any unexpired terms"). The Supreme Court has
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35 plainly held that elections to fill vacancies are *not* general elections – they are special
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37 elections. *State ex rel. Rummens v. King County*, 160 Wash. 520, 523 (1931) ("It is there
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39 distinctly said that the election to fill the vacancy, although held at the same time and place as
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41 the general election, would be a special election.") (citing *State ex rel. Sampson v. Superior*
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43 *Court*, 71 Wash. 484 (1913)). Indeed, RCW 29A.04.175, which defines "special elections,"
44
45 confirms that Petitioners cannot use semantics to transform a special election that might occur
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47 in 2005 to fill vacancies in the Legislature into a constitutional general election for legislators

1 that are held at fixed biennial intervals. RCW 29A.04.175 provides as follows: "Special
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3 election' means any election that is not a general election and may be held in conjunction with
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5 a general election or primary." *See also* RCW 29A.04.073 ("General election' means an
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7 election *required to be held on a fixed date* recurring at regular intervals.") (emphasis added).
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9 Moreover, the dates set for elections by statute are "mandatory" and specifically set the dates
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11 for all elections except for very limited and specified exceptions. RCW 29A.04.321(5). A
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13 special election for Governor is not one of those exceptions.

14
15 **2. The Election Contest Statutes Prohibit a New Special Election for**
16
17 **Governor.**

18 All of the parties that have briefed this issue agree that the election contest statutes
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20 explicitly provide for certain remedies. Opposition at 3; Response at 2. Nevertheless,
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22 Petitioners suggest that RCW 29A.68.011 impliedly provides this Court with sweeping power
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24 to order a new special election by virtue of the words "do as the court orders." Opposition at
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26 4. If the Legislature meant to make available to the courts the remedy of ordering a new
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28 election, they would have said so. They clearly knew how to expressly limit the Court's
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30 ability to set aside an election. *See* 29A.68.080 and .110. State legislatures that have seen fit
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32 to give courts the power to order a new election have done so by passing a law expressly
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34 authorizing the court to order a new election as an available remedy.⁶ Washington has no
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36 such law. Its courts have no such power.

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41 ⁶ *See, e.g.* Haw. Rev. Stat. § 11-174.5(b) ("If the judgment should be that the general, special
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43 general, special, or runoff election was invalid, a certified copy thereof shall be filed with the
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45 governor, and the governor shall duly call a new election to be held not later than one hundred
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47 twenty days after the judgment is filed.") (West 2005); Idaho Code § 34-2021 ("The judgment of the
court in cases of contested election shall confirm or annul the election according to the right of the
matter . . . or order a new election to be held at a time and place as determined by the court.")
(Michie 2004); Kan. Stat. Ann. § 25-1448 ("then the court may order another election for such office
to be held within 45 days after the date of such order") (West 2005); Mo. Ann. Stat. § 115.593 ("If

1 Petitioners propose that, because the election contest statutes do not explicitly prohibit
2
3 a new special election, those statutes must include that remedy. Opposition at 7. This
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5 argument could not be more squarely refuted by a century of Washington election contest
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7 jurisprudence emphasizing that election contests rest upon and are strictly defined by the
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9 statutory authority provided by the Legislature. See, e.g., *Becker v. County of Pierce*, 126
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11 Wn.2d 11, 18 (1995) ("Early this century we clearly established that the right to contest an
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13 election 'rests solely upon, and is limited by, the provisions of the statute relative thereto.")
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15 (quoting *Quigley v. Phelps*, 74 Wash. 73, 75 (1913)); *Malinowski v. Tilley*, 147 Wash. 405,
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17 407 (1928) ("[T]he right to hear and determine an election contest is not ordinarily a judicial
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19 function of the courts, and can be exercised by them only when and to the extent which the
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21 right is conferred by statute."); *State ex rel. Mills v. Beeler*, 149 Wash. 473, 475 (1928)
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23 (rejecting late filed affidavit in support of election contest: "[t]he court has no inherent
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25 jurisdiction to hear election contests, and such a proceeding is not according to the course of
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27 common law. The right of the court to hear and determine such a matter if it exists must be
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29 found in the statute. Beyond the power given by the statute the court has no jurisdiction in
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31 election contests") (citing *Whitten v. Silverman*, 105 Wash. 238 (1919); *State ex rel. Ransom*
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33 *v. McPherson*, 128 Wash. 265 (1924); *Malinowski*, 147 Wash. 405). Even Petitioners have
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35 acknowledged that, with respect to substantive rights and remedies, election contests statutes
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40 the court or legislative body trying a contested election determines there were irregularities of
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42 sufficient magnitude to cast doubt on the validity of the initial election, it may order a new election
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44 for the contested office or on the contested question." (West 2005); Okla. Stat. Ann. tit. 26 § 8-122
45
46 ("[If] it is deemed impossible to determine . . . to whom a certificate of election shall be issued . . .
47
the judge shall notify the appropriate election board secretary of same . . . The Governor shall then
order a new election to be conducted as soon as is practicable in the same manner as the contested
election[.]") (West 2005); Tex. Elec. Code Ann. § 232.041 ("In an election contest in which the
contested election is declared void, the court shall include in its judgment an order directing the
appropriate authority to order a new election.") (West 2005).

1 are narrowly construed. *See* Reply to WSDCC's Opposition and Supplemental Opposition to
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3 Petitioners' Motion for Expedited Discovery at 7 (describing cases that hold that election
4
5 contest statutes are narrowly construed as cases where "a party was seeking *a substantive*
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7 *remedy* or right that either was not provided or was expressly denied in the applicable
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9 statute.") (emphasis added).⁷ That concession fatally undermines their argument.

10
11 Aware that Washington's election contest statutes do not provide for a court to order a
12
13 new special election, Petitioners nervously hedge their bet and contend alternatively that the
14
15 November 2004 election *never ended*, and that any new special election will simply resume
16
17 proceedings in the November 2004 election after a winter hiatus. Opposition at 7. Petitioners
18
19 state: "What petitioners seek is *not* a special election, but simply a new vote in the tainted and
20
21 still incomplete November 2004 election." This is flatly incorrect. If there is one thing that is
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23 indisputably clear in this dispute, it is that the November 2004 election is complete: Governor
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25 Gregoire was certified and has been "duly elected" according to the plain language of the
26
27 Constitution. WASH. CONST. art. III, § 4 ("The person having the highest number of votes
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29 *shall be declared duly elected*, and a certificate thereof shall be given to such person")
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31 (emphasis added). Results in the 2004 election were certified twice, and Governor Gregoire
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33 was declared the victor in the final certification. She has been issued a certificate of election
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35 signed by the President of the Senate, the Speaker of the House, and the Secretary of State. A
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37 third certification of the November 2004 election under the novel theory that it is incomplete
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39 is not only not possible, it is forbidden. *See* RCW 29A.64.070 (results may not be "recertified
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45 ⁷ Election contest statutes, unlike statutes that purport to restrict a citizens right to vote or
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47 impose qualifications for office, are *not* "liberally construed." *Compare* *Becker*, 126 Wn.2d at 18
(election contest statutes narrowly construed) *with* *Dumas v. Granger*, 137 Wn.2d 268, 284 (1999)
(holding that residency requirements for running for office subject to liberal construction).

1 more than twice"). The proposition that the election continues in perpetuity until this lawsuit
2 is resolved is not "common sense" – it is nonsense – and the cases Petitioners cite do not
3 support the argument.⁸
4
5

6
7 **B. There Is No Equitable or Common Law Authority for a New Statewide**
8 **Special Election.**
9

10 There is, quite simply, no Washington case where a court has ordered a new
11 statewide election as a result of an election contest. Petitioners instead rely on *Foulkes v.*
12 *Hays*, 85 Wn.2d 629 (1975), where the Court expressly denied an election contest but
13 because of fraudulent alteration of ballots between initial counting and a mandatory recount,
14 exercised general equitable powers and allowed a new election for a county commissioner,
15 under an earlier, and then separately codified, version of what is now a portion of RCW
16 29A.68.011. On its face *Foulkes* does not apply to this case. This is an election contest
17 about the election of an Article III, § 1 officer whose manner of election is subject to
18 constitutional restrictions. As the Secretary of State acknowledges, constitutional authority
19 vested original exclusive jurisdiction in the Legislature to hear a contest for a statewide
20 office. *See* Secretary of State's Response to WSDCC's Motion to Dismiss for Lack of
21 Subject Matter Jurisdiction at 5; WSDCC's Reply in Support of Motion to Dismiss for Lack
22 of Subject Matter Jurisdiction at 4. If the Court decides the Legislature delegated its
23 constitutional authority to the courts by way of RCW 29A.68.020, *et. seq.*, that authority is
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43 ⁸ Opposition at 7-8 (*citing Public Citizen v. Zell Miller*, 813 F. Supp. 821, 828-829 (N.D. Ga.
44 1993) (permitting run-off election, where it was explicitly authorized by Georgia election statutes
45 and permitted under federal elections statutes, and no winner had been declared); *Castillo v. Texas*,
46 404 S.W.2d 97, 99 (Tex. Civ. App. 1966) (city incorporated after date customarily used to hold city
47 elections, permitted to elect commissioners where otherwise "it would have been necessary for the
election to have begun before the City came into existence"))).

1 circumscribed by the terms of the legislation. The Court operates without its usual equitable
2 powers and cannot go outside the scope of such a delegation.⁹
3

4
5 Moreover, the *Foulkes* holding regarding a new election has been significantly
6 narrowed. In *Becker*, 126 Wn.2d 11, decided well after *Foulkes* and after the amendment
7 and recodification of the "alternative" statute upon which *Foulkes* relied, the Supreme Court
8 ruled that when a petitioner seeks to correct election official error pursuant to 29A.68.011
9 (1)-(5), "invalidation of the election . . . is not a possible result . . . the *only* relief that a court
10 may afford is to order that the offending person 'forthwith correct the error, desist from the
11 wrongful act, or perform the neglected duty.'" *Becker* 126 Wn.2d at 20; *see also Reid v.*
12 *Dalton*, 100 P.3d 349, 354 (Wash. Ct. App. 2004) ("When a court declares an election
13 invalid, the *sole remedy* is to void the certification.") (emphasis added).
14
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17 Confronted with this language from *Becker*, Petitioners brush it aside as "dicta."
18 Opposition at 6. But the Court in *Becker* carefully noted that the applicability of the election
19 contest and error correction statutes was a "significant" issue, and the opinion is most
20 assuredly not advisory. *Id.* at 19.
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⁹ *See, e.g., Becker*, 126 Wn.2d at 18 ("Early this century we clearly established that the right to contest an election 'rests solely upon, *and is limited by*, the provisions of the statute relative thereto.") (emphasis added); *Malinowski*, 147 Wash. at 407 ("[T]he right to hear and determine an election contest is not ordinarily a judicial function of the courts, and can be exercised by them *only when and to the extent which* the right is conferred by statute.") (emphasis added); *Beeler*, 149 Wash. at 475 (rejecting late filed affidavit in support of election contest: "[t]he court has no inherent jurisdiction to hear election contests, and such a proceeding is not according to the course of common law. The right of the court to hear and determine such a matter if it exists must be found in the statute. *Beyond the power given by the statute the court has no jurisdiction in election contests.*") (emphasis added).

1 **C. Policy Considerations Weigh Strongly Against Conducting a New**
2 **Statewide Special Election.**
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4 There is no basis in Washington law to order a new statewide special election, and
5 policy concerns counsel against it as well. As courts and commentators elsewhere have
6 cautioned, second elections are inherently problematic. The Supreme Court of Arizona, in
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8 *Huggins v. Superior Court*, 163 Ariz. 348, 351 (1990), refused to order a new election
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10 observing:
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14 A second election, however, is not immune from illegal ballots and may
15 prove no better than the first. Moreover, a second election is costly, and
16 the costs are not limited to the heavy fiscal expense of running an election
17 another time. Some votes will be lost in a second election that were
18 properly recorded in the first; these include voters who have died, voters
19 who have moved, and voters whose interest is too attenuated to pull them
20 to the polls a second time.
21

22
23 *See also Developments in the Law: Elections*, 88 Harv. L. Rev. 1298, 1315 (1975) ("Even a
24 second election may raise similar doubts, for there is no assurance it will replicate the results
25 that the first election would have produced had it been free from violations. Indeed, there
26 may even be identifiable biases in second elections.").

27
28
29 Moreover, as the Secretary of State has reminded the Court, the Executive branch,
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31 not the Judiciary, has expertise in the setting and conduct of elections. Response at 3
32
33 (Secretary of State has "considerable knowledge and responsibility with respect to election
34 administration"). Indeed, courts traditionally and appropriately refrain from interference
35 with completed elections unless the contestant has met the heavy burden needed to
36
37 "invalidate the expressed will of the voters." Brief of Amicus Curiae, Secretary of State, at
38
39 7-8, *Becker v. County of Pierce*, 126 Wn.2d 11 (1995) (No. 61553-5) (also noting that
40
41 "[c]ourts universally recognize the strong public policy favoring stability and finality of
42
43 election results.").

1 Washington's own laws express a preference against conducting new elections to
2 determine the result of close electoral outcomes. In the event there is a tie vote for
3 Governor, there is no run-off or special election; the Washington Constitution directs the
4 Legislature to determine the winner by joint vote. WASH. CONST. art. III, § 10. For tie votes
5 for all other elected officials, including state and federal legislators, lots are cast to
6 determine the winner of a tie vote and no special election is held. RCW 29A.60.221.¹⁰
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12 Petitioners describe a parade of horrors that would follow from the conclusion that
13 the election contest statutes do not contain any special election remedy, suggesting that the
14 Court would be left powerless to act. But our election contest statutes in fact arm the Court
15 with a potent array of remedial tools. Opposition at 8-9. Indeed, the entire election can be
16 set aside in the face of gross fraud or error that a petitioner can prove changed the outcome
17 of the election. See RCW 29A.68.080. Alternatively, the Court can annul the election if it
18 is established that the person declared elected was not qualified to hold the office. RCW
19 29A.68.020(2); RCW 29A.68.050. See *In re Contested Election of Schoessler*, 140 Wn.2d
20 368, 384 (2000) (annulling election under prior contest statute RCW 29.65.020 because
21 candidate did not meet residency requirements). Indeed, provided that a petitioner can meet
22 his burden and show illegal votes that change the outcome of an election, the statutes
23 provide for the extreme remedy of annulling the election and installing the contestant into
24 office. RCW 29.68.050. These are hardly impotent remedies, much less ones that call out
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42 ¹⁰ Over forty years ago, Washington formally abandoned holding special elections to
43 determine the outcome of tie votes for statewide officers. Prior to the enactment of RCW 29.62.080,
44 now codified at RCW 29A.60.221, tie votes for state district or legislative offices resulted in a
45 "special election to fill such office . . . ordered by the proper officer." Rem. Rev. Stat. § 5349.
46 Rejecting the concept of a "revote" in such cases, in 1961 the Legislature *repealed* § 5349 and the
47 law was changed to eliminate special elections for tie votes for statewide officers and to instead
resolve those elections by casting lots. Laws of 1961, ch. 130, § 13; RCW 29A.60.221.

1 to the Court to fashion from whole cloth a "special election do over" nowhere to be found in
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3 the text or history of our election contest jurisprudence or constitution.

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5 The true danger lies with Petitioners' position. The precedent Petitioners seek would
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7 provide that, unless it were conducted with absolute administrative perfection, a statewide
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9 election where millions of votes were cast could be struck down only to be held again at a
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11 time and place of a court's choosing. Nothing in the statute authorizes such a result.
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13 Existing Washington election remedies protect the people by guarding against fraudulent
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15 elections, and this State's statutes and its Constitution provide for the orderly filling of office
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17 if the election is indeed corrupt. The rule advanced by Petitioners would allow an entirely
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19 new special election through litigation because the outcome of the first one is close. This is
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21 not the law in Washington. In fact, as the Court emphasized in *Hill v. Howell*, 70 Wash.
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23 603, 613 (1912), "[a]n election honestly conducted under the forms of law ought generally
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25 to stand, notwithstanding individual electors may have been deprived of their votes, or
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27 unqualified electors been allowed to participate . . . it is generally impossible to arrive at any
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29 greater certainty of result by resort of oral evidence. Public policy is best subserved by
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31 allowing the election to stand, and trusting to strict enforcement of the criminal laws for
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33 greater security against the like irregularities and wrongs in the future." *Id.* at 613. Exactly.

34 35 **II. CONCLUSION**

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37 The special election that Petitioners seek is not allowed by the election contest
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39 statues or the Constitution. For the reasons set forth above, and in the WSDCC's Motion,
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41 the Court should strike the requested relief.
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3 **PERKINS COIE LLP**

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5
6 By s/Kevin J. Hamilton

7 Kevin J. Hamilton, WSBA # 15648

8 William C. Rava, WSBA # 29948

9 1201 Third Avenue, Suite 4800

10 Seattle, WA 98101-3099

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12
13 Attorneys for Intervenor-Respondent
14 Washington State Democratic Central
15 Committee
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47

SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838

7 North Wenatchee Avenue, Suite 600

Wenatchee, WA 98807

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751

c/o Perkins Coie LLP

1201 Third Avenue, Suite 4800

Seattle, WA 98101-3099