The Honorable John E. Bridges
Hrg 2/4/05 @ 9:00 a.m.

STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

TIMOTHY BORDERS, et al., Petitioners, v. KING COUNTY, et al., Respondents, WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, Intervenor, LIBERTARIAN PARTY OF WASHINGTON STATE, Intervenor.	NO. 05-2-00027-3 SECRETARY OF STATE'S RESPONSE TO WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

I. SUMMARY OF THIS RESPONSE

Article III, section 4 of our state constitution states that elections for statewide officers (including the office of Governor) "shall be decided by the legislature in such manner as shall be determined by law."

In 1977, the Washington Legislature passed such a law. That law (now codified as RCW 29A.68.020) expanded Washington's election contest statute to broadly provide that all election contests—regardless of whether they involve county, district, or statewide offices—

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shall proceed in the courts. Laws of 1977, 1st Ex. Sess., ch. 361. And pursuant to that 1977 law, the petitioners have filed an election contest in this court.

Intervenor Washington State Democratic Central Committee (the "Democrats") argue that the manner determined by this law for resolving election contests in court is unconstitutional when applied to the office of governor.

The State of Washington's chief elections officer–Respondent Secretary of State Sam Reed–respectfully disagrees for at least five reasons:

1. Neither the text nor the history of Article III, section 4 prohibit the Legislature from allowing court jurisdiction to hear statewide election contests.
2. The text and history of our state's election contest law confirm that the Legislature has vested courts with jurisdiction to hear statewide election contests.
3. The Legislature's debates concerning this election contest suit confirm that the Washington Legislature vested courts with jurisdiction to hear election contests relating to governor.
4. The Washington Supreme Court's refusal to allow the Legislature *exclusive* jurisdiction under Article II, section 8 confirms that the Legislature does not have *exclusive* jurisdiction under Article III, section 4.
5. The Democrats' non-Washington cases do not apply to the constitutional provision and statutory contest proceeding at issue in this case.

As the rest of this brief explains in more detail, the Washington Secretary of State respectfully requests that this Court accordingly deny the Democrats' motion to dismiss for lack of subject matter jurisdiction and allow this election contest to proceed in the prompt, orderly, and non-partisan manner that the Legislature decided upon when adopting our state's election contest law.

II. LEGAL DISCUSSION

A. Neither The Text Nor The History Of Article III, section 4 Prohibit The Legislature From Allowing Court Jurisdiction To Hear Statewide Election Contests.

The territorial code of Washington established two separate elections contest procedure—one for elected legislative officeholders, and another for elected county officeholders. (There were no at large executive officials elected in Washington before

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statehood, for the territorial Governor of Washington was appointed by the President of the United States instead of being elected by the People.[1])

Contests involving the election of a Washington legislator were heard by the legislature,[2] and contests involving Washington's county officials were heard by the courts.[3]

With statehood, the Washington Constitution in 1889 vested the Legislature with the initial power to decide election contests involving both legislators and statewide elected officials. With respect to legislators, Article II, section 8 declared that "Each house shall be the judge of the election, returns and qualifications of its own members." And with respect to elected statewide officials, Article III, section 4 more broadly provided the resolution of contested elections involving the state executive branch would be "decided by the legislature in such manner as shall be determined by law."

In other words, the manner for resolving election contests relating to legislators remained the same as in our State's pre-Constitution territorial days. They would be judged by the legislative house involved.

But election contests relating to statewide offices – elected offices which did not exist in our State's pre-Constitution territorial days – would be determined in whatever new manner the legislature decided to provide by law. And our legislature subsequently decided to provide that manner in our State's election contest law – a law which expressly provides for a petitioner's pursuing his or her election contest in the courts. RCW 29A.68.020 & .011.[4]

Since the ***text*** of Article III, section 4 allows the legislature to decide to provide for that manner of determining statewide election contests, the Democrats' motion relies upon a

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[1] 10 U.S. Statutes at Large, c 90 p. 172 (1853) (reprinted in Volume 0 RCW).

[2] 1881 Washington Territorial Code §§3125-3139.

[3] 1881 Washington Territorial Code §3105.

[4] More specifically, RCW 29A.68.020 provides that "All election contests must proceed under RCW 29A.68.010." As the Code Revisor's Note to RCW 29A.68.20 confirms, the referenced "RCW 29A.68.010" is currently "RCW 29A.68.011". And RCW 29A.68.011 expressly provides that election contests shall proceed before "Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county" – that is, proceed in the Washington courts.

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snippet from the July 26, 1889 *Spokane Review* to argue that "constitutional history confirms that Article III, §4 vests the Legislature with exclusive jurisdiction to hear and determine election contests for statewide executive officers." Democrats' Motion at 7:3-7 (emphasis added).[5]

But a snippet of legislative history cannot change text.

Nor does the snippet of history the Democrats rely upon establish the sweeping proposition the Democrats assert.

Indeed, the more comprehensive daily coverage of our State's Constitutional Convention during those territorial days was provided by the *Oregonian* – and the July 26, 1889 *Oregonian* sets forth the discussion the Democrats rely upon somewhat differently:

> Mr. Stiles asked if the usual way of deciding such contested elections was not through the courts.
>
> Mr. Weir thought these particular cases of contested elections ought to be decided by the legislature.

This short exchange does not support the Democrats' sweeping assertion that, as ultimately adopted, Article III, §4 forever vested the legislature with exclusive jurisdiction to hear and determine election contests for statewide executive offices. Instead, it simply acknowledges that although the usual way to decide contested elections is through the courts, the default could be to have them decided by the legislature (absent the legislature deciding to provide another manner as shall be determined by law).

The above exchange does not re-write the text of Article III, §4 to add a provision that the legislature's jurisdiction exclusive. Nor does that exchange re-write the text of Article III, §4 to delete the legislature's authority to decide that election contests relating to statewide elected offices would be determined in a manner that the legislature decided to provide for by law – authority which the legislature subsequently exercised by deciding to provide in our

[5] This *Spokane Review* quote is reproduced in Rosenow, *The Journal of Washington State Constitutional Convention 1889* (1962), which is the "authority" the Democrats' motion cites.

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State's election contest law that the manner for pursuing an election contest would be in the courts.

B. The Text And History Of Our State's Election Contest Law Confirm That The Legislature Has Vested Courts With Jurisdiction To Hear Statewide Election Contests.

Before 1977, the legislature withheld jurisdiction from the courts concerning contested elections involving the state executive branch.[6] Thus, for example, when the election of Governor-elect Langlie was challenged in 1941, the legislature (rather than the courts) exercised jurisdiction in that election contest.[7]

In 1959, the legislature extended the Washington law governing court contests involving county elections to provide the courts jurisdiction over contests involving district and precinct elected officials as well – but still not statewide executive officials.[8]

The Washington Supreme Court, however, subsequently warned of the "grave danger to our democratic institutions" if the partisan legislature claimed exclusive jurisdiction to disqualify and unseat state elected officials.[9] Consistent with this more modern conclusion that the venue for partisan election contests should not be in the partisan legislature, the Washington legislature decided in 1977 to extend our State's election contest statute to broadly provide for court proceedings in all election contests (instead of just county, district, and precinct contests as had previously been the case). 1977 Washington Laws Chapter 361 §101 (now codified at RCW 29A.68.020).

That 1977 expansion is fatal to the Democrats' statutory claim, for the manner provided for in that enactment does not in any way purport to withhold from the courts jurisdiction over election contests that happen to involve a statewide office such as the Governor.

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[6] In 1927, the Legislature updated the procedure contained in the territorial code for contesting legislative elections. 1929 Washington Laws Ch. 205 § 1. However, no provision was made for how to contest the election of statewide executive officials.

[7] Wash. S. Journal 29-33 (Jan.14, 1941).

[8] 1959 Washington Laws Ch. 329 § 26.

[9] State ex rel. O'Connell v. Dubuque, 68 Wn.2d 553, 561 n.5, 413 P.2d 972 (1966).

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C. The Legislature's Debates Concerning This Election Contest Suit Confirm That The Washington Legislature Did Not Claim Jurisdiction To Hear Election Contests Relating To Governor.

The body the Democrats argue has exclusive jurisdiction over this election contest is not claiming such exclusive jurisdiction. On January 10, 2005, Senate Republicans moved to amend House Concurrent Resolution 4402 to delay certification of the Governor's election until January 25, 2005. That motion failed 25 to 24.[10] And the legislature's debate of that issue confirms the legislature's understanding that it had by law vested the courts with jurisdiction to hear this election contest case.

A crucial vote in that 25-24 rejection of the Republican's proposed amendment was that of Senator Jim Hargove (D - Hoquiam). He explained that he was voting against that amendment because the court process currently underway in this Chelan County Superior Court provided a clear statutory mechanism to address this matter consistent with our Constitution's provision that such contests be decided by the legislature in such manner as shall be determined by law:

> We have, in the Constitution, as you suggested – contested elections for such offices shall be decided by the Legislature in such a manner as determined by law, and there is a law, the Contested Elections Law. And there has been a suit filed, I believe in Chelan County, to have a trial, and go through those all factual issues, which I support. ...
>
> But going ahead with the certification of the governor-elect does not stop that process. If it, in fact, did stop that process, I would be voting different today, because this would be our last chance to have a say in that. And it would make sense to delay it. But that does not stop that process. We have a process in place in this state. We have an election. We have a recount. We have a hand recount. We have auditors certify that election. The Secretary of State, happens to be a Republican, certified that election, also. And then we accept the result. And that does not seal off the Contested Elections Law, that then a suit can be brought and those discrepancies can be challenged in front of a court of law, with a trial, instead of delaying all the work we're doing down here and turning the Legislature into the court of law.

January 10, 2005 Senate Floor Debate at page 3.

[10] January 10, 2005 Senate Floor Debate, at page 15 (attached to Declaration of Jeffrey T. Even).

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Senator Adam Kline (D - Seattle) also opposed the amendment, and likewise concurred with Senator Hargrove's interpretation of the legislature's having previously vested jurisdiction with the courts by law pursuant to Article III, §4:

> I want to also start by commending [the Republicans] for having chosen a statutory way, the way that this Legislature and our predecessors set out, for resolving this issue rather than bringing it to a partisan body ourselves. It will go to the courts, a nonpartisan body, and it will be resolved probably by the Supreme Court in the end. . . .
>
> But the question to get down to in the proceeding that's coming in the next few weeks, I hope it's going to be a quick one, in Chelan County and ultimately here in the Supreme Court, is whether the mistakes, those human and machine errors, were sufficiently one-sided when you nip them out mathematically against the other, to have changed the result. If the courts find that, and this is my faith in our judiciary, if the courts find that, I'll accept the result. Our judiciary, I believe, are people of nonpartisan integrity.

January 10, 2005 Senate Floor Debate, at page 10.

As one last example, Senate Majority Leader Lisa Brown (D - Spokane) similarly concurred:

> We, the legislative branch, my favorite branch of government, do not confirm elections. We do not ratify elections. We do not certify elections. Our duty is spelled out under the Constitution, the clause that was ready previously. It states very clearly that we shall receive the results, the Speaker shall open, publish and declare the results in the presence of a majority of members of both Houses. It does further state that under a contested election that this shall be decided by the Legislature in such manner as shall be determined by law. Not by any process, by law. And we have a law, a contested election law….
>
> Problems that have been raised can and are being raised in the appropriate venues. As I stated before, were we to take any other action we would be making it up as we go along. People have said, but we don't know about this particular incident or that particular incident. Not only that, but we do not have a process under law in order for us to judge that. How would we accept evidence? Would we vote on every case, deciding whether that person's vote did or did not count? Were we to delay for two weeks who's to say what would occur in terms of the normal operations of our system? And who's to say if our deliberations were to result in a different conclusion than that of the judiciary branch? Talk about undermining confidence of the public in our system. Us taking it upon ourselves to make the decision, take over the process, and decide as we go along would greatly undermine confidence in our

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> process and we all know it. It's been raised about the issue of trust. Who do you trust?

January 10, 2005 Senate Floor Debate, at pages 11-12.

In simple point of fact, none of the legislators debating the proposed amendment to delay certification of the 2004 Governor's election agreed with the interpretation of Article III, §4 that the Democrats now advance to prevent this Chelan County Superior Court from proceeding with this case under the election contest statute.

Instead, all of the legislators who discussed this issue concluded, consistent with the discussion of Article III, §4 in the prior pages of this Response Brief, that the Washington Constitution permitted the legislature to decide to provide the courts with jurisdiction to hear statutory election contests such as this one regarding the 2004 Governor's election.

This point concerning current legislators' view that the legislature had decided to provide the courts with jurisdiction by law pursuant Article III, §4 is factually important. *Cf Sackett v. Santilli*, 146 Wn.2d 498, 508, 47 P.3d 948 (2002) (quoting *State ex rel. Foster-Wyman Lunber v. Superior Court*, 148 Wash. 1, 11, 267 P. 770 (1928))(the interpretation by the current legislature "should have great weight with [the courts] in determining the proper view of the constitutional provision.").

D. The Washington Supreme Court's Refusal To Allow The Legislature *Exclusive* Jurisdiction Under Article II, §8 Confirms That The Legislature Does Not Have *Exclusive* Jurisdiction Under Article III, §4.

Article II, section 8 of our State Constitution declares that "Each house shall be the judge of the election, returns and qualifications of its own members."

Based on the implicit premise that Article II, §8 (relating to the election of State legislators) is the same as Article III, section 4 (relating to statewide executive elections), the Democrats cite a 1951 California case to argue that a statute granting the courts jurisdiction to hear a contest under a provision like Article II, section 8 is an unconstitutional delegation of exclusive legislative duties. *In re McGee*, 36 Cal.2d 592, 595, 226 P.2d 1, 3 (1951) (the

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California Constitution confers exclusive jurisdiction on the legislature to decide contests of primary elections involving legislative races).

The Washington Supreme Court, however, strongly rejected that argument concerning Article II, §8 in *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 413 P.2d 972 (1966).

Much like the argument concerning Article III, section 4 in opposition to *this* election challenge, the party opposing the election challenge in *O'Connell* argued that Article II, §8 "totally deprives the courts of jurisdiction to inquire into and pass judgment on the eligibility of a candidate, nominee or election [of a] member of either house." *O'Connell*, 68 Wn.2d at 560. As in the California *McGee* case, the opponent in *O'Connell* described this as a "total want of jurisdiction extending to primary as well as final general elections." *Id*. at 560.

But our State Supreme Court rejected that argument, holding that Article II, section 8 "does not divest the courts of jurisdiction to hear and decide questions respecting the election, returns and qualifications of candidates at the primary election." *Id.* at 563. Although the *O'Connell* election challenge involved a primary election rather than general election, the Washington Supreme Court made it very clear that Washington law takes a very dim view of claims that our State Constitution should be interpreted to divest our courts of jurisdiction in election contest actions:

> We apprehend grave danger to our democratic institutions if it be the inexorable rule that, without regard to concepts of fair play and due process of law, the House and Senate of either the State Legislature or the Congress have exclusive jurisdiction to disqualify and unseat members thereof and that the courts are completely powerless in the premises. Conceding the separation of powers to be one of the keystones of freedom, we note among other dangers that, should the courts be deemed utterly without jurisdiction, one political part can, if ruthlessly bent upon destruction of the opposition, disqualify and unseat all of its opposing members.

O'Connell, 68 Wn.2d at 561 n.5.

In short, *O'Connell* rejected the Democrats' essential premise that our State Constitution requires the legislature to have exclusive jurisdiction over election contests. Especially since Article III, §4 expressly allows the legislature the flexibility to decide to

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provide for election contests proceeding in a manner determined by law, there is nothing unconstitutional about the legislature deciding – as it did in 1977 – to determine by law that such election contests shall proceed in the non-partisan courts rather than in the legislature.

E. The Democrats' Non-Washington Cases Do Not Apply To The Constitutional Provision And Statutory Contest Proceeding At Issue In This Case.

The Democrats invoke several non-Washington cases to argue that election contests regarding statewide offices in Washington must be determined solely by the legislature. But as the following paragraphs explain, such non-Washington cases are not even relevant since they do not involve the situation at issue here – that is, a State Constitution that expressly enables the legislature to decide that election contests shall proceed in the manner determined by law, and the legislature then exercising that authority by deciding to provide by law that such election contests shall proceed in the non-partisan courts rather than in a partisan forum.

For example, the Democrats cite the 1873 Arkansas case of *Brooks v. Baxter*, 28 Ark. 129, 134-135, 1873 WL 998 at *4-5 (1873). But that case did not address the question of whether a legislature such as Washington's can grant jurisdiction over election contests to the courts.

Baxter was a product of a tumultuous period of Arkansas' post-Civil War history known as the "Brooks-Baxter War".[11] The November 1872 election produced charges of widespread voting fraud,[12] and the declared winner (Mr. Baxter) surrounded himself with a "Governor's Guard" of forty to fifty armed men to block his opponent's attempt to oust him.[13]

[11] See, Logan Scott Stafford, "*Judicial Coup d'Etat: Mandamus, Quo Warranto and the Original Jurisdiction of the Supreme Court of Arkansas*," 20 U.Ark. Little Rock L.J. 891 (1998).

[12] For example, the entire vote from at least four counties was thrown out. 20 U.Ark. Little Rock L.J., at 929.

[13] 20 U.Ark. Little Rock L.J., at 939.

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The attorney general filed a common law *quo warranto* application –not a statutory election contest – with the Arkansas Supreme Court alleging that Mr. Baxter had "usurped, intruded into and unlawfully held" the office of governor.[14]

The Arkansas Court, however, observed that the legislature had by statute determined the manner in which actions concerning the governor's election would proceed ***in the legislature*** – a statute that provides "the method of conducting such contests before both houses in joint meeting, provides how the case shall be brought before them, and how notice shall be given and proof taken, etc." *Brooks*, at *16 (emphasis added). Not surprisingly, the Arkansas Court concluded that "wherein a specific mode of contesting elections was provided by statute according to the requirements of their constitution… this specific mode alone could be resorted to, to the exclusion of the common law mode of inquiry by proceedings in *quo warranto*." *Brooks*, at *20. Accordingly, the *Brooks* court concluded that it lacked jurisdiction to hear the petitioner's common law *quo warranto* application.[15]

But the opposite conclusion applies here. The Washington legislature has by statute determined the manner in which contest actions proceed ***in the courts*** – adopting a statute that provides the method of conducting election contests before the Washington courts, provides how the case shall be brought before them, and how notice shall be given and proof taken, etc. Chapter 29A.68 RCW. Given this specific mode of contesting elections provided by statute, the Democrats' citation of *Brooks* only confirms that "this specific mode alone could be resorted to" – and thus, as provided in that statute, this court does have jurisdiction to hear this statutory election contest.

The other cases cited by the Democrats are similarly inapposite.

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[14] That quo warranto suit was also in response to a constitutional amendment pushed by Governor Baxter that re-enfranchised former Confederate soldiers. 20 U.Ark. Little Rock L.J., at 933-39.

[15] The Arkansas Supreme Court may have had other considerations in mind other than the persuasiveness of Baxter's legal arguments. The Chief Justice later testified to a congressional investigation that one of Baxter's militia officers actually attended the oral argument with a martial law proclamation in his pocket. *Id*. at 940.

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For example, *Robertson v. State ex rel. Smith*, 109 Ind. 79, 10 N.E. 582 (1887), similarly involved a common law *quo warranto* application rather than a statutory action under a statute's election contest procedures. In that case, the State's General Assembly had passed a statute that provided for a specific mode of contesting elections ***in the legislature***. *Robertson*, 10 N.E. at 588. Given that specific statutory mode for pursuing election contests in the legislature, the *Robertson* court unsurprisingly concluded that the courts did not have jurisdiction to entertain a common law *quo warranto* proceeding instead.

The same situation was present in *Roe v. Mobile County Appointment Bd.*, 676 So.2d 1206 (Ala. 1995) (§ 17-15-23 Ala.Code provides exclusive method for contesting the election of senator or representative in the Alabama legislature), and *Taylor v. Beckham*, 108 Ky. 278, 56 S.W. 177, 178 (1900) (Kentucky statute provides that contested elections for governor shall heard by a board of the general assemble chosen by lot). These cases accordingly do not support the Democrats' essential premise that it was unconstitutional for the Washington legislature to decide to provide by law in our election contest statute that statewide election contests proceed in the non-partisan courts rather than partisan legislature.

Nor does *Dickson v. Strickland*, 144 Tex. 176, 265 S.W. 1012, 1016 (1924), support the Democrats' argument – for the constitutional provision in Texas is simply not analogous to ours. Article 4, §4 of the Texas Constitution states that "contested elections for either [executive officer] shall be determined by both houses of the Legislature in joint session", without the additional language in our State's Article III, §4 that allows the legislature the flexibility to decide that such contests may proceed in a manner determined by law (e.g, proceed in the courts in the manner determined by law in Washington's election contest statute).

In short, the Democrats' non-Washington cases do not relate to whether it was unconstitutional for the Washington legislature to decide to provide by law that gubernatorial election contests proceed in the non-partisan courts rather than in a partisan legislative body.

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And such non-Washington cases certainly do not satisfy the Democrats' heavy burden of proving that the Washington election contest statute's providing for contests to proceed in court is, when applied to statewide elections such as Governor, unconstitutional beyond a reasonable doubt. E.g., *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998) (Washington courts presume that statutes are constitutional, and the person challenging a statute on constitutional grounds must prove the statute is unconstitutional beyond a reasonable doubt).

III. CONCLUSION

The Washington election contest statute allows the petitioners' gubernatorial election contest to proceed in this court in a prompt, orderly, and non-partisan manner. And as explained above, the Washington election contest statute's provision for this statutory court proceeding is not unconstitutional under Article III, section 4.

To the contrary, the Washington legislature's deciding to provide by law for such a prompt and orderly disposition in a non-partisan forum is consistent with the text and history of Article III, section 4. It is consistent with the text and history of our State's election contest law. It is consistent with the current legislature's view that the legislature has provided for court jurisdiction in this matter pursuant to Article III, section 4. It is consistent with the Washington Supreme Court's refusal to recognize a partisan forum as having *exclusive* jurisdiction under the even less flexible provisions of Article II, section 8. And it is not refuted by the Democrats' proffer of non-Washington cases such as *Brooks v. Baxter*.

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The Washington Secretary of State respectfully requests that this Court accordingly deny the Democrats' motion to dismiss for lack of subject matter jurisdiction.

DATED this 26th day of January, 2005.

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