

1 court to order a prompt new election.¹ If this Court ultimately determines that it has authority
2 to set aside or annul an election on the basis that it cannot be known with certainty which
3 candidate received the highest number of legal votes, and it determines that it is appropriate to
4 set aside the gubernatorial election for that reason, then the Court will have to determine
5 whether its authority is confined to setting aside or annulling the election, or whether the
6 Court has equitable power to order a new election.²

7 Secretary Reed respectfully submits that if the Court eventually concludes that the
8 election results should be set aside, under the law, the voters, and not this Court or the
9 Legislature, would select Washington's governor.

10 In instances where "it shall appear that another person than the one returned has the
11 highest number of legal votes," the "court shall declare such person duly elected." RCW
12 29A.68.050. Otherwise, the remedy designated by the election contest statute is an order
13 "annulling and setting aside such election". *Id.*³ If, as the Intervenors contend, this Court's
14 authority does not include ordering a new election, an order setting aside the election
15 nonetheless would lead to an election, as it would create a vacancy in the office of governor.
16 RCW 42.12.010(7) ("Every elective office shall become vacant on the happening of any of the
17 following events . . . (7) The decision of a competent tribunal declaring void his or her
18 election or appointment"). A new election would occur under the terms of article III, section
19 10 of the state constitution. That section provides that upon removal of the governor, the
20 duties of office devolve upon the lieutenant governor. Const. art. III, § 10. By virtue of this
21 constitutional provision, "[a]ny person succeeding to the office of governor as in this section

22 ¹ Only if it is demonstrated to the Court that "another person than the one returned has the highest
23 number of legal votes" shall the Court "declare such person duly elected." RCW 29A.68.050.

24 ² See *Foulkes v. Hays*, 85 Wn.2d 629, 537 P.2d 777 (1975) (recognizing equitable authority of a court to
25 order a new election in a statutory proceeding to correct election fraud or error absent another adequate remedy).

26 ³ Presumably the remedy of annulling or setting aside a contested election without also declaring
another candidate to be the winner would be appropriate for those causes set forth in RCW 29A.68.020 (2)-(4),
where the person whose right is being contested is ineligible for office or has engaged in disqualifying
misconduct.

