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I. INTRODUCTION

To the extent that *any* Washington court has jurisdiction to consider an election contest under RCW 29A.68 *et seq.* for the office of Governor,¹ such actions must be brought pursuant to RCW 29A.68.011 and must be filed in "the appropriate court." This Court is not "the appropriate court" for an action contesting a statewide election and naming as Respondents every one of the State's counties and their chief election officials, as well as the Secretary of State, the Speaker of the House, and the President of the Senate. The election contest statute specifies that an affidavit of an elector initiating an election contest "must be filed with the *appropriate court*," RCW 29A.68.030 (emphasis added), and that "[u]pon such affidavit being filed, the clerk shall inform the judge of the *appropriate court*," RCW 29A.68.040 (emphasis added).

With all due respect for this Court, Chelan County is not the appropriate venue for this statewide election contest. Many of the county Respondents now seek dismissal of the claims against them – in part because venue is not proper. The only court that *is* an appropriate venue for all of the county Respondents – and the only "appropriate" court – is the Washington Supreme Court, where three other election contests involving this very

¹ Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC") will separately address the question of whether any court has jurisdiction to consider election contests for the office of Governor in light of Article III, § 4 of the Washington Constitution, which provides that "contested elections for [Governor] shall be decided by the legislature in such manner as shall be determined by law." By filing this motion, WSDCC does not concede that any court has jurisdiction to decide such election contests; only that, if any court has jurisdiction, there is only one "*appropriate court*" for such an action: the Washington Supreme Court. The Court need not address the issues raised in this motion regarding venue unless it finds that it has subject matter jurisdiction over this election contest. *See generally Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315-16 (2003) (discussing interplay between concepts of subject matter jurisdiction and venue).

1 election have been initiated. Transfer to the Supreme Court would maximize judicial
2 efficiency and avoid the potential for inconsistent results. Upon transfer of this action to the
3 Supreme Court, that Court may specify how further proceedings are to be conducted and
4 may select an appropriate venue for any fact finding, such as Thurston County (where the
5 certificate of election was issued and the Secretary of State, as Chief Election Officer under
6 RCW 29A.04.230, managed the election and issued guidelines to all chief county election
7 officers for the two recounts).
8
9

10 Accordingly, Intervenor-Respondent Washington State Democratic Central
11 Committee ("WSDCC") moves the Court to dismiss the action or, in the alternative, to
12 transfer venue to the Supreme Court, which could then consider this action in concert with
13 other pending contests as it deems appropriate.
14

15 **II. RELIEF REQUESTED**

16 WSDCC respectfully requests that the Court grant its motion to dismiss this action
17 because venue is improper. In the alternative, WSDCC requests that the Court determine
18 that the Washington Supreme Court is the appropriate court to hear this contest and transfer
19 this statewide election contest to the Supreme Court. Even if the Court concludes that venue
20 is proper as to some of the parties, WSDCC requests that the Court transfer this case to
21 Thurston County, where the certificate of election was issued, where the rules and
22 procedures for conducting the election and the recounts were developed, implemented and
23 monitored, and where the Chief Election Officer resides.
24

25 **III. ISSUES PRESENTED**

26 1. Whether Chelan County Superior Court is "the appropriate court" for an
27 election contest under RCW 29A.68.011 and 29A.68.030 where the election contest
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WSDCC'S MOTION TO DISMISS FOR
IMPROPER VENUE OR, IN THE
ALTERNATIVE, TO TRANSFER VENUE - 2

[SL050200.132]

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1 concerns an election for a statewide office and was filed against all the State's counties and
2
3 their chief election officials, among others.

4
5 2. Whether the Court should transfer this election contest to the Washington
6
7 Supreme Court, which is "the appropriate court" under the election contest statute.

8
9 3. Whether, if the Court does not transfer this contest to the Washington
10
11 Supreme Court, the Court should transfer it to Thurston County Superior Court.

12 IV. FACTUAL BACKGROUND

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14 On January 7, 2005, Petitioners filed this election contest. Petitioners are seven
15
16 individuals and the Rossi for Governor Campaign. Pet. at 1, 3. Petitioners' filings reveal the
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18 residence of two of the individual Petitioners: Elector Thomas L. Canterbury resides in
19
20 Chelan County. Pet. at 5. Christopher Vance, chairman of the Washington State
21
22 Republican Party ("WSRP"), resides in King County. Aff. of Chris Vance in Supp. of
23
24 Election Contest Pet. ("Vance Aff.") ¶ 2. Petitioners have named as Respondents all 39
25
26 counties of the State and their respective auditors or highest-ranking election officials. Pet.
27
28 at 1, 3. They have also named as Respondents Secretary of State Sam Reed, Speaker of the
29
30 Washington State House of Representatives Frank Chopp, and President of the Washington
31
32 State Senate, Lieutenant Governor Brad Owen. Pet. at 2. WSDCC and the Libertarian Party
33
34 of Washington both moved to intervene in the election contest on January 12, 2005.
35
36 Declaration of William C. Rava in Support of WSDCC's Motion to Dismiss for Improper
37
38 Venue or, in the Alternative, to Transfer Venue ("Rava Decl.") ¶ 5. On the same day, the
39
40 Court granted the motions to intervene, but provided any party the opportunity to object to
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42 intervention prior to Friday, January 14, 2005, at 11:00 a.m. Rava Decl. ¶ 5, Ex. D. No
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44 party did so. *Id.*

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WSDCC'S MOTION TO DISMISS FOR
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1 Prior to the filing of this action, two other contests concerning this election had
2 already been lodged or filed in the Washington Supreme Court. Rava Decl. ¶¶ 2, 4, Exs. A,
3 C. Since the filing of this action, at least two new additional actions have been initiated, one
4 in Kitsap County Superior Court and another in the Supreme Court. Rava Decl. ¶¶ 6, 8,
5 Ex. E. WSDCC has moved to intervene in the Kitsap County action. Rava Decl. ¶ 6.
6
7
8
9

10 This election, including recounts, was administered by the Secretary of State in
11 Thurston County as Chief Election Officer of the State. See RCW 29A.04.230. Local
12 county procedures are developed to comply with laws adopted in Olympia and with rules
13 written or adopted by the Secretary of State. The election was certified by the Secretary of
14 State in Thurston County, the certificate of election was signed by the President of the
15 Senate and the Speaker of the House in Thurston County, and Thurston County is, of course,
16 the seat of our State's government. Rava Decl. ¶ 7, Ex. F.
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25 V. ARGUMENT AND AUTHORITY

26 This motion is based on CR 12(b)(3), CR 82(b), RCW 29A.68 *et seq.*,
27 RCW 4.12.030, RCW 4.12.060, and the authorities cited below.
28
29

30 A. Chelan County Superior Court Is Not the Proper Venue for a Statewide 31 Election Contest Filed Against Every County and Chief Election Officer 32 in the State. 33 34

35 Election contests may be initiated for the limited causes set forth in
36 RCW 29A.68.020. That statute requires that the contest be brought pursuant to the venue
37 and time limitations set forth in RCW 29A.68.011, which provides that a challenge to the
38 issuance of a certificate of election must be "filed with the appropriate court" within ten days
39 of the issuance of the certificate. RCW 29A.68.011 (final paragraph). The election contest
40 statutes also specify that an affidavit of an elector "must be filed with the *appropriate*
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1 court," RCW 29A.68.030 (emphasis added), and that "[u]pon such affidavit being filed, the
2 clerk shall inform the judge of the *appropriate court*," RCW 29A.68.040 (emphasis added).
3

4 This Court is not the "appropriate" court under these statutes for this election contest.
5
6 A superior court could, of course, be the proper forum for some election contests, such as
7
8 contests challenging elections for county or city officers.² Here, however, Petitioners
9
10 challenge the election for a statewide official – an election conducted under the oversight of
11
12 a statewide official – and name all the counties and chief election officials of the State as
13
14 Respondents. *See* Pet. at 1-3. Petitioners raise issues regarding ballots cast throughout the
15
16 State and regarding the actions of county election officials throughout the State. But venue
17
18 is not proper in this Court as to all counties and their election officials.³ Indeed, several of
19
20 the counties have already moved to dismiss this action for improper venue pursuant to
21
22 RCW 36.01.050 and RCW 4.12.020(2), including Stevens and Island Counties. Under
23
24 RCW 36.01.050, venue is proper in Chelan County for only Chelan, Douglas, and Grant
25
26 Counties. *See* RCW 36.01.050; Rava Decl. ¶ 9, Ex. H. Under RCW 4.12.020(2), venue is
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33 ² *See generally Dumas v. Gagner*, 137 Wn.2d 268 (1999) (reviewing ruling of Benton
34 County Superior Court regarding contest over local Port District Commissioner's election); *Gold Bar*
35 *Citizens for Good Gov't v. Whalen*, 99 Wn.2d 724 (1983) (reviewing ruling of Snohomish County
36 Superior Court regarding contest over city mayor's election). Under Article III, § 4 of the
37 Washington Constitution, the Legislature has exclusive jurisdiction over an election contest for the
38 office of Governor. Thus, it is not surprising that there are no cases discussing "the appropriate
39 court" to hear a contest for a statewide executive office.
40

41 ³ RCW 4.12.025 provides that, in a suit against multiple defendants, the suit may be brought
42 where one of the defendants resides. However, if venue would be unfair to a defendant who does not
43 reside in the forum county, the court may sever that defendant from the lawsuit, so that the claims
44 against that defendant may be pursued separately, in the proper venue. *See* CR 21. If county and
45 county official Respondents move to dismiss this contest for improper venue, the contest would
46 either be transferred or refiled as to those counties throughout the State. As discussed in Part V.B.1.,
47 *infra*, it would be inefficient for multiple contests to proceed throughout the state.

1 proper against county officials in Chelan County only for claims that arose in Chelan
2
3 County. *See* RCW 4.12.020(2).

4
5 The only Petitioners who even allege any error or irregularity in Chelan County are
6
7 Thomas E. Canterbury and Fredi Simpson. Mr. Simpson does not even contend that his own
8
9 vote was not counted, but instead recites that, on December 23, 2004, long after Chelan
10
11 County had certified the results of the manual recount, the Chelan County canvassing board
12
13 refused to recanvass Mr. Canterbury's vote (which was previously considered and rejected
14
15 because his signature on his absentee ballot did not match the signature on his registration
16
17 records). This is far from error; the Washington Supreme Court has unambiguously and
18
19 unanimously ruled that the board had discretionary authority to correct errors brought to
20
21 their attention prior to certification of the county returns. *Wash. State Republican Party v.*
22
23 *King County Div. of Records, Elections & Licensing Servs.*, ___ P.3d ___, 2004 WL
24
25 3016346, at *1 (Wash. Dec. 22, 2004) (finding that "under proper circumstances a
26
27 canvassing board may decide that ballots should be recanvassed before certification of a
28
29 recount"). And the Supreme Court was equally emphatic in *McDonald v. Secretary of State*
30
31 *Reed*, ___ P.3d ___, 2004 WL 2937796 (Wash. Dec. 14, 2004), that the Court was without
32
33 power to order a canvassing board to recanvass ballots "previously rejected in this election."
34
35 *Id.* at *2. Indeed, the Court in *McDonald* rejected almost identical arguments – the county
36
37 canvassing boards had improperly refused to reconsider ballots rejected for signature
38
39 problems. *Id.* But even if it were error, this plainly does not establish grounds for an
40
41 election contest under RCW 29A.68.020. Mr. Canterbury's allegations are patently
42
43 insufficient to support an election contest and, without Mr. Canterbury's affidavit, this
44
45 election contest proceeding has no remaining connection to Chelan County.
46
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WSDCC'S MOTION TO DISMISS FOR
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ALTERNATIVE, TO TRANSFER VENUE - 6

[SL050200.132]

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1 The remedy sought by Petitioners further underscores that that this is not the
2
3 "appropriate court" for such an action. Petitioners request that the Court order an
4
5 unprecedented new special election for the office of Governor. Pet. at 10. WSDCC disputes
6
7 that such a remedy is even legally available without amendment to our Constitution. But
8
9 even if Petitioners' requested remedy were available, it is a remedy that would impose a
10
11 substantial burden on counties and taxpayers statewide. A new special election would create
12
13 a significant expense for taxpayers across the State and would require considerable time
14
15 from state and county election officials to be implemented. If such a statewide burden is
16
17 imposed, the appropriate court to impose it is the only statewide court available – the
18
19 Supreme Court.⁴ Further, the election at issue is already final and the new Governor has
20
21 been sworn into office. Petitioners essentially ask the Court to remove a sitting Governor
22
23 from office by voiding the results of the 2004 election for Washington Governor, which
24
25 results have been certified by the chief election official in every county, the Secretary of
26
27 State, and the Legislature. Rava Decl. ¶¶ 3, 7, Exs. B, F. If the Court were to set aside this
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29 election, the Court would be negating the votes of people throughout the State, including
30
31 those residing in counties far away from Chelan; potentially ignoring or overturning the
32
33 Legislature's vote; and ousting a sitting Governor. A superior court is not the "appropriate"
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35 court to issue such an order.
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44 ⁴ Similarly, hearing and managing this election contest will impose a significant burden on
45 the resources and docket of this Court, which will be borne by the taxpayers of Chelan County. It
46 does not seem reasonable that the Legislature would have imposed such a burden on a single county
47 for the determination of a contest involving a statewide office.

1 **B. The Court Should Transfer This Contest to the Washington Supreme**
2 **Court, Which Is the Only Appropriate Court for This Contest.**
3

4 If it does not dismiss this contest for improper venue, the Court should transfer this
5
6 contest to the Washington Supreme Court. The Court has the authority to do so for two
7
8 reasons. As discussed above, RCW 29A.68.020, with its reference to RCW 29A.68.011,
9
10 requires election contests to be brought in "*the* appropriate court."⁵ It is beyond reasonable
11
12 dispute that the Washington Supreme Court is *an* "appropriate" court under the statute. The
13
14 question is whether a superior court of any single county is also an "appropriate" court.
15
16 There is nothing about RCW 29A.68.011 that suggests that the law contemplates multiple
17
18 "appropriate" courts. The statute's reference to "the" appropriate court suggests there is only
19
20 one such court. But even if both the Supreme Court and all county superior courts are
21
22 "appropriate" courts under RCW 29A.68.011, the action should be transferred to the
23
24 Washington Supreme Court under RCW 4.12.030 and 4.12.060 for convenience and to serve
25
26 the ends of justice.

27
28 **1. Under RCW 29A.68.011, the Washington Supreme Court Is the**
29 **"Appropriate" Court for This Contest.**
30

31 Under RCW 29A.68.011, to the extent an election contest may be brought in court at
32
33 all, the Washington Supreme Court has original jurisdiction. Having this contest heard in
34
35 the Supreme Court rather than a superior court would alleviate the problems of single-
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37 county administration discussed above, would be an efficient use of judicial resources, and
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45 _____
46 ⁵ To be precise, RCW 29A.68.020 provides that "[a]ll election contests must proceed under
47 RCW 29A.68.010," which section was repealed in 2004 and later enacted in the form of RCW
29A.68.011.

1 would serve the public's interest in having this matter resolved in a fair and just, but also
2 expedient, fashion.
3

4 If this contest were heard in the Supreme Court, there would be no concerns about
5 venue being proper as to the many county and county election official Respondents. Each
6 county and its chief election official can properly be sued in the Supreme Court. *See, e.g.,*
7 *State ex rel. Kurtz v. Pratt*, 45 Wn.2d 151, 152 (1954) (exercising original jurisdiction over
8 Whatcom County Auditor).
9

10 The important statewide implications of an election contest seeking to remove a
11 sitting Governor from office, particularly a contest that seeks an unprecedented new special
12 election for Governor, warrant consideration by the Supreme Court. As Petitioners no doubt
13 agree, this is a matter of substantial importance to voters throughout the State. An election
14 contest for a statewide office, by its very nature, implicates such important state interests
15 that it mandates hearing in the Supreme Court. As such, it should first be offered to the
16 Supreme Court for that Court to decide whether, and to what extent, to exercise its original
17 jurisdiction.
18

19 In addition, the particular history of this election and the recounts for the 2004
20 Governor's race make the Supreme Court a uniquely appropriate court. The Supreme Court
21 is familiar with the facts surrounding the 2004 Governor's race. During the manual recount,
22 the meaning and application of Washington election law was litigated and resolved in two
23 separate legal actions before the Supreme Court, including one action in which the Court
24 agreed in part with the interpretation of Washington recount statutes advocated for by the
25 WSRP, appearing on behalf of Mr. Rossi. *See Wash. State Republican Party*, 2004 WL
26 3016346; *see also McDonald*, 2004 WL 2937796.
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WSDCC'S MOTION TO DISMISS FOR
IMPROPER VENUE OR, IN THE
ALTERNATIVE, TO TRANSFER VENUE - 9

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Moreover, the Court should transfer this contest to the Supreme Court to allow consolidation with other election contests filed in the Supreme Court. Consolidation is appropriate when "actions involving a common question of law or fact are pending before the court[.]" CR 42(a). When cases involving common questions of law or fact are brought before different courts, the proper way to consolidate is to transfer venue to the court that should hear the action. *See Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat. Bank*, 115 Wn.2d 307, 318 (1990). Two election contests were lodged or filed with the Supreme Court prior to the initiation of this action. Rava Decl. ¶¶ 2,4, Exs. A, C. Since this contest was filed, one additional contest was filed with the Supreme Court and another contest was filed in Kitsap County Superior Court. Rava Decl. ¶¶ 6, 8, Ex. E. In a matter of such importance, it would be highly inefficient to have multiple election contests taking place independently in different courts throughout the State and which possibly could lead to varying decisions. The counties and officials named should not have to defend multiple contests throughout the State. Thus, consolidation of all of these election contests is appropriate. And, for the reasons discussed above, the Supreme Court is in a better position than any superior court to hear the contest.

Where state interests are involved, original jurisdiction in the Supreme Court is appropriate:

Because this case concerns the constitutionality of a statute and involves issues relating to the expenditure of public funds, we consider the matter to be of sufficient public importance to warrant our exercise of original jurisdiction.

City of Tacoma v. O'Brien, 85 Wn.2d 266, 268 (1975) (mandamus action). The Supreme Court, therefore, has accepted original jurisdiction when statewide interests are involved. *Cf. Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 54 (2003) (exercising original

WSDCC'S MOTION TO DISMISS FOR
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VENUE - 10

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1 jurisdiction over petition for writ of mandamus challenging constitutionality of referendum);
2
3 *State ex rel. O'Connell v. Meyers*, 51 Wn.2d 454, 460 (1957) (exercising original
4
5 jurisdiction in mandamus action involving duties of Secretary of State prior to elections);
6
7 *State ex rel. Pac. Bridge Co. v. Wash. Toll Bridge Auth.*, 8 Wn.2d 337, 342 (1941)
8
9 (exercising original jurisdiction over petition for writ of mandamus where respondent was a
10
11 state agency and the general public has an interest in its affairs).

12
13 The Supreme Court does not normally conduct fact-finding hearings, of course, but
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15 in this instance a fact-finding hearing may not even be necessary. Petitioners must
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17 overcome significant legal hurdles before any court hears evidence in this matter, such as
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19 establishing that *any* court has subject matter jurisdiction over an election contest for the
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21 office of Governor and that a court can order an unprecedented new special election for
22
23 Governor. The Supreme Court is the proper court to decide these legal issues. If the
24
25 Supreme Court determines that a hearing pursuant to RCW 29A.68.050 is necessary, the
26
27 Supreme Court may refer questions of fact to a master or superior court. RAP 16.2(d).⁶
28
29 Moreover, whatever the outcome in the trial court, an appeal to the Supreme Court is
30
31 certain. Thus, for all these reasons, the Washington Supreme Court is the "appropriate"
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33 court for this contest under RCW 29A.68 *et seq.*

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45 ⁶ Under RAP 16.2(d), which governs original actions in the Supreme Court against state
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47 officers, the Court has a choice whether to transfer to a superior court for determination on the merits
or to retain original jurisdiction. If it chooses not to transfer the case, it may refer questions of fact to
a master or the superior court, but retains original jurisdiction.

1 **2. Even if Venue Is Proper in Both This Court and the Supreme**
2 **Court, This Court Should Transfer This Contest to the Supreme**
3 **Court for Convenience and to Serve the Ends of Justice.**
4

5 RCW 4.12.030 and 4.12.060 give the Court authority to transfer any case to a court
6
7 that would be more convenient or to serve the ends of justice:
8

9 The court may, on motion, in the following cases, change the place of
10 trial when it appears by affidavit, or other satisfactory proof: . . .
11 (3) That the convenience of witnesses or the ends of justice would be
12 forwarded by the change
13

14
15 RCW 4.12.030; *see also* RCW 4.12.060 ("If the motion for a change of the place of trial be
16 allowed, the change shall be made . . . to the most convenient county . . ."). A party's right
17 to have a case transferred to a more appropriate forum is of equal importance with the right
18 to be sued initially in a court with proper venue. *See State ex rel. Merritt v. Superior Court*,
19 147 Wash. 690, 696 (1928) ("[O]ur statute . . . has provided for a change of the place of trial
20 where the convenience of the witnesses or the ends of justice demand, and the rights so
21 granted are as valuable as the [right to be sued initially in a court with proper venue].").
22
23

24
25 Even if venue is proper in this Court under RCW 29A.68.011, that statute does not
26 grant the superior court exclusive jurisdiction. This Court may transfer the contest to the
27 Supreme Court to serve the "ends of justice." *Cf. Toliver v. Olsen*, 109 Wn.2d 607, 609
28 (1987) (allowing transfer of habeas corpus petition filed in superior court to the court of
29 appeals to serve the ends of justice); *see generally* RCW 4.12.030.
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33 For the same reasons that the Washington Supreme Court is the appropriate court to
34 hear this contest under RCW 29A.68 *et seq.*, a transfer of this contest to the Supreme Court
35 would serve the ends of justice. *See* Part V.B.1., *supra*. Therefore, even if the Court
36 decides that RCW 29A.68 *et seq.* does not require that this action be brought in the Supreme
37 Court in the first instance, the important statewide interests implicated are grounds for this
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WSDCC'S MOTION TO DISMISS FOR
IMPROPER VENUE OR, IN THE
ALTERNATIVE, TO TRANSFER
VENUE - 12

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1 Court to transfer the action to the Washington Supreme Court. The Supreme Court is
2 familiar with the factual issues surrounding this election and is the appropriate court to hear
3 the considerable legal issues that should be examined prior to any hearing. Finally, this
4 Court should transfer this contest to the Supreme Court to allow consolidation with the other
5 election contests already filed with the Supreme Court.
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11 **C. If This Court Does Not Transfer This Contest to the Supreme Court, It**
12 **Should Transfer It to Thurston County Superior Court.**
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14 In the alternative to dismissal or transfer to the Supreme Court, this Court could
15 transfer this contest to Thurston County Superior Court. An election contest determines
16 whether the winning candidate properly was issued a certificate of election and declared
17 elected, or whether the certificate should not be issued because of one of five contest
18 grounds specified by the statute. RCW 29A.68.020. Under the Constitution, the Secretary
19 of State delivers the returns certified by the counties to the Speaker of the House of
20 Representatives, who "open[s], publish[s] and declare[s] the result thereof in the presence of
21 a majority of the members of both houses." WASH. CONST. art. III, § 4. The Secretary of
22 State presided over the election for Governor and issued guidelines to all 39 counties for the
23 election and two subsequent recounts. *See, e.g., Rava Decl.* ¶ 10, Ex. I. In addition, the
24 Certificate of Election was issued in Olympia and the original and amended abstracts from
25 each count were filed by the Secretary of State's office, located in Olympia. *Rava Decl.*
26 ¶¶ 3, 7, Exs. B, F. Moreover, the superior court in Thurston County is proximate to the
27 Supreme Court and is the Court in which suits involving governmental actions commonly
28 are brought. If this court determines this contest can be brought in any superior court,
29 transfer to Thurston County is appropriate.
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VI. CONCLUSION

For the reasons set forth above, the Court should grant the Motion to Dismiss for Improper Venue or, in the Alternative, to Transfer Venue.

DATED: January 20, 2005.

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