Honorable John Bridges
Department 3
Noted For Hearing
Friday February 4, 2005; 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, Thomas Canterbury, Tom Huff, Margie Ferris, Paul Elvig, Edward Monaghan, Dino Rossi, and Christopher Vance, Washington residents and electors, and the Rossi for Governor Campaign, a candidate committee, Petitioners, Vs. King County and Dean Logan, its Director of Records, Elections and Licensing Services, et al., Respondents.	NO. 05-2-00027-3 PIERCE COUNTY AND PIERCE COUNTY AUDITOR'S REPLY TO OPPOSITION TO DISMISSAL

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I. INTRODUCTION

As noted in their prior memorandum, Pierce County and its Auditor join and adopt as additional grounds for dismissal the analysis contained in similar motions filed by other Counties in this action. See 1/14/05 Joinder Brief. Pierce County further also joins and adopts the motions to dismiss and strike thereafter filed by intervenor Washington State Democratic Central Committee (hereinafter "WSDCC"). See 1/21/05 WSDCC Motions. Now, in reply to petitioner's opposition, the instant memorandum addresses: 1) how the untimeliness of the petition and its "affidavits" preclude any challenge to Pierce County's certificate of election; 2) how the failure of those "affidavits" to comply with statutory requirements also are fatal to such a challenge; and 3) how any judgment or remedy imposed against any other entity should not include a revote in Pierce County.

II. ANALYSIS

A. PIERCE COUNTY'S CERTIFICATE OF ELECTION IS NO LONGER SUBJECT TO CHALLENGE

Pierce County and its Auditor have previously noted that petitioner's submissions were untimely. See 1/14/05 Joinder, pp. 4-5. In response, petitioners nowhere dispute 1) that their "election contest under RCW 29A.68" was initiated on January 7, 2005, see 1/7/05 Petition, p. 3; 2) that it came three weeks after Pierce County issued its certification of election on December 17, 2004, see McCarthy Aff; ER 201; and 3) the applicable statutes require a certificate of election be challenged "no later than ten days following the issuance of a certificate of election." RCW 29A.68.011. See also RCW 29A.68.030. Rather, petitioners argue -- without citation to authority or reference to the actual statutory language -- that any certificate of election can be challenged by affidavits filed within ten days of the Legislative certificate of election because "[o]nly the Legislature has power to issue the certificate of election for gov

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ernor." 1/18/05 Pet.'s Combined Opp., p. 12. Because the Legislature certified the governor's election on January 10, 2005,[1] petitioners claim "the time for starting an election contest action ha[d] not yet run" when either the January 7, 2005, petition and Vance affidavit were filed or their numerous additional affidavits were submitted thereafter in mid-January 2005.[2] Id.

Though petitioner's opposition neither quotes -- much less follows -- the actual statutory language of the ten-day rule under RCW 29A.68.011 and RCW 29A.68.030, those statutes control the issue. Indeed, the Court "has no inherent jurisdiction to hear election contests, and such a proceeding is not according to the course of the common law" and therefore its power "to hear and determine such a matter if it exists must be found" in a statute and absent such statutory power "the court has no jurisdiction in election contests." Washington v. Superior Court for Kitsap County, 149 Wash. 473, 475 (1928). See also Malinowski v. Tilley, 147 Wash. 405, 407 (1928) ("the 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 the right is conferred by statute."); State ex rel. Ransom v. McPherson, 128 Wash. 265, 266 (1924) ("an election contest is not a matter of judicial cognizance unless expressly made so by statute"). Under the binding statutory scheme, petitioner's initial filings might have been timely had they sued only the Secretary of State and sought to void only his certification. However, petitioners instead seek to set aside the election by suing Pierce and every other County to obtain an order specifically "declaring that any certification of the results of the

[1] See 1/12/05 Rava Dec., Ex. "A:" 1/10/05 Legislative Cert. Of Election.
[2] Petitioners do not even attempt to justify their far later third wave of January 26, 2005, submissions by other electors -- filed far after even their own time table for filing had expired. See 1/26/05 Pet.'s Opp. To Mot.'s of Pierce et al., p. 2; 1/26/05 Ferris Aff.; 1/26/05 Sheridan Aff., etc.

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election and any certificate of election issued as a result of the election are also void." See 1/7/05 Petition (emphasis added).

Petitioner's affidavits and the relief they seek as against Pierce and other similarly situated counties are contrary to precedent, violate clear statutory language, and conflict with the policy the election contest statutes were enacted to promote.

1. Petitioners' Mid- and Late-January 2005 Affidavits Are Untimely

Petitioners' sole stated justification for the untimeliness of their contest against Pierce County is to claim under Article III, Sec. 4 of the Washington State Constitution that only the "Legislature has power to issue the certification of election for governor," and therefor they argue the statutory ten-day period does not run from the certification of "*results* prior to that date . . .." 1/18/05 Pet.'s Combined Opp., p. 12 (emphasis in original). However, it is also only the Legislature that has power to issue the certification of election for other executive officers such as the Auditor. See Article III, Sec.'s 3-4. Nevertheless, where such an election contest did not seek to void a specific certificate of election, the Supreme Court in Becker v. Pierce County, 126 Wn.2d 11, 21 n. 8 (1995), calculated the ten-day limitation for the filing of a contest against a state executive officer instead from the date "the Secretary of State was required to prepare certified returns" for that election. (Emphasis added). Hence, the Legislature's pro forma final certification clearly is not the point from which the timeliness of an election challenge of a state executive officer is gauged.

Here, the Secretary of State certified the election in question on December 30, 2004.[3] Accordingly, at the very least, under RCW 29A.68.011 and RCW 29A.68.030, the Secretary's certification of the instant election makes untimely any pleading or supporting affidavit filed

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after January 9, 2005. Petitioner's mid- and late-January 2005 affidavits of electors are therefore untimely as a matter of law and should be stricken, see 1/18-19/05 & 1/26/05 Affidavits, and Pierce County and its Auditor so move.

2. Petitioner's Initial January 7, 2005, Petition and Vance Affidavit also are Untimely

As to the January 7, 2005, petition and Vance submission that *were* filed within ten days of the Secretary's certification, such also are untimely. Though the petitioner in Becker -- like petitioners here -- sought an order setting "aside" an executive officer's election, compare 1/7/05 Petition, p. 10 ¶ (2) with 126 Wn.2d at 20, here the petition and Vance statement expressly seek to do so by having the Court specifically declare "any certification of the results of the election and any certificate of election issued as a result of the election are also void." See 1/7/05 Petition (emphasis added). Because RCW 29A.68.020 requires "[a]ll election contests . . . proceed under RCW 29A.68.010," see also 126 Wn.2d at 19, Becker addressed the accrual of the limitations period for a contest that was not seeking to void any particular certificate of election and therefore established the Secretary of State's certification as the beginning date for the limitations period. However, where -- as here -- a contest does seek to set aside an election by voiding a particular certificate, the applicable statutes, case law and public policy make clear the contest must be filed within ten days of the issuance of the particular certificate being challenged.

RCW 29A.68.011 (6) provides that where an election challenge claims "[a]n error or omission has occurred . . . in the issuance of a certificate of election," an affidavit so demonstrating "shall be filed with the appropriate court no later than ten days following the issuance

[3] See 1/21/05 Rava Dec. Ex. "B:" 12/30/05 Sec. of State Cert.

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of a certificate of election." (Emphasis added). See also RCW 29A.68.030. Our courts hold:

> If a statute is clear on its face, its meaning is to be derived from the language of the statute alone. This court has repeatedly held that an unambiguous statute is not subject to judicial construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it. A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable.

Kilian v. Atkinson, 147 Wn.2d 16, 20-21 (2002) (emphasis added). The only "certificate of election" specified in RCW 29A.68.011 is the certificate claimed to have issued with an "error or omission." If a challenge to "a certificate of election" instead were to accrue within ten days following the issuance of some other "certificate of election" besides the one being challenged, the statute would have so stated. Indeed, when a County's certificate of election was specifically challenged in Dumas v. Gagner, 137 Wn.2d 268, 282-83 (1999), the Supreme Court looked to the date the "County Auditor issued a certificate of election" in order to apply the ten-day limit. Hence precedent and the "language of the statute alone" make clear that ten days from "a certificate of election" is gauged from the date the certificate being challenged was issued, and this Court should decline petitioner's invitation to ignore case law and "add language" so as to start accrual instead from the last certificate issued rather than the first.

The Supreme Court's approach to the limitation period complies with the policy behind the statutory scheme for election challenges: to determine the "winner of close contests for elective offices as expeditiously and accurately as possible" as well as "provide closure to the recount process." See 1991 Wash. Laws ch. 90 § 1. As our state Supreme Court has expressly recognized:

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> There exists a substantial public interest in the finality of elections, necessitating prompt challenges. The legislature has recognized that public policy in allowing only 10 days in which to challenge elections involving public offices. [citation omitted]. The United States Supreme Court has approved the principle. "The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election." NLRB v. A.J. Tower Co., 329 U.S. 324, 331, 91 L. Ed. 322, 67 S. Ct. 324 (1946).

La Vergne v. Boysen, 82 Wn.2d 718, 721 (1973) (emphasis added). Hence in Becker, where no specific County certificate of election was being challenged, to determine the date of accrual for a challenge to the election of a state executive officer, the Supreme Court again looked to the earliest state certificate issued (i.e. that of the Secretary of State) and not the last state certificate (i.e. that of the Legislature). A ten-day rule running from the date of the challenged certificate not only is consistent with this precedent, common sense, the face of the statute, and principles of statutory application, but promotes the public interest in resolving an election "expeditiously" and giving "closure to the recount process." A ten-day rule running instead from some other unidentified later certificate ignores precedent and requires adding language to a clear statute, as well as ensures an election will not be resolved "expeditiously" or provide prompt "closure to the recount process" and threatens the "dangers attendant upon the allowance of indiscriminate challenges after the election" -- dangers especially manifest where the election concerns the state's chief executive officer.

Accordingly, petitioner's January 7, 2005, challenge to Pierce County's December 17, 2004, certificate of election comes too late and therefore should be dismissed as to Pierce County and its Auditor. See Becker, 126 Wn.2d at 19-20 (election contest of state executive officer properly dismissed because petitioner's challenge "was not timely."); La Vergne v. Boysen, 82 Wn.2d at 722 (dismissal of election contest affirmed because of delay in filing).

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B. CONTEST SUBMISSIONS ALSO ARE INSUFFICIENT AS TO PIERCE COUNTY

Even had the petition and all affidavits been filed within ten days of Pierce County's December 17, 2004, certification and been filed by proper electors,[4] this action still would be defective and subject to dismissal as to Pierce County and its Auditor. As noted elsewhere, the constitutional requirement that a gubernatorial election contest can be decided only by the legislature is certainly applicable to all respondents. See Wash. Const., Art. III, § 4; 1/20/05 WSDCC Mot. to Dismiss For Juris., pp. 2-20. Likewise, as to non-adjoining counties such as Pierce and public officials such as its Auditor, it has been shown that: 1) this Court is not "the appropriate court" in "the proper county" required by the election statutes; 2) such is a jurisdictional defect; and 3) that venue also is absent as to movants because no Chelan County elector filed a timely and sufficient affidavit.[5] See e.g. RCW 29A.68.011; 1/18/05 Island Co. Mot. to Dismiss, p. 3; 1/19/05 WSDCC Resp. to Pet. Combined Opp., pp. 4-5. Lastly, respondents' briefing has demonstrated that petitioners cannot contest an election without complying with the substantive requirements of an election contest for each named respondent. See 1/21/05 WSDCC Mot. to Dismiss Causes, pp. 3-21. As demonstrated below, however, petitioners' substantive failures are especially applicable to their claim against Pierce County and its Auditor and provide additional grounds for dismissal as to these respondents.

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[4] In its initial briefing, Pierce and other counties observed -- while petitioners nowhere denied -- that the "Rossi for Governor Campaign" cannot vote and therefore cannot be an "elector" or "registered voter" who may properly bring an election contest. See RCW 29A.68.011-.030; 1/14/05 Pierce Cy Joinder, pp. 3-4; 1/18/05 King Cy Mot. to Dismiss, p. 3. As to the original petitioners Borders, Canterbury, Huff, Ferris, Elvig, and Monaghan, none filed an "affidavit" within ten days of *either* the County's *or* Secretary of State's certification of election and therefor also cannot now be parties to any challenge. See RCW 29A.68.011-.030. See also discussion supra at 3-4; 1/19/05 WSDCC Memo. in Resp. to Pet.'s Combined Opp., p. 4 n. 4. Indeed, of these original petitioners, only the far later January 18, 2005, Huff statement makes any allegation specific to Pierce County and such shares the same evidentiary and substantive defects contained in both the Vance submission and those that followed it. See infra at 9-14.

[5] See untimely 1/18/05 Canterbury and Simpson "affidavits" and discussion infra at 9-14. See also 1/19/05 WSDCC Memo. in Resp. to Pet.'s Combined Opp., p. 4 n. 4.

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The January 7, 2005, submission by petitioner Vance and the other far later submissions simply make the bold assertion as against Pierce County that "it appears that election officials have committed errors, omissions, mistakes, neglect, and other wrongful acts" and expressly note such speculation is not based on personal knowledge but "on the reports [Vance has] received from investigators, [his] communications with [unidentified] elections officials, and . . . review of [unspecified] elections records" or state what the witness "believe[s]" based simply on understandings of "media reports and the [unidentified] proceedings in the various lawsuits . . ." See e.g. 1/7/05 Vance Aff., p. 3; 1/18/05 Huff Aff., pp. 1-2; 1/26/05 Ferris Aff., pp. 1-2. However, RCW 29A.68.030 expressly provides that a challenge to the issuance of a certificate of election instead requires that a timely "affidavit of an elector . . . must set forth specifically" the "particular causes of the contest" and must be tested to determine "if the particular causes of contest are alleged with sufficient certainty." (Emphasis added). Here, the Vance and later statements are not proper "affidavits" and do not properly "set forth specifically . . . particular causes of the contest" as to Pierce County or its Auditor -- much less with "sufficient certainty."

1. Proper And Sufficient "Affidavits" Have Not Been Filed

As to the requirement that an "affidavit" be submitted, petitioners claim it is "sufficient to allege the causes of contest without providing testimonial proof" and cite the cases of Dumas, supra, and McCormick v. Okanogan County, 90 Wn.2d 71 (1978). See 1/18/05 Pet.'s Combined Opp., p. 9. See also 1/26/05 Pet.'s Opp. To Mot.'s of Pierce et al., pp. 3. However, Dumas nowhere addresses the requirements of an "affidavit" but concerns the insignificance of a petition's failure to "cite specific subsections of the statute." 137 Wn.2d at 282 (finding a petition was adequate "so long as it is sufficient to satisfy necessary legal requirements" such

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as alleging "sufficient facts"). As a matter of law, "an affidavit is not a pleading" because in a pleading "allegations of conclusions of fact may be permissible, whereas an affidavit is but a statement of fact from which judicial conclusions may be drawn." 2A CJS, Affidavits §5 (1972) (emphasis added). See also 3 Am Jur. 2d Affidavits §2 (2002) ("An affidavit is not a pleading . . . ."). Petitioners' cited case of McCormick likewise has nothing to do with the adequacy of an election challenge affidavit -- or even of a petition for that matter -- but rather addressed whether a petitioner's claims of misconduct met the separate and distinct substantive requirements for a recall of a previously properly elected official. 90 Wn.2d at 75.

Petitioners next attempt to justify their submissions by claiming the repeated use of the undefined term "affidavit" in the election contest statutes, see e.g. RCW 29A.68.011, RCW 29A.68.030, RCW 29A.68.040, does not "import into the election contest statute standards of evidence . . . ." See 1/18/05 Pet.'s Combined Opp., p. 10. However, a "statutory term that is left undefined should be given its 'usual and ordinary meaning and courts may not read into a statute a meaning that is not there.'" Burton v. Lehman, __ Wn.2d __, 2005 Wash. LEXIS 67, *7 (2005) (quoting State v. Hahn, 83 Wn.App. 825, 832 (1996)). If "the undefined statutory term is not technical, the court may refer to the dictionary to establish the meaning of the word," Burton, supra at * 8 (citing Heinsma v. City of Vancouver, 144 Wn.2d 556, 564 (2001)), while "a term of art includes its legal tradition and meanings." State v. Bradshaw, 152 Wn.2d 528, 537 (2004). In pertinent part, the dictionary definition of affidavit is "a written declaration made under oath before a notary public," American Heritage Dictionary 28 (4th ed. 2000), while our courts similarly define this term of art as "a written declaration of facts, voluntarily made, and confirmed by the oath of the party making it." Clay v. Portick, 84 Wn.App. 553, 561 (1997) (quoting Black's Law Dictionary 58 (6th ed. 1990)). Both this

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"usual and ordinary meaning" as well as the "legal tradition and meanings" of "affidavit" clearly import an "evidentiary" standard.

Being a statement of facts sworn to under oath, an affidavit "is in the nature of evidence . . .." 2A CJS, Affidavits §3 (1972) (emphasis added). Because an affidavit is "evidence," the evidentiary rules apply -- including the requirement that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge." ER 602. Therefore, as a matter of law "[a]n affidavit must be based on personal knowledge, and its allegations should be of the pertinent facts and circumstances, rather than conclusions." 3 Am Jur. 2d Affidavits §12 (2002). The claim that the statutory term "affidavit" refers neither to this "common and ordinary" nor "legal tradition and meaning" of that word, but somehow imports instead a mere pleading standard allowing unsupported conclusions without the necessity of showing personal knowledge, improperly requires the Court to "read into a statute a meaning [of affidavit] that is not there." Instead, the statutes require an "affidavit" in its common and ordinary meaning, as well as in its legal tradition and meaning. Petitioners have simply failed to submit any such document as to Pierce County or its Auditor.

Finally, petitioners ignore their baseless claims of Pierce County error, misconduct, and neglect so as to argue -- at least as to their claim of "illegal votes" by others -- that RCW 29A.68.090 "states that to allege illegal votes as a cause of contest, 'it is sufficient to state generally that illegal votes were cast . . . .'" Pet.'s Combined Opp., p. 10. However, the fact that RCW 29A.68.090 allows a claim of illegal voting to be stated "generally" -- in contrast to the required "setting forth specifically" with "sufficient certainty" their other "particular

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causes of the contest" pursuant to RCW 29A.68.030[6] -- does not relieve petitioners of the requirement that even "general" statements of illegal voting still must be made expressly pursuant to an "affidavit." Indeed, RCW 29A.68.020 (5) clearly incorporates this and other requirements of RCW 29A.68.011 for "[a]ll election contests . . . ." (Emphasis added). The "substantial public interest in the finality of elections," La Vergne, 82 Wn.2d at 721, does not disappear when bald allegations of illegal voting are made by a submission that fails to show it is based on personal knowledge or admissible evidence.

In any case, petitioners' conveniently delete the remainder of RCW 29A.68.090 which itself also provides any general statement of illegality must also specifically state "that, if given to the person whose election is contested in the specified precinct or precincts, will, if taken from that person, reduce the number of the person's legal votes below the number of legal votes given to some other person for the same office." (Emphasis added). Here, neither the Vance nor any other submission by petitioners identifies the required "specified precinct or precincts" in Pierce County and many affirmatively attest to the fact that "[i]t is impossible to determine which gubernatorial candidate received the greatest number of legitimate votes." See e.g. 1/7/05 Vance Aff., p. 7 (emphasis added); 1/18/05 Huff Aff., p. 2 (emphasis added). The provisions of RCW 29A.68.090 therefore provide petitioners little comfort even when narrowed to their claim of illegal voting. Accordingly, Pierce County and its Auditor move to strike not only the untimely January 7, 2005, submission of petitioner Vance on these grounds, but also on these grounds the even more untimely mid- and late-January 2005 affidavits submitted on behalf of petitioners.

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[6] The uniform assertions by the Vance and Huff submissions of "apparent" causes of contest obviously fail to assert other "particular causes of contest are alleged with sufficient certainty" as required by RCW 29A.68.030.

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2. Mid- and Late-January Submissions Have Additional Independent Defects

Petitioner Huff's "affidavit" and the other second wave of mid-January submissions against Pierce County -- as well as petitioners' recent third wave of still later affidavits, see e.g. 1/26/05 Ferris Aff.; 1/26/05 Sheridon Aff., p. 7 -- have the additional fatal defect of expressly admitting they are made "to the best of my knowledge and belief." Compare 1/18/05 Huff Aff., p. 3, 1/18/05 Sheridan Aff., p. 7, 1/26/05 Ferris Aff., p. 3 and 1/26/05 Sheridan Aff., p. 7 with 3 Am. Jur. 2d Affidavits §15 (2002) ("An affidavit made on knowledge and belief is insufficient as an affidavit unless authorized by a special statute or where those matters sworn to are of necessity opinions or conclusions of law.") See also e.g., Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1412-13 (9th Cir. 1995) (declaration based on information and belief was insufficient, because there were no facts to establish personal knowledge); Columbia Pictures Industries, Inc., 944 F.2d 1525, 1529 (9th Cir. 1991) aff'd 123 L.Ed.2d 611 (1993) (affidavit based on "information and belief" does not demonstrate the requisite personal knowledge); Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1377 (9th Cir. 1978) (using prefaces such as "I believe" insufficient); Stewart v. Booker T. Washington Ins., 232 F.3d 844, 851 (11th Cir. 2000) ("upon information and belief" insufficient); Fowler v. Southern Bell Tel. and Tel. Co., 343 F.2d 150, 154 (5th Cir. 1965) ("knowledge, information and belief" insufficient); Robbins v. Gould, 278 F.2d 116, 118 (5th Cir. 1960) ("knowledge and belief" insufficient).

Further, these affidavits are fatally defective also to the extent they impermissibly seek to submit against Pierce County hearsay documents for which no evidentiary foundation has been shown under ER 901, see e.g. 1/18/05 Sheridan Aff., pp. 4-6 & ex. "D;" 1/26/05 Sheridan Aff., pp. 4-6 and ex. "D," because a party may not rely on "having its affidavits

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considered at face value" but must "set forth specific facts" that are admissible in evidence. Tiger Oil Corp. v. Department of Licensing, State of Wash., 88 Wn.App. 925, 929-30 (1997). See also Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 12-13 (1986); Dombrosky v. Farmers Ins. Co. of Washington, 84 Wn.App. 245, 253 (1996); Carlton v. Day Island Marina, 46 Wn.App. 784, 788 (1987). For these independent evidentiary reasons alone, the second and third waves of untimely and defective submissions -- cannot be considered and should be stricken.

3. Affidavits Do Not Allege Proper Grounds For Election Contest

Pierce County and its Auditor have noted above that petitioners cannot meet the substantive requirement of showing their preferred candidate would have won the election but for alleged illegal votes under RCW 29A.68.090. See supra at 11-12. Others have similarly observed that petitioners have not demonstrated their candidate would have won but for alleged misconduct of some unidentified precinct election board as similarly required by RCW 29A.68.070 and .080. See 1/18/05 King Cy Mot. to Dismiss, p. 7; 1/21/04 Klickitat Auditor's Mot. to Dismiss, pp. 5-7; 1/21/05 WSDCC Mot. to Dismiss Causes, pp. 13-15. Likewise, it has been well briefed that petitioners fail to make the required showing that any illegal votes were procured by the winning candidate or were challenged on or before election day.[7] See 1/21/05 WSDCC Mot. to Dismiss Causes, pp. 11-12, 15-16, 19-20. Finally, it has been shown that petitioners fail to demonstrate their claim of other election discrepancies were the result of either illegal votes or precinct election officer misconduct as required by RCW 29A.68.020. Id. at pp. 17-19.

[7] Indeed, despite the opportunity to do so, see McDonald v. Reed, __ Wn.2d __ , 103 P.3d 722 (2004), petitioners previously actively opposed having uncounted valid votes be considered and raised no concern about either supposedly disenfranchised voters or illegal votes until after a second recount resulted in their candidate loosing.

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Because these substantive failures of proof apply fully to petitioners' claim against Pierce County and its Auditor, they too are grounds for their dismissal.

C. NO REMEDY AGAINST COUNTY BY CHALLENGING LEGISLATIVE CERTIFICATE

Finally, it has been noted by others that the remedy of a state-wide revote is not available here. See 1/20/05 WSDCC Mot. to Strike Relief, pp. 3-11. However, even if a revote were otherwise available in some County for which a valid and timely challenge had been made, a revote would not be a remedy available in Pierce or other similarly situated Counties just because a valid contest might have been alleged against some other entity. Indeed, petitioners' decision to sue every County and its Auditor confirms their own recognition that they cannot obtain a state-wide revote without demonstrating grounds for an election contest in every county. Certainly, nothing in the statutory framework dictates the instant otherwise absurd procedure whereby state officials and each of the 39 Counties and 39 County Auditors from the state's four corners are dragged into a single Superior Court "situated near the geographic center of the state." 1/18/05 Pet.'s Combined Opp., p. 3. Because of the aforementioned untimeliness of the contest as to Pierce County and its Auditor, the insufficiency of the affidavits as to them, and the other substantive statutory failures applicable to them, Pierce County's certificate of election is no longer subject to challenge.

Accordingly, should the Court conclude petitioners have met their burden as to some other entity and that the Court has the authority to order a revote, such relief must be confined to that County against whom petitioners filed a timely, adequate, and sufficiently supported affidavit. Because as to Pierce County and its Auditor, petitioners have not done so, any relief granted cannot be ordered against Pierce County or its Auditor.

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III. CONCLUSION

For the above stated reasons, Pierce County and its Auditor respectfully request the Court dismiss them with prejudice.

DATED this 31st day of JANUARY, 2005.

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