The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,
Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,
Plaintiff Intervenors

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,
Plaintiff Intervenors

v.

STATE OF WASHINGTON, et al.,
Defendant Intervenors

WASHINGTON STATE GRANGE,
Defendant Intervenor.

No. CV05-0927-JCC

WASHINGTON STATE GRANGE'S TRIAL BRIEF

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

TABLE OF CONTENTS

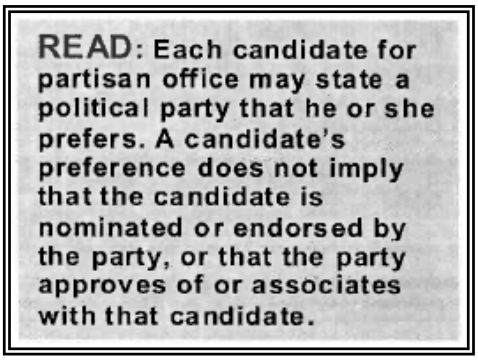
FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

I. INTRODUCTION

The Washington State Grange was chartered in 1889.[1] Although it was originally formed to represent the interests of farmers, it has advocated a variety of goals throughout its long existence – including women's suffrage, rural electrification, protection of water resources, universal telephone service, and election reforms by way of Initiative pursuant to the Initiative and Referendum clause of the Washington State Constitution.[2] It was also the lead Petitioner in this case's Supreme Court appeal: *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 (March 2008) ("*Grange*").

The State's Trial Brief *[Dkt. No. 303]* outlines several reasons why plaintiffs' arguments and evidence do not satisfy the high burden of proof necessary for this Court to nullify (or re-write) provisions of a duly enacted State law – in this case, a law that the voters of Washington directly enacted themselves by a nearly 60% - 40% margin. The Grange does not waste the Court's or other counsel's time repeating the State's explanation a second time.[3]

Instead, the Grange submits this Trial Brief to focus on just one of the reasons plaintiffs' constitutional challenge must fail – namely, the words printed on the election ballot itself:



[1] *Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 446 n.2 (2008).*
[2] *Grange, 552 U.S. at 446-47 and footnotes 2 &3.*
[3] *If plaintiffs seek at trial to reassert their prior arguments invoking trademark law or ballot access theories such as a political organization's supposed First Amendment "right" to identify its official nominee on the ballot or a minor party's First Amendment "right" to have its nominee's name printed on the second-stage November runoff ballot, then the Grange respectfully references – rather than repeats – its prior briefing on those topics as well. See, e.g., Dkt. Nos. 249, 267, 268, & 283.*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

II. RELEVANT FACTS

The evidence at trial will demonstrate many interesting facts. For example, demonstrate that many leaders in the three plaintiff political organizations really, really don't like the Top Two election system that Washington State voters established when they passed Initiative 872.

The evidence at trial will also show that the two major political parties in this State now have to operate (and pay for) their own system of selecting party nominees because Initiative 872 freed county auditors from having to operate (and taxpayers from having to pay for) the two major political parties' candidate-nomination process.[4]

Although facts like these reveal the plaintiff political organizations' reasons for wanting this Court to nullify the voters' enactment of Initiative 872, such facts are tangential to the underlying First Amendment issue upon which plaintiffs base their case. That issue is whether this Court should hold provisions of Initiative 872's Top Two election system unconstitutional on the grounds that the State's application of those provisions imposes an unconstitutionally severe burden on these particular plaintiffs' First Amendment rights.

The facts relevant to this First Amendment issue are few and straightforward:

[4] *The joint Pretrial Order confirms that these two political parties have in fact nominated candidates on their own while the Top Two system has been place during the 2008 and 2010 elections. Joint Pretrial Order [Dkt. No. 300] at p.11, Agreed Fact ¶20 ("The Washington Republican Party nominated candidates for one or more partisan offices in the 2008 and 2010 elections.") and ¶21 ("The Washington Democratic Party nominated candidates for one or more partisan offices in the 2008 and 2010 elections."). The third plaintiff political organization in this case also asserts that it nominated its own candidates in 2008 and 2010. Joint Pretrial Order [Dkt. no. 300] at p.20, Plaintiffs' Contention ¶35 ("The Washington Libertarian Party nominated candidates for one or more partisan offices in the 2008 and 2010 elections.").*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

A. The Challenged Provisions Of Initiative 872.

The plaintiff political organizations' constitutional attack against Initiative 872 focuses on the Initiative's "preference" provisions. As Trial Exhibit A-1 confirms, the Initiative's preference provisions:

- Apply only to the specific offices which the Initiative defines as being a "partisan office" – e.g., Governor, State legislator, and County Commissioner.[5]
- Allow a candidate for those specified "partisan offices" to state on his or her Declaration Of Candidacy the name of the political party he or she prefers (if any).[6]
- Require the candidate's preference statement (if any) to be listed with the candidate's name on the ballot.[7]

The U.S. Supreme Court has held that these provision do not on their face impose a severe burden on the plaintiff political organizations' First Amendment right of association.[8]

The as-applied question in this case is therefore whether the State has applied the above provisions of Initiative 872 in a way that imposes an unconstitutionally severe burden on the plaintiff political organizations in this case.

B. The Election Ballot Under Initiative 872 .

The joint Pretrial Order *[Dkt. No. 300]* confirms that the plaintiff political organizations will not dispute the following facts at trial:

---

[5] *Trial Exhibit A-1 (admissibility stipulated to in Joint Pretrial Order [Dkt. No. 300] at Appx. A, p.4): Initiative 872, section 7 (establishing a 2-stage, top two election system for "partisan offices") and section 4 (identifying those "partisan offices" as being three (and only three) categories of public office: "(1) United States senator and United States representative; (2) All state offices, including legislative, except (a) judicial offices and (b) the office of the superintendent of public instruction; and (3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise." Those provisions of Initiative 872 (Trial Exhibit A-1) are codified at Rev. Code Wash. RCW 29A.52.112 and RCW 29A.04.110.*

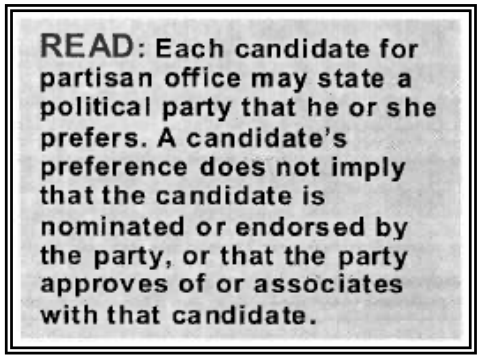
[6] *Trial Exhibit A-1 (admissibility stipulated to in Joint Pretrial Order [Dkt. No. 300] at Appx. A, p.4): Initiative 872, section 4 . That provision of Initiative 872 (Trial Exhibit A-1) is codified at Rev. Code Wash. RCW 29A.04.110.*

[7] *Trial Exhibit A-1 (admissibility stipulated to in Joint Pretrial Order [Dkt. No. 300] at Appx. A, p.4): Initiative 872, sections 4 and 7(3). Those provisions of Initiative 872 (Trial Exhibit A-1) are codified at Rev. Code Wash. RCW 29A.04.110 and RCW 29A.52.112.*

[8] *Grange, 552 U.S. at 444 ("I-872 does not on its face impose a severe burden on political parties' associational rights").*

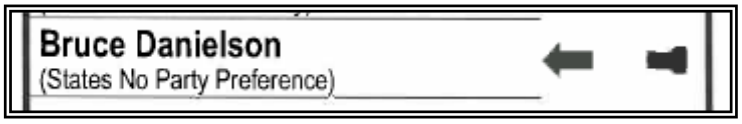
FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

- Each voter has the ballot when he or she votes on it.[9]
- That ballot says:[10]



- If a candidate stated a party preference on his or her Declaration Of Candidacy, the preference stated by that candidate is printed on the ballot below his or her name, with parentheses and the first letter of each word capitalized – for example:[11]

- If a candidate did not state a party preference on his or her Declaration Of Candidacy, then "(States No Party Preference)" is printed below his or her name on the ballot – for example:[12]



The following section outlines how the above facts confirm one of the (many) flaws fatal to plaintiffs' attack against the constitutionality of Initiative 872.

---

[9] *Joint Pretrial Order [Dkt. No. 300] at p.12, Agreed Fact ¶24 ("The ballot the voter votes on is one document that every voter has when voting.")*

[10] *Joint Pretrial Order [Dkt. No. 300] at pp.7-8, Agreed Fact ¶9; Trial Exhibit A-133a (Kitsap County 2010 November election ballot, admissibility stipulated to in Joint Pretrial Order [Dkt. No. 300] at Appx. A, p.14).*

[11] *Joint Pretrial Order [Dkt. No. 300] at p.7, Agreed Fact ¶8; Trial Exhibit A-41a (Jefferson County 2008 November election ballot, admissibility stipulated to in Joint Pretrial Order [Dkt. No. 300] at Appx. A, p.8).*

[12] *Joint Pretrial Order [Dkt. No. 300] at p.7, Agreed Fact ¶8; Trial Exhibit A-133a (Kitsap County 2010 November election ballot, admissibility stipulated to in Joint Pretrial Order [Dkt. No. 300] at Appx. A, p.12).*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

III. DISCUSSION

As noted in the joint Pretrial Order *[Dkt. No. 300, at 23:24-24:19]* as well as the State's Trial Brief *[Dkt. No. 303]*, plaintiffs' demand in this case presents at least five issues:

1. Can the Plaintiff political parties prove, under an objective standard, that there is widespread voter confusion among reasonable and well-informed Washington voters as to whether a candidate's statement of preference for a particular political party means that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate?
2. If so, is that widespread voter confusion *caused by* the State's implementation of I-872?
3. If so, does that voter confusion severely burden the political parties' right of association under the First Amendment by being widespread in scope and forcing an *actual* association between the party and the candidate, in contrast to the mere *impression* of association?
4. Do the State's Precinct Committee Officer election laws severely burden the First Amendment association rights of the three political parties in this case? If so, does that conclusion regarding the PCO election laws entitle Plaintiffs to declaratory or injunctive relief against I-872?
5. Does the State's sponsor disclosure law [Washington's PDC laws] severely burden the First Amendment association rights of the three political parties in this case? If so, does that conclusion regarding the sponsor disclosure law [PDC laws] entitle Plaintiffs to declaratory or injunctive relief against I-872?

As noted earlier, the Grange does not waste the time of this Court or other counsel simply repeating the detailed analysis presented in the State's Trial Brief regarding these five issues. Instead, the Grange outlines in the following paragraphs why the wording of the election ballot used by the State to implement the "preference" provisions of Initiative 872 defeats plaintiffs' claim that this Court must rule those provisions unconstitutional.

A. The Evidence Will Confirm That The Election Ballot Used By The State To Implement Initiative 872 Employs Ballot Wording That Complies With The U.S. Supreme Court Opinion In This Case.

The plaintiff political organizations' claim is that Initiative 872 "burdens their associational rights because voters will assume that candidates on the general election ballot are the nominees of their preferred parties", and that "even if voters do not assume that candidates on the general election ballot are the nominees of their parties, they will at least assume that the parties associate with, and approve of, them." *Grange*, 552 U.S. at 454.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

As the Supreme Court's March 2008 decision in this case explained, however, since the lower courts had up to that point barred the State from conducting any election under Initiative 872,

> we do not even have ballots indicating how party preference will be displayed. It stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot.
>
> * * * *
>
> And without the specter of widespread voter confusion, [plaintiffs'] arguments about forced association and compelled speech fall flat.

Grange, 552 U.S. at 455-57 (footnotes omitted) (the Court's 5-Justice majority decision).

Chief Justice Roberts likewise noted that "we have no idea what those ballots will look like". *Grange*, 552 U.S. at 460 (Roberts, C.J., concurring). He therefore went on to explain the following with respect to the claims plaintiffs are asserting in this case:

> In such a case, it is important to know what the ballot actually says – both about the candidate and about the party's association with the candidate. .... I would wait to see what the ballot says before deciding whether it is unconstitutional.

Grange, 552 U.S. at 461-62 (the 2-Justice concurring opinion).

The election ballot's wording is crucial because, as more than one Justice pointed out, the ballot is the only document that all voters are guaranteed to see, and it is the last thing each voter sees before marking his or her vote. *Grange*, 552 U.S. at 460 (Roberts, C.J., concurring) ("The ballot ... is the last thing the voter sees before making his choice") (quoting *Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J., concurring)); *Grange*, 552 U.S. at 465 (Scalia, J., dissenting) (The ballot "is the only document that all voters are guaranteed to see, and it is 'the last thing the voter sees before he makes his choice.'") (citing *Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J., concurring).

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

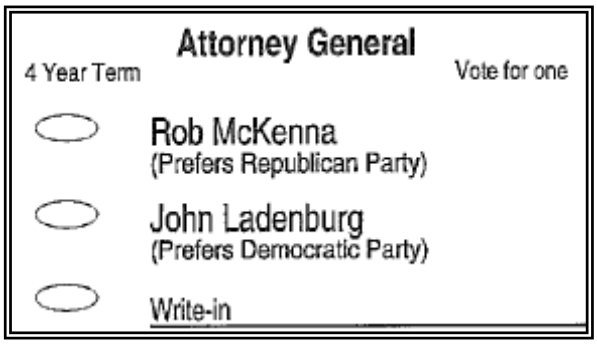
Back in March 2008, certain members of the Supreme Court indicated some skepticism about whether the State of Washington would in fact implement Initiative 872 with ballots worded along the lines suggested at page 2 of the Grange's Supreme Court Reply Brief.[13]

The evidence at trial will confirm, however, that the State of Washington did implement Initiative 872 with such ballot language.

The previously-noted page 2 of the Grange's Supreme Court Reply Brief offered the following ballot language as one alternative for identifying a candidate's preference:[14]

> PUBLIC OFFICE – ATTORNEY GENERAL:
> ☐ **Chris R. Jones** (prefers Democratic Party)
> ☐ **Chris D. Jones** (prefers Republican Party)

The evidence at trial will show that the State of Washington does in fact use that type of ballot language to implement Initiative 872.[15] For example:[16]



---

[13] *Grange, 552 U.S. at 460 (noting the ballot wording alternative offered at page 2 of the Grange's Reply Brief) and at 462 (C.J. Roberts noting that "I agree with Justice Scalia that the history of the challenged law suggests the State is not particularly interested in devising ballots that meet these constitutional requirements") (Roberts, C.J., concurring). The Grange's Reply Brief – referred to in the Supreme Court Oral Argument as "the Grange Yellow Brief" because of the yellow cover on Supreme Court reply briefs – is available on Westlaw at 2007 WL 2679380. For this Court's convenience, a copy is attached as Tab A to this Trial Brief.*

[14] *Tab A (Grange's Supreme Court Reply Brief at p.2).*

[15] *Joint Pretrial Order [Dkt. No. 300] at p.7, Agreed Fact ¶8.*

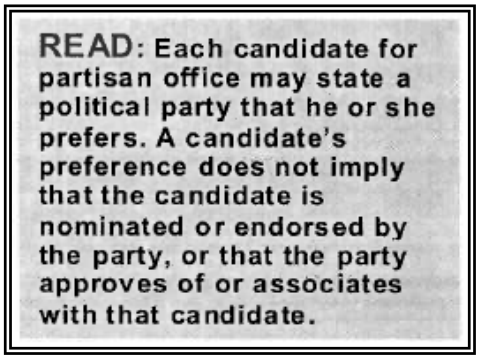
[16] *Trial Exhibit A-41a (Jefferson County 2008 November election ballot, admissibility stipulated to in Joint Pretrial Order [Dkt. No. 300] at Appx. A, p.8).*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

The previously-noted page 2 of the Grange's Supreme Court Reply Brief also offered the following ballot language as one alternative for reminding voters what a candidate's preference statement on the ballot means:[17]

> The political party name shown next to a candidate identifies the party which that candidate listed as being his or her party preference when filing for office. It is not a statement by the political party identifying that candidate as being a party member or being that party's candidate, nominee, or representative in this election.

The evidence at trial will show that the State of Washington does in fact use that type of ballot language to implement Initiative 872.[18] For example:[19]



In short, the evidence at trial will confirm that the State of Washington has adopted ballot language that follows the U.S. Supreme Court's direction in this case. And that ballot language negates the essential premise necessary for plaintiffs' constitutional attack – namely, that the election ballot being used under Initiative 872 is written in a way that misleads the reasonable well-informed voter into thinking that when the ballot says "(Prefers Republican Party)" after a candidate's name, that ballot instead means that that candidate is nominated or

---

[17] *Tab A (Grange's Supreme Court Reply Brief at p.2).*

[18] *Joint Pretrial Order [Dkt. No. 300] at pp.7-8, Agreed Fact ¶9.*

[19] *Trial Exhibit A-133a (Kitsap County 2010 November election ballot, admissibility stipulated to in Joint Pretrial Order [Dkt. No. 300] at Appx. A, p.14).*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

endorsed by the Republican Party, or that the Republican Party approves of or associates with that candidate.[20]

Given the ballot wording actually used by the State to implement Initiative 872, the plaintiff political organizations cannot prevail unless they first convince this Court that the evidence they produce at trial requires this Court to hold that reasonable well-informed voters in Washington are too stupid to understand the previously-noted preference language printed on their election ballots. The Grange, however, submits that Washington voters are not stupid.

B. The Evidence Will Confirm That The State's Precinct Committee Officer Election Laws And Public Disclosure Commission Laws Are Not Even A Part Of Initiative 872 – And Thus Cannot Entitle Plaintiffs To Declaratory Or Injunctive Relief Against That Initiative.

Two of the three plaintiff political organizations argue that the Washington statutes allowing local Republican and Democratic party organizations to elect their Precinct Committee Officers ("PCOs") in taxpayer-funded elections are unconstitutional. But they will not prove at trial that Initiative 872's Top Two election system applies to the election of Precinct Committee Officers.

---

[20] *The U.S. Supreme Court made it clear in this case that federal courts must maintain great faith in the ability of individual voters to inform themselves about election issues. Grange, 552 U.S. at 454. Plaintiffs accordingly cannot ignore the objective fact of what the election ballot actually says, and demand instead that federal judges in the State of Washington engage in a subjective inquiry into every top two election each election cycle – with the constitutionality of every election being subjected to a battle of "experts" and pollsters opining on the particular races, candidates, and electorate involved in that year's lawsuit. As prior briefing in this case therefore explained, the proper (and only workable) legal measure is an objective "reasonable voter" test that focuses on the substance of the written communication made to each voter on the election ballot itself – not a subjective expedition driven by various "experts" offering their views on the types, causation, and significance of alleged (and amorphous) "confusion" concerning the specific races, candidates, and electorate involved in the particular case being tried that year. See Grange's Summary Judgment Motion at pp.4-5 [Dkt. No. 249]; State's Summary Judgment Motion at pp.10-12 [Dkt. No. 239].*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

That is because, by its very terms, Initiative 872's Top Two election system does not apply to the election of Precinct Committee Officers. The Initiative's top two election system applies to three (and only three) categories of public office:

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of the superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

Trial Exhibit A-1 (admissibility stipulated to in Joint Pretrial Order *[Dkt. No. 300]* at Appx. A, p.4): Initiative 872, section 4 (codified at Rev. Code Wash. RCW 29A.04.110).

The election of Precinct Committee Officers simply is not one of the offices to which the Initiative's Top Two system applies. Thus, even if plaintiffs were to prove that the State's allowing local Republican and Democratic party organizations to elect their Precinct Committee Officers in taxpayer-funded elections is unconstitutional, that would not make the preference provisions of Initiative 872 unconstitutional. Instead, it would render those two organizations' free ride under Washington's Precinct Committee Officer laws unconstitutional – a ruling those two plaintiffs deliberately do not seek in this case.[21]

The plaintiff political organizations also complain about inconveniences or supposed burdens they face under certain Public Disclosure Commission ("PDC") laws. But plaintiffs will not prove at trial that Initiative 872 enacted those PDC laws.

That is because Initiative 872 did not enact those PDC laws. Trial Exhibit A-1 (admissibility stipulated to in Joint Pretrial Order *[Dkt. No. 300]* at Appx. A, p.4). Thus, even if plaintiffs were to prove that certain PDC laws saddle them with unconstitutionally severe burdens, that would not make the challenged provisions of Initiative 872 unconstitutional.

---

[21] *As noted in this case's prior legal briefing, the Washington PCO laws' allowing public funds to be spent on the election of these two political parties' officers might well be invalid under the Washington State Constitution's prohibition against gifts of public funds. Washington Constitution, Article VIII, sections 5 and 7. Grange's Summary Judgment Motion at p.6, n.9 [Dkt. No. 249]. But these two plaintiff political organizations (obviously) do not seek such a ruling in this case.*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

Instead, it would make the provisions in the PDC laws that they complain about unconstitutional – a ruling they strategically do not seek in this case either.

IV. CONCLUSION

Plaintiffs' evidence and arguments at trial will not justify this Court's entering a ruling that Washington voters are too dumb to understand that the preference language on their election ballots means what it says. Too dumb to realize that when the ballot they vote on says:

> Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

it means:

> Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

For the reasons explained in this Trial Brief (as well as those in the defendant State's Trial Brief), the Washington State Grange respectfully submits that the evidence at trial will not prove plaintiffs' claim that parts of Initiative 872 are unconstitutional. This Court should accordingly deny plaintiffs any relief in this case, and dismiss their Complaints with prejudice.

RESPECTFULLY SUBMITTED this 10th day of January, 2011.

FOSTER PEPPER PLLC

s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA No. 14844
Kathryn C. Carder, WSBA No. 38210
Foster Pepper PLLC
1111 Third Avenue, suite 3400
Seattle, WA 98101
telephone: 206-447-8934
telefax: 206-749-1902
email: ahearne@foster.com
Attorneys for defendant-intervenor Washington State Grange

CERTIFICATE OF SERVICE

Thomas F. Ahearne states: I hereby certify that on January 10, 2011, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties listed below:

1. WASHINGTON STATE GRANGE'S TRIAL BRIEF.

John J. White, Jr./Kevin B. Hansen
Livengood, Fitzgerald & Alskog, 121 Third Avenue
Kirkland, WA 98033-0908
white@lfa-law.com; hansen@lfa-law.com
Attorneys for Plaintiffs Washington State Republican Party, *et al.*.

David T. McDonald
K&L Gates, 925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
david.mcdonald@klgates.com;
Attorneys for Intervenor Plaintiffs Washington Democratic Central Committee, *et al.*.

Orrin Leigh Grover, Esq.
Orrin L. Grover, P.C.
416 Young Street
Woodburn, OR 97071
orrin@orringrover.com, gkiller3@earthlink.net
Attorneys for Intervenor Plaintiffs Libertarian Party of Washington State, *et al.*.

Todd R. Bowers/James K. Pharris/Jeffrey T. Even/Allyson Zipp
1125 Washington Street SE
Olympia, WA 98501-0100
ToddB@atg.wa.gov; Jamesp@atg.wa.gov;
jeffe@atg.wa.gov; allysonz@atg.wa.gov
Attorneys for Defendants State of Washington, Secretary of State Sam Reed and Attorney General Rob McKenna

I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Seattle, Washington this 10th day of January, 2011.

s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA No. 14844
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Telephone: (206) 447-8934
E-mail: ahearne@foster.com