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The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

WASHINGTON STATE REPUBLICAN  
PARTY, et al.,

Plaintiffs,

WASHINGTON STATE  
DEMOCRATIC CENTRAL  
COMMITTEE, et al.,

Plaintiff Intervenors,

and

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

STATE DEFENDANT-  
INTERVENORS' MOTIONS IN  
LIMINE

**MOTION**

Defendant-Intervenors State of Washington, Rob McKenna, Attorney General of the State of Washington, and Sam Reed, Secretary of State of the State of Washington (hereinafter “State”), hereby make the following motions in limine:

- A. Exclusion of witnesses
- B. Preclude any testimony from Mr. Richard Winger, one of Plaintiffs’ expert witnesses, because his proffered testimony is not relevant to the issues before the Court in this matter.
- C. Plaintiffs should be prohibited from eliciting evidence or making arguments in support of any ballot access claims as those have been dismissed by this Court.

These motions in limine do not withdraw or replace the pending motions to strike certain plaintiff witnesses (Dkt. Nos. 287 and 289). As noted in the Pretrial Order jointly submitted by the parties on today’s date, the “Expert Witnesses” and “Other Witnesses” identified in that Pretrial Order are listed subject to the Defendants’ pending motions to strike as well as their motions in limine.

**ARGUMENT**

**A. Exclusion of Witnesses.**

The State requests that the Court enter an exclusion of witnesses order consistent with FRE 615. Specifically, the State asks that the Court order all persons identified by the parties as witnesses in this matter or whom the parties reasonably anticipate could be called as impeachment, rebuttal or surrebuttal witnesses be excluded from the courtroom during the testimony of any other witness. However, the State asks that the order not apply to: 1) The parties in this matter, or the designated representatives of non-natural parties; and 2) any witness identified in the pre-trial order by the parties as an expert. With regard to the experts, the State requests that the Plaintiffs’ several experts not be permitted to sit through the

1 testimony of other Plaintiffs' experts, but only be permitted to sit through the testimony of the  
2 State's expert, Dr. Donovan.

3 **B. Exclusion of the Testimony of Richard Winger as Not Relevant.**

4 Plaintiffs have listed Richard Winger as a possible expert witness in this matter.  
5 Mr. Winger should be precluded from presenting testimony in this matter because the  
6 subjects of his proposed testimony are not relevant to the issues before the Court in this case.

7 Plaintiffs in the pretrial order have indicated that Mr. Winger will testify on two  
8 issues. First, Mr. Winger will testify to "instances and effects of instances where candidates  
9 have been permitted to falsely claim the mantle of a political party to benefit from the public  
10 standing of that party." Pretrial Order at 25-26. Plaintiffs do not provide any detail  
11 regarding the manner in which these candidates 'claim[ed] the mantle' of a party.  
12 Presumably, however, these candidates are the same as those to which he referred in his  
13 declaration submitted in opposition to Defendants' motions for summary judgment. Dkt. 273  
14 at 3-13. These candidates – all of whom are from states outside Washington – all appear to  
15 have 'claimed the mantle' of a party by running as a candidate of that party in the election,  
16 rather than by simply indicating a preference for a party. *Id.*

17 Relevant evidence is that which has "any tendency to make the existence of any fact  
18 that is of consequence to the determination of the action more probable or less probable than  
19 it would be without the evidence." FRE 401. The issue in this matter centers on whether a  
20 candidate's statement that he or she prefers a particular party causes widespread voter  
21 confusion because voters will interpret the candidate's statement to mean the preferred  
22 political party approves of or endorses the candidate, or agrees with the candidate's  
23 preference. Evidence of such voter confusion is only relevant if it is caused by the State's  
24 implementation of I-872 and "severely burdens" the party's associational rights. Dkt. 184 at  
25 10; *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451, 128  
26 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).

1 Mr. Winger's proposed testimony about candidates in other states who claimed  
2 membership in a party or ran in the party's primary is irrelevant to the issues in this case.  
3 Such testimony has no tendency to prove that a statement of party preference by a candidate  
4 causes voter confusion. Indeed, none of the candidates he describes in his declaration appear  
5 to have run in a system like the one at issue in this case where candidates do not run as  
6 members of a party or in the party's primary, but rather as candidates who state only which  
7 party they prefer. In addition, because of this and the fact the candidates cited by Mr. Winger  
8 all ran in states other than Washington, Mr. Winger's proffered testimony also has no  
9 tendency to prove any voter confusion has been caused by the manner in which the State has  
10 implemented I-872.

11 The second subject on which Plaintiffs seek testimony from Mr. Winger is that I-872  
12 hinders or prevents minor political parties from presenting their message on the general  
13 election ballot. Pretrial Order at 25-26. Presumably, such testimony would be the same as or  
14 similar to that contained in Mr. Winger's declaration submitted in opposition to the  
15 Defendants' summary judgment motions in which Mr. Winger alleged that I-872 prevents the  
16 candidates of minor parties from advancing to the general election. Dkt. 273 at 13-67. Such  
17 evidence is only relevant to Plaintiffs' ballot access claims and not to the issues that are  
18 involved in this matter – voter confusion and whether any such confusion severely burdens  
19 the parties' associational rights. This Court has dismissed all of Plaintiffs' ballot access  
20 claims and, therefore, Mr. Winger should not be permitted to offer testimony that is only  
21 relevant to such claims. Dkt. 184 at 11-15.

22 **C. Plaintiffs Should Be Prohibited from Eliciting Evidence or Making Arguments in**  
23 **Support of Their Ballot Access Claims, Which Have Been Dismissed by This**  
24 **Court.**

25 Plaintiffs indicate in the Pretrial Order that they intend to pursue ballot access  
26 arguments. Pretrial Order at 21 (e.g., minor parties are “denied any meaningful opportunity  
to participate in the general election process”). However, this Court has dismissed all ballot

1 access claims made by the parties. Dkt. 184 at 11-15. As such, evidence and argument in  
2 support of such a claim should be precluded at trial.

3 **CONCLUSION**

4 For the foregoing reasons, this Court should grant the State's motions in limine.

5 RESPECTFULLY SUBMITTED this 7th day of January, 2011.

6 ROBERT M. McKENNA  
7 Attorney General

8  
9 /s/ Todd R. Bowers  
10 TODD R. BOWERS, WSBA#25274  
11 Senior Counsel  
12 JAMES K. PHARRIS, WSBA #5313  
13 JEFFREY T. EVEN, WSBA #20367  
14 ALLYSON ZIPP, WSBA #38076  
15 Deputy Solicitors General  
16 Attorney General of Washington  
17 800 Fifth Avenue, Suite 2000  
18 Seattle, WA 98104-3188  
19 Telephone: (206) 464-7352  
20 Fax: (206) 587-4229  
21 E-Mail: [ToddB@atg.wa.gov](mailto:ToddB@atg.wa.gov)  
22 Attorneys for Defendant Intervenors  
23 State of Washington  
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**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I electronically filed the foregoing State Intervenors' Motions in Limine with the clerk of the court using the CM/ECF system which will send notification of such filing to the following:

John White and Kevin Hansen, attorneys for Washington State Republican Party

David McDonald and Emily Throop, attorneys for Washington State Democratic Central Committee

Orrin Grover and John Mills, attorneys for Libertarian Party of Washington State

Thomas Ahearne, Marco Magnano, and Kathryn Carder, attorneys for Washington State Grange

DATED this 7<sup>th</sup> day of January, 2011.

/s/ Todd R. Bowers  
Todd R. Bowers

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