Nos. 11-35122, 11-35124, and 11-35125

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et al.
Plaintiff-Appellants,

v.

STATE OF WASHINGTON, SAM REED, ROB McKENNA, and WASHINGTON STATE GRANGE,
Defendant-Appellees,

On Appeal From The United States District Court
for the Western District of Washington
The Honorable John C. Coughenhour
No. 2:05-CV-00927-JCC

BRIEF OF APPELLEE WASHINGTON STATE GRANGE

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I. INTRODUCTION

The Washington State Grange was the lead Petitioner in this case's prior Supreme Court proceeding. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) ("*Grange*"). This is the Grange's Brief in response to plaintiffs' appeal of the district court rulings below.[1]

The State's Brief in this consolidated appeal explains many reasons why plaintiffs' *as-applied* challenge to Initiative 872 fails as matter of law. Instead of wasting this court's time with a rephrasing of the State's explanations, the Grange joins in the State's arguments supporting the district court rulings in the Grange's and State's favor.

The Grange accordingly submits this Brief solely to focus on the most fundamental and straightforward reason that the district court's rejection of plaintiffs' claims must be affirmed. That reason is based on the plain, unambiguous wording of the election ballot that the State adopted to apply the Initiative's "preference" provisions in this case.

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[1] *The Washington State Grange was chartered in 1889. Grange, 552 U.S. 442, 446 n.2 (2008). 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. Grange, 552 U.S. at 446-47 and footnotes 2 &3.*

II. JURISDICTIONAL STATEMENT

Like the State, the Grange concurs in the jurisdictional statement at pages 3-4 of the Brief of the Washington State Republican Party ("WSRP").

III. ISSUES

The Grange concurs in the statement of issues in the State's Brief.

As noted earlier, the Grange's Brief does not repeat the detailed analysis presented in the State's Brief regarding all those issues, but instead files this Brief to focus on the dispositive fact that the express wording of the election ballots in this case defeats plaintiffs' *as-applied* challenge to the constitutionality of the elections that used those ballots.

IV. STATEMENT OF THE CASE

The Grange concurs in the Statement Of The Case in the State's Brief.

V. COUNTERSTATEMENT OF MATERIAL FACTS

The Grange agrees with the State's Counterstatement Of Facts.

The Grange notes, however, that that counterstatement goes beyond the few, fundamental facts needed to establish the fatal flaw in plaintiffs' *as-applied* challenge to Initiative 872. The following pages accordingly set forth the few, fundamental facts material to the rejection of plaintiffs' appeal.

A. The Challenged Provisions Of Initiative 872.

Plaintiffs' challenge to Initiative 872 focuses on the Initiative's "preference" provisions. Those provisions do three things:

- Those provisions define the term "partisan office" to simply mean those offices for which a candidate may state the name of the political party he or she prefers on his or her Declaration Of Candidacy.[2]

- Those provisions limit such "partisan offices" to a specific group of Statewide and local positions – e.g., governor, legislator, and county commissioner.[3] "Partisan office" does not include President or Vice-President.[4] Nor does it include political party offices such as Precinct Committee Officer ("PCO").[5]

- Those provisions require a candidate's preference statement (if any) to be listed with that candidate's name on the election ballot.[6]

The Supreme Court rejected plaintiffs' claim that those provisions *on their face* impose an unconstitutional burden on political parties' right of association.[7]

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[2] *Initiative 872, section 4 (codified at RCW 29A.04.110). A full copy of the Initiative measure plaintiffs' challenge is attached as Appendix A.*

[3] *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."). Appendix A (codified at RCW 29A.52.112 and RCW 29A.04.110).*

[4] *Id.*

[5] *Id.*

[6] *Initiative 872, sections 4 and 7(3). Appendix A (codified at RCW 29A.04.110 and RCW 29A.52.112).*

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

The *as-applied* question in this case is therefore whether the State's application of the above preference provisions in the elections at issue imposed an unconstitutionally severe burden on these plaintiffs' right of association.

B. The Election Ballot That The State Used To Apply The Challenged Provisions Of Initiative 872 .

Plaintiffs have admitted the following facts material to the elections they challenge in this case:

- Every voter in the elections at issue had the election ballot in front them when they voted on that ballot.[8]

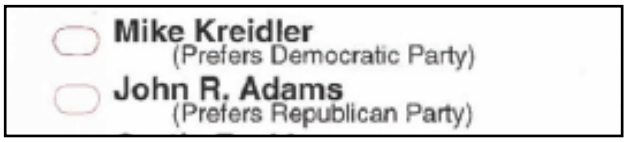
- The ballot every voter had when he or she voted said:[9]

> READ: 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.

[8] *Grange's Supplemental Excerpts of Record ("GSER"), at GSER 54, Agreed Fact ¶24 ("The ballot the voter votes on is one document that every voter has when voting.").*

[9] *GSER 49 – GSER 50, at Agreed Fact ¶9 (State mandated wording for all ballots); State's Excerpts of Record at 235 (example pictured from Clark County ballot).*

- For each candidate who had stated a party preference on his or her Declaration Of Candidacy, the preference stated by that candidate was printed on the ballot below his or her name, with parentheses and the first letter of each word capitalized.[10] For example:[11]



- If a candidate in those elections had not stated a party preference on his or her Declaration Of Candidacy, then "(States No Party Preference)" was printed below his or her name on the ballot.[12] For example:[13]

As explained later in Part VIII of this Brief, the above facts refute plaintiffs' *as-applied* challenge to the "preference" provisions of Initiative 872.

VI. STANDARD OF REVIEW

The Grange concurs with the Standard Of Review stated in the State's Brief.

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[10] *GSER 49, at Agreed Fact ¶8 (State mandated wording for all ballots).*

[11] *State's Excerpts of Record at 205 (King County ballot, Insurance Commissioner race).*

[12] *GSER 49, at Agreed Fact ¶8; (State mandated wording for all ballots).*

[13] *State's Excerpts of Record at 205 (King County ballot, Insurance Commissioner race).*

VII. SUMMARY OF ARGUMENT

The express wording of the election ballots in this case refute plaintiffs' claim that the State unconstitutionally applied the Initiative's "preference" provisions.

VIII. LEGAL ARGUMENT

As previously noted in Part I of this Brief, the Grange joins in the State's arguments supporting the district court rulings in the Grange's and State's favor.[14]

The following pages accordingly focus solely on the most fundamental and direct reason why plaintiffs' challenge to the State's application of Initiative 872 fails as a matter of law – i.e., the plain, unambiguous wording of the election ballot that the State adopted to apply that Initiative.

A. The Election Ballot Used By The State To Apply Initiative 872 Complied With The Supreme Court's Ruling In This Case.

Plaintiffs' 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 (underline added).

[14] *Since the attorney fee issues (both on appeal as well as in the district court) do not relate to the Grange, the Grange does not (cannot) properly address those issues one way or the other.*

As the Supreme Court's March 2008 ruling 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 5-Justice majority opinion).

Chief Justice Roberts likewise noted in his concurring opinion that "we have no idea what those ballots will look like". *Grange*, 552 U.S. at 460 (Roberts, C.J., concurring; with Alito, J., joining that concurrence). Chief Justice Roberts therefore went on to explain the following with respect to these plaintiffs' claims:

> 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 several members of the Court 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 same).

When the Supreme Court issued its decision upholding the constitutionality of this Initiative's preference provisions *on their face*, two members of the Court indicated some skepticism about whether the State of Washington would, after remand, adopt ballots worded along the lines suggested at page 2 of the Grange's Supreme Court Reply Brief to *apply* those preference provisions.[15]

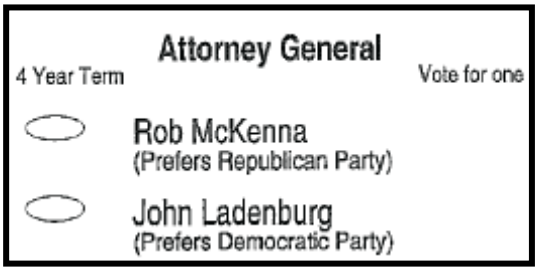
But the record in this case confirms that, after remand, the State of Washington did adopt ballots worded along those lines.

[15] *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. It is also in the record at GSER 15 – GSER 42, with the previously-noted page 2 of that Reply being GSER 24.*

Specifically, the previously-noted page 2 of the Grange's Supreme Court Reply Brief offered the following ballot wording as one alternative for constitutionally identifying a candidate's "preference" under Initiative 872:[16]

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

Plaintiffs admit that that is the type of election ballot wording the State subsequently adopted after remand.[17] For example:[18]



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 that ballot means:[19]

> 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.

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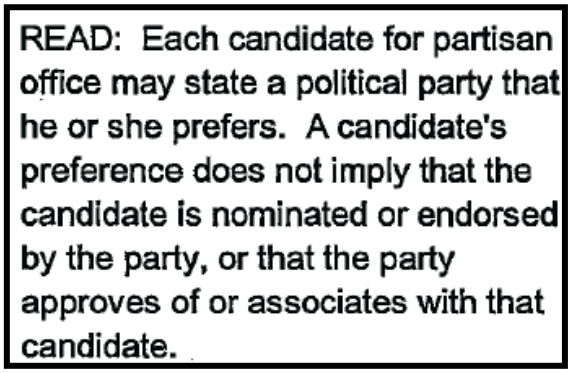
[16] *GSER 24.*
[17] *GSER 49, at Agreed Fact ¶8 (State mandated wording for all ballots).*
[18] *State's Excerpts of Record at 224 (Jefferson County ballot).*
[19] *GSER 24.*

Plaintiffs admit that that is the type of ballot language the State subsequently adopted after remand.[20] For example:[21]


READ: 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.

In short, Plaintiffs admit that the State of Washington applied Initiative 872 by adopting ballot language consistent with the Supreme Court proceedings in this case.

That ballot language, moreover, negates the essential premise underlying plaintiffs' *as-applied* challenge in this case – namely, plaintiffs' premise that Washington's election ballot misleads reasonable well-informed voters into thinking that when the ballot says "(Prefers Republican Party)" after a candidate's name, the ballot instead means that that candidate is nominated or endorsed by the Republican Party, or that the Republican Party approves of or associates with that candidate.

The clear, objective wording of the election ballots that plaintiffs challenge in this case refutes plaintiffs' claim. The Supreme Court has already made it clear

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[20] *GSER 49 – GSER 50, at Agreed Fact ¶9 (State mandated wording for all ballots).*

[21] *State's Excerpts of Record at 235 (example pictured from Clark County ballot).*

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' briefs provided no legal authority for their essential premise that federal courts should instead ignore what the ballot those voters vote on clearly and unambiguously says.

Nor did plaintiffs' briefs provide any applicable legal authority for their argument that the federal courts in Washington must embark on a subjective inquiry every time an election under Initiative 872 is challenged – with the constitutionality of that particular election being subjected to a battle of "experts", pollsters, and supposedly "informed observers" opining on the races, candidates, and electorate involved in that particular case. As the State's Brief in this appeal and the record below have both confirmed, the proper (and only workable) standard for the courts to employ 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 the aforementioned "experts", pollsters, and supposedly "informed observers" offering their views on whether or not voters in a particular election were subjectively "confused", and if so, the type, degree, cause, and significance of that alleged (and amorphous) "confusion".[22] Accord, *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 469, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (proper standard for an

[22] *State's Brief at pp. 23-24; this point was presented to the district court below as well. GSER 131 – GSER 132; GSER 145 – GSER 147.*

as-applied challenge is accordingly an objective one which focuses on the communication's substance rather than amorphous considerations of intent and effect).

The State's Brief presents several additional arguments that confirm the correctness of the district court's dismissal of plaintiffs' case. But as explained above, the most direct and straightforward reason why that ruling was correct is the clear and unambiguous wording of the election ballot that the State adopted to apply the Initiative's preference provisions in this case.

B. Complaints About *Another* Law Do Not Invalidate *This* Law.

1. Washington's Precinct Committee Officer (PCO) Election Law.

The Democratic Central Committee and WSRP note that the district court ruled against the constitutionality of the Washington statute governing the election of the Democratic Central Committee's and WSRP's Precinct Committee Officers (PCOs).[23]

[23] *The Grange did not argue in defense of that separate, PCO statute below. To the contrary, although not an issue in this federal case, the Grange noted that the PCO law's use of public funds for the election of Democratic Central Committee and WSRP internal officers was legally suspect under the Washington State Constitution's prohibition against gifts of public funds (Washington Constitution, Article VIII, sections 5 and 7). GSER 133, at footnote 9.*

But Initiative 872's top two election system does not apply to the election of Precinct Committee Officers. By its very terms, the Initiative's top two system only applies to the following 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.

Initiative 872, section 4 (Appendix A, codified at RCW 29A.04.110).

The election of Precinct Committee Officers (PCOs) is not an office to which the Initiative's top two election system applies. The Democratic Central Committee and WSRP asked for – and got – a ruling against the constitutionality of Washington's PCO law. But that does not make Initiative 872 unconstitutional.

2. Washington's Public Disclosure Commission (PDC) Laws.

The WSRP and Democratic Central Committee also complain about burdens and inconveniences they face under certain Public Disclosure Commission ("PDC") laws in Washington.

But Initiative 872 did not enact those PDC laws. If provisions of the PDC law saddle the WSRP or Democratic Central Committee with an unconstitutionally severe burden, those provisions of the PDC law may be unconstitutional. But that does not make Initiative 872 unconstitutional.

3. Federal Trademark Law.

The Washington State Libertarian Party complains that Initiative 872 must be invalidated because its allowing a candidate to state the name of the political party he or she prefers is a violation of federal (i.e., preemptive) trademark law.

As section VIII.B.4 of the State's Brief explains, however, federal trademark law does not even apply to election ballots.

The Grange also adds that the comparative nature of a candidate's stating the name of the political party he or she prefers would be protected even if trademark law somehow applied.

That is because the First Amendment undisputedly protects a candidate's right to tell voters if he or she prefers one political party over others. But to tell voters that personal preference, the candidate must say the political party's name. Even in commercial speech cases, trademark law allows a person to use someone else's trademark to compare his product to that other person's product. E.g., *New Kids on the Block v. News America Publishing*, 971 F.2d 302, 306 (9th Cir. 1992) ("Indeed, it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the [allegedly infringed upon] mark"); *Smith v. Chanel, Inc.*, 402 F.2d 562, 564-69 (9th Cir. 1968) (defendant free to advertise his perfume by stating that it duplicated 100% the plaintiff's well known Chanel #5).

The same comparative principle applies here – for it is virtually impossible for a candidate to tell voters which political party he or she prefers (if any) without saying that political party's name.

A candidate's stating the name of the political party he or she personally prefers also falls squarely within trademark law's "nominative use" exemption. This court has described that exception as follows:

> [1] the product or service in question must be one not readily identifiable without use of the trademark;
>
> [2] only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and
>
> [3] the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

Playboy Enterprises, Inc. v. Welles, 279 F.3d 796, 801 (9th Cir. 2002).

In the *Playboy Enterprises* case, this court held that Ms. Wells could use the phrase "Playboy Playmate of the Year 1981" to identify herself on her commercial website because her use of the Playboy Playmate trademark was a nominative use. *Id*. at 799. More specifically, this court explained:

> (1) any other description would be too wordy and awkward – for it would be "impractical and ineffectual" for Ms. Wells to identify herself as the "nude model selected by Mr. Hefner's magazine as its number-one prototype woman for the year 1981";
>
> (2) Ms. Wells was only using the bare title, and not any of Playboy's specialized font or logo; and
>
> (3) Ms. Wells was not using anything else but the 1981 Playboy Playmate title to suggest sponsorship or endorsement by Playboy.

Playboy Enterprises, 279 F.3d at 802-03.

A candidate's stating the name of the political party he or she personally prefers is similarly a "nominative use" of that name – a use that trademark law would (if it applied) expressly permit. That is because:

(1) it would be unwieldy for the ballot to describe the candidate's stated preference other than by saying that political party's name – e.g., it would be "impractical and ineffectual" for the ballot to state the candidate "prefers the political party whose mascot is a braying donkey" or "prefers the political party whose mascot is a pudgy pachyderm";

(2) the ballot does not "use" a political party's supposed trademark beyond simply stating that party's name in ordinary font with no logo; and

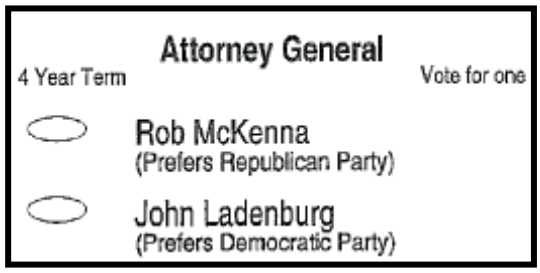
(3) the ballot does not allow for a use suggesting the candidate is endorsed or sponsored by that political party – indeed, the ballot expressly negates that suggestion.

In short, the comparative and nominative use of political party names on the election ballots at issue provide two additional reasons why the wording of those ballots does not violate federal trademark law, and why trademark law accordingly does not invalidate the State's application of Initiative 872's preference provisions in the elections at issue in this case.

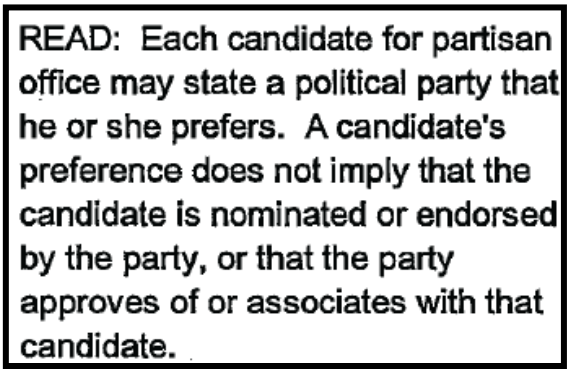
IX. CONCLUSION

The pages upon pages of arguments and spin presented in the plaintiffs' three briefs do not (and cannot) change the clear and unambiguous wording of the election ballot that the State adopted to apply Initiative 872's preference provisions.

The ballots adopted by the State to apply Initiative 872's preference provisions clearly and unambiguously list party name as what the candidate prefers:


Attorney General
4 Year Term
Vote for one
Rob McKenna
(Prefers Republican Party)
John Ladenburg
(Prefers Democratic Party)

And the ballots adopted by the State to apply the Initiative's preference provisions clearly and unambiguously state that the 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:


READ: 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 Brief (as well as those in the State's Brief), the Washington State Grange respectfully submits that the district court was correct when it rejected plaintiffs' *as-applied* challenge to the elections at issue in this case. Plaintiffs' appeal should accordingly be rejected, and the district court's decision affirmed.

RESPECTFULLY SUBMITTED this 11th day of August, 2011.

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CERTIFICATE OF COMPLIANCE

I certify pursuant to FRAP 32(a)(7)(c) and Ninth Circuit Rule 32-1 that the attached brief complies with the type-volume limitations in that it is proportionally spaced, has a typeface of 14 points or more, and contains 3614 words including text and footnotes, but excluding the Tables of Contents and Authorities and its attached Certificates.

DATED this 11th day of August, 2011.

s/ Thomas F. Ahearne

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Attorneys for Appellee
Washington State Grange

CERTIFICATE OF SERVICE

(1) I certify that I electronically filed the attached Brief Of Appellee Washington State Grange with the Clerk of the Court for the Ninth Circuit Court of Appeals by using the appellate CM/ECF system on August 11, 2011, all participants in this case are registered CM/ECF users, and that service will thereby accomplished by the appellate CM/ECF system.

(2) I certify that I arranged for the Grange's corresponding Grange's Supplemental Excerpts of Record ("GSER") to be served by mailing to the following counsel on August 11, 2011:

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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 11th day of August, 2011.

s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA No. 14844

INITIATIVE 872

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal, hereby certify that, according to the records on file in my office, the attached copy of Initiative Measure No. 872 to the People is a true and correct copy as it was received by this office.

AN ACT Relating to elections and primaries; amending RCW 29A.04.127, 29A.36.170, 29A.04.310, 29A.24.030, 29A.24.210, 29A.36.010, 29A.52.010, 29A.80.010, and 42.12.040; adding a new section to chapter 29A.04 RCW; adding a new section to chapter 29A.52 RCW; adding a new section to chapter 29A.32 RCW; creating new sections; repealing RCW 29A.04.157, 29A.28.010, 29A.28.020, and 29A.36.190; and providing for contingent effect.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

TITLE

NEW SECTION. **Sec. 1.** This act may be known and cited as the People's Choice Initiative of 2004.

LEGISLATIVE INTENT: PROTECTING VOTERS' RIGHTS AND CHOICE

NEW SECTION. **Sec. 2.** The Washington Constitution and laws protect each voter's right to vote for any candidate for any office. The Washington State Supreme Court has upheld the blanket primary as protecting compelling state interests "allowing each voter to keep

APPENDIX A

party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." *Heavey v. Chapman*, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980). The Ninth Circuit Court of Appeals has threatened this system through a decision, that, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington.

WASHINGTON VOTERS' RIGHTS

NEW SECTION. **Sec. 3.** The rights of Washington voters are protected by its Constitution and laws and include the following fundamental rights:

(1) The right of qualified voters to vote at all elections;

(2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;

(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

DEFINITIONS

NEW SECTION. **Sec. 4.** A new section is added to chapter 29A.04 RCW to read as follows:

"Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of 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.

APPENDIX A

Sec. 5. RCW 29A.04.127 and 2003 c 111 s 122 are each amended to read as follows:

"Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) for public office ((~~at the polls~~)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

Sec. 6. RCW 29A.36.170 and 2003 c 111 s 917 are each amended to read as follows:

(1) ((~~Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan~~)) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name((~~s~~)) of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes ((~~for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted,~~)) will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for ((~~any other nonpartisan~~)) an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.130.

(2) ((~~On the ballot at the general election~~)) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed ((~~under the title of the office~~)) for that position on the ballot at the general election.

NEW SECTION. **Sec. 7.** A new section is added to chapter 29A.52 RCW to read as follows:

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

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(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in RCW 29A.36.170.

(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

CONFORMING AMENDMENTS

Sec. 8. RCW 29A.04.310 and 2003 c 111 s 143 are each amended to read as follows:

((~~Nominating~~)) Primaries for general elections to be held in November must be held on:

(1) The third Tuesday of the preceding September; or ((~~on~~))

(2) The seventh Tuesday immediately preceding ((~~such~~)) that general election, whichever occurs first.

Sec. 9. RCW 29A.24.030 and 2003 c 111 s 603 are each amended to read as follows:

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate ((~~a~~)) his or her major or minor party ((~~designation, if applicable~~)) preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

Sec. 10. RCW 29A.24.210 and 2003 c 111 s 621 are each amended to read as follows:

Filings for a partisan elective office shall be opened for a period of three normal business days whenever, on or after the first day of the regular filing period and before the sixth Tuesday prior to ((~~a primary~~)) an election, a vacancy occurs in that office, leaving an unexpired term to be filled by an election for which filings have not been held.

Any ((~~such~~)) special three-day filing period shall be fixed by the election officer with whom declarations of candidacy for that office are filed. The election officer shall give notice of the special three-day filing period by notifying the press, radio, and television in the county or counties involved, and by ((~~such~~)) any other means as may be required by law.

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Candidacies validly filed within the special three-day filing period shall appear on the primary or general election ballot as if filed during the regular filing period.

The procedures for filings for partisan offices where a vacancy occurs under this section or a void in candidacy occurs under RCW 29A.24.140 must be substantially similar to the procedures for nonpartisan offices under RCW 29A.24.150 through 29A.24.170.

NEW SECTION. **Sec. 11.** A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

Sec. 12. RCW 29A.36.010 and 2003 c 111 s 901 are each amended to read as follows:

On or before the day following the last day allowed for ((~~political parties to fill vacancies in the ticket as provided by RCW 29A.28.010~~)) candidates to withdraw under RCW 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party ((~~designation, if any~~)) preference or independent designation as shown on filed declarations.

Sec. 13. RCW 29A.52.010 and 2003 c 111 s 1301 are each amended to read as follows:

Whenever it shall be necessary to hold a special election in an odd-numbered year to fill an unexpired term of any office which is scheduled to be voted upon for a full term in an even-numbered year, no ((~~September~~)) primary election shall be held in the odd-numbered year if, after the last day allowed for candidates to withdraw, ((~~either of the following circumstances exist:~~

~~(1) No more than one candidate of each qualified political party has filed a declaration of candidacy for the same partisan office to be filled; or~~

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((~~(2)~~)) no more than two candidates have filed a declaration of candidacy for a single ((~~nonpartisan~~)) office to be filled.

In ((~~either~~)) this event, the officer with whom the declarations of candidacy were filed shall immediately notify all candidates concerned and the names of the candidates that would have been printed upon the ((~~September~~)) primary ballot, but for the provisions of this section, shall be printed as ((~~nominees~~)) candidates for the positions sought upon the ((~~November~~)) general election ballot.

Sec. 14. RCW 29A.80.010 and 2003 c 111 s 2001 are each amended to read as follows:

((~~(1)~~)) Each political party organization may((~~:~~

~~(a) Make its own~~)) adopt rules ((~~and regulations; and~~

~~(b) Perform all functions inherent in such an organization.~~

~~(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in RCW 29A.28.010~~)) governing its own organization and the nonstatutory functions of that organization.

Sec. 15. RCW 42.12.040 and 2003 c 238 s 4 are each amended to read as follows:

(1) If a vacancy occurs in any partisan elective office in the executive or legislative branches of state government or in any partisan county elective office before the sixth Tuesday prior to the ((~~primary for the~~)) next general election following the occurrence of the vacancy, a successor shall be elected to that office at that general election. Except during the last year of the term of office, if such a vacancy occurs on or after the sixth Tuesday prior to the ((~~primary for that~~)) general election, the election of the successor shall occur at the next succeeding general election. The elected successor shall hold office for the remainder of the unexpired term. This section shall not apply to any vacancy occurring in a charter county ((~~which~~)) that has charter provisions inconsistent with this section.

(2) If a vacancy occurs in any legislative office or in any partisan county office after the general election in a year that the position appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified as defined in RCW ((~~29.01.135~~))

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29A.04.133 and shall continue through the term for which he or she was elected.

CODIFICATION AND REPEALS

NEW SECTION. **Sec. 16.** The code reviser shall revise the caption of any section of Title 29A RCW as needed to reflect changes made through this Initiative.

NEW SECTION. **Sec. 17.** The following acts or parts of acts are each repealed:

(1) RCW 29A.04.157 (September primary) and 2003 c 111 s 128;

(2) RCW 29A.28.010 (Major party ticket) and 2003 c 111 s 701, 1990 c 59 s 102, 1977 ex.s. c 329 s 12, & 1965 c 9 s 29.18.150;

(3) RCW 29A.28.020 (Death or disqualification--Correcting ballots--Counting votes already cast) and 2003 c 111 s 702, 2001 c 46 s 4, & 1977 ex.s. c 329 s 13; and

(4) RCW 29A.36.190 (Partisan candidates qualified for general election) and 2003 c 111 s 919.

NEW SECTION. **Sec. 18.** This act takes effect only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect.

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