

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,

and

WASHINGTON STATE GRANGE,

Defendant Intervenor.

No. CV05-0927 JCC

PLAINTIFF INTERVENOR
WASHINGTON STATE
DEMOCRATIC CENTRAL
COMMITTEE'S TRIAL BRIEF

PLAINTIFF INTERVENOR WASHINGTON STATE
DEMOCRATIC CENTRAL COMMITTEE'S TRIAL BRIEF

- 1

CV05-0927 JCC

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I. INTRODUCTION

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2 The Washington State Democratic Central Committee (“WSDCC”) respectfully
3 submits this trial brief in anticipation of trial January 18, 2011. The WSDCC’s evidence and
4 issues are generally set out in its pending Motion for Summary Judgment and its Cross-
5 Motion for Summary Judgment. The Court is familiar with the material in those motions and
6 it will not be repeated here. The facts which the parties seek to prove at trial are largely
7 undisputed though individual pieces of evidence may draw objections. The interpretation of
8 the facts will likely be the contentious part of this trial.

9 The State will argue to the Court that the question whether voters likely understand the
10 political party preference statement on ballots to be an indication of affiliation between a
11 candidate and the party preferred must be determined solely from the ballot and voter’s
12 pamphlet. WSDCC will argue that context matters. What the voter perceives on reading a
13 ballot is influenced by what the voter expects to be told by the ballot.

14 The State will argue that the fact that voters actually understand the party preference
15 statement on the ballot to indicate a candidate’s affiliation with a political party is irrelevant
16 unless an hypothetical voter, the reasonable, well-informed voter, would understand the
17 State’s ballots to be indicating a candidate’s party affiliation. The State, however, has no
18 evidence that voters understand the ballots to be indicating anything other than a candidate’s
19 party affiliation. The WSDCC will argue that the State’s lack of evidence is a failure by the
20 State to demonstrate that it has implemented the Top Two primary in a constitutional manner
21 as required by the Supreme Court. The State asks the Court to speculate that voters have an
22 understanding that is inconsistent with their actual actions, statements and expectations. The
23 State should be required to produce more than speculation as support for its position.

24 The State will argue that there is no significant injury to the Democratic Party as a
25 result of the unauthorized associations promoted by the State on I-872 ballots. The WSDCC
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1 will show that the injury is extremely severe because the State's implementation has diluted
 2 the votes of Democratic candidates with the result that the candidates did not qualify for the
 3 general election.

4 II. ANALYSIS

5 A. Context Matters.

6 The fundamental issue before the Court in this trial is whether context matters. The
 7 Defendants urge the Court to resolve this case by limiting its view to the four corners of the
 8 ballot document and voter's pamphlet to conclude that no reasonable well-informed voter
 9 would perceive the statement of Democratic party preference printed by the State after a
 10 candidate's name to indicate that the candidate is associated with or affiliated with the
 11 Democratic Party. But how the voter understands the information on the ballot is affected by
 12 the voter's expectation with respect to the information that will be on the ballot. In
 13 Washington a well informed voter expects to see an indication of whether a candidate belongs
 14 to a political party or is an independent printed after the candidate's name because
 15 Washington's election law requires that information to be printed there: "*The political party*
 16 *or independent candidacy of each candidate for partisan office shall be indicated next to the*
 17 *name of the candidate on the primary and election ballot.*" RCW 29A.36.121(3).

18 A reasonable well informed Washington voter expects to see the party affiliation of a
 19 candidate after the candidate's name on the ballot because that was the system well-informed
 20 voters were told would be the result of voting for I-872. *See* Pre-Trial Order, dkt. 300
 21 ("Order"), Ex. 369 (Top Two primary FAQ from www.blanketprimary.org, p.1-2 ("Does this
 22 mean that, in a qualifying primary, the candidates are nonpartisan?: No, *the candidates will*
 23 *continue to express a political preference when they file for office and that party designation*
 24 *will appear on the ballot. . . . Would the primary ballot look any different to the voter?: No.*
 25 *At the primary . . . the party designations will appear after the candidates' names"*)).

26 PLAINTIFF INTERVENOR WASHINGTON STATE
 DEMOCRATIC CENTRAL COMMITTEE'S TRIAL BRIEF

- 3

CV05-0927 JCC

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1 A reasonable well informed Washington voter expects that candidates list their party
2 affiliation when they file for office because the media outlets which the well informed voter
3 consults identify candidates as associated with the political party the candidate indicates as a
4 preference on his or her declaration of candidacy. *See, e.g. id.*, Ex. 353 (Spokesman Review
5 Article, “House, Senate Races Draw a Crowd).

6 The evidence indicates that a majority of Washington voters believe that the purpose
7 of voting in the primary election is to designate party nominees for the general election ballot.
8 *See id.*, Ex. 334 (Elway Research Interactive focus group study, “Voter Evaluation of Primary
9 Ballot Interactive Polling Workshop”), p. D-I_017157, #7 (56% of study participants believed
10 the purpose of a primary election was to “Designate the party nominees for the General
11 Election”). Such voters reasonably expect that the primary ballot will ask them to choose a
12 nominee from among a selection among candidates affiliated with a party.

13 Biases, context and expectation affect human perception in other fields of endeavor as
14 the Court must surely have seen during a long career conducting and observing cross-
15 examination of witnesses. There is no reason to believe, and neither the State nor the Grange
16 offers any evidence to demonstrate, that reasonable well informed voters in Washington lack
17 biases and expectations and are unaffected by context.

18 The Defendants object to the admission of evidence that demonstrates the context,
19 biases and expectations of voters with regard to the information the State has placed on ballots
20 and in voter pamphlets. This objection should be over-ruled. The Court can and should
21 consider the context within which Washington voters read ballots and voter’s pamphlets in
22 determining whether there is a possibility that significant voters at the time of voting perceive
23 the party preference printed after a candidate’s name as indicating that candidate’s affiliation
24 with that party.

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26 PLAINTIFF INTERVENOR WASHINGTON STATE
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- 4

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1 B. The State Has Not Met Its Burden.

2 The Defendants misapprehend the State's burden of proof. It is not a sufficient
3 response at this stage of the litigation for the State to assert "you can't prove that we increased
4 the confusion." The question is not whether the State's implementation of I-872 has caused
5 additional confusion; the question is whether the State's implementation has eliminated the
6 possibility of confusion. Justice Thomas wrote "we must...ask whether the ballot could
7 conceivably be printed in such a way as to eliminate the possibility of widespread voter
8 confusion and with it the perceived threat to the First Amendment." *See Wash. State Grange*
9 *v. Wash. State Republican Party*, 552 U.S. 442, 456 (2008). The State in its Trial Brief agrees
10 that this quote indicates that the question is whether the ballot was in fact printed such that it
11 eliminates the possibility of widespread confusion. Dkt. 303 at 18. The issue is not whether
12 the ballot increases confusion; the question is whether it eliminates confusion.

13 Similarly, Chief Justice Roberts in his concurrence wrote: "If the ballot is designed in
14 such a manner that no reasonable voter would believe that the candidates there are nominees
15 or members of, or otherwise associated with, the parties the candidates claimed to 'prefer' the
16 I-872 primary system would likely pass constitutional muster." *Id.* at 456. In arguing that
17 voter confusion must be directly caused by the State's actions the State contradicts the
18 Supreme Court's articulation of the question. As the State notes in its Trial Brief, the
19 Supreme Court "directed the inquiry regarding voter confusion to a specific fact: does a
20 'well-informed electorate ...interpret a candidate's party-preference designation to mean that
21 ...the party associates with or approves of the candidate.'" Dkt. 303 at 12. The question is
22 how the voter interprets the designation, not why the voter interprets it that way or who
23 caused the misunderstanding.

24 The history of primary systems in this State creates an inherent risk that voters simply
25 continue to view ballot information as they have in the past and thus perceive party preference
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PLAINTIFF INTERVENOR WASHINGTON STATE
DEMOCRATIC CENTRAL COMMITTEE'S TRIAL BRIEF

- 5

CV05-0927 JCC

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1 information as indicating an association. The State's burden in implementing I-872 is to
2 demonstrably change the voter's view of primary ballots and party information, not simply
3 allow it to continue. The State offers no evidence that it has eliminated, or even reduced
4 substantially, the possibility of confusion about association or that its ballot design meets
5 Justice Roberts' standard. The State needs to affirmatively demonstrate that its
6 implementation of I-872 has eliminated the possibility of voter confusion. The State has
7 proposed no evidence to meet this burden. It simply points to the notice it prints on the
8 ballots without any evidence of interest in whether the notice is even read by voters much less
9 that it has any effect. That is insufficient.

10 C. The State's Implementation of I-872 Has Changed Election Outcomes.

11 Allowing candidates who are not affiliated with the Democratic Party to use the
12 Democratic Party's name on ballots dilutes the votes that actual Democratic nominees on the
13 same ballot receive by giving the Democratic voters in the electorate what appear to be
14 multiple options. The State could have implemented I-872 so as to avoid this confusion by
15 rejecting the use by candidates of party names on ballots unless confirmed by the party
16 named. It chose not to do so. The evidence will show that in many instances Democratic
17 nominees failed to qualify for the general election by a much smaller number of votes than
18 unauthorized candidates using the Democratic Party's name received in the same election.
19 The interference with the Democratic Party's ability to consolidate its members behind its
20 nominee is clear and present and unnecessary.

21 **III. CONCLUSION**

22 The State's evidence will not show that its implementation of I-872 has in fact
23 eliminated the risk of widespread voter confusion about the meaning of the party preference
24 designation used by the State on its ballots. In fact the evidence will show widespread
25 confusion continues. This confusion not only harms the Democratic Party by allowing
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PLAINTIFF INTERVENOR WASHINGTON STATE
DEMOCRATIC CENTRAL COMMITTEE'S TRIAL BRIEF

- 6

CV05-0927 JCC

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1 unauthorized persons to be viewed as spokespeople for the Party. It also harms the Party by
2 diluting the votes of its members in the electorate by spreading them among unauthorized
3 candidates.

4 The State's implementation of I-872 is unconstitutional and should be enjoined.

5 DATED this 10th day of January, 2011.

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14 Washington State Democratic Party and
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- 7

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2011, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ David T. McDonald
David T. McDonald, WSBA # 5260

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