

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE  
REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON STATE  
DEMOCRATIC CENTRAL  
COMMITTEE, et al.,

Plaintiff Intervenors,

LIBERTARIAN PARTY OF  
WASHINGTON STATE, et al.,

Plaintiff-Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant-Intervenor,

WASHINGTON STATE GRANGE,

Defendant-Intervenor.

No. C05-0927 JCC

**LIBERTARIAN PARTY'S  
OPPOSITION TO MOTIONS  
FOR SUMMARY JUDGMENT  
BY STATE OF WASHINGTON  
& WASHINGTON STATE  
GRANGE**

Noted on motions calendar for  
Friday, September 17, 2010

Oral argument requested

**I.  
INTRODUCTION**

On March 18, 2008, the US Supreme Court reversed and remanded the earlier decision of the Ninth Circuit, expressly stating that the as-applied constitutional claims raised below by the Republican, Democratic & Libertarian Parties should be addressed on remand. See *Wash. St. Grange v. Wash. St. Republican Party*, \_\_\_ US \_\_\_, 128 S. Ct. 1184, n 11 (2008) (slip op.).

**A. The Motions for Summary Judgment.**

1. **State of Washington.** The State of Washington has moved for summary judgment arguing:<sup>1</sup>

a. That the State Has Eliminated Any “Real Threat” of Voter Confusion.

b. Real Voter Confusion Must Be Judged By An Objective Standard.

2. **Washington State Grange.** The Washington State Grange has moved for summary judgment arguing<sup>2</sup> that the

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<sup>1</sup> The State has also presented arguments regarding the Washington’s sponsor disclosure provisions of RCW §42.17.510(1), the Precinct Committee Officer elections and the applicability of the Washington state finance disclosure law on the Republican Party. Those issues are reserved to the Democratic and Republican parties and, to the extent appropriate, the Libertarian Party joins in their positions on those issues.

ballot itself refutes the Plaintiffs' claims that the "reasonable voter is confused about party affiliation vs, party preference.

a. That the State Has Eliminated Any "Real Threat" of Voter Confusion.

### **B. The Issues Before the Court.**

1. **Voter Confusion.** The core issue following the decision of the United States Supreme Court is the question of voter confusion regarding the party "preference" designation under I-872.

In his concurring opinion, Chief Justice Roberts provided a guiding standard for the determination of the constitutionality on an as-applied basis on remand:

I share *Justice Scalia's* concern that permitting a candidate to identify his political party preference on an official election ballot--regardless of whether the candidate is endorsed by the party or is even a member--may effectively force parties to accept candidates they do not want, amounting to forced association in violation of the First Amendment.

I do think, however, that whether voters *perceive* the candidate and the party to be associated is relevant to the constitutional inquiry. Our other forced-association cases indicate as much. ...

What makes these cases different, as *Justice Scalia* explains, is the place where the candidates express their party preferences: on the ballot. See *post*, at 4 (dissenting

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<sup>2</sup> The Grange has also presented arguments regarding the Precinct Committee Officer elections and the applicability of the Washington state finance disclosure laws. See footnote one, *supra*.

opinion) (noting "the special role that a state-printed ballot plays in elections"). And what makes the ballot "special" is precisely the effect it has on voter impressions. See *Cook v. Gralike*, [531 U.S. 510, 532](#) (2001) (Rehnquist, C. J., concurring in judgment) ("[T]he ballot . . . is the last thing the voter sees before he makes his choice"); *Anderson v. Martin*, [375 U.S. 399, 402](#) (1964) ("[D]irecting the citizen's attention to the single consideration of race . . . may decisively influence the citizen to cast his ballot along racial lines").

But because respondents brought this challenge before the State of Washington had printed ballots for use under the new primary regime, we have no idea what those ballots will look like. Petitioners themselves emphasize that the content of the ballots in the pertinent respect is yet to be determined. See Reply Brief for Washington State Grange 2-4, 7-13.

If the ballot is designed in such a manner that no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to "prefer," the I-872 primary system would likely pass constitutional muster. I cannot say on the present record that it would be impossible for the State to design such a ballot. Assuming the ballot is so designed, voters would not regard the listed candidates as "party" candidates, any more than someone saying "I like Campbell's soup" would be understood to be associated with Campbell's. Voters would understand that the candidate does not speak on the party's behalf or with the party's approval. On the other hand, if the ballot merely lists the candidates' preferred parties next to the candidates' names, or otherwise fails clearly to convey that the parties and the candidates are not necessarily associated, the I-872 system would not survive a First Amendment challenge.

As the Chief Justice continues:

If the ballot is designed in such a manner that no reasonable voter would believe that the candidates listed

there are nominees or members of, or otherwise associated with, the parties the candidates claimed to "prefer," the I-872 primary system would likely pass constitutional muster. ... On the other hand, if the ballot merely lists the candidates' preferred parties next to the candidates' names, or otherwise fails clearly to convey that the parties and the candidates are not necessarily associated, the I-872 system would not survive a First Amendment challenge.

Finally, Chief Justice Roberts would require that:

... Voters... understand that the candidate does not speak on the party's behalf or with the party's approval.

On these motions, the Court must determine whether there is a factual issue regarding the existence of voter confusion arising from the I-872 ballot on which the defendants rely.

2. **Parties' Rights of Expression.** A second issue under I-872, as implemented, is that all political parties are denied the right to express their preferences in any official communication to the voter.

3. **Minor Parties' Denial of the General Election Forum.** The final issue is that, except in rare instances, minor parties are effectively forever denied the forum of the general election and the general election campaign by I-872.

## **II. ARGUMENT**

### **A. THE STANDARD ON SUMMARY JUDGMENT.**

As described above, the trial of this case will not focus on traditional factual disputes. The ballots and the election procedure followed in 2008 and 2010 are laid out in the State's factual presentation. Rather, the trial will be about the factual effects of those events. The Supreme Court has held that, where reasonable minds can differ on the inferences to be drawn from the facts presented, summary judgment should be denied. *Adickes v. S.H. Kress & Co.* (1970) 398 US 144, 157, 90 S.Ct. 1598, 1608. See also *Lake Nacimiento Ranch Co. v. San Luis Obispo County* (9th Cir. 1987) 841 F. 2d 872, 875; *Amey, Inc. v. Gulf Abstract & Title, Inc.* (11th Cir. 1985) 758 F. 2d 1486, 1502.

Thus, where words or conduct may be interpreted in several ways, one supporting the motion and one controverting it, summary judgment must be denied. For example, in a defamation case, summary judgment is improper if the words published are capable of more than one meaning, only one of which is defamatory.

*Hallmark Builders, Inc. v. Gaylord Broadcasting Co.* (11th Cir. 1984)  
733 F. 2d 1461, 1463.

Here, on the issue of voter confusion, the essence of the case remanded from the Supreme Court is the *inference* drawn by the voter from the presentation of candidates. It is an inquiry to determine the existence or non-existence of voter confusion. In other words, summary judgment is improper where conflicting inferences can be drawn about the voter's understanding (i.e., where reasonable minds could disagree as to a person's motives, etc.). [See *Braxton-Secret v. A.H. Robins Co.* (9th Cir. 1985) 769 F2d 528, 531] This conclusion flows naturally from the well-recognized rule:

On summary judgment the inferences to be drawn from the underlying facts contained... must be viewed in the light most favorable to the party opposing the motion.

*United States v. Diebold,  
Incorporated*, 369 U.S. 654, 655  
(1962).

This applies with equal force to the other prongs that Plaintiff-Intervenor Libertarian Party urges on the Court. The effects of I-872 on political parties and their opportunity to exercise their First Amendment rights and the effect of I-872 must be based on detailed factual presentations.

**B. THE RECORD AMPLY DEMONSTRATES THAT THE STATE CANNOT MEET ITS BURDEN.**

**1. The State's Presentation.**

The Washington State Grange offers no evidence in support of its motion for summary judgment. Instead, it relies on the evidence presented by the State of Washington. The State of Washington presented the following evidence related to the issues of voter confusion:

The Declaration of Catherine Blinn is offered for the sole purpose of presenting and authenticating the attached exhibits. The exhibits are various materials produced by the Washington State Secretary of State and county elections office that are either part of the election process or part of the Secretary of State's voter education campaign conducted in 2008. No evidence is offered that shows how the voters responded to any of the materials or perceived any presentation on the ballot, in the voter educational materials or otherwise. The State would leave the entire issue to the speculation that because pieces of paper or public service announcements were delivered or made, these must have had their full intended effect.

The State has not offered any opinion, expert or otherwise, in evidentiary support of its position.

2. **What The State Has Not Told the Court.** The documents produced by the State in discovery and the testimony of its own expert, Dr. Todd Donovan, belie the patina of voter comprehension that the State wishes to convey.

Except for Exhibit A, the excerpt of Dr. Donovan's deposition, the Exhibits to the Declaration of Orrin Grover are all documents produced by the State of Washington in discovery from its own files. These documents show a pattern of misunderstanding and confusion in the Secretary of State's office, in the media and among county officials.

**a. The Media Is Confused.**

Exhibit B contains four examples of newspaper/media coverage. These stories plainly illustrate that the fine distinctions of "party preference" and party endorsement are lost even on the presumptively knowledgeable members of the Fourth Estate. The designations of "Republican," "Democrat," "R-Moses Lake" are used without clarification or distinction that Washington State no longer recognizes party endorsement in ballot discussions. See Exhibit B, pp. 1-3.

**b. The State Election Officials Themselves  
Are Confused.**

Exhibit C commences with a press release from the Hon. Sam Reed, the Washington Secretary of State which informs the public that "State Sen. Dan Swiecker, *R-Rochester*,... efiled from the comfort of his home...," following his release from the hospital. [Emphasis added.] The release also points out that "State Rep. Jim McIntire, *D-Seattle*,...also filed online." [Emphasis added.] Pages 2 and 3 of Exhibit C are an April 21-22, 2008, email exchange showing the confusion among county auditors about the implementation of the Top Two primary system. This is followed by a two page email, on April 16, 2008, showing the confusion arising from the administration of the PCO elections with the top two system.

Exhibit D is a June 22, 2010 Catherine Blinn, Esq. email that itemizes several 2008 races where the Top Two system produced lopsided results.

Exhibit E is a November 25, 2008 memorandum from Jeffrey Even, Esq. to the Director of Elections again showing the confusion arising from the administration of the PCO elections with the top two system.

**c. Finally, The Voters Are Confused.**

According to the State's own expert, the voters are confused. In his deposition. Dr. Donovan repeatedly admitted that the voters are confused about the labeling of party representatives, candidates and other issues. The following are quotes from his excerpt of Dr. Donovan's deposition.<sup>3</sup> Dr. Donovan repeatedly acknowledges that he believes that the voters are confused about "factual questions," party nominations, and "basic factual knowledge about the political process," even under the Top Two system:

A. [Donovan] [cont.] **But my assumption is, and I think I'm supporting it with data, on a lot of these things, we measure very high levels of error in response to factual questions. P. 79, lines 22-24.**

A. [Donovan] This relates to the Manweller study, that if we're going **to be measuring confusion, we need to be aware of most people don't know what a nomination process probably is. P. 80, lines 22-24.**

A. [Donovan] I -- **it [Donovan's Expert Report] means what it says, that most Americans lack basic factual knowledge about political process related to parties, candidates, and nominations. P. 81, lines 19-21.**

Q: [Grover] **So does that mean they don't know what a nomination is?**

A. [Donovan] **Yeah. P. 82, lines 14-16**

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<sup>3</sup> The page numbers used are the page numbers from the reporter's transcript.

Q: [Grover] [Do] you believe there is no [voter] confusion because you disagree with [Dr. Manweller's] methodology. P. 84, lines 1-3.

A. [Donovan] No, I would disagree with that statement. **I was saying there is substantial confusion. You start with confusion. P. 84, lines 11-13**

**C. THE TOP TWO SYSTEM DEPRIVES ALL POLITICAL PARTIES OF THE RIGHT TO HAVE THEIR VOICE HEARD IN THE ELECTORAL PROCESS.**

1. **The Effect on All Parties.** The State's expert, Dr. Todd Donovan's textbook states that: "The single most important factor in state politics is the political party." In his deposition, Dr. Donovan tried to qualify the statement from his book:<sup>4</sup>

I don't necessarily agree or disagree with it. I could maybe think of other things that we could say are quite important, **but I don't deny the importance of parties in state politics. P. 90, lines 17-20**

Yet, notwithstanding the fact that its expert doesn't "deny the importance parties in state politics," the State of Washington wants this Court to accept as constitutional a system that denies all political parties any opportunity to express their preference for a candidate in the official electoral process. Party nominations are

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<sup>4</sup> At the outset, Dr. Donovan advised that the chapter from which the quote was taken was written by one of his co-authors.

reduced to nothing under the Top two system. They are not registered on the ballot, they are not contained in the voters' pamphlet, their voice is nowhere to be found in the official information provided by the State of Washington. This is contrary to the law:

But the political party and the independent candidate approaches to political activity are entirely different and *neither is a satisfactory substitute for the other*. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status under California law, such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not.

In *Williams v. Rhodes*, the opportunity for political activity within either of two major political parties was seemingly available to all. But this Court held that to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. No discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties. Similarly, here, we perceive no sufficient state interest in conditioning ballot

position for an independent candidate on his forming a new political party as long as the State is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support. (Fn. 16 omitted.)

*Storer v. Brown Frommhagen v. Brown*, 415 U.S. 724, 745-746 (1974).<sup>5</sup>

The essence of our political system requires that political parties, including minor parties, and independents have the right to participate in the system and even in the general election. The Top Two system turns this process on its constitutional head. The Declaration of Richard Winger, filed herewith, describes the evils of the Top Two process:

1. **Party Dilution.** The Top Two process encourages party misidentification and raiding. See Declaration of Richard Winger, Opinion One.

2. **Denial of Access for Minor Parties & Independents.** Minor party and independent candidates will be denied access to the general election ballot and the general election

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<sup>5</sup> For the reader's reference, *Williams v. Rhodes Socialist Labor Party v. Rhodes*, 393 U.S. 23 (1968).

political debate in all but the most unusual circumstances. See Declaration of Richard Winger, Opinions Two, Three & Four.

**3. As Applied Here, the Denial of Access Is Unconstitutional.** The denial of all access to the general election ballot by a candidate that garnered significant votes in the primary is unconstitutional. In the 1980 Washington gubernatorial election, the Top Two system would have eliminated Republican John Spellman, who was the third highest vote getter in the primary but won the governorship in the general election. Under the Top two system, a candidate such as John Spellman would be denied any place on the general election ballot even though he garnered hundreds of thousands of votes.

### **III. CONCLUSION**

The motions of the State of Washington and the Grange should be denied.

RESPECTFULLY SUBMITTED this 13th day of September, 2010.

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LIBERTARIAN PARTY'S OPPOSITION TO  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on September 13, 2010, I caused to be electronically filed the foregoing Memorandum, the Declaration of Orrin Grover and the Declaration of Richard Winger with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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