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 TRIAL BRIEF

TRIAL DATE: 01/18/2011

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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, Democractic & 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.).

II.
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

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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 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.

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The Chief Justice continued:

> 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.

In this trial, the Court must determine the extent to which voter confusion exists 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. **Denial of the General Election Forum to Minor parties.** The final issue is that, except in rare instances, minor

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parties are effectively forever denied the forum of the general election and the general election campaign by I-872.

III.
DISCUSSION

A. THE EVIDENCE AT TRIAL WILL AMPLY DEMONSTRATES THE BURDEN ON THE NOMINATING PROCESS.

1. **Nomination Is Important.**

The nomination process is "…the crucial juncture at which the appeal to common principles [among voters] may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Conn*. 479 U.S. 208, 216 (1986). Moreover, a party's right to exclude [undesirable candidates] is central to its freedom of association, and is never "more important than in the process of selecting its nominee." *California Democratic Party v. Jones*, 530 U. S. 567, 575 (2000).

Neither the Washington State Grange nor the State of Washington will offer any evidence that shows that, as applied, I-872 offers a political party the opportunity to exclude candidates that fail to meet its principles or to voice that party's approval of a candidate on the electoral ballot.

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Instead, the evidence will show a pattern of misunderstanding and confusion in the Secretary of State's office, in the media, among county officials and, consequently, among voters.

a. **The Media Is Confused.**

The media exhibits to be offered at trial will illustrate that the distinctions between "party preference," "party endorsement" and "party nomination" are lost even on the presumptively knowledgeable members of the Fourth Estate.

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

As discussed in the Libertarian Party's opposition to the State's motion for summary judgment, press releases from the Office of the Secretary of State to be offered at trial will illustrate that the distinctions between "party preference," "party endorsement" and "party nomination" are equally blurred in the official communications of Washington State officials.

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

As discussed in the Libertarian Party's summary judgment opposition, the confusion in the media and the official communications by state offices has resulted in or exacerbated

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confusion among the voters. In the words of the State's expert, "you start with confusion" and the process goes downhill from there.

B. **THE TOP-TWO SYSTEM DEPRIVES EVERY POLITICAL PARTY OF THE RIGHT TO HAVE ITS VOICE HEARD IN THE ELECTORAL PROCESS**.

1. **The Effect on All Parties.** The textbook authored by State's expert, Dr. Todd Donovan states that: "The single most important factor in state politics is the political party." The defendants seek to impose a system on the Washington voters that denies any meaningful participation by political parties in the electoral process:

- Political party affiliation is banned from the ballot;
- Political party nomination is banned from the ballot; and
- Party identification and political message are barred from the official electoral publications and documentation provided to the voters by the State.

The political parties are completely excluded from the official communications to the voters in the electoral process. This means that the political parties have no official forum to communicate their message to the voters.

On March 23, 1933, the German Reichstag passed the Enabling Act giving Adolph Hitler the power to make his own laws. Members of opposition parties were denied access to the legislative

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chamber by stormtroopers. On July 14, 1933, the Law Against the Formation of Parties was adopted and the passage to dictatorship was complete.

The political party system in the United States has developed and matured in our country for 235 years. It has evolved peacefully by allowing party agendas to evolve and even to allow parties themselves to be replaced with changing economic or political conditions. I-872 is the product of a well-meaning but misguided attempt to neuter the influence of political parties—or for that matter any form of political affiliation. The party is denied its right to express its choice and denied to right to reject a candidate claiming its mantle who is antithetical to its beliefs.

The exclusion of political parties from the process as implemented by the State of Washington is prohibited by the decisions of the United States Supreme Court. See *Storer v. Brown Frommhagen v. Brown*, 415 U. S. 724, 745-746; *Williams v. Rhodes Socialist Labor Party v. Rhodes*, 393 U.S. 23 (1968).

The effect of I-872 on minor parties such as the Libertarian Party is more profound. Only under the most unusual circumstances will a minor party candidate ever appear on the general election ballot

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under I-872. If I-872 had been in effect at the time, it is doubtful that the Republican Party would have ever taken its place as a major political party.

III.
CONCLUSION

The Court should declare I-872 unconstitutional as applied by the State of Washington..

RESPECTFULLY SUBMITTED this 10th day of January, 2011.

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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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