Nos. 11-35122, 11-35124 and 11-35125
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Plaintiff/Appellants,

v.

WASHINGTON STATE GRANGE, *et al.*,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
HONORABLE JOHN C. COUGHENOUR
CASE NO. 2:05-CV-00927-JCC

REPLY BRIEF OF APPELLANT WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, TO BRIEF OF APPELLEES STATE OF WASHINGTON, ROB MCKENNA, AND SAM REED and WASHINGTON STATE GRANGE

DAVID T. MCDONALD
EMILY D. THROOP
PETER A. TALEVICH
JENNIFER S. ADDIS
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104-1158
(206) 623-7580

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON STATE CASES

FEDERAL CASES

WASHINGTON STATE STATUTES AND REGULATIONS

FEDERAL STATUTES

OTHER AUTHORITIES

INTRODUCTION

Like the dog that did not bark in the night, the State and Grange Responses are significantly silent.[1]

1. Neither brief explains why the State utilizes the candidate's party preference statement as the "political party of the candidate" on ballots and as the candidate's "party affiliation" on public information documents other than for the purpose of having voters perceive the candidates as affiliated with the political parties so identified.

2. Neither brief identifies evidence establishing that the State's disclaimer, the cornerstone of defense arguments, measurably reduces or eliminates voter confusion about the association between a candidate and the political party printed on the ballot after the candidate's name or, for that matter, is even read.

3. Glaringly, despite the vast resources available to them, the State and Grange fail to identify any evidence demonstrating that voters are not confused by the use of candidate party preference statements on the ballot.

[1] The "State" collectively refers to Appellees State of Washington, Attorney General Rob McKenna, and Secretary of State Sam Reed. The "Grange" refers to Appellee the Washington State Grange. The "Democrats" refers to Appellant Washington State Democratic Central Committee, the "Republicans" refers to Appellant Washington State Republican Party, and the "Libertarians" refers to Appellants Libertarian Party of Washington State, Ruth Bennett, and John S. Mills. The Appellants are collectively referred to as the "political parties."

4. Finally, neither brief identifies any burden upon the State if the Democrats' requested relief is granted.

In reversing this Court's prior decision that I-872 was facially unconstitutional, the Supreme Court allowed the State an opportunity to implement I-872 so as to "eliminate any real threat of voter confusion" before being enjoined. The State has now had that opportunity and failed. Instead, the State implemented I-872 so as to associate candidates and political parties in voters' minds based on the unilateral decision of the candidate. The State's implementation of I-872 should either be enjoined in its entirety, as requested by the Republicans, or, at a minimum, modified, as requested by the Democrats, to bar the printing of the Party's name after a candidate's name on the ballot over the Party's objection.[2]

ARGUMENT

I. Washington's Implementation of I-872 Affirmatively Forces an Association in Voters' Minds Between Candidates and Political Parties.

The State's responsibility for voters' perception that party preference labels are party affiliation badges is beyond dispute.

[2] As stated in its opening brief, the Democrats adopt by reference the arguments the Republicans make in their reply brief to the extent that such arguments are not addressed in this brief. In particular, the Democrats adopt without further elaboration the Republicans' arguments with respect to the state constitutionality issues and the agreed payment of attorneys' fees.

Justice Souter, questioning the State at oral argument, expressed his view that voters would treat a statement of party preference as a statement of party affiliation:

> JUSTICE SOUTER: Do you know any Democrats who go around saying I prefer the Democratic Party who do not regard themselves and register themselves as Democrats? I mean, in the real world I don't know that—I don't know whether this is fatal to your case, but in the real world, it seems to me the distinction you're drawing is simply not drawn.
>
> MR. McKENNA: Your Honor, I think it's helpful to think of the expression of party preference as a subset of party affiliation….

DSER00004.

The Supreme Court required the State to eliminate the obvious risk that voters would perceive that candidates who state a preference for a party are affiliated with that party. Instead, in implementing I-872, the State made critical choices that increased the risk of voter confusion rather than eliminating it. First, the State chose to use candidates' unilateral party preference statements as party labels on ballots in the position where state law requires a candidate's party to be shown.[3] Then it required all participants in the political process in Washington to treat party preference statements as indicating party affiliation.

[3] The State's expert acknowledges that "prefers" party is a party label. *See* ER00207-08.

I-872 specifically amends or repeals a number of Washington statutes to create the Top Two primary system, but it does not repeal or amend RCW 29A.36.121(3), the current codification of Washington's longstanding public policy requiring ballots to disclose a candidate's political party after the candidate's name.[4] Instead I-872 added a provision requiring the State to print a candidate's unilateral party preference statement on ballots after the candidate's name. As a result, after passage of I-872 Washington law provides:

> RCW 29A.36.121(3): The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot.
>
> RCW 29A.52.112(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 . . . .

The State decided to implement I-872 by using the party preference statement made by the candidate as the basis for the party affiliation statement required by RCW 29A.36.121(3).[5] It could have treated party preference

[4] The list of statutes amended by or repealed by I-872 is found in the preamble to the Initiative, at lines 1-7 of page 1 of Appendix A to the State Brief. Because the state constitution requires that amendatory laws set forth completely the laws that will be amended, decisions as to which statutes were repealed and which remained on the books were necessarily purposive. *Wash. Citizens Action of Wash. v. State*, 162 Wn.2d 142, 152, 171 P.3d 486 (2007).

[5] When I-872 was before the voters "party preference" and "party affiliation" were equivalent terms. I-872 was adopted by voters in 2004. At that time voters were

statements as supplemental information to the party label or it could have required party consent before allowing the candidate to use its name, but instead the State chose to proceed in a manner that allows "false flag" candidates, sore losers and fringe-group free riders to freely leverage a well-known party's name to advance their personal and antithetical political agendas.

The State also chose to require participants in the political process to equate the candidate's party preference statement and the candidate's party affiliation for all campaign regulatory purposes:

> RCW 42.17.040: (1) Every political committee . . . shall file a statement of organization with the commission. . . . (2) The statement of organization shall include but not be limited to: . . . (f) The . . . party affiliation of each candidate whom the committee is supporting or opposing . . . .
>
> WAC 390-05-274: (1) "Party affiliation" as that term is used in chapter 42.17 RCW and Title 390 WAC means the candidate's party preference as expressed on his or her declaration of candidacy. A candidate's preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate.

---

being instructed by State election officials to "affiliate" with a party by selecting a "party preference" and to vote only for candidates of the same party preference in order to choose their party's nominees. *See* Republicans' Reply Br., Figure 2. In choosing to use party preference statements as party affiliation statements, the State thus carried out voter intent, even though it meant that the First Amendment rights of the political parties would be infringed, rather than implementing I-872 in a manner that respected those rights (such as requiring a party's consent before allowing a candidate to use the party's name).

> (2) A reference to "political party affiliation," "political party," or "party" on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate's self-identified party preference.

The disclaimer contained in the second sentence of WAC 390-05-274(1), like the disclaimer the State added to ballots, certainly does not dispel confusion. In the first sentence readers are told that the candidate's party preference is the candidate's party affiliation. Nothing about the second sentence says that the candidate's party preference is not the candidate's party affiliation. This Court has noted that such equivocal statements are not effective disclaimers. *See Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1077 (9th Cir. 2006) (disclaimer's effectiveness was undercut by adjacent "may or may not be dealer approved" label).

In any event, the disclaimer cannot have any impact on the readers of the forms submitted to regulatory authorities by candidates and committees for the purpose of providing information to voters who seek to be well-informed: it does not appear on the forms. *See* WAC 390-16-011 and WAC 390-16-012 (specifying the official form of registration statement that political committees and candidates, respectively, must file for public information purposes).[6] A voter seeking to learn a candidate's party affiliation from public records is told the candidate is affiliated

[6] Copies of the forms are attached to this brief as Exhibits A and B for easier reading.

with whatever party the candidate self-identified in his or her filing statement. "Affiliation" means "the state or process of affiliating or being affiliated,"[7] and "affiliated" means "officially attached or connected to an organization."[8]

Political association is thus expressly forced upon political parties by the State. The State could have avoided forcing unwanted political associations on political parties by requiring consent of political parties to the use of their names, but instead the State simply appropriated the parties' names.

The State and Grange, in their arguments, treat the State's disclaimer on the ballot as some kind of political Philosopher's Stone with magic properties that turns lead into gold and fog into clear air. But the disclaimer on its face does nothing of the kind. The disclaimer does not affirmatively disclaim associations between the candidate and the party preferred. It equivocates and simply indicates "maybe yes, maybe no." By failing to state whether the party has in fact nominated, endorsed, approved or associated with the candidate, it loses any power it might have had to dispel confusion. At most it perpetuates confusion and may even exacerbate confusion. The disclaimer is not sufficient to eliminate the risk of confusion and I-872, as implemented, is unconstitutional.

[7] http://oxforddictionaries.com/definition/affiliation.
[8] http://oxforddictionaries.com/definition/affiliated.

II. The Political Parties' Evidence—Uncontradicted—Demonstrates That a Significant Risk of Voter Confusion Exists Under the State's Implementation of I-872.

During the Supreme Court oral argument on the facial challenge in this matter, Chief Justice Roberts observed:

> [C]learly, it's just like a trademark case. I mean, they're claiming their people are going to be confused. They are going to think this person is affiliated with the Democratic or Republican Party when they may, in fact, not be at all. . . . I didn't suggest it would be a trademark violation. I think I said it was just like the same analysis. And I don't know why you would give greater protection to the makers of products than you give to people in the political process.

DSER00007-08.[9]

Consistent with Chief Justice Roberts' observation, the Supreme Court framed the central question in this case akin to the way a similar issue is framed in trademark cases but with greater protection for people in the political process than trademark law gives the makers of products. The central question about the State's implementation of I-872 is the existence of *risk* of confusion—not (as the State urges) actual confusion or even the likelihood of confusion a trademark owner is required to prove. The analytical tools of trademark law provide a ready analytical

[9] The Democrats did not appeal the trial court's decision to deny it leave to amend its complaint to add an explicit trademark action. As Chief Justice Roberts noted, it is the same analysis in any event and this Court is free to objectively evaluate the risk of confusion in a manner similar to the manner in which it would evaluate the higher standard of likelihood of confusion in a trademark case. The Democrats, however, support the Libertarians' appeal of denial of its trademark claim as noted elsewhere in this brief.

tool set for the Court to evaluate whether the State eliminated the risk of confusion created by its implementation of I-872.

The State argues that it should not have the burden of proof on the issue of confusion. But the evidence is clear that the use of the Democratic Party's name in a preference statement on ballots was intended by the State and the drafters of I-872 to indicate that the candidate so identified is a Democrat without regard to whether the Democratic Party in fact associates with the candidate. In such circumstances courts presume confusion will occur. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 354 (9th Cir. 1979) ("When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived."). Such a presumption is more than warranted in this case. Given the explicit connection made by statute and regulation in Washington between party preference and party affiliation and the voter intent to equate the two when I-872 was adopted, it is difficult to imagine confusion *not* occurring.

Risk of confusion should be evaluated objectively, based on the reaction of the typical voter exercising ordinary caution. *Cf. Sleekcraft*, 599 F.3d at 353. The typical voter, acting in an election system that has equated party preference and party affiliation, seeing a party preference statement on the ballot in the location

where party affiliation is required by law to be placed, and perhaps finding a disclaimer that does not affirmatively disavow association between the candidate and the party, reasonably presumes that the candidate belongs to the party and is a party nominee. As the State's expert Dr. Donovan acknowledged:

> Democratic Party officials (including Precinct Committee Officers, and Legislative District Committees) thus nominate candidates prior to the primary election. This would suggest that a reasonable person would conclude that most Democratic candidates listed on the Top Two general election ballot are in fact the official nominee of the Party.
>
> . . .
>
> If well-informed voters were in Dr. Manweller's samples . . . and they were aware of [the Democratic Party's] policy of endorsing candidates or any party's practice of endorsing candidates, the[y] may assume that a mock Top Two general election ballot listed candidates nominated or endorsed by a party.

ER01093-94. Such well-informed voters using a real Top Two general election ballot to vote in low-visibility races seem particularly likely to assume that the candidates listed are nominated by or endorsed by the party after their name.

Dr. Donovan indicates that typical voters are confused voters. ER01031 ("[C]onfusion about political facts—particularly about matters related to political parties and political processes—is the norm among voters."). The State unsurprisingly would prefer to analyze risk of confusion only with respect to hypothetical voters who are the most discriminating rather than typical voters. But a meaningful analysis of risk of confusion includes the unsophisticated as well as

the sophisticated. *See Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 293 (3d Cir. 1991) (noting that where relevant consumer market included both discriminating and casual purchasers, the relevant class for "likelihood of confusion" analysis was the "least sophisticated consumer in the class"). Stated another way, a real evaluation of the risk of constitutional injury from voter confusion should be based on the voters who are likely to cast ballots, not some artificial subset with extraordinary acuity.

The State and Grange position boils down to an argument that the mere fact that the State placed a disclaimer on the ballot is sufficient to immunize its implementation of I-872 from constitutional scrutiny, whether or not it does anything to prevent voters from being confused by the ballots. The district court apparently agreed with this proposition, ignoring evidence that many voters did not even read or understand the disclaimer. ER00103. It did so without regard to whether such behavior was the behavior of typical voters exercising ordinary caution in this context. The district court gave the disclaimer "magic bullet" weight rather than treating it with the judicial skepticism of disclaimers that should be expected. *Au-Tomotive Gold, Inc.*, 457 F.3d at 1077 ("Auto Gold suggests that the disclaimers on its packaging dispel any potential for confusion. Courts have been justifiably skeptical of such devices—particularly when exact copying is

involved."); *see also Home Box Office, Inc. v. Showtime/The Movie Channel, Inc.*, 832 F.2d 1311, 1315-16 (2d Cir. 1987) (citing Jacob Jacoby & Robert Raskoff, *Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble Than They Are Worth?*, 76 Trademark Rep. 35 (1986); Mitchell Radin, *Disclaimers as a Remedy for Trademark Infringement: Inadequacies and Alternatives*, 76 Trademark Rep. 59 (1986); 2 H. Nims, *Unfair Competition and Trademarks* §§ 366f, 379a (4th ed. 1947)) (recognizing the "body of academic literature that questions the effectiveness of disclaimers in preventing consumer confusion as to the source of a product"). The district court erred in failing to approach the State's disclaimer defense with appropriate skepticism.

The constitutional inquiry does not end, as the State and Grange urge, with determining whether a disclaimer has been placed on the ballot. The State needed to prove that the disclaimer as worded and in the context in which it is read—if it is read at all—in fact dispels the risk of confusion created by the State's use of party preference statements to indicate a candidate's party on ballots.

The efficacy of a disclaimer cannot be evaluated independent of the context in which it will be read. The Grange gives undue emphasis to the disclaimer by isolating the text in its brief. Grange Br. 4. As discussed in the Democrats' brief, the disclaimer actually appears only once on ballots and is generally no larger than

the box in which voters select a single race. It is also typically smaller than other instructions on the ballot. A ballot, reprinted on Page 13 of the Democrats' brief, shows a much more accurate depiction of the State's disclaimer in context. ER 00159-60. Similarly, the Grange's examples of specific offices also omit a crucial part of the ballot, that which identifies the races as "Partisan Offices." Grange Br. 9. This message—and its ordinary meaning of association with a party—overwhelms (on most ballots) the disclaimer that the Grange entirely relies upon. *See* ER 00159-60 (stating "Partisan Office" ten times on ballot, compared to disclaimer stated once).

It should not be assumed the impact of the disclaimer, even if read and understood, is to dispel any risk of confusion as opposed to increasing the risk of confusion. *See, e.g.*, *Hat Corp. of Am. v. D.L. Davis Corp.*, 4 F. Supp. 613, 622 (D. Conn. 1933) (undertaking, in a dispute between the makers of Dobbs Hats and an individual named Dobbs who wished to sell Hats under his own name, "the task of determining now whether any explanatory suffix to the name, such as 'not connected with the original Dobbs,' would suffice to avoid the confusion"). As that court stated:

> Since the only purpose of an explanatory suffix is to prevent confusion between the impressions conveyed by the defendant's use of the name and those conveyed by the plaintiff's use of the name, the efficacy of such a suffix will largely depend upon the connotations which

> the public has become habituated to attach to the plaintiff's use of the name. . . . For the eye of the purchaser, long taught to identify the product by the name Dobbs alone, promptly registers the identity as complete upon catching the surname without noticing and pondering the significance of initials or suffix. . . . *For one who has known of one Dobbs only, suddenly confronted with the suggestion that there are in existence varieties of the species, is not informed which Dobbs is "his" Dobbs. Confusion is created by the very explanation intended to avert confusion.*

Id. (emphasis supplied).

For 100 years Washington voters have been habituated to seeing only nominated Democrats on the general election ballot using a political party's name. Taking into account this long history of association in the voter's mind, the equivocal disclaimer used to implement I-872 suggests to voters that every candidate using the Democratic Party's name could be and therefore likely is a Democratic nominee. Paraphrasing *Hat Corp*., "the eye of the [voter] long taught to identify the [candidate's party] by [the party label] promptly registers the identity as complete upon catching [the party name] without noticing and pondering the significance of ['prefers'] or [disclaimer]." *See id.*

The district court could—and should—have granted summary judgment to the political parties on the basis that the State's disclaimer, as written, would not dispel the risk of confusion even if read. Alternatively, the district court could and should have granted summary judgment to the political parties because the State failed to create a genuine issue of material fact since it is undisputed that the State

has no evidence to offer on the essential fact question of whether its disclaimer dispels the risk of confusion. What the district court should not have done is to grant summary judgment to the State on the speculative basis that the disclaimer provided by the State would be read by voters, would be understood by voters and would in context actually dispel the risk of confusion. The district court's decision should be reversed and summary judgment granted to the political parties.

III. State Action Caused the Confusion.

The undisputed evidence summarized in the political parties' opening briefs demonstrates that the Top Two primary as implemented carries a heavy risk that voters who see the Democratic Party's name after a candidate's name on the ballot will, in the words of the Chief Justice, "think this person is affiliated with the Democratic . . . Party when they may, in fact, not be at all." DSER00007-08. Indeed voters could hardly think otherwise given the affirmative obligation placed upon election officials by RCW 29A.36.121(3) to indicate "next to the name of the candidate on the primary and election ballot" "the political party or independent candidacy of each candidate for partisan office."

The State suggests that it is not responsible for the obvious equation by the electorate of party preference and party affiliation. But the perception that the two are the same is the result of discretionary decisions made by the State. When it

implemented I-872, the State made a choice to use a candidate's statement of preference as indicating the candidate's party affiliation pursuant to RCW 29A.36.121(3).

The State decided that candidate party preference statements, which are made months before voting, would be made on forms that contain no disclaimer. This makes it highly likely that candidate preference statements are, in fact, understood and intended by candidates to be statements to prospective voters claiming affiliation with the party preferred. WAC 434-215-012. The State decided to require participants in the political process to treat candidate party preference statements as party affiliation claims. *See* WAC 390-18-020 (if candidate has stated a party preference at filing, advertising must identify "candidate's political party" and State publishes "a list of abbreviations or symbols that clearly identify political party affiliation . . . [that] may be used by sponsors to identify a candidate's political party"); WAC 390-05-274(2) ("A reference to 'political party affiliation,' 'political party,' or 'party' on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate's self-identified party preference."). The State's implementation of I-872 creates a regime in which voters are exposed to political advertising with mandated content equating party

preference with party affiliation for long periods of time before ballots are even distributed, counteracted only by an equivocal disclaimer on the ballot.

And, finally, the State made the decision to deny political parties any opportunity to bar the use of their name by candidates who are not nominated by, endorsed by or affiliated with the political parties whose name they seek to use.

The State is properly called to account for risk of confusion caused by its decisions.

IV. There is No Evidence the State's Disclaimer Diminished or Eliminated Confusion.

Conspicuous by its absence in the State and Grange briefs is any actual evidence that the risk of confusion inherent in implementing I-872 was diminished or eliminated as a result of the implementation. The State made no investigation into the effect of the steps it took in connection with voter confusion, suggesting indifference to whether the steps had any impact at all—consistent with the skepticism expressed by the several Supreme Court Justices about the interest of State election officials in implementing I-872 constitutionally.[10] The State

[10] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 462 (2008) (Roberts, C.J., concurring) ("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. ").

stretches to convert absence of evidence into affirmative evidence. Thus, for example, the State argues:

> [W]hile the Secretary of State receives numerous questions from voters every election, these questions do not reveal confusion that a candidate's statement of party preference means the party prefers the candidate. SSER 93-94. Such questions demonstrate that reasonable, well-informed voters understood the difference between a candidate's personal preference for a party and a candidate's affiliation with a party.

State Br. 17. First, the absence of questions in this context simply indicates that the public equates party preference and party affiliation as the State's statutes contemplate and the drafters of I-872 apparently intended. That does not help the State's case. Second, examination of the questions the State relies upon indicates they do not support the State's citation. One of the most popular questions asked is "How do I change my party preference on my voter registration?" SSER 93. Clearly voters, as Justice Souter anticipated, do not draw a distinction between a party preference statement and a party affiliation by party registration. The public believes that party preference is an affiliation you must register, as is typically done in party registration states.[11]

[11] Washington does not register voters by party and one may suspect that these questions are from new voters who believe that Washington's system is like all the other partisan primary systems in the country in terms of party preference and party affiliation. Or they may be voters just reaching the voting age. Either is a potentially significant bloc of confused voters and one that grows over time, suggesting that the problem of voter confusion will increase, not decrease, as more

Similarly, examination of the news articles cited by the State indicates that even in its careful selection of counter-evidence the State could not avoid submitting additional evidence of pervasive public confusion. State Br. 18 n.8.

> By contrast, the 'Top Two' rules allow candidates to self-identify party affiliations on ballots. In other words, they may describe themselves as Democrats or Republicans, even if they were not the chosen nominee of the party organizations.

SSER 70.

> Candidates may choose to label themselves as "Democrat," "Republican," "Green," or otherwise on the ballot.

SSER 74.

> [Secretary of State] Reed said candidates can state their preferred party identification on the ballot.

SSER 77.

> A voter can choose a candidate from any party for any race . . . .

SSER 86.

> The parties still have no say in determining who gets to call themselves a Democrat or a Republican . . . .
>
> Q. So in some races, we could have two Democrats or two Republicans in the general election?
>
> A. That's possible. It will happen in a state House race in the 7th Legislative District because only Republicans are running. It could happen in a race with several candidates from one major party and a single candidate from the other major party.

---

new voters enter the system from out of state or advancing age.

SSER 88.

> Washington voters will once again be able to vote for any candidate of any party for each office. Voters might favor a Republican in one race, a Democrat in another and a Libertarian in still another. . . . [The top two] will advance to the November general election ballot even if they turn out to be candidates of the same party.

SSER 90.

V. Strict Scrutiny Applies, But Even if "Rational Basis" Were the Standard, the State's Implementation of I-872 Would Not Pass Muster.

The State argues that the Democrats have not shown that the State's implementation of I-872 imposes a severe burden on First Amendment rights, warranting strict scrutiny, and that the Supreme Court has already ruled that the State's implementation of I-872 will survive a less than strict scrutiny analysis. State Br. 39. The State is flatly wrong on both counts.

The Democrats' evidence shows a substantial risk that outcomes in multiple elections were changed by the State's decision to place unilateral party preference statements on ballots as identification of candidate party affiliations. The Supreme Court, in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) clearly indicated that the burden resulting from a risk of changing outcomes by eliminating or changing party nominees is severe:

> In concluding that the burden Proposition 198 imposes on petitioners' rights of association is not severe, the Ninth Circuit cited testimony that the prospect of malicious crossover voting, or raiding, is slight, and that even though the numbers of "benevolent" crossover voters

> were significant, they would be determinative in only a small number of races. . . . But a single election in which the party nominee is selected by nonparty members could be enough to destroy the party. . . . Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. "[R]egulating the identity of the parties' leaders," we have said, "may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message."

530 U.S. at 579 (first citation omitted) (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 n.21 (1989)).[12]

The State's assertion that the Supreme Court has already evaluated the burden imposed by its implementation of I-872 and found it minimal is facially without merit: the Supreme Court did not have before it the State's actual implementation of I-872 and could not weigh the actual burden imposed by that implementation. Even if this Court concludes that the burden imposed by the State's implementation of I-872 is not severe, it does not follow that the State's implementation is automatically immune to constitutional constraint. The so-called "rational basis" test is not a guarantee. As the State noted in its brief, "When a state electoral provision places *no heavy burden* on associational rights, a State's important regulatory interest will *usually* be enough to justify *reasonable*,

[12] As discussed in the Democrats' opening brief, the confusion created by I-872 has caused the Democratic Party to alter its message after its preferred standard-bearers have been defeated in the primary by non-affiliated candidates capitalizing on the party label. *See* Democrats' Opening Br. 29-32 (describing, *inter alia*, defeat of Democratic incumbent State Senator Jean Berkey in primary election).

non-discriminatory restrictions." State Br. 39 (citations omitted, emphasis supplied).

A conclusion that a burden is not severe is not the same as a conclusion that the burden is not heavy. "Usually" does not mean "always." And, given the absence of any evidence of burden that would be placed upon the State if the Democrats' request for the right to consent to the use of its name, it is by no means evident that the State's implementation of I-872 is reasonable. The State implemented I-872 with the transparent intent to allow non-affiliates of the Democratic Party to free-ride on the Party's investment in its name and goodwill, while at the same time diluting the meaning of the name and the Party's message; the evidence indicates it is succeeding. As the Chief Justice suggested, a reasonable partisan election system would give people in the political process at least as much protection of their name as is given to the makers of products. *See* DSER00008. As implemented, I-872 does not meet that standard of reasonableness.

The State does not dispute that its implementation of I-872 is unconstitutional if this Court concludes, as it did earlier in this case, that the State has implemented a system in which "voters cannot differentiate (1) bona fide party members . . . from outsiders . . . or (2) party nominees . . . from 'spoiler' intraparty

challengers." *See Wash. State Republican Party v. Washington*, 460 F.3d 1108, 1121 (9th Cir. 2006). Nor does the State dispute that its implementation of I-872 is unconstitutional if this Court concludes, as the Supreme Court did in *Jones* and *Eu*, that potentially changing the outcome of elections and regulating party leaders' identities is a severe burden on associational rights. In either circumstance, the implementation should be enjoined in its entirety, consistent with this Court's prior action. If, however, this Court concludes that the burden is not severe it should nevertheless grant political parties the minimal and reasonable protection of requiring their consent to the use of their name on ballots to indicate the party of candidates. The State has provided no reason to deny such minimal relief.

VI. The State's Use of Party Names is Not Nominative Use.

The Grange in its Response suggests the State's appropriation of a political party's name is a permitted "nominative use" under trademark law, thus apparently conceding that many candidates are "not readily identifiable without use of" the party label on ballots. Grange Br. 15. However, nominative use does not apply where, as here, the State on many fronts suggests that candidates who state a preference for a party are affiliated with that party. *See Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 801 (9th Cir. 2002).[13] Nor does it apply where, as here, the

[13] Not only did Ms. Welles do nothing to suggest an affiliation with Playboy, her

use goes beyond mere use of the name itself and extends to symbols associated with the name. *See id.* at 802 ("Welles' banner advertisements and headlines satisfy [the second element] because they use only the trademarked words, *not the font or symbols associated with the trademarks*.") (emphasis supplied). The conceded fact that many candidates are not readily identifiable by the voting public without a party label also concedes a substantial risk that I-872 allows candidates to free ride unconstitutionally on the party's investment in building the party's reputation and to dilute the party's message.

VII. It is Not Necessary for the Libertarians to Prove Confusion in Order to Protect Their Trademark Against Dilution.[14]

The Democrats support the appeal of the Libertarians to protect its trademark rights and offer two brief comments.

---

disclaimer—unlike the one used by the State—unequivocally and affirmatively disavowed any affiliation with Playboy. *Id.* at 799 n.1 ("This site is neither endorsed, nor sponsored, nor affiliated with Playboy Enterprises, Inc. . . . .").

[14] The Libertarians' Opening Brief was not submitted until two weeks after the Democrats' Opening Brief. For that reason the Democrats could not in the Opening Brief adopt or support arguments of the Libertarians to avoid potential redundancy as it did with respect to Republican arguments. Now that it has access to the Libertarians' Opening Brief, the Democrats adopt and support the following Libertarian arguments: Section A (freedom of association claim); Section C (trademark claim); and Section D (attorneys' fees). Section B involves ballot access issues that do not pertain to major parties, and the Democrats take no position on this claim.

First, the State asserts that trademark law is inapplicable because its use of the Libertarian Party's name is not in commerce. The State does not dispute, however, that it requires candidates who file with a Libertarian Party preference to use the Libertarian Party's trademarked name or logo on their advertising to raise money and sell goods. Those candidates are making use of a trademark in commerce under established Washington law. *See Most Worshipful Prince Hall Grand Lodge of Wash. v. Most Worshipful Universal Grand Lodge*, 62 Wn.2d 28, 44, 381 P.2d 130 (1963); *see also Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 820 (9th Cir. 1996) (affirming injunction issued under Lanham Act preventing infringement of nonprofit environmental advocacy group's name). The State thus faces liability for induced or contributory trademark infringement. *See Inwood Labs. v Ives Labs.*, 456 U.S. 844, 854 (1982):

> [L]iability for trademark infringement can extend beyond those who actually mislabel goods with the mark of another . . . if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.

Second, the State asserts it can have no trademark liability in the absence of confusion. Although the evidence shows that confusion is abundant in fact, confusion is not required for all trademark claims. The State fails to consider 15

U.S.C. § 1125(c) which makes clear that where a famous mark (such as a major political party name) is involved, injunctive relief is available whether confusion if proven or not. 15 U.S.C. § 1125(c)(1) provides:

> Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, *regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.*

The Libertarians should have been permitted to pursue their trademark claims.

CONCLUSION

Washington State uses a candidate's unilateral statement of party preference as the basis for indicating the candidate's party on the ballot. This creates a clear risk that voters will assume the candidate is a nominee of or representative of the party, forcing unwanted political associations on the party in violation of the First Amendment and potentially changing the outcomes of elections and the message of the party. The State and Grange failed to demonstrate that the State's implementation of I-872 eliminated the risk of voter confusion about whether candidates who self-identify a party preference that is printed after their name on ballots are nominated by, endorsed by, approved by or associated with the party

they have named. Summary judgment and appropriate injunctive relief should have been given to the political parties. Summary judgment should not, in any event, have been given to the State. The district court should be reversed and the State's implementation of I-872 enjoined.

DATED this 25th day of August, 2011.

K&L GATES LLP

By s/David T. McDonald
David T. McDonald
Emily D. Throop
Peter A. Talevich
Jennifer S. Addis
925 Fourth Ave., Suite 2900
Seattle, WA 98104
Phone: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com
emily.throop@klgates.com

Attorneys for Plaintiff/Appellant
Washington State Democratic Central
Committee

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit rule 32-1, the attached Reply Brief of Plaintiff/Appellant is proportionally spaced, has a typeface of 14 points or more and contains 5,736 words, including both text and footnotes, and excluding this Certificate of Compliance, the Table of Contents, the Table of Authorities, and the Certificate of Service.

s/David T. McDonald
David T. McDonald

SE-57911 v1

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Nos. 11-35122, 11-35124 and 11-35125

I hereby certify that on August 25, 2011, I electronically filed the foregoing document and attached exhibits with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that on this date I served a copy of Appellant Washington State Democratic Central Committee's Supplemental Excerpts of Record by U.S. Mail, properly addressed and postage prepaid, to:

James K. Pharris
Jeffrey T. Even
Allyson Zipp
Office of Washington Attorney General
1125 Washington Street SE
Olympia, WA 98504

Thomas F. Ahearne
Kathryn Carder
Marco J. Magnano Jr.
Foster Pepper, PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Orrin L. Grover III
Law Offices
416 Young St.
Woodburn, OR 97071
Attorneys for Libertarian Party of Washington State

John J. White, Jr.
Kevin B. Hansen
Livengood Fitzgerald & Alskog
PO Box 908
Kirkland, WA 98033
Attorneys for Washington State Republican Party

Signature: s/ David T. McDonald
David T. McDonald