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

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

INTRODUCTION

The motions of the State of Washington (the "State") and the Washington State Grange (the "Grange") to dismiss the Washington State Democratic Central Committee's ("Democratic Party") case should be denied. Although the State and Grange have prevailed on the issue whether I-872 is facially unconstitutional, the Democratic Party's case goes beyond a facial challenge to I-872. The remainder of the Democratic Party's case was reserved by this Court for hearing after the resolution of the facial challenge. Because the defendants appealed this case ten weeks after it was filed and obtained a stay of trial proceedings pending resolution of the appeals, there has been little opportunity to develop a trial court record on claims and issues other than the facial challenge. The Democratic Party's case should not be cut off without a reasonable opportunity to develop its record and argue its remaining challenges to the State's implementation of I-872.

The State's implementation of I-872 raises issues that have not yet been resolved in this action: The implementation violates the Democratic Party's federal and state rights to protect its name and symbols from dilution and tarnishment, violates the Democratic Party's well-established right to bar participation by non-members in the selection of the Democratic Party's officers and violates the Democratic Party's well-established right to limit participation to its membership in processes that select its nominees for public office. The Democratic Party intervened in this case alleging that the State's implementation of I-872 misappropriated the Democratic Party's name and forced it to associate with unauthorized candidates. The Democratic Party should not be required to file a new case to address issues that were directly and impliedly raised by the pleadings in this case and arguments to date but remain unresolved. This Court should deny the State and Grange's premature Motions to Dismiss.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

BACKGROUND AND STATEMENT OF FACTS

In November 2004 the voters of Washington passed Initiative 872 ("I-872"), intending to replace the State's unconstitutional blanket primary system with a blanket primary in which only the top two vote-getters would advance to the general election, rather than one candidate from each major political party. I-872 allows any candidate to state that his or her party preference is the Democratic Party and have that preference printed on the ballot in conjunction with the candidate's name. As implemented by the State, the preference will also be printed in voter's pamphlets and is required by law to appear as the candidate's party designation in all political advertising by anyone about the candidate. I-872 allows all voters, regardless of party affiliation, to participate in all elections held on primary day including the election of Democratic precinct committee officers.

On May 18, 2005 the Secretary of State adopted regulations for its first implementation of I-872. On May 19, 2005 the Republican Party brought this action challenging the constitutionality of I-872 as implemented by State and local officials.

Shortly thereafter, the Democratic Party intervened. One basis of the Democratic Party's challenge was a facial challenge to I-872, contending that RCW 29A.36.170, as modified by I-872, placed on the general election ballot as the Party's nominees candidates who had not been selected in a process limited to those voters authorized by the Democratic Party to participate in selection of its nominees. Complaint in Intervention 10:7-11. The Complaint went beyond a mere facial challenge, however. The Complaint challenged I-872 because "The Initiative, as implemented by State and local officials, eliminates mechanisms previously enacted by the state to protect [the First Amendment rights of the Party and its adherents] and provides no effective substitute mechanisms for the Party and its adherents to protect their rights of association and of determining the Party's message." *Id.* at 3:8-12. The Complaint alleged that I-872 was

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

> ...intended to force the Party to be associated publicly with candidates who have not been nominated by the Party, who will alter the political message and agenda the Party seeks to advance, and who will confuse the voting public with respect to what the Party and its adherents stand for. The State seeks to appropriate the use of the Democratic Party's name in primaries and general elections..."

Id. at 2:19-23.

The Complaint further alleged that I-872 as implemented by State officials "eliminates mechanisms previously enacted by the State to protect the First Amendment rights of the Party and its adherents." *Id.* at 3:8-10.

The Democratic Party specifically alleged that because of the State implementation of I-872 "Any individual may appropriate the Party's name, regardless of whether the Party desires affiliation with that person" and that "[t]he State, through its filing statute compels the Party to associate with any person who files a declaration of candidacy expressing a 'preference' for the Party, regardless whether the Party desires association with the person." *Id.* at 5:18-23. The Party alleged that the filing statutes, in and of themselves were unconstitutional because of forced association. *Id.* at 10:3-6.

In addition, the Complaint alleged that the presence of unauthorized, competing candidates carrying the Democratic Party name and participation of unauthorized voters would result in "dilution and potential suppression of its message." *Id.* at ¶16. The Complaint alleged that I-872 was intended to and would result in a change in what the Democratic Party stands for. *Id.* at 6:7-11.

At this Court's request, on June 17, 2005 the Republican, Democratic, and Libertarian Parties filed motions for summary judgment *limited only to facial challenges* to I-872. In support of its motion the Democratic Party submitted the declaration of its then Chairman, Paul Berendt, who testified in part

> The Party has expended considerable time and expense to develop a coherent set of goals and principles that guide the Party and to create a corresponding "brand awareness" among the electorate for candidates identified as

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

> Democrats. Allowing any candidate, even those who are hostile to the Party, to misappropriate the Party name and appear on the ballot as a Democratic candidate will undermine this name association that has built up in loyal Party voters' mind.

Declaration of Paul Berendt at ¶10 (Dkt. # 56).[1] Mr. Berendt went on to note that I-872 "will result in a misapprehension of the Party's position on various issues. Over time, the Parties' message will become further blurred..." *Id.* at 7:15-17.

The State tendered to the Court for consideration its implementation of I-872. Exhibit C to the Declaration of James K. Pharris. (Dkt. No. 66) (hereinafter "Pharris Decl."). The implementation rules provided a new form of declaration of candidacy. Pharris Decl., Exhibit C, OTS-8074.3[4]. The declaration of candidacy for partisan office asked the candidate to check one of two options:

"my party preference is _____"

or

"I am an independent candidate."

The form noted that "The party preference will be listed on the ballot exactly as provided unless limited space necessitates abbreviation."

The State proposed to use continue using the same ballot forms as it had been using prior to I-872, and WAC 434-230-170 (the regulation specifying the ballot form) was amended to provide that:

> If the position is a partisan position, the party preference or independent status of each candidate *shall be listed next to the candidate*. The party preference *must be listed exactly as provided by the candidate on the declaration of candidacy* unless limited space on the ballot necessitates abbreviation or the party description is, in the opinion of the county auditor, obscene.

WAC 434-230-170 (as amended; emphasis added).

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[1] At the time of his declaration, Mr. Berendt had 25 years of experience working with candidates, voters and party officials in the State of Washington. Declaration of Paul Berendt at ¶3 (Dkt. #56).

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

This Court granted the political parties' motions for summary judgment based on the facial challenge to I-872, noting in its Order that it had reserved issues related to the political parties' as applied challenges to I-872. *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907, 926 n.13 (W.D. Wash. 2005). This Court then entered a permanent injunction enjoining the implementation or conduct of elections under I-872 and separately enjoining the enforcement or implementation of RCW 29A.24.030 (the filing statute created by I-872) as part of any primary or general election. *See* Permanent Injunction (Dkt. # 94).

Thereafter, the State repealed the implementation of I-872 that had been tendered by it to this Court for review. The State and Grange appealed the Court's order on July 29, 2005—ten weeks after the case was filed. (Dkt. ## 95, 97). On August 12, 2005 this Court entered a stay of further proceedings pending resolution of the appeals. (Dkt. # 107). The Ninth Circuit affirmed the summary judgment that I-872 was unconstitutional. The State and Grange then petitioned for a writ of *certioriari* from the United States Supreme Court, which was granted on February 26, 2007. In its Reply Brief on the merits before the Supreme Court, the Grange proposed for the first time that the State might use a new form of ballot rather than the one specified by the State in the proposed implementation adopted by the State on May 18, 2005. The Supreme Court reversed the Ninth Circuit's affirmance of this Court's summary judgment, holding, in part, that the facial challenge to the constitutionality of I-872 depended upon the threat of confusion for voters looking at the ballot between the party's actual candidates and candidates merely "preferring" the Democratic Party. The Court concluded it had no evidentiary basis to evaluate the risk of confusion in the context of a facial challenge if there was no implementation of I-872 to evaluate. The Supreme Court's decision (1) did not

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

grant summary judgment to the State or Grange, and (2) on its face did not fully resolve the case; it only addressed the political parties' facial challenge. The Supreme Court expressly recognized that it was not reaching all the issues in the case, only those issues encompassed by the questions upon which it granted certiorari. *Washington State Grange v. Washington Republican Party*, 128 S. Ct. 1184, 1195 n.11 (2008). It noted that it was not reaching trademark arguments because those had not been addressed in the Court of Appeals and were not within the scope of the questions upon which certiorari was granted. *Id.*

After the Supreme Court decision the State adopted emergency regulations to create a new implementation of I-872 for the August 2008 primary and specified the manner in which Democratic Party precinct committee officers ("PCOs") were to be chosen at that blanket primary.[2] PCOs are officers of the Democratic Party who are elected at the primary election process and who collectively constitute the county central committees of the Democratic Party. RCW 29A.80.030, .051. In order to be eligible for the position of PCO, a candidate must be a member of the Democratic Party and receive at least ten percent of the votes received by the Democrat on the ballot receiving the most votes in the precinct. RCW 29A.80.041, .051. Pursuant to the Washington State Constitution, whenever a vacancy occurs in legislative office or partisan local office, the vacancy must be filled by a person who is one of three nominees proposed by the PCOs of the same party as the elected official who created the vacancy. WASH. CONST., Art. 2, §15.

[2] The State did not return to this Court to seek modification of or vacation of either the injunction regarding implementation of I-872 or the injunction prohibiting the use of RCW 29A.24.030 in connection with any primary or general election. Whether the injunction should be vacated by this Court or scaled back to a preliminary injunction with lesser scope is an issue that remains to be determined by the Court.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

However, after the State's implementation of I-872, candidates for the office of PCO are not required to demonstrate membership in the Democratic Party and in addition write-in candidacies are allowed. Members of the general public receive ballots for the PCO race and determine for themselves whether to vote in the Party's election. Election officials ignore RCW 29A.80.051's ten percent requirement. WAC 434-230-100, WAC 434-262-075.

In addition, the State's Public Disclosure Commission adopted regulations to implement I-872 that specify that for purposes of its forms and the statutes it administers, the terms "party affiliation" and "party preference" are synonymous.[3] The Public Disclosure Commission advised candidates and advertising sponsors that in order to comply with RCW 42.17.510, which requires a candidate's party "designation" to be included in all electioneering communications, independent expenditures and political advertising about the candidate, advertisers were to include the candidate's preference as his or her party designation using abbreviations that indicate affiliation with Democratic Party if the candidate had indicated a Democratic preference. Additionally, candidates and advertisers were authorized by the Public Disclosure Commission to use official symbols and logos of the Democratic Party to indicate the candidate's preference. "Political Advertising", PDC Brochure dated July 2008, *available at* http://www.pdc.wa.gov/archive/guide/brochures/pdf/2008/2008.Bro.ElectComm.pdf.

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[3] **WAC 390-05-274 Party affiliation -- Party preference.** (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. (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.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

On October 2, 2008 the Ninth Circuit issued its opinion directing this Court dismiss facial challenges to I-872 in light of the Supreme Court's decision in this case and returning the case to this Court for further proceedings. The opinion also ordered this Court to dismiss the political parties' (1) equal protection claims; and (2) claims contending that I-872 imposes illegal qualifications on voting, sets illegal timing of federal elections or imposes discriminatory campaign finance rules. Although the State and Grange had argued to the Ninth Circuit, as they do here, that the Supreme Court decision resolved all claims in the case and the case should be dismissed, the Ninth Circuit did not order the case dismissed. Indeed, the Court of Appeals specifically provided that this Court may consider further development of the record with respect to the parties' ballot access and trademark claims as well as dispose of outstanding questions related to the State's motion to vacate the award of fees and costs. It also did not bar this Court from permitting amendments to the pleadings pursuant to the Federal Rules of Civil Procedure.[4] The Ninth Circuit's mandate issued on October 24, 2008.

ARGUMENT

The State and Grange ask this Court to end this case abruptly before all the issues are

[4]While appeal was pending in this matter, the Washington Supreme Court issued its opinion in *Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 171 P.3d 486 (2007), determining that an initiative is unconstitutional if it does not comply with the Washington Constitution's requirement (Article II, Section 37) that proposed legislation print in full the text of statutes it seeks to amend and identify statutes it will repeal. Because this Court's 2005 decision, in part, held that various statutes affecting minor political parties were repealed even though not mentioned in I-872, this subsequent Washington Supreme Court opinion raises colorable questions of state law as to whether (1) I-872 was is a valid enactment in the first place and (2) the extent to which it can be held to have repealed or amended statutes by implication. Last April the Democratic Party moved to amend and supplement its complaint to reflect the State's new implementation of I-872 and to include the issues raised by *Washington Citizens Action of Washington*. At the time the Court concluded that it lacked jurisdiction to consider the motion because of the pending appeals by the State and Grange and struck the motion without prejudice to seek leave to amend after the Court received the mandate of the 9th Circuit disposing of the appeals. Last week the Democratic Party filed a new motion requesting leave to amend its complaint to include this claim.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

heard by the Court. Their requests are premised on an assertion that the Supreme Court's resolution of the narrow issue of facial constitutionality of I-872 necessarily resolved all as applied challenges to the State's implementation of I-872 and authorized the State to proceed with trademark infringement or trademark dilution in implementing I-872. On the contrary, the Supreme Court, the Ninth Circuit and this Court have all recognized that this case is broader than a mere facial challenge to I-872. *Washington State Grange*, 128 S.Ct. at 1195 n.11; *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1124 n.28 (9th Cir. 2006); *Logan*, 377 F. Supp. 2d at 926 n.13. The Ninth Circuit based its remand order in part on the Supreme Court's recognition in footnote 11 that it was addressing a limited set of issues and that others were better suited "for consideration on remand." *Washington State Grange*, 128 S.Ct. at 1195 n.11. As applied challenge were not addressed by the Supreme Court since this Court had "previously directed the parties to limit their briefs to Plaintiffs' facial challenge of Initiative 872. The [District] Court reserved issues related to Plaintiffs' as applied challenge." *Logan*, 377 F. Supp. 2d at 926 n.13. The Democratic Party's as applied challenge to I-872 is now before this Court.[5] In addition, the 9th Circuit has made it clear that this Court may allow the Democratic Party to proceed to develop trademark claims.

A. The Democratic Party's Case Should Not Be Dismissed Because the State's Implementation of I-872 Is Likely Unconstitutional "As Applied" to the Democratic Party.

It is well-established that the State may not force a political party to have its precinct

[5] Chief Justice Roberts explicitly recognized that the Supreme Court's March 18th opinion had not fully resolved the case in his concurrence: "[B]ecause 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 …[and] I would wait to see what the ballot says before deciding whether it is unconstitutional." *Washington State Grange*, 128 S.Ct. at 1196-97 (Roberts, C.J. concurring).

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

committee officers elected in a primary in which members of the general public are allowed to participate. In *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003) the Ninth Circuit dealt addressed this very issue:

> The [Supreme] Court recognized the strength of a party's interest in selecting its own leaders. *See* [*Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989)] at 230. It also noted the important role party leaders play in shaping the party's message. *See id.* at 231, n.21.
>
> The Secretary of State has not articulated any state interest to justify allowing nonmembers to vote for Libertarian Party precinct committeemen, and we see none. In the absence of a state interest to justify the burden on the plaintiffs' freedom of association, we agree with the district court that allowing nonmembers to vote for precinct committeemen violates the party's associational rights. *See Cool Moose Party v. Rhode Island*, 183 F.3d 80, 88 (1st Cir. 1999) (declaring prohibitions on opening primaries to nonmembers unconstitutional where the state failed to articulate any justification).

351 F.3d at 1281.

Moreover, the State may not force a political party to have the selection of its nominees adulterated by the participation of non-members in the process. *California Democratic Party v. Jones*, 530 U.S. 567 (2000). In implementing I-872 the State has done indirectly what it is prohibited from doing directly: PCOs are not simply officers of the Democratic Party. They are the party officers who, pursuant to the State Constitution, nominate the candidates eligible to fill vacancies in offices held by Democrats. WASH. CONST., Art II, § 15. The Democratic Party's constitutional right to select its own nominees and officers is protected from both direct and indirect adulteration. However, in derogation of this constitutional right, in the State's implementation of I-872 the State not only ignores its own statutory requirements in connection with the eligibility of candidates for PCO and the election of PCOs, it issues ballots for the Democratic Party's PCO races to any voter who shows up at the polls without regard to the affiliation of the voter. RCW 29A.04.206(2), (3).

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

The State has offered no justification for its interference in the election of Party officers. Rather than justify its interference to this Court it has asked this Court to ignore the interference by dismissing this case. Substantive issues remain to be addressed in this case. The motions to dismiss should be denied.

B. The Democratic Party Should Be Allowed to Demonstrate the State's Violation of the Party's Right to Protect Its Name.

The Democratic Party's name and its symbols are well known and have long been used to identify the Party's candidates.[6] The essence of this case is the Democratic Party's allegation that the State is misappropriating its name and causing it to be used in a fashion that will deprive it of its meaning and its strong connection with Party candidates. This allegation supports not only a claim for violation of the Party's constitutional right of association, but also a claim for violation of the Party's rights under trademark law to protect its name and symbols from dilution by blurring and tarnishment.[7] Although trademark issues were not before the Supreme Court when it considered the facial challenge to I-872, at oral argument Chief Justice Roberts observed the similarity of the analysis to trademark law:

> CHIEF JUSTICE ROBERTS: But clearly, it's just like a trademark case. I mean, they're claiming their people are going to be confused....

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[6] At the time I-872 passed, reports indicate that approximately one-third of the voting population in the country thought of itself as Democrat. "Over the last four years, for example, surveys by the Pew Research Center show the Democratic advantage in party ID among adults growing from 3 percentage points in 2004 (33 percent Democrat to 30 percent Republican) to an average of 9 points so far in 2008 (36 percent Democrat to 25 percent Republican)." Party ID Wars by Mark Blumenthal, National Journal, June 26, 2008 available at http://www.nationaljournal.com/njonline/mp_20080626_8995.php

[7] "Blurring occurs when another's use of a mark creates 'the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff's product.' Tarnishment, on the other hand, occurs 'when a famous mark is improperly associated with an inferior or offensive product or service.'" *Playboy Enters., Inc. v. Welles*, 279 F.3d 786, 805 (9th Cir. 2002), quoting *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1326 n.7 (9th Cir 1998).

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

The State understood that trademark issues were in the case:

> MR. McKENNA: Mr. Chief Justice, they make that claim without the benefit of any evidence. . . . And, of course, we don't believe trademark law applies here in this case, although I can address that if you wish.

The Chief Justice commented that he was not suggesting that it was a trademark violation[8] but expressed comfort with giving political parties at least as much protection of their names as makers of products had. The State concurred that such protection was deserved:

> CHIEF JUSTICE ROBERTS: 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.
>
> MR. McKENNA: They deserve protection, of course, Mr. Chief Justice…

As it implemented I-872, however, the State has not protected the Democratic Party's name; it has appropriated the Democratic Party's name in a wide variety of situations, as if the Party had no rights whatsoever with regard to its name. The new declaration of candidacy form permits each candidate for partisan office to write-in a political party preference that will thereafter be printed with the candidate's name, on the primary and general election ballots, in voter's guides, on sample ballots and, by virtue of the state's advertising statute, RCW 42.17.510(1), be included in all advertising about the candidate as a means to identify the candidate's party. The State's Public Disclosure Commission ("PDC"), which regulates campaign activities and financing, adopted a new regulation equating the "party preference" given by a candidate on his or her declaration of candidacy to "Party Affiliation" wherever

[8] As the Supreme Court's opinion noted at n.11, trademark arguments were not reviewed by the Supreme Court since they had not been considered by the Court of Appeals.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

that term is used in statutes and regulations enforced by the PDC. *See* WAC 390-05-274. One of the statutes enforced by the PDC is RCW 42.17.040(2)(f), effective January 1, 2008, which requires that every political committee in the State, including a candidate's own campaign, file a public statement with the PDC that includes the "party affiliation" of each candidate the campaign is supporting. By virtue of New WAC 390-05-274, the party affiliation of the candidate that must be shown in the statement is automatically the party preference selected unilaterally by the candidate in his or her declaration of candidacy.

Washington election law also requires that all advertising for or against a candidate must clearly identify the party preference that the candidate gave in his or declaration of candidacy. RCW 42.17.510(1). In July 2008, the PDC began distributing flyers advising all participants in campaign activities in Washington that the requirement to identify a candidate's party preferences could be met by using certain abbreviations for each party. *See* "Abbreviations," PDC Political Advertising Flyer (July 2008), *supra*. These abbreviations are *exactly* the same abbreviations that the PDC promoted for years as clearly identifying political party affiliation: "The following abbreviations may be used in advertising. PDC believes they *clearly identify political party affiliation*." "Political Advertising" Guide, PDC (Dec. 2004). *See* Declaration of David T. McDonald in Support of Washington State Democratic Party's Opposition to Defendants Motions to Dismiss, **Exhibit A** ("Political Advertising" Guide, PDC (Dec. 2004) (emphasis added) Dkt. #57, Ex. E. In the State's implementation even trademarks and logos of parties may be unilaterally appropriated by unauthorized candidates and opponents of unauthorized candidates: "Official symbols or logos adopted by the state committee of the party may be used in lieu of other identification." *Id.* No

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

requirement is imposed for the candidate or the advertiser to obtain party permission before making use of the official logos or symbols of a political party or abbreviations known to indicate to the public party affiliation identified in advertising.[9]

Contrary to contentions of the State and Grange, the right of a political party to protect the use and abuse of its name is well recognized and confusion need not be shown in order to support relief pursuant to the trademark laws. The protections of the Lanham Act (15 U.S.C. §1051, *et seq.*) clearly extend to the use of names and symbols of political organizations. *United We Stand America, Inc. v. United We Stand America New York, Inc.*, 128 F.3d 86, 90 (2nd Cir. 1997); *American Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 694 (N.D. Ohio 2002); *Tomei v. Finely*, 512 F. Supp. 695 (N.D. Ill. 1981). The protections granted by trademark law are not limited to prohibiting the use of an entity's name or and symbol in a manner that will cause confusion about the source of goods or services similar to those distributed by the entity. Both federal and state trademark law protect against the dilution of a famous name, mark or symbol's meaning and value by prohibiting unauthorized use of famous names and symbols that is likely to dilute the distinctiveness of the name or tarnish its reputation. 15 U.S.C. § 1125(c); RCW 19.77.160. Potential dilution may be enjoined by the Court whether or not confusion has yet occurred: Injunctive relief is authorized to protect against blurring or tarnishment "regardless of the presence or absence of actual or likely

[9] Despite the statutory scheme that will force political parties and advertisers to show an affiliation between candidate and party in all campaign materials because of a candidate's statement of "preference" in his or her declaration of candidacy, the Secretary of State has implemented I-872's filing statute without requiring a candidate to show permission from a party to use its name. *See Top 2 Primary: FAQs for Candidates*, "Can the political parties prevent a candidate from expressing a preference for their party?" WASH. SEC. OF STATE WEBSITE *at* http://www.secstate.wa.gov/elections/faqcandidates.aspx (last viewed December 6, 2008).

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

confusion, of competition, or of actual economic injury." 15 U.S.C. § 1125(c)(1). A mark is famous "if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c)(2)(A). There can be no doubt that the Democratic Party's name meets this test after more than a hundred years of usage to identify the Party's candidates to voters. Party labels provide a shorthand designation of the views of party candidates on matters of public concern. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986). As noted by the Court in its Order of July 15, 2005 in this case:

> Party name and affiliation communicate meaningful political information to the electorate.... Even non-commercial associations are entitled to protect their name against misappropriation and misuse. *See, e.g., Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wash. 2d 28, 35 (Wash. 1963)

Logan, 377 F. Supp. 2d at 926-7.

The State suggests that that the Supreme Court's determination that voter confusion could not be presumed to occur from all conceivable ballot designs meant that the Court "disposed of *any* trademark related argument." State Mot. to Dismiss at 11 (emphasis added). The State overreaches. The trademark issues in this case are not those related to a hypothetical ballot design; they go to the specific ballot design used in conjunction with the other uses made by the State of the party's name and symbols. The Democratic alleged confusion from the State's implementation of I-872, alleging that by "appropriat[ing] the use of the Democratic Party's name in the primary and general elections," the State would "alter the political message and agenda the Party seeks to advance, and [] will *confuse the voting public* with respect to what the Party and its adherents stand for." Complaint in Intervention,

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

2:19-23 (emphasis added). But even if it had not alleged confusion, actual confusion is not required in a claim of trademark *dilution*, which "raises the possibility of recovery based on an entirely different consumer state of mind." 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION ("MCCARTHY") § 24:72 (4th ed.). *See, e.g., Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796 (9th Cir. 2002) ("Dilution works its harm not by causing confusion in consumers' minds regarding the source of a good or service, but by creating an association in consumers' minds between a mark and a different good or service.").[10] By allowing a candidate's Democratic "party preference" to misappropriate the Party's nicknames, labels, and logo in mass advertising, in voter's pamphlets and even on the ballot, the State's implementation of I-872 indisputably creates the required association in voters minds to constitute a violation of anti-dilution trademark laws regardless of whether voters are actually confused. Indeed, the State's obvious purpose of printing a preference for the Democratic Party on the ballot, in the voter's pamphlet and in political advertising is to associate the candidate with the Party's issues and philosophy in the minds of the voter.

Both the State and the Grange urge dismissal of trademark claims based on an argument that trademark law does not protect political parties absent competition between businesses. *United We Stand* rejects this faulty premise.[11] The use of the disputed mark in

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[10] "The dilution theory grants protection to strong, well-recognized marks even in the absence of a likelihood of confusion, if defendant's use is such as to be likely to diminish or dilute the strong identification value of the plaintiff's mark even while not confusing customers as to source, sponsorship, affiliation or connection." 4 MCCARTHY § 24:72.

[11] The Grange and State have repeatedly argued that political parties are not entitled to invoke the Lanham Act to protect misappropriation of their names because the parties are not "using the ballot in connection with the sale of goods." *See* Grange Mot. To Dismiss at 3. In its Motion to Dismiss, the State cites a Florida district court opinion holding that the political activity of circulating petitions did not qualify as a use in commerce. *See Tax Cap Committee v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D. Fla. 1996). The State then suggests that "I-872 is simply part of the political process, not a service performed in commerce." The Second Circuit

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

that case is precisely the same political dispute between that exists here in Washington: claiming an affiliation with a political party, its platform, its logo, and its policies by an individual unauthorized by the party do so and in competition with authorized party candidates.

The State attempts to distinguish *United We Stand*, contending that only where two organizations are "in direct competition" should trademark law apply. However, as noted above, trademark law provides protection against dilution by blurring or tarnishment, even where no confusion or competition is present. 15 U.S.C. 1125(c)(1), *supra*.

Political parties need not have registered their names and symbols as trademarks to enjoy the benefits of trademark protection. *See Partido Revolucionario Dominicano (PRD) Seccional Metropolitania de Washington-DC, Maryland y Virginia v. Partido Revolucionario Dominicano, Seccional de Maryland y Virginia*, 312 F. Supp. 2d 1, 11 (D.D.C. 2004) (along with common law trademark claims, the Lanham Act's protection of unfair competition extends even to an owner of an unregistered mark). And even though confusion is not required to support a dilution claim, when a potential for confusion exists with respect to political organizations, there arises "an additional, unique harm" that goes beyond traditional trademark injury. *Id.* at 16.

> If different organizations were permitted to employ the same trade name in endorsing candidates, voters would be unable to derive any significance from an endorsement, as they would not know whether the endorsement came from the organization whose objectives they shared or from another organization

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considered and flatly rejected this same proposition in *United We Stand*, noting that the "suggestion that the performance of such functions is not within the scope of 'services in commerce' seem to us to be not only wrong but extraordinarily impractical for the functioning of our political system." 128 F.3d at 90 and 91 n.2 ("respectfully" disagreeing with *Tax Cap*).

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

> using the same name. Any group trading in political ideas would be free to distribute publicity statements, endorsements, and position papers in the name of the "Republican Party," the "Democratic Party," or any other. *The resulting confusion would be catastrophic*; voters would have no way of understanding the significance of an endorsement or position taken by parties of recognized major names.

United We Stand, 128 F.3d at 90 (emphasis added).

In its July 15, 2005 Order, this Court noted its belief that merely allowing an unauthorized candidate to use the party's name on a ballot would foster confusion. *Logan*, 377 F. Supp. 2d at 927. Where widely-recognized party symbols, logos, and abbreviations are appropriated in addition to party names and used constantly in advertising, the confusion is only magnified.

There is no prejudice to the State in allowing trademark related claims to proceed. The defendants have been on notice since the beginning of the case that they would eventually have to defend against trademark claims. The Libertarian Party expressly alleged:

> I-872 deprives the LP of its proprietary right to the use of the party name, thus leading to voter confusion regarding which candidates are speaking for the party and which are imposters or renegades appropriating the party name for their own purposes. The name "Libertarian Party" is a nationally trademarked name and therefore may be used by candidates only with LP consent.

Dkt. #3, attach. 1, ¶20.

Similarly, although not pled as such, the issue whether the State is, in implementing I-872, wrongfully appropriating the Democratic Party's name has been in this case since

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

its inception.[12] The Supreme Court expressly indicated it was not considering trademark arguments and the Court of Appeals has made it clear that this Court may allow the Democratic Party to further develop the record with respect to claims that its trademarks have been wrongfully appropriated by the State through I-872. The Ninth Circuit's order directed this Court to examine "the claims that Initiative 872 unconstitutionally … appropriates the political parties' trademarks," and the Democratic Party believes the strength of its claims merits consideration. The motions to dismiss should be denied.

C. Dismissal is Not Warranted Given the Democratic Party's Motion to Supplement and Amend

Finally, this case should not be dismissed as currently pending before this court is a Motion to Amend and Supplement the Complaint. Granting this motion would permit the Democratic Party to add a new cause of action based on Article II, Section 37 of the Washington Constitution. The basis for this cause of action arose as a result of a subsequent decision of the Washington State Supreme Court before the United States Supreme Court issued its opinion. These new state law claims under the Washington Constitution fall under

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[12] The Democratic Party believes its original Complaint set forth sufficient allegation of misappropriation of its name to give notice of a complaint that wrongful blurring and tarnishment was occurring or likely to occur as a result of the implementation by the State of I-872 even though the trademark statutes were not referenced. "The nature and character of a pleading are determined from the allegations. The court is not limited to plaintiffs' theory, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory." *Duncan v. Stuetzle*, 76 F.3d 1480, 1486 n.9 (9th Cir. 1996) (applying California law). If the Democratic Party's complaint is not already sufficient to raise the dilution issues, the Democratic Party respectfully requests leave to amend the complaint to correct the insufficiency. "Under the liberal rules of federal practice, dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper "only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). A plaintiff's "complaint is not to be dismissed because the plaintiff's lawyer has misconceived the proper legal theory of the claim, but is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief" *Corrections USA v. Dawe*, 504 F. Supp. 2d 924, 934 (E.D.Cal. 2007) *quoting United States v. Howell*, 318 F.2d 162, 166 (9th Cir.1963).

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

this Court's "supplemental jurisdiction" precisely to fully resolve "other claims that are so related to claim in the action … that they form part of the same case or controversy [.]" 28 U.S.C. § 1367(a).

CONCLUSION

This case presents important issues about the use and misuse of party labels and names. It should not be summarily concluded when only one of those issues has been resolved. This is particularly true where the Court has noted that its initial summary judgment order was based on a limited focus and that issues other than facial challenges were reserved. Proceedings in this Court were stayed less than three months after the case was filed. Now that it has jurisdiction again, the Court should deny the State and Grange's Motions to Dismiss and proceed to deal with the remaining issues in the case.

DATED this 8th day of December, 2008.

s/ David T. McDonald
David T. McDonald, WSBA #5260
Alex Wagner, WSBA # 36856
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Tel: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com

Attorneys for Plaintiffs in Intervention, Washington State Democratic Party and Dwight Pelz, Chair

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2008, 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 the following:

James Kendrick Pharris

Thomas Ahearne

Richard Dale Shepard

John James White, Jr.

/s/David T. McDonald
David T. McDonald, WSBA #5260
Alex Wagner, WSBA # 36856
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Tel: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com

Attorneys for Plaintiffs in Intervention, Washington State Democratic Party and Dwight Pelz, Chair