The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,
Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,
Plaintiff Intervenors

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,
Plaintiff Intervenors

v.

STATE OF WASHINGTON, et al.,
Defendant Intervenors

WASHINGTON STATE GRANGE,
Defendant Intervenor.

No. CV05-0927-JCC

WASHINGTON STATE GRANGE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Note on Motions Calendar:
Friday, September 17, 2010

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I. SUMMARY OF THIS REPLY

The political parties' assorted opposition briefs do not defeat the summary judgment requested by the defendants in this case.

First, with respect to their widespread voter confusion claim, the plaintiff political parties do not dispute that the ballot says what it says.

Nor did they refute that an objective reading of that ballot does not allow the widespread voter confusion conclusion plaintiffs need as an essential element for their claim.

So plaintiffs instead rely on a subjective test to support the declaration they need this Court to make to grant plaintiffs' claim – namely, that Washington voters are too lazy or stupid to understand what the ballot they vote on says.

But plaintiffs did not refute the point made in the defendants' summary judgment motions that courts apply an objective test – not subjective test – in situations like this.

Nor did plaintiffs refute that this Court's adopting such a subjective test to determine the constitutionality of State and local elections is impractical and unworkable.

Indeed, the summary judgment papers in this case confirm that point. Plaintiffs submitted newspaper clippings, deposition excerpts, and "expert" declarations based on social surveys and theories about theoretical ballots in theoretical elections to support plaintiffs' claim that if one tries to make an educated guess about what an individual voter in a particular election might be thinking when he or she marks his or her ballot for various races in that election (which is a subjective test), one may conclude there may be some confusion among a portion of those individual voters concerning various parts of their ballot. The defendant State has likewise submitted evidence contesting the subjective "facts" plaintiffs' claim. Such issues of disputed fact under a subjective test illustrate the tar pit in which a subjective test would place the federal courts whenever they are asked to judge the constitutionality of a top two election in this State.

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In short, plaintiffs did not refute that an objective reading of the ballot that voters vote on defeats the widespread voter confusion conclusion essential to plaintiff's demand that this Court invalidate Initiative 872 as being unconstitutional.

Second, with respect to their arguments about the unconstitutionality of the PDC laws, plaintiffs do not dispute that Initiative 872 did not enact those PDC laws. Thus, even if the State's PDC laws are unconstitutional, that does not make I-872 unconstitutional instead.

Third, with respect to their arguments about the unconstitutionality of the State's PCO elections, plaintiffs do not dispute that the top two system enacted by Initiative 872 does not apply to the election of PCOs. Thus, even if the State's PCO election laws (or the State's implementation of those PCO election laws) is unconstitutional, that does not make I-872 unconstitutional instead.

II. DISCUSSION

A. The I-872 Ballot Itself Satisfies The Objective, "Reasonable Voter" Standard.

The threshold legal question on summary judgment is whether the test for unconstitutional, "widespread voter confusion" is objective or subjective. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 456, 128 S.Ct. 1184, 170 L.Ed. 151 (2008) ("*Grange*").

In *Grange*, the United States Supreme Court outlined an objective test for widespread voter confusion that focuses on how a reasonable voter would read the I-872 ballot. *See Grange*, 552 U.S. at 456 ("the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment"); 455 ("whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot"); 460 ("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") (emphasis added).

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Under this objective, "reasonable voter" standard, I-872 is constitutional. As explained in the Grange's opening brief *[Dkt. No. 249 at p. 4]*, every single I-872 ballot says:

> READ: Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

The statement of the candidate accordingly says "Prefers" – not "Nominee of" or "Endorsed by" or "Supported by" or any other statement that implies the political party approves of or associates with that particular candidate.

To deny the defendants' summary judgment motion, this Court must therefore at the very least assume that the reasonable voter in this State is lazy (does not read his or her ballot) and/or stupid (cannot understand the simple, unambiguous language on his or her ballot). That is not a reasonable assumption under the law. *E.g.*, *Grange*, 552 U.S. at 461 (federal courts maintain great faith in the ability of individual voters to inform themselves about election issues).[1]

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[1] *For the political parties to prevail this Court would also have to assume that this State's citizens are so uninformed that they do not understand the law enacted with I-872. That is not a reasonable assumption under the law either because courts hold that all citizens are deemed to know what the law says – a principle that makes particular sense here because the law that voters are being deemed to know is the same law they voted to enact. C.f., e.g., In re Estate of Niehenke, 818 P.2d 1324, 1329 (Wash. 1991) (testator is presumed to know the law governing wills, and thus the effect of Washington's anti-lapse statute); Barsons v. DSHS, 794 P.2d 538, 540 n.1 (Wash. App. 1990) (party is presumed to know the law governing the appellate process, and thus the import of statements by the administrative law judge). Thus, voters are presumed to know that Initiative 872 redefined "primary" and "primary election" to mean a procedure for winnowing candidates for public office to a final list of two as part of a special or general election...", and that*

> *Pursuant to Chapter 2, Laws of 2005 [Initiative 872], a partisan primary does* ***not*** *serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. ... Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter.* ***Voters at the primary election are not choosing a political party's nominees.*** *[Wash. Admin. Code 434-262-012 (emphasis added)].*

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In his concurring opinion, Chief Justice Roberts cited the pages of the Grange's Supreme Court Reply Brief that had offered examples of language similar to that now used in on the I-872 ballot to inform the reasonable voter that a candidate claiming to "prefer" a party does not mean the party nominated or associates with that candidate, and then explained: "[a]ssuming 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 with the party's approval." *Grange*, 552 U.S. at 460-61 (Roberts, C.J., concurring).

In short, the political parties' opposition briefs did not refute that their claim of widespread voter confusion must rise or fall on an objective reading of the I-872 ballot, or that an objective reading of that ballot defeats their claim.

B. When The Political Parties Say "Objective," They Really Mean "Subjective."

As noted above, plaintiffs do not refute that the legal standard for "widespread voter confusion" must be objective. They do not refute that the legal standard is based on a "reasonable voter." Nor do they refute that their allegation of widespread voter confusion must be based on the I-872 ballot.

Instead, some of them use the word "objective" to advocate for a subjective inquiry into whether individual voters were actually confused by the I-872 ballot.[2]

They do not, however, refute the point in the defendants' summary judgment motions that such a subjective "standard" is not workable.

For example, plaintiffs do not explain how "widespread voter confusion" may be systematically and reliably measured. Is it county by county? (What happens if voters in King County understand the ballot, but voters in Peirce County do not?) Is it measured office by

[2] *Libertarian Opp. to Grange MSJ p. 7 [Dkt. No. 272]; Dem. Opp. to Grange MSJ pp. 3-4 [Dkt. No. 259].*

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office? (Were voters confused about whether Dino Rossi is the Republican nominee and Patty Murray is the Democratic candidate for U.S. Senate? Were voters confused about whether Jim McDermott is the Democratic nominee for U.S. House of Representatives?) Must it be measured in each election cycle, or just one? (Are voters confused in the primary, but not the general election? Are voters confused this year, but not during the election in two years?) And how many individual voters must "actually" be confused for it to be "widespread"?

The *Sleekcraft* trademark factors suggested by the State Democratic Central Committee do not resolve those questions. (Dem. Opp. to State MSJ pp. 18-20, *[Dkt. No. 257]*.)

First, trademark law is not applicable in this case. The purpose of trademark law is to protect the use of trademarks in commercial transactions.[3] The standard under *Sleekcraft* measures: the likelihood of consumer confusion from a mark that renders a competitor's conduct unlawful. *See AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979). By contrast, the standard here measures widespread voter confusion from a ballot that renders an enacted statute unconstitutional. Thresholds for unlawful commercial speech are not an adequate foundation to measure the constitutionality of a State statute.

Second, the factors suggested by *Sleekcraft* are not objective (*i.e.*, evidence of actual confusion, intent in selecting the mark).

Third, the *Sleekcraft* factors, even if they were persuasive, are not correctly applied in the Central Committee's brief. The person using the party's "mark" is the candidate, not the State. The State is the printer, not the speaker here. And thus the "objective" *Sleekcraft* test the Central Committee wants this Court to adopt requires this Court to examine the "intent" of each candidate when he or she states the name of the political party he or she "prefers".

Finally, the political parties' trademark claims have already been explicitly dismissed. (Aug. 20, 2009 Order at p. 18, *[Dkt. No. 184]*). Central Committee is not entitled to sneak in

[3] *Bosley Medical Institute v. Kremer*, 403 F.3d 672, 676-78 (9th Cir. 2005).

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through the back door the trademark arguments that were already rejected by this Court. (Aug. 20, 2009 Order at 17, *[Dkt. No. 184]*) (party preference statements on the ballot and in the voter pamphlets may not form the basis of a federal or state trademark violation).

In sum, plaintiffs opposition briefs did not refute that the widespread voter confusion basis for plaintiffs' claim that I-872 is unconstitutional fails because it is directly refuted by an objective reading of the I-872 ballot itself.

C. Initiative 872 Did Not Enact The PDC Laws Plaintiffs Complain About.

Plaintiffs put the cart before the horse when arguing that I-872, not the PDC laws, affect their constitutional rights. Initiative 872 did not enact the PDC laws. The PDC laws, and their impact, if any, on the parties' rights, are not the subject of this lawsuit. The political parties do not offer any reason why they cannot (or should not) file a separate suit for relief related to any alleged unconstitutional burdens or confusions caused by the PDC laws.

Plaintiffs opposition briefs did not refute the point that if Washington's PDC laws are unconstitutional, then Washington's PDC laws are unconstitutional. Nor did they refute the point that that does not make I-872 unconstitutional instead.

D. Initiative 872's Top Two Election System Does Not Apply To The Election Of Precinct Committee Officers.

Plaintiffs again put the cart before the horse when arguing that I-872, not the PCO election laws, affect their constitutional rights. Initiative 872 does not apply to PCO offices. By its explicit terms, that Initiative's top two election system applies to only three categories of elected office – none of which are PCOs. Initiative 872, section 4 (now codified at RCW 29A.04.110).

Plaintiffs do not provide any reason why they cannot (or should not) file a separate suit for relief related to any alleged unconstitutional burdens or confusions relating to the State's PCO election laws.

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Plaintiffs' complaint about PCO elections boils down to a claim that it is unconstitutional for the State to implement its PCO laws by placing PCO elections on the same ballot as the offices elected under Initiative 872. If that claim has merit, then the State's implementation of its PCO election laws unconstitutional. That does not make Initiative 872 unconstitutional instead.

If plaintiffs' PCO claim has merit, then the remedy would be to prohibit the State from putting PCO elections on the I-872 ballot. The remedy would not be to instead invalidate Initiative 872 as plaintiffs demand in this case. The remedy of ordering the State to keep PCO elections off the I-872 ballot (or, as an alternative, simply stop conducting PCO elections for the two major political parties at taxpayer expense) would also be consistent with this Court's August 20, 2009 Order, which held that "Plaintiffs will not be able to strike down I-872 in its entirety. Instead the best that Plaintiffs can achieve is to invalidate certain portions of I-872's implementation and enjoin the State from implementing I-872 in specific ways that lead to voter confusion or other forms of forced association." (Order at 21 *[Dkt. No. 184]*.)

In short, if Washington's PCO election laws (or the State's implementation of those PCO elections) is unconstitutional, then Washington's PCO election laws (or the State's implementation of those PCO elections) is unconstitutional. Plaintiffs do not refute the dispositive point that that does not make I-872 unconstitutional instead.

III. CONCLUSION

Plaintiffs' three bases for claiming Initiative 872 is unconstitutional fail as a matter of law. For the reasons explained in this motion (as well as those in the defendant State's corresponding motion), the defendant-intervenor Washington State Grange therefore respectfully requests that this Court enter summary judgment in the defendants' favor, and accordingly dismiss plaintiffs' suit with prejudice.

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RESPECTFULLY SUBMITTED this 17th day of September, 2010.

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CERTIFICATE OF SERVICE

Kathryn C. Carder states: I hereby certify that on September 17, 2010, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties listed below:

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I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Seattle, Washington this17th day of August, 2010.

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