The Honorable Thomas S. Zilly

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 Intervenors.

No. CV05-0927TSZ

WASHINGTON STATE GRANGE'S MOTION TO DISMISS

Note on Motions Calendar:
Friday, December 12, 2008

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

TABLE OF CONTENTS

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

I. INTRODUCTION

The Washington State Grange moves that this case be dismissed based upon the Supreme Court's legal rulings in *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___,128 S.Ct. 1184, 170 L.Ed.2d 151 (2008), and the Ninth Circuit's October 2, 2008 Mandate remanding this case back to this Court, 2008 WL 4426713 (copy also attached as Appendix A to the State's Motion To Dismiss).

Since the State's Motion To Dismiss details the primary reasons for this dismissal, the Washington State Grange does not repackage and repeat those arguments here. Instead, it limits its discussion to the four points outlined below.

II. LEGAL DISCUSSION

A. This Case Must Be Dismissed Because It Has No Separate "Ballot Access" Or "Trademark" Claim Independent Of The First Amendment Challenge Rejected By The Supreme Court.

The State's Motion To Dismiss notes that "ballot access" and trademark-like arguments were occasionally made by a political party to support its First Amendment challenge in this case.

But those arguments made to support the First Amendment challenge in this case were exactly that. Arguments made to support the First Amendment challenge in this case.

They were not separate "claims" independent of this case's First Amendment challenge.

The United States Supreme Court has now rejected that First Amendment challenge. This case must be dismissed for the simple and straightforward reason that it has no separate "ballot access" or "trademark" claim independent of that rejected First Amendment challenge.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

B. A "Ballot Access" Argument Cannot Save This Case From Dismissal Because The Supreme Court's Ruling Also Rejected The Legal Premise For Such An Argument.

The State's Motion To Dismiss is correct when it explains (at pages 5-9) that a ballot access argument cannot save this case from dismissal. That is because the Supreme Court's ruling in this case also rejected the legal premise for such a ballot access argument.

In short, the Supreme Court held that the "First Amendment does not give political parties a right to have their nominees designated as such on the ballot". *Washington State Grange*, 128 S.Ct. at 1193 n.7 (underline added). That ruling eliminates the legal premise for any argument by a political party in this case that it has a ballot access "right" to have its nominee on a ballot. (The lack of merit to any ballot access argument is further confirmed in this case by the fact that Initiative 872's top-two runoff system grants all candidates for public office virtually unrestricted access to be listed on the ballot in the first-stage, winnowing primary that is open to *all* registered voters.)

C. A Belated "Trademark" Claim Cannot Save This Case From Dismissal Either.

The State's Motion To Dismiss is also correct when it explains (at pages 9-15) that the political parties did not assert any trademark infringement claim that can save this case from dismissal.

Indeed, trademark law does not even apply to the free speech authorized by the Supreme Court's decision upholding Initiative 872 – i.e., a candidate's publicly stating the name of the political party he or she personally prefers (if any).

That is because the purpose of trademark law is to protect the use of trademarks in commercial transactions. *Bosley Medical Institute v. Kremer*, 403 F.3d 672, 676-78 (9th Cir. 2005). For trademark law to apply, the alleged infringer must therefore be using the trademark "in connection with the sale of goods or services." *Id*. at 677.

That threshold commercial speech requirement is crucial because it prevents trademark law from running afoul of the First Amendment protections guaranteed to noncommercial

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

speech – especially political speech. 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §27.71 (4th ed. 2005) (citing legislative history); accord *Tax Cap Committee v. Save Our Everglades*, 933 F. Supp. 1077, 1079, 1081-82 (S.D. Fla. 1996) (trademark law does not prohibit one political action committee from using a petition form that closely resembles the form developed by a different political action committee because the defendant was not using that petition form for commercial purposes); see also *Bosley Medical Institute*, 403 F.3d at 676-80 (defendant's use of plaintiff's trademark on website criticizing plaintiff's product was permissible).

The political parties do not – indeed, cannot – claim that a candidate running for office is using the ballot in connection with the sale of goods or services. To the contrary, that ballot is part of the State's election system – and the candidate's statement of personal preference on that ballot is pure political speech to which trademark law does not even apply.

The comparative nature of a candidate's personal party "preference" also confirms that his or her stating the name of that political party would be protected even if trademark law somehow applied.

That is because the First Amendment undisputedly protects a candidate's right to tell voters if he or she prefers one political party over another. But to tell voters that personal party preference, the candidate must say the political party's name.

Even in commercial speech cases, trademark law allows a person to use someone else's trademark to compare his or her own product to that other person's product. E.g., *New Kids on the Block v. News America Publishing*, 971 F.2d 302, 306 (9th Cir. 1992) ("Indeed, it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the [allegedly infringed upon] mark"); *Smith v. Chanel, Inc.*, 402 F.2d 562, 564-69 (9th Cir. 1968) (defendant free to advertise his perfume by stating that it duplicated 100% the plaintiff's well known Chanel #5).

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

The same comparative advertising principle applies here – for it is virtually impossible for a candidate to tell voters which political party he or she prefers (if any) without saying that political party's name.

A candidate's saying the name of the political party he or she personally prefers also falls squarely within trademark law's "nominative use" exemption. The Ninth Circuit has described that exception as follows:

> [1] the product or service in question must be one not readily identifiable without use of the trademark;
>
> [2] only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and
>
> [3] the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

Playboy Enterprises, Inc. v. Welles, 279 F.3d 796, 801 (9th Cir. 2002).

In the *Playboy Enterprises* case, the Ninth Circuit held that Ms. Wells could use the phrase "Playboy Playmate of the Year 1981" to identify herself on her commercial website because her use of the Playboy Playmate trademark was a nominative use. *Id*. at 799. More specifically, the Ninth Circuit explained:

> (1) any other description would be too wordy and awkward – for it would be "impractical and ineffectual" for Ms. Wells to identify herself as the "nude model selected by Mr. Hefner's magazine as its number-one prototype woman for the year 1981";
>
> (2) Ms. Wells was only using the bare title, and not any of Playboy's specialized font or logo; and
>
> (3) Ms. Wells was not using anything else but the 1981 Playboy Playmate title to suggest sponsorship or endorsement by Playboy.

Playboy Enterprises, 279 F.3d at 802-03.

A candidate's statement of the name of the political party he or she personally prefers is similarly nothing more than a "nominative use" of that name which trademark law would expressly permit. That is because:

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

(1) it would be unwieldy for a person to describe his or her political party preference on the ballot other than by stating that political party's name – e.g., it would be "impractical and ineffectual" for a person to state on the ballot that she "prefers the liberal party represented by a donkey that holds the current majority in Congress and soon will control the White House";

(2) the political candidate does not "use" a political party's supposed trademark beyond simply stating that party's name in ordinary font with no logo; and

(3) Initiative 872 does not allow for a use suggesting the candidate is endorsed or sponsored by that political party – indeed, the Initiative expressly provides to the contrary that the statement on the ballot is the candidate's personal preference for that party, not the party's preference for that candidate.

In short, the Supreme Court has rejected the First Amendment challenge which the political parties had previously made some trademark-like arguments to support. The political parties cannot save this case from dismissal by now suggesting that those trademark-like arguments were instead separate trademark infringement claims because (1) no such independent trademark claims were pled, (2) trademark law does not even apply to a political candidate's statement of his or her personal party preference, and (3) even if it did, trademark law would still permit that statement under its comparative advertising and nominative use principles. The impact of the Supreme Court's ruling in this case is simple and straightforward: the political parties' suit must be dismissed.

D. It Is Time To Put An End To This Case.

The fundamental purpose of the Civil Rules is "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. With that primary Rule in mind, the Washington State Grange believes it is important to remember the procedural history of this case:

- *November 2004:* The citizens of this State enact Initiative 872, voting 60% - 40% to adopt that Initiative's Top Two election system effective December 2004.
- *May & June 2005:* The State Republican Party, the State Democratic Central Committee, and the State Libertarian Party file their Complaints to block

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

implementation of that Top Two election law, asserting facial challenges under the First Amendment of the federal constitution.[1]

- *July 2005:* This Court agrees with the political parties' First Amendment challenge. This Court accordingly strikes down Washington's Top Two election law and enjoins its implementation.
- *Fall 2005:* While this Court's decision is on appeal, its injunction stands to prohibit Washington's citizens from voting in the Top Two election system they had overwhelmingly adopted.
- *Fall 2006:* While this Court's decision is on appeal, its injunction stands to prohibit Washington's citizens from voting in the Top Two election system they had overwhelmingly adopted.
- *Fall 2007:* While this Court's decision is on appeal, its injunction stands to prohibit Washington's citizens from voting in the Top Two election system they had overwhelmingly adopted.
- *March 2008:* The United States Supreme Court reverses this Court's decision.
- *October 2008:* The Ninth Circuit Court of Appeals issues its Mandate remanding this case back to this Court.

In summary, the citizens of this State overwhelmingly adopted Initiative 872's Top Two election system back in 2004. The political parties successfully prevented those citizens from being allowed to use that Top Two system for four years. And now, the United States Supreme Court has determined that the political parties' First Amendment challenge has no merit.

This Court should not delay or extend these proceedings any further. The political parties have had their day before the United States Supreme Court, and they lost. This Court should now put an end to this case by entering the dismissal with prejudice which is now four years overdue.

III. CONCLUSION

For the reasons explained above, as well as the reasons explained in the State's Motion To Dismiss, this Court should dismiss this case.

---

[1] *In addition to challenging the constitutionality of the Top Two system enacted by I-872, the Republican Party also argued that* ***if*** *the First Amendment rendered Washington's Top Two system unconstitutional, then the First Amendment rendered the "Montana" system unconstitutional as well – an argument that was rendered moot by the Supreme Court's ruling that the First Amendment did* ***not*** *render Washington's Top Two system unconstitutional.*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

RESPECTFULLY SUBMITTED this 20th day of November, 2008.

FOSTER PEPPER PLLC

s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA No. 14844
Foster Pepper PLLC
1111 Third Avenue, suite 3400
Seattle, WA 98101
telephone: 206-447-8934
telefax: 206-749-1902
email: ahearne@foster.com

Attorneys for the defendant-intervenor
Washington State Grange

CERTIFICATE OF SERVICE

Thomas F. Ahearne states: I hereby certify that on November 20, 2008, 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:

1. Washington State Grange's Motion To Dismiss; with this Declaration Of Service and attached Proposed Order.

John J. White, Jr./Kevin B. Hansen
Livengood, Fitzgerald & Alskog, 121 Third Avenue
Kirkland, WA 98033-0908
white@lfa-law.com; hansen@lfa-law.com
Attorneys for Plaintiffs Washington State Republican Party *et. al.*,

David T. McDonald/Alex Wagner
K&L Gates, 925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
david.mcdonald@klgates.com; alex.wagner@klgates.com
Attorneys for Intervenor Plaintiffs Washington Democratic Central Committee and Paul R. Berendt

Richard Shepard
Shepard Law Office, Inc., 818 So. Yakima Ave., #200
Tacoma, WA 98405
richard@shepardlawoffice.com
Attorneys for Intervenor Plaintiffs Libertarian Party of Washington State, Ruth Bennett and J.S. Mills

Maureen Hart/James K. Pharris/Jeffrey T. Even
1125 Washington Street SE
Olympia, WA 98501-0100
marnieh@atg.wa.gov;Jamesp@atg.wa.gov; jeffe@atg.wa.gov
Attorneys for Defendants State of Washington, Secretary of State Sam Reed and Attorney General Rob McKenna

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 this 20th day of November, 2008.

/s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA No. 14844
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Telephone: (206) 447-8934
Fax: (206) 749-1902
E-mail: ahearne@foster.com