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 Intervenors.

No. CV05-0927JCC

WASHINGTON STATE GRANGE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

***Note on Motions Calendar:***
***Friday, December 12, 2008***



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## I. INTRODUCTION

The Washington State Grange's Motion To Dismiss (Doc. #134) fully explained the reasons why the Supreme Court's legal rulings in this suit require the dismissal of this First Amendment case filed by political parties back in 2005.

In response, the political parties make four basic arguments – each of which boils down to a demand that the case they filed in the first half of 2005 not be dismissed because there's now a different case they want to make at the tail end of 2008. (Doc. #146 & #150.)

The Washington State Grange agrees with (but does not waste this Court's time by repeating) the points explained in the State's Reply on this dismissal issue (Doc. #164). Instead, the Grange limits its discussion to the points outlined below.

## II. DISCUSSION

### 1. The Political Parties' Complaints About The 2008 PCO Elections Are Not The 2005 Complaints They Filed In This Case.

The political parties argue that this case should not be dismissed because they now have a complaint about the State's 2008 PCO elections.

But a complaint about the State's 2008 PCO elections is exactly that.

It's a complaint about the State's 2008 PCO elections.

It's not the complaint that the political parties filed in this 2005 case challenging the constitutionality of the top two primary established by Initiative 872.

### 2. The Political Parties' Complaints About The State's New Application Of State Campaign Finance And Reporting Laws Are Not The 2005 Complaints They Filed In This Case.

The political parties also argue that this case should not be dismissed because they now have a complaint about the State's new application of State campaign finance and reporting laws.



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But a complaint about the State's new application of State campaign finance and reporting laws is exactly that.

It's a complaint about the State's new application of State campaign finance and reporting laws.

It's not the complaint that the political parties filed in this 2005 case challenging the constitutionality of the top two primary established by Initiative 872.

**3. The Political Parties' New "Trademark-like" Causes Of Action Are Not In The 2005 Complaints They Filed – and cannot legitimately be injected to now bring this case back to life.**

The political parties also argue that this case should not be dismissed because they now have trademark-like causes of action that they would like to assert in this case.

Indeed, because its 2005 Complaint actually did not assert any such trademark claim, the State Republican Party's Response brief backpedal by saying "If the Court determines that federal and state trademark matters are not clearly before it, the Republican Party requests leave to amend to expressly invoke the Lanham Act and similar state statutes." Doc. #150 at page 12:13-15.

Likewise, because its 2005 Complaint actually did not assert any such trademark-like claim either, the State Democratic Central Committee's Response brief backpedals by saying "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." Doc. #146 at page 20:21:, see also that same Central Committee Response brief (Doc. #146) at page 9:12-14 (supporting its attempt to avoid dismissal by now arguing that the Ninth Circuit "did not bar this Court from permitting amendments to the pleadings").

The political parties' backpedaling and reliance upon an amendment to their Complaints to avoid dismissal confirms the interdependence of the dismissal and amendment motions currently pending before this Court.



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It also confirms that the political parties' new trademark-like complaints are not the complaints they filed in this 2005 case challenging constitutionality of the top two primary established by Initiative 872.

Moreover, the political parties' opposition briefs do not address – never mind refute – the Grange's demonstration that the political parties' new trademark-like claims have no legal basis in trademark law. Doc. #134 at page 4:13 – page 7:16 (Grange's Motion at 2:13-5:16).

Instead, the political parties' opposition briefs completely ignore that dispositive trademark law.

Similarly, the political parties' opposition briefs do not provide any legal authority whatsoever to refute the dispositive point that the First Amendment undisputedly protects a candidate's right to tell voters if he or she personally prefers one political party over another, and that to exercise that protected speech the candidate must in fact utter the political party's name. Doc. #134 at page 5:16 – page 7:16 (Grange's Motion at 3:16-5:16).

Instead, the political parties completely ignore this dispositive First Amendment point. That is because they simply cannot refute that the free speech protected by our First Amendment includes a person's freedom to utter in public the name of the political party he or she personally prefers. As our Supreme Court has made perfectly clear, an individual candidate's freedom of speech "is at the core of our electoral process and of the First Amendment freedoms, not at the edges" – and thus the very notion that the First Amendment somehow allows an *abridgment* of free speech "sets our First Amendment jurisprudence on its head." *Republican Party of Minnesota v. White*, 536 U.S. 765, 781-82 (2002) The Supreme Court has accordingly held that the First Amendment protects not only accurate speech in the political arena, but also exaggeration, vilification, and outright false statements as well. *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940); accord, *Public Disclosure*



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*Commission. v. 119 Vote No! Committee*, 957 P.2d 691, 695, 135 Wash.2d 618 (1998) (State law cannot prohibit falsity in political debate).[1]

**4. The Political Parties' New Cause Of Action Under Article II, §37 Of The Washington State Constitution Is Not In The 2005 Complaints They Filed – and cannot legitimately be injected to now bring this federal suit back to life.**

The political parties lastly argue that this case should not be dismissed because they now want to add a new legal claim under Article II, §37 of the Washington State Constitution.

Once again confirming the interdependence of the dismissal and amendment motions currently before this Court, the political parties acknowledge that they must amend their 2005 Complaints to add this new claim. And to justify their prior failure to include any Article II, §37 claim against Initiative 872, they suggest that such a claim against an Initiative's constitutionality did not exist until the Washington Supreme Court's November 2007 decision in *Washington Citizens Action v. State*, 162 Wash.2d 142, 171 P.3d 486 (2007). State Republican Party's Response (Doc. #150) at page 2:16-19 and page 13:10-16; Central Committee's Response (Doc. #146) at page 20:12-16.

But challenging a Washington State Initiative under the solitary sentence that comprises Article II, §37 of the Washington State Constitution is not a "new" legal claim created after the

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[1] *Indeed, the Supreme Court has consistently held that the First Amendment protects an broad array of speech that is much more offensive or objectionable than merely uttering generic words like "Democrat" or "Republican" – for example, holding that the First Amendment protects a person who publicly accuses a political opponent of "blackmail" or being a "traitor to his God, his country, his family, and his class" (Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 13 (1970); Letter Carriers v. Austin, 418 U.S. 264, 284-286 (1974)); protects a person who publicly broadcasts pornography over the internet (Reno v. American Civil Liberties Union, 521 U.S. 844, 882 (1997)); protects a person who publicly disseminates "virtual" child pornography (Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002)); protects a person who publicly discloses an illegally taped telephone call about teachers' union negotiations (Bartnicki v. Vopper, 532 U.S. 514, 535 (2001)); protects a person who publicly distributes a parody of a respected minister having a drunken incestuous bout with his mother in an outhouse (Hustler Magazine v. Falwell, 485 U.S. 46, 48, 57 (1988)); and protects a person who publicly wears in a courthouse a jacket stating "FUCK THE DRAFT. STOP THE WAR" – with the Court noting "one man's vulgarity is another's lyric", and to forbid particular words invites "a substantial risk of suppressing ideas in the process" (Cohen v. California, 403 U.S. 15, 25, 26 (1971)).*



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political parties filed their 2005 Complaints in this case. That provision of the Washington State Constitution has existed since 1889.[2] And its application to Washington State Initiatives was unequivocally settled long before the political parties filed their Complaints in this 2005 case.[3] The political parties accordingly do not establish any legitimate justification for their failure to have included an Article II, §37 claim in their original 2005 Complaints if they had really believed such a claim was any legitimate part of their case.

Moreover – and dispositively here – the political parties also fail to refute the legal reasoning detailed in the Grange's briefing that explains why the political parties' belated State Constitutional claim cannot now be injected to bring this federal case back to life. Doc. #151 at page 5:12 – page 12:10 (Grange's opposition to Central Committee's motion to amend at 3:12-10:10).

## III. CONCLUSION

If one or more of the political parties want to file a suit based on complaints they have about the November 2008 election or what will be occurring in 2009, then, as the State notes in its Reply brief (Doc. #164), the political parties are free to litigate their new complaints at an appropriate time in an appropriate forum.

But the legal challenge that the political parties brought in this 2005 case is over. Under the Supreme Court's rulings in this suit, the political parties' legal challenge in this case must now be dismissed. It is time to put an end to this particular federal suit's challenge to

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[2] *In full, it states: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length". Wash. Const. Art. II, sec. 37 (1889).*

[3] *E.g., State v. Thorne, 129 Wash.2d 736, 753, 921 P.2d 514 (1996); Amalgamated Transit Union v. State, 142 Wash.2d 183, 247, 11 P.3d 762 (2000) ("Article II, §37 applies to Initiatives"). Indeed, Article II, §37 was one of the Washington State Constitutional provisions that the Washington State Supreme Court relied upon in its highly publicized 2000 decision invalidating Tim Eyman's first Car Tab Initiative (Initiative 695). Amalgamated Transit Union, 142 Wash.2d at 245-56.*



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Initiative 872. For the reasons explained in the Grange's and State's briefing, this Court should accordingly dismiss this case.

RESPECTFULLY SUBMITTED this 12th day of December, 2008.

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## CERTIFICATE OF SERVICE

Thomas F. Ahearne states: I hereby certify that on December 12, 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 Reply In Support Of Its Motion To Dismiss; with this Declaration Of Service and attached Proposed Order.

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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 this 12th day of December, 2008.

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