No. 11-1266

# In The
# Supreme Court of the United States

LIBERTARIAN PARTY OF WASHINGTON STATE,
RUTH BENNETT and J. S. MILLS,

*Petitioners,*

v.

WASHINGTON STATE GRANGE,
SAM REED, Secretary of State,
STATE OF WASHINGTON and ROB MCKENNA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## LIBERTARIAN PARTY OF WASHINGTON'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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# REPLY TO OPPOSITION ON PETITION FOR A WRIT OF CERTIORARI

## I.

## INTRODUCTION

On June 28, 2012, this Court issued its decision in *United States v. Alvarez*, ___ U.S. ___ (2012) ("*Alvarez*"). Justice Kennedy spoke for the plurality:

> "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (citation omitted) (internal quotation marks omitted). As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." (citation omitted).

Slip Opinion, at 4.

In their opposition, the State of Washington argues that the Petitioners "abandoned" their second question presented. State Brief, pp. 32-33. In its brief, the Grange cynically accuses all petitioners of seeking "annual" trials of voter intelligence. Grange Brief, pp. 12-13.

The State misapprehends the nature of the second question: it is the right of access to the official electoral process. The Petitioners argue the importance of electoral access by minor parties to the health and vitality of our political system throughout their Petition. *E.g.*, Petition, pp. 20-28.

At its heart, this case is about the same principles as *Alvarez*. In *Alvarez*, this Court held that "the Government's chosen restriction on the speech at issue be '*actually necessary*' to achieve its interest." Slip Opinion, at 13.

Behind the dry procedural avoidance of the State and the scoffing of the Grange, there is no articulation by either for Washington's implementation of a system that disembowels the American political party system.

The rights of political parties, voters and candidates decussate in this case. In previous cases:

- This Court has held that it is unconstitutional to deny access to the general election ballot by requiring an early petition drive. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).
- This Court has held that states cannot establish the rules for the internal governance of political parties. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).
- This Court has held that a state may not label a candidate as having "disregarded the voters' instruction on term limits" on the ballot. *Cook v. Gralike*, 531 U.S. 510 (2001).
- This Court has held that a state may not prohibit a political party from opening its doors to independent voters who wish

to associate during the election process by voting in the party's primary. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

- This Court has held that a state cannot force a political party to open its nomination process to "wholly unaffiliated" voters. *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

And

- This Court has held that barring a voter from changing her affiliation for an extended period violates her right of free association. *Kusper v. Pontikes*, 414 U.S. 51 (1973).

This case brings together a thread from each of these cases in presenting this Court with the intersection of state regulation of ballot access pitted against the First Amendment rights of the political parties and the voters of the State of Washington.

As implemented by the State of Washington, the "Top Two" system draws together the worst elements of the electoral experiments from the past century: denial of ballot access, forced association and the total exclusion of political parties from the official electoral process.

Under I-872, as-applied, all political parties are denied all access whatsoever to the official electoral process, whether on the ballot or in official electoral materials. Emerging political parties and movements

are effectively denied any access to the general election campaign and ballot. Contrary to the intent of our constitutional form of government, minority voices are stifled and then silenced.

Adding the proverbial insult to injury, the Washington "Top Two" system allows any candidate to freely associate himself or herself with an established party regardless of their true allegiance and denies the offended political party any opportunity for disavowal.[1]

This case offers this Court a unique opportunity to harmonize the central principles of its decisions in the areas of ballot access and the associational and expressive rights of candidates, of major and minor political parties and of the voters.[2] As-applied, this case offers this Court four issues that are outlined in the Petitioners' Questions Presented:

- The unconstitutional exclusion of all political parties from any participation in the official election process.

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[1] The Grange argues that the petitioners would deny the candidates their First Amendment right to describe themselves on the ballot. Rather, the Petitioners object to a system where the candidates can speak on the ballot but the parties are denied any right to speak on the ballot or in any official electoral publication.

[2] Scholarly discussions of the confusion in this Court's jurisprudence appear in the articles by Dimitri Evseev (at pp. 1287-1322) and Jessica Levinson (at pp. 478-495) cited in Petition at p. 24.

- The unconstitutional exclusion of minor political parties from any participation in the general election.
- The unconstitutional denial of any opportunity to communicate nomination or disavowal of association in any part of the official election process by any political party.
- The infringement of the trademark rights as evidenced by the unauthorized use of the Libertarian Party's trademark on Washington election ballots.

## II.

## EXCLUSION FROM THE POLITICAL PROCESS

### A. I-872 EXCLUDES PARTIES FROM THE OFFICIAL POLITICAL PROCESS

> The Constitution grants States "broad power to prescribe the Time, Places and Manner of holding Elections for Senators and Representatives," Art. I, §4, cl. 1, which power is matched by state control over the election process for state offices.

*Clingman v. Beaver*, 544 U.S. 581, 586 (2005).[3]

[3] Citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Tashjian*).

However, the "broad power" of the States to regulate elections is limited by the First Amendment. *Eu v. San Francisco County Democratic Central Committee*, *supra*, at 222. Objective review of the briefs, the decision and the oral argument in this Court's prior consideration of I-872 show that it was never contemplated by this Court that the implementation of the "Top Two" initiative would lead to the total exclusion of all participation by the political parties in the official electoral processes.

The State and the Grange offer the hollow rationalization that political parties were "free" to "conduct conventions" and to "nominate" candidates. Yet, the implementation of I-872 denied all political parties any access to the official Washington electoral process. Moreover, candidates were denied any right to claim their party's nomination on the ballot and the parties were denied the right to announce their nominees in any official election publication issued by the State.

These practices violate the holding of the Ninth Circuit in *Eu v. San Francisco County Democratic Central Committee*, 826 F.2d 814 (1987), *affirmed*, 489 U.S. 214 (1989). In that opinion, the Court of Appeals held that a ban on party speech (such as that implemented by Washington under I-872):

> . . . patently infringe[d] both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information.

*Id*., at 835.

## B. I-872 EXCLUDES VIABLE CANDIDACIES FROM THE GENERAL ELECTION

As illustrated in the Petition, candidates receiving 24.3% of the vote in the "Top Two" primary are still denied the right to appear in the general election. (*See* Petition, p. 15.) The district court opined that the "Top Two" is no different than a general election and a runoff:

> In this manner, the general election becomes a runoff between the top-two vote getters in the primary. App. 34.

This analogy fails because of the difference in timing. A true runoff election is held immediately after the general election, at the peak of voter interest.[4] Under the "Top Two" system, the first election which is open to all candidates is held before the normal election season begins, at a time when voters' interest is not yet focused on electoral matters. As explained in the Petition, this Court has recognized that interest during the election season does not peak until the last month or few weeks before the general election.[5] *See* Petition, at 14. *See also Anderson v.*

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[4] It is in fact, the closeness of the general election vote that marks continued voter interest in the true runoff situation.

[5] This is borne out in actual Washington State vote totals. In the 2011 August primary the voter turnout was 29.4%. In the November 2011 election, the voter turnout was 52.95%. Of nearly equal significance is the increase in registered voters between the two elections. For the November election, there were 882,264

(Continued on following page)

*Celebrezze*, *supra*, at 790-791.[6] This is doubly true in a presidential election cycle. For the 2012 campaign, the Republican national convention will be August 27th through August 30th and the Democratic national convention will be September 3rd through September 6th. The Washington "Top Two" primary will be held August 7, 2012,[7] *three* months before the November election. This is before the selection of the Presidential nominees *and* before the parties' platforms are determined at the national conventions.

Why is the timing difference important? In his dissent in *Timmons*, *supra*, Justice Stevens eschewed the idea that the ballot is not a forum for political expression. *Id.*, at 373.

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additional registered voters, an increase of 24% between the two elections. *See* http://vote.wa.gov/results/20110816/Turnout.html (August 2011 results) and http://vote.wa.gov/results/20111108/Turnout.html (November 2011 results).

[6] The State argues: "In contrast to *Celebrezze*, the I-872 primary occurs in August, and a candidate is not required to act before the major parties select their nominees." (State Brief, p. 31.) While true in one sense, this argument distorts the rationale of *Celebrezze* because *Celebrezze* focused on allowing independent (and minor party) candidates an opportunity to coalesce support among voters because "[the voters] are dissatisfied with the choices within the two major parties." *See Celebrezze*, *supra*, at 791, in other words, after the major parties select their platforms and their nominees. In this regard, I-872 violates the rationale of *Celebrezze*.

[7] *See* http://www.sos.wa.gov/elections/. The pattern in 2008 was identical. The primary was on August 19, 2008 before either major party convention was held.

Justice Stevens recognized that, since minor parties have limited resources, further limiting their participation in the general election denies them an important opportunity to put their message in front of the voter. *Id.* Under the "Top Two" system, as implemented by Washington, every party, minor or major, is denied access to *any* part of the official electoral process: no opportunity to reach the voters in any official electoral publication and no voice on the ballot in *either* election.

### C. I-872 EXCLUDES MINOR PARTIES FROM THE GENERAL ELECTION

An important focus for this Court must be in the incorrect interpretation and application of a previous Washington State case, *Munro v. Socialist Workers' Party*, 479 U.S. 189 (1986).

In *Munro*, this Court upheld an electoral system that required a minor party candidate to obtain 1% of the vote in the primary election in order to advance to the general election. Many readers have misapplied this Court's *dicta* statement near the end of the majority opinion:

> It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election.

*Id.*, at 199.

*Munro*'s holding was that access to the general election ballot conditioned on garnering 1% of the vote in the primary was unconstitutional. Nevertheless, many, including the Ninth Circuit in this case (App. 20), have seized upon the above-quoted language as a holding that access to a statewide primary ballot permits complete exclusion from the general election. Of course, if Washington had required a 20% threshold to placement on the general election ballot, this Court would have held that restriction unconstitutional. Yet, under I-872, even a candidate who receives 20% of the primary vote is unlikely to advance to the general election.[8] As the *Munro* majority itself stated:

> Undeniably, such restrictions raise concerns of constitutional dimension, for the "exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day. . . ." *Anderson v. Celebrezze*, 460 U.S., at 787-788.

*Id.*

Of course, the issue under I-872 is not the size of the threshold required to reach the general election ballot, it is the virtual exclusion of all minor party candidates in all general elections. As designed, under I-872, minor party candidates will almost never reach the general election contest or ballot.

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[8] *See* discussion of the 9th District Legislative race in Petition, at 15.

## D. I-872 EXCLUDES A PARTY'S RIGHT TO SPEAK

### 1. A PARTY CANNOT SPEAK TO PROTECT ITS NAME

At the core of the First Amendment's right of association is the right "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party*, *supra*. The Declaration of Richard Winger details numerous specific instances[9] where individuals or parties have attempted to hijack a party label for their own purposes. *See* "Opinion One," Winger Declaration, at p. 3.

However, it is not necessary to rely on Mr. Winger's expert testimony. Incidents such as these are chronicled in published decisions of the federal courts. In *LaRouche v. Fowler*, 152 F.3d 974 (1998), *affirmed*, 529 U.S. 1035 (2000), the court of appeals explained the significance for a political party of avoiding improper forced association:

> [I]t is the *sine qua non* of a political party that it represents a particular political viewpoint. And it is the purpose of a party convention to decide on that viewpoint, in part by deciding which candidate will bear its standard: the liberal or the conservative,

[9] Richard Winger Declaration, LibER, Vol. II, Tab 8, pp. 3-13, PACER Doc. 273.

> the free trader or the protectionist, the internationalist or the isolationist.
>
> * * *
>
> The Party's ability to define who is a "bona fide Democrat" is *nothing less than the Party's ability to define itself*.

*Id.*, at 995-996 (emphasis added).

### 2. A PARTY CANNOT SPEAK TO PRESENT ITS MESSAGE.

The Respondents have failed to identify any juncture in the I-872 process where any party, major or minor, can identify itself, its nominee or its position. Instead, the State hides behind the fiction of "winnowing" the field and the Grange marches out a surfeit of sarcasm[10] in defense of the decision below.

Behind the Respondents' pronouncements, the words of Justice Scalia in his dissenting opinion in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) ring clear:

> There is no state interest behind this law except the Washington Legislature's dislike for bright-colors partisanship, and its desire to blunt the ability of political parties with noncentrist views to endorse and advocate their own candidates. . . . I dissent from the

[10] Perhaps Thomas Jefferson said it best: "Resort is had to ridicule only when reason is against us."

> Court's conclusion that the Constitution permits this sabotage.

*Id.*, at 470-471.

As Justice Scalia predicted, the implementation makes the "sabotage" of the Constitutional scheme and the political party system complete.

For the reasons stated, this Court should accept the first and second questions presented in the petition.

## III.

## USE OF THE LIBERTARIAN PARTY'S TRADEMARK

The trademark discussion in the opposition briefs fails to accurately present the law as it applies to this case.

In its brief, the Grange cites *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302 (9th Cir. 1992) and *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796 (2002) but their analysis of these cases is too shallow.

In *New Kids on the Block*, the Ninth Circuit drew the outlines of the "nominative use" defense, a new extension of the "fair use" doctrine. In the majority opinion, Judge Koszinski set out three requirements for "nominative use." The third is missing here:

> . . . and third, the use must do nothing that would, in conjunction with the mark, *suggest*

> *sponsorship or endorsement* by the trademark holder.

*Id.*, at 308 (emphasis added).

When a candidate states that he or she "prefers" the Libertarian Party the clear implication is one of affiliation, sponsorship or endorsement. The "nominative use" exception in *New Kids* is exactly what the name implies, using the trademark name to identify the product such as for a newspaper survey.

Similarly, *Playboy* is a "nominative use" case. In *Playboy*, Ms. Welles used her title of Playmate of the Year 1981 on her website. The Ninth Circuit found this use proper because Ms. Welles did not claim (in fact she denied) sponsorship of Playboy Enterprises. Significantly, since she had earned the title of Playmate of the Year, it was logical that she should be entitled to report her achievement. The same would apply to the holder of a gold medal from the Olympics or the member of a winning team in the Super Bowl.

The facts in *Playboy* point up the fallacy in the opposition's reasoning. Unlike Ms. Welles, candidates claiming to "prefer" a party have not earned any authorization from the party whose trademark or reputation they are co-opting. The candidates cannot say that they do not seek or imply the sponsorship because that is their exact purpose in claiming the preference: In doing so, they are saying, "I am an adherent of the Republican, Democratic or Libertarian philosophy." Such a claim is not protected.

For the reasons stated, this Court should accept the third and fourth questions presented in the petition.

## IV.

## CONCLUSION

The petition for a writ of certiorari on all of the Questions Presented by Petitioners should be granted.

Respectfully submitted,

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