11-35125

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,	)
Appellants,	)
vs.	)
WASHINGTON STATE GRANGE, *et al.*,	)
Defendants & Appellees.	)

On appeal from the judgment entered in the United States District Court for the Western District of Washington
Case No. 2:05-cv-000927-JCC
The Honorable John Coughenour
United States District Court Judge

REPLY BRIEF BY APPELLANTS LIBERTARIAN PARTY, J. S. MILLS AND RUTH BENNETT

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BRIEF

I. INTRODUCTION

The State of Washington and the Grange, in their answering briefs, have sought to recast the nature of the debate and of their oppression of the rights of the Plaintiffs.

To clear the air, this Court must examine the chronology of I-872 as implemented by the State of Washington in 2008:

1. Candidates were required to declare their candidacy for "partisan" office on or before June 6, 2008.

2. The official state voter's pamphlets were mailed to every household in Washington.

3. The ballots were mailed to overseas and military voters 30 days before the election.

4. The 2008 "partisan" primary election was held on August 19, 2008.

5. The official state voter's pamphlets were mailed to every household in Washington.

6. The ballots were mailed to overseas and military voters 30 days before the election.

7. The 2008 "partisan" general election was held on November 4, 2008.

While the Plaintiffs may hold "conventions" and "nominate" candidates to bear their party's banner, such "nominations" have *no role whatsoever* in the official election process. The denial of access to any official participation in the election process is not the only effect of I-872 on the Plaintiffs. Candidates are permitted to wrap themselves in the mantle of any of the Plaintiffs by claiming that they "prefer" one or the other political party.

…

…

II.
ARGUMENT

A.
This Case is Not Solely About Voter Confusion

The State of Washington and the Grange have taken a single theme from the previous decision of the Supreme Court to cast this as a case solely about "voter confusion." This is a mischaracterization of the nature of the debate. This misapprehends the nature of the electoral process.

The precedential source of I-872 comes from a suggestion in *dicta* in *California Democratic Party v Jones*, 530 U.S. 567 [2000]["*Jones*"]:

> Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—*which may include nomination by established parties* and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has

> all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association.
>
> [Emphasis added.]
>
> *Id.* at 585-586.

In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, ___, ["*Grange*"] the Supreme Court described the use of the form of primary suggested in *Jones*:

> Petitioners are correct that we assumed that the nonpartisan primary we described in *Jones* would be constitutional. But that is not dispositive….

In *Grange*, the Supreme Court pointed out that the constitutionality of the *Jones* primary is not disposed of by mere reference to *Jones*. Instead, the Supreme Court deferred the determination of the constitutionality of I-872 until the statute was fully implemented. *Id.* at __.

Now we know that the State of Washington's implementation fails constitutionally in at least two ways:

- I-872 denies the Plaintiffs all access to the official electoral process.

• I-872 creates widespread confusion about the meaning of the party preference designation on the ballot and denies the Plaintiffs any official opportunity to rebut false claims of affiliation.

B.
Denial of Ballot Access

As Chief Justice Rehnquist wrote in *Cook v. Gralike*, 531 U.S. 510 [2001][concurring in the judgment]:

> The result is that the State injects itself into the election process at an absolutely critical point–the composition of the ballot, which is *the last thing the voter sees* before he makes his choice–and does so in a way that is not neutral as to issues or candidates. The candidates who are thus singled out have *no means of replying* to their designation which would be equally effective with the voter.
>
> [Emphasis added.]
> *Id.*, at 532.

As implemented, I-872 denies the Plaintiffs any official opportunity to reply to the party preference designation or to advise the voter of the party's selected candidate. Thus, I-872 denies the political parties the right to express their choice on the ballot at the same time that it saddles the party with a "party preference" to which the Plaintiffs have no opportunity to reply.

This process omits a critical element of the primary *suggested* by *Jones*: that the ballot include candidates "*…nominat[ed] by established parties….*" *Jones, supra*, at 585. The Supreme Court's example did not contemplate a primary and election process that totally disenfranchises the Plaintiffs from any participation in the official election process.

Indeed, this would be at odds with the expressed opinion of the Appellee's own expert, Dr. Todd Donovan who acknowledged that political parties are "fundamentally important" to state politics.[1]

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[1] Dr. Donovan offered this testimony in his deposition:

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11 Q. (by Mr. Grover) The single most important factor in
12 state politics is the political party.
13 MR. AHEARNE: Same objection.
14 A. You finding that in my book?
15 Q. (by Mr. Grover) Yes.
16 A. Yeah, my coauthor wrote the chapter on parties; sorry.
17 No, I don't dis -- I don't necessarily agree or
18 disagree with it. I could maybe think of other things
19 that we could say are quite important, but I don't deny
20 the importance of parties in state politics.
21 Q. So they would at least be an important factor even if
22 it's not the single most important factor.
23 A. Certainly, yeah. No, I mean, we -- and going back to
24 the introduction-to-American-politics lecture, we would
25 say *that the political system would not work without*

At a minimum, the Plaintiffs' rights of access[2] to the voter through the ballot and the official election materials should

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p. 0092
1 *political parties*.
2 Q. And under the Washington top-two primary system, how do
3 political parties indicate to their -- or assure that
4 their preference for a particular candidate is
5 communicated to the voters?
6 A. How do the parties in the state communicate that
7 their -- how do they do that under any ballot?
8 Q. Well, in Oregon, they're entitled to put Republican
9 after their designation on the ballot, indicating that
10 they're the nominee of the Republican Party. In
11 Washington, they're not permitted to do that.
12 A. Yeah, I guess --
13 Q. The party's not able to register any communication
14 through the ballot or through the voters' pamphlet.
15 A. They're --
16 Q. Is that correct?
17 A. Yeah, I think the disconnect we're having in this is
18 that -- I'll get back. *The voter's conception of the*
19 *party is largely independent of the party organization*.
20 *So the party -- you know, you can say that the party is*
21 *fundamentally important to state politics. That doesn't*
22 *necessarily mean voters have any sense of how candidates*
23 *have labels listed next to their name and how that*
24 *relates to a party organization*.

[Emphasis added.]
LER, Tab 10, pp. 16-18
[Page and line numbers in the text are from the original deposition transcript.]

[2] The State of Washington argues in footnote 19 of its brief [Appellee's Brief, pp. 56-57] that the Libertarian's argument regarding its inability to advance to major party status is "raised for the first time on appeal." On the

> … reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, *supra,* at 14 (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)).
>
> *Federal Election Commission v. Wisconsin Right To Life, Inc*., 551 U.S. 449 ___ [2007] ["*Wisconsin Right To Life*"].

C.
Voter Confusion: "The Reasonable, Well-Informed Voter"

Every lawyer recalls the endless efforts [and humor] in learning the concept of the "reasonable man," a hypothetical individual who does the correct thing, correctly anticipates the consequences of events and interprets contracts with aplomb.

The State of Washington and the Grange believe that they have found this mythical character in their state: the Washington voter. Under Appellees' analysis, the Washington voter cannot be confused between "preference" and "nomination."

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contrary, this point is simply an additional consequence that flows from I-872's unconstitutional denial of meaningful access to the general election ballot for minor parties. The argument that the denial of ballot access was unconstitutional was made in the Libertarian's opposition to the State's motion for summary judgment in the district court. See LER, Tab 7, pp. 12-16.

The Grange and the State of Washington expect the voter to understand the difference between the "candidate's preference," as indicated on the ballot and the "political party's" preference which is nowhere to be found in the official literature.

This tautology is reminiscent of the dialogue in *The Search for Signs of Intelligent Life in the Universe*, a 1986 Tony award-winning play written by Jane Wagner and performed by Lily Tomlin. "Trudy," a bag lady, is a central character who acts as a "creative consultant" to visiting aliens. Lily Tomlin, as Trudy, describes her conversation with the aliens:[3]

> I show 'em this can of Campbell's tomato soup. I say, "This is soup." Then I show 'em a picture of Andy Warhol's painting of a can of Campbell's tomato soup. I say, "This is art." "This is soup." "And this is art." Then I shuffle the two behind my back. Now what is this? No, *this* is soup and *this is art*!
>
> http://www.whysanity.net/monos/soupart.html

In her own way, Trudy has captured the essence of the opinion of the Appellee's expert, Dr. Todd Donovan that the voters

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[3] Apologies to Chief Justice Roberts and Justice Scalia, who focused on similar analogies in the opinion in *Grange*.

do not necessarily "have any sense of how candidates…labels relate[] to a party organization."[4] Borrowing the words of William Butler Yeats, Washington voters are asked to "know the dancer from the dance."[5]

Nor is the lack of understanding a denigration of the Washington voter. After all, the media and state officials exhibited [and contributed to] the same confusion Plaintiffs ascribe to voters. [For examples, see LP Opening Brief, pp. 24-25.] These are not "isolated" incidents or "shorthand" references, as described by the Appellees. Three different state officials, Washington Secretary of State Sam Reed, Deputy Elections Director Catherine Blinn and Deputy Solicitor General Jeffrey Even each made statements equating "party" and "preference."

In *Wisconsin Right To Life, Inc.*, *supra*, the Supreme Court quoted a prominent study that demonstrated the lack of voter sophistication during the 2000 election cycle:

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[4] See footnote 1, *supra*.

[5] William Butler Yeats, *Among School Children.*

> A prominent study found, for example, that during the 2000 election cycle, 85 percent of respondents to a survey were not even able to name at least one candidate for the House of Representatives in their own district. See Inter-university Consortium for Political and Social Research, American National Election Study, 2000: Pre- and Post-Election Survey 243 (N. Burns et al. eds. 2002) online at [URL omitted] (as visited June 22, 2007, and available in Clerk of Court's case file).
>
> *Id.* at n 6.

Is it little wonder that the average voter, overtaxed by the burdens of daily life, is unable to discern the meaning of a fine print[6] disclaimer stating the meaning of "prefer" during the brief time allotted to completing the election ballot. To borrow a page from trademark law, in *Trafficschool.com, Inc., v. Edriver Inc.*, F.3d ___, [July 28, 2011][*"Trafficschool.com*"]**,** this Court recently confirmed that a "disclaimer" may not be enough to avoid consumer confusion.

> Defendants claim that they reacted by "explaining away any confusion" and adding disclaimers to the bottom of

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[6] Consumer protection statutes commonly require type larger than the typeface on this brief for critical disclosures such as interest rates and penalty terms. E.g., see 12 C.F.R. § 226.6[b][2][i] [requiring 16 pint type]; 12 C.F.R. §343.40[b][6][B]; 15 U.S.C § 1638[b][2][B][i] and 15 U.S.C § 1638[a][1].

> each web page. [Fn. omitted.] But defendants knew that the disclaimers were ineffective, because adding them didn't end the stream of emails sent by consumers who thought they'd contacted their state DMV.
>
> *Id.*, at 9755.

The record here is rife with documentation showing the confusion of the media, election officials, state officials and voters, notwithstanding the ballot disclaimer.[7]

D.
The Combined Effect Of I-872
Forces The Conclusion
That It Is Unconstitutional
As-Applied In Washington

In their brief, the State of Washington quotes selectively from *Munro v Socialist Workers Party*, 479 U.S. 189 [1986]["*Munro*"]. In *Munro*, the Supreme Court upheld Washington state's old law, which required a candidate who wanted to be on the general election to poll at least 1% of the total primary vote in the state's blanket primary. Appellee Washington's brief confuses a system that guarantees a party which polls 1% in

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[7] The language of *Trafficschool.com* also emphasizes why the district court should have permitted the full development of the factual record through a trial.

the primary with a system that requires that a candidate poll a minimum of 1% and place second in the vote tally.

The Appellee's Brief does not acknowledge that I-872 virtually guarantees that minor party candidates will be denied access to the general election ballot.[8]

Munro holds that the 1% primary vote test is constitutional based on its prior ballot access cases on petition requirements for getting on the general election ballot. The *Munro* Court said:

> "We are unpersuaded, however, that the differences between the two mechanisms are of constitutional dimension…requiring candidates to demonstrate such support is precisely what we have held States are permitted to do.
>
> *Id.*, at 199.

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[8] The State of Washington argues in footnote 18 of its brief [Appellee's Brief, p. 52] that the Libertarian's argument regarding the refusal of the district court to consider expert testimony is tied to the ballot access claims. This misstates the record and Appellants' Brief. The denial of consideration of expert testimony by the district court was part of its ruling on the motions for summary judgment. The argument is presented in that section of the Appellant's Brief. Appellants' Brief, p. 19. The section of Appellant's Brief arguing ballot access contains a reference to the declaration of Richard Winger for the proposition that an I-872 system will almost always deny minor parties access to the general election ballot, hardly a premise that admits disagreement.

In other words, there is no constitutional difference between a petition threshold and a primary vote test, then obviously a primary vote test of up to 5% would also be constitutional. Under I-872, experience shows a candidate needs an average vote of 30%, to place second. This is a *de facto* unconstitutional barrier to general election ballot access.

Laws that affect the ballot always have a correlative effect on political parties and other voter advocacy groups.

The United States Supreme Court has held that the State cannot mandate racial labels on a ballot [*Anderson v. Martin*, 375 U.S. 399 (1964)].

In *Cook v. Gralike*, *supra*, the Supreme Court barred the mandatory labeling of ballots against a candidate's wishes:

> It also attaches a concrete consequence to noncompliance–the printing of the statement "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" by the candidate's name on all primary and general election ballots. Likewise, a nonincumbent candidate who does not pledge to follow the instruction receives the ballot designation "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."

> In describing the two labels, the courts below have employed terms such as "pejorative," "negative," "derogatory," " 'intentionally intimidating,' " "particularly harmful," "politically damaging," "a serious sanction," "a penalty," and "official denunciation."
>
> *Id.*, at 524.

In discussing the wide-raging effects of "ballot-labeling," Chief Justice Rehnquist wrote, in his concurrence:

> Missouri's Article VIII flunks two of these three requirements. Article VIII is not only not content neutral, but it actually discriminates on the basis of viewpoint because only those candidates who fail to conform to the State's position receive derogatory labels. The result is that the State injects itself into the election process at an absolutely critical point–the composition of the ballot, which is the last thing the voter sees before he makes his choice–and does so in a way that is not neutral as to issues or candidates. The candidates who are thus singled out have no means of replying to their designation which would be equally effective with the voter.
>
> *Id.*, at 531-532.

Chief Justice Rehnquist also reminded the reader that "ballot labeling" is only:

> …valid "provided that [it is] …narrowly tailored to serve *a significant governmental interest,* and that [it leaves] open ample alternative channels for communication of the information." *Clark* v.

> *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).
>
> [Emphasis added.]
> *Id.*, at 532.

I-872 fails these tests because it allows a candidate to append any label as a "preference," without affording the party, or any of its other candidates on the ballot any *comparable alternative* channel to communicate their disagreement.

E.
The Libertarian Party Is Entitled To Protect Its Trademark

In its brief, the State of Washington argues that trademark protection applies only to commercial settings, citing *Bosley Med. Inst., Inc. v. Kremer*, 403 F. 3d 672 [9th Cir., 2005].

In its argument, the State seeks to recast the issue in its favor by asserting that the dispute is between the Appellants and the State. Rather, the issue is the State's action in allowing candidates to infringe by claiming association with the Libertarian [or Republican or Democratic] Party for their benefit in garnering contributions and votes.

The State does not acknowledge that this Court relied upon *United We Stand America, Inc. v. United We Stand America New York, Inc.*, 128 F.3d 86 [2d. Cir. 1997] in the *Bosley* decision in its analysis. *Bosley, supra,* at p. 679.[9] The record shows that the Libertarian Party has a registered trademark. LER, Tab 5. Nothing in the State's argument contravenes the right of the Libertarian Party to protect that trademark.

III.
CONCLUSION

The Appellee's would have this Court dissect the parts of I-872 instead of confronting the initiative as a whole. A popular television quiz show on Country Music Television demonstrates to its contestants and its viewers how much we have forgotten from our elementary school education. It is not disrespectful of the Washington voter to reach the logical conclusion that "nominate" and "prefer" are confusing to persons not steeped in the minute

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[9] Similarly, in *Yost v. Committee for Idaho's High Desert, Inc.*, 92 F.3d 814 [1996]["*Yost*"], this Court affirmed a finding of liability for trademark violations in favor of the Committee for Idaho's High Desert, Inc. ["*CHID*"]

details of the political process. After all, the word "nominate," means

> • To propose by name as a candidate, especially for election;[10] and
> • To propose as a candidate for election to office.[11]

And, the word "prefer" is defnied as:

> **:** to promote or advance to a rank or position[12]

The district court would have this Court accept its reasoning:

> "*Putting aside the issue of "party preference" and forced association*, there can be no doubt that the "top-two" aspect of I-872 would be permissible if the "primary" were renamed a "general election," and the "general election" were renamed a "runoff."
>
> ER 00069.

As the Appellants pointed out in their Opening Brief, "timing is everything." Candidates for election must register in June. The primary is in August. The general election [or "runoff," as the district court would have it] is not for another 13 weeks, on

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[*Id.*, 823-824.] In its decision, this Court characterized *CHID* as "a non-profit environmental education and advocacy organization" [*Id.*, 817.]

[10] This definition appears at http://www.thefreedictionary.com/nominate.

[11] This definition appears at http://www.merriam-webster.com/nominate.

the first Tuesday in November. This is precisely the form of interference that the Supreme Court chastised in *Anderson v. Celebrezze*, 460 U.S. 780 [1983]:

> An early filing deadline may have a substantial impact on independent-minded voters. In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidates. See A. Bickel, Reform and Continuity 87-89 (1971). Yet Ohio's filing deadline prevents persons who wish to be independent candidates from entering the significant political arena established in the State by a Presidential election campaign - and creating new political coalitions of Ohio voters - at any time after mid to late March. 11 At this point developments in campaigns for [460 U.S. 780, 791] the major-party nominations have only begun, and the major parties will not adopt their nominees and platforms for another five months.
>
> *Id.*, at 790-791.

It cannot be said too often that the rights of voters, candidates and political parties are inextricably intertwined in the

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12 This definition appears at http://www.merriam-webster.com/prefer.

electoral process. Each is an essential element in the process and must be accorded its constitutional dignity.

To speak the plain truth, is there anyone – including a voter who is or is not "well informed" - so lacking in common sense that we do not immediately recognize that someone who writes "prefers "Democratic Party" believes and is claiming the mantle of that Party?

What political party, large or small, committed utterly to its beliefs, its programs, does not gaze helplessly at these "preferences" knowing that the State has absolutely stripped it of its rights to either support or denounce that candidate in any meaningful way?

For the Appellees to smugly say "well, gosh, a party can still nominate whomever they chose" is the height of hypocrisy. What good is a "nomination" when a party cannot communicate it to the voters in their election materials?

The State and the Grange claim the protection of the Supreme Court's ruminations in *Grange* but it has not sought any

avenue to rectify the damage that I-872 does to the fundamentals of the political party system that is "fundamentally important" to the state political system.

This Court should rule that I-872 is unconstitutional and invalid for the reasons stated above. Alternatively, this Court should overturn the summary judgment and should remand the case for trial. Further, this Court should overturn the vacation of the fee settlement agreement and award the Appellants fees on appeal.

Dated at Woodburn, Oregon, this 25th day of August, 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit rule 32-1, the attached Brief of Plaintiff/Appellant is proportionally spaced, has a serif typeface of 14 points or more and contains not more than 6,000 words, including both text and footnotes, and excluding this Certificate of Compliance, the Table of Contents, the Table of Authorities, and the Certificate of Service.

Dated at Woodburn, Oregon, this 25th day of August, 2011.

ORRIN L. GROVER, P.C.
/s/ Orrin L. Grover
ORRIN L. GROVER

CERTIFICATE OF SERVICE
U.S. Court of Appeals Docket Nos. 11-35122, 11-35124 and 11-35125

I hereby certify that on August 25, 2011, I electronically filed the foregoing document and attached exhibits with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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