The Honorable John C. Coughenour

IN THE UNITED STATES DISTRICT COURT FOR THE 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, RUTH BENNETT and J. S. MILLS, Plaintiff Intervenors v. STATE OF WASHINGTON, *et al*., Defendants, WASHINGTON STATE GRANGE, *et al.,* Defendant Intervenors	Case No: CV05-0927-JCC LIBERTARIAN PARTY'S OPPOSITION TO MOTION BY STATE DEFENDANTS TO DISMISS **NOTED FOR APRIL 10, 2009**

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LIBERTARIAN PARTY'S OPPOSITION TO MOTION BY STATE DEFENDANTS' TO DISMISS

The Defendants' motions to dismiss would have this Court throw out the baby with the bathwater. The Supreme Court has simply held that the constitutionality of I-872 cannot be determined by mere facial analysis.[1] The Court did not decide the as-applied challenges to I-872 or the trademark issues. Indeed, the Supreme Court's opinion is filled with references confirming that Court's anticipation of further proceedings:

> That factual determination must await an as-applied challenge. *Washington State Grange v. Washington State Republican Party*, *supra*, 1195 [2008].
>
> …[W]e need not decide that question here. *Id., at* 1194, n. 9.
>
> We do not consider the ballot access and trademark arguments …. *Id., at* 1195, n. 11.
>
> The campaign finance issue also was not addressed below and is more suitable for consideration on remand. *Id., at* 1196, n. 11.

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[1] The Supreme Court granted certiorari on the narrow issue:

> "Does Washington's primary election system ... violate the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot?"
>
> *Washington State Grange v. Washington State Republican Party*, *128 S. Ct. 1189,* 1195, n. 11.

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> Petitioners themselves emphasize that the content of the ballots in the pertinent respect is yet to be determined. *Id., at* 1200 [Roberts, C.J, concurring].
>
> But this record simply does not allow us to say with certainty that the election system created by I–872 is unconstitutional. *Id., at* 1201 [Roberts, C.J, concurring].

Further, the Supreme Court set forth the limit of its review in its opinion:

> We do not consider the ballot access and trademark arguments as they were not addressed below and are not encompassed by the question on which we granted certiorari: "Does Washington's primary election system ... violate the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot?"
>
> *Washington State Grange v. Washington State Republican Party*, *supra,* 1195, n. 11.

In its order of remand, the Ninth Circuit specifically contemplated that this Court would gather additional evidence and consider the as-applied issues:

> The district court may allow the parties to further develop the record with respect to the claims that Initiative 872 unconstitutionally constrains access to the ballot and appropriates the political parties' trademarks, to the extent these claims have not been waived or disposed of by the Supreme Court.
>
> *Washington State Republican Party v. Washington*, 545 F.3d 1125, 1126 [9th Cir., 2008]

In judging the Defendants' motions, it is useful to consider

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the procedural status of this case. The original judgment was entered by Judge Zilly, on summary judgment without a trial. Judge Zilly's orders narrowed the scope of this Court's consideration in 2005, following the longstanding principle that a judicial officer does not reach issues that are unnecessary to his decision. See July 15, 2005 Order, at 13, n. 13 [Dkt. 87]:

> The Court has previously directed the parties to limit their briefing to plaintiffs' facial challenge of Initiative 872. *The Court reserved issues relating to plaintiffs' as-applied challenge.*
>
> [Emphasis added.]

Analysis by comparison of the procedural history of this case to that of *California Democratic Party* v. *Jones*, 530 U. S. 567 [2000] is illuminating. Before the Ninth Circuit and the Supreme Court addressed the challenges in *Jones,* the District Court had conducted a full trial [see *California Democratic Party* v. *Jones*, 984 F. Supp. 1288, 1297 (E.D. Cal; 1997)], allowing the appellate courts to work from a fully developed record. That was not the case here where the initial district court proceedings were narrowed to the facial challenges by the court and the parties.

After the ruling by the United States Supreme Court, I-872 still presents a critical convergence where primary and general election ballot access issues clash with the rights and roles of major

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and minor political parties. While there have been many prominent independent campaigns in American political history, the political party system is still the principal vehicle for implementing change. In the case of the Republican Party, of course, the evolution was that party's emergence from a plethora of parties in the 1860 Presidential election. The resolution of these issues may ultimately impact the future of the political party system in our country.[2]

> The defendants' arguments boil down to four premises:
> 1. Any Ballot Access Claim Was Resolved by *Washington Grange*.
> 2. Any Trademark Claim Was Resolved by *Washington Grange.*
> 3. The Trademark Claims Were Waived.
> 4. There Can Be No Trademark Claim.
>
> The defendants' arguments fail on each point.

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[2] The channel to political change can be protracted and torturous. In 1884, Belva Lockwood, the first woman admitted to practice before the United States Supreme Court, garnered 4,149 votes for President as the candidate for the National Equal Rights Party of the Pacific Slope. [Of course, all votes were cast by men since women did not yet vote.]. [*Politics at the Periphery*, Gillespie (1993), pp. 146-147.] Ninety-eight years later, in 1972, Theodora Nathan, Libertarian candidate for Vice President, received the first electoral college vote ever cast for a woman. Another 36 years passed before Hillary Clinton received millions of primary votes for the Democratic nomination for President in 2008.

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ARGUMENT

1. The As-Applied Primary Ballot Access Claim Was Not Resolved by *Washington Grange*.

The language of the Supreme Court opinion makes it clear that the Court was not deciding any as-applied challenge to I-872:

> That factual determination must await an as-applied challenge. On its face, I-872 does not impose any severe burden on respondents' associational rights.
>
> *Washington State Grange v. Washington State Republican Party*, *supra,* 1195.

Since the preliminary injunction was dissolved for the 2008 election cycle, this Court will have experiential evidence from which to evaluate the effects of I-872 on political party access and voter confusion. This is exactly what the Supreme Court contemplated in its language, "…and we can do no more than speculate in this facial challenge…." *Washington State Grange v. Washington State Republican Party*, *supra,* 1193.

In his July 2005 order, Judge Zilly repeatedly referenced the wisdom of Justice O'Connor's comments in *Clingman v. Beaver*, 544 U.S. 581 [2005][O'Connor, J. concurring]:

…

…

…

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> Primaries constitute both a " 'crucial juncture' " in the electoral process, *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (quoting *Tashjian v. Republican Party of Conn*., 479 U.S. 208, 216 (1986)), and a vital forum for expressive association among voters and political parties, See *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)
>
> *Clingman v. Beaver*, *id.,* at 599 [2005][O'Connor, J. concurring].

The as-applied challenges to I-872 cannot be resolved in the context of a motion to dismiss under Rule 12.

2. Trademark Claim Was Not Resolved by *Washington Grange*, or Waived.

This argument requires little discussion since the Supreme Court specifically declined to address the trademark issue in footnote 11 [*id., at 1195*], because it was "not addressed below and… not encompassed by the question on which [the Court] granted certiorari…." *Id.*

Any claim that the trademark issue is not fully presented for determination may be addressed by amendment of the pleadings. The Libertarian Party included its claim to a trademark in its original complaint. [3]

[3] The Libertarians only recently obtained new counsel. The party is preparing a First Amended Complaint based on the issues presently before the Court and reflecting the changes in the parties' respective positions since the original complaint was filed. Similar motions are already pending by the other plaintiffs.

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3. There Are Valid Trademark Claims.

Arguments illustrating for this Court that a triable trademark issue can be raised by a political party have been ably presented by the Washington Republican Party in its Opposition to State and Grange Motions to Dismiss, pp. 9-12. Nothing is served by repeating those arguments or case law here. The Libertarian Party joins in the argument presented by the Washington Republican Party.

4. There Has Been No Meaningful Determination of the Issues Relating to Access to the General Election Ballot

There has been little, if any, discussion regarding the limitations that I-872 places on access to the general election ballot, particularly for minor parties. This is logical because, at the time of the original judgment in this Court, the impact of I-872 on the minor party nominating process was not completely known. See District Court Order, July 15, 2005, pp. 8-10. The determination of I-872's impact on general election access has been, logically, deferred pending the determination of the validity of the facial challenge to the primary portion of I-872's system and to the "fleshing out" of the minor party procedures. *Id.*

A guarantee of access to the general election ballot is essential to the ability of minor political parties and independent political candidates to present themselves to the electorate:

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> New parties struggling for their place must have the time and opportunity to organize in order to meet *reasonable* requirements for ballot position, just as the old parties have had in the past.
>
> [Emphasis added.]
> *Williams v. Rhodes*, 393 U.S. 23, 32 [1968].

The results of Washington's handling of the 2008 elections show the catastrophic effect of I-872 on minor parties' and independents' access to the general election ballot: No minor party candidate appeared on the general election ballot for any office except President/Vice President.[4]

In the September 2008 primary conducted under I-872, several minor party candidates polled significantly in Congressional races:[5]

4th Congressional District:	Gordon Allen Pross, the Grand Old Party candidate polled 4.56% of the votes cast.

[4] Washington permitted Bob Barr and Wayne Root, Libertarian nominees for President and Vice President, to appear on the general election ballot in 2008. However, Plaintiffs Bennett and Mills would have been denied positions on the general election ballot as the respective Libertarian nominees for Governor and Senator, as they were in 2004.

[5] The election results appear on the Secretary's website at: http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID=25&JurisdictionTypeID=3&ViewMode=All.

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5th Congressional District:	Randall Yearout, the Constitution Party candidate polled 3.07% of the votes cast.
5th Congressional District:	John Beck, the Libertarian Party candidate polled 2.14% of the votes cast.
6th Congressional District:	Gary Murrell, the Green Party candidate polled 3.56% of the votes cast.

Notwithstanding the fact that these candidates polled well in a district-wide vote, they were not allowed to carry their message to the general election ballot and its voters. As the Supreme Court has stated:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.
>
> *Williams v. Rhodes*, *supra,* at 31.

Historically, there were no ballot access restrictions in the first 100 years of the Republic. Winger, *How Many Parties Ought to Be On the Ballot: An Analysis Of* Nader v. Keith, Election Law Journal, Vol. 5, No. 2, 2006. Thus, Belva Lockwood was able to seek the office of the Presidency even though she could not vote for herself. Recent empirical evidence supports the conclusion that there is no adverse

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impact on the cognizable state interests by significant relaxation of ballot access requirements. *Id.,* at 177-178, notes 54-60.

Denial of general ballot access must be a primary concern of this Court. That is, whether "…ballot access restrictions…," such as I-872 "…limit the field of candidates from which voters might choose." See *Anderson v. Celebrezze,* 460 U.S. 780, 786 [1983], citing *Bullock v. Carter*, 405 U.S. 134, 143 [1972].

CONCLUSION

The motions to dismiss must be denied.

DATED: Monday, April 06, 2009, at Woodburn, Oregon.

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