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, et al.,

Defendant Intervenors.

NO. CV-05-00927-TSZ

STATE'S MOTION TO DISMISS

NOTE ON MOTION CALENDAR:

DECEMBER 12, 2008

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I. MOTION

The Defendant Intervenors State of Washington, Sam Reed, Secretary of State, and Rob McKenna, Washington State Attorney General, move for dismissal of all remaining claims in this case. This motion is based upon the pleadings and other documents in the record, the legal authorities cited herein, and the decisions and orders of this Court, the Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States.

II. INTRODUCTION: HISTORY OF THE CASE

This is an action challenging the constitutionality of Initiative Measure No. 872 (I-872), enacted by Washington State voters in November of 2004. Initiative 872 establishes a "top-two" election system for certain public offices that consists of a primary conducted among candidates who may or may not express a preference for a political party, followed by a general election (in effect, a runoff) between the top two vote-getters seeking each office. The Washington State Republican Party filed this action in May of 2005, followed quickly by interventions from the State's Democratic and Libertarian Parties. Republican Compl. (Doc. #1); Libertarian Mot. to Intervene (Doc. #3); Democratic Mot. to Intervene (Doc. #2). Although the original action was filed against local officials, the State and its election officers intervened to defend I-872, as did the Washington State Grange, which had sponsored I-872. State Answer to Compl. (Doc. #23); Grange Answers to Compls. (Docs. #37-39); Order Granting Mot. to Intervene (Doc. #30).

The political parties brought a facial challenge to I-872 before any election had been conducted pursuant to its terms. This court adopted an expedited briefing schedule and hearing date in order to resolve the case on summary judgment. Scheduling Order (Doc. #44). The court additionally instructed the parties to prepare an agreed stipulation of legal issues. Stipulation (Doc. #40). That stipulation essentially replaced the original pleadings, much as a pretrial order does.

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After a hearing, this court issued an order granting declaratory and injunctive relief in favor of the political parties. Order (Mem. Op.) (Doc. #87). The court granted a permanent injunction restraining the State from implementing I-872. Permanent Inj. (Doc. #94).

The State and the Grange appealed the court's decision to the United States Court of Appeals for the Ninth Circuit, which affirmed. *Wash. State Republican Party v. Wash.*, 460 F.3d 1108 (9th Cir. 2006). After granting the certiorari petitions of both the State and the Grange, the United States Supreme Court issued an opinion in March of 2008, reversing the Ninth Circuit and declaring that I-872 is facially constitutional. *Wash. State Grange v. Wash. State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). The effect of the Supreme Court's decision was to reverse and vacate the injunction entered by this court. *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869, 871 (9th Cir. 1992) ("once an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be enforced.")

On remand, the Court of Appeals asked for additional briefing concerning the status of the case and issued an Order on October 2, 2008, remanding the case to this court with instructions to dispose of certain issues and to further consider certain other issues. *Wash. State Republican Party v. Wash.*, No. 05-35774, 2008 WL 4426713, at *1 (9th Cir. Oct. 2, 2008) (App. A to this Motion).

III. THE NINTH CIRCUIT'S ORDER ON REMAND

The Ninth Circuit's Order directed the following disposition of the case.

First, "[t]he district court should DISMISS all facial associational rights claims challenging Initiative 872. *See Wash. State Grange*, 128 S. Ct. at 1187." Order at 2 (App. A).

Second, "[t]he district court should DISMISS all equal protection claims. The allegedly discriminatory statutes were repealed by Initiative 872. *See Wash. State Grange*, 128 S. Ct. at 1192-93." Order at 2 (App. A).

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Third, "[t]he district court should DISMISS as waived all claims that Initiative 872 [1] imposes illegal qualifications for federal office, [2] sets illegal timing of federal elections or [3] imposes discriminatory campaign finance rules because these claims were neither pled by the parties nor addressed in summary judgment by the district court." Order at 2 (App. A).

Fourth, "[t]he 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.*" Order at 2 (App. A) (emphasis added).

Fifth, the Ninth Circuit vacated the "October 3, 2006 order[] granting attorney's fees and costs" and directed "[t]he district court may make appropriate findings concerning the parties' settlement of fees and should determine whether restitution or further fee awards are appropriate in response to appellee Washington State's motion to vacate award of attorney's fees and costs, for judgment awarding restitution of fees and costs and for costs."[1] *Wash. State Republican Party*, 2008 WL 4426713, at *1 (App. A).

By this Motion, the State seeks to implement the Court of Appeals Order and dispose of all remaining issues in this case.

IV. SUMMARY OF ARGUMENT

Based on the Supreme Court's decision in *Washington State Grange*, the Ninth Circuit directed that all the claims in the case be dismissed except for the claims of ballot access and trademark. However, these claims were either waived or disposed of by the Supreme Court's decision in *Washington State Grange*. All issues properly before this court have been resolved. Therefore, the entire case should be dismissed.

[1] The attorney fee issues are treated in a separate State motion, filed on the same day as this motion, and are therefore not further discussed here.

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V. ARGUMENT

A. The Supreme Court's Decision In *Washington State Grange*

There are five basic principles in the Supreme Court's decision.

First, the "I-872 primary does not, by its terms, choose parties' nominees. The essence of nomination—the choice of a party representative—does not occur under I-872 . . . [because the] top two candidates from the primary election proceed to the general election regardless of their party preferences." *Wash. State Grange*, 128 S. Ct. at 1192.

Second, under I-872, "parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations." *Id.* at 1192-93.

Third, the "First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Id.* at 1193 n.7.

Fourth, "I-872 does not on its face . . . compel political parties to associate with or endorse candidates". *Id.* at 1196.

Fifth, "because there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters, I-872 does not on its face severely burden respondents' associational rights." *Id.*

To the extent they were not waived, these principles resolve the ballot access and trademark claims made by the parties.

B. The Ballot Access Claim Is Resolved By The Principles In The Supreme Court's Decision And Should Be Dismissed

All three political parties made some mention of ballot access in their complaints. Republican Compl. (Doc. #1, ¶ 21); Democratic Compl. (Doc. #31, ¶ 16); Libertarian Compl. (Doc. #28, ¶¶ 25-26, 34, 40(c)). Ballot access was also the fifth legal issue the parties stipulated to. The stipulation stated the issue as follows:

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> Does Initiative 872's limitation of access to the general election ballot to only the top two vote-getters in the primary for partisan office unconstitutionally limit ballot access for minor political parties?

Stipulation (Doc. #40, ¶ 5). The stipulation also stated that the "political parties may address an additional issue related to ballot access that the parties to this lawsuit could not reach agreement upon." Stipulation (Doc. No. 40, ¶ 5).

In the District Court all three political parties argued that Initiative 872 unconstitutionally limited ballot access for minor parties. Republican Mot. for Summ. J. (Doc. #49 at 24-25); Democratic Mot. for Summ. J. (Doc. #55 at 23); Libertarian Mot. for Summ. J. (Doc. #52 at 15-17). All three parties relied primarily on *Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S. Ct. 533, 93 L. Ed.2d 499 (1986). In *Munro* the Court upheld a provision of Washington's prior blanket primary requiring "that a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the State's primary election before the candidate's name will be placed on the general election ballot." *Id.* at 190. The Court upheld the 1% requirement because "States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Id.* at 193.

The political parties argued that I-872 is unconstitutional because under the top two primary the candidate coming in second would likely, they speculated, have to have between 21% and 41% of the vote to advance. They argued that this was more than a modicum of support required by *Munro*.

The problem with this argument is that it is based on the premise that I-872 is a party nominating primary. However, the Supreme Court rejected this contention. The Court held that the "I-872 primary does not, by its terms, choose parties' nominees. The essence of nomination—the choice of a party representative—does not occur under I-872 . . . [because the] top two candidates from the primary election proceed to the general election regardless of

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their party preferences." *Wash. State Grange*, 128 S. Ct. at 1192. Under I-872 "parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations." *Id.* at 1192-93. As the Supreme Court observed, party nomination is "*simply irrelevant*" to this new system. *Id.* at 1192 (emphasis added). Since I-872 does not involve party nominations, the issue of minor party "ballot access" is moot.

The Supreme Court has struck down statutes that favored major parties by imposing ballot access restrictions on minor parties. For example, in *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968), the Court struck down a law that required, among other things, that "a new party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election" in order to obtain a place "on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States." *Id.* at 24-25. On the other hand, the Republican and Democratic Parties could obtain a place "on the ballot simply by obtaining 10% of the votes in the last gubernatorial election and need not obtain any signature petitions." *Id.* at 26. The ballot access requirement for new parties was invalid because they gave "the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate." *Id.* at 31.

Initiative 872 does not have this feature because it treats all political parties exactly the same. "Under I-872, all elections for partisan offices are conducted in two stages: a primary and a general election. To participate in the primary, a candidate must file a declaration of candidacy form, on which he declares his . . . party preference," if any. *Wash. State Grange*, 128 S. Ct. at 1189 (internal punctuation and footnote omitted). "In the primary election, voters may select any candidate listed on the ballot, regardless of the party preference of the candidates or the voter." *Id.* (internal punctuation omitted). The "candidates with the highest

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and second-highest vote totals advance to the general election, regardless of their party preferences. . . . Thus, the general election may pit two candidates with the same party preference against one another." *Id.*

Moreover, under I-872, there are virtually no restrictions on a candidate's access to the primary election ballot. To qualify for the ballot for a state partisan office, a candidate need only timely file a declaration of candidacy, along with a filing fee equal to 1% of the annual salary for the office. Wash. Rev. Code 29A.24.030 (declaration of candidacy requirement); Wash. Rev. Code 29A.24.091 (filing fee). Initiative 872 imposes no signature requirements to access the ballot, except that candidates who cannot pay the filing fee may substitute petition signatures in lieu of the filing fee. Wash. Rev. Code 29A.24.091.

A minor party candidate has the same access to the primary ballot as the candidate of a major party or the candidate of no party. A minor party candidate has the same opportunity as any other candidate to compete for votes among *all* registered voters in the primary election. By affording all candidates virtually unrestricted access to the primary ballot, which is open to *all* registered voters, I-872 fully satisfies any interest in ballot access and permits all candidates to compete for support among all the voters. *Munro*, 479 U.S. at 197 (constitutional interest in ballot access is fully satisfied when "candidates can campaign among the entire pool of registered voters"). If the nominee of a minor party does not advance to the general election, it is not because of some restriction imposed by I-872, it is because the candidate of the minor party does not have enough popular support to be one of the top-two vote-getters.

The Stipulated Statement of Legal Issues provides that other ballot access claims could be raised. In the District Court, the Republican Party also made a separate claim that I-872 would deny the Republican Party access to the general election ballot. Republican Mot. for Summ. J. (Doc. #49 at 25-26). The Republicans argued that if a candidate who prefers the Republican Party advances to the general election but the Republican nominee (who presumably also prefers the Republican Party) does not, then the Republican Party will be

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denied access to the general election ballot. The Republicans also argued that if seven candidates prefer the Republican Party and each receives 10% of the vote but none of them is in the top-two, the Republican Party will be denied access to the general election ballot.[2]

This argument fails for the same reason that the minor party ballot access claim fails. As the Supreme Court's ruling confirms, the Republican Party has no First Amendment right to have its nominee advance to the general election ballot. The Republican candidate has the same access to the primary election ballot, and the same opportunity to compete for votes as every other candidate. But the First Amendment does not confer any special privileges on the Republican Party or any political party as such. The political parties' ballot access claims are resolved by the Supreme Courts decision in *Washington State Grange* and should be dismissed.

C. The "Trademark Infringement" Claim Was Either Waived Or Was Resolved By The Supreme Court Decision

1. The political parties did not assert a trademark infringement claim in this case.

None of the political parties asserted a trademark infringement claim. Trademark infringement claims are generally governed by the Lanham Act, 15 U.S.C. § 1114 et seq. A trademark infringement claim may also be brought under state law. *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wn.2d 28, 381 P.2d 130 (1963). The complaints filed by the Republican and Democratic parties do not allege any violation of the Lanham Act or state law related to trademark infringement Neither complaint even uses the word "trademark." Republican Compl. (Doc. #1, ¶ 21); Democratic Compl. (Doc. #31, ¶ 16). Similarly, the Libertarian Party's Complaint pleads no cause of action and

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[2] The Republican Party's 70% example seems far-fetched. However, there is nothing unconstitutional about the outcome. Indeed, the United States Constitution does not require a state to conduct a primary, or require that the winner of an election receive a majority rather than a plurality. There is no constitutional principle requiring a state to aggregate the votes cast for candidates favoring a particular party for purposes of determining who advances to the general election.

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seeks no relief under Lanham Act or state law relating to trademark infringement. Libertarian Compl. (Doc. #28, ¶¶ 28-41; Prayer for Relief ¶¶ 1-10). The Libertarian Party makes one reference to "trademark" in its "Facts" section, and in the context of the complaint, can only be taken as a factual assertion offered in support of the Libertarians' First Amendment claim:

> I-872 deprives the LP of its proprietary right to the use of the party name, *thus leading to voter confusion regarding which candidate(s) are speaking for the party and which are imposters or renegades appropriating the party name for their own purposes*. The name "Libertarian Party" is a nationally trademarked name and therefore may be used by candidates only with LP consent.

Libertarian Compl. (Doc. #28, ¶ 20) (emphasis added).

The Parties' Stipulated Statement of Legal Issues sets out five issues. None of those five issues even imply—never mind raise—a trademark infringement claim. The stipulation provides that the "political parties may address an additional issue *related to ballot access* that the parties to this lawsuit could not reach agreement upon. The Libertarian Party may address additional *issues unique to its status as a minor political party.* Stipulation (Doc. #40 at 2-3). However, this language does not authorize a trademark infringement claim. Trademark infringement is not related to ballot access and it is not an issue unique to the statues of a minor political party. In sum, the political parties did not allege a trademark infringement claim.

2. Any Trademark Claim Was Resolved By The Supreme Court's Decision In *Washington State Grange*

One of the main issues in the case was whether "Washington's filing statute imposed forced association of political parties with candidates in violation of the parties' First Amendment associational rights[.]" Stipulation (Doc. #40, ¶ 4). To the extent any of the parties raised a trademark-like claim, it was not a claim of trademark infringement—it was a

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claim that allowing a candidate to state a party preference using the party name imposed a forced association that violated the parties' First Amendment rights.[3]

The Supreme Court rejected this argument. "I-872 does not on its face . . . compel political parties to associate with or endorse candidates". *Wash. State Grange,* 128 S. Ct. at 1196. Moreover, "there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters, I-872 does not on its face severely burden respondents' associational rights." *Id.*

The Supreme Court's conclusion that there is no basis for presuming voter confusion also disposed of any trademark related argument. Under both the Lanham Act and state law, a plaintiff must establish that the public will be confused to state a claim. *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1218 (11th Cir. 2008) (To prevail on a claim of trademark infringement, a plaintiff must establish, among other things that, the "defendant used the mark in a manner likely to confuse consumers."); *Most Worshipful Prince Hall Grand Lodge*, 62 Wn.2d at 35 (""The underlying concept [of trademark infringement] is that of unfair competition in matters in which the public generally may be deceived or misled."'). Not only did the Court hold that there is no basis for presuming voter confusion, the Court went on to explained how the ballot could "be printed in such a way as to eliminate the possibility of widespread voter confusion". *Wash. State Grange*, 128 S. Ct. at 1194. According to the Court, "the actual I-872 ballot could include prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party." *Id.* The "ballots might note preference in the form of a candidate statement that

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[3] In the District Court the briefs filed by the Republican Party did not discuss trademark infringement. Republican Mot. for Summ. J. (Doc. #49), Republican Reply (Doc. #81). The Democratic Party cited a Washington trademark infringement case (*Most Worshipful Prince Hall Grand Lodge,* 62 Wn.2d 28) but the argument was made in support of the party's First Amendment Claim. Democratic Reply (Doc. #75 at 4-8). The Libertarian Party referred to the concept of trademark in both of its briefs. But, again, the argument was in support of the party's First Amendment claim. Libertarian Mot. for Summ. J. (Doc. #52 at 114); Libertarian Reply (Doc. #78 at 12).

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emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as 'my party preference is the Republican Party.'" *Id.* The Court also suggested that "the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots." *Id.* The Court concluded: "We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion." *Id.* Given that the Supreme Court resolved the issue of voter confusion, there is no basis for any claim of trademark infringement.

3. The Statement Of Party Preference Under Initiative 872 Does Not Give Rise To A Trademark Infringement Claim

The statement of party preference under I-872 does not give rise to a trademark infringement claim because is not the kind of use that trademark law is designed to protect against. Under the Lanham Act, a plaintiff must prove that, "in connection with the sale, offering for sale, distribution, or advertising of any goods or services", the defendants' use of the mark occurred in commerce". *N. Am. Med. Corp.*, 522 F.3d at 1218. If the plaintiff fails to prove this element, there is no trademark infringement. For example, in *Tax Cap Committee v. Save Our Everglades, Inc.*, 933 F. Supp. 1077 (S.D.Fla.,1996), both the plaintiff and defendant were gathering signatures to put different constitutional amendments on the election ballot. The plaintiff claimed that the defendant's use of the same color scheme on its petition forms violated its trademark. The district court rejected this argument because gathering signatures was not a service in commerce. According to the court, "[v]iewing the solicitation of signatures on the petitions as a 'service', such a service is not being rendered in commerce, it is being rendered as part of the political process. Unlike [the plaintiff, the defendant] solicits no funds, no volunteers, and no supporters on the face of its petitions. Unlike [the plaintiff, the defendant] does not sell or rent the names obtained through its petition drive. *Id.* at 1081. The court distinguished simply gathering petition signatures from other activities such as "soliciting

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donations, preparing press releases, holding public meetings and press conferences". *Id.* Similarly, I-872 is simply part of the political process, not a service performed in commerce. The initiative permits, but does not require, candidates to state the name of the political party he or she personally prefers, and authorizes that statement to appear on the ballot. It does no more.

Thus, any use of a trademark under I-872 is quite different from the kind of use that trademark law was designed to protect against. For example, in *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86 (2nd Cir. 1997), there was a dispute between two organizations—"United We Stand America, Inc." and "United We Stand, America New York, Inc." *Id.* at 88. Originally, "'United We Stand America' (the 'Mark') was a service mark initially used by the principal campaign committee for Ross Perot's 1992 presidential campaign. . . . After friction and division among Perot's New York supporters, [United We Stand New York was incorporated and used] the Mark in connection with its political activities." *Id.* The court held that United We Stand New York was engaged in service in commerce because it was "was incorporated 'to solicit, collect and otherwise raise money' in support of the presidential candidacy of Ross Perot." *Id.* at 90. The corporation "engaged in political organizing; established and equipped an office; solicited politicians to run on [its] slate; issued press releases intended to support particular candidates and causes; endorsed candidates; and distributed partisan political literature." *Id.* Essentially United We Stand New York was in direct competition with United We Stand. The court held that these activities fell within the Lanham Act.

By permitting a candidate to state the name of the political party he or she personally prefers, the State is in no way competing with the political parties. The State does not engage in any political organizing. It does not solicit funds or issue press releases intended to support particular candidates. It does not endorse candidates or distribute partisan literature. The State

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in no way is in competition with the political parties. The State simply conducts elections. This is not a service in commerce under the Lanham Act.

Nor does the candidate's act of stating the name of the political party he or she personally prefers infringe on any party's trademark. The candidate is simply stating that name as a way of providing some information about himself or herself to the voters. Trademark law is not implicated by the State's decision to include that personal preference information on the ballot for certain public offices. The purpose is to provide voters with information, not to impair any party's trademark.

The result is the same under state law. Under Washington law, "'[t]he underlying concept [of trademark infringement] is that of unfair competition in matters in which the public generally may be deceived or misled.'" *Most Worshipful Prince Hall Grand Lodge*, 62 Wn.2d at 35. The "basic principle of the doctrine of unfair competition . . . is [that] no dealer or manufacturer has the right, by any name, mark, sign, label, dress, or other artifice, to represent to the public that the goods sold by him are those manufactured or produced by another, thus passing off his goods for those of such other to the latter's injury." *Pac. Coast Condensed Milk Co. v. Frye & Co.*, 85 Wash. 133, 138, 147 P. 865 (1915). Thus, like the Lanham Act, Washington trademark law applies to the sale and distribution of goods and services in commerce. Like the Lanham Act, Washington law is not limited to for profit businesses. For example, in *Most Worshipful Prince Hall Grand Lodge,* two competing organizations were each holding themselves out to be the Masonic Lodge for African-Americans. The court concluded that there was a trademark violation because "an established fraternal organization is entitled to relief when its name or one so similar as to be deceiving is adopted by another organization and used in a manner which is confusing and deceiving to the public and is detrimental to the organization already using the name." *Most Worshipful Prince Hall Grand Lodge*, 62 Wn.2d at 35. However, the key is that two organizations are in competition with

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each other, and the improper use of the trademark results in unfair competition. Initiative 872 results in no unfair competition among claimants to a trademarked name or symbol.

This action is a facial challenge to the enactment of I-872, and the political parties could not show (even if they had properly pleaded the issue) that permitting a candidate to state the name of the political party he or she personally prefers would, in and of itself, infringe trademark rights. To the extent that the political parties' suit might be deemed to raise any trademark infringement claim, that claim should be dismissed.

D. There Are No Remaining Issues for This Court to Decide

After ruling on motions for summary judgment, this Court issued an Order on August 12, 2005, clarifying its earlier rulings and reserving for possible future decision a claim by the Republican Party that the "Montana" primary filing statute, Wash. Rev. Code § 29A.24.031, was unconstitutional as part of the "Montana" primary filing system. Order dated Aug. 12, 2005 (Doc. #107). The Supreme Court decision allowing Washington to implement the top-two system set forth in I-872 renders moot any questions about the "Montana" system, because that system has been superseded and will no longer be used in Washington.

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VI. CONCLUSION

For the reasons stated above, the court should dismiss all remaining claims in this case. After granting the State's contemporaneously filed motion with respect to attorney fees, the court should accordingly dismiss this suit with prejudice.

RESPECTFULLY SUBMITTED this 14th day of November, 2008.

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Counsel for Intervenor Defendants State of Washington, Rob McKenna, and Sam Reed

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing electronically to the following:

John White
Kevin Hansen
Richard Shepard
Thomas Ahearne
David McDonald

Executed this 14th day of November, 2008, at Olympia, Washington.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG,
Plaintiffs-Appellees,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF WASHINGTON; ROB MCKENNA, Attorney General; SAM REED, Secretary of State; WASHINGTON STATE GRANGE,
Defendants-Intervenors-Appellants.

Nos. 05-35774
05-35780

D.C. No.
CV-05-00927-TSZ

ORDER

On Remand from the United States Supreme Court

Filed October 2, 2008

Before: Dorothy W. Nelson, Pamela Ann Rymer and Raymond C. Fisher, Circuit Judges.

ORDER

This case was remanded to us from the United States Supreme Court. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008). In light of the Supreme Court's decision, we VACATE our opinion in *Washington State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006), VACATE our August 22, 2006 and October 3, 2006 orders granting attorney's fees and costs and REMAND to the district court with the following instructions.

The district court should DISMISS all facial associational rights claims challenging Initiative 872. *See Wash. State Grange*, 128 S. Ct. at 1187.

The district court should DISMISS all equal protection claims. The allegedly discriminatory statutes were repealed by Initiative 872. *See Wash. State Grange*, 128 S. Ct. at 1192-93.

The district court should DISMISS as waived all claims that Initiative 872 imposes illegal qualifications for federal office, sets illegal timing of federal elections or imposes discriminatory campaign finance rules because these claims were neither pled by the parties nor addressed in summary judgment by the district court.

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.

The district court may make appropriate findings concerning the parties' settlement of fees and should determine whether restitution or further fee awards are appropriate in response to appellee Washington State's motion to vacate award of attorney's fees and costs, for judgment awarding restitution of fees and costs and for costs.

Remanded for proceedings according to the above instructions.

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