The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV-05-00927-JCC

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

**NOTE ON MOTION CALENDAR:**

**DECEMBER 12, 2008**



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## I. INTRODUCTION

The Defendants State of Washington and Washington State Grange have filed motions to dismiss the remaining issues in this case, and the Democratic and Republican Parties have filed oppositions to these motions. This is a reply to the Democratic Central Committee's Opposition (Dem. Opp'n) (Docket #146) and its supporting declaration (Docket 147) and to the Republican Party's Opposition (Rep. Opp'n) (Docket #150).[1]

## II. SUMMARY OF ARGUMENT

Neither the Democrats nor the Republicans have identified an issue that was (1) included in the case as originally filed, and (2) not disposed of either by the express language of the Supreme Court decision in *Wash. State Grange v. Wash. State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 1189, 170 L. Ed. 2d 151 (2008), or by necessary implication of that decision. Instead, they seek to expand the case into new areas of the law not contemplated in the original pleadings and easily separable from the constitutionality of Initiative 872 (I-872). All issues properly before this Court have been resolved. Therefore, the entire case should be dismissed.

## III. ARGUMENT

### A. The Political Parties Did Not, And Could Not, Plead An "As Applied" Challenge To I-872 In Their Original Complaints"

Both the Democratic and Republican Parties have scrambled to reinterpret their original pleadings in this case to include challenges to the constitutionality of I-872 "as applied." Both parties suggest that allegations in their respective pleadings referring to the

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[1] In order to avoid a lack of clarity as to the relief sought on this motion, one statement made by counsel for the Libertarian Party and its officers bears brief mention. Counsel stated that he "does not understand and did not advise the clients that dismissal of the Libertarian Party of Washington State would operate to dismiss Ruth Bennett or J.S. Mills." Richard Shepard's Mot. for Leave to Withdraw From Representation of the Libertarian Party of Washington State, Ruth Bennett and J.S. Mills, Certificate of Service and Advice, ¶ 2. To the contrary, the State's motion to dismiss is addressed to the claims asserted by the Plaintiffs and Intervenor-Plaintiffs, and not to the status of specific plaintiffs. State's Mot. to Dismiss at 2.



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manner in which the State would implement I-872 amounted to an "as applied" challenge to the statute. Dem. Opp'n at 10-12; Rep. Opp'n at 4-5. But the political parties could not bring a legal challenge to the State's implementation of I-872 in May of 2005. The Initiative had not yet been implemented or applied and the political parties had no factual basis for mounting an "as applied" challenge. *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994) (pleading must be well grounded in fact). The political parties could not have commenced a case based on facts related to the implementation of the Initiative that had not occurred, and their complaints cannot now be construed to have done so. The references to "as implemented" in the original pleadings, read in context, are simply an extension of the effort of both parties to deliver a quick knockout blow to I-872 by asserting that the Initiative, by its very nature, violated their constitutional rights—that is, that I-872 was *facially* unconstitutional.[2] At no point in their original pleadings did either the Republicans or the Democrats concede (even as a backup position) that I-872 could be implemented in a constitutional manner and that their challenge was only to specific, identified implementation choices the State proposed to make. Both parties hoped and intended that the entire statutory scheme would be struck down, and their aspirations in this regard have obviously not changed.[3]

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[2] In May of 2005, when this case was filed, no election had been conducted under I-872. The Secretary of State adopted emergency rules in 2005 to implement I-872, but the rules were never applied, as they expired during the time the State was enjoined from implementing the Initiative. Even if the complaints of the Republican and Democratic Parties were construed as challenges to these rules (now a long-mooted issue), they were facial challenges to the rules, not "as applied" challenges to the statute. Moreover, the political parties are mistaken if they believe that challenging those rules—which have been superseded and will never be used to guide any primary—constituted stating an "as applied" challenge. *Wash. State Grange*, 128 S. Ct. at 1194 (describing this case as a facial challenge and noting that I-872 had never been implemented); *id.* at 1192 (quoting the Secretary's administrative rules).

[3] The Republicans point out that this Court included language in its Order on Preliminary Injunction reserving "issues related to plaintiffs' as-applied challenge." Rep. Opp'n at 5, quoting the Order (Docket #87) at 13. If the Supreme Court decision had not clearly disposed of the facial challenge to I-872 or had been written in a different way, it is conceivable that there might have been additional issues to consider on remand. This Court was prudent not to overstate the scope of the Order being entered. It does not necessarily follow, of course, that additional proceedings are now in order.



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The various theories marshaled by the political parties in opposition to the dismissal motions (and in support of their parallel motions to amend their complaints) continue to sound the theme that I-872 cannot be implemented constitutionally at all. Neither party identifies specific applications of I-872 that are the basis for a claim.[4] The "applications" attacked amount either to allegations about separate statutes, not I-872, or to novel state law claims.

**B. The Election Of Precinct Committee Officers Is Not An Application Of I-872**

Both the Democratic and Republican Parties seek to inject into this case a claim that the State is somehow violating their rights by the manner in which the State conducts elections for party Precinct Committee Officers (PCO's). Dem. Opp'n at 10-12; Rep. Opp'n at 6-8. PCO elections are conducted by the State because of a series of statutes enacted long before I-872 was enacted, and left unchanged when I-872 was approved by the voters in 2004.[5] Any complaints about the manner in which PCO elections are conducted have nothing whatsoever to do with the implementation of I-872. If the complaints had merit, the remedy would be to adjust the manner in which PCO's are chosen, not to invalidate I-872 or alter the way "Top Two" primaries are conducted. If there is any problem with the statutes concerning election of PCO's, it should be the subject of a different case.[6]

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[4] A true "as applied" claim would recognize that I-872 is facially constitutional but would object to some specific way in which the State applied it. For instance, the State might invite an "as applied" challenge if it (1) did not treat all parties alike in permitting candidates to express a party preference, or (2) attempted to restrict political parties in endorsing or supporting candidates in either the primary or the general election, or (3) purported to require political parties to accept as their "nominees" the candidates qualifying in the "Top Two" primary for the general election. The State has done none of these things, of course.

[5] Laws of 1907, ch. 209, § 22 (providing for the election of precinct committee officers on public ballots).

[6] In another section of their brief, the Republicans also complain about language in WAC 434-262-075(2), which adjusts implementation of the PCO election statutes to reflect that candidates in the "Top Two" primary are not representatives of political parties, rendering inoperable language in RCW 29A.80.051 requiring a candidate for PCO to receive at least ten percent of the number of votes cast "for a candidate of the same party who received the most votes in the precinct." Rep. Opp'n at 8. The obvious purpose of this rule was not to deny that some candidates may indeed be "nominees" or "representatives" of a political party but to avoid confusion in linking PCO elections to a primary where candidates who file are not seeking the nomination



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**C. The Enforcement Of State Campaign Finance Laws Is Not The Implementation Of I-872**

The Democratic and Republican Parties also assert that I-872 is somehow implicated in the State's enforcement of an entirely separate series of laws relating to political campaign financing and reporting. Dem. Opp'n at 8; Rep. Opp'n at 8-9. These laws, again, existed long before I-872 was enacted and were not amended by it. The campaign finance laws have a function and purpose distinct from the operation of the election laws: "to promote complete disclosure of all information respecting the financing of political campaigns and lobbying". RCW 42.17.010. When the State moved in 2008 from a party nominating primary to a candidate winnowing primary, the Public Disclosure Commission found it appropriate to adjust the campaign reporting regulations to clarify how candidates should report their relationships (if any) with political parties. WAC 390-05-274 (referred to in the Rep. Opp'n at 8) simply clarified how the term "party affiliation" as used in the campaign finance statutes would be applied given that I-872 established a system in which candidates are no longer (necessarily) affiliated with political parties but may express a "preference" for a party. The purpose of this rule was not to implement I-872, but to clarify the implementation of the separate campaign disclosure laws. In no sense does the rule render "party preference" equivalent with "party affiliation" for purposes of conducting elections.[7] The interpretation of this rule, adopted by a separate agency to implement a completely different statute, is beyond the proper scope of the present case.[8]

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of a political party. Again, any objection would be to the implementation of the PCO election statutes, not to the implementation of I-872.

[7] The Republicans also cite, with apparent disapproval, a campaign finance regulation requiring sponsors of advertising supporting or opposing a candidate to identify the candidate's political party or independent status in the advertising. Rep. Opp'n at 8, citing WAC 390-18-020(1). If this language is objectionable, it is beyond the scope of the present litigation, as it has no connection with the enactment or implementation of I-872.

[8] The Democratic Party refers to a Public Disclosure Commission "Political Advertising" Guide, which lists abbreviations for political party names that might be used in political advertising. Dem. Opp'n at 14, and Ex. A to Dem. Opp'n (Docket #147). The document in question pre-dates the enactment of I-872. In any case, however, there is nothing exceptional about references to "party affiliation" in the political advertising


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**D. None Of The Political Parties Has Preserved A "Trademark" Issue For Further Consideration In This Case**

Both the Democrats and the Republicans assert that the Court has before it a "trademark" or "quasi-trademark" issue remaining for adjudication. Neither party mentioned trademark in its original pleadings, so both parties attempt to transform more general language into a "trademark-like" argument. The Democrats attempt to cast their trademark argument as a variant of the party's "right to protect its name." Dem. Opp'n at 12-20.[9] However, the Supreme Court has held that conducting a "Top Two" primary of the type set forth in I-872 does not implicate the Democratic Party's First Amendment rights of free speech and free association. The "First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Grange*, 128 S. Ct. at 1193 n.7. Furthermore, "I-872 does not on its face . . . compel political parties to associate with or endorse candidates". *Id.* at 1196.[10]

The Republicans make a similar claim that they somehow have "trademark-type" claims awaiting resolution by this Court. Rep. Opp'n at 9-12. The claim that I-872 results in state appropriation of the Republican Party's name is a restatement of the idea that I-872 violates the Party's right of association by confusing voters as to whether a given candidate is or is not "affiliated" with the Republican Party. The Supreme Court rejected this argument in the context of a facial challenge to I-872's implementation.

If the political parties wish to assert that some particular application of I-872 violates, dilutes, or blurs their trademark rights, and can produce evidence to support such an

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laws (where party affiliation may indeed be an issue), even though party affiliation no longer plays a role in determining how the State fills offices.

[9] It is noteworthy that the Democrats' original complaint gives no clue that trademark claims are asserted, but complains about the use of the Party's name only in the context of a "right of association" constitutional claim. Compl., ¶¶ 12, 33 (Docket #31).

[10] The Democrats correctly observe that the Supreme Court did not expressly deal with trademark arguments because they were not before the Court. (Dem. Opp'n at 13). The Supreme Court of course did not know (not having the full record) that trademark issues were not properly in the case at all.



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assertion, they are free to litigate the issue at an appropriate time and in an appropriate forum.[11] However, they are not entitled to convert the present litigation over the facial constitutionality of I-872 into a trademark case, simply by invoking "name protection" language from pleadings focused entirely on First Amendment claims.

**E. The Assertion Of Unrelated State Law Claims Is Not A Proper Basis For Extending The Life Of This Case**

The Republicans again assert that this case should be expanded to include a novel state law claim based upon a very broad reading of *Wash. Citizens Action v. State*, 162 Wash. 2d 142, 171 P.3d 486 (2007), and an assumption that the state courts would extend the *Citizens Action* analysis to the very different circumstances of the present case. Rep. Opp'n at 13-14. While this issue might conceivably have been included in the Republicans' original complaint, it was not.[12] Now that the federal law issues in this case have been resolved, it would be inappropriate to convert the litigation into a state law case based on *Citizens Action* allegations. Those issues should be litigated, if anywhere, in the state courts.

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[11] Both Parties assert that the State has unlawfully "appropriated" their names. Dem. Opp'n at 12; Rep. Opp'n at 9. Apparently, they contend that merely permitting a candidate to express a preference for a political party and allowing that preference to be reflected on the ballot constitutes an "appropriation" of the Party's name. This would require a considerable extension of trademark case law, if the issue were actually litigated.

[12] The Republicans' assertion is not well taken that they could not have done so because *Washington Citizen Action* wasn't decided until after they commenced this case. The arguments upon which they seek to rely, however, are based upon a reading of article 2, section 37, of the Washington Constitution, which has been in effect since statehood.



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## IV. 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 12th day of December, 2008.

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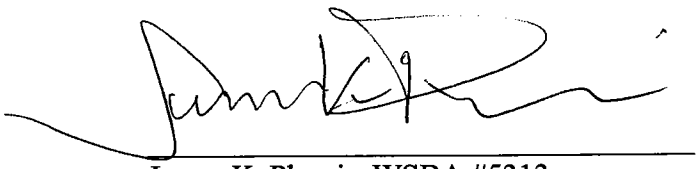
**CERTIFICATE OF SERVICE**

I certify that on this date I electronically filed State Of Washington's Reply In Support Of Motion To Dismiss 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 12th day of December, 2008, at Olympia, Washington.



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