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'S REPLY TO LIBERTARIAN PARTY'S OPPOSITION TO MOTION TO DISMISS

NOTED FOR APRIL 10, 2009

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I. INTRODUCTION

The Defendant Intervenors State of Washington, Sam Reed, Secretary of State, and Rob McKenna, Washington State Attorney General, moved for dismissal of all remaining claims in this case. This brief responds to the Libertarian Party's memorandum in opposition to the State's Motion (abbreviated here as Lib. Opp. to Mot. to Dism.).

II. ARGUMENT

A. There are no "as applied" issues remaining to be decided by this Court.

The Libertarian Party begins by pointing out that the Supreme Court declined to address certain issues presented in their briefing, issues that were beyond the scope of the question on which the Supreme Court granted review, or were not part of the facial challenge analysis adopted by the Supreme Court, or were otherwise not properly before the Court. Lib. Opp. to Mot. to Dism. at 2-4, citing *Washington State Grange v. Washington State Republican Party*, 552 U.S.___, 128 S. Ct. 1184, 1194-95, 170 L. Ed. 2d 151 (2008). It is true that the Supreme Court declined to resolve certain issues, but the Ninth Circuit remanded the case to this Court to consider such claims only "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). As we explained in the State's Motion To Dismiss (Doc. 133) and the State Of Washington's Reply In Support Of Motion To Dismiss (Doc. #164), the claims referred to by the Supreme Court have either been waived or resolved by the Supreme Court's decision in this case. The Libertarian Party does not respond to the arguments made in either the State's motion or reply.

The Libertarian Party incorrectly labels these claims as " as applied" claims (Lib. Opp. to Mot. to Dism. at 3). In fact, the issues in question (ballot access and trademark) could only be "facial" challenges to I-872, because (like the First Amendment claims considered and decided by the Supreme Court) I-872 had not been applied when this case was commenced. The State's reply explained that political parties' pleadings that began this case could not have

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asserted an "as applied" challenge to I-872. I-872 had never been "applied" because no election had been conducted under the Initiative. State's Reply in Supp. of Mot. to Dism. (Doc. #164) at 2-4. Although I-872 has now been used to conduct the 2008 primary and general election in Washington, any "as applied issues" raised by this new development are beyond the scope of this case and should be litigated, if they have any merit, in a different proceeding.[1] There is no "as applied" challenge to I-872 remaining for this Court to consider, and the parties' efforts to keep the case alive by adding new issues should be rejected.

B. There is no trademark claim before this Court awaiting resolution.

The Libertarian Party claims that the trademark infringement issue is before the Court because the Supreme Court expressly declined to address the issue in footnote 11. Lib. Opp. to Mot. to Dism. at 7. However, the Supreme Court did not refer to a trademark infringement claim. Rather, the Court was referring to the Libertarians' constitutional claim. According to the Supreme Court, "[r]espondent Libertarian Party of Washington argues that I-872 is *unconstitutional* because of its implications for . . . *trademark protection*[.]" *Washington State Grange*, 128 S. Ct. at 1195 n.11 (emphasis added). As the State pointed out in its Motion to Dismiss (Doc. #133 at 10), the Libertarian Party's only reference to trademark in its original complaint (Doc. #28, ¶ 20) was a passing reference, offered in support of its First Amendment Claim, to the fact that the name "Libertarian Party" is trademarked. At no point have the issues in this case included a claim that I-872 infringes the trademark of the Libertarian Party or of the other Plaintiffs. The Libertarian Party does not respond to this argument.

The Libertarians suggest that this deficiency could be corrected by amendment of the pleadings. Lib. Opp. to Mot. to Dism. at 7. By implication, the Party concedes that the trademark infringement issue is otherwise not properly part of the case.

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[1] Thus, it is telling that the Libertarian Party, like the Republican and Democratic Parties, expresses an intent to amend its complaint to add new issues. Lib. Opp. to Mot. to Dism. at 7 n.3.

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C. There is no basis for the Libertarian Party's trademark claim.

The Libertarian Party asserts that its trademark is valid, but it makes no arguments to support its claim. Instead, it adopts the arguments of the Republican Party in its Opposition to the State and Grange's motions to dismiss. Lib. Opp. to Mot. to Dism. at 8. However, the Republican Party's arguments are not well taken.

As the State pointed out in its motion (Doc. # 133 at 12-15) and reply (Doc. #164 at 6-7), the statement of party preference permitted by I-872 does not give rise to a trademark infringement claim because it is not the kind of use that trademark law protects against.

D. The Supreme Court decision resolves any issues concerning ballot access.

The Libertarian Party attempts to resurrect arguments that I-872 unconstitutionally restricts minor parties' access to the general election ballot. Lib. Opp. to Mot. to Dism. at 8-11, citing cases such as *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) and *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). *Williams* and *Anderson* are part of a line of cases holding that states must allow all candidates, including independent candidates and candidates who prefer minor parties, fair access to the ballot. However, the cases cited all involve states with party nominating systems in which the primary is open only to major parties that nominate their candidates through a primary that is limited to voters who belong to the parties. In such a state, an independent or minor party candidate can participate in the election only through access to the general election, which is the only election in which all the voters participate.

I-872 does not limit participation in the primary election to major party candidates and Washington's "top-two" primary is not a party nomination system. Under the "top-two" system, any candidate may participate in the primary in which all the state's voters participate in selecting which candidates will advance to the general election. A candidate may declare a preference for a major party, a minor party, or no party at all. This participation fulfills the

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constitutional requirement by giving any candidate easy and complete access to the full spectrum of the electorate.

In the "top-two" system, the general election functions like a runoff, in which the top two vote-getters from the primary compete. These candidates may have stated a preference for a major or minor political party, or they may be independent candidates. It would make no sense to suggest that minor party or independent candidates should participate in the runoff, even if they do not gain one of the top two positions in the primary, because these candidates have already had a full opportunity to present their views to the electorate.

The Libertarian Party argues that Initiative 872 had a "catastrophic" effect on minor parties' access to the general election ballot because some minor party candidates had significant support but did not advance to the general election. Lib. Opp. to Mot. to Dism. at 9-10. This argument is based on the mistaken view that the top-two primary is a party nominating system, and that political parties have a constitutional right to be on the general election ballot. The Supreme Court rejected both of these contentions. *Washington State Grange*, 128 S. Ct. at 1192. ("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."). *Id.* at 1193 n.7 (The "First Amendment does not give political parties a right to have their nominees designated as such on the ballot."

Under I-872, there are virtually no restrictions on access to the primary election ballot, so every candidate has the same opportunity to compete for votes. Thus, the candidates the Libertarian Party refers to had exactly the same access to the ballot as every other candidate. The reason they did not advance to the general election is that they did not have enough public support to be one of the top two vote-getters. But this result was not because of any restriction in I-872. Rather, it was because these candidates could not persuade enough citizens to vote for them. Where a candidate who preferred a minor party was among the top two vote-getters,

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they advanced to the general election. For example, Ruth Bennett, who is one of the Libertarian plaintiffs, preferred the Libertarian Party, and was one of the top two vote-getters for a seat in the State House of Representatives. For this reason, she advanced to the general election in 2008. *See* Attach. A.[2]

The 2008 results illustrate that candidates who express a preference for a minor party have full opportunity to participate in the primary, including a chance of advancing to the general election if they gain sufficient support from the primary voters. In this regard, they are treated exactly the same as candidates who express a preference for a major party. The ballot access case law developed in states with party nomination systems simply does not apply to Washington's "top-two" election system.

III. CONCLUSION

For the reasons stated above, the Court should dismiss this suit with prejudice.

RESPECTFULLY SUBMITTED this 10th day of April, 2009.

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[2] Attachment A consists of copies of the 2008 general election results as shown on the Secretary of State's official website (http://vote.wa.gov), for legislative districts 37, 40, and 49. The results show that Ruth E. Bennett ("prefers Libertarian Party") was one of the two candidates for District 37, State Representative, Position 2. In addition, they show that Howard Pellett ("prefers Green Party") was one of the two candidates for District 40, State Representative, Position 2; and that Mike Bomar ("prefers Independent Party") was one of the two candidates for District 49, State Representative, Position 2.

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:

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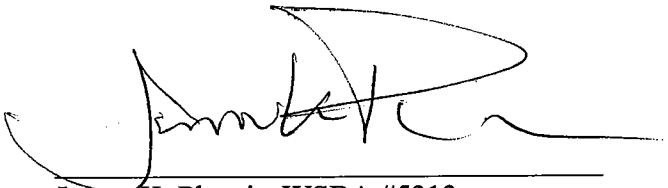
Executed this 10th day of April, 2009, at Olympia, Washington.



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