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Washington State Democratic Central Committee, et al.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs - Appellees,

v.

DEAN LOGAN, King County Records & Elections Division Manager,

Defendant,

and

WASHINGTON STATE GRANGE,

Defendant-Intervenor – Appellant,

v.

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff-Intervenors - Appellees,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff-Intervenors – Appellees.

No. 05-35774

(Dist. Ct. No. CV-05-0927-TSZ)

APPELLEE WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S OPPOSITION TO MOTION TO EXPEDITE REVIEW

PURSUANT TO CIRCUIT RULES 27-12 & 34-3(3)

I. SUMMARY OF OPPOSITION

The Motion for Expedited Review by Appellant Washington State Grange fails to show the good cause required for expedited review.

The Grange appeals from a District Court decision declaring Washington's Initiative 872 unconstitutional. Initiative 872 created a so-called "top two" partisan primary system. Immediately prior to the adoption of Initiative 872, at its 2004 session, Washington's Legislature specifically identified and adopted an alternative primary election system to be used in the event that a "top two" partisan primary system was determined by a court to be unconstitutional. Using his line-item veto authority, and based on serious doubts as to the constitutionality of the "top two," Washington's governor vetoed the "top two" provisions of the legislature's primary election bill. This brought into effect the legislature's back-up system.

The effect of the District Court decision for which the Grange seeks expedited review is to put into effect the exact alternative, which the Legislature has already specified should be used in the event that a court struck down the "top two" system. Despite this historical background, the Grange seeks expedited review on the basis a final decision of this Court must be published before the 2006 session of the Washington Legislature so that the Legislature will have an opportunity to immediately enact a primary election system consistent with this Court's decision. *Grange Motion at 1*. The argument is speculative at best with respect to whether the Legislature would pass legislation and the Grange provides no evidence of any legislation even pending consideration. At worst, the argument simply is not plausible. If the Grange wins its appeal, Initiative 872—originally proposed by the Grange—will be the primary system to be used and the Grange would hardly advocate that the Legislature abandon it. If the Grange loses its appeal and the District Court's decision that Initiative 872 is unconstitutional is

upheld, Washington's Legislature has already selected the alternative primary system to be used in just that event and there is no reason for the Legislature to revisit the issue.

In essence, what the Grange seeks from the Court is preferential treatment so that when it loses its appeal it can attempt to lobby Washington's Legislature to reverse its 2004 decision and select yet another primary system designed by the Grange for Washington. The Washington State Democratic Party respectfully submits that facilitating lobbying by a special interest group is not good cause for expedited review.

II. SUPPLEMENTAL STATEMENT OF FACTS

Prior to 2004, Washington State had a blanket primary. In 2000 the Supreme Court declared such primaries to be an unconstitutional infringement on the First Amendment rights of association of political parties. *California Democratic Party v. Jones,* 530 U.S. 567 (2000). Washington's political parties, led by the Democratic Party, immediately requested Washington replace the unconstitutional primary. Washington refused to do so, prompted in no small measure by the Grange, leading to litigation lasting almost four years during which the State continued to violate the First Amendment rights of the parties. Eventually, in 2003 this Court declared Washington's blanket primary to be unconstitutional. *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003); 388 F.3d 1281 (9th Cir. 2004). Both the State and the Grange unsuccessfully petitioned the Supreme Court for writs of certiorari, *Reed v. Democratic Party of Washington*, 540 U.S. 1213, 124 S. Ct. 1412 (2004); *Washington State Grange v. Washington State Democratic Party*, 124 S.Ct. 1663 (2004).

In response to the court decisions, the Grange and the Secretary of State

advocated for Washington to adopt a "top two" partisan primary system.[1] Acknowledging the significant risk that such a system would be found unconstitutional, Washington's Legislature crafted a thoughtful two part response.

> In sum, ESB 6453 contained two parts. Part 1 (sections 1-57) provided for the Louisiana top two primary system. Part 2 (sections 102-193) provided for the alternative Montana system should a court strike down the top two primary system.

Washington State Grange v. Locke, 153 Wn.2d 475, 483 (2005).[2] Washington's then Governor, himself a lawyer and former prosecutor, vetoed the top two portion of the bill leaving the Montana system as the replacement for the blanket primary:

> Governor Locke gave several reasons for his decision. Because the level of participation is almost twice as high in general elections as it is in primary elections, the governor sought to provide broader voter choice in the general election by choosing the system that allowed for more candidates in the general election. VM at 2 [Veto Message]. In addition, he worried that the top two primary system would result in instances where two candidates of the same party would advance to the general election, disenfranchising voters of other parties. *Id.* He also expressed concern that the top two primary system would effectively deny minority and independent candidates access to the general election ballot because those candidates would almost never be one of the top two vote getters in a primary election. *Id.* The governor predicted that the top two system would "almost certainly result in major parties nominating their candidates through caucuses and embroiling the state in lengthy litigation over the use of party labels by candidates who have not been nominated according to party rules". *Id.* Finally, he speculated that the political parties would promptly block the top two primary in federal court. *Id.* at 3, Therefore, he vetoed the sections establishing the top two primary, leaving the Montana primary system in its place. *Id.* at 4.

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[1] Generally speaking, in such systems all candidates, independents as well as those associated with a political party appear on the primary election ballot. Any voter, whether affiliated with a candidate's party or not, may vote for any candidate and the "top two" vote getters advance to the general election. Such systems may be constitutional if they do not interfere with the right of political parties to select their candidates and to select those with whom they will be associated on the ballot. *Jones,* 530 U.S. at 572; *Id* at 598, n.8 (dissenting opinion).

[2] In the Montana system, any voter can choose to participate in the selection of any party's candidates but can only participate in the selection process for only one party's candidates in any given election year. A characteristic of the Montana system is that the voter's choice of selection process in which to participate remains private.

153 Wn.2d at 484-5.

The Grange petitioned the Washington Supreme Court for an order declaring the Governor's partial veto invalid but the Court upheld the veto. *Washington State Grange v. Locke, supra.* A referendum to overturn the veto was filed but failed to obtain the necessary signatures.[3] Meanwhile, the Grange sponsored Initiative 872, which would enact the "top two" partisan primary, for the November 2004 ballot.

Initiative 872 passed. Shortly thereafter, in the 2005 Legislative session, efforts were made to repeal the Montana system and to significantly amend the "top two" primary enacted by Initiative 872. *See* District Court Order of July 15, 2005 at 8, 9. The Legislature rejected both the proposed Montana repeal and the proposed amendments to the "top two" primary system. *Id.* Shortly after the legislative session concluded, crystallizing the specifics of the constitutional issue, the Washington State Republican Party sued State election officials for, among other things, a permanent injunction barring implementation of the "top two" primary system.[4] The Washington State Democratic Party, the Washington State Libertarian Party and the Washington State Grange all intervened in the action.

After briefing and a four hour hearing, the District Court issued an extensive

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[3] Three referenda were filed by Richard Pope (Referenda 56, 57, and 58). According to the Secretary of State's website, no supporting signatures were ever submitted for any of these referenda. *See* http://www.secstate.wa.gov/elections/initiatives/statistics_referendummeasures.aspx

[4] The Grange seems to suggest that its motion for expedited review should be granted because Washington's political parties did not initiate this suit until after the Legislature had the opportunity to make any changes to the primary election system in light of initiative 872. There is no question that this suit was timely brought. The Court may take judicial notice that both of Washington's major political parties, the Secretary of State and most of the State's election officials had their legal and staff resources substantially tied up in connection with recounts and an eventual six month election contest relating to the closest Gubernatorial election in state history (a margin of 129 votes out of 2.8 million). In these circumstances the timing of this litigation is both appropriate and understandable.

order finding that Initiative 872 was not materially distinguishable from the blanket primary declared by this Court to be unconstitutional in *Reed* and held it to be unconstitutional on the separate grounds that it impermissibly adulterated the candidate selection process of the parties and that its filing statute forced the parties to be associated with self-nominated candidates whose candidacies were in violation of party rules. The Court entered an immediate preliminary injunction enjoining the enforcement or implementation of Initiative 872. The Grange did not appeal the issuance of the preliminary injunction, as permitted by (28 U.S.C. §1291(a)). After further proceedings the District Court entered a permanent injunction. The Grange appeals from the entry of the permanent injunction.

III. ARGUMENTS

The Grange requests this Court agree to issue a final opinion in this case by mid-January 2006 so that this Court's opinion will be available to the Washington State Legislature when it begins its 2006 session. *Grange Motion at 3.* The Grange asserts that unless this Court issues its opinion within that time frame it will be impossible for the Washington Legislature to adopt a primary election system consistent with the Court's opinion. *Grange Motion at 7.* However, there is no reason to assume that the Legislature has any interest whatsoever in adopting yet another primary election system and the Grange provides no evidence of any such interest.

The Grange contends, without basis, that the voters of Washington "overwhelmingly rejected" the Montana primary system when they voted in favor of Initiative 872. Initiative 872 did not purport to repeal the Montana primary system and the voters were not asked to reject the Montana primary system. At most, the election returns in 2004 indicate that the voters preferred the "top two" system to the Montana system. Votes in favor of Initiative 872 say nothing about the voters' opinion of the Montana system as a system to be used if the "top two"

primary system cannot be used.

Moreover, the Grange assumes, again without any apparent basis, that a decision by this Court in mid-January, 2006 would end the litigation. In fact, in the predecessor litigation related to the blanket primary, both the State and the Grange refused to let the litigation end at the Ninth Circuit and sought Supreme Court review. There is no reason to believe that the Grange will behave any differently if this court upholds the District Court decision. There is even less reason to believe that the Legislature will act during the pendency of an appeal, either to this Court or from this Court's decision.

Washington's legislative authority expressly provided for the primary election system to be used by the State in the event that the "top two" primary system turned out to be unconstitutional. The Grange's assertion that expedited review is necessary because the political parties have "succeeded in imposing upon the People of Washington a 2005 election process dictated by federal court injunctions instead of one enacted by the State's duly elected legislative authority" is simply not supported by the record. The District Court did not order the State of Washington to use the Montana primary system. The District Court simply enjoined the implementation of the unconstitutional "top two" primary system. Washington's Legislature decided that the Montana system would be used in the event of such an injunction.[5]

IV. CONCLUSION

Every litigant would like his or her case heard on an expedited basis. It is not possible to give every litigant that preferential treatment. The Grange has not

[5] The Grange argument in this regard is particularly ironic given that the Grange urged the District Court, if it found Initiative 872 to be unconstitutional, to strike selective parts of Initiative 872 and thereby dictate that the people of Washington be forced to use a new Grange-preferred primary system rather than use the alternative selected by the people themselves had selected through their elected legislature in 2004. *See* District Court Order of July 15, 2005 at 35.

made a sufficient showing to warrant giving its appeal special treatment. The Motion for Expedited Review should be denied.

DATED this 10 day of August, 2005.

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CERTIFICATE OF SERVICE

NICI DAWBER states:

I hereby certify that I served the above document via U.S. Mail and e-mail on August 10, 2005, upon the following parties:

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I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Seattle, Washington this 10th day of August, 2005.

Nici A. Dawber

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