Nos. 05-35774, 05-35780

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*
Appellees/Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, *et al.*
Appellees/Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, *et al.*,
Appellees/Plaintiff Intervenors,

v.

DEAN LOGAN, King County Records & Elections Division Manager, *et al.*,
Defendants,

STATE OF WASHINGTON, *et al.*
Appellants/Defendant Intervenors,

WASHINGTON STATE GRANGE,
Appellant/Defendant Intervenor.

On Appeal from The United States District Court
for the Western District of Washington at Seattle
No. C05-0927Z
The Honorable Thomas Zilly, United States District Court Judge

RESPONSE OF APPELLEES POLITICAL PARTIES IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE FAIRVOTE, ET AL.

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I. INTRODUCTION

The Washington State Republican Party, the Washington State Democratic Central Committee, and the Libertarian Party of Washington State (collectively, "the political parties") join in opposing the Motion for Leave to File Brief of Amici Curiae by proposed *amici* FairVote, Jack Bennetto, John R. Burbank, George K. Cheung, Jerome Cronk, Todd Donovan, Gerric W. Dudley, Robert Keller, David Korten, Frances Korten, Becky Liebman, Krist Novoselic, and Nadine Shiroma.

The motion should be denied because it fails to identify any relevance of *amici*'s brief to this case. The brief asks this Court to either render an advisory opinion on the constitutionality of a hypothetical election system or act in a legislative capacity by grafting *amici*'s preferred system onto I-872.

II. ARGUMENT

Under Fed. R. App. P. 29(b), a motion for leave to file an amicus brief must state: "(1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." The proposed *amici*'s motion satisfies only the first requirement by stating the interests of FairVote and the Washington State voters identified in the motion. The motion completely fails to satisfy either part of the second requirement and should be denied. Even had *amici* demonstrated the desirability of an *amicus* brief, the Court should

deny their motion because the matters asserted in their brief are both extraneous and irrelevant to this Court's disposition of the appeals by the State and the Washington State Grange.

It is well established that federal courts do not render advisory opinions:

> This Court is without power to give advisory opinions. It has long been its considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied[.]

Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945) (citations omitted). According to the Supreme Court, advisory opinions "intrude upon powers vested in the legislative or executive branches." *United Public Workers v. Mitchell*, 330 U.S. 75, 91 (1947). "Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories." *Id.*

Here, *amici* ask the Court to "provide guidance for Washington State in devising a constitutional voting system" by "confirm[ing] that the various modifications and alternatives to the top-two system discussed [in *amici*'s brief] are fully constitutional and compatible with Washington State law." Amici Curiae Br. at 14, 15. The "modifications and alternatives" on which *amici* would like the Court

to opine include "ranked choice voting systems," Amici Br. at 20-24, "multi-seat district elections," Amici Br. at 27-28, 30-32, and eliminating the primary election system altogether, Amici Br. at 28-30. None of these issues were before the district court. *Amici* refer to a handful of city ordinances, apparently hoping that the Court will "provide direction" by, in effect, ruling on their constitutionality. There was neither briefing nor evidence submitted to the district court on the constitutionality of those ordinances because they are entirely beyond the scope of this litigation. The "guidance" requested by *amici* is beyond the jurisdiction of federal courts. The Court should decline *amici*'s invitation to opine on the validity of a hypothetical election system, or draft one.

In addition, *amici* urge that this Court could "salvage Initiative 872 from its current constitutional defects" by adding a "ranked choice voting feature" as a "minor modification." Amici Br. at 21. The proposal is instead a request to validate a wholesale restructuring of the American electoral system. *Amici* cite no authority supporting their proposition that this Court can "salvage" I-872 by adding a ranked choice voting system. No such authority exists: "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). *Amici*'s proposal was not presented to the

voters as a alternative or "fall-back" option to the initiative, and this Court is not competent to make the kind of policy decisions necessary to "modify" or "improve" Washington's election system.[1]

Finally, *amici* contends that I-872, with the addition of a ranked choice voting system, would be constitutional if the political parties are given the opportunity to nominate or endorse. This argument, however, simply mirrors the error of the State and Grange in conflating two separate, protected First Amendment rights of the political parties. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 575-576, 580 (2000) ("The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee."); *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214, 226 n.16 (1989); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1977); *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004), *cert. denied sub nom., Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004).

III. CONCLUSION

Basically, *amici* ask the Court to rule on legislative enactments that are not part

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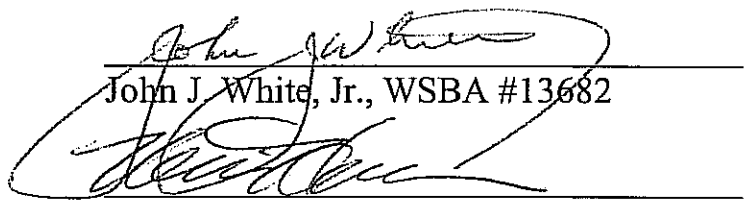
[1] *Amici* acknowledge that although Washington's legislature adopted a similar system nearly 100 years ago, the legislature has since rejected that system.

of this case, re-design a new election system for Washington and pre-approve the system under the Voting Rights Act. *Amici* are correct that the district court decision should be affirmed, but their request to narrow its scope is, in reality, a request to transmogrify the decision.

DATED this 28th day of October, 2005.



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(Dist. Ct. No. CV05-0927Z)

APPELLEE WASHINGTON STATE REPUBLICAN PARTY'S PROOF OF SERVICE

PURSUANT TO CIRCUIT RULE 25(d)(1)(B)(3)

The undersigned certifies that he caused to be served a true and correct copy of:

(1) Response of Appellees Political Parties in Opposition to Motion for Leave to File Brief of Amici Curiae FairVote, et al.; and

(2) This Proof of Service upon the following parties via U.S. Postal Service, postage prepaid, and by-e-mail:

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DATED October 28, 2005, at Kirkland, Washington.

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