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,

vs.

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

Defendants,

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-TSZ

PLAINTIFFS' SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: WEDNESDAY, JULY 13, 2005

WITH ORAL ARGUMENT

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs (collectively referred to herein as "the Party" or "the Republican Party) submit this supplement to their motion for summary judgment, asking the Court to find Initiative 872 ("I-872") unconstitutional on the additional ground that it violates the right to equal protection under the law.

On May 19, 2005, before filing this lawsuit, counsel for the Republican Party submitted a public records disclosure request to the Secretary of State's office ("the Secretary"), seeking documents relating to the implementation of I-872. *See* Declaration of Kevin B. Hansen, Ex. 1. Counsel did not receive the requested documents until Monday, June 20, 2005, after the Party's motion for summary judgment had already been filed. *See* Hansen Decl., ¶ 2.

A number of the documents are related to the "emergency" promulgation of WAC 434-215-015, which purports to eliminate the minor party nominating process described in RCW 29A.20.110 through 29A.20.201. These documents make clear that although the Secretary knew the regulation changed I-872, which is beyond the Secretary's statutory authority, he adopted the regulation to bolster the State's litigation position. The regulation is void and entitled to no deference, leaving the State with a primary election system that protects the nominating rights of minor parties while denying that protection to the Party, in violation of its equal protection rights.

II. FACTUAL BACKGROUND

In the 2005 legislative session, the Secretary sponsored legislation to "implement" the primary election statutes in the aftermath of I-872. *See* Hansen Decl., Ex. 3 at 381-82, 453. According to the Secretary, the legislation would, among other things, "eliminate[] the minor party and independent candidate convention process." *Id.* at 453. Tracy Buckles, the Secretary's Elections Program Coordinator, characterized the legislation as "changing the way minor parties . . . gain access to the ballot." *Id.* at 583. In a December 1, 2004 e-mail sent to county elections officials, Shane Hamlin, the Secretary's Legislative Liaison, confirmed that a portion of the Secretary's bill, including the portion eliminating the minor party convention

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process, would require a two-thirds majority vote because it would change language contained in I-872. *See id.* at 228-29, 231, 302-03.

The Secretary has been well aware that I-872's sponsors viewed the initiative as making no change in the use of conventions to nominate minor party candidates. On March 8, 2005, Ms. Blinn circulated to key staff in the Secretary of State's office (including Secretary Reed's office itself), the following "Frequently Asked Question[]" from the "I-872 website"

> **Would this proposal eliminate minor party candidates from the primary or general election ballot?** (Emphasis in original)
>
> No. Minor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the primary ballot for each office (as they do now). Minor party candidates have had good success recently advancing candidates to the general election in districts where only one of the major political parties runs a candidate (about 15% of all legislative districts). Presumably they would continue to do well in these circumstances.

Id. at 728.

Ms. Blinn explained, "[F]or minor party candidates, the paragraph compares the process in the blanket primary and the top-two primary, but not the Montana primary." *Id.* Thus, elimination of the minor party convention rights by the Secretary's proposed bill would be an amendment of I-872, requiring a two-thirds vote of the legislature. In response, John Pearson, the retired deputy director of elections, then serving as special assistant to the director of elections, stated, "This is not good news." *Id.*

The records released by the State indicate that the Secretary's office decided that if the legislature would not "fix" the problems with I-872, the Secretary would do so by regulation. In a March 22 e-mail to county election officials, Nick Handy, the Secretary's Director of Elections, described the Secretary's bill as "suffering from two distinct ailments. First, after the rough session last year on the primary, this Legislature lacks the political will to deal with the primary again. Second, some legislators may actually be willing to make the problems worse to strengthen the political parties' ability to challenge the initiative." *Id.* at 158-59. Mr Handy then disclosed the Secretary's inclination "to solve the problems relating to the

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initiative through the rulemaking process." *Id.* This inclination was strengthened when Representative Kathy Haigh notified the Secretary that she could not get enough support to pass the Secretary's proposed bill. *Id.* at 467-69. At this point, however, elimination of minor party convention rights was still considered to be beyond the scope of I-872 had done.

As late as April 19, Ms. Blinn was advising other election officials that I-872 did not address nominating conventions for minor parties. *See id.* at 11. However, as litigation approached, the State's view of the effect of I-872 on minor party convention rights changed radically. In her power point presentation at the May 12 "Elections Conference" for county elections officials, Ms. Blinn predicted that the political parties would "argue that the nominating system for minor party and independent candidates should still be required" and that "[i]f minor parties can hold nominating conventions, major parties should be allowed to also." *See id.* at 30, 41. To avoid that argument, the Secretary prepared and enacted emergency regulations on an expedited basis, in part to be in place prior to this lawsuit. *See id.* at 7.

On May 18, two days before this lawsuit was filed, the Secretary adopted emergency regulations. In one of those new regulations, WAC 434-215-015, the Secretary abolished the minor party convention rights that I-872's sponsors intended to continue. The regulation states that RCW 29A.20.110 through 29A.20.201 [convention nominating rights and control over the use of a minor party's name] "are limited to candidates for President and Vice-President of the United States."

III. LEGAL ARGUMENT

A. Initiative 872 violates the Equal Protection clause by allowing minor political parties to nominate candidates and control their message, but denying the same right to the Republican Party.

The Party's First Amendment associational rights "are protected from unequal regulatory burdens under the Equal Protection Clause of the Fourteenth Amendment." *Schrader v. Blackwell*, 241 F.3d 783, 788 (6th Cir. 2001). When deciding whether a law violates the Equal Protection Clause, a court must "look . . . to three things: the character of

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1 the classification in question; the individual interests affected by the classification; and the
2 governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S.
3 330, 335 (1972). A law impairing "a fundamental political right" must be supported by
4 interests that "meet close constitutional scrutiny." *Dunn*, 405 U.S. at 336 (quotation marks and
5 citations omitted).

6 The State's primary election system unlawfully discriminates against the Republican
7 Party by authorizing minor political parties to nominate candidates through a convention
8 process while at the same time denying a similar right to the Party. Under RCW 29A.20.121,
9 which remains effective in spite of the Secretary's unauthorized machinations, "[a]ny
10 nomination of a candidate for partisan public office by other than a major political party may
11 be made only. . . [i]n a convention." The State also provides minor parties with a mechanism
12 to protect themselves from individuals or groups who attempt to hijack the party name or force
13 an association with the minor political party. RCW 29A.20.171(1) recognizes that there can
14 be only one nominee of a minor political party. RCW 29A.20.171(2) provides for "a judicial
15 determination of the right to the name of a minor political party."

16

17 Under to *California Democratic Party v. Jones*, 530 U.S. 567 (2000), "the process by
18 which a political party selects a standard bearer who best represents the party's ideologies and
19 preferences" is "the basic function of a political party." *Jones*, 530 U.S. at 575, 581 (quotation
20 marks and citations omitted). The unequal treatment of the Republican Party in selecting its
21 nominee severely burdens the Party's First Amendment rights. *See id.* at 582.

22 In its rush to promulgate regulations eliminating minor party nominating rights, the
23 State has in effect acknowledged that it has no interest in supporting the differing treatment
24 of major and minor parties. The primary election system, which protects the First Amendment
25 right of association to minor political parties and their adherents, improperly denies the same
26 protection to the Republican Party. On this basis alone, it is unconstitutional.

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B. The Secretary's regulation, abolishing minor party convention rights, is inconsistent with I-872 as described by both its sponsors and the Secretary. The court should also disregard the regulation as "litigation-eve" effort to bolster the Secretary's litigating position.

The Secretary clearly understood that I-872 preserved minor party convention rights and name protection. The Secretary also knew that any legislative changes to those minor party nomination processes needed two-thirds approval by the legislature. Unable to persuade the legislature to eliminate minor party nominating conventions, and desiring to avoid an inevitable equal protection argument by the major political parties, the Secretary took matters into his own hands and adopted WAC 434-215-015. This action, however, is void because it exceeded the Secretary's statutory authority. "An agency may not promulgate a rule that amends or changes a legislative enactment." *Edelman v. State ex rel. Pub. Discl. Comm'n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004).

Even *if* the Secretary had the power to adopt WAC 434-215–015, the rule is entitled to no deference. "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

DATED this 23rd day of June, 2005.

/s/ John J. White, Jr.
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1 **CERTIFICATE OF SERVICE**

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3 I hereby certify that on June 23, 2005, I electronically filed the foregoing Plaintiffs' Supplement to Motion for Summary Judgment and the Declaration of Kevin B. Hansen with the clerk of the Court using the CM/ECF system which will send notification of such filing
4 electronically to the following:

5
6
- David T. McDonald and Jay Carlson, attorneys for the Democratic Central Committee;
- Richard Dale Shepard, attorney for the Libertarian Party;
- Curtis G. Wyrick, attorney for Clark County Auditor;
- Ronald S. Marshall, attorney for Cowlitz County Auditor;
- H. Steward Menefee and James R. Baker, attorneys for Grays Harbor County Auditor;
- Norm Maleng, attorney for Dean Logan, King County Records & Elections;
- Janice E. Ellis, Gordon W. Sivley and Robert Tad Seder, attorneys for Snohomish County Auditor;
- Steven J. Kinn, attorney for Spokane County Auditor;
- Rob McKenna, Attorney General;
- Maureen A. Hart, Solicitor General;
- James K. Pharris, Sr. Assistant Attorney General; and
- Jeffrey T. Even, Assistant Attorney General;
- Thomas F. Ahearne, Attorney for Defendant-Intervenor Washington State Grange;
- David Alvarez, attorney for Jefferson County Auditor.

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I sent the above-mentioned by facsimile and first class United States Mail, postage
19 prepaid, to defendants as follows:

20
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21 Attorney for Defendants Wahkiakum County
22 Pacific County and Pacific County Auditor
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23 Cathlamet, Washington 98612
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25 DATED this 23rd day of June, 2005.

26
/s/ John J. White, Jr.
27 John J. White, Jr., WSBA #13682

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