The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE,

Defendant Intervenor.

No. CV05-0927 JCC

PLAINTIFF INTERVENORS' OPPOSITION TO WASHINGTON STATE GRANGE'S MOTION FOR SUMMARY JUDGMENT

**NOTE ON MOTION CALENDAR: September 17, 2010**

**ORAL ARGUMENT REQUESTED**

**CROSS-MOTION**

The Washington State Grange's Motion ("Grange Motion") for Summary Judgment should be denied. The Democratic Party agrees, however, with the Grange that trial is not



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needed in this matter. The Court should exercise its authority to grant summary judgment to a non-movant and enter judgment on the remaining issues in favor of the Democratic Party.

**MEMORANDUM**

## I. Introduction

The Grange seeks summary judgment based on its assertion that a single notice printed on partisan ballots is sufficient to overcome any confusion caused by the printing of "(Prefers Democratic Party)" after the names of candidates who are not nominated by, endorsed by, affiliated with or associated with the Democratic Party. The Grange offers no evidence in support of its speculative assertion other than the wording of the notice. The Democratic Party has summarized in its response to the State's Motion for summary judgment the extensive record that contradicts the Grange's speculative assertion and will not repeat the record in detail in this response.

Secondarily, the Grange asks the Court to evaluate the constitutionality of the State's implementation of I-872 in an "isolation booth." It asks the Court to ignore the manner in which the State's implementation of I-872 interacts with existing statutes that the voters, in adopting I-872, assumed would be part of the final system being created by passage of I-872. I-872 gave the voters a specific list of statutes that it would amend or repeal. In the Grange's view, if implementation of I-872 causes some statute that was not called out to be amended or repealed to have unconstitutional impact, implementation of I-872 should take priority over any other priorities the voters or the Legislature might have. In the Grange's view the Court should simply bypass the Legislature and rewrite or repeal laws as needed. The Grange offers no authority for its request that the Court wear blinders. If the manner that the State chooses to implement I-872 causes other State statutes to have an unconstitutional impact, then the solution is not for the Court to begin rewriting the State's existing laws piecemeal to accommodate I-872 as state officials chose to implement it. The solution is to deal with the



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cause of the problem not the side effects. The remedy is for the Court to enjoin the implementation that causes the impact.

**II. Law and Argument**

*A. Objectively the State's Ballot Implies Association to the Voters and the Court Should Resist the Grange's Invitation to Apply a Subjective and Speculative Standard in Order to Uphold I-872.*

The Grange asks the Court to hold that a single notice on the ballot is: (a) read by all voters; (b) understood by all voters to be relevant to statements after candidate names elsewhere on the ballot; (c) understood by the voters to mean they should ignore the State's history of placing party affiliations after candidate names when they get to the portion of the ballot that contains partisan offices; (d) understood by the voters to mean that they should forget that they were told by the proponents of I-872 that under the Top Two party affiliation would continue to be on ballots after the candidate's name; and (e) understood by the voters to mean they should ignore the state law that requires a candidate's party to be printed after his or her name on the ballot.

The Grange provides no evidentiary support for its speculative assertion about the subjective state of mind of the voters as they vote using Washington's ballots under the Top Two system. It offers no evidence that the "disclaimer" upon which it relies is even read by voters or, if read, is effective.

There is no objective basis for asserting that any voter reads the instructions and notices on the ballot after the first time they vote; it is only an assumption the Grange asks the Court to make:

> Q Has the Secretary of State's office conducted any studies to determine what percentage of voters read the instructions on the ballot?
> A No, that I recall. No.

McDonald Decl., Ex. 2 (Reed Dep. 29:9-12).



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Objectively, even assuming that some voters read the instructions, there is no reason to believe that all voters read, understand and remember notices and instructions on the ballot. Experience suggests the reality is quite different. For example, consider the testimony of Nick Handy, State Director of Elections:

> Q In 2004 did the ballot contain instructions on how to fill it out?
> A Yes.
> Q Approximately how many ballots in the 2004 election did voters do something with their ballots other than follow the instructions on the ballot itself?
> A I don't have that number. I know that King County duplicated, I believe, 90,000 ballots in the 2004 general election. Part of those would be provisional ballots cast where the voter cast their marks on a ballot they weren't entitled to vote their entire ballot on. Some of those would have been damaged ballots. But the vast majority of those would typically be situations where a voter did something other than perfectly fill in the oval or fill in the box and the tabulator could not then accurately capture the voter's intent.

*Id.,* Ex. 17 (Handy Dep. 10:13-11:3).

> Q Is it fair to say that you assumed that most people read instructions in connection with ballots, but you don't assume that all people read instructions?
> A I think that's a fair statement.
> Q You indicated that there was a voter intent manual of something like 45 to 60 pages. I can't remember what it was.
> A Correct.
> * * *
> Q Is it fair to say that there appear to be at least somewhere around 50 or 60 situations in which voters have not followed the instructions in connection with how to fill out their ballot and it's occurred frequently enough that it's worth writing a manual about?
> A Yes.

*Id.* at 60:4-11, 61:4-9.

All that can be objectively said is that a voter who votes in a race probably has read the portion of the ballot that has the candidate's name for whom the voter voted. And, objectively, in a partisan race, that name has a party label printed in conjunction with it.[1]

[1] "(Prefers Democratic Party)" is a party label and voting cue. McDonald Decl. Ex. 4 (Donovan Dep. 50:18-51:1). Dr. Donovan was retained by the State on February 5, 2010 to provide expert testimony in this case. A copy of this contract and curriculum vitae are attached the McDonald Declaration as Exhibits 5 and 6. *See* discussion of voting cues at pages 11-12 in the Democratic Party's opposition to the State Motion for Summary Judgment.



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Objectively, the laws of the State of Washington require that a candidate's political party be printed on the ballot in conjunction with his or her name and have so required since Statehood. RCW 29A.36.121(3)[2] requires that: "*The political party* or independent candidacy *of each candidate* for partisan office *shall be indicated* next to the name of the candidate on the primary and election ballot." (Emphasis supplied). RCW 29A.36.121 pre-exists I-872 and was not amended, repealed or altered by it. I-872 begins:

> AN ACT Relating to elections and primaries; amending RCW 2 29A.04.127, 29A.36.170, 29A.04.310, 29A.24.030, 29A.24.210, 29A.36.010,29A.52.010, 29A.80.010, and 42.12.040; adding a new section to chapter 29A.04 RCW; adding a new section to chapter 29A.52 RCW; adding a new section to chapter 29A.32 RCW; creating new sections; repealing RCW 29A.04.157, 29A.28.010, 29A.28.020, and 29A.36.190; and providing for contingent effect.

Declaration of Catherine Blinn in Support of Motion for Summary Judgment, ("Blinn Decl.") Dkt. 241, Ex. A (Official Text of Initiative 872 1:1-7).

The objective evidence indicates that the voters' intent in adopting I-872 was that candidate statements of party preference would be used on ballots and elsewhere to identify the candidate's party affiliation as they had been in the State for the century preceding. The voters expressly were told by I-872 proponents in the Voter's Guide that party candidates would be on the general election ballot under I-872 just as they had been prior to I-872:

> All the voters will decide who is on the November ballot. *Whether it's one Republican and one Democrat, one major and one minor party, or even an Independent* — they will be the candidates the voters want the most.

McDonald Decl. Ex. 8 (Rebuttal of Argument Against I-872, 2004 Online Voter's Guide) (emphasis supplied). A Grange sponsored website supporting I-872 expressly told voters that party labels would continue to be used as before:

> **How would this proposed initiative change our election laws?**
>
> …[Under the proposed system] Candidates for partisan offices *would continue to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots. . .*

[2] All RCW and WAC's referenced in this motion are included in David McDonald's Declaration, ¶ 22, Ex. 21.



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> At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names...
>
> **Would the primary ballot look any different to the voter?**
>
> No. At the primary the candidates for each office will be listed under the title of that office, *the party designations will appear after the candidates' names*…
>
> **Would the general election ballot look different to the voter?**
>
> Sometimes, … the voter might be presented with a choice in the general election *between two candidates of the same political party*. This would happen only if both of those candidates received more votes in the primary than any *other candidates (in the same political party or any other political party)*. A qualifying primary *forces political parties* to recruit the best possible candidates and to actively contest all offices on the ballot.

Dkt. #8-2, Ex. 3 (Pgs. 13 and 14 of 21) (FAQ posted on Grange sponsored website supporting I-872) (emphasis supplied). As the Ninth Circuit concluded, the intent of I-872 was that primaries would continue to be "overtly partisan." *Wash. State. Repub. Party v. State of Wash.*, 460 F.3d 1108, 1113 n.5, 1118 (9th Cir. 2006), *cert. granted*, *judgment vacated and case remanded*, 478 U.S. 1015.

In short, the clear objective evidence is that given the context reasonable voters would understand the party preference statement placed after the candidates' names in the State's implementation of I-872 to be an indication of party affiliation. The voters intended the preference information to be a statement of party affiliation when they passed I-872 and state law requires party affiliation to appear after the candidate's name on the ballot.

The Grange's speculative motion for summary judgment should be denied.

*B. The State's Public Disclosure Laws Do Not Create the Unconstitutional Burden; the State's Implementation of I-872 Does.*

The Grange also asks the Court to artificially divorce the implementation of I-872's requirements from the election system with which they are intertwined. I-872 cannot be implemented in isolation from the rest of the State's political law and regulation, and it was



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not adopted by the voters without consideration of the context in which it would be implemented. It must be assumed that the voters were aware of the statutory and regulatory framework they were modifying with I-872 and elected not to rewrite the entirety of that framework except as provided in the Initiative's text.

Statutes which made use of declarations of candidacy to provide information to the public, such as RCW 29A.36.121 (which requires a candidate's political party to be printed after his or her name on election ballots), RCW 42.17.040 (requiring the party affiliation of candidates to be disclosing by committees formed to support or oppose the candidate) and RCW 42.17.510 (which requires the party designation of a candidate to be included in all political advertising), are conspicuously absent from the list of statutes that I-872 amended or repealed:

> AN ACT Relating to elections and primaries; amending RCW 29A.04.127, 29A.36.170, 29A.04.310, 29A.24.030, 29A.24.210, 29A.36.010,29A.52.010, 29A.80.010, and 42.12.040; adding a new section to chapter 29A.04 RCW; adding a new section to chapter 29A.52 RCW; adding a new section to chapter 29A.32 RCW; creating new sections; repealing RCW 29A.04.157, 29A.28.010, 29A.28.020, and 29A.36.190; and providing for contingent effect.

Blinn Decl., Ex. A.

State officials chose after the fact to do something not required by I-872 as part of its implementation and not contemplated by the voters apparently, i.e. change the party preference statement from an indication of the candidate's political party to something purportedly divorced from any political party. That aspect of their implementation has side effects, causing existing statutes and regulations to have unconstitutional impacts. The appropriate remedy is not for the Court to personally rewrite Washington's election system piece by piece to create a new system that there is no evidence the voters intended. The solution is to remove the root cause—the implementation of I-872 that creates the side effects.



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*C. Although the Grange Argues that I-872 Does Not Directly Apply to PCO Elections, as Implemented by the State, I-872 is Intertwined with PCO Elections.*

The Grange asserts that I-872 is unrelated to PCO elections. But State officials disagree, concluding that I-872 "impliedly repealed" RCW 29A.80.051 which reads "…to be declared elected, a candidate [for PCO] must receive at least ten percent of the number of votes cast for the candidate of the candidate's party receiving the greatest number of votes in the precinct." McDonald Decl. Ex. 7 (Blinn Dep. 48:1-10).[3] The 10% threshold has been a statutory requirement for the election of PCOs since at least 1961.[4] It assures that PCOs have a minimum level of support from the Democrats in the precinct that they are elected to represent. PCOs collectively comprise the County Central Committee of the Party. RCW 29A.80.030. The County Central Committee is the body specified by the State constitution to nominate the replacement when a vacancy in legislative or local partisan office occurs. Wash. Const., Art. II, § 15.

In implementing I-872 State officials have chosen to treat candidates for partisan office on the ballot as unrelated to the parties they prefer, even if the candidates have in fact been nominated by the party they prefer. WAC 434-262-075(2) now provides:

> RCW 29A.80.051 includes a requirement that, to be declared elected, a candidate for precinct committee officer must 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. This requirement for election is not in effect because candidates for public office do not represent a political party.

---

[3] Q And so your implementation of the 10 percent threshold under the Top Two Primary is based on your understanding that it was last amended in 2004?

A Really that it was impliedly repealed by Initiative 872, because the Pick-A-Party Primary was impliedly repealed by Initiative 872.

Q Do you know whether the PCO statute with the 10 percent threshold was a creature of the Montana Primary, which you refer to as the Pick-A-Party?

A Yeah. I think it predates the Pick-A-Party Primary, but I'm not. . . I mean, I think it was part of the Blanket Primary…

[4] The 10% requirement appears in the enactment of an amended 29.42.050 in 1961. McDonald Decl., Ex. 22 (1961 Session Laws, c. 130, § 6).



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Because of their implementation of I-872 State officials ignore the 10% threshold requirement. According to Catherine Blinn, Deputy Director of Elections:

> Q Is the 10 percent rule still in the statute?
> A The RCW is still on the books, yeah.
> Q And I take it in some fashion you have a regulation that says ignore it; is that correct?
> A The WAC explains that it's no longer in effect under the -- under Initiative 872, under the law for Initiative 872, because if you think about a percent, there's really no denominator anymore. There's no - the 10 percent rule was to state that each PCO candidate had to receive at least 10 percent of the votes cast for a candidate of that same party in that precinct. I believe it's the candidate who received the most votes of that party in that precinct. There are no other candidates of that party in that precinct because the other candidates in the other races are not appearing on the ballot representing the party.
> Q Is it Secretary of State's office's position that in my precinct, for example, in 2008, that there were no Democrats on the ballot except for me?
> A And, I'm sorry, you were running as PCO?
> Q Yes.
> A There were no other candidates appearing on the ballot as Democrats, yes.
> Q My question was: Were there any other candidates on the ballot who were Democrats?
> A That would be up to the candidate to tell you that. But in terms of how they're appearing on the ballot there were no other candidates appearing on the ballot representing the Democratic Party.
>
> * * *
>
> Q But I take it you have advised the various local election officials to ignore the 10 percent requirement?
> A Yes.
> Q Have you also advised them to ignore any nominations issued by the respective major parties?
> A They've never been a recipient of those, so it's -- it's in terms of -- I guess I'd have to ask for clarification on the question.

McDonald Decl., Ex. 1 (Blinn Dep. 7:22-9:13). The Democratic Party's nominations are readily available to election officials on the parties' website. *Id.,* Ex. 18 (Pelz Dep. 34:9-16).

The State's implementation of I-872 not only impacts the enforcement of the 10% threshold in PCO races, it also requires the Party to have its grass roots officers selected by voters who are not affiliated with the Party. Because in the State's view the implementation of I-872 requires that the State take the position that there are no Democratic candidates on the primary ballot except the PCO ,the State also ignores RCW 29A.52.151(1)(a) which



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provides: "(a) A voter's affiliation with a major political party is inferred from either selecting only that party in the check-off box, or voting only for candidates of that political party in partisan races." The State could readily limit voting in PCO races under the Top Two system to Party members by simply counting only those votes in the PCO race cast by voters who also only voted for nominees or authorized candidates of the Party in all partisan races in which the voter cast a ballot.[5] The Party has previously consented to this approach in connection with the Montana primary.

Instead, the State has implemented the Top Two system so as to allow voting on the election of party officers by anyone who chooses to do so. Under the Top Two system the State hands each voter in the primary a ballot allowing him or her to vote in the election of Democratic Precinct Committee Officers without taking any steps to determine that the voter is in fact affiliated with and entitled to vote in the election.

> Q. In implementing the Top Two Primary, has the Office of Secretary of State taken any steps to assure that voters who vote in PCO elections are affiliated with the political party whose PCO they are electing?
> A. Voters are instructed that if they consider themselves a Republican or a Democrat, they may vote for a candidate of that party.
> Q. Is that the extent of the State's efforts to assure that voters who cast ballots for PCO are affiliates of that political party?
> A. Yes.

*Id.,* Ex. 1 (Blinn Dep. 49:11-21). There is no significant difference between the State's implementation of PCO elections as part of the Top Two System and Arizona's unconstitutional implementation of PCO elections as part of its blanket primary system. *See Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277 (9th Cir. 2003).

The Grange motion for summary judgment on PCO issues should be denied.

[5] This is a tested, implementable approach. It is the mechanism that wwas used by the State in connection with consolidated ballots under the Montana primary in order to count only ballots of those affiliated with a given Party.



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## III. Conclusion

The Grange asked the voters to pass I-872 on the representation that candidates' party affiliations would continue to be shown on primary and election ballots. Rather than implement the statute in the fashion the voters evidently intended, the State's implementation of the Top Two tries to do something there is no indication the voters intended—to divorce candidates from parties on ballots. As a result, the State's implementation of I-872 and the integration of I-872 with the State's election system creates a situation in which associations are forced on political parties in violation of their First Amendment rights of association. As implemented and applied, I-872 is unconstitutional. The Grange motion should be denied.

DATED this 13th day of September, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 13, 2010, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ David T. McDonald
David T. McDonald, WSBA # 5260



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