CA nos. 05-35774 and 05-35780
DC. no. C 05-0927Z

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et al.
Plaintiff-Appellees,

v.

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

and

WASHINGTON STATE GRANGE,
Defendant-intervenor-Appellant,

STATE OF WASHINGTON, et al.
Defendant-intervenor-Appellants,

v.

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.; and
LIBERTARIAN PARTY OF WASHINGTON STATE, et al.;
Plaintiff-intervenor-Appellees.

On Appeal From The United States District Court
for the Western District of Washington
The Honorable Thomas Zilly

SUPPLEMENTAL BRIEF OF THE WASHINGTON STATE GRANGE

Thomas F. Ahearne, WSBA #14844
Ramsey Ramerman, WSBA #30423
FOSTER PEPPER PLLC
Attorneys for Appellant/Defendant-Intervenor
Washington State Grange

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-4400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. SUMMARY

The United States Supreme Court unequivocally rejected the notion that Washington's Top Two system could be enjoined before it was even carried out:

> Respondents [the political parties] ask this Court to invalidate a popularly enacted election process that has never been carried out.... The First Amendment does not require this extraordinary and precipitous nullification of the will of the people.... We accordingly hold that I-872 is facially constitutional. The judgment of the Court of Appeals is reversed. *It is so ordered.*

Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184, 1195-96 (2008).

The impact of the U.S. Supreme Court's March 2008 ruling was thus clear and immediate: Washington could (finally) carry out the Top Two election system that its voters had overwhelmingly enacted back in November of 2004. And Washington has accordingly done that – with military ballots as well as vote-by-mail ballots for that Top Two system's August 19, 2008 primary having gone out pursuant to the Supreme Court's decision.

While the political parties may wish to file another suit asserting as-applied claims which they might believe might exist *after* a Top Two election is carried out and completed in Washington, the U.S. Supreme Court has rejected the political parties' attempt to attack that Top Two election *before* it is carried out, and has reversed the lower court's ruling to the contrary. The U.S. Supreme Court's ruling leaves no substantive issues remaining in the political parties' pre-election case.

II. DISCUSSION

The Washington State Grange keeps this submission short because the Grange mostly agrees with (and therefore does not repeat) the points made in the Supplemental Brief Of The State Of Washington.

The case before this Court's three-judge panel was succinctly summarized in prior briefing:

> In September 2004 the State of Washington conducted a "Montana" style primary for the first time. Six weeks later the citizens of Washington voted 60%-40% to replace that Montana system with a top two system instead (Initiative 872).
>
> On the eve of the Initiative's implementation in 2005, three political parties sought a federal court injunction invalidating its enactment – claiming the Initiative's provisions violated the First Amendment *on their face*.
>
> The district court agreed and enjoined the Initiative's top two system – effectively ordering Washington to conduct the rejected Montana style election in 2005 instead.

Washington State Grange's September 16, 2005 Opening Brief at page 1.

Under that District Court ruling – and this Court's decision to affirm that ruling – Washington voters were then required to endure the rejected Montana style election in 2006 and 2007 as well.

On March 18, 2008, however, the United States Supreme Court reversed. As noted earlier, the Supreme Court unequivocally ruled that Washington's Top Two system was not invalid as the political parties had claimed (and as this Court had held):

> Respondents [the political parties] ask this Court to invalidate a popularly enacted election process that has never been carried out.... The First Amendment does not require this extraordinary and

> precipitous nullification of the will of the people.... We accordingly hold that I-872 is facially constitutional. The judgment of the Court of Appeals is reversed. *It is so ordered.*

Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184, 1195-96 (2008). And thus, as also noted earlier, military ballots and mail-in-ballots for the Top Two system's August 19, 2008 primary are now in the mail.

In light of the Supreme Court's reversal of the lower court and its ruling that the Top Two election can be carried out, there simply are no substantive issues left in this pre-election case. The issues noted in this Court's July 3, 2008 order (as well as the Supreme Court opinion's footnote 11) might be possible issues in some post-election as-applied suit, but until a Top Two election is actually completed in Washington, any such as-applied challenge is neither justiciable nor ripe.

Speculation about trademark dilution or confusion that might arguably arise when a Top Two election is actually carried out, speculation about ballot access practicalities that might arguably arise when a Top Two election is actually carried out, or speculation about campaign finance effects that might arguably arise when a Top Two election is actually carried out, are at this pre-election stage exactly that – speculation about what might arguably arise when a Top Two election is actually carried out. The notion that such as-applied challenges to Washington's not-yet-been-allowed-to-be-applied Top Two statute is nothing short of an oxymoron.[1]

---

[1] *See, e.g., the Webster's Dictionary definition of that term: "oxymoron: a combination of contradictory or incongruous words." Webster's Ninth New Collegiate Dictionary (1991) at 844.*

Indeed, the United States Supreme Court itself rejected the notion that the political parties' challenges could be maintained *before* the Top Two election in November – expressly noting for example that "the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion". *Washington State Grange*, 128 S.Ct. at 1194. Thus, while the Supreme Court did not categorically rule out the possibility of an as-applied challenge to Washington's Top Two election law *after* the November 2008 election, the Supreme Court did make it clear that parties filing such a legal challenge would have to base their suit on how the Top Two election had in fact been conducted and implemented. See, e.g., *Washington State Grange*, 128 S.Ct. at 1194 (whether or not unconstitutional voter confusion results from Top Two elections will have to depend on evidence concerning how the State of Washington conducted and implemented the Top Two statute in actual elections).

Here, the November 2008 election is still months away. The State of Washington has not completed its educational campaign to remind and educate voters about the Top Two system that the Supreme Court has now ruled the Washington voters can (finally) be allowed to participate in. For example, the State-wide Voters' Pamphlet for the upcoming general election will not even be distributed until around mid-October.

Without a single Top Two election season having ever been conducted by the State, as-applied challenges such as the trademark, ballot access, or campaign finance arguments that one or more of the political parties might wish to pursue are

at this point premature. Cf., e.g., *PUD No. 1 v. Bonneville Power Admin.*, 947 F.2d 386, 397 (9th Cir. 1991) (until defendant had implemented its regulation, any claim that it was unreasonable was only "hypothetical" and "unripe for judicial review").

III. CONCLUSION

The United States Supreme Court has determined that the political parties' pre-emptive suit against Washington's Top Two election system has no merit. The impact of the Supreme Court's ruling on this case is therefore clear. The political parties' pre-election facial challenge to Washington's Top Two election system has failed. After this case is ultimately remanded to the District Court for dismissal, the political parties are not necessarily foreclosed from filing a post-election challenge to pursue the type of as-applied challenges mentioned in this Court's July 3 order (and the Supreme Court opinion's footnote 11). But any factual basis for such as-applied challenges are pure speculation at this point.

In short, the U.S. Supreme Court's decision made it clear that if the political parties want to mount an as-applied challenge to Washington's Top Two election system, then the political parties must wait until *after* such a Top Two election is actually carried out. The impact of the Supreme Court's ruling in this case is thus simple and straightforward: the political parties' suit must be dismissed.

RESPECTFULLY SUBMITTED this 4th day of August, 2008.

FOSTER PEPPER PLLC

Thomas F. Ahearne, WSBA No. 14844
Ramsey Ramerman, WSBA No. 30423
Attorneys for Appellant/Defendant-Intervenor
Washington State Grange

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A) AND CIRCUIT RULES 28-4 AND 32-1

I certify that the attached brief complies with the type-volume limitations in that it is proportionally spaced, has a typeface of 14 points and contains 1,263 words.

DATED this 4th day of August, 2008.

Ramsey Ramerman, WSBA No. 30423
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101

Attorneys for Appellant/Defendant-Intervenor
Washington State Grange

CERTIFICATE OF SERVICE

RAMSEY RAMERMAN states:

I hereby certify that I served the above document via Federal Express and e-mail on August 4, 2008, upon the following parties:

John J. White, Jr./Kevin B. Hansen
Livengood, Fitzgerald & Alskog
121 Third Avenue
Kirkland, WA 98083-0908
white@lfa-law.com; hansen@lfa-law.com
Attorneys for Plaintiff-Appellees Washington State Republican Party *et. al.*,

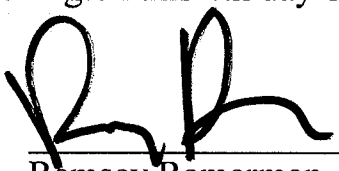
David T. McDonald/Alex Wagner
K & L Gates
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Davidmcdonald@klgates.com; alex.wagner@klgates.com
Attorneys for Plaintiff-Intervenor-Appellees Washington Democratic Central Committee and Paul R. Berendt

Richard Shepard
Shepard Law Office, Inc.
818 So. Yakima Ave., #200
Tacoma, WA 98405
richard@shepardlawoffice.com
Attorneys for Plaintiff-Intervenor-Appellees Libertarian Party of Washington State, Ruth Bennett and J.S. Mills

Maureen Hart/James K. Pharris/Jeffrey T. Even
1125 Washington Street SE
Olympia, WA 98501-0100
marnieh@atg.wa.gov; Jamesp@atg.wa.gov; jeffe@atg.wa.gov
Attorneys for Defendant-Intervenor-Appellants State of Washington, Secretary of State Sam Reed and Attorney General Rob McKenna

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

Executed at Seattle, Washington this 4th day of August, 2008.



Ramsey Ramerman