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July 11, 2008

John J. White Jr.
Livengood, Fitzgerald & Alskog
P. O. Box 908
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David T. McDonald
Kirkpatrick & Lockhart Preston Gates & Ellis
925 Fourth Avenue, Suite 2900
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RE: ***Washington State Grange v. Washington State Republican Party***

Dear Mr. White and Mr. McDonald:

This is to acknowledge receipt of your separate letters asserting that the injunction issued by the District Court in this case is still in force, despite the clear reversal of the District Court's ruling by the United States Supreme Court in *Washington State Grange v. Washington State Republican Party,* ___U.S.___, 128 S. Ct. 1184 (2008). You allege that the state of Washington should refrain from conducting the "top two" primary enacted by the people in Initiative 872, and should instead conduct the type of primary established under the immediately prior version of state law.

Neither of you can be surprised to know that the state of Washington began preparing to conduct a "top two" primary as soon as the Supreme Court issued its opinion on March 18, 2008, and has adopted rules and policies to implement Initiative 872. Candidate filing has been conducted in preparation for a "top two" primary, the voters' pamphlet for the primary has been prepared, and the primary is scheduled to be conducted on August 19, 2008. Wholly aside from the practical impossibility of your suggestion, there is no legal basis for it. The injunction was based entirely upon the District Court's conclusion that I-872 would facially violate the constitutional rights of the plaintiff political parties—a judgment that has been reversed. An injunction must be obeyed *until* it is "reversed by orderly and proper proceedings." *United States v. United Mine Workers of America*, 330 U. S. 258, 293 (1947). *See also, Howat v .Kansas*, 258 U.S. 181, 190 (1922) (orders of a court are to be respected "until its decision is reversed for error by orderly review, either by itself or by a higher court"). We believe we stand on firm legal ground in taking the

position that review by the United States Supreme Court constitutes "an orderly review . . . by a higher court." Initiative 872 is fully enforceable and governs the conduct of Washington's elections.

The injunction entered by the District Court has been reversed by the Supreme Court along with the reasoning giving rise to it, and the injunction is no longer operative. The final paragraph of the Supreme Court opinion contains the following passage:

> Immediately after implementing regulations were enacted, respondents obtained a permanent injunction against the enforcement of I-872. The First Amendment does not require this extraordinary and precipitous nullification of the will of the people. Because I-872 does not on its face provide for the nomination of candidates or compel political parties to associate with or endorse candidates, and because there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters, I-872 does not on its face severely burden respondents' associational rights. 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, 128 S. Ct. at 1195-1196.

Mr. McDonald's letter suggests that the recent order of the Ninth Circuit Court of Appeals requesting additional briefing on unrelated issues somehow supports the notion that the District Court injunction is still in force. There is no basis for such a contention. Not surprisingly, the brief order issued by the Ninth Circuit on July 3, 2008, contains no reference to the injunction, and no implication that despite reversal by the United States Supreme Court, the injunction is in any respect alive. The Ninth Circuit has asked for supplemental briefs only "on the issues raised but not resolved in the appeal before this three-judge panel" along with "any intervening authority on the ballot access and trademark claims that has been filed since these issues were originally briefed."

The Ninth Circuit order apparently stems from a footnote in which the Supreme Court declined to address certain issues raised by the Libertarian Party relating to ballot access, trademark protection of party names, and campaign finance. *Washington State Grange,* 128 S. Ct. at 1195 (n.11). This comment hardly suggests that there is any basis for continuing what the United States Supreme Court termed the "extraordinary and precipitous" injunction entered by the District Court. It appears that the Ninth Circuit panel is simply trying to determine whether any other issues remain to be decided by that court. We do not believe that any issues remain. [1]

[1] The State's position is that the United States Supreme Court's rationale forecloses all three of the issues raised by the Libertarian Party and discussed in footnote 11, as all of the arguments raised by the Libertarian Party

However, unless and until the parties prevail on any remaining unresolved claims, and secure an injunction based upon them, they hardly block implementation of the I-872 primary. Your suggestion that a party's mere legal claims should be treated as though they have been litigated and as though an injunction has been entered based on them, when that is not the case, would, in and of itself, constitute an additional "extraordinary and precipitous" act.

Your demand that the State refrain from conducting the August 19, 2008, primary amounts to nothing more than a request that the State refrain from following a law enacted by the people and upheld by the Supreme Court of the United States. For the reasons stated herein there is no basis for not following the law. Accordingly, we reject your request to cancel the primary election.

Sincerely,

Maureen Hart

Maureen Hart
Solicitor General

MH:rs
cc: Thomas F. Ahearne

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were dependent on the proposition that I-872 establishes a primary in which party candidates will be nominated, a proposition rejected by the Supreme Court. The State will expand on its position in the briefing to be filed in response to the Ninth Circuit's July 3 order.