Nos. 05-35780 & 05-35774

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et. al.
PLAINTIFFS – APPELLEES

WASHINGTON DEMOCRATIC STATE CENTRAL COMMITTEE, et. al.
PLAINTIFF INTERVENORS – APPELLEES

LIBERTARIAN PARTY OF WASHINGTON STATE, et. al.
PLAINTIFF INTERVENORS – APPELLEES
v.
DEAN LOGAN, Manager of King County Records & Elections Div., et al.,
DEFENDANTS

STATE OF WASHINGTON, et. al.
DEFENDANT INTERVENORS – APPELLANTS

WASHINGTON STATE GRANGE, et. al.
DEFENDANT INTERVENORS – APPELLANTS

APPEAL FROM DECISION IN THE
U.S. DISTRICT COURT, WESTERN DISTRICT WASHINGTON

LIBERTARIAN PARTY'S SUPPLEMENTAL BRIEF

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BACKGROUND

On August 22, 2006, this court affirmed the District Court's determination that Washington's Initiative 872 was invalid on associational rights grounds. *Wash. State Republican Party v. Washington*, 460 F.3d 1108 (2006). On March 18, 2008 the U.S. Supreme Court, determining a single issue—that Initiative 872 does not facially violate "the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot"—reversed and remanded for resolution of the remaining issues. *Wash. State Grange v. Wash. State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 1195 n.11 (2008). On July 3, 2008 this Court ordered additional briefing on the impact of the Supreme Court decision on "issues raised but not resolved in the appeal before this three-judge panel."

ARGUMENT

Initiative 872 is invalid, facially and as applied, for a variety of reasons not previously reached by the District Court, this Court or the Supreme Court. First, Initiative 872 can be harmonized with unreferenced minor party nominating statutes and thus does not impliedly repeal them. As applied, Initiative 872 severely burdens the Libertarian Party's unrepealed statutory rights to nominate their candidates and to control the use of their name. Second, Initiative 872 places a severe burden on the Libertarian Party's well-established ballot access rights. Third, Initiative 872 fosters infringement of the Libertarian Party's statutory and common law trademark rights. Fourth, Initiative 872, as applied, deprives the Libertarian Party of the ability to financially support its candidates at levels similar to those available to major parties. Fifth, the State cannot show a legitimate interest, let alone an important or compelling interest, to justify the initiative.

PART I – INITIATIVE 872 DID NOT REPEAL WASHINGTON'S MINOR PARTY NOMINATING STATUTES

As applied, Initiative 872 has deprived the Libertarian Party of its statutory right to hold nominating conventions and deprived the Libertarian Party of its statutory and common law right to control use of its name, all of which were unchanged by the actual text of Initiative 872. Initiative 872 did not impliedly repeal the minor party nominating statutes, R.C.W. §§ 29A.20.110 through 29A.20.200, but the State has acted as though it did.

> Repeal or amendment by implication is never favored. This is even more true when a later act contains a schedule of statutes repealed and such schedule does not include the statute under consideration.

Washington State Welfare Rights Organization v. State, 82 Wash.2d 437, 439, 511 P.2d 990 (1973)(citations omitted).

Section 17 of Initiative 872, while purportedly repealing statutes inconsistent with Initiative 872, did not repeal the minor party nominating statutes.

Repeal by implication may be found only when the subsequent legislation "covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, or … the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect." *ATU Legislative Council v. State*, 40 P.3d 656, 660 (Wash. 2002) (internal citation omitted). Here, neither test is satisfied.

Initiative 872 left intact statutes relating to the definition of "major" political parties, R.C.W. § 29A.04.086. When Attorney General McKenna was asked about this definition by Justice Scalia, he described at least one

way to harmonize I-872 and the statute: "[U]nless and until the legislature chooses to alter the statute to harmonize at a practical level, the way that we will apply that statute is to count the votes of the party cast for the party's official nominee." (*Transcript of Oral Argument*, October 1, 2007, at 22).

Initiative 872 also left intact Washington's "write-in" statute, R.C.W. § 29A.60.021. While generally described as limiting the general election ballot to two candidates only, Initiative 872, as applied, does not actually limit the general election to two candidates. The Secretary of State is prepared to accept write in candidacies for the general election.[1] Obviously, if the state can "harmonize" Initiative 872 with two key unrepealed election statutes, the initiative did not "cover the entire subject matter" of elections.

The minor party nomination and name control statutes may be harmonized with Initiative 872 simply by allowing minor party nominees exclusive use of the party name and requiring those candidates so nominated to compete in the primary with all other candidates. Unfortunately, this alternative would still burden minor party candidates with one route to the general election ballot and a threshold for access to the general election ballot greatly increased beyond constitutionally permissible levels.[2]

A second and more appropriate way to harmonize Initiative 872 with the unreferenced, unrepealed minor party nomination statutes—and the State's continued recognition of general election write-in candidates—is to give full effect to the 2004 legislation regarding minor parties, which places minor party candidates directly on the general election ballot. This

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[1] See, Filing A Declaration Of Write-In Candidacy, http://www.secstate.wa.gov/_assets/elections/WriteinDeclaration.pdf (last viewed 7/28/08) ("The day prior to the primary or ***general election*** is the last day a declaration of write-in candidacy may be filed." (emphasis added))

[2] See, Libertarian Party's Response Brief, at 19-24, filed herein on 10/17/05.

treatment is actually more consistent with the operation of the former blanket primary than the treatment the state now gives to minor parties.

The initiative sponsors said in the Voter's Pamphlet that they wanted to "restore the kind of choice that the voters enjoyed for seventy years with the blanket primary" (ER 257). However, voters did not choose minor party nominees in the former blanket primary. For seventy years minor parties have nominated their candidates through conventions. Before 1977 minor party nominees appeared directly on the general election ballot. Since 1977 the blanket primary was a qualifying process where the minor party convention nominee also had to obtain at least 1% of the primary vote to advance to the general election. *See, Socialist Worker's Party v. Munro,* 479 U.S. 189 (1986).

The harmonization of write-in candidacies by the State under Initiative 872 demonstrates that the general election is not exclusively a "runoff" election between the "top two" candidates. If write-in candidates may participate in the general election, there is no legitimate reason why candidates nominated by minor parties could not also participate in that same election.

PART II – INITIATIVE 872 DEPRIVES THE LIBERTARIAN PARTY OF BALLOT ACCESS RIGHTS

Both the Supreme Court and this Court have rejected the Appellants' argument that Initiative 872 established a nonpartisan primary. *See, Wash. State Grange,* 125 S.Ct. at 1192. *Wash. State Republican Party,* 460 F.3d at 1118-1119.

Ballot access restrictions burden candidates, political parties and voters. "[A]bsent recourse to referendums, 'voters can assert their

preferences only through candidates or parties or both.' By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Illinois State Bd. Of Elections v. Socialist Workers Party*, 440 US 173, 184 (1979) (citation omitted)(emphasis added).

Ballot access restrictions are constitutionally suspect if they "unfairly or unnecessarily burden[] the 'availability of political opportunity.'" *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (plurality opinion) (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)), or if they "operate to freeze the political *status quo." Jenness v. Fortson*, 403 U. S. 431, 438 (1971) (emphasis in original).

As to Initiative 872's impact, the District Court said:

> "Initiative 872, if otherwise valid would significantly alter Washington State's political landscape and severely limit the important role of minor parties in the State's political process. This would remove from the general election the ability to choose candidates from a broad political spectrum. The scope of voters' disenfranchisement would be enormous."

Order of July 15, 2005 at 33-34 n.25 (ER 568-69) (emphasis added)

These findings and conclusions have not been disputed. As applied, the Initiative is unconstitutional because it "severely" burdens minor party candidate ballot access rights and "disenfranchise[es]" voters.

In *Nader v Brewer*, 2008 WL 2669682 (9th Cir. July 9, 2008), this Court observed, "[s]trict scrutiny is applicable where the government restricts the overall quantum of speech available to the election or voting process . . . ." *Nader*, at *7 (internal citation omitted). Plainly, by limiting the number of candidates who can qualify for listing on the general election ballot, the "top two" system established by Initiative 872 "restricts the overall quantum of speech available" in the general election.

The ability of any candidate to appear on the primary election ballot under Initiative 872 fails to cure this problem. Ballot Access expert Richard Winger noted, based on Washington history under the blanket primary, minor party and independent candidates would rarely, if ever, appear on the general election ballot under a "top two" regime. ER 503-509. Neither the State nor the Grange has directly disputed Mr. Winger's testimony.

Indirectly, the Grange's campaign website argued that minor party candidates could "compete aggressively" and thus have a meaningful chance to appear on the general election ballot in districts where only one of the major parties is dominant.[3] As shown by Mr. Winger, ER 503-509, the historical evidence refutes this argument. Even if it were so, it violates the "one-person-one-vote" rule by favoring voters in some districts with choices that would not be available to voters in other districts. *See, Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) (invalidating a nominating petition requirement which "discriminates against the residents of the most populous counties of the State in favor of rural sections").

"That 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion." *Lubin*, 415 U.S. at 715. In the earlier case regarding the blanket primary the State told this Court "[a]llowing multiple filings by minor party candidates would further disburse (sic) the strength of small parties and would increase the possibility that if none of them gains one percent of the primary vote, no representative of that party would qualify for

[3] Under the header of "**A Qualifying Primary Will be Better for Minor Party Candidates**," the Grange's website, *Yes on 872: Vote for the Person, Not the Party*, stated that minor parties that "compete aggressively in districts where one of the two larger parties is not running any candidates … will have a good chance of qualifying a candidate for the general and winning more support for their party than in the past." ER 29.

the general election ballot." *Brief of Appellee State of Washington, Democratic Party of Washington v Reed* (02-35428), at 47.[4] Moreover:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike,…

Jenness, 403 U.S. at 442

The "top two" primary also creates problems similar to problems presented by early filing deadlines struck down by this Court in *Nader*, including a lack of voter interest at the time of the primary and difficulty in recruiting campaign volunteers at an early point in the election cycle. 2008 WL 2669682 at *9. Further, the exclusionary effect of the "top two" primary deprives independent and third party candidates of any ability to respond to developments in the course of the campaigns of the "top two" (and likely major party) candidates.[5] These factors were recognized as significant, perhaps dispositive, in *Anderson v. Celebrezze*, 460 US 780 (1983), and later recognized by this Court as dispositive in *Nader*, *Id.* Similarly, they are dispositive here.

The Libertarian Party's ballot access rights are severely burdened by Initiative 872, facially and as applied, and the state has failed to demonstrate a legitimate, let alone compelling, interest in defense of its restrictions of these well-established rights.

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[4] One must wonder, since the State once argued that minor party candidates might be unable to garner 1% of the primary vote to advance to the general election, why the State is not now concerned that Initiative 872 requires minor party candidates to earn an average of 34% of the primary vote to advance to the general election.

[5] For example, either or both "top two" candidates could die or become indicted between the primary election and the general election.

PART III – INITIATIVE 872 INFRINGES ON LIBERTARIAN PARTY TRADEMARK RIGHTS

Initiative 872 authorizes Washington, and candidates authorized by Washington, to assume and exercise rights of ownership over the trademarked organizational name belonging to the Libertarian Party. The name "Libertarian Party" is a registered trademark of the Libertarian National Committee in use since 1972. (ER 169-172) As part of its internal rules the Libertarian Party requires all candidates who wish to represent the Libertarian Party must be members of the Libertarian Party. One becomes a member of the Libertarian Party by subscribing to or affirming a non-aggression pledge. (ER 158-168) This requirement has no known parallel in any other generally recognized political party in America.

This Court recognized the importance of party labels in its initial decision. *Wash. State Republican Party*, 460 F. 3d at 1119 ("party labels provide a shorthand designation of the views of party candidates on matters of public concern …. [and] [v]oters rely on party labels on the ballot in deciding for whom to vote." (internal citation omitted)). Academics have written that a political party name is "the most important resource that the party possesses." *See, e.g.,* Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. Pa. L. Rev. 793, 804 (2001).

Initiative 872 "does not merely place the ballot off limits for party building; it makes the ballot an instrument by which party building is impeded, permitting unrebutted associations that the party itself does not approve." *Wash. State Grange*, 125 S.Ct. at 1199 (Scalia, J. dissenting). Initiative 872 also requires a candidate's "party preference" to appear in Washington's published voter's pamphlet. Initiative 872 § 11. Any candidate may declare and use that "party preference" in soliciting

donations, preparing press releases, holding public meetings and press conferences, and otherwise engaging in the activities of a typical political campaign.

> The fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods. The consumer who knows at a glance whose brand he is being asked to buy knows whom to hold responsible if the brand disappoints and whose product to buy in the future if the brand pleases. … A successful brand, however, creates an incentive in unsuccessful competitors to pass off their inferior brand as the successful brand by adopting a confusingly similar trademark, in effect appropriating the goodwill created by the producer of the successful brand.

Ty Inc. v. Perryman, 306 F.3d 509, 510 (7th Cir., 2002)(emphasis added)

The right to enjoin infringement of a trade or service mark "is as available to public service organizations as to merchants and manufacturers." *N.A.A.C.P. v. N.A.A.C.P. Legal Defense and Educ. Fund*, 559 F. Supp. 1337, 1342 (D.D.C. 1983), *rev'd on other grounds*, 753 F.2d 131 (D.C. Cir.), *cert. denied*, 472 U.S. 1021(1985). Retention of a distinct identity by a non-profit organization that sells no goods is just as important as it is to a commercial organization. 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 9:5 (4th ed. 1996). In *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86 (2d Cir. 1997), the Second Circuit articulated sound policy reasons for including political organizations within the protection of the Lanham Act:

> A political organization that adopts a platform and endorses candidates under a trade name performs the valuable service of communicating to voters that it has determined that the election of those candidates would be beneficial to the objectives of the organization. Thus voters who support those objectives can

> support the endorsed candidates with some confidence that doing so will advance the voters' objectives. If different organizations were permitted to employ the same trade name in endorsing candidates, voters would be unable to derive any significance from an endorsement, as they would not know whether the endorsement came from the organization whose objectives they shared or from another organization using the same name. Any group trading in political ideas would be free to distribute publicity statements, endorsements, and position papers in the name of the "Republican Party," the "Democratic Party," or any other. The resulting confusion would be catastrophic; voters would have no way of understanding the significance of an endorsement or position taken by parties of recognized major names. The suggestion that the performance of such functions is not within the scope of "services in commerce" seem to us to be not only wrong but extraordinarily impractical for the functioning of our political system.

United We Stand Am., Inc. 128 F.3d at 90 (citation omitted) (emphasis added).

Justice Scalia echoed these concerns in his dissent:

> "It does not take a study to establish that when statements of party connection are the sole information listed next to candidate names on the ballot, those statements will affect voters' perceptions of what the candidate stands for, what the party stands for, and whom they should elect."

Wash. State Grange, 125 S.Ct. at 1202 (Scalia, J. dissenting)

Regardless whether the Lanham Act applies, Washington State's common law prohibits deceptive noncommercial uses of organizational names. *See, e.g., Prince Hall Lodge v. Univ. Lodge*, 381 P.2d 130, 135 (Wash. 1963) (recognizing that an organization "is entitled to relief when its name or one so similar as to be deceiving is adopted by another organization and used in a manner which is confusing and deceiving to the public and is detrimental to the organization already using the name.").

An instructive 1924 Washington Supreme Court decision involved Progressive Party presidential candidate Robert LaFollette. *State ex rel. LaFollette v. Hinkle,* 229 P. 317 (1924). In that year citizens of Washington organized the "LaFollette State Party" and nominated several candidates for public office, including Mr. LaFollette for the office of President, all without Mr. LaFollette's authorization and against his wishes. Members of the Progressive Party of Washington, which had also nominated Mr. LaFollette for President, sought a writ of mandate to prevent the Secretary of State from placing the candidates nominated by the "LaFollette State Party" on the general election ballot. In authorizing a writ directing the Secretary to strike the word "LaFollette" and to show on the ballot instead that the "State Party" had made the disputed nominations the court said:

> Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. Nor is it necessary that it be alleged or proved that such unauthorized use will damage him.

Hinkle, 131 Wash., at 93.

While *Hinkle* involved an individual's name, it clearly demonstrates the Washington Supreme Court places a significant value on the exclusive right of ownership to an established name beyond its use in commerce, including particularly within the realm of political speech. Initiative 872 deprives the Libertarian Party of its right to control its name.

PART IV – INITIATIVE 872 SEVERELY BURDENS THE LIBERTARIAN PARTY'S RIGHT TO FINANCIALLY SUPPORT IT'S NOMINEES

Washington allows "major parties" and "*bona fide* political parties" to contribute more than 2.3 million dollars ($0.70 per state registered voter per cycle) to each of its candidates for statewide office. R.C.W. § 42.17.640(4)[6] A "major party" is one whose candidate receives 5% or more of the vote in a prior statewide general election. RCW § 29A.04.086

If the district court correctly determined that Initiative 872 "impliedly repealed" Washington's minor party nomination statutes, Initiative 872 repealed minor party "certificates of nomination". RCW § 29A.20.161 A "certificate of nomination" is required to be a "*bona fide* political party" for campaign contribution purposes. RCW § 42.17.020(6). If the Libertarian Party is neither a "major party" nor a "*bona fide* political party", the most it can contribute to its statewide candidates is $1400.

The cost of a successful statewide campaign in Washington runs in the hundreds of thousands or millions of dollars.[7] In *Lubin v. Panish*, 415 U.S. 709 (1974), the Supreme Court invalidated on equal protection grounds

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[6] As of June 27, 2008 Washington had 3,393,695 active registered voters. See, *Voter Registration Report June, 2008*, http://www.secstate.wa.gov/_assets/elections/VoterRegistrationReportJun08.pdf (Last viewed July 28, 2008)

[7] As of April 10, 2005, Washington's Secretary of State, Sam Reed, received and dispersed $651,319.93 in connection with his 2004 reelection campaign. See, http://hera.pdc.wa.gov/wx/viewdoc_new.asp?strAppName=PDC&nZoomPercent=100&nDocId=788209&nQRSeq=4&nCurrentIndex=1&nPageNum=1&UseIrc=no As of June 29, 2005, Washington's Governor, Christine Gregoire, received and dispersed $6,364,683.93 in connection with her 2004 election campaign. See, http://hera.pdc.wa.gov/wx/viewdoc_new.asp?strAppName=PDC&nZoomPercent=100&nDocId=808539&nQRSeq=6&nCurrentIndex=1&nPageNum=1&UseIrc=no (Last viewed July 26, 2007)

filing fee statutes that required payment of a few hundred dollars for ballot access, unless the state also had available a non-economic means of ensuring the "seriousness" of a candidate. Prior to Initiative 872, Washington allowed the Libertarian Party to qualify as a "*bona fide* political party" and raise and spend funds at the same levels as the "major" parties.

One Equal Protection defect of Initiative 872, as applied, is that it deprives Libertarian Party of the opportunity to financially support its candidates in amounts comparable to those allowed to major parties. Initiative 872 severely undermines the political viability of the Libertarian Party and its candidates, meanwhile insulating the major party candidates from competition, regardless of the candidate selection process and regardless of the credentials or political views of the individual candidates.

PART V – INITIATIVE 872 HAS NO LEGITIMATE STATE INTEREST

"[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992)(citations omitted)(emphasis added). The purpose of the Elections Clause, U.S. Const. Art. I, § 4, cl. 1, is "ensuring that elections are 'fair and honest,' and that 'some sort of order, rather than chaos, is to accompany the democratic process.'" *Cook v. Gralike*, 531 U.S. 510, 524, (2001) (citing to *Storer v. Brown*, 415 U.S. 724, 730 (1974)) "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits*

v. Thornton, 514 U.S. 779, 833-834 (1995) (emphasis added), and see, e.g., *Gralike*, 531 U.S. at 522-523; *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Unfortunately, the evidence shows that Initiative 872 establishes an unfair and disorderly election system. It creates a "laundry list" primary ballot that discourages voter participation and confuses and frustrates those who do participate. It fosters party splintering and factionalism by undermining political party control over its message and its candidates. It requires ad hoc and arbitrary "harmonization" with statutes and regulations not addressed by the Initiative. It forces candidates to campaign to the political center, thus violating their "speaker's autonomy" rights. It favors the glib, well-financed and telegenic candidate who is more interested in getting elected than in principled policy choices. Particularly alarming, the history of Initiative 872 demonstrates it was designed to evade constitutional restraints on blanket primary systems. *Compare, Gralike, supra.*

> There is no state interest behind this law except the Washington Legislature's dislike for bright-colors partisanship, and its desire to blunt the ability of political parties with non-centrist views to endorse and advocate their own candidates. … The State's justification for this (to convey a "modicum of relevant information") is not only weak but undeserving of credence. We have here a system which, like the one it replaced, does not merely refuse to assist, but positively impairs, the legitimate role of political parties.

Wash. State Grange, 125 S.Ct. at 1203 (Scalia, J. dissenting)

Initiative 872 violates the Elections Clause.

CONCLUSION

For the foregoing reasons, and regardless of the associational rights questions, this court should re-affirm the trial court injunction.

DATED Saturday, August 02, 2008, at Tacoma, Washington.

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