11-35125

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,	)
Appellants,	)
vs.	)
WASHINGTON STATE GRANGE, *et al.*,	)
Defendants & Appellees.	)

On appeal from the judgment entered in the United States District Court for the Western District of Washington
Case No. 2:05-cv-000927-JCC
The Honorable John Coughenour
United States District Court Judge

APPELLANTS' OPENING BRIEF

ORRIN LEIGH GROVER, Esquire
California State Bar No. 64153
ORRIN L. GROVER, P.C.
416 Young Street
Woodburn, Oregon 97071
Telephone: [503] 981-5836

Attorney for Appellants
Libertarian Party of Washington State,
Ruth Bennett & John S. Mills, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

RULES, STATUTES AND CONSTITUTIONAL AUTHORITY

OTHER MATERIALS

WEB REFERENCES

OPENING BRIEF
FOR APPELLANTS LIBERTARIAN PARTY OF WASHINGTON, RUTH BENNETT AND JOHN STUART MILLS

I.
OVERVIEW

Prior to 2004, the State of Washington ("Washington") used a "blanket primary" system. Under the "blanket primary" system, primary voters were allowed to vote in the primary of any party they chose, regardless of the voter's registration. Political analysts praised and criticized the system for years because it allowed voters to cross party lines and influence the selection of nominees in a party other than the voter's party.

In 2000, the United States Supreme Court declared the California "blanket primary" unconstitutional. *California Democratic Party* v. Jones, 530 U.S. 567 [2000]["*California Democratic Party*"]. Washington's "blanket primary" system was similarly declared unconstitutional in 2003 in *Democratic Party of Washington v. Reed*, 343 F. 3d 1198 [9th Cir. 2003], *cert. denied sub nom., Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004).

In reaction to the action of the Ninth Circuit in *Democratic Party of Washington v. Reed*, *supra*, the Washington State Grange ["the "Grange"] proposed I-872, an initiative creating a "Top Two"

primary system. The voters adopted I-872 in the fall 2004 election. Before it could be implemented, it was declared unconstitutional by the United States District Court for the Western District of Washington. That decision was upheld by this Court. *Wash. State Republican Party v. Washington*, 460 F. 3d 1108 [9th Cir. 2006]. In 2008, the United States Supreme Court overruled this Court and held that I-872 was not unconstitutional on its face. The case was remanded for determination whether I-872 is unconstitutional as applied. On remand from this Court, the district court has found that all aspects of I-872 are constitutional except the precinct committee officer selection provisions. These issues, together with procedural attorneys fees issues are the principal subjects of this appeal.

II.
JURISDICTIONAL STATEMENT

Voters of the State of Washington passed Initiative 872 ("I-872") in November of 2004. The Washington State Republican Party (the "Republicans") filed the underlying action challenging the constitutionality of the Top Two partisan system in the Western District of Washington on May 19, 2005. The Washington State Democratic Central Committee [the "Democratic Party"] and the Libertarian Party of Washington State [the "Libertarians"] intervened as Plaintiffs, and the State and the Washington State Grange

intervened as Defendants. Judge Thomas S. Zilly found I-872 facially unconstitutional and entered a permanent injunction on July 29, 2005. This Court affirmed the district court, but the Supreme Court reversed on March 18, 2008. Following remand, the Ninth Circuit vacated its earlier opinion and remanded to the district court for further proceedings with instructions to dismiss all facial challenges. See *Washington State Republican Party v. Washington* 545 F. 3d 1125 [9th Cir. 2008].

On remand, the case was reassigned to Judge John C. Coughenour. The State and the Grange promptly moved to dismiss the entire case and for a refund of fees paid pursuant to a stipulated settlement following the first Ninth Circuit decision. On August 20, 2010, Judge Coughenour ruled on the pending motions. The Judge reversed the stipulated fee award and granted the State's motions to dismiss the trademark and ballot access claims.

After discovery, the State and the Grange moved for summary judgment regarding the constitutionality of I-872 as applied. In their opposition to the State and Grange's motion, the Parties counter-moved for summary judgment on the issue of I-872's unconstitutionality as applied. On January 11, 2011, Judge Coughenour granted partial summary judgment for the Grange and

State, holding the Top Two partisan system generally constitutional as implemented, and partial summary judgment for the Parties, holding the State's method of electing party precinct committee officers under the Top Two unconstitutional, disposing of all claims. The district court entered final judgment on January 20, 2011.

The district court had jurisdiction for these claims pursuant to 28 U.S.C. §§ 1331 and 1343(a) and 15 U.S.C. § 1121. The Libertarian Party timely filed a notice of appeal on February 11, 2011. Appellate jurisdiction in this Court lies under 28 U.S.C. § 1291.

III.
STATEMENT OF THE ISSUES

The Libertarian Appellants rely on the following issues in this appeal:

A. FREEDOM OF ASSOCIATION CLAIMS.[1]

1. I-872 violates the rights of the Libertarian Party to freedom of association.

---

[1] The Democratic and Republican Parties, in related Case Nos. 11-35122 & 11-35123, also appealed from the district court's orders in this case. To minimize redundancy, the Libertarian Party adopts by reference the arguments the Democratic and Republican Parties make in their opening briefs filed in Case Nos. 11-35122 & 11-35123 to the extent that such arguments are not addressed in this brief. In particular, the Libertarian Appellants adopt without further elaboration the Democratic and Republican Parties' arguments with respect to freedom of association.

2. Permitting candidates to self-designate "party preference" forces the political parties to associate with candidates who are not representative of their platform and ideals.

3. It was error for the district court to refuse to consider the expert testimony offered in support and opposition to the motions for summary judgment.

4. Under I-872, as implemented by the State of Washington, there was widespread confusion about the meaning of party preference

B. **BALLOT ACCESS CLAIMS**.

1. Political Parties Are An Integral Aspect of the American Political System.

2. The Importance of Political Parties.

3. Ballot Access Is A Fundamental Right

4. It's All In The Timing. As-Implemented, The Timing of the I-872 Process Is Fatal To Its Constitutionality.

5. As-applied, I-872 Operates to Deny Ballot Access

6. I-872 Also Operates to Deny Minor Parties the Opportunity to Advance to Major Party Status Under RCW 29A.04.086

7. This Court Must Find I-872 Unconstitutional.

C. **TRADEMARK CLAIMS**.

1. The district court erred in failing to allow the Libertarian Party an opportunity to amend its complaint to supplement its allegations regarding its trademark claims when no prejudice to the party-opponents existed. .[2]

---

[2] The Libertarian Appellants adopt without further elaboration the Republican Party's arguments with respect to the district court's

2. The district court erred in finding that the Plaintiffs could not obtain relief against the Defendant State of Washington.

3. The district court erred in finding that misrepresentation of the political party of a candidate on the ballot did not violate the trademark rights of the Libertarian Party.

D. **CLAIMS RELATING TO ATTORNEYS FEES.**

1. The District Court Erred, Applying Washington's "Context" Rule For Construing Contracts, Because It Misunderstood The Critical Language Of The Compromise Fee Agreement & Stipulation.

2. Even Under the District Court's Reasoning, Reversal of the Fee Award Was Premature Because Substantial Aspects of this Case Remain To Be Decided.

3. The Libertarian Appellants are entitled to fees on appeal under 42 U.S.C. § 1988.[3]

IV.
STATEMENT OF THE CASE

In 2002, the United States Supreme Court declared the "blanket primary" unconstitutional. Writing for the majority in *California Democratic Party, supra*, Justice Scalia described the blanket system:

---

denial of leave to amend to address constitutionality issues under Article II, Section 37 of the Washington constitution. [See Republican's Opening Brief, § VIII(G).]

[3] The Libertarian Appellants adopt the Republican and Democratic Parties' arguments with respect to the Appellants' right to attorneys' fees. [See Republicans' Opening Brief, § VIII(G) and Democrats' Opening Brief, § V.]

> Under California law, a candidate for public office has two routes to gain access to the general ballot for most state and federal elective offices. He may receive the nomination of a qualified political party by winning its primary,[1] see Cal. Elec. Code Ann. §§15451, 13105(a) (West 1996); or he may file as an independent by obtaining (for a statewide race) the signatures of one percent of the State's electorate or (for other races) the signatures of three percent of the voting population of the area represented by the office in contest, see §8400.
>
> *California Democratic Party*, at 569.

In discussing the effect of the "blanket primary" system, Justice Scalia affirmed the importance of organized political parties in our electoral landscape:

> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." *Eu*, *supra*, at 224 (internal quotation marks omitted). The moment of choosing the party's nominee, we have said, is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U. S., at 216; see also *id.*, at 235-236 (*Scalia, J.*, dissenting) ("The ability of the members of the Republican Party to select their own candidate ... unquestionably implicates an associational freedom"); *Timmons*, 520 U. S., at 359 ("[T]he New Party, and not someone else, has the right to select the New Party's standard bearer" (internal quotation marks omitted)); *id.*, at 371 (*Stevens*, J., dissenting) ("The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office").
>
> *California Democratic Party*, at 575.

In the penultimate paragraph of *California Democratic Party*, Justice Scalia suggests an alternate, non-partisan "blanket primary:"

> …Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot--which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.
>
> *California Democratic Party*, at 585.

Following *California Democratic Party*, Washington's blanket primary system was declared unconstitutional by the Ninth Circuit in *Democratic Party of Washington v. Reed*, *supra*.

As implemented, I-872 denied *all* ballot access to *every* political party in both the partisan primary and in the general elections. Under the ballot proposed and used by Washington, no political party has a right to place or endorse *any* candidate on *any ballot*, whether for the primary or the general election. "[T]he special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard

bearer who best represents the party's ideologies and preferences[],"[4] is wiped from the Washington political landscape. Under I-872, Justice Scalia's deference to the fundamental rights of an organized association of voters, a "political party," is cast out like yesterday's bathwater.

Plainly, reading the penultimate paragraph of *California Democratic Party*, the Court did not intend its proposal would operate to deny every political party the right to place its candidates on *any* ballot or the right to endorse any candidate on any ballot. Nevertheless, this is the course that Washington has chosen.

On remand, the district court first pared down the case by dismissing the parties' trademark claims and the parties' ballot access claims under Rule 12[b]. ER, 00084. The district court also set aside the parties' stipulated agreement settling the plaintiffs' claims for attorneys' fees from the original appeal before this Court. *Id*.

Thereafter, all sides moved for summary judgment. On January 11, 2011, the district court granted summary judgments disposing of all remaining aspects of the case:

1. The court granted summary judgment against the

---

[4] *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 [1989], as cited in *California Democratic Party*, *supra*, at 575.

plaintiffs on the constitutionality of I-872, as applied, on the issue of voter confusion [ER, 00099-00109, 00115];

2. The court granted summary judgment in favor of the plaintiffs on the constitutionality of the portions of I-872 mandating procedures for the selection of precinct committee officers [ER 00109-00115];

In the case before it, this Court must determine whether I-872 violates the rights of the political parties to freedom of association [including the freedom from forced association], denying the political parties their fundamental right of meaningful ballot access, and violating the rights of the Libertarian Party and the other Appellants to protect their trade names. The Appellants seek an injunction barring the State of Washington from these violations. Also, the Appellants seek their attorneys' fees under 42 U.S.C. § 1988.

V.
STATEMENT OF FACTS

Detailed discussions of the facts of the case are contained in the briefs filed by the Republican and the Democratic parties and need not be repeated here. The Republicans' Statement of Facts is contained at pp. 8 to 33 of their brief. The Democrats' Statement of Facts is contained at pp. 8 to 33 of their brief.

…

VI.
STANDARD OF REVIEW

This Court reviews an order granting or denying summary judgment *de novo. See Brodheim v. Cry*, 584 F. 3d 1262, 1267 [9th Cir. 2009]. On cross motions for summary judgment, each moving party bears the burden for its own motion. *See Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F. 3d 1132, 1136 [9th Cir., 2001] [quoting *United States v. Fred A. Arnold, Inc.*, 573 F. 2d 605, 606 (9th Cir. 1978)].

The constitutionality of a state law is reviewed *de novo*. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F. 3d 1099, 1103 [9th Cir., 2004].

This Court reviews a judgment dismissing a case on the pleadings *de novo*. *Turner v. Cook*, 362 F. 3d 1219, 1225 [9th Cir., 2004]. Likewise, a district court's dismissal for failure to state a claim is reviewed *de novo*. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F. 3d 1066, 1072 [9th Cir., 2006].

VII.
ARGUMENT

The crux of this case is summarized in a paraphrase of Alice in Wonderland:

> Well! I've often seen a partisan political party without a election," thought Alice; "but a partisan primary election

> without a political party! It's the most curious thing I ever saw in my life!"[5]

As implemented by Washington, this is the effect of I-872. Political parties are denied any opportunity for ballot access to the partisan primary or general election ballot. Washington presupposes I-872 implements Justice Scalia's suggestion in *California Democratic Party* for a constitutionally permissible, non-partisan blanket primary: non-partisan elections without political parties. [*California Democratic Part, supra,* at 585-586.] But, Washington does not conduct a nonpartisan blanket primary. It conducts a partisan primary election. It denies political parties all access to both the partisan primary and the general election ballots, while wrapping candidates in the mantle of the political parties by the self-designated "party preference."

…

…

…

---

[5] Of course, Lewis Carroll wrote: Well! I've often seen a cat without a grin," thought Alice; " but a grin without a cat! It's the most curious thing I ever saw in my life!" *Alice In Wonderland*, Lewis Carroll [1885][as republished by Forgotten Books, 2008].
In this case, the Cheshire Cat is the State of Washington which sits, self-satisfied and grinning, because it has denied all political parties access to any ballot, primary or general election.

A. FREEDOM OF ASSOCIATION CLAIMS. [6]

1. Permitting candidates to self-designate "party preference" under I-872 forces the political parties to associate with candidates who are antithetical to their platform and ideals.

The "party preference" portion of I-872 denies the Appellants the right to choose candidates whose positions and ideals are consistent with those of the Appellants. Permitting a candidate to "self-designate" his party preference creates a double-edged wound to the party. On one hand, it denies the party the right to choose a candidate who reflects that party's message, selected through its nomination process. On the other, it opens the door to persons of ill intent who use the party's image, ideals and reputation to gain electoral advantage.

The record below documents many instances of such shenanigans. The following are just a few:

•. **Lyndon LaRouche.** In 1973 Lyndon LaRouche formed the U.S. Labor Party, but in 1979 he disbanded it and created an organization which seemed to suggest that his organization was part of the Democratic Party. The NDPC then started running many candidates in Democratic Party primaries, not only for Congress and

---

[6] See footnotes 1 & 2, *supra.*

state legislature, but for Democratic Party office. LaRouche also ran for president in various Democratic presidential primaries in all presidential elections 1980 through 2004. LaRouche's success in winning a handful of delegates led to the national Democratic Party's rule against seating any delegate pledged to LaRouche. The rule was upheld by the U.S. Court of Appeals, D.C., Circuit, in *LaRouche v. Fowler*, 152 F. 3d 974 [1998], aff'd, 529 U.S. 1035 [2000].

The national party chair had issued a letter in January 1996, formally determining that LaRouche is not a *bona fide* Democrat. Although the organization ostensibly is loyal to the Democratic Party, the group's message over the decades has always been hostile to the Democratic Party presidential platform. The problem, from the viewpoint of the Democratic Party and also the viewpoint of other observers, is not so much the group's message, as its tactics. Currently the organization has been setting very large cardboard cutouts of President Obama in public that show the President with the type of moustache made famous by Adolf Hitler. The message is that Obama is similar to Hitler in his policies. Also, on July 28, 2010, a LaRouche supporter attending a Brookings Institution press conference for outgoing White House budget director Peter Orszag was recognized to ask a question, but instead of asking a question, he

broke into a song which began, "Peter Orszag and Larry Summers, they're fascist pigs, they're fascist pigs…Obama's health care is Hitler approved." At that point he was removed. This incident was reported in many news stories. A 1989 book *Lyndon LaRouche and the New American Fascism,* authored by Dennis King, details how the LaRouche organization has engaged in violence and dirty tricks starting in the early 1970's. A member of the LaRouche organization, Kesha Rogers, won the Texas Democratic primary on March 2, 2010 for U.S. House, 22nd district. This is one many instances when LaRouche supporters have won *bona fide* Democratic Party nominations for state legislative and Congressional seats by co-opting the party label.

The LaRouche movement was especially harmful to the Illinois Democratic Party in 1986. A LaRouche supporter won the Democratic Party primary for Lieutenant Governor. The gubernatorial candidate of the Democratic Party, Adlai Stevenson, was so opposed to running on a joint ticket in November with the LaRouche supporter that he withdrew as the Democratic Party nominee, and instead became the gubernatorial nominee of a new party, the Illinois Solidarity Party. The Democratic Party was listed on the November ballot with no one for Governor, and the LaRouche

supporter, Mark Fairchild, as the candidate for Lieutenant Governor. Polling only 7% in the general election, the Fairchild candidacy caused severe harm to the party's campaign because it denied the party the benefit of the "straight party" ticket used in Illinois at that time. Stevenson lost.

•. **Arizona.** Arizona requires all ballot-qualified parties to nominate by primary, even minor parties. The Libertarian Party and the Green Party have been vexed by unwanted candidates in their primaries. In 2002, three students entered and won Arizona Libertarian primaries, apparently for the purpose of qualifying for public funding, even though *bona fide* Arizona Libertarian candidates never apply for public funding as a matter of principle. The three students were Yuri Downing for State Senate, district 17; and Trevor Clevenger and Paul Dedonati, for State House, district 17. After the candidates received public funding, the state agency that administers the public funding program determined that the students had not used the money for legitimate campaign expenses, a determination that embarrassed the party. Even if the three candidates had not been accused of wrongful use of the money, their application for public funding, standing alone, embarrassed the party, because one of the core principles of the party is opposition to the use of public

funds for private advantage. Also, in 2010, the Arizona Green Party was unhappy that at least twelve *faux* candidates filed as write-in candidates in the Green Party primary, even though these candidates were unknown to party leaders, and refused to communicate with party leaders or to attend party endorsement meetings.

•. **Klu Klux Klan Efforts.** In California in 1980, a Ku Klux Klan leader, Tom Metzger, won the Democratic Party nomination for U.S. House, 43rd district. This incident was a prime reason why the Democratic Party filed a lawsuit in 1984 to strike down a law which banned the party organization from endorsing candidates in its own primary, *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 [1989].

•. **David Duke in Florida & Georgia.** David Duke, well-known Klan leader, tried to file in the Republican Party presidential primary in Florida in 1992, but he was rebuffed. Duke sued and lost. *Duke v. Smith*, 13 F. 3d 388 [11th Cir., 1994].

David Duke tried to file in the Republican Party presidential primary in Georgia in 1992, but was rejected. He sued and was rebuffed again. *Duke v. Cleland*, 87 F. 3d 1226 [11th Cir., 1996].

•. **David Duke & Top Two.**[7] The Republican Party in Louisiana was embarrassed in 1989 when David Duke won a special election for the Louisiana legislature, using the party label "Republican". He was a registered Republican, but the Republican Party had opposed his election. Duke also placed second in the Louisiana first round election in 1990 for U.S. Senate, again with the party label "Republican." And he placed second in the first round election in 1991 for Governor, yet again with the "Republican" label. Exit polls showed that if only registered Republicans had been voting in the first round, Duke would not have placed first or second. Louisiana was using a "top-two" election system in the years when Duke ran in these elections.

•. **Missouri.** In Missouri in 2006, an avowed white supremacist, Frazier Glenn Miller, filed to run in the Democratic Party's primary for U.S. House, 7th district. In Missouri, candidates file with the Secretary of State, and the Secretary of State then forwards the filing fee on to the political party. The Democratic Party refused to accept the fee from the Secretary of State, so the Secretary of State then returned the check and did not list Miller on the

---

[7] Prior to the adoption of I-872, the only state using a "top two" system similar to I-872 was Louisiana.

Democratic Party primary ballot. Miller sued in U.S. District Court, but the Court upheld keeping him off the primary ballot. *Miller v. Carnahan*, unreported, decision of May 31, 2006, U.S. Dist. Ct., Western District, Southern Division, 06-5032-CV-S-RED.

The above are just a few examples of abuse by self-designation.

2. **It was error for the district court to refuse to consider the expert testimony offered in support and opposition to the motions for summary judgment.**

In its opinion, the district court declined to consider the Plaintiffs' expert evidence, stating that it was

> …presented with a legal question of whether the implementation of I-872 would create the possibility for widespread confusion among a reasonable, well-informed electorate.
>
> ER, 00105

In doing so, the district court misses the point of the remand. This Court directed the district court to:

> …allow the parties to further develop the record with respect to the claims that Initiative 872 unconstitutionally constrains access to the ballot.
>
> *Washington State Republican Party v. Washington*,
>
> 545 F. 3d 1125, supra, at 1125.

Development of the record, by definition, includes the presentation and consideration of evidence by that court. Instead, the district court engages in its own *ad hoc* evaluation of the applicability

of testimony regarding social science evidence, ending with the conclusion that "the number of uninformed voters should gradually decline." Of course, this conclusion is made without citation to authority, evidence or other articulated basis.

Appellants recognize that a district court has wide authority with regard to the acceptance or rejection of expert testimony or any other evidence. However, that discretion is bounded by the decisions of the United States Supreme Court. Discussing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 [1993], in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 [1999], the Court stated:

> The Court also discussed certain more specific factors, such as testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique." *Id.*, at 593-59
>
> *Id.*, at 139.

Yet, below, the district court articulated none of these factors except to opine that "battle of experts would likely emerge revealing no clear answer from competing social experiments." [ER, 00105, p. 14.] Where the district court has failed to consider the *Daubert*/*Kumho* factors, it has failed to properly exercise its discretion.

3. **Under I-872, as implemented by the State of Washington, there was widespread confusion about the meaning of**

party preference.

In his concurring opinion, Chief Justice Roberts provided a guiding standard for the determination of the constitutionality on an as-applied basis on remand:

> If the ballot is designed in such a manner that no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to "prefer," the I-872 primary system would likely pass constitutional muster. … On the other hand, if the ballot merely lists the candidates' preferred parties next to the candidates' names, or otherwise fails clearly to convey that the parties and the candidates are not necessarily associated, the I-872 system would not survive a First Amendment challenge.
>
> *Grange*, *supra,* at p. 460.

Finally, Chief Justice Roberts would require that:

> … Voters… understand that the candidate does not speak on the party's behalf or with the party's approval.
>
> *Grange*, *supra,* at 462.

No evidence was offered by the State[8] in the district court to show how the voters interpreted any of the ballot materials or perceived any presentation on the ballot, in the voter educational materials or otherwise. In support of its motion, the State filed the Declarations of Catherine Blinn, an attorney employed as Assistant

---

8 On summary judgment, the Grange did not offer any evidence in support of its motion for summary judgment. Instead, it relied on the evidence offered by the State.

Director of Elections in the Office of the Secretary of State, and Jeffrey Even, a Deputy Solicitor General for the State of Washington. Blinn's Declaration authenticated Exhibits A through T. These were election materials used by the Office of the Secretary of State and materials documenting the campaign by the Office of the Secretary of State to acquaint voters with the intent and operation of I-872. No evidence was offered by the State to support the effectiveness or the effect of these materials.

On the other hand, the materials presented by the Plaintiffs documented the widespread confusion. This issue is briefed in detail by the Republican [Republican's Opening Brief, pp. 8-32] and Democratic [Democrat's Opening Brief, pp. 9-26, 44-46] parties. The Libertarian Plaintiffs have incorporated these arguments and so will only briefly address these issues here.

a. **The State's Own Expert Acknowledged The Voter Confusion Under I-872.**

The deposition testimony of the State's own expert, Dr. Todd Donovan belies the patina of voter comprehension that the State attempted to convey to the district court.

In his deposition, Dr. Donovan repeatedly admitted that the voters are confused about the labeling of party representatives, candidates and other issues. The following are quotes from Dr.

Donovan's deposition in which he repeatedly acknowledges that the voters are confused about "factual questions," party nominations, and "basic factual knowledge about the political process," even under the Top Two system:

> A. [Donovan] [cont.] **But my assumption is, and I think I'm supporting it with data, on a lot of these things, we measure very high levels of error in response to factual questions.** LER, Tab 10, p. 4, lines 22-24.
>
> A. [Donovan] This relates to the Manweller study, that if we're going **to be measuring confusion, we need to be aware of most people don't know what a nomination process probably is.** LER, Tab 10, p. 5, lines 22-24.
>
> A. [Donovan] I -- **it [Donovan's Expert Report] means what it says, that most Americans lack basic factual knowledge about political process related to parties, candidates, and nominations.** LER, Tab 10, p. 46, lines 19-21.
>
> Q: [Grover] **So does that mean they don't know what a nomination is?**
> A. [Donovan] **Yeah.** LER, Tab 10, p. 7, lines 4-16.
>
> Q: [Grover] [Do] you believe there is no [voter] confusion because you disagree with [Dr. Manweller's] methodology. LER, Tab 10, p. 9, lines 1-3.
>
> A. [Donovan] No, I would disagree with that statement. **I was saying there is substantial confusion. You start with confusion.** LER, Tab 10, p. 9, lines 11-13.

…

…

…

…

b. **The State Failed to Acknowledge the Evidence of Widespread Media Confusion.**

Examples of newspaper/media coverage in the record plainly illustrate that, even while reporting on the "Top Two," the fine distinctions of "party preference" and party endorsement are lost even on the presumptively knowledgeable members of the Fourth Estate. LER, Tab 9, pp. 19-25. The designations of "Republican," "Democrat," "R-Moses Lake" are used without any clarification or distinction that Washington State no longer recognizes party endorsement in elections. *Id.*

c. **Washington State Officials Manifested Confusion In Their Official Communications.**

Even Washington State employees, who conducted the campaigns allegedly designed to educate the voters, manifest their confusion repeatedly. For example, a press release from the Hon. Sam Reed, the Washington Secretary of State informed the public that "State Sen. Dan Swecker, *R-Rochester,…* efiled from the comfort of his home…," following his release from the hospital. [Emphasis added. LER, Tab 10, pp. 26.]The release also points out that "State Rep. Jim McIntire, *D-Seattle*,…also filed online." [Emphasis added. LER, Tab 10, pp. 26-27.] An April 21-22, 2008, email exchange shows the confusion among county election auditors about the implementation

of the Top Two primary system. LER, Tab 10, pp. 28.] Another email, on April 16, 2008, shows the confusion arising from the administration of the PCO elections under the top two system. [LER, Tab 10, pp. 30.] A June 22, 2010 email from Catherine Blinn, Esq. itemizes several 2008 races where the Top Two system produced lopsided results. [LER, Tab 10, pp. 33.] Finally, a November 25, 2008 memorandum from Jeffrey Even, Esq. to the Director of Elections again showing the confusion arising from the administration of the PCO elections with the top two system. [LER, Tab 10, p. 35.][9]

Ignoring the opinion of its own expert, Washington denies the existence of widespread confusion, abetted by its own staff, among voters and members of the press. The Libertarian Appellants believe that the evidence cited here and by the other Appellants should have compelled the district court to find that I-872, as applied, created an unacceptable level of confusion among voters regarding party identification, rendering it unconstitutional. Alternatively, this evidence, at a minimum, raised a question of fact regarding which reasonable minds could differ, requiring denial of

9 "LER" refers to the Supplemental Excerpt filed for Appellants Libertarian Party, Bennett & Mills. LER is tabbed pursuant to Circuit Rule 30-1.6[a]. Page numbers refer to the sequential PACER imbedded page numbers appearing at the top of each page.

the Appellees' motions for summary judgment. Where reasonable minds can differ on the reasonable inferences to be drawn from the facts presented, summary judgment should be denied. See *Adickes v. S.H. Kress & Co.* (1970) 398 US 144, 157. See also *Lake Nacimiento Ranch Co. v. San Luis Obispo County* (9th Cir. 1987) 841 F. 2d 872, 875.

B. **BALLOT ACCESS CLAIMS**.

1. Political Parties Are An Integral Aspect of the American Political System.

Between the elections of 1852 and the 1868, the political party structure changed radically. Consider the popular votes:[10]

Election Year	Party	Votes
Election Year: 1852		
1852	Democratic	1,607,510
1852	Whig	1,386,942
1852	Free Soil	155,210
1852	Union	6,994
1852	Southern Rights	2,331
Election Year: 1856		
1856	Democratic	1,836,072
1856	Republican	1,342,345
1856	American/Whig	873,053

[10] These electoral results are taken from Wikipedia pages for each election. For example: http://en.wikipedia.org/wiki/United_States_presidential_election,_1860. To reach the applicable page, simply change the number of the electoral year at the end of the URL.

Election Year: 1860

1860	Republican	1,865,908
1860	So. Democratic	848,019
1860	Const/Whig	590,901
1860	No. Democratic	1,380,202

Election Year: 1864*

1864	National Union	2,218,388
1864	Democratic	1,812,807

Election Year: 1868*

1868	Republican	3,013,650
1868	Democratic	2,708,744

* In 1864 and 1868, the minor party candidates polled less than 0.1% of the vote.

In this brief span, ten different parties polled statistically significant popular vote totals. At the conclusion of this period of national upheaval, the present day Democratic and Republican parties emerged as the majority parties.

In the latter part of the 19th century and the early part of the 20th century, the Populist, the Progressive, and the Bull Moose parties had a significant impact on the American political landscape.

…

…

…

2. The Importance of Political Parties.

Today, our state and local governments function based upon party identification. Clause 2 of Article One of the United States Constitution provides:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a member.

Each house selects its leadership based on party membership. In the House, leadership is vested in the Speaker, a member elected from the majority political party. The Speaker is also the presiding officer of the House. In the Senate, the presiding officer is the Vice President of the United States, a partisan officer. United States Constitution, Article 1, Section 3. Leadership is vested in the majority leader, also elected by the members of the party holding a majority of seats in the Senate. Members of Congress from Washington are identified by the House itself as having party affiliation, just as are members from every state. http://house.gov/representatives/#state_wa.

State legislative bodies, including Washington State, operate in a similar fashion. RCW 42.17.020 (10) "Caucus political committee" means a political committee organized and maintained

by the members of a major political party in the state senate or state house of representatives.

3. Ballot Access Is A Fundamental Right.

> …[T]he right to vote, whether in the primary or the general election, is the right to vote "for the candidate of one's choice."
>
> *Reynolds* v. *Sims* 377 U.S. 533, 555 [1964]

No general election ballot threshold higher than 5% has ever been approved. See Jenness v. Fortson, 403 U.S. 431 (1971). Yet, under I-872, a candidate receiving 31% of the vote may be denied access to the general election ballot.[11] Numerous federal cases have analyzed the constitutionality of minimum signature requirements for ballot access in a general election. *Lee v. Keith*, 463 F 3d 763 [7th Cir., 2006][10% of last vote cast is too high for an independent candidate]; *Socialist Labor Party v. Rhodes*, 318 F Supp 1262 [S.D. Ohio 1970][7% of the last gubernatorial vote is too high for a minor party]; *American Party v. Jernigan*, 424 F Supp 943 [E.D.Ark 1977][7% of the last gubernatorial vote is too high for a minor part]; *Lendall v. Jernigan*, 424 F Supp 951 [E.D. Ark 1977][10% (of the last gubernatorial vote is too high for an independent candidate]; *Greaves v. State Bd. of*

[11]This is based on the hypothetical example where, in a three candidate race, the top two candidates each receive 34% and the third candidate receives 32%.

Elections, 508 F Supp 78 [E.D.N.C.][10% of the last vote cast is too high for an independent candidate]; *Obie v. North Carolina State Bd. of Elections*, 762 F Supp 119 [E.D.N.C][10% of number of registered voters is too high for an independent candidate for district office].

In these cases, the federal courts have repeatedly invalidated excessive minimum petition requirements that denied candidates access to the general election ballot.

Nor is the denial of general election ballot access because of I-872's extraordinarily high threshold a theoretical construct. In Washington's 1980 gubernatorial primary election, there was a large Republican field. Under I-872, John Spellman, *who was elected in the general election*, would have been denied a place on the general election ballot because he was not one of the top two vote getters.[12] In 1996, no Republican would have advanced because of a crowded field, even though the eight Republican-designated candidates on the primary ballot pulled 48% of the primary vote. See LER, Tab 2, p. 6; http://www.sos.wa.gov/elections/results.

For the Libertarian Appellants, the point is even more significant. I-872 denies the Libertarian Party the ability to limit candidates on the ballot who carry its name, effectively assuring that

no Libertarian will place in the "top two." The "top two" calcifies Washington's electoral system. But I-872 poses even greater harms on the Libertarian and other minor parties. It denies them access to the ballot when voters actually vote.

Plaintiffs' expert Richard Winger describes the burden on minor parties most succinctly:

> **Opinion Three**. Minor party candidates and minor party voters are under a severe burden when minor party candidates only appear on the second round in elections at which only one major party member is running. This is because, as Opinion Two shows, the Washington-style "top-two" system prevents them from appearing on the general election ballot in November (except in races in which only one major party member is running). This is a severe barrier on the rights of minor party candidates to express their views and to have the attention of and access to the average voter, because public interest in broad political issues, and political philosophy, is significantly higher during the prime, general election campaign season for federal office, September through November of even-numbered years.
>
> LER, Tab 8, pp. 62-67.

Here, the timing of I-872, as implemented, denies minority and independent candidates their most effective forum.

…

…

…

---

12 See http://en.wikipedia.org/wiki/John_Spellman.

4. It's All In The Timing. As-Implemented, The Timing of the I-872 Process Is Fatal To Its Constitutionality.

Minority candidates are constitutionally entitled to use the forum of the election to try to win converts to their programs and principles. See *Williams v. Rhodes*, 393 U.S. 23, 89 [1968].

Here, the timing of the election is fatal. The primary is held before Labor Day, nearly three months before the general election. Labor Day has always marked the beginning of serious campaigning in election years. Voter interest begins to turn to the election process at that point. Prior to the 2008 presidential election, party nominating conventions were held in mid-summer. We all remember the days when the conventions were followed with a hiatus before campaigning [and public interest] began in earnest on Labor Day weekend.

The Supreme Court has specifically recognized the importance of timing on candidates and issues. See *California Democratic Party*, 530 U.S., at 586 [*Kennedy*, J., concurring]. The early primary poses a special difficulty for voters attracted to minor party candidates, for whom support may not coalesce until comparatively late in the election cycle. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 791-792 [1983] [discussing emergence of independent candidacies late in the election cycle].

5. As-applied, I-872 Operates to Deny Ballot Access.

A guarantee of access to the general election ballot is essential to the ability of political parties and independent political candidates to present themselves to the electorate. This is most particularly the case for minor parties and independent candidates.

> New parties struggling for their place must have the time and opportunity to organize in order to meet *reasonable* requirements for ballot position, just as the old parties have had in the past.
>
> [Emphasis added.]
> *Williams v. Rhodes*, 393 U.S., at 32 [1968].

Washington's application of I-872 in the 2008 election shows the catastrophic effect of the measure on minor parties' and independents' access to the general election ballot: Excluding the ballots for President and Vice President,[13] only one minor party candidate appeared on the general election ballot for any partisan office. In the race for State Representative in District 37, Plaintiff Ruth Bennett appeared on the ballot because there were only two candidates in the partisan primary, exactly as Richard Winger

---

[13] Washington permitted Bob Barr and Wayne Root, Libertarian nominees for President and Vice President, to appear on the general election ballot in 2008.

predicted.[14]

In the August 2008 primary conducted under I-872, several minor party candidates polled significantly in Congressional races:[15]

5th Congressional District:	Randall Yearout, the Constitution Party candidate polled 3.07% of the votes cast.
5th Congressional District:	John Beck, the Libertarian Party candidate polled 2.14% of the votes cast.
6th Congressional District:	Gary Murrell, the Green Party candidate polled 3.56% of the votes cast.

Notwithstanding the fact that these candidates polled well in a district-wide vote, they were not allowed to carry their message to the general election ballot and its voters. The Supreme

---

[14] In 2008, Plaintiffs Bennett and Mills were denied the right to appear on the general election ballot as the respective Libertarian nominees for Governor and Senator. They were on the ballot in those races in 2004. Under I-872, the Libertarian Party was denied the right to nominate a candidate for Governor, Senator or any other office. In 2004, Ruth Bennett polled 63,464 votes. In the closest gubernatorial election in Washington history, 129 votes separated the two leading candidates. See the election results at:
http://www.sos.wa.gov/elections/2004gov_race.aspx

[15] The election results appear on the Secretary's website at:
http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID=25&JurisdictionTypeID=3&ViewMode=All.

Court has roundly criticized state denial of the forum of the general election ballot for new ideas and political goals:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.
>
> *Williams v. Rhodes*, *supra,* at 31.

Historically, there were no ballot access restrictions in the first 100 years of the Republic. Winger, *How Many Parties Ought to Be On the Ballot: An Analysis Of* Nader v. Keith, Election Law Journal, Vol. 5, No. 2, 2006. Recent empirical evidence supports the conclusion that there is no adverse impact on the cognizable state interests by significant relaxation of ballot access requirements. *Id.,* at 177-178, notes 54-60.

Denial of general ballot access must be a primary concern of this Court. That is, whether "…ballot access restrictions…," such as I-872 "…limit the field of candidates from which voters might choose." See *Anderson v. Celebrezze,* 460 U.S. 780, 786 [1983], citing *Bullock v. Carter*, 405 U.S. 134, 143 [1972].

…

…

6. I-872 Also Operates to Deny Minor Parties the Opportunity to Advance to Major Party Status Under RCW 29A.04.086

At the outset, contrary to the representations of the State, I-872 is a partisan election statute. It operates as a partisan statute because, in practice, "self-designation" operates as a designation of party membership. See Republican's Opening Brief, pp. 10-17 for specific examples.

In Washington, important legislative rights are granted only to members of "major" political parties. Under RCW 29A.04.086, major political party qualification requires polling 5% of the *general* election vote for at least one nominee for president, vice president, United States senator, or a statewide office.[16]

In the Washington Legislature, only by the members of a major political party may organize and maintain a "caucus political committee."

---

16 The text of 29A.04.086 reads in part:

> "Major political party" means a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. A political party qualifying as a major political party under this section retains such status until the next even-year election at which a candidate of that party does not achieve at least five percent of the vote for one of the previously specified offices.

Under I-872, a rising minor party faces unconstitutional barriers in its quest for major party recognition:

1. First, to achieve this status, a party must poll 5% of the vote for one of the specified in an even year election. Effectively, as discussed *infra*/*supra*, a minor party will only qualify for the general election ballot in a state office race where there are only two candidates in the primary. However, since Washington permits minor party nominees on the general election ballot for the Presidential election, the Libertarian Party or another minor party may qualify in a Presidential election year.

2. Of course, the 5% party access threshold is meaningless under I-872 because the ballot is limited to two candidates.

3. Assume that five [5] candidates from the Libertarian Party reached the Washington Legislature. These Libertarian Party legislators will still be denied the right under Washington law to form caucus political committees unless they have achieved major party status. Even if the Libertarian Party achieves major party status, the legislators will lose the right to maintain a caucus political committee unless the Party can continue to overcome the primary election roadblock under I-872 to achieve a 5% vote two years later.

The 5% threshold under RCW 29A.04.086 for major party status is an illusory goal which can never be achieved in the general election because the minor party is denied access to the general election ballot. Then, even if it is achieved, for example, through a strong Presidential candidate, it will be snatched away two years later because the operation of I-872 will again deny the party general ballot access.

7. This Court Must Find I-872 Unconstitutional.

I-872 is a partisan primary statute that overturns the idea of political parties altogether. Consider what Washington officials say about I-872:

> *"A Top Two primary . . . allows candidates to file for partisan office and list on the ballot a party affiliation, regardless whether the candidate has been endorsed or nominated by that party."*
>
> State of Washington, describing I-872 to potential bidders for its Top Two primary "education" effort.
> ER00270

And, in another portion of the State's official literature:

> *"The parties still have no say in determining who gets to call themselves a Democrat or Republican [on the ballot]."*
> *ER00775*

And, from Secretary of State Reed, himself:

…

…

> *"Voters in Seattle may see two Democrats in the General, while voters in Walla Walla may see two Republicans in the General."*
>
> Secretary Reed, explaining the effect of the Top Two partisan primary to the National Association of Secretaries of State. ER00785.

All parties are denied the right to determine the scope of their association on the partisan primary and the general election ballots. As Washington admits, no political party can express any message, including its preference for a candidate on either the primary or the general election ballot. Similarly, political parties are denied the right to express their endorsements in the official voter's pamphlet. On occasion, the major parties might be represented by candidates of their choice in the general election. However, the Libertarian's and other minor parties will not. Constitutional ballot access in a partisan system cannot rest on verbal legerdemain about whether candidates are party representatives. The lack of control over candidates' association with the Libertarian party denies the Libertarian party the only opportunity to carry a coherent version of its political vision to Washington voters.

Once the primary is finished, even a candidate polling as much as 32% of the primary vote is denied the right to present his or

her message and candidacy on the general election ballot.

In its order dismissing the ballot access claims, the district court opined,

> "*Putting aside the issue of "party preference" and forced association*, there can be no doubt that the "top-two" aspect of I-872 would be permissible if the "primary" were renamed a "general election," and the "general election" were renamed a "runoff."
> ER 0000.

The district court's "apart from" is not unlike Tom Leherer's "Apart from that Mrs. Lincoln, how did you enjoy the play?" This district court fails to take into account that "timing is everything." Historically, a "runoff' is an election that must be held within a few weeks, prior to the expiration of the incumbent's term. Since, by definition, a runoff comes *following* a hotly contested general election, voter interest is at its peak.

The court's analogy fails because, under I-872, the primary election is held in mid-August, when voter interest is minimal, and the general election is held in early November. When minor party candidates with constitutionally significant voter appeal are denied access to the general election ballot, their candidacies and their message are unconstitutionally marginalized.

Under I-872, minor parties and independent candidates are "kept off the [general] election ballot and thus denied an equal

opportunity to win votes…." [*Williams v. Rhodes*, *supra,* at 31] Consider if I-872 had been in effect in the period between 1852 and 1868. [Election results are reported *supra.*] Virtually, none of the parties that struggled to present their issues to the public would have seen the light of day in a general election. Today's Republican Party would still be a footnote in history because it would have been denied "the time and opportunity" to meet "reasonable requirements for ballot position,…." *Williams v. Rhodes*, *supra* at 32**.**

This denial of ballot access under I-872 is unconstitutional.

C. **TRADEMARK CLAIMS**.

> CHIEF JUSTICE ROBERTS: I didn't suggest it would be a trademark violation. I think I said it was just like the same analysis. And I don't know why you would give greater protection to the makers of products than you give to people in the political process.
>
> MR. McKENNA[17]: They deserve protection, of course, Mr. Chief Justice ...
>
> Oral Argument Tr., p. 27, lines 13-22.

In its opinion, the Supreme Court stated:

---

[17] Mr. Robert McKenna, Attorney General for the State of Washington, represented the State of Washington at oral argument before the United States Supreme Court at oral argument.

> 11. Respondent Libertarian Party of Washington argues that I-872 is unconstitutional because of its implications for ballot access, trademark protection of party names, and campaign finance. We do not consider the ballot access and trademark arguments as they were not addressed below and are not encompassed by the question on which we granted certiorari:….
>
> *Grange*, fn 11.

On remand, this Court ordered the district court:

> The district court may allow the parties to further develop the record with respect to the claims that Initiative 872 unconstitutionally constrains access to the ballot and appropriates the political parties' trademarks,….
>
> *Washington State Republican Party v. Washington, supra.*

In its opinion, the district court held:

> The Court finds that Plaintiffs failed to properly allege trademark violations under federal or state law and that any claims they have subsequently argued are without merit. Accordingly, the Court GRANTS Defendants' motion to dismiss any trademark violations.
>
> ER, 00074.

The district court failed to allow any of the parties to supplement their pleadings with regard to the claims of trademark violations that were specifically reserved by the Supreme Court and this Court.

…

…

1. **The District Court Erred By Failing To Allow The Libertarian Party An Opportunity To Amend Its Complaint To Supplement Its Allegations Regarding Its Trademark Claims When No Prejudice To The Party-Opponents Existed.** .[18]

The Libertarians' original complaint alleged:

> 20. I-872 deprives the LP of its proprietary right to the use of the party name, thus leading to voter confusion regarding which candidate(s) are speaking for the party and which are imposters or renegades appropriating the party name for their own purposes. The name "Libertarian Party" is a nationally trademarked name and therefore may be used by candidates only with LP consent.
>
> LER, Tab 1, p. 8.

In its opposition to the motion to dismiss,[19] the Libertarian Party stated:

> The Libertarians only recently obtained new counsel. The party is preparing a First Amended Complaint based on the issues presently before the Court and reflecting the changes in the parties' respective positions since the original complaint was filed. Similar motions are already pending by the other plaintiffs.
>
> LER, Tab 7, p. 7, fn 3.

The district court's dismissal without permitting the parties to amend was particularly inappropriate in an order that allowed the Appellants to amend their complaints on other issues. As the district court recognized in its own order:

---

[18] See footnote 2, *supra.*

[19] The opposition to the motions to dismiss was filed 14 days after present counsel appeared in the case.

> "The policy of allowing amendments is to be applied with extreme liberality." *Waldrip v. Hall*, 548 F. 3d 729, 732 (9th Cir. 2008) (internal quotation omitted).
>
> ER, 00075.

2. **The District Court Erred In Finding That The Plaintiffs Could Not Obtain Relief Against The Defendant State Of Washington.**

The district court based its dismissal in significant part on its determination that trademark protections do not "extend[] federal trademark regulation to state ballots." However, this statement by the district court is made without citation to supporting authority or rationale for limitation.

The district court recognized that trademark protection had been extended to political organizations in *United We Stand America, Inc. v. United We Stand America New York, Inc. ("United We Stand")*, 128 F. 3d 86, 89–90 [2d. Cir. 1997] but failed to offer any basis for distinguishing *United We Stand* from the present situation. This is at odds with existing case law.

Other federal courts, including the Ninth Ciruit, have followed *United We Stand*. See *American Family Life Ins. Co.* v. *Hagan*, 266 F. Supp. 2d 682, 694 [N.D. Ohio 2002]; *Tomei* v. *Finely*, 512 F. Supp. 695 [N.D. Ill. 1981]; *Brach Van Houten Holding, Inc. v. Save Brach's Coalition For Chicago*, 856 F. Supp. 472, 475-76 [N.D. Ill. 1994] [soliciting donations, preparing press releases, holding public

meetings and press conferences, and organizing on behalf of its members' interests was performing "services" within the meaning of the Lanham Act]; and *Committee for Idaho's High Desert v. Yost*, 881 F. Supp. 1457, 1470-71 (D. Idaho 1995), *aff'd*, 92 F. 3d 814 [9th Cir. 1996][non-profit organization engaged in dissemination of information about environmental causes via news releases, newsletters, and public advocacy entitled to Lanham Act protection even if it did not "place products into the stream of commerce."]

United We Stand has also been cited with approval in this Circuit. See *Bosley Medical Institute v. Kremer*, 403 F. 3d 672, 679 [9th Cir., 2005].

Moreover, contrary to the opinion of the district court, the Lanham Act specifically provides for action against a state. Section 43(a) of the Lanham Act, 15 U. S. C. § 1125[a], enacted in 1946, created a private right of action against "[a]ny person" who uses false descriptions or makes false representations in commerce. § 43(a) has been amended to define "any person" as follows:

> (2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.
>
> 15 U.S.C., § 1125(a)(20)

Thus, there is no basis for the district court to conclude that a "any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" is not subject to federal protection simply because it is made by a state official or on a printed ballot.

3. **The District Court Failed To Consider The *Sleekcraft* Factors In Evaluating The Trademark Rights Of The Libertarian Party.**

In *AMF Inc. v. Sleekcraft Boats*, 599 F. 2d 341 [9th Cir., 1979], this Court considered a non-exhaustive set of eight factors to evaluate trademark confusion:

> In determining whether confusion between related goods is likely, the following factors are relevant: [11]
> 1. strength of the mark;
> 2. proximity of the goods;
> 3. similarity of the marks;
> 4. evidence of actual confusion;
> 5. marketing channels used;
> 6. type of goods and the degree of care likely to be exercised by the purchaser;
> 7. defendant's intent in selecting the mark; and
> 8. likelihood of expansion of the product lines.
>
> [11] The list is not exhaustive. Other variables may come into play depending on the particular facts presented. [Citation omitted.]
>
> *Id.*, at 348.

In *Brookfield Communications, Inc. v. Westcoast Entertainment Corp.*, 174 F. 3d 1036 [9th Cir., 1999], this Court applied

the *Sleekcraft* factors in the context of an internet claim. The language of the opinion offers insight in this case:

> …(1) the virtual identity of marks, (2) the relatedness of plaintiff's and defendant's goods, and (3) the simultaneous use of the Web as a marketing channel.… [W]e conclude that these three Sleekcraft factors are the most important in this case and accordingly commence our analysis by examining these factors first.
>
> *Id.*, at 1054.

Likewise, these three factors mark the most significant factors in analyzing the effect of trademark violations in the political context:

[1] Identity of marks. Where a candidate states that he or she "prefers" the Libertarian Party [or the Republican or Democratic parties], they are using the *exact* name that is protected.

[2] Relatedness of Goods. The "goods" involved here are identical—the candidate who expresses a preference seeks to capitalize on the ideals and political position of the Libertarian Party. Where the marks are identical and they are used to describe the same goods, likelihood of confusion follows "as a matter of course." *Brookfield, supra,* at 1056.

[3] The Marketing Channel. Here, the interloper holds the strongest advantage. He or she is allowed to co-opt the protected trademark while the owner of the trademark is denied any

opportunity in the same forum [the ballot] to deny the theft of political message.

In analyzing this last factor, one must consider a hypothetical ballot where the Libertarian Party is allowed to announce its nominee and other candidates are allowed to state "Libertarian" as a "preference." Having these competing claims on the same ballot would unquestionably create voter [consumer] confusion because the conflicting messages would appear in competition on the same page. *Brookfield, supra*, at 1057. In fact, "many forms" of confusion may result. *Id.* Once we realize the effect of having the Libertarian's trademark competing on the same page, we cannot avoid the conclusion that allowing an interloper to use the trademark when the Libertarians are even denied rebuttal must violate the trademark rights of the Libertarian Party.

4. **The District Court Erred Failing To Consider The Property Interest Of The Libertarian Party In Its Trademark Rights**.

The property interest of the Libertarian Party in its name is recognized as protected under Washington law. See *Most Worshipful Prince Hall Lodge of Wash. v. Most Worshipful Universal Grand Lodge, A.F.& A.M.*, 381 P. 2d 130, 62 Wn. 2d 28 [Wash., 1963], the court held:

> … the LaFollette[20] case … show[s] the value which this court has placed upon the right to the exclusive use of an established name.
>
> *Id.*, at 44.

In its dismissal, the district court completely failed to address the issue of the Libertarian Party's fundamental property rights in its trademark. LER, Tab 5, pp. 25-28 contains a copy of the Libertarian Party trademark.

D. CLAIMS RELATING TO ATTORNEYS FEES.[21]

1. The District Court Erred, Applying Washington's "Context" Rule For Construing Contracts, Because It Misunderstood The Critical Language Of The Compromise Fee Agreement & Stipulation.

The State defendants entered into an agreement to settle on the issue of appellate attorneys fees. The agreement was confirmed by a stipulation filed with this Court. The State gained the full financial benefit of the discount that they negotiated. The State would never permit the Plaintiffs to come back after a Supreme Court decision and claim that, somehow, they were entitled to an increased fee because the Supreme Court had affirmed the Ninth Circuit. Of

---

20 The court here refers to *State Ex Rel. LaFollette v. Hinkle*, 229 P. 2d 317, 131 Wn. 86, 93 [1924].

21 The Libertarian Appellants adopt the Republican Party's arguments with respect to the Appellants' right to previously awarded attorneys fees. [See Republicans' Opening Brief, § VIII(F).]

course not, because the parties each made an agreement to place one aspect of this litigation *beyond further dispute, by stipulation.*

The district court focused its determination on the language of the last sentence of the stipulation. The language relied upon by the district court is, "[n]o waiver is intended of any claims for further proceedings in the appeal or in any other aspect of the case . . . ." (*Id.*) Contrary to the opinion of the district court, on its face, the language has the opposite meaning. The words are "any *claims for further* proceedings in the appeal…." [Emphasis added.]

In other words, the parties were agreeing that claims for proceedings *after* the stipulation were not waived. This was not a reservation of the right to *reopen* the agreement evidenced by the stipulation. When the language is analyzed carefully, reference to the extrinsic evidence supporting this interpretation is not necessary.

At the time of the stipulation the only thing the parties knew for sure was that there would be no rehearing in the Ninth Circuit because the time to file had expired. It was reasonable for the parties to agree to put aside this aspect of the litigation without prejudice to either side's right to claim fees or costs in a *different aspect* of the litigation.

…

2. **Even Under the District Court's Reasoning, Reversal of the Fee Award Was Premature Because Substantial Aspects of this Case Remain To Be Decided.**

The State Defendants obtained the reversal of the decision of the Court of Appeals but they did not obtain a dismissal of the case. Therefore, the State cannot not claim "prevailing party" status. At best, the decision in the Supreme Court was an interim step in the resolution of this case. If Plaintiffs are successful in their as-applied challenge, they will have "prevailed on a significant issue in the litigation and have obtained…the relief they sought." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 793 [1989] Thus, the Appellants would still be "'prevailing parties' within the meaning of § 1988. *Id.* See also *Hensley v. Eckerhart,* 461 U.S. 424, 433 [1983]. Since determination of "prevailing party" status must await the conclusion of the litigation, it was premature to reverse the fee award and set aside the stipulation.

3. **The Libertarian Appellants are entitled to fees on appeal under 42 U.S.C. § 1988.**[22]

If they prevail, Appellants are presumptively entitled to

---

[22] The Libertarian Appellants adopt without further elaboration the Republican and Democratic Parties' arguments with respect to the Appellants' right to attorneys fees. [See Republicans' Brief, § VIIIG and Democrats' Brief, § V.]

costs, including reasonable attorneys fees under 42 U.S.C. §1988 for violations of the Civil Rights Act. *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1285 [9th Cir. 2004]. Accordingly, the Appellants request that the Court award their reasonable attorneys' fees on appeal.

VIII.
CONCLUSION

This Court should rule that I-872 is unconstitutional and invalid for the reasons stated above. Alternatively, this Court should overturn the summary judgment and should remand the case for trial.

Further, this Court should overturn the vacation of the fee settlement agreement and award the Appellants fees on appeal.

Dated at Woodburn, Oregon, this 21st day of June, 2011.

ORRIN L. GROVER, P.C.
/s/ Orrin L. Grover
ORRIN L. GROVER,
OSB NO. 78010
Attorney for Plaintiff Intervenors
LIBERTARIAN LP OF WASHINGTON STATE, RUTH BENNETT, and J. S. MILLS
Email: orrin@orringrover.com

STATEMENT OF RELATED CASE

Pursuant to Ninth Circuit Rule of Appellate Procedure 28-2.6, Plaintiffs/Appellants, by and through their undersigned counsel, hereby state that there are two related cases to the instant appeal each captioned *Washington State Republican Party, et al. v. Washington State Grange, et al.*, whose Ninth Circuit cause numbers are 11-35122 and 11-35123, and which are currently pending in this Court.

Dated at Woodburn, Oregon, this 21st day of June, 2011.

ORRIN L. GROVER, P.C.
/s/ Orrin L. Grover
ORRIN L. GROVER

CORPORATE DISCLOSURE STATEMENT

The Appellant, Libertarian Party of Washington, is a Washington corporation. There is no parent corporation or corporate stockholder.

Dated at Woodburn, Oregon, this 21st day of June, 2011.

ORRIN L. GROVER, P.C.
/s/ Orrin L. Grover
ORRIN L. GROVER

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit rule 32-1, the attached Brief of Plaintiff/Appellant is proportionally spaced, has a serif typeface of 14 points or more and contains not more than 13,000 words, including both text and footnotes, and excluding this Certificate of Compliance, the Table of Contents, the Table of Authorities, the Statement of Related Cases, and the Certificate of Service.

Dated at Woodburn, Oregon, this 21st day of June, 2011.

ORRIN L. GROVER, P.C.
/s/ Orrin L. Grover
ORRIN L. GROVER

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2011, I caused to be electronically filed the foregoing Appellants' Opening Brief with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

ORRIN L. GROVER, P.C.
/s/ Orrin L. Grover
ORRIN L. GROVER, OSB NO. 78010

Attorney for Plaintiff Intervenors LIBERTARIAN LP OF WASHINGTON STATE, RUTH BENNETT, and J. S. MILLS
Email: orrin@orringrover.com