Hon. John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors, vs. STATE OF WASHINGTON, et al., Defendant Intervenors, WASHINGTON STATE GRANGE, et al., Defendant Intervenors.	NO. CV05-0927-JCC OPPOSITION TO STATE AND GRANGE MOTIONS TO DISMISS

I. INTRODUCTION

The Court should deny the motions by the State and Grange to dismiss the Washington State Republican Party's complaint ("Complaint"). Both motions disregard the Republican Party's as-applied challenge to Initiative 872 ("I-872"). Notwithstanding clear statements from

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the courts that the as-applied challenge has not been addressed, defendants boldly assert that it has been resolved. This Court's 2005 ruling expressly stated that it did not address the as-applied challenge. *See* Order at 13, n.13 (Dkt. 87). The sole question presented to the Supreme Court in the petition for *certiorari* was the facial invalidity of I-872. The Supreme Court, likewise, expressly noted that it addressed only the question presented in the Petition. *See Wash. State Grange v. Wash. State Republican Party,* 128 S. Ct. 1189, 1195 n.11 (2008).

The State's 2008 implementation of I-872 violated core First Amendment rights of the Republican Party, as would have the implementation that was underway in 2005. The First Amendment violations include enabling rival party voters to select Republican party officers, mandating the content of political speech about false-flag candidates and restricting the Party's ability to communicate with its members about its nominees. As applied, I-872 violates fundamental associational rights because neither the press, the public, nor even State officials drew any real world distinction between candidates on the ballot who had been nominated by the Republican Party and carried its name and those who were not nominated but carried the Party's name anyway.

Developments since the original filing of the Complaint give rise to additional claims. In *Wash. Citizens Action v. State*, 162 Wn. 2d 142, 171 P.3d 486 (2007) (" *WCA*"), the Washington State Supreme Court ruled that an initiative that failed to disclose accurately the statutes it affected is void under Washington's Constitution. In light of the Ninth Circuit's order on remand, there is no question I-872 repealed multiple provisions of Washington law which were not disclosed in the text of the initiative. I-872 falls squarely within the prohibition announced by *WCA* and is invalid under Washington's Constitution. The State has continued to find new statutes that were impliedly repealed by I-872.[1]

In 2006, the State re-enacted the minor party convention statutes that the Ninth Circuit

[1] In April, the Washington State Republican Party sought to amend its Complaint to add this claim. The Motion was denied without prejudice because a Mandate had not yet issued. This claim is included in the Motion to Amend filed last week.

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found had been impliedly repealed in 2004 by I-872. The re-enactment of those statutes raises the equal protection claims for the Republican Party because State law again extends differential protections to minor parties.

II. FACTUAL BACKGROUND

In 2003, the Ninth Circuit declared Washington's blanket primary unconstitutional because it interfered with fundamental First Amendment rights of political parties and their members. *See Democratic Party v. Reed*, 343 F. 3d 1198 (9th Cir. 2003). After failing to obtain enactment of a "top two" primary by the legislature, the Grange launched its campaign for I-872.[2] In November 2004, I-872 passed. Under I-872's modified blanket primary, only the top two vote-getting candidates advance, rather than one candidate from each of the major political parties, along with candidates from Washington's minor political parties.

I-872 authorizes any candidate to state a "preference" for the Republican Party and the State prints that preference on ballots distributed to the voters. As implemented, a candidate's expressed "preference" must be repeated by any person who engages in political communications during the election campaign. Under the State's 2005 implementation, there was to be no change in the appearance in ballots distributed to voters. Candidates' "party preference" would be included on the ballot after their names in the same manner as the candidates' party "designation" had previously been included. The only change to the ballot form regulation was to substitute the term "party preference or independent status" for political party designation. The new regulation stated:

> If the position is a partisan position, the party preference or independent status if each candidate shall be listed next to the candidate. The party preference must be listed exactly as provided by the candidate on the declaration of candidacy ....

WAC 434-230-170 (as amended).

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[2] The Grange filed I-872 with the office of the Secretary of State in January 2004, before it began its lobbying effort with the legislature. As a result, the initiative no longer reflected Washington law after the legislature adopted a replacement for the unconstitutional blanket primary. Despite its knowledge that the initiative did not accurately reflect Washington law that it purported to amend, the Grange presented I-872 to voters for signature and ultimate passage.

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I-872 permits all voters, regardless of party affiliation, to vote in all primary elections. The State's implementation of I-872 does not provide for separate ballots for Republican voters so that only Republicans participate in selecting Republican office holders, standard-bearers and Republican Party officers.

The State adopted its regulations to implement I-872 on May 18, 2005. On May 19, 2005, the Republican Party brought this action challenging I-872, both facially and as implemented by the state and local elections officials. The Republican Party exists to promote a particular set of political beliefs and to elect public officials who will govern according to the Party's philosophy. *See* Complaint at 4:2-5. The Complaint alleged that "the State seeks to *appropriate* the use of the Republican Party's name in primaries and general elections." *Id*. at 2:20-21 (emphasis added). The Complaint alleged irreparable injury from "dilution and potential suppression" of the Republican message. *See id*. at 6:23-25.

III. ARGUMENT

A. The Republican Party's as-applied challenge to I-872 has always been part of this case, and remains unresolved.

The Complaint alleged that:

> [t]he Initiative, *as implemented by State and local officials*, eliminates mechanisms previously enacted by the state to protect [the First Amendment rights of the Party and its adherents] and provides no effective substitute mechanisms for the Party and its adherents to protect their rights of association and of determining the Party's message.

Complaint at 3:5-8 (emphasis added). It further alleged that I-872 was "intended to establish a *de facto* blanket primary," *id*. at 6:9, and that "[t]he Defendants intend to administer the State's partisan primary in a manner that denies the Party the right to nominate its candidates and control the use of its name." *Id.* at 7:17-18.

In its Answer to the Complaint, the State sought affirmative relief that its conduct of elections under I-872 passed constitutional muster. *See* State Answer at 8 (Dkt. 23). The Grange also specifically addressed the as-applied element of the Complaint in its Answer, asserting that despite the State's then-ongoing implementation efforts the as-applied challenge

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was premature. *See* Grange Answer at 9 (Dkt. 38).

The cross-motions for summary judgment addressed only the plaintiffs' facial challenge:[3]

> The Court has previously directed the parties to limit their briefs to plaintiffs' facial challenge of Initiative 872. The Court reserved issues related to plaintiffs' as-applied challenge.

Order at 13, n.13 (Dkt. 87).

The Supreme Court's decision dealt with the facial challenge and only the specific matters encompassed within the question posed in the petition for *certiorari*. The Court expressly noted that it was not addressing ballot access or trademark issues. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1195 n.11 (2008). "In the ordinary course we do not decide questions neither raised nor resolved below. As a general rule, furthermore, we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." *Glover v. United States*, 531 U.S. 198, 205 (2001) (internal citations omitted).

In directing dismissal of only the *facial* associational rights claims, the Ninth Circuit did not direct dismissal of the as-applied challenges. *See* State Mot. to Dismiss, App. A (Dkt. 133). The Ninth Circuit recognizes the difference between facial and as-applied challenges. In *Alaskan Indep. Party v. Alaska* , No. 07-35186, 2008 U.S. App. Lexis 21007 (9th Cir. October 6, 2008) (case name amended by 2008 U.S. App. Lexis 21978), the court noted that the Supreme Court decision in *Wash. State Grange v. Wash. State Republican Party* did not resolve as-applied challenges, but that the Alaskan Independence Party had failed to bring an as-applied challenge in its case.[4] *Id.* at *15-16.

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[3] The State's representation that the stipulation of legal issues represented a pre-trial order that eliminated the as-applied challenge from the case is contradicted by this Court's Order on Preliminary Injunction.

[4] Two members of the panel in *Alaskan Independence Party* were also panel members in this case.

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B. The State's 2008 implementation of I-872 violated the First Amendment.

On April 24, 2008, the State adopted its first installment of new regulations implementing I-872, which further demonstrate that the State has little interest in respecting constitutionally-protected rights or even the express language of I-872. Chief Justice Roberts noted that "the history of the challenged law suggests the State is not particularly interested in devising ballots that meet . . . constitutional requirements." 128 S. Ct. at 1197 (Roberts, C.J., concurring).[5]

1. The State's implementation allows unaffiliated and rival party voters to elect Republican party officers, contrary to established First Amendment precedent.

The Chief Justice's skepticism of the State's interest in devising a constitutional ballot design was well-placed. The ballot used in 2008 enabled rival party and unaffiliated voters to select Republican party officers, in violation of Supreme Court and Ninth Circuit precedent.

The Republican Party has a strong First Amendment interest in the selection of its party officers. "Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989). RCW 29A.80.041 requires that candidates for the "office of [Republican precinct committee] officer" ("PCO") submit a declaration of candidacy and be a member of the Republican Party. To be elected, the PCO candidate must receive the most votes cast and "at least ten percent of the number of votes cast for the candidate of the candidate's party receiving the greatest number of votes in the precinct." RCW 29A.80.051.

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[5] The State, through the emergency regulations promulgated in May 2008, selects among later-enacted statutes, giving effect to some provisions, and disregarding others. *See, e.g.,* White Decl. in Support of Mot. to Amend Complaint ("White Decl."), Exs. 3 & 5 (WAC 434-208-110 gives effect to later law when dates conflict, but the regulations fail to give effect to 2006 Sess. Law, Ch. 344 requiring "nominating primary" in August and authorizing minor parties and independents to nominate candidates directly to the general election) (Dkt. 139). The regulations disregard later statutes that are inconsistent with its planned implementation of I-872.

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Under its implementation of I-872, the State disregarded the statute's ten percent requirement, and permitted candidates to run for the position without declaring their party membership. PCO candidates appear on the same consolidated primary ballot as other candidates in the primary election, not a separate party ballot. The State permits any voter regardless of political affiliation to cast votes for Republican PCOs and also permits write-in candidates. *See* RCW 29A.04.206(3) (voters possess "[t]he right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate."); WAC 434-230-100; WAC 434-262-075.

Washington's primary ballot is functionally identical to the ballot at issue in *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003). "The district court correctly held that allowing nonmembers to vote for party precinct committeemen violates the Libertarian Party's associational rights. Precinct committeemen are important party leaders . . . ." *Id.* at 1281. Republican PCOs in Washington are also important party leaders. They have a state constitutional role in nominating replacements for elected officials of the Republican Party whose offices become vacant. *See* WA. CONST. art. II, sec. 15. Republican PCOs make up the County Central Committee which, in turn, elects the State Committee. The State Committee is vested with the power to:

> (1) Call conventions at such time and place and under such circumstances and for such purposes as the call to convention designates. The manner, number, and procedure for selection of state convention delegates is subject to the committee's rules and regulations duly adopted;
>
> (2) Provide for the election of delegates to national conventions;
>
> (3) Fill vacancies on the ticket for any federal or state office to be voted on by the electors of more than one county;
>
> (4) Provide for the nomination of presidential electors; and
>
> (5) Perform all functions inherent in such an organization.

RCW 29A.80.020. The State can demonstrate no compelling interest in permitting non-

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Republicans to vote for party leaders or to receive votes as write-in candidates for party office.

2. The 2008 implementation violated other First Amendment protections.

As it implemented I-872 in 2008, the State equated "party preference" and "party affiliation." WAC 390-05-274.

The State's implementation of I-872 included the application of campaign advertising statutes. The State requires that Party political advertising critical of candidates who have misappropriated the Republican name still refer to them by the Republican name. *See* WAC 390-18-020(1). This State regulation of the content of Republican Party political communications violates the First Amendment.

Another implementing regulation, made effective approximately a week before the 2008 August primary, provided:

> RCW 29A.80.051 includes a requirement that, to be declared elected, a candidate for precinct committee officer must receive at least ten percent of the number of votes cast for a candidate of the same party who received the most votes in the precinct. This requirement for election is not in effect because *candidates for public office do not represent a political party*.

WAC 434-262-075(2) (emphasis added). The regulation *denies* the affiliation of Republican nominees for public office. Republican nominees who appear on the ballot *do* represent the party, even if their representative status might not be officially reflected on the ballot. This regulation is consistent with 2005 statements by elections officials that there was not "any language associated with the Initiative that contemplates a partisan nomination process separate from the primary." *See* White Decl. in Support of Mot. for Prelim. Inj., Ex. 8 (county auditor letters) (Dkt. 8). As applied, the State denies that Republican nominees are candidates "of the party."

Last year, Washington specified the form of the primary election ballot. *See* White Decl., Ex. 4 (RCW 29A.04.008 (as amended by Ch. 38, Laws of 2007)) (Dkt. 139). The

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State's application of I-872 this year ignored this later-enacted statute that provided protection for the right to associate.

The Complaint alleged that I-872 was "intended to establish a *de facto* blanket primary." Complaint at 6:9. The Republican Party is entitled to introduce evidence to show that the press, the public, and even State officials charged with implementing I-872 viewed candidates' expression of "party preference" in 2008 as creating an affiliation with the Republican Party, just as did prior primary systems.

C. The Party's trademark-type claims were neither resolved by the Supreme Court nor waived by the Party.

The Supreme Court expressly disclaimed addressing any question beyond the facial validity of I-872. The Court noted that whether voters would interpret party-preference designations as reflecting endorsement by the parties could not be resolved without an "evidentiary record against which to assess their assertions that voters will be confused." 128 S. Ct. at 1193-94. The Complaint, as originally filed, alleged the State's appropriation of the Republican Party's name. *See* Complaint at 2:20. The effect of both the statute and the rules implementing the statute is a change in the Republican Party's positions and what it stands for. *See id*. at 6:13-17. The Grange responded to the claim of trademark, tradename and equitable protection of the Republican Party's rights to its name by asserting affirmative defenses. *See* Grange Answer at 10:1-7 (Dkt. 37). The trademark-like nature of the Republican Party's claims was specifically discussed by the Chief Justice at oral argument. *See Wash. State Grange v. Wash. State Republican Party*, Tr. Oral Argument at 26-27, www.supremecourtus. gov/oral_arguments/argument_transcripts/06-713.pdf

Washington law protects the Republican Party's well-known name from unauthorized use and dilution by the State. Under Washington law, the owner of a "famous" mark is protected from dilution of the mark and may obtain injunctive relief to prohibit its

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unauthorized use. *See* RCW 19.77.160. "'Trademark' or 'mark' means . . . any word, name, symbol, or device, or any combination thereof, and any title, designation, slogan, character name, and distinctive feature of radio or television programs, used by a person in the sale or advertising of services to identify the services provided by him or her and to distinguish them from the services of others." RCW 19.77.010(10). Dilution

> means the lessening of the capacity of a famous mark to identify and distinguish goods or services through use of a mark by another person, regardless of the presence or absence of (a) competition between the owner of the famous mark and other parties, or (b) likelihood of confusion, mistake, or deception arising from that use.

RCW 19.77.010(6). The State's appropriation of the Republican mark means that the Republican name on the ballot will become less distinctive, as it may be used by anyone regardless of connection with the Party or its principles.

There can be no question that the term "Republican" is a famous mark associated with the Republican Party, its candidates and principles.

> It is a matter of common knowledge that in campaigns at general elections such terms as "Democrat", "Democrats" and "Democratic" have been used for such a length of time as to render their beginnings almost in "time out of memory" to connote the Democratic Party, its members and candidates. The same observation is equally true of "Republican", "Republicans" and the "Republican Party".

Chambers v. Greenman Ass'n, 58 N.Y.S.2d 637, 641, *aff'd*, 269 App. Div. 938 (1945).

> The name Republican is the distinguishing mark of the party which carries that appellation and the right to the use of the party name and emblem must be preserved to the exclusive use of candidates of that party.

Plonski v. Flynn, 35 Misc. 2d 863, 865, 222 N.Y.S.2d 542 (1961). The State has appropriated the mark "Republican" as well as the traditional nicknames and symbols of the Republican Party. State law requires the Republican Party name be used in all political advertising that refers to any candidate who expresses a "preference" for the Party. *See* RCW 42.17.510. In

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implementing I-872, the State's guidance on political advertising provides that "[o]fficial symbols or logos adopted by the state committee of the party may be used in lieu of other identification" by candidates on political communications, fundraising, billboards, radio and television advertising. *See* Pub. Discl. Comm'n, Political Advertising, July 2008, http://www.pdc.wa.gov/archive/guide/brochures/pdf/2008/2008.Bro.Adv.pdf. Under Washington law, dilution of the Republican mark may be enjoined, whether or not there is confusion.

There can also be no doubt that dilution of the Republican Party name and the potential for confusion are integral parts of this case and have not been waived. Judge Zilly noted,

> The right to select the candidate that will appear on the ballot is important to political parties that invest substantial money and effort in developing a party name. Party name and affiliation communicate meaningful political information to the electorate. . . .
>
> The Court is persuaded by Plaintiffs' arguments that allowing any candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates.

Order at 29-30 (Dkt. 87).

State and federal law also provide protection to nonprofit and political groups where unauthorized use will cause confusion. Federal courts recognize that nonprofit organization are entitled to protection of their names and symbols from competitors, and that political organizations render services "in commerce." *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F. 3d 86 (2nd Cir. 1997). The Second Circuit protected United We Stand under federal trademark law because the organization "engaged in political organizing; established and equipped an office; solicited politicians to run on [the] organization's slate; issued press releases intended to support particular candidates and causes; endorsed candidates; and distributed partisan political literature." *Id*. at 90. Just as United We Stand was engaged in those activities, so too was the Republican Party. *See*, *e.g.*, Complaint at 4:2-7.

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Washington law clearly protects nonprofit organizations from misappropriation of their names and symbols. *See Most Worshipful Prince Hall Grand Lodge of Wash. v. The Most Worshipful Universal Grand Lodge*, 62 Wn. 2d 28, 381 P. 2d 130 (1963). It is state law that requires the printing of the Republican Party name in conjunction with candidates who have appropriated it without authorization. *See* WAC 434-230-045. The State publishes a Voters' Pamphlet that requires the publication of a candidate's expression of "political party preference." RCW 29A.32.032. The test for protection under Washington law is whether "an established . . . 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." *Most Worshipful Prince Hall Grand Lodge* , 62 Wn.2d at 35.[6] The Defendants are aware of the claim, and the Party should be permitted to prove a claim that is a recognized part of this case.[7] If the Court determines that federal and state trademark matters are not clearly before it, the Republican Party requests leave to amend to expressly invoke the Lanham Act and similar state statutes.

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[6] Again, the State suggests to the Court that this action is only a facial challenge. *See* State Mot. at 15:3 (Dkt. 133). The allegation of appropriation of the parties' names and symbols is sufficient to state a claim of violation of Washington and federal protections for the names and symbols of nonprofit organizations.

[7] The factual allegations in the complaint as originally filed, which prompted the Grange to deny that statutory, common law or equitable trademark protection applied (and assert affirmative defenses) should be sufficient under the Federal Rules to survive a motion to dismiss. *See*, *e.g.*, *Mansoor v. Air Fr. KLM Airlines*, No. 08CV0828 JM(RBB), 2008 U.S. Dist. LEXIS 86916 (S.D. Cal. October 27, 2008) (test is whether defendant can file an answer and conduct discovery). "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The Second Circuit in *United We Stand* and the Washington Supreme Court in *Prince Hall* make clear that there is a cognizable legal theory for relief from both confusing use of the Republican Party name and dilution of the name. Even if the allegations were inadequate, the Court should permit amendment in the absence of prejudice to the opposing party. *See Wyshak v. City Nat'l Bank*, 607 F.2d 824, 826 (9th Cir. 1979).

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D. The Supreme Court did not resolve ballot access issues on an as-applied basis.

The State admits that ballot access was clearly raised in the Republican Complaint along with those of the Democratic and Libertarian Parties and was part of the briefing on the facial challenge to I-872. *See* State Mot. to Dismiss at 5:22-6:5 (Dkt. 133). Plaintiffs' complaint raised I-872's *operational* denial of ballot access to the Republican Party where its vote may be split by multiple candidates. *See* Complaint at 7:2-8. This Court did not address ballot access on an as-applied basis. Whether I-872 functionally erects unreasonable ballot access thresholds has not been addressed by any court.[8]

E. I-872 violates the Washington State Constitution as authoritatively interpreted by the Washington Supreme Court in *Washington Citizens Action v. State*.

While this Court's proceedings were stayed pending appeal, Washington's Supreme Court issued a decision addressing the validity of an initiative that, like I-872, did not accurately reproduce the law in effect at the time the initiative was presented to voters for approval or rejection. On November 8, 2007, Washington's Supreme Court decided *Wash. Citizens Action v. State*, 162 Wn.2d 142, 171 P.3d 486 (2007). The court held that Initiative 747 violated Article II, Section 37 of the state constitution because at the time of the *vote* on the initiative, the text of the initiative did not accurately set forth the law it sought to amend.[9] Here, the text of the initiative did not accurately set forth the law from the moment the Grange began seeking signatures. *See* White Decl., Ex. 6 (Dkt. 139). The Grange proceeded with inaccurate language in the initiative notwithstanding notice that the text of the initiative was

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[8] With respect to minor party candidates, the Court may take judicial notice of the 2008 ballot. No minor party candidates for statewide office appeared on the 2008 general election ballot or for any federal office other than president. *See* 2008 Election Results *Lttp://vote.wa.gov/Elections/WEI* (state and federal Executive tabs). *Cf.* 2004 Election Results http://www.secstate.wa.gov/elections/previous_elections.aspx (2004 General Election and subsidiary pages) (last visited December 8, 2008).

[9] The Ninth Circuit's determination that substantial portions of Washington election law were impliedly, rather than explicitly, repealed by I-872 is law of the case.

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defective. *See id.*, Ex. 2. As in *WCA*, the "proponents could have filed a new initiative" that accurately reproduced the law it was amending. 162 Wn.2d at 158. The literature to promote I-872 made representations to voters that are expressly contrary to the State and Grange's arguments to this Court and the Ninth Circuit that I-872 repealed minor party nomination rights. *See* White Decl. in Support of Mot. for Prelim. Inj., Ex. 3 ("Would this proposal eliminate minor party candidates from the primary or general election ballot? No. Minor parties would continue to select candidates the same way they do under the blanket primary.")

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny the State and Grange motions to dismiss.

DATED this 8th day of December, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2008, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James Kendrick Pharris

Richard Dale Shepard

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/s/ John J. White, Jr.
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