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Ms. Maureen Hart
Solicitor General
Washington State Office of the Attorney General
1125 Washington Street SE
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Re: Response to your July 11th Letter

Dear Ms. Hart:

Thank you for your letter of July 11, 2008.

It appears that you and your clients have misunderstood my letter and my prior communications with the State about the injunction. Neither I nor the Washington State Democratic Party asked the State to cancel the August 19th primary election. We only request that election officials (1) obey the law by complying with federal court orders no matter how much they might personally prefer to use another primary system, (2) accept only candidate filings authorized by our State's effective election laws, (3) count votes as authorized by these same laws, and (4) certify to the general election ballot only those qualified to advance under these same laws

Your letter asserts that practical difficulties that Secretary of State Reed might now encounter were he to comply with Judge Zilly's injunction make it impossible to comply. If there are substantial practical difficulties, they are only the result of Secretary Reed's actions in making the decision months ago to use emergency powers to attempt to hastily implement a wholly new primary system and while simultaneously deciding to ignore the necessary step of asking the court to modify the pending injunction to permit his actions, despite having ample time and opportunity to do so.

Failure to seek modification of an injunction is not an excuse for failure to comply with the injunction. As I'm sure you know, F.R.C.P. 62(a) unambiguously states that an injunction entered by a District Court is not automatically stayed pending appeal. Moreover, as the 9th Circuit's July 3, 2008 order makes clear, there are still issues to be reviewed and resolved in the pending appeal. The Federal Rules also specify that any opinion of the 9th Circuit vacating Judge Zilly's injunction, if any ever issues, is effective when the mandate of the 9th Circuit issues. FED.R.APP.P. 41. No mandate from the 9th Circuit (or the Supreme

Court for that matter) to Judge Zilly has ever issued, as Judge Zilly's July 9, 2008 order unmistakably implies.

Based on your letter and Secretary Reed's public statements this past week, the Secretary's theory is that a Supreme Court opinion which (1) intentionally did not purport to address all the issues pending in the case on appeal, (2) issued no instructions to the District Court, and (3) which did not direct that the injunction be vacated, nevertheless converts the injunction into a mere "technicality." Among the flaws in the Secretary's theory is the unsupported assumption that the only legal basis on which I-872 could have been enjoined is the singular issue reviewed by the Supreme Court in its March 18 opinion.

The Supreme Court's opinion only instructed the reversal of the 9th Circuit's finding that the First Amendment does not require enjoining I-872 based on the political parties' facial challenge to the Initiative. That is not the same thing as saying that the District Court's injunction is not supportable on any basis. The Supreme Court did not foreclose the possibility that the 9th Circuit, on remand, might uphold the District Court on a basis not addressed in the Supreme Court opinion. There is no dispute that the 9th Circuit can uphold the District Court's injunction on any basis supported by the record, irrespective of whether the District Court itself relied on the basis. *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983, 1003 (9th Cir. 2005). The Court of Appeals may yet affirm the permanent injunction or its continuance as a preliminary injunction pending trial of the remaining issues.

The rhetoric of his press releases aside, Secretary Reed cannot seriously contend that the existing litigation was complete when the Supreme Court issued its mandate on April 21, 2008. The Secretary participated in the status conference held with the District Court shortly after it issued its July 15, 2005 decision. The Secretary is well aware that the District Court indicated that all issues in the case had not been addressed by its summary judgment order. Indeed, in response to a request by the Republican Party at that time that the Court specifically indicate whether it was resolving all issues if it intended to do so, the Court did not terminate proceedings in the District Court. Instead the District Court's August 12, 2005 Supplemental Order stayed the litigation pending completion of the 9th Circuit appeal and reconfirmed that its review of I-872 had not yet reached additional issues that might lead to a declaration of unconstitutionality. And, as you know, the District Court additionally reserved the parties' as applied challenges in note 13 of its July 15, 2005 order.

The 9th Circuit's recent order seeking supplemental briefing is certainly not the first time this year that State officials were made aware that this litigation and appeal are ongoing. In addition to any other notice the State may have received, I know that I personally advised the Secretary's office of our view that the injunction remained in force on March 26, 2008 in a conference call. I reiterated this view both at an April 16 election law seminar, examining the implications of the Supreme Court's opinion on I-872 alongside senior officials of his office as panelists and again on April 22 in a letter to the Secretary providing comments on the emergency regulations proposed by the Secretary to implement I-872. In that letter, I explicitly informed the State of its imprudence in proceeding with a hastily constructed implementation of I-872 without waiting to see what, if any, modifications the District Court

made in its injunction.

We agree that the *United Mine Workers* case requires election officials to obey an injunction that is in effect even if the injunction is determined to be erroneous. The case recognizes that:

> An injunction duly issuing out of a court of general jurisdiction with equity powers...must be obeyed...however erroneous the action of the court may be.... [U]ntil its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected and disobedience of them is contempt of its lawful authority to be punished.

United States v United States Mine Workers, 330 U.S. 258, 293,294 (1947). Your letter pointed to the partial phrase "reversed for error by orderly review." The meaning of "*orderly*" review, when read in context, seems clear: a review that is complete, final and resulting in appropriate orders. It does not bless any partial or incomplete review. The requirement that the decision of the issuing court—the District Court in this instance—be "reversed" seems equally clear: the injunction at issue, not the limited review by another court of the judgment associated with that injunction, must be reversed. Neither the Supreme Court nor the 9th Circuit has issued any order in this case vacating the District Court's injunction or reversing Judge Zilly's decision to grant an injunction.

Very truly yours,

K&L GATES LLP

By
David T. McDonald

cc: John J. White
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