The Honorable 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,

v.

STATE OF WASHINGTON, et al.,

Defendant-Intervenors,

WASHINGTON STATE GRANGE,

Defendant-Intervenor.

NO. CV05-0927-JCC

STATE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PREVIOUSLY NOTED ON MOTION CALENDAR FOR SEPTEMBER 17, 2010

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I. INTRODUCTION

This is the reply of the State of Washington, Defendant-Intervenor, in support of the State's Motion for Summary Judgment in this matter (St. SJ Mot.) (Dkt. 239), and in reply to the Memoranda in Opposition to the State's Motion filed by the Washington Democratic Central Committee (Dem. Opp.) (Dkt. 257), the Washington State Republican Party (Rep. Opp.) (Dkt. 260), and the Libertarian Party of Washington State (Lib. Opp.) (Dkt. 272). In further support of its Motion, the State offers the points raised in this Memorandum, in the attached Declaration of Jeffrey T. Even, and in the exhibits attached to the Declaration.

II. ARGUMENT

A. Applying The Objective Standard Set Forth In The State's Motion, I-872 Is Constitutional As Implemented By The State

As discussed in the State's Motion (pp. 5-9), the central question before the court is: have the plaintiff political parties shown that state actions implementing I-872 substantially misled or confused reasonable informed voters in such a way as to severely impair the First Amendment rights of the political parties? The State urged the Court to adopt an objective standard when considering this question: "whether a reasonable, informed voter will be confused between (a) a candidate who has expressed a preference for a given political party in filing for partisan public office and (b) a candidate who has been officially nominated by, or endorsed by, or authorized to speak on behalf of that political party." St. SJ Mot. at 10. None of the political parties have challenged the application of an objective standard in evaluating the constitutionality of the State's implementation of I-872, or offered any argument why a different standard should be applied. Instead, as discussed below, the three political parties all seek to obscure the application of that objective standard by pointing to alleged facts or legal arguments that miss the point: (1) They refer to "confusion" that does not suggest a reasonable, informed voter would be unable to distinguish between a candidate expressing a preference for a party and a candidate nominated by that party; (2) They refer to "confusion"

that is at most anecdotal, not widespread; (3) They refer to "confusion" not attributable to the State's implementation of I-872; (4) They offer meager evidence that the "confusion" they posit has a severe negative effect on the political parties' First Amendment rights; and (5) In a time-honored ploy, they improperly try to shift the burden of proof to the State.

None of the arguments offered by the political parties change the basic analysis here: the State has implemented I-872 in a manner consistent with the Supreme Court opinion in *Washington State Grange v. Washington State Republican Party ("Grange")*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). *See* State's Motion at pp. 5-9 and the declaration and exhibits submitted in the support of Motion.[1] None of the parties point out any significant difference between the implementation steps set forth in the majority and concurring *Grange* opinions, and the steps actually taken by the State in implementing I-872. The *Grange* Court described a manner of constitutionally implementing I-872. This Court would err if it dismissed that description as meaningless chatter, not intended to be of any relevance in the future course of the litigation.

B. The Court Should Not Adopt Standards Taken From The Law Of Trademark

The Democratic Party suggests that in applying an objective standard, the Court might borrow principles from the law of trademark, and specifically suggests a series of factors called the *"Sleekcraft* factors." Dem. Opp. at 18-20. This appears to be at least an indirect effort to revive the trademark claims this Court has ruled are not properly part of the case. In the Court's Order of August 20, 2009, the Court observed that "the State's expression of

[1] The Democratic Party belittles the State's education efforts in implementing I-872 as "modest" and offers false comparisons of the State's expenditures with the amounts spent on campaigns for major public office. Dem. Opp. at 9; *but see* Declaration of Blinn, ¶¶ 7-11 (describing extensive voter education campaign). None of the political parties, however, challenge the accuracy of the State's description of its ongoing efforts to properly implement I-872, nor do any of them offer plausible evidence that a different education program, or an expenditure of additional public funds, would resolve the "confusion" issues they see with respect to the administration of the Top Two primary. The implication of their position is that no amount of education would be sufficient to cure the constitutional problems they assert.

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candidates' party preference on the ballot and in the voter pamphlets may not form the basis of a federal or state trademark violation." August 20 Order (Dkt. 184) at 17.

Just as there is no cognizable claim of trademark infringement in this case, neither should the court apply principles from the law of trademark to the unrelated field of First Amendment analysis. The law of trademark was developed to protect the proprietary rights of private parties from improper commercial uses, and has been extended to nonprofit and political groups to only a limited extent. *See, United We Stand America, Inc. v. United We Stand America New York, Inc.*, 128 F.3d 86 (2d. Cir. 1997).

Moreover, there are striking differences between the facts of this case and the traditional commercial context of a trademark infringement action:

- The names of the political parties, especially highly generic terms such as "democratic" and "republican," terms used in the general political discourse of the nation since its founding, are in all likelihood not subject to trademark by specific party organizations.
- The State is not itself appropriating or using the parties' names, but is merely accommodating the desires of individual candidates to express a party preference.
- The State is not appropriating the parties' names with the end of commercial gain or for the purpose of depriving anyone of income or of lawful property rights.

The standard in this case is widespread confusion among reasonable informed voters as to whether a stated party preference implies party nominee status, not merely general "confusion" about the precise relationship between a candidate and a political party. The "*Sleekcraft* factors" offered by the Democratic Party are either irrelevant or misleading as applied to this case, and should not be adopted.

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C. The Political Parties Have Not Met Their Burden Of Proving The Type Or Extent Of Voter Confusion That Would Justify Invalidating I-872

Although the parties do not object to the use of an objective standard in theory, their position appears to be that the Court should make its determination based on subjective evidence.[2] Subjective evidence should not be allowed to obfuscate the issue before this Court or to subvert the Supreme Court's clear direction regarding the standard of proof in this case. This Court should give such evidence no more weight than it warrants under the objective, reasonable informed voter standard that applies here.

The political parties necessarily bear a higher burden than merely proving that some voters are confused. Their burden is, more precisely, to demonstrate "that a *well-informed electorate* will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange,* 552 U.S. at 454. Moreover, that confusion must be "widespread." *Id.* at 456. Crucially, it is insufficient for the political parties to show that some voters may conclude that a candidate expressing a preference for a political party has thereby "associated" or "affiliated" with that party. To be relevant, the evidence must concern voter confusion about the party's attitude toward the candidate, not about the candidate's attitude toward the party. The political parties must also prove that they are harmed by that confusion. *Id.* at 458.

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[2] If such evidence were the appropriate basis for deciding this matter, then it could no longer be resolved on summary judgment. As demonstrated by the exhibits accompanying this Reply, if subjective evidence such as that relied upon by the parties is relevant, there are material facts at issue, rendering summary judgment in favor of the political parties inappropriate.

By contrast, under the State's theory, summary judgment should be granted in favor of the state because the Court's determination is based simply on how a reasonable, informed voter would perceive the undisputable evidence—the ballot and other state-issued voting materials. Chief Justice Roberts contemplated just that, saying:

> [i]f 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.

Grange, 552 U.S. at 460 (Roberts, C.J., concurring).

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1. Evidence is relevant only if it concerns confusion as to whether a candidate's statement of party preference means that the party endorses or nominates the candidate.

The testimony of the political parties' own officials, however, demonstrates that voters understand the distinction between a "preference" and a nomination. Officials of both major parties described as "confusion" incidents in which voters asked whether candidates who expressed a preference for the party was the party's nominee. In other words, they described, as indicators of confusion, conversations in which the voter clearly understood that a candidate's "preference" does not necessarily mean that the party has affiliated with that candidate. *See, e.g.*, Esser Decl., ¶ 7 (describing conversations with voters questioning whether party preference means party approval of a candidate); *See also,* Even Decl Ex. L (Ravens Dep. at 45:18-22) (voters asking "who is the Democrat in this race?"); *Id.*, Ex. G (Brady Dep. at 36:7-15) (voters asking which candidate is the party nominee); *Id.* Ex. H (Simpson Dep. at 12:17-22) (voters asking "do you recognize this person as a Republican"); *Id.*, Ex. H (Simpson Dep. at 17:1-9). Such questions would not arise unless voters understood precisely the point about which the parties claim voters are confused. Voters demonstrate their understanding of the distinction between a candidate's preference for a political party and the political party's decision to nominate the candidate when they ask questions such as those described by the political parties' officials. Similarly, no questions fielded by the Secretary of State regarding the Top Two primary in 2010 revealed confusion among voters regarding whether the candidates' statements of party preference meant that they were party nominees. *Id*., Ex. U.

Likewise, irrelevant to the Court's inquiry is evidence that some voters and some news media speak loosely about the relationship between political parties and candidates. All three political parties ask the Court to assume that press stories or anecdotes describing candidates as "Democrats" or "Republicans" are evidence of confusion between candidates actually nominated or approved by the parties, and candidates who have merely expressed a party

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preference. Dem. Opp. at 6-8; Rep. Opp. at 3-6; Lib. Opp. at 9 and 11-12.[3] Such practices may more reasonably be attributable to mere shorthand by people who are under no obligation to be legally precise. More notably, the political parties have not shown that, in any of the examples upon which they rely, the candidates were *not* members of or associated with the party, so the labels may have been used accurately.

The parties also offer "expert" testimony about the existence of confusion. The Parties cite a study conducted by Dr. Mathew Manweller, an expert retained by the Republican Party and a local party officer, purporting to show that some voters did not understand the difference between "Candidate prefers *N* Party" and "Candidate is the nominee of *N* Party." Dem. Opp. at 10; Rep. Opp. at 7-11. However, the State's retained expert, Dr. Todd Donovan, has filed a report showing numerous problems with the methodology and concluding that the results of the Manweller report are unreliable. Decl. of Even, Exs B & C.[4,5]

2. Evidence of voter confusion is relevant only if the confusion is attributable to the State's implementation of I-872.

In addition to relying on imprecise notions of "voter confusion," the political parties forget that the only "confusion" that is relevant to this proceeding is confusion resulting from the State's implementation of I-872. All three parties refer to news stories, blogs, and other material not produced by the State or subject to State control. Dem. Opp. at 6-8, Rep. Opp. at 3-6; Lib. Opp. at 9. Aside from the points raised above as to whether these items are really

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[3] The news media also publish material that accurately describes how the Top Two primary works, and properly informs the voters of the distinction between expressing a party preference and being the party's nominee. Decl. of Even, Exs. M through T.

[4] The Republican Party has attempted to rehabilitate Dr. Manweller's findings through a declaration of Dr. John Orbell (Rep. Opp. at 10-11) on the methodology of social science experimentation. Dr. Orbell was identified as an expert witness at 5:01 PM on Thursday, September 16, eight days after he signed his declaration in this matter and 35 days after the State disclosed the reports of Dr. Donovan to the plaintiffs. His declaration should be considered in light of the fact that the State and Grange have had no opportunity to question Dr. Orbell or analyze his findings.

[5] The political parties also rely upon a "focus group" study performed by Elway Research as evidence of voter confusion. Rep. Opp. at 6-7; Dem. Opp. at 9. The Elway report was commissioned as one step in the State's due diligence as to ballot design. It does not support the political parties' theory of "widespread" voter confusion. *Grange* 552 U.S. at 456. It was never intended to qualify as expert testimony in this proceeding.

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evidence of widespread "confusion" in the sense required, they are certainly not evidence of confusion caused by the State's implementation of I-872.[6]

The State's expert has documented that "confusion about matters of politics is common and widespread regardless of the political phenomena being considered." Even Decl., Ex. C at 4 (Report of Todd Donovan, PhD). Consequently, if all that were required in order to challenge the constitutionality of an electoral system was a demonstration of some level of confusion, every system for conducting elections would be vulnerable to attack. *See Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) ("there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process").

The State is not responsible for that background confusion, nor does it shoulder the constitutional burden of eliminating it in order to justify the adoption of a Top Two primary system. The issue before the Court is not whether confusion exists, but whether that confusion was produced by the specific steps taken by the State in implementing I-872.

3. The political parties offer no convincing evidence that their First Amendment rights have been severely harmed by the manner in which I-872 has been implemented.

The political parties also offer no convincing evidence that they have been severely harmed. They fail to show a causal connection between state implementation and the harm they claim to have suffered. And what harm they describe is not severe enough to trigger constitutional concerns.

The Democratic Party concentrates on an argument that the Party is "harmed" because its chosen nominees do not always advance to the general election. Dem. Opp. at 11-14.[7] This amounts to a restatement of the "facial invalidity" contention that primaries should be about

[6] The political parties nowhere assert, nor could they plausibly, that the State has somehow fostered and directed the "confusion" alleged to be present in the media, nor can they show that "correcting" the media's deficiencies is somehow part of the State's constitutional obligation in implementing I-872.

[7] The Democratic Party fails to mention that in many (probably most) races on the ballot, the Democratic Party nominee does advance to the general election ballot.

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nominating party candidates, and that a system that does not accomplish this purpose violates the rights of the parties. This was precisely the argument rejected in *Grange*. If a nominated party candidate fails to advance, the obvious reason is that the candidate in question did not garner enough public support to place first or second in votes in the primary. It is naïve or presumptuous to suggest that voters would advance the "wrong" candidate only because they are confused about which candidate is the "right" one. As *Grange* establishes, the Top Two primary leaves parties with their full panoply of associational rights, which does not include the right to a place on the general election ballot.

The Republican Party devotes no briefing to showing severe harm, except for its contention that the State's implementation of campaign reporting requirements interferes with the party's ability to communicate with its members. Rep. Opp. at 19-20. This misplaced argument is discussed in section D3 below. The Republican Party also filed declarations describing various ways in which the Top Two primary has caused inconvenience, or forced the Party to change how it operates. Decl. of Brady, ¶ 6; Decl. of Simpson, ¶¶ 5-7. These amount to a contention that "we liked the old system better" and hardly show a severe impact on constitutional rights.[8]

4. Any tension between the language of I-872 and the language of other Washington statutes would not be a legitimate basis for invalidating I-872.

The political parties attempt to make hay out of the existence, alongside I-872, of other Washington statutes enacted before the establishment of the Top Two system, statutes which sometimes must be administered in such a way as to harmonize with the election system

[8] The Libertarian Party asserts, without extensive discussion, that the Top Two primary "encourages party misidentification and raiding" and that the Top Two primary denies access by minor parties and independents to the general election ballot. Lib. Opp. at 14-15. These are "facial challenge" arguments and have already been decided by *Grange* and other cases. Moreover, the Declaration of Richard Winger, offered in support of the Libertarians' arguments, refers only to incidents of alleged party "raiding" occurring in systems other than the Top Two primary. Decl. of Winger, *passim*. If such incidents occurred in states with more traditional partisan primaries, they cannot suggest that the Top Two primary could be the unique cause of such events.

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established in I-872. The parties attempt to turn these vestigial statutes into roadblocks preventing the proper implementation of the Top Two primary.

The Democratic Party attempts to create a conflict between I-872 and the language of Wash. Rev. Code § 29A.36.121(3), which defines the ballot format and provides that "the political party or independent candidacy of each candidate for partisan office shall be indicated next to the names of the candidate on the primary and election ballot." Dem. Opp. at 4-6. The Democratic Party first seeks to inflate the importance of this innocuous language into a strong historic principle that favors showing the "party affiliation" of all candidates for partisan office on the ballot. They then criticize the Secretary of State for adjusting the language on the ballot to conform to the "party preference" language used in I-872. In fact, the State's current practice provides the voters with all of the information required by both § 29A.36.121(3) and I-872, easily harmonizing the two.

The Democratic Party attempts to set up another false conflict by quibbling about the definition of the term "partisan office." Dem. Opp. at 3-4. The Party quotes a definition of the term from a publication of a federal agency and then appears to argue that this definition either supersedes state law or somehow creates hopeless confusion among Washington voters. *Id.* In fact, I-872 expressly defines the term "partisan office." In Washington, "partisan office" means "a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." Wash. Rev. Code § 29A.04.110. Reasonably informed voters will understand that this definition applies whenever the term "partisan office" is used in Washington law, not some alternate definition provided elsewhere.

The Republican Party contends that the State's implementation of I-872 expressly equates "party preference" and "party affiliation". Rep. Opp. at 16-17. To the contrary, the administrative rule to which they refer simply provides that the term "party affiliation" as used in campaign finance laws means the candidate's self-identified party preference. *Id.* The cited

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rule, accordingly, says nothing about what "party preference" means in the context of the Top Two primary; it merely explains what "party affiliation" means in a different context.

D. The Political Parties' Remaining Arguments Lack Merit, and Neither Support Any Ruling In Their Favor Nor Preclude Summary Judgment In Favor Of The State

The political parties offer four additional arguments that require only brief mention in this reply.

1. With regard to the political parties' arguments about elections of precinct committee officers, the Republican Party is incorrect in attributing to the State the view that I-872 impliedly repealed Wash. Rev. Code § 29A.80.051, or that the Secretary of State did so by administrative rule. Rather, the cited statute no longer has any factual predicate upon which it can operate. *See* State's Response to Democratic Party's Mot. For PSJ (Dkt. 255) at 3.

2. The Democratic and Republican Parties have offered no reason why their arguments regarding sponsorship disclosure justify any remedy beyond addressing the straightforward cause of what they claim to be voter confusion, as opposed to setting aside I-872 in its entirety. *See* State's Mot for SJ (Dkt. 239) at 12-16.

3. The Republican Party mischaracterizes state law when contending that the state regulates the manner in which it communicates with its members. Rep. Opp. at 19-20. Moreover, to the extent their claims are based upon a pending state court lawsuit, their arguments should be made there, and not in federal court. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 669 n.4 (9th Cir. 2004) (federal courts generally refrain from interfering with a pending state court proceeding).

4. Finally, the Libertarian Party contends that the pending motion presents the issue of whether minor political parties are denied access to the general election ballot. This Court has already rejected the Libertarians' claim, holding that it lacks merit as a matter of law. Order at 15 (August 20, 2009) (Dkt. 184).

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III. CONCLUSION

For these reasons, and for the reasons expressed in the State's Motion for Summary Judgment, the Court should grant the State's Motion for Summary Judgment.

DATED this 17th day of September, 2010.

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed State's Reply in Support of Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Executed this 17th day of September, 2010, at Olympia, Washington.

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