No. 11-1263

In The Supreme Court of the United States

WASHINGTON STATE
DEMOCRATIC CENTRAL COMMITTEE,

Petitioner,

v.

WASHINGTON STATE GRANGE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY OF WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION AND STATUTES

REGULATIONS

TABLE OF AUTHORITIES – Continued

REPLY

I. Washington Rewrites *Grange*.

This Court held in *Washington State Republican Party* v. *Washington State Grange*, 552 U.S. 442, 456 (2008) ("*Grange*") that Initiative 872 was facially constitutional because it could conceivably be implemented to "eliminate the possibility" of widespread voter confusion. Washington asserts that *Grange's* holding goes much further, directing lower courts to assume top two partisan systems created by making cosmetic changes to existing partisan systems are devoid of any risk to First Amendment rights arising from ongoing use of party labels. Thus, in Washington's view, it need not demonstrate that it has eliminated the risk of voter misperception that *Grange* acknowledged exists in such cosmetically changed systems; in light of *Grange*, risk must be assumed to have been eliminated. According to Washington, *Grange* decided – in the absence of any evidence and in advance of implementation – that generally incorporating some features in an I-872 implementation guarantees that voters would not draw an erroneous conclusion from Washington's use of political party names after candidate names on its ballots, irrespective of other election procedures, voter expectations and distractions.

Washington is wrong. *Grange*, a facial challenge, did not disagree with the Ninth Circuit's conclusion that a ballot clearly stating that a candidate "prefers" a party did too little to eliminate the risk of voter

confusion. *See id.* at 455-56; *Wash. State Democratic Party* v. *Washington*, 460 F.3d 1108, 1119 (9th Cir. 2006). Rather, the Court determined, based on self-described speculation, that Washington might be able to cure the constitutional problem presented by legislatively changing the meaning of party labels that have an existing and widely shared meaning. *See Grange*, 552 U.S. at 455-56 ("As long as we are speculating about the form of the ballot – and we can do no more than speculate in this facial challenge . . . ."). Washington reads *Grange* to make context, history, and public confusion irrelevant to any as-applied constitutional query because (in its speculation) the Court wholly accounted for these factors and determined, without evidence, that they would have no impact of voter understanding of the new usages.

In short, Washington treats *Grange* as an as-applied decision, but plainly it is not. *Grange* resolved a facial challenge, and there are limits to its control of subsequent cases. *See Chicanos Por La Causa, Inc.* v. *Napolitano*, 558 F.3d 856, 861 (9th Cir. 2009) (upholding statute on facial challenge but noting "[i]f and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision"), *aff'd sub nom. Chamber of Commerce of the U.S.* v. *Whiting*, 131 S. Ct. 1968 (2011).

Grange offered Washington an opportunity to take demonstrably effective action, nothing more. *Grange* required Washington to eliminate the risk of

confusion, not merely to assume the efficacy of hypothetical tools deployed in the midst of real world confusion. Washington rewrites *Grange* to require lower courts to assume Washington's I-872 implementation eliminates the risk of confusion. On the contrary, *Grange* pointed out that an empirically debatable assumption "'is too thin a reed to support a credible First Amendment distinction' between permissible and impermissible burdens on association." *Grange*, 552 U.S. at 457 (quoting *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 600 (2000) (Stevens, J., dissenting)). Faced as it was with experimental findings that Washington's ballots lead to voter misperception, numerous uncontradicted media articles and elected officials' statements reflecting ongoing confusion, and numerous elections so close that even modest confusion would change the outcomes, *see* App. 14-17, the Ninth Circuit did not correctly apply the principles of *Grange* and *Jones* to require proof from Washington. Instead it adopted Washington's assumption that risk was eliminated. Its summary judgment upholding the implementation was erroneous.

Washington would also rewrite *Grange* to foreclose rational basis review of its implementation. According to Washington, *Grange* decided that all implementations of top two systems automatically pass rational basis review simply because voters think party preference is important. *See* Br. in Opp'n 15. It is true that party labels on ballots are important drivers of votes, but that fact does not justify their misuse. It amplifies the risk that votes will be

changed because of false or misleading associations and the integrity of elections undermined. Rational basis review in an as-applied challenge should go beyond merely identifying Washington's justification and should instead examine whether Washington's implementation is reasonable taking account of all circumstances, including steps it reasonably could have taken to mitigate risk but did not. Justice Breyer described this kind of inquiry in content-regulation cases as a "proportionality" review. *United States* v. *Alvarez*, No. 11-210, slip op. at 9 (June 28, 2012) (Breyer, J., concurring). This case is not about content regulation, but Justice Breyer's logic is equally applicable to the "reasonableness" prong of the rational basis inquiry in other types of First Amendment cases. *Grange* did not predetermine the outcome of rational basis review. The Ninth Circuit should have considered more than the relevance of party preference information to voters in determining that Washington's I-872 implementation passed rational basis review.

II. The Decision Below Turned On An Empirically Debatable Assumption That Washington's Disclaimer Is Effective.

Washington does not dispute that the Ninth Circuit simply assumed Washington's disclaimer was read and wholly effective. Instead, it argues that the Democratic Party erroneously focuses on the disclaimer and that the Ninth Circuit's decision was based on more than the disclaimer. Br. in Opp'n 23

(citing App. 12-13).[1] But the pages Washington cites show that the lower court's analysis is essentially limited to the manner of the designation of party preference on the ballot ("(Prefers Republican Party)") and the disclaimer.

The Ninth Circuit stated that Voters' Pamphlets and ballot inserts also include the disclaimer. App. 13. But Washington does not produce Voters' Pamphlets before primaries and estimates that more than 75% of voters do not read any part of the general election Voters' Pamphlet. *See* Pet. 28. There is no evidence of the extent to which the disclaimer on the ballot inserts is read by voters.[2] The Ninth Circuit also referred to the fact that Washington had conducted an advertising campaign in 2008. App. 10. The 2008 advertising campaign was modest: only $773,000 statewide (including consultant's fees). *See* U.S. Dist. Ct. Dkt. No. 258-3 at 39. The campaign was conducted

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[1] Elsewhere Respondents point to the similar discussion in the District Court opinion, but the District Court's approach was not materially different from the Ninth Circuit's. More importantly, the Ninth Circuit review was *de novo*. *See* App. 12. Unlike the district court opinion, the Ninth Circuit opinion has precedential effect in the states of Arizona and California.

[2] Washington's regulations used to require that the disclaimer notice be enclosed on an entirely separate insert for the primary election. *See* Wash. Admin. Code § 434-250-040(1)(j),(k) (repealed Jan. 6, 2012). This regulation has been repealed, although a separate regulation provides that the disclaimer must appear alongside the other information contained on the ballot instructions insert. *See* Wash. Admin. Code § 434-230-015(3)(j), (k).

in the cacophony of an open-seat Presidential election year in which statewide offices, congressional offices, and local legislative offices were also contested. Over $46,000,000 was spent on Washington's 2008 statewide and congressional campaigns alone. *See id.* at 43-45. There is no evidence that Washington's advertising campaign about the nuanced change in the meaning of party labels on ballots had any ongoing effect.

The Ninth Circuit's analysis focused on the ballot form. Any such analysis necessarily turns on an analysis of whether the disclaimer in fact eliminates the risk of confusion. Washington's ballot form is virtually the same ballot design that, without a disclaimer, has been found to create for voters the impression of an association between candidates and parties.

Washington's ballots do not use the wording suggested in *Grange* ("my party preference is the Republican Party."). Instead, the ballots designate preference in the manner the Ninth Circuit assumed in its 2006 opinion ("clearly state that a particular candidate 'prefers' a particular party") and that it found resulted in an unconstitutional risk of confusion. *See Wash. State Democratic Party*, 460 F.3d at 1119. Chief Justice Roberts also suggested that a ballot that "merely lists the candidates' preferred parties next to the candidates' names" would be constitutionally deficient. *See Grange*, 552 U.S. at 461 (Roberts, C.J., concurring). Whether or not the ballot

design eliminates confusion, then, comes down to the effect of the disclaimer.

The record leaves far from clear whether voters read, or understand, the disclaimer. Washington conducted a focus group in 2008 to test the clarity of its disclaimer language. After reading language similar to what Washington now uses, less than half of group participants said they found the language clear or very clear. Ninth Cir. Appellants' Excerpts of Record ("ER") 243 (Item 14). Thirty-six percent found it confusing, very confusing or somewhat confusing. *Id.* The remaining 16% found it somewhat clear. *Id.* The focus group did not measure comprehension, only perceived clarity. Washington subsequently changed the disclaimer and placed it on the ballot without further testing. ER 1011.

Even for voters who found the disclaimer clearly written, the record provides no indication whether the disclaimer would decrease or increase the risk of voter confusion. After all, Washington voters had just been told by Washington in 2004 and 2006 to declare their "party affiliation" by disclosing their "party preference" on their ballot. *See* Pet. 18-19; App. 130. Washington described its proposed I-872 implementation to its advertising consultant in 2008 as one in which candidates' "party affiliation" would appear after their name on the ballot. Pet. 18-19.

The Ninth Circuit conceded that the experiment by Mathew Manweller, utilizing Washington's ballot design including the disclaimer, "*suggest[ed] voter*

confusion," but called it irrelevant because the disclaimer was placed in a different portion of the ballot and Manweller did not provide Voters' Pamphlets and ballot inserts. *See* Pet. 33; App. 14-15 (emphasis added). Washington provided no evidence that relocating the disclaimer made any difference to its effectiveness.

A quick comparison suggests the disclaimer was *more* likely to be seen and read on Manweller's sample ballots than on Washington's actual ballot. *Compare* App. 132, 133 (Manweller sample ballots) *with* App. 126 (official primary ballot containing much smaller disclaimer in proportion to the ballot). Washington's disclaimers are not dramatically large, as suggested by the Grange's brief in opposition, nor are they highlighted by arresting imagery such as Washington used in prior years to draw voter attention to the need to declare a party affiliation/preference. *Compare* Br. in Opp'n 5 *with* App. 126, 130.

If the disclaimer upon which the Ninth Circuit decision rests is not read by most voters or when read has no impact, it does not even mitigate, much less eliminate, the risk of voter confusion.

The Court in *Grange* likely assumed that Washington would "be providing lots of other information on the ballot to make it very clear what the expression 'party preference' means" based on Washington's representations to the Court. *See* Transcript of Oral Argument at 50:5-8, *Grange*, 552 U.S. 442 (2008). But

in the end, Washington delivered little beyond the disclaimer. It ignored the Court's suggestion that preference be designated in the form "my party preference is the Republican Party." *See Grange*, 552 U.S. at 456. Instead Washington used the impersonal "(Prefers Republican Party)" descriptive format, as the Ninth Circuit had originally assumed it would. The focus is now on the effectiveness of Washington's disclaimer because that is the only substantial change Washington made to the ballot contemplated by the Ninth Circuit's decision in 2006.

In the absence of evidence from Washington showing the disclaimer actually, not presumptively, eliminates confusion, it was error for the Ninth Circuit to simply assume that relocating the disclaimer eliminated all risk of confusion and to affirm summary judgment.

With the issue squarely presented, and a full record, this case presents an ideal vehicle for this Court to resolve the Democratic Party's first question presented.

III. The Principles Used To Determine The Factual Issue Of Likelihood Of Confusion Do Not Need To Be Reinvented.

This case requires determination of a narrow factual question: the likelihood of voter confusion about association, given the manner in which political party names are used on the ballots. The factual question – likelihood of confusion about approval or

association – resembles the factual question – likelihood of confusion about approval or source that is routinely addressed in trademark infringement cases. Respondents argue that the well-developed framework used by federal courts to evaluate the factual question of likelihood of confusion in trademark cases should have no relevance to determining the same fact in constitutional cases.

Contrary to Respondents' argument, trademark law is designed to address issues very similar to those at stake here. The purposes of trademark law are to protect the public "so that it may be confident that in purchasing a product bearing a particular trademark which it favorably knows it will get the product which it asks for and wants to get" and to protect the owner from misappropriation of the energy, time and money spent in presenting the product to the public. *See In re Canadian Pac. Ltd.*, 754 F.2d 992, 994 (Fed. Cir. 1985) (quoting S. Rep. No. 1333, at 3 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274). The framework for evaluating likelihood of confusion should not be substantially different here than in trademark cases just because the issues now arise in the context of voters and ballots rather than soup cans and grocery shoppers.

Courts in trademark cases have learned to be skeptical of an automatic assumption that a disclaimer prevents confusion. Respondents have not pointed to a single case that gives a trademark disclaimer the "magic bullet" status they seek to give Washington's ballot disclaimer. No such treatment of their ballot

disclaimer is warranted. Certiorari should be granted on the Democratic Party's second question.

IV. The Ninth Circuit's Cursory Rational Basis Review Merits A Second Look.

Washington argues that rational basis review of its I-872 implementation was waived during the Ninth Circuit portion of this appeal. This argument is without merit. The Democratic Party challenged the constitutionality of the I-872 implementation in its opening Ninth Circuit brief and laid out its injury for the court to evaluate, asserting it to be a severe burden warranting strict scrutiny. Washington argued in response that its implementation imposed only a modest burden on associational rights and that constitutionality should be evaluated under the lesser rational basis test. It argued that I-872 passed such review. In reply, the Democratic Party reaffirmed its belief that the burden was severe and disputed Washington's unsupported claim that its implementation passed even the rational basis test. The Ninth Circuit upheld Washington's implementation *by applying the very standard Washington argues was waived*, and the court did not find the issue to have been waived by either side. *See* App. 17; *see also Lilly* v. *Virginia*, 527 U.S. 116, 123 (1999) (noting that court below had addressed petitioner's purportedly waived claim

without mentioning waiver).[3] The Democratic Party's third question presented is properly before this Court and should be considered on the merits.

V. The Issues Raised Are Of Substantial National Importance.

Contrary to Respondents' view, California's current system and Arizona's proposed system[4] raise the same constitutional issues as Washington's system. This is no small matter, as Arizona, California and Washington are home to an estimated 37,000,000 potential voters.[5] Perceived distinctions based on California's and Arizona's registration requirement are illusory: both measures change "registration" based on affiliation to registration based on "party preference." *See* Cal. Elec. Code § 2151(a) (permitting party registration by "the name of the political party that he or she prefers"); Az. Open Elections/Open Gov't Act, § B ("[V]oters shall be permitted to state

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[3] Washington's reliance on *Heller* v. *Doe*, 509 U.S. 312, 319 (1993), is misplaced: the *Doe* respondents argued for (i) a higher tier of scrutiny (ii) that was not requested from the appellate court and (iii) which the appellate court never considered. All three aspects do not apply here.

[4] As of late June 2012, the proponents of Arizona's new system report that they have obtained sufficient signatures to place the measure on the November 2012 ballot. *See* AzOpenGov, http://www.azopengov.org (June 29, 2012).

[5] *See* 2012 United States Census Tables, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0398.xls (June 26, 2012).

their party preference (if any) in their own words on their voter registration form. . . ."). Both publicly equate "party affiliation" and "party preference."[6] There is no reason to believe that reprinting a candidate's party preference from his or her voter registration form is materially different than reprinting it from his or her declaration of candidacy. Both present the same risk of burdening associational rights.

Moreover, Washington, California, and Arizona all require or would require ballot disclaimers, and none permit a party to object to a candidate's preference statement. The same constitutional problem raised in *Jones* and *Grange* – forced association with imposter candidates – exists in these top two systems as well.

The Ninth Circuit's decision has encouraged and will continue to encourage clones of Washington's system that lack measures to protect parties from unwanted association. The Ninth Circuit did this by applying a rule that simply assumes a disclaimer is effective – no evidence needed. *Grange* does not call for such an analysis on an as-applied challenge.

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[6] *See, e.g.*, Cal. Sec'y of State, Frequently Asked Questions ("What do party preferences mean when listed with candidates' names on the ballot? . . . The term 'party preference' is now used in place of the term 'party affiliation.' "), http://www.sos.ca.gov/elections/2012-elections/june-primary/faqs-primary-2012.htm (June 26, 2012).

Review is warranted to guide courts and legislatures in evaluating top two systems.

CONCLUSION

The Court should grant the petition.

DATED this 2nd day of July, 2012.

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