No. 11-_____

In The
Supreme Court of the United States

LIBERTARIAN PARTY OF WASHINGTON STATE,
RUTH BENNETT and J. S. MILLS,

Petitioners,

v.

WASHINGTON STATE GRANGE,
SAM REED, Secretary of State,
STATE OF WASHINGTON and ROB MCKENNA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ORRIN LEIGH GROVER, III
Counsel of Record
416 Young Street
Woodburn, Oregon 97071
(503) 981-5836
(503) 981-8680 (Fax)
orrin@orringrover.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) ("*Grange*"), this Court invited the lower court to review Washington Initiative I-872 after it was applied by the State of Washington to determine unresolved questions regarding the statute and whether the initiative, as applied, would pass constitutional muster.

This case returns to this Court again challenging the constitutional validity of the Washington State "Top Two" primary system, as applied in the elections since this Court's decision in *Grange*.

Political parties have a First Amendment right to ballot access, to announce the endorsement of their nominee and to associate with adherents of common principles. Under the First Amendment, "severe" burdens on ballot access are subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Choosing a party nominee 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 v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986). Without question, the selection of a party nominee is integral to the associational freedom of the political party. *Id.*, at 235-236 (*Scalia*, *J.*, dissenting).

As applied, under the opinion of the Ninth Circuit, Washington's "Top Two" initiative presents important

QUESTIONS PRESENTED – Continued

questions regarding the application of the precedents of this Court in judging the constitutionality of an electoral system that severs political parties from the voting process and denies minor parties any access to the general election ballot, except in the most unusual circumstances.

The questions presented are:

1. By denying minor parties, including the Libertarian Party, virtually all access to the general election ballot, does I-872 violate the constitutional rights of minor parties and voters?

2. By denying the Libertarian Party the right to disavow false candidacies or to acknowledge its nominee on the ballot or in any official publication, does I-872 violate the associational rights of the Libertarian Party?

3. By denying the Libertarian Party the right to disavow false candidacies or to acknowledge its nominee on the ballot or in any official publication, does I-872 deny the Libertarian Party trademark protection guaranteed by federal law?

4. Does the unauthorized use of the trademarked name "Libertarian Party" by the State on election ballots to indicate "party preference" of unaffiliated candidates constitute competition with the Libertarian Party in violation of the Lanham Act?

LIST OF PARTIES

The names of the Petitioners are:

Libertarian Party of the State of Washington

Ruth Bennett

John S. Mills

The names of the Concurrent Petitioners are:

Democratic Central Committee of the State of Washington

The names of the Other Plaintiffs Below are:

Washington State Republican Party

Steve Neighbors

Marcy Collins

William Michael Young

Diane Tebelius

Bertabelle Hubka

Mike Gaston

The names of the Respondents are:

Washington State Grange

Sam Reed, Secretary of State

State of Washington

Rob McKenna

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASE LAW

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

OTHER MATERIALS

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

The Libertarian Party of Washington State, Ruth Bennett and J. S. Mills respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

PREVIOUS PROCEEDINGS BEFORE THIS COURT

This case was previously before this Court and the opinion is reported at *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) ("*Grange*") (Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Stevens, Souter, Ginsburg, Breyer, and Alito, JJ., joined. Roberts, C. J., filed a concurring opinion, in which Alito, J., joined. Scalia, J., filed a dissenting opinion, in which Kennedy, J., joined.).

[1] The Petitioners here are filing concurrently with the Democratic Central Committee of the State of Washington in seeking review of the same opinion of the Ninth Circuit. Petitioners here join in the Appendix filed with the Petition filed by the Democratic Central Committee of the State of Washington and will cite thereto.

Petitioners join in the grounds asserted for certiorari in the concurrently filed Petition for Certiorari filed by the Democratic Party of Washington.

OPINIONS BELOW

The opinion of the court of appeals is reported at ___ F.3d ___ (2012) (App., pp. 1-30.) The opinion of the district court (App., pp. 31-65) granting summary judgment in favor of the Respondents and against the Petitioners is unreported.

Prior to the 2008 opinion of this Court, the lower opinions in this case are reported at *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005), and *Wash. State Republican Party v. Wash.*, 460 F.3d 1108 (9th Cir. 2006).

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2012. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).[2]

[2] Petitioners Libertarian Party of Washington State, Ruth Bennett and J. S. Mills join in the grounds asserted for certiorari in the Petition for Certiorari concurrently filed by the Democratic Central Committee of the State of Washington.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I:

"Congress shall make no law . . . abridging the freedom of speech."

U.S. Const., amend. XIV:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

15 U.S.C. §1114(1):

(1) Any person who shall, without the consent of the registrant –

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

> As used in this paragraph, the term "any person" includes the United States, all agencies and instrumentalities thereof, and all individuals, firms, corporations, or other persons acting for the United States and with the authorization and consent of the United States, and any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. The United States, all agencies and instrumentalities thereof, and all individuals, firms, corporations, other persons acting for the United States and with the authorization and consent of the United States, and 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.

STATEMENT

In 2003, this Court invalidated Washington's blanket primary as a violation of political parties' First Amendment freedom of association. *See Democratic*

Party of Wash. State v. Reed, 343 F.3d 1198, 1201 (9th Cir. 2003).

In response to that decision, the Washington State Grange proposed the People's Choice Initiative of 2004, or Initiative 872 ("I-872" or "Top Two"), as a replacement. *See Grange*, 552 U.S. at 446-447. The initiative passed and became effective in December 2004. *See id.* at 447.

I-872 created an electoral system in which the primary does not select party nominees but serves to winnow the electoral field for the general election.

In May 2005, the Washington State Republican Party, later joined by the Washington State Democratic Central Committee and the Libertarian Party of Washington State, filed suit against the state, challenging the Top Two system.

The district court granted the plaintiffs' motions for summary judgment and enjoined the implementation of I-872, *see Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 932 (W.D. Wash. 2005), and the Ninth Circuit affirmed, *see Wash. State Republican Party v. Wash.*, 460 F.3d 1108, 1125 (9th Cir. 2006).

In 2008, this Court reversed in *Grange*, *supra*. This Court determined that, *on its face*, I-872 did not severely burden the plaintiffs' associational rights. This Court remanded the case to allow the implementation of I-872 and the determination of whether the initiative was unconstitutional "as applied."

Also, important issues *not decided* by this Court in the *Grange* decision in 2008 are now ripe for resolution.

1. In 2008, this Court deferred the "ballot access" and "trademark" questions:

> 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, p. 458, n. 11.

2. Further, in *Grange*, several members of the Court expressed concerns about whether the form of the ballot and the election materials would compel association between political parties and candidates. Chief Justice Roberts expressed it most succinctly:

> . . . the history of the challenged law suggests the State is not particularly interested in devising ballots that meet [] constitutional requirements.

Grange, p. 462.

In their respective opinions, Chief Justice Roberts and Justice Scalia debate whether the "prefers" that is to be used on the ballot denotes a mere affinity, such as one for Campbell's Tomato Soup, or the unconstitutional assumption of a party mantle.

After the decision in *Grange*, this case returned to the district court. The I-872 was implemented in August 2008 and has been used in Washington elections ever since. The district court dismissed some

claims (including the Libertarian Party's trademark claims) under Rule 12(b) of the Federal Rules of Civil Procedure, and then granted summary judgment in favor of the State, holding I-872 constitutional.[3] Neither order was published.

The Plaintiffs and Plaintiff-Intervenors appealed. The Ninth Circuit affirmed the District court on all issues except an issue related to attorneys' fees. *See Wash. State Republican Party v. Wash. State Grange*, ___ F.3d ___ (2012), App., pp. 1-30.

On the ballot access issue, the Ninth Circuit summarized:

> We recognize the possibility that I-872 makes it more difficult for minor-party candidates to qualify for the general election ballot than regulations permitting a minor-party candidate to qualify for a general election ballot by filing a required number of petition signatures. This additional burden, however, is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems. *See Cal. Democratic Party v. Jones*, 530 U.S. 567,

[3] The district court did strike down the portion of I-872 dealing with "PCO's," (party precinct committee officers) but found that portion of the statutory scheme severable. App., pp. 56-64.

> 585-586 (2000). The district court therefore properly dismissed these claims.
>
> *Id.*, App., p. 21.[4]

The Ninth Circuit disposes of the Libertarian Party's trademark rights in a similar fashion:

> But it has not plausibly alleged that the *state* uses party labels on the ballot to perform a service in competition with the Libertarian Party. Nor has it even attempted to make this showing.
>
> *Id.*, App., pp. 21-22.

Of course, the essence of the use of the "prefers" label on the ballot is to inform the voter of the candidate's *claimed* affiliation. The only plausible reason for a candidate to claim Libertarian preference is to use the mantle of the party for his or her advantage.

REASONS FOR GRANTING THE PETITION

Under Rule 10(c) of this Court, the instant case presents a decision of a United States Court of Appeals on important questions of federal law that should be settled by this Court.

---

[4] In its decision, the Ninth Circuit treats the "observation" of this Court at the conclusion of *Jones*, *supra*, at 585, as a *holding* of this Court. Moreover, while openly acknowledging that minor parties' rights are burdened, the court below did not attempt to make any analysis of the severity of that burden or of the competing state interest (an "inherent feature") permitting the imposition of that burden.

I.

AS APPLIED, THE "TOP TWO" SYSTEM PRESENTS IMPORTANT QUESTIONS ABOUT THE FUTURE OF MAJOR AND MINOR POLITICAL PARTIES: THE SIGNIFICANCE OF THE "TOP TWO" SYSTEM IS RAPIDLY INCREASING

The rising importance of the "non-partisan," or "Top Two" primary system on the American political and legal scene highlights the immediacy of the issues presented to this Court.

A. The Increase in "Top Two" Jurisdictions.

The use of the "Top Two" system is spreading throughout the Western United States. California voters adopted Proposition 14 on June 8, 2010, amending multiple sections of the California Government Code to create a "Top Two" primary system.[5]

In Arizona, at this moment, a petition to adopt a "Top Two" initiative is circulating for the November 2012 ballot.[6]

---

[5] *See* Jessica A. Levinson, *Is the Party Over? Examining the Constitutionality of Proposition 14 as It Relates to Ballot Access for Minor Parties*, 44 Loy. L.A. L. Rev. 463, 466-474 (2011), available at: http://digitalcommons.lmu.edu/llr/vol44/iss2/3.

[6] *See* http://www.ballot-access.org/2012/04/14/arizona-top-two-primary-initiative-expected-to-qualify-for-ballot-this-year/ (accessed April 15, 2012).

In November 2008, a "Top Two" initiative (Proposition 65) was presented to and defeated by Oregon voters.[7]

B. There Is Substantial Pending Litigation Regarding "Top Two" Initiatives.

There are already three separate lawsuits pending in California state and federal courts that challenge California's "Top Two" initiative:

1. *Field v. Bowen* (San Francisco Superior Court Case No. CGC 10-502018, filed July 20, 2010) (petition for writ of mandate to California Supreme Court denied *sub. nom. Field v. Superior Court* (*Bowen*), No. S188436.

2. *Chamness v. Bowen* (C.D. Cal., case no. 2:2011-cv-01479 (judgment for defendants 08/23/2011); 9th Circuit Case Nos. 11-70882 (petition for writ denied 03/29/2011), 11-55534 (preliminary injunction appeal dismissed on motion by appellant 04/07/2011), and case nos. 11-56303 and 11-56449, filed 02/17/2011, currently pending.

3. *Rubin v. Bowen* (Alameda County Superior Court, case no. RG11605301, filed November 21, 2011).

---

[7] *See* http://www.ballot-access.org/2008/120108.html.

II.

POLITICAL PARTIES ARE THE CRUX OF THIS PETITION

This case centers on the importance of political parties, major and minor, in the great "experiment" of American Democracy.

Political parties are the bedrock that allows our democratic system to function. As Justice Scalia tells us, writing for the Court in *California Democratic Party v. Jones*, 530 U.S. 567 (2000):

> The formation of political parties was almost concurrent with the formation of the Republic itself. See Cunningham, The Jeffersonian Republican Party, in 1 History of U. S. Political Parties 239, 241 (A. Schlesinger ed., 1973).
>
> *Id.*, at 574.

Justice Scalia continues, describing the alliance of free ideas and voters that unite to create a political party:

> Consistent with this tradition, the Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs,. . . ."
>
> *Id.*

"Top Two" is a seesaw attempt between political parties, reform movements, the public and the courts, all struggling to compromise between the primary electoral system and the Constitution. Unfortunately,

compromises involving the rights to free speech and association are not easily forged.

In the 19th century, the shifting of political parties was a recognized feature of the landscape. The original Federalist and Democratic Party dominance gave way to the Whig/Democratic era which, in turn, gave way in 1856[8] to the Democratic/Republican parties we have today. Minor parties abounded throughout the 19th century and the early 20th century without apparent deleterious effects on the body politic.

Ballot access and party endorsement issues did not exist before the late 1880's. Prior to that time, political parties issued "tickets" that listed their candidates that were distributed to voters. During the 1880's, the United States switched over to the "Australian ballot." Under this system, still used today, the ballot is prepared at public expense and distributed by the governmental electoral offices, listing party nominees (and initiatives), and cast in secret.

---

[8] In 1856, the Republican Party ran its first presidential candidate, John Fremont, who received 33.1% of the popular vote and 114 Electoral College votes. In 1860, Abraham Lincoln was elected as the first Republican President with 39.8% of the popular vote and 180 Electoral College votes. In 1864, Lincoln was elected as the only President ever elected from the "National Union Party," and the first president elected with a majority popular vote (55%) since 1852.

When ballots were printed by electoral officers, disputes began to arise about access to and content of the ballot.

This Court has recognized that ballot access and content involve the fundamental rights to free speech and association that are frequently at odds with the governmental interest in regulation of the electoral process.

This case presents both the questions of the importance of access to the general election ballot and the right of political parties to convey their candidate selection, or nomination, to the voter at the pivotal moment of casting one's ballot.

III.

AS APPLIED, WASHINGTON'S "TOP TWO" PRIMARY SYSTEM DENIES ACCESS TO THE GENERAL ELECTION BALLOT BY CANDIDATES WHO HAVE DEMONSTRATED SIGNIFICANT VOTER SUPPORT

May unlimited access to the primary ballot constitutionally substitute for access to the general election ballot?

This Court has repeatedly pointed out that the timing of the electoral season is critical. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983):

> (A) disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few

> months before the election. (Footnote omitted.)

Id., at 792.

During oral argument in *Clingman v. Beaver*, 544 U.S. 581 (2005), Justice Kennedy emphasized the timing issue:

> JUSTICE KENNEDY: Well, even in presidential elections, most people don't get interested until or 3 weeks before the election. Everybody knows that.
>
> MR. POE: Well, Your Honor, we – this is not the presidential primaries of which we're talking about.
>
> JUSTICE KENNEDY: Well, I'm saying even in a presidential primary. If they're local races, it – it takes longer. The public just tunes out until the last last couple weeks.

Oral Argument Tr., p. 7.

In Washington, the "Top Two" primary is held in mid-August, well before the beginning of the fall "election season." In a presidential election year, for example, the primary is held before the presidential campaigns begin[9] in earnest on Labor Day. Public

[9] In 2008, the first "Top Two" primary was held before the major party nominating conventions. The primary was on August 19, 2008. The Democrat's convention was held on August 25-28, 2008 and the Republicans' convention on September 1-4, 2008.

interest in the election cycle and the issues before the voters until mid-September or later.

By its very terms, the "Top Two" primary system would deny general election ballot access to a candidate who garnered as much as 30% of the vote in a three candidate race. For example, in the Washington Legislative race for the 9th District, Glen Stockwell, a Democrat, received 24.3% (ER,[10] p. 647) of the vote but, because of the "Top Two," was denied access to the general election ballot which eliminated all but two Republican candidates.[11]

IV.

AS APPLIED, WASHINGTON'S "TOP TWO" PRIMARY SYSTEM COMPELS POLITICAL PARTIES TO ASSOCIATE WITH CANDIDATES

The obituary of noted architect Ludwig Mies Van Der Rohe in the New York Times quoted him as saying, "God is in the details." (New York Times, August 19, 1969, Obituary by Alden Whitman.) And so it is with the "Top Two" primary. The seed for the Washington Grange initiative lies in the conclusion of

---

[10] The term "ER" refers to the Joint Excerpt of Record in the Court of Appeal. Petitioner Libertarian Party filed a Supplemental Excerpt of the Record as well which is cited as "LibER." LibER citations also include the PACER document number from the district court.

[11] The "prefers Republican" candidates, Susan Fagan and Pat Hailey, did not demonstrate significantly greater voter support. Their vote tallies were 29.24% and 25.64%, respectively.

the majority opinion in *California Democratic Party v. Jones*, 530 U.S. 567, 585 (2000), when the Court offered in closing:

> Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. 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. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" – all without severely burdening a political party's First Amendment right of association.
>
> (Underline emphasis added.)
> *Id.* at 585-586.

The Washington State Grange attempted to reproduce the suggested *nonpartisan* primary but omitted a decisive detail: "nomination by established

parties." Nothing in this Court's observation supports the use of an election process where political parties are utterly excluded from the ballot process. Adding insult to injury, parties are affiliated with multiple candidates who are neither selected by nor endorsed by them.

The *Jones* suggestion did not contemplate that the proffered alternative would eliminate two hundred and twelve years of direct party participation in the electoral process. Yet this is how the State of Washington has chosen to implement I-872. The State has altogether denied political parties the right to announce their nominees on the ballot or even in the voter's pamphlet:

> Q Okay. But even with the counties, there's no way – no county is allowing a political party to publish their nominations in the voters pamphlet?
>
> A That's correct. I don't think that state law gives the counties the authority to do that.
>
> Q Okay. And just – I may be beating a dead horse, but on the ballot you have to use the word "party," correct? On the preference line it has to be "Prefers" blank, 16 characters and you have to use the word "Party" after it?

> A Um-hmm, or your other option is to state "No Party Preference." Yes, that's correct.
>
> Deposition of Catherine Blinn[12]
> ER, pp. 198-199.

In other words, after "joining together in furtherance of their common beliefs" and exercising their fundamental right to select a nominee, the members of the state's political parties are denied any opportunity to communicate their values or preferences in any official forum. The United States has regressed from 1860 when the fledging Republican Party directly (and freely) distributed ballots to the public to 2008 when the Democratic Party cannot express its nomination or place a candidate who has support of nearly 25% of the voters on the general election ballot for the 9th District. Such a result, creates an unacceptable system:

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.
>
> *Jones*, *supra*, at 574.

As applied, the "Top Two" has created the "unimaginable:" a system that surgically separates the political parties from the political process. Parties are

---

[12] Catherine Blinn is the Assistant Director of Elections in the Office of the Washington Secretary of State.

allowed to meet, to hold conventions, to vote, to campaign but, at the most critical juncture in the electoral process, they are denied the right to speak to the voters. In his concurring opinion in *Cook v. Gralike*, 531 U.S. 510 (2001), Chief Justice Rehnquist perhaps said it best:

> Article VIII is not only not content neutral, . . . the State injects itself into the election process at an absolutely critical point – the composition of the ballot, which is the last thing the voter sees before he makes his choice – and does so in a way that is not neutral as to issues or candidates. The candidates who are thus singled out have no means of replying to their designation which would be equally effective with the voter.
>
> *Id.*, at 531-532.

Earlier in his concurrence, the Chief Justice highlighted the source of the fundamental flaw in an electoral system without party participation:

> In *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972), we said: "[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." And in *Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983), we said that "voters can assert their preferences only through candidates or parties or both."
>
> *Id.*, at 531-532.

As I-872 is applied, Washington has tried to separate the parties from the voters, a chasm that is constitutionally impermissible.

V.

AS APPLIED, WASHINGTON'S "TOP TWO" PRIMARY SYSTEM EVISCERATES MINOR PARTIES

The importance of minor political parties in our electoral system has frequently been recognized in this Court.

This Court's decisions explicitly recognize the importance of minor parties to the development of political discourse among the body politic:

> The minor party's often unconventional positions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions. And its very existence provides an outlet for voters to express dissatisfaction with the candidates or platforms of the major parties.
>
> *Munro v. American Socialist Workers' Party*, 479 U.S. 189, 200 (1986) (*Marshall, J.*, dissenting).

The constitutional significance of minor parties is at the core of the First Amendment guarantee of "the

freedom to join together in furtherance of common political beliefs," *Tashjian*, *supra*, at 214-215.

Perhaps, *Anderson*, *supra*, says it best:

> . . . limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. (Citations omitted.)
>
> *Id.*, at 793-794.

Then Justice Stevens, writing for the Court, quotes Professor Alexander Bickel:

> Again and again, minor parties have led from a flank, while the major parties still followed opinion down the middle. In time, the middle has moved, and one of the major parties or both occupy the ground reconnoitered by the minor party;. . . .
>
> "[A]s an outlet for frustration, often as a creative force and a sort of conscience, as an ideological governor to keep major parties from speeding off into an abyss of mindlessness, and even just as a technique for strengthening a group's bargaining position for the future, the minor party would have to

> be invented if it did not come into existence regularly enough."
>
> *Id.*, at 794, n. 17 (quoting from A. Bickel, *Reform and Continuity* (1971), at 79-80, n. 11.)

Continuing, the Court conjoins the place of minor parties with the fundamental right to free speech under the First Amendment:

> In short, the primary values protected by the First Amendment – "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) – are served when election campaigns are not monopolized by the existing political parties.
>
> *Id.*, at 794.

The Court's discussions are not idle aphorisms or chauvinistic clichés. Minor parties have frequently helped to spark public discourse and inspire policy change.[13] They have also provided an electoral outlet

---

[13] While the American socialist movement, and its affiliated minor parties, have never achieved significant electoral success, the 20th century marked a significant shift in the authority of federal and state government in the areas of regulation of commerce and redistribution of wealth. *See* Bruce Ackerman, *We The People: Transformations, Vol. 2* (Harvard University Press, 2000) 280: "The *Lochner* Court was . . . interpreting the Constitution, as handed down to them by the Republicans of Reconstruction. *Lochner* is no longer good law because the American people repudiated Republican constitutional values in the 1930s, not

(Continued on following page)

for dissatisfaction with the existing state of affairs. The Bull Moose Party provided an avenue for resolution of an impasse within the Republican Party. The long and distinguished list of minor party influences on public debate need not be rendered here because the most recent manifestation, the Tea Party Movement, is the subject of daily media attention. In the three years of its existence, this Movement has sharply focused the national political debate on its agenda.[14] To remain vital and to resolve our overwhelming national problems, our republic needs the wisdom and inspiration of all branches of the voter spectrum.

This sentiment was clearly stated in *Third Parties in America: Citizen Response to Major Party Failure*:

> Third parties are not aberrations in the American political system; they are in fact necessary voices for the preservation of democracy. They represent the needs and demands of Americans whom the major parties have ignored.
>
> Minor parties are also innovators. Policy ideas at times remain outside the two-party system because the major parties remain preoccupied with issues that defined the party alignment in the last critical election. The

---

because the Court was wildly out of line with them before the Great Depression."

[14] The House of Representatives Administration Committee recognized the Tea Party Caucus as an official congressional member organization on July 19, 2010.

> major parties are often unable or unwilling to deal with new issues, even those concerning a sizeable portion of the electorate.[15]

Id. at 222.

VI.

THIS CASE OFFERS AN OPPORTUNITY FOR THE COURT TO RECONFIRM THE ELECTORAL SIGNIFICANCE OF MINOR PARTIES AND THEIR BALLOT ACCESS

Over the past 20 years, this Court's messages regarding minor parties have frequently been mixed, creating a jurisprudence that threatens the speech and associational freedom of minor parties, particularly in the area of ballot access.[16]

The Court's first foray into the quagmire of minor party ballot access was in *Williams v. Rhodes*, 393 U.S. 23 (1968). In *Williams*, the Court applied the

---

[15] Steven Rosenstone, *et al.*, *Third Parties in America: Citizen Response to Major Party Failure* (Princeton University Press, 1984). Professor Rosenstone is currently a professor of political science at the University of Minnesota.

[16] Lengthy, scholarly analyses of the confusion and heartbreak created for minor parties and independent candidates in the 44 years since *Williams v. Rhodes*, *supra*, are contained in Levinson, *supra*, at 478-495 and Dimitri Evseev, *A Second Look At Third Parties: Correcting The Supreme Court's Understanding Of Elections*, Boston University Law Review, Vol. 85, December 2005, pp. 1288-1301.

strict scrutiny test and affirmed the importance of minor party participation:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society.
>
> *Williams v. Rhodes*, *supra*, at 39 (Douglas, J. concurring.)

Three years later, minor party interests were defeated when the Court upheld a 5% ballot access[17] petition requirement in *Jenness v. Fortson*, 403 U.S. 431 (1971).

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), the Court departed from the strict scrutiny standard in upholding a prior registration requirement. One year later, the Court handed down *Storer v. Brown*, 415 U.S. 724 (1974) and *American Party v. White*, 415 U.S. 767 (1974) creating more doctrinal confusion. While paying lip service to the strict scrutiny standard, the *Storer* court wrote that there is no "litmus

[17] The 5% requirement in *Jenness* is now regarded as the constitutional "high water mark" for ballot access requirements. However, most states require considerably fewer petition signatures.

paper test" for ballot restrictions. *Storer*, *supra*, at 730.

In 1983, the Court set out to clarify its ballot access law in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Writing for the Court, Justice Stevens expostulated a test in which the "character and magnitude" of the infringed First Amendment interest is considered. Then, Stevens wrote, a court must "identify and evaluate" the interests of the State. *Anderson* has signaled the implementation of a "sliding scale" approach to the First Amendment interests in the electoral forum. The next two ballot access decisions of this Court were *Munro v. Socialist Workers' Party*, *supra*, and *Tashjian*, *supra* (1984). Both cases cite to *Anderson's* sliding scale. (*See Munro*, *supra*, at 194, 198, 202; and *Tashjian*, *supra*, at 214, 218, 200, 220, 221, 225, n. 13, 234.)

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Court favored the major parties and denied minor party free speech by holding an anti-fusion voting statute constitutional. The majority opinion openly announced that, "[t]he Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system." *Id.*, at 367.[18]

---

[18] Anyone who doubts the Court's favoritism for major parties in *Timmons* need only refer to the dissent: "The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather

(Continued on following page)

Three years later, the Court struck down the California blanket primary system in *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

The closing observation in *Jones* suggesting the *nonpartisan* primary (*id.*, at 585-586) marks the death knell of virtually all minor party access to the general election ballot in Washington and, eventually, throughout the nation. As noted ballot access expert Richard Winger testified in the district court:

> **B. Opinion Two**. Any election system in the United States in which all candidates from all parties run on a single ballot in the first round for federal and/or state office, and then only the top two vote-getters may be on the ballot in the second round, inevitably and always means that minor party candidates will never appear on the ballot in the second round. The only exceptions to this statement are instances in which only one major party member runs in the first round.
>
> Richard Winger Declaration, LibER, Vol. II, Tab 8, p. 13, PACER Doc. 273.

The State of Washington will no longer have "the virtue of political activity by minority, dissident groups," who "innumerable times have been in the

---

than in favor of, its constitutionality." *Id.*, at 378 (Stevens, J., dissenting).

vanguard of democratic thought and whose programs were ultimately accepted. . . ."[19]

This Court should take this case to reaffirm the First Amendment rights of speech and association belonging to minority groups seeking to persuade the political majority.

VII.

THE USE OF THE LIBERTARIAN PARTY'S TRADEMARK ON THE BALLOT TO INDICATE PARTY PREFERENCE CONSTITUTES A COMPETITIVE USE IN VIOLATION OF THE LIBERTARIAN PARTY'S TRADEMARK RIGHTS

Federal law protects the right to trademark the Libertarian Party's name. The Libertarian National Committee, Inc. has applied for and obtained a trademark for the name, "Libertarian Party." *See* LibER, Tab 5.

Under the "Top Two" system, any candidate is permitted to state that he or she "prefers" the Libertarian Party. The sole purpose of making such a claim would be for the candidate to obtain the benefits of the mantle of the Libertarian Party.

Expert Richard Winger's Declaration cites specific examples in Arizona of faux candidates claiming status as Libertarians in an apparent attempt to

---

[19] *Williams v. Rhodes*, *supra*, at 39 (*Douglas, J.* concurring).

obtain undeserved public campaign financing. *See* LibER, Vol. II, Tab 8, pp. 8-9, PACER Doc. 273.

This issue is closely intertwined with the issues involving voter confusion that are the subject of the Petition by the Democratic Central Committee.

The debate between the members of this Court in *Grange* about the analogy to Campbell's Tomato Soup highlight the issue. Setting aside the differences between the protections for commercial speech and freedom of association. When the state-printed ballot permits the use of the registered trademark of the Libertarian Party in association with other candidates, this is a plain violation of 15 U.S.C. §1114(1)(b).

This is competition, not a mere case of permitting an expressed preference ("I like Campbell's"). Washington State's use of "preference" on the ballot is designed to convey the message "I contain the same ingredients as Campbell's Soup," or "I am just like Campbell's Soup." Therein lies the competition, "I prefer Republican," translates to "I am just like that other candidate" who also "prefers" the Republican Party.

This Court should use this case to harmonize its cases regarding speech on the ballot involving party labels.

VIII.

CONCLUSION

For all of the reasons stated above, Petitioners respectfully submit that a writ of certiorari should be granted on the Questions Presented.

Respectfully submitted,

ORRIN L. GROVER
Attorney for Petitioners

APPENDIX

The Petitioners here are filing concurrently with the Democratic Central Committee of the State of Washington in seeking review of the same opinion of the Ninth Circuit. Petitioners here join in the Appendix filed with the Petition filed by the Democratic Central Committee of the State of Washington and will cite thereto.