

Nos.11-35122 and 11-35124

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WASHINGTON STATE
REPUBLICAN PARTY, et al.,

Appellants,

v.

STATE OF WASHINGTON, ROB
MCKENNA, SAM REED, AND
WASHINGTON STATE GRANGE,

Appellees.

STATE'S RESPONSE TO
MOTION TO ASSIGN TO
ORIGINAL PANEL

Appellees, the State of Washington, Rob McKenna, Attorney General of the State of Washington, and Sam Reed, Secretary of State of the State of Washington, hereby respond to the motion of the Washington State Democratic Central Committee and the Washington State Republican Party to assign these appeals to the same panel of judges that heard a prior appeal in this action. The State Appellees neither support nor oppose the political parties' motion. While Appellants offer no strong reason to assign these appeals to the prior panel, neither is there any strong reason to assign a different panel.

This case concerns the constitutionality of Washington's system for conducting primary elections. The political parties previously mounted a facial challenge to this system, which challenge was rejected by the United States Supreme Court. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). On remand, the parties developed a factual record, and based upon that record the District Court rejected the political parties' challenge to the manner in which Washington implemented its system for conducting primary elections. *Washington State Republican Party v. Washington State Grange*, 2011 WL 92032 (W.D. Wash. 2011). The questions before the Court in these appeals are significantly different from those decided by the previous panel in 2006. These second appeals present an as-applied challenge, based upon a factual record and upon the Supreme Court's guiding decision resolving the prior facial challenge. In both respects, these appeals differ from the prior appeals.

This suggests the absence of any particularly compelling reason for concluding that these appeals should be assigned to the same panel, though there are also no strong reasons to select a different panel. Accordingly, the

State Appellees commend the issue of panel selection to the sound discretion of the Court.

RESPECTFULLY SUBMITTED this 10th day of May, 2011.

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