

The Honorable John C. Coughenour

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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,

vs.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-JCC

PLAINTIFF WASHINGTON STATE
REPUBLICAN PARTY TRIAL BRIEF

TRIAL DATE:
JANUARY 18, 2011

I. INTRODUCTION

1
2 Washington's implementation of I-872 violates the Republican Party's First
3 Amendment rights. The State's implementation permits rival party and unaffiliated voters to
4 elect Republican precinct committee officers. The State's implementation of I-872 also
5 violates the First Amendment by forcing the Republican Party to be associated with candidates
6 on the State's ballots who have expressed a "preference" for the Republican Party. That voters
7 would understand that placement of the Republican Party name in conjunction with candidates
8 on the ballot meant they were Party nominees or affiliates was known to the State from the
9 time it began designing the I-872 ballot. The results of the State focus group are confirmed by
10 a political science experiment testing the understanding of voters exposed to the State's ballots.
11 The connection between the Republican Party and candidates on the ballot listing a Republican
12 preference is further confirmed by how the press across Washington state refers to partisan
13 candidates and even by key state officials speaking both officially and in unguarded moments.

14 As implemented, I-872 also violates the Republican Party's First Amendment rights
15 because it forces the Republican Party, if the Party wishes to speak about a candidate who has
16 expressed a "preference" for the Republican Party, to repeat a candidate's party identification.
17 This is content regulation of the Party's political speech and sustainable only if it is narrowly
18 tailored to serve a compelling state interest. The State's implementation of I-872 also violates
19 the First Amendment by restricting how the Republican Party communicates with its members
20 regarding its nominees.

II. STATEMENT OF FACTS

A. Washington's Partisan Primaries.

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23 From 1935 until 2003, Washington used a blanket primary to narrow the field of
24 candidates for the general election. All candidates, regardless of party, appeared on a single,
25 consolidated ballot. Candidates listed a party, which appeared in conjunction with their name
26 on the ballot. The top vote-getter from each party advanced to the general election. Pre-Trial
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1 Order (“PTO”) Agreed Facts, ¶4.

2 In 2000, the Supreme Court struck down California’s blanket primary. Following the
3 invalidation of California’s blanket primary, the Ninth Circuit struck down Washington’s
4 blanket primary in 2003. PTO, Agreed Facts, ¶5.

5 In 2004, Washington adopted a replacement system, under which candidates filed a
6 declaration of candidacy for nomination to partisan office and indicated their party (“the
7 Montana Primary”). All candidates seeking a major political party’s nomination for an office
8 appeared separately on the primary ballot, and voters were limited to voting in a single party’s
9 nomination races. The candidate receiving the plurality of votes among candidates for the
10 same nomination advanced to the general election as that party’s nominee. Minor parties
11 continued to nominate candidates by convention. Washington used this system at the 2004
12 primary. Washington also continued to use this system from 2005 through 2007, while an
13 injunction against the implementation of I-872 was in place.

14 Under the State’s implementation of this Primary, some counties used separate party
15 ballots, while others used a consolidated ballot. The consolidated ballots included a box for
16 voters to indicate their political party affiliation. The State used the following party affiliation
17 statement on its consolidated ballots:

18 [Stop sign graphic]

19 Before proceeding, please indicate the political party with which you wish to
20 affiliate.

21 If you do not select a party preference or if you select more than one party, your
22 votes for partisan office will not count.

23 Ex. 535 (Chelan County 2006 primary ballot); *see also* Exs. 532, 533 (“Before proceeding,
24 please indicate the political party with which you choose to affiliate.” King County 2004 and
25 2006 ballots); 540:7 (Whatcom County 2006 sample ballot); 542 (Pacific County), 543:1
26 (Kittitas County 2006); 544 (Klickitat County 2004 and 2006); 549 (“Before proceeding,
27 please select the political party with which you choose to affiliate.” Franklin County 2006).

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1 The King County Local Voters Pamphlet explained: “The single ballot provides a place to
2 indicate your party preference.” Ex. 534:4. In Kitsap County, the following appeared on the
3 2004 consolidated ballot:

4 CAUTION!

5 Before proceeding please select the political party with which you choose to
6 affiliate.

7 If you do not select a political party preference or if you select more than one
8 party, your votes for partisan contests will not count.

9 Note: Political Party Preference Selection is private and no record is made of
10 your choice.

11 Ex. 536; *see also* Exs. 537 (Snohomish County - “Select one political party preference”), 546:9
12 (San Juan County 2006), 548:13 (Garfield County 2006). For counties using multiple ballots
13 in the Montana Primary, ballot instructions stated that “political party affiliation is inferred by
14 choosing a political party ballot.” *E.g.*, Exs. 538 (Thurston County), 541 (Jefferson County),
15 542:3 (Kittitas County 2004).

16 In early 2004, the Grange launched its campaign for I-872, also known as the Top Two
17 Primary. The press release announcing the filing of I-872 had this headline, “Grange files
18 initiative to preserve State’s primary system.” Ex. 380. Voters were told that the primary
19 “preserves the rights that voters now enjoy under the blanket primary.” Ex. 380. The Grange
20 also told voters that the general election ballot would look no different, except that it would
21 sometimes have two candidates “from the same political party.” Ex. 369. The sponsor’s
22 Voters Pamphlet statement represented that “I-872 will restore the kind of choice in the
23 primary that voters enjoyed for seventy years with the blanket primary.” Ex. 435:4.

24 Washington voters adopted I-872. Partisan elections have operated under I-872's
25 provisions since 2008.

26 To participate in a primary, a candidate files a declaration of candidacy form on which
27 he or she may declare his or her major or minor party preference or independent status. In the
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1 primary, voters may select any candidate listed on the ballot, regardless of the party preference
2 of the candidates or the voter. The candidates with the highest and second-highest vote totals
3 at the primary advance to the general election, regardless of their party preferences.

4 Washington law calls for a presidential primary to be conducted in years in which the
5 President of the United States is elected, at a time separate from the primary for other elected
6 offices. The presidential primary is for major parties only. State law directs that the
7 presidential primary be conducted in substantially the same manner as the partisan primary for
8 other offices except as necessary to accommodate political parties rules or as otherwise
9 provided in RCW 29A.56. The presidential primary differs from the Top Two Primary used
10 with regard to other elected offices in that only candidates for President appear on the ballot,
11 candidates appear separately based upon political party, and the major political parties are
12 authorized to limit participation in the presidential primary to those voters who sign a
13 declaration affiliating with that political party. Washington law governing the presidential
14 primary is codified at RCW 29A.56.010 through RCW 29A.56.060; related regulations are
15 codified at WAC 434-219. Washington conducted its first presidential primary in 1992, and
16 has conducted one every presidential election year since then, except in 2004 when it was
17 suspended by the legislature.

18 **B. I-872 was always intended and understood to associate the Republican Party with**
19 **candidates who designated the Republican Party as their “preference” when filing**
20 **for office.**

21 I-872 continued, rather than changed, the former blanket primary’s practice of
22 candidates unilaterally determining political association on the ballot. “Candidates for partisan
23 offices *would continue* to identify a political party preference when they file for office, and that
24 designation would appear on both the primary and general election ballots.” Ex.369 (emphasis
25 added). The voters were told that the primary ballot would look no different and that “the
26 party designations will appear after the candidates’ names . . . (just as they do now in the
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1 blanket primary).” The general election might look different because “the voter might be
2 presented with a choice in the general election between *two candidates of the same political*
3 *party.*” *Id.* at 2 (emphasis added). The proponent’s Voters Pamphlet statement confirmed that
4 the candidates on the ballot were associated with the parties. “All the voters will decide who
5 is on the November ballot. *Whether it’s one Republican and one Democrat, one major and*
6 *one minor party, or even an independent – .*” Ex. 435b:4 (emphasis in original).

8 Today, voters are still told that candidates on the ballot are associated with the political
9 parties. The July 20, 2010 *News Tribune* noted, “Top two isn’t a nomination process but is
10 instead a way to winnow the field down to two candidates. It may be a distinction without a
11 difference, but the U.S. Supreme Court bought it . . . both finalists may be *from the same party*
12 as a consequence – not totally unintended but not the main point either.” Ex. 318 (Emphasis
13 added). Nor is the *News Tribune* view isolated. In 2008, *The Daily News (Longview)* stated,
14 “Like the blanket primary, the Top 2 allows voters to choose from *candidates of all political*
15 *parties* listed on a single primary ballot. Unlike the blanket primary, which advances
16 candidates from each of the parties to the general election, the Top 2 advances only the top two
17 vote-getters regardless of *party affiliation.*” Ex. 7 (emphasis added). *See also* Ex. 39 (*News*
18 *Tribune* headline August 18, 2008, “A blanket primary substitute, if voters can keep it”).
19 Candidates elected under the I-872 system are identified by party affiliation, not as merely
20 having expressed a “preference” for one party or another on the ballot.
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1 **C. The State's "Top Two" primary and general election ballots create an**
 2 **association of the partisan candidates and the parties.**

3 **1. The continuing, pervasive references in the press and other media to**
 4 **candidates as "party" candidates reflects the reality of even sophisticated**
 5 **political observers' understandings.**

6 Candidates file for office listing the political party preference printed on the ballot
 7 and on all political advertising referencing their candidacy. PTO, Agreed Facts, ¶¶ 8, 19
 8 Across the state, the press has reported filing as an act of affiliation with the party listed in the
 9 Declaration of Candidacy. The *Yakima Herald* reported, "Republicans' State Rep. Charles
 10 Ross got a Democratic opponent Friday . . ." and, after running down a list of candidates,
 11 noted that "all filed as Republicans on Friday." Ex. 93. From the *Peninsula Daily News*, ".
 12 . . Doug Cloud . . . filed Monday as a Republican to challenge Dicks." Ex. 88. At the close
 13 of filing in 2008, *The Seattle Times* headline noted, "Many of November's legislative races will
 14 be single-party . . . only Republicans or only Democrats filed for office." Ex. 91. The press
 15 distinguished a filing under a party name from being "unaffiliated" with a party. Ex. 507. This
 16 cycle, the *Sammamish Review*, *Port Townsend & Jefferson County Leader*, *The Olympian*, and
 17 *The News-Tribune* all described candidates as Republican or Democrat based on their filing
 18 for office. Exs. 83, 106, 340, 341.

19 During election campaigns, candidates are regularly described by party name,
 20 "Republican" or "Democrat," in the media, not merely preferring a party. *E.g.*, 2008 articles
 21 at Exs. 20, 21, 30, 46, 49 (referring to Goodspaceguy Nelson - a "perennial Democratic
 22 candidate"), 50, 54, 55, 73, 74, 79, 85, 87, 90, 100, 102, 118, 131, 182, 189, 193, 202, 204,
 23 205, 206, 208, 224, 225, 226, 227, 229, 230, 231, 232, 239, 241, 242, 244, 248, 253, 254, 255,
 24 257, 294. Candidates continued to be referred to as "running as a Democrat or Republican"
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1 or representing a party in the 2010 election cycle. Exs. 166, 167, 299, 303, 306 (“The third
2 candidate represents the Green Party”), 307, 322 (“Three candidates ... are running as
3 Democrats”), 342, 343. *See also* Exs. 261, 262, 263, 264, 267, 270, 276, 277, 278, 283, 284,
4 290, 291, 309 (“The state Republican Party wants to retake the district’s state Senate seat in
5 its bid to return from near political obscurity ...”), 310, 313 (“In partisan races, party
6 affiliations, such as Democrat, Republican or independent, are listed as a preference under the
7 top-two rules.”), 314, 315, 317, 320, 323, 324, 326:1 (“In Washington state’s top-two system,
8 it’s possible for two candidates from the same party to advance to the November ballot. But
9 most likely this time . . . there will be one of each.”), 328, 329, 333. Even the Secretary of
10 State’s office still omits the “prefers” *caveat* when discussing candidates. Ex. 319 (August 2,
11 2010 news release). Other sources use “affiliate” and “preference” interchangeably. *E.g.*, Ex
12 325;. *See also* Exs. 96, 163, 165. The treatment of candidates as connected to the political
13 parties was no different in the limited number of partisan elections in 2009. *Id.* at Exs. 155-
14 157, 159-161, 173, 174-177, 180, 274.

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18 On August 22, 2010, the *Spokesman Review* reported, “Didier said he would endorse
19 Rossi if the *Republican nominee* would” Ex. 331; *see also* Ex. 332. Dino Rossi had
20 listed “Republican” as his party preference when filing, and had advanced to the 2010 general
21 election, but was not then the Republican nominee.¹

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23 Media references to candidates on the general election ballot as being from or of “the
24 same party” or “two Republicans” or “two Democrats” are also commonplace. Ex. 126, 127,
25 132-135, 137, 139-140, 148, 150, 154, 211, 218, 271, 321. Even where the WSRP has
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27 ¹ The Washington State Republican Party nominated Rossi on August 27, 2010.

1 expressly rejected a candidate appearing on the ballot as a “Republican,” the party designation
2 appears on the ballot and political discourse. In 2008, Michael Delavar filed for Congress and
3 appeared on the ballot as “prefers Republican party.” The party nominee was Christine Webb,
4 and the WSRP did not recognize Delavar as a legitimate Republican candidate. Delavar
5 advanced, Webb did not. Even after the primary, the WSRP offered no support for him.
6 Before the primary, the press identified Delavar as a “Republican” candidate, notwithstanding
7 the party’s rejection of his candidacy. Ex. 31. After the primary, the press continued to reflect
8 association. “Republican congressional candidate Michael Delavar has a lot to say about why
9 the US is wrong to be in Iraq The unofficial primary results point to a familiar
10 Republican versus Democrat scenario” Ex. 256.

13 Both before and after the 2010 election, the press was full of articles and editorials
14 linking the Republican Party with candidates who would appear on the ballot expressing a
15 “preference” for the Republican Party. These articles included no caveat, no disclaimer. *See*
16 *generally* Exs. 475, 477-506, 509-517, 522-531. The *Herald* endorsed “Republican Dennis
17 Richter” for legislature explaining that its “choice comes down to an opportunity to give
18 minority Republicans more leverage, better enabling a fair hearing for good ideas from both
19 parties.” Ex. 474. The *Spokesman Review*’s pre-primary headline on a county commission
20 race read, “Mager faces 4 GOP challengers.” Ex. 481. The *Seattle Times*’ “Your guide to
21 Election Night” included a map showing “party control” of Washington’s legislatures. Ex.
22 488. Its headline the morning after Election Day about the state legislative races was, “GOP
23 takes early leads.” Ex. 499. Its 2010 reporting of detailed election results reflected the
24 traditional “D” and “R” or “GOP” and “Dem” designations for the candidates, not an
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1 expression of preference. Exs. 489, 518-520. The *Olympian* noted that “GOP moves closer
2 to Dems in state House, Senate.” Ex. 494. A *Herald* headline read, “In Olympia, GOP will
3 gain seats - if not control.” Ex. 506. “Three close races in King and Snohomish counties will
4 decide which party will control the State senate next year,” reported the *Seattle Times*. Ex
5 521. As later returns were counted, and the prospect of change in control of the legislature
6 dimmed, it noted, “The GOP needed 13 seats to take control [of the state senate].” Ex. 508.
7
8 When rolling out its campaign to implement I-872, the Secretary of State’s office listed
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10 “Mandatory ‘Avoidance’ Statements,” including “Candidates should not be referred to as
11 ‘republican,’ ‘Democrat,’ ‘Independent,’ ‘Libertarian,’ *etc.*” Ex. 219 at 4.

12 **2. The State’s only organized test of its ballot design before final**
13 **implementation of the Top Two showed voter confusion.**

14 Shortly after the Supreme Court upheld the facial validity of I-872, the State sought to
15 conduct a focus group to test ballot formats. Ex. 281. The Secretary of State’s office
16 explained that “[a] Forum is urgently needed to test information that will be presented to
17 voters relating to the Top Two Primary for the August Primary.” Ex. 282. On April 3, 2008,
18 the State contracted with Elway Research to “[c]onduct a Forum of not less than forty (40)
19 people.” The Forum was to be conducted April 10 and “will be used to test information that
20 will be presented to voters relating to the Top Two Primary.” Ex. 280. The actual focus group
21 assembled 36 voters drawn from the Central Puget Sound region for a two hours interactive
22 session of combined polling and discussion. A moderator facilitated the discussion of each
23 alternative ballot. Ex. 334:3, 6.
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26 Among the “key findings” of the post-focus group report was that “most participants
27 (20/36) believe that the purpose of a primary election was to designate the party’s nominees
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1 for the general election.” *Id.* at 3. The State tested four versions of a “disclaimer” on the focus
2 group participants. *Id.* at 11 (Chart showing language). The State’s implementation has not
3 used any of the four forms it presented to the focus group. Instead, it combined language from
4 the first and second variants. Thirty-six percent of participants found the State’s first variant
5 confusing. The second part of that format is very similar to the disclaimer language currently
6 used by the State. *See* Ex. 335.

8 The State’s focus group also tested ballot language regarding partisan identification.
9 Ex. 334:13. The State presented focus group participants with a partisan ballot that stated
10 “prefers Republican Party” and “prefers Democratic Party” below hypothetical candidate
11 names. Forty-eight percent of participants viewed the language as meaning endorsed by,
12 representing, or associated with the political party. Another 6% did not know what was meant.
13 Ex. 334:13 (Variant C). The focus group reviewed another version, Variant D, which added
14 parentheses, “(prefers Republican Party),” and “(prefers Democratic Party),” following
15 discussion of the prior version. Fifteen percent of participants still viewed it as a statement
16 of representation or association, and the portion that did not know what it meant increased to
17 12%.

20 The State conducted no outside test of the final language used for the notice or its party
21 preference statement. The State did not undertake any studies after its implementation to
22 gauge voter confusion. The WSRP has regularly received calls during election season from
23 voters confused by the “prefers Republican Party” label.

1 **3. Professor Manweller’s experiment to test understanding of the ballot**
2 **design actually used confirms widespread confusion regarding**
3 **candidate-party relationships on the Top-Two ballot.**

4 In 2009, Mathew Manweller, Associate Professor of Political Science at Central
5 Washington University, conducted a series of cognitive experiments on Washington voters to
6 determine whether the ballot design under the Top-Two system confused them about the
7 relationship between candidates on the ballot and Washington’s political parties. Voters were
8 presented with sample ballots for the Top-Two Primary and Top-Two General Election,
9 including the disclaimer language and party designation used by the State in its current
10 implementation. The experiment results indicate that voters are highly confused by the ballot
11 form used in the Top-Two system, both in the primary and general election. When viewing
12 the ballot form used by the State in its current implementation, 56.6% of the “new voter”
13 population in the experiment perceived the candidates on the general election ballot to be the
14 nominees of the political parties. Thirty percent of a second group that participated in the
15 experiment, “registered voters,” perceived the candidates on the general election ballot as party
16 nominees. A third group made up of “active voters” also showed high rates of confusion -
17 35% perceived candidates on the Top-Two General Election as party nominees. The
18 percentages of participants who understood that candidates on the general election ballot are
19 party nominees occurred notwithstanding disclaimer language (on the experiment’s sample
20 ballots) identical to that used by the State. Ex. 359:26. Within each experiment population,
21 high percentages perceived candidates on the Top-Two General Election ballot to be a
22 representative of, or affiliated or associated with, the political party whose name appeared in
23 connection with them on the ballot. The percentages ranged from a low of 42.3% of
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1 “registered voters” who perceived candidates as representatives of the political party to a high
2 of 93.3% of “new voters” who viewed the candidates appearing on the Top-Two General
3 Election ballot as associated with the political party.
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5 High levels of confusion are also present regarding the relationship between candidates
6 on the ballot and the political parties on the Top-Two Primary ballot. Ex. 359:8. Almost 26%
7 of new voters understood candidates on the Top-Two Primary ballot were party nominees.
8 Within the registered voter group, 29.4% believed candidates carrying the party name on the
9 Top-Two Primary ballot were party nominees and 19.1% of the “active voter” population
10 viewed candidates on the Top-Two Primary ballot as party nominees.
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12 Professor Manweller concludes that “[t]he data implies that between one-fifth to one-
13 fourth of the voters misinterpret primary ballots and between one-third to one-half misinterpret
14 general election ballots regarding whether the candidates on the ballots are political party
15 nominees.” Ex. 359:20. He further concludes,
16

17 On the second question looking at whether voters perceive an official
18 relationship between candidates on a nonpartisan ballot and political parties, the
19 evidence is stronger. Across all voter types, respondents consistently
20 misinterpreted both primary and general election ballots 80-90 percent of the
21 time.

22 *Id.*

23 The State’s expert, Professor Todd Donovan of Western Washington University, has
24 conceded, both at deposition and publicly, that candidates expressing a party preference are
25 party candidates. With respect to the August 2010 primary, “‘The only big deal on the primary
26 ballot was the Republican U.S. Senate contest. That makes it likely that more Republican
27 voters than usual were mobilized,’ [Donovan] said.” When discussing the primary election
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1 results with the *Bellingham Herald*, Professor Donovan stated, ““Obviously, Republicans are
2 going to be turning out because they had a competitive (U.S.) Senate race.”” Ex. 293. “Todd
3 Donovan . . . said the most visible consequence of Washington’s primary system is found in
4 safe Democratic or Republican legislative districts, where incumbents now face tougher
5 general-election challenges from someone in their own party.” Ex. 286. In Professor
6 Donovan’s view, candidates on the ballot are thereby connected to the parties.
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8 The State has no evidence upon which to conclude that its implementation does not
9 confuse voters, despite hiring its expert in February 2010. Ex. 346. The State’s expert
10 prepared two reports: one on levels of voter knowledge and confusion generally, and the
11 second criticizing the Manweller experiment. Exs. 338-39. These reports do not address the
12 question whether the State’s ballot form to implement I-872 misleads or confuses voters about
13 the affiliation of candidates with the political parties conjoined with them on the ballot.
14

15 **4. State election administrators also treat “party preference” as affiliation in**
16 **real life.**

17 Throughout the State’s current implementation, election officials have referred to
18 candidates on the Top Two ballot as being affiliated with, “of,” or “from” the same political
19 party. The statements are made without reference to a particular candidate, but instead express
20 the connection between candidates and parties on the Top Two ballot in general.
21

22 Even when the Secretary of State’s office refers to candidates as “preferring” a party,
23 it uses other terms that reflect intimate association among candidates using the Republican
24 name and the party. The Secretary of State’s blog headline on October 21, 2010 was, “Top 2
25 Primary creates some all-in-the-family races” to describe general election contests “between
26 candidates who prefer the two mainline political parties.” Ex. 547.
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1 Secretary Reed, when directing his staff on the key elements of I-872, stated that “the
2 voter can vote across party lines” and that “The two finalists might happen to be from the same
3 party, different parties or no party at all.” Ex. 220 at 4. His public statements likewise
4 reflected the reality of the association between candidates on the ballot and the Republican
5 Party. Secretary Reed told the *Seattle Post-Intelligencer* on August 14, 2008, “I think it’s a
6 little strange to have potentially two people of the same party in the general election[.]” Ex.
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8 48. Secretary Reed’s comments in other media outlets are similar:
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10 Reed based his higher [turnout] prediction on the empowering effect he said the
11 new top two primary will have for voters, who can pick any candidate from any
12 party . . . Reed, a Republican facing three opponents, said he doesn’t expect
13 any of the eight partisan statewide races on the primary to yield two candidates
14 of the same party on the November general election ballot.

15 Ex. 57, *The Olympian*, August 10, 2008
16

17 Reed says candidates running against each other in the general election will
18 now have to really stand out against there [sic] opponent, especially when
19 political parties are the same.
20

21 *KNDO/KNDU*, Tri-Cities, August 22, 2008, Ex. 26.
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23 “We will be using the top 2 system, which means when voters go to vote they
24 no longer will have to pick a party. The will be able to vote for the person of
25 either party and (*sic*) any of those races,” Reed said.
26

27 www.kndo.com, May 15, 2008, Ex. 70
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Secretary of State Sam Reed, who had urged ‘no funny business’ when
candidates express their political party preference on their official filing
said state and local election officials reported strong compliance.
...[N]early all were signing up as Democrats or Republicans. . .

Ex.102, *Whidbey Examiner*, June 6, 2008

Most telling is Secretary Reed’s acknowledgment that by affiliating with the party on
the ballot candidates get themselves an electoral boost.

1 Secretary of State Same Reed said while it's possible more candidates will
 2 decide against listing a party preference than those who filed as independents
 3 before doing so presents some risks. "We could see that happening," he said.
 4 "What offsets that quite a bit is by indicating Democrat or Republican you pick
 up a little bit of a base. It gives you a start."

5 Ex.104, *Tri-City Herald*, June 2, 2008.²

6 Other statements by election administrators link parties and Top Two ballot candidates. Exs.
 7 29, 66, 77, 99, 101, 138 ("minor party and independent candidates will file for office and
 8 appear on the ballot in the same manner as major party candidates"), 213, 219:7, 220, 222.

9
 10 **5. The term "Republican brand" is used both locally and nationally**
 11 **to describe candidates and officeholders who carry the**
 12 **Republican name in elections.**

13 The relative power or weakness of the Republican Party brand with the voting public
 14 is a regular topic of political discourse, both in past elections and today. *See, e.g.,*
 15 [http://swampland.blogs.time.com/2010/09/07/why-the-tea-party-can-help-the-republican-](http://swampland.blogs.time.com/2010/09/07/why-the-tea-party-can-help-the-republican-brand/)
 16 [brand/\(last visited 9/12/10\); http://www.washingtonpost.com/wp-](http://www.washingtonpost.com/wp-dyn/content/article/2010/08/22/AR2010082202859.html)
 17 [dyn/content/article/2010/08/22/AR2010082202859.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/08/22/AR2010082202859.html) (last visited 9/12/10); Ex. 304. The
 18 2008 elections were not good for Republicans in Washington or nationally. Republican
 19 candidates faced substantial challenges "in Washington state, where the Republican brand
 20 doesn't have the luster it used to . . ." Ex. 75, Fox News, June 24, 2008; Ex. 61 (Rossi will
 21 have to overcome the "current weakness of the GOP brand"). News reports suggested that
 22 use of the party nickname "GOP" was a way to "re-brand" candidates or run under different
 23 labels. Exs. 86, 225, 275. The *Seattle Times* reported,
 24

25 Reed said that Republican Attorney General Rob McKenna had

26
 27 ² Candidates trade on party name, seeking to capture a part of the base vote, even if they have no connection
 28 to the party.

1 considered going with “GOP.” But Reed talked him out of it and says
 2 he wishes Rossi and other “GOP’s had stuck to the party line. “I just
 3 think it’s clearer to the voters and actually a little more respectful in
 some ways to give the full party name”

4 Ex. 86.

5 In the 2008 Insurance Commissioner’s race, a local Republican party official stated
 6 no party preference on the ballot. The Secretary of State’s blog noted that he lost to a
 7 candidate who “touted the Republican brand” Ex. 297.

9 **D. The State’s implementation of I-872 through its election campaign finance laws
 10 reinforces the association on the ballot, and mandates the content of the
 11 Republican Party’s political speech.**

12 **1. Washington’s campaign finance statutes are an integral part of its election
 13 system.**

14 Like I-872, Washington’s campaign finance laws were created by initiative. In
 15 adopting I-134, the voters declared, “The financial strength of certain individuals or
 16 organizations should not permit them to exercise a disproportionate controlling influence on
 17 the *election of candidates*.” RCW 42.17.610(1). (Emphasis added). Years later, when
 18 expanding the statute to cover more political speech, the legislature explained its reasoning,
 19 “Timely disclosure to voters of the identity and sources of funding for electioneering
 20 communications is *vitaly important to the integrity of state, local and judicial elections*.”
 21 RCW 42.17.561(1) (added by Wash. Sess. Laws 2005 C 455 §1) (Emphasis added). State
 22 regulation of election campaigns begins long before candidates file formal declarations with
 23 election officials. The State’s regulation of election campaigns begins when a candidate
 24 “first has the expectation of receiving contributions from making expenditures in any
 25 election campaign, whichever is earlier.” RCW 42.17.040. The 2012 campaigns for
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1 governor, secretary of state, attorney general, state treasurer, insurance commissioner, and
2 state lands commissioner all began in early 2009, when the incumbents filed with the Public
3 Disclosure Commission (“PDC”). Filing candidates must state their “party affiliation.”
4 RCW 42.17.040(2)(f); *see also* Ex. 181. The Declaration of Candidacy form, filed with
5 election officials, includes an explanation to the candidate of duties under the election
6 campaign finance laws. The Secretary of State’s office and the PDC work together in
7 designing the Declaration of Candidacy form to be filed with election administrators. Exs.
8 114, 116. “A candidate for partisan office must identify his or her political party on the C-1
9 registration. . . . The following abbreviations may be used in advertising. PDC believes
10 they clearly identified political party.” Ex. 301.

13 Washington’s campaign finance laws are part of its election system, including I-872.
14 The Secretary of State’s training materials include campaign finance matters. Ex. 110 (Q&A
15 15). The PDC issued a public report on “How Campaign Finance Laws are Impacted by
16 Initiative 872” and “How to Implement I-872.” Ex. 266. Katie Blinn, Assistant Director of
17 Elections, participated in the PDC’s rule-making to implement I-872. Ex. 272.

19 “Bona fide political parties” in Washington are able to contribute much greater sums
20 to candidates than other donors. RCW 42.17.640(2)-(6); *see also* Ex. 336. A “bona fide
21 political party” includes, “an organization that has been recognized as a minor political party
22 by the Secretary of State.” RCW 42.17A.005(6), Wash. Sess. Laws C 204 §101 (effective
23 January 1, 2012). The statute’s current version effective this election cycle, continues to
24 define “bona fide political party” as including “[a]n organization that has filed a valid
25 Certificate of Nomination with the Secretary of State under Ch. 29A.20 RCW”
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1 notwithstanding its implied repeal by I-872. RCW 42.17.020(6)(a). “Bona fide political
2 party” also includes a “major political party,” and expressly incorporates the definition at
3 RCW 29A.04.086. RCW 42.17.020(6)(6). Major political party status turns on the party
4 having “[a]t least one nominee for president, vice president, United States senator, or a
5 statewide office receive[d] at least 5% of the total vote cast at the last preceding state general
6 election in an even-numbered year.” RCW 29A.04.086.

8 Major political party status continues “until the next even-year election at which a
9 candidate of that party does not achieve at least 5% of the vote from one of the previously
10 specified offices. *Id.* “If *none* of these offices appear on the ballot in an even-year general
11 election, the major party retains its status as a major party through that election.” *Id.*
12 (Emphasis added). The U.S. Senate race appeared on the 2010 ballot. PTO, 5:9-17.

14 The State has taken the position that there were no candidates of a party on the 2010
15 ballot. Ex. 350. PCOs for a “major political party” are elected on the primary ballot. RCW
16 29A.80.051. That statute sets a threshold for election, requiring a candidate for PCO to
17 “receive at least 10% of the number of votes cast for the candidate of the candidate’s party
18 receiving the greatest number of votes in the precinct. *Id.* As part of its implementation of
19 I-872, the State has adopted WAC 434-262-075, which provides that the 10% threshold is
20 “not in effect” because no candidate other than the PCO represents a political party. Ex. 197
21 (Attorney General of Washington “Client Advice Memorandum”). Under the State’s
22 implementation, Washington will cease to have any major political parties after the 2010
23 general election, because no candidates are of a party.

26 Washington’s election campaign finance laws are so important to the integrity of the
27
28

1 State's election process, that violating them is grounds to set aside an election if the
 2 violation "probably affected the outcome of any election It is intended that this remedy
 3 be imposed freely in all appropriate cases to protect the right of the electorate to an informed
 4 and knowledgeable vote." RCW 42.17.390(1). A special rule for setting aside elections
 5 appears to apply if political advertising is defamatory (shown by clear and convincing
 6 evidence). In such case, "damages are presumed and do not need to be proven." RCW
 7 42.17.530.
 8

9
 10 **2. Washington's election campaign finance laws make clear that "party
 preference" affiliates the candidate with the political party.**

11 The State's implementation of I-872 expressly equates "party preference" and "party
 12 affiliation." In 2008, the State adopted the first set of "emergency rules" equating party
 13 affiliation and party preference. The State readopted those emergency rules in May 2009
 14 and again,, without change, on May 27, 2010:³

- 15
 16 (1) "Party affiliation" as that term is used in Ch. 42.17 RCW and TITLE
 17 390 WAC means the candidate's party preference as expressed on his
 18 or her Declaration of Candidacy. A candidate's preference does not
 19 imply that the candidate is nominated or endorsed by that party, or that
 the party approves of or associates with that candidate.
- 20 (2) A reference to "political party affiliation," "political party," or "party,"
 21 on disclosure forms adopted by the Commission and TITLE 390 WAC
 refers to the candidates self-identified party preference.⁴

22 In evaluating whether to adopt the emergency regulation, the agency's general
 23 counsel posed the question as "whether you wish to continue to explain that a party
 24 'affiliation' by a candidate as the term is used in RCW 42.17 and title 390 WAC means a
 25

26 ³<http://www.pdc.wa.gov/archive/commissionmeetings/minutesmaterials/pdfs/2010/5.27.10.meeting.minutes.final.pdf>

27 ⁴<http://www.pdc.wa.gov/archive/commissionmeetings/meetingshearings/pdfs/2010/05.27.2010.EmergencyRules.pdf>.
 Compare, Ex. 152 (2008 emergency regulation)

1 ‘preference’[.]” Ex. 337. Thus, the candidate’s party preference is an affiliation, but is a
 2 unilateral affiliation determined by the candidate. The PDC’s publicly distributed materials
 3 similarly use the terms “preference” and “affiliation” interchangeably. *See, e.g.*, Ex. 302.
 4

5 Once a candidate “has expressed a party or independent preference on the
 6 Declaration of Candidacy, that party or independent designation” must be reproduced on all
 7 political advertising, including any independent political speech. RCW 42.17.510(1). The
 8 legislature was “fully aware that I-872 had passed” when it mandated that all political
 9 advertising repeat the candidate’s party preference. Ex. 147. This inclusion requirement
 10 is a powerful disincentive to speak about candidates falsely using the Republican name.
 11

12 **E. The State’s implementation of I-872 enables unaffiliated and rival party voters**
 13 **to select Republican Party officers.**

14 **1. Precinct committee officers and their role in Republican Party**
 15 **governance.**

16 Candidates seeking election as Republican PCOs file as candidates of the Republican
 17 Party. The State recognizes that PCO elections are “intraparty election[s].” WAC 434-230-
 18 100(2).

19 Precinct committee officers are officers of the major political parties. The office is
 20 voted upon at the primaries, and the names of all candidates appear on the ballot for the
 21 primary for each even-numbered year. Subsequent to the implementation of I-872,
 22 candidates for PCO appear under a heading that reads:
 23

24 Election of Political Party Precinct Committee Office

25 Precinct Committee Officer is a position in each major political party. For
 26 this office only: If you consider yourself a Democrat or Republican, you may
 vote for a candidate of that party.

27 PTO, Agreed Facts, ¶14.
 28

1 The PCO statute further provides:

2 However, to be declared elected, a candidate must receive at least ten percent
3 of the number of votes cast for the candidate of the candidate's party
receiving the greatest number of votes in the precinct.

4 RCW 29A.80.051.

5 **2. The important role of precinct committee officers in Washington**
6 **elections.**

7 The PCOs in each county collectively constitute the County Central Committee of
8 the Party. In addition to their other duties, the PCOs elect the chair and vice chair of the
9 county central committee. RCW 29A.80.030. The county central committee of each county
10 elects two representatives who, in conjunction with the representatives from the other
11 counties, collective constitute the state committee of the Party. The state committee elects
12 the chair and vice chair of the state committee. RCW 29A.80.020. PTO, Agreed Facts,
13 ¶15.

14 When a vacancy in the legislature or in partisan county office occurs, the person
15 appointed to fill the vacancy must be from a list of three individuals provided by the county
16 central committee or state committee of the same party as the office holder whose office
17 has been vacated. Article II, Section 15, Washington State Constitution.

18 In 2009, party county central committees or state committees provided lists of
19 individuals to fill three vacancies in state legislative offices for candidates elected in 2008
20 who had been nominated by a political party and whose offices subsequently became vacant.
21 In each case, the relevant county legislative body filled the vacancy from those lists. PTO,
22 Agreed Facts, ¶¶16-17.

23 **3. PCOs' role in administering elections and election integrity.**

24 PCOs also perform key duties in filling positions for election officers whose duty is
25 to ensure the smooth running and integrity of the state's election process. PCOs provide
26 names of workers for election boards in their respective precincts to their county chairs.
27 RCW 29A.44.430. The county auditor (or other election official) appoints the election
28

1 officers from the list provided by the chair of the county central committee. RCW
2 29A.44.410. The State describes precinct election officers as “[t]he people who run elections
3 at each poll site.” Ex. 11.

4 Political party observers, selected by the chair of each county central committee,
5 oversee the processing of absentee ballots. County auditors are required to notify the chairs
6 of the party county central committees of the date and location at which the ballots will be
7 processed to enable party observers to be present. WAC 434-250-110(1). Counting center
8 operations must be observed by political party observers, if appointed by the chair of the
9 county central committee. WAC 434-261-020. The county auditor is required to request the
10 appointment of party observers in writing and provide training to the observers appointed by
11 the county chair. *Id.*

14 4. PCOs and the presidential primary.

15 The State conducts quadrennial presidential primaries, and RCW 29A.56.040(1)
16 expressly provides that “[e]xcept where necessary to accommodate the national or state rules
17 of a major political party or where this chapter specifically provides otherwise, the
18 presidential primary must be conducted in substantially the same manner as a state partisan
19 primary under this title.” Thus, except to the extent that the Republican Party’s rules provide
20 otherwise, the State’s procedures under I-872 would govern. PCOs select the members of
21 the state committee, which is empowered to adopt rules governing the Republican Party.
22 RCW 29A.80.010 & .011. The State requires that “the state chair of each major party shall
23 submit in writing to the secretary of state the exact wording of any party declaration required
24 by rules of the state or national party” to be signed by voters participating in the presidential
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1 primary. WAC 434-219-140.

2 **5. Washington can and does administer elections that limit participation to**
3 **members of a single political party.**

4 Washington's presidential primary limits participation to voters who affirmatively
5 affiliate with the political parties, if party rule so requires. RCW 29A.56.050; WAC 434-
6 219-140(3). Historically, the State used a separate absentee ballot for the office of precinct
7 committee officer. RCW 29.36.030 (1991). In 2006, Washington elected PCOs through
8 separate party ballots, which could be voted only by voters who demonstrated affiliation with
9 the party by choosing its ballot and agreeing to forego participation in voting for candidates
10 of any other party in that primary election, under the Montana Primary.

12 **III. ARGUMENT**

13
14 **A. The undisputed record establishes widespread voter confusion.**

15 Perhaps the best objective evidence of the relationship between parties and candidates
16 under the Top-Two Primary is how people talk about them in common discourse. The press,
17 election administrators, and even Secretary Reed and the State's expert witness all talk about
18 candidates as being "of" or "from" a party, or as the Republican/Democratic/Libertarian/
19 Green Party candidate. The words used are objective manifestations of the speakers'
20 understanding. And, that understanding is that the candidates are representatives, associates,
21 affiliates or even the nominees when they appear on the ballot conjoined with the party name.

22
23 The voters' understanding is objectively manifested by the State's own focus group.
24
25 Even after a two-hour discussion session, 15% of the State's test population thought the
26 candidates were endorsed by or representatives of the political parties, and another 12% just
27 could not tell what the ballot meant. Ex. 334:13, Table D. Manweller's study confirms
28

1 what the State had already learned in its focus group. A very substantial proportion of voters
2 understand that the conjunction of candidate and party on the ballot means the candidate is
3 the party's representative or otherwise associated with it.
4

5 In the *Grange* decision, the Supreme Court made clear it rejected only a facial
6 challenge. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 445 (2008).
7 The Court did not reject the notion that the Top-Two ballot may confuse voters: "In the
8 absence of evidence, we cannot assume that Washington's voters will be misled That
9 factual determination must await an as-applied challenge." 552 U.S. at 457-58.
10

11 The Secretary of State admits that voters will be misled by candidates' use of the
12 Republican Party name on the ballot. Candidates "by indicating Democrat or Republican [. . .]
13 . . .] pick up a little bit of a base. It gives [them] a start." Ex. 104. Voters cast ballots for
14 them based on their identification with the party on the ballot. Secretary Reed's admission
15 is consistent with political science literature that emphasizes the primacy that party
16 identification has on how voters cast their ballots. Ex. 452. The "party brand" has
17 significant effect on citizens' perceptions across educational ranges, and "are most potent for
18 average citizens." Ex. 449:4-15. "The 'simple act' of labeling a congressman as a
19 Republican or a Democrat systematically affects what information about the candidate will
20 be stored in memory and what information will later be available for informing one's
21 evaluations." Ex. 450:15.
22

23
24 The Ninth Circuit observed,

25 Given that the statement of party preference is the *sole* indication of
26 political affiliation shown on the ballot, that statement creates the
27 impression of associational ties between the candidate and the
28 preferred party, irrespective of any actual connection or the party's

1 desire to distance itself from a particular candidate. The practical
2 result of a primary conducted pursuant to Initiative 872 is that a
3 political party's members are unilaterally associated on an
4 undifferentiated basis with *all* candidates who, at their discretion,
5 "prefer" that party.

6 *Wash. State Republican Party v. Washington*, 460 F.3d 1108, 1119-20 (2006), vacated after
7 reversal, 545 F.3d 1125 (2008).⁵

8 The Ninth Circuit's first Amendment concern has been validated.

9 If I-872's practical effect is to create an association without the WSRP's consent, I-
10 872 violates the First Amendment. The undisputed evidence shows that this is I-872's
11 practical effect. Indeed, creating an involuntary affiliation between candidates on the ballot
12 and the Republican Party is exactly what I-872 was designed to accomplish. Ex. 369.

13 The candidates' unilateral designation of a "party preference" *continued* existing
14 practice. Exs. 369, 380. This association is perceived by voters, evidenced by both the
15 State's focus group and the Manweller experiment. Voters' perception of whether candidates
16 are party candidates is directly relevant to whether there has been a First Amendment
17 violation, and the placement of the party name as the only information about the candidate
18 on the ballot heightens its impact. *Grange*, 552 U.S. at 459-60 (Roberts, C.J. concurring.)

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24 ⁵A vacated opinion has no precedential value, *see In re Daniel*, 771 F.2d 1352, 1361 n.19 (9th Cir. 1985), but may have
25 ongoing persuasive value. *See DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1447-48 & n.9 (9th Cir. 1996) (*quoting Freschi*
26 *v. Grand Coal Venture*, 767 F.2d 1041, 1051 (2nd Cir. 1985), *cert. granted, judgment vacated and case remanded for*
27 *reconsideration in light of Randall v. Loftsgaarden*, 478 U.S. 1015, *opinion on remand*, 800 F.2d 305 (2nd Cir.), *as*
28 *amended*, 806 F.2d 17 (2nd Cir. 1986)) ("*Freschi* was vacated by the Supreme Court and remanded for reconsideration in
light of *Randall*; however, *Randall* did not affect this portion of *Freschi*, and we find the Second Circuit's reasoning on the
point persuasive.").

1 **B. Testing the State’s implementation, in context, against well-developed law on**
 2 **what causes confusion among consumers in the real world yields the inescapable**
 3 **conclusion that reasonable voters will understand that candidates using the**
 4 **Republican party name on the Top Two ballot are associated with the Party.**

5 While this is not a trademark case, trademark cases regularly address when and how
 6 confusion arises from use of similar names or marks. They provide a framework for
 7 evaluating whether the State’s use of the Republican Party name on ballots and other state-
 8 sponsored election materials results in confusion over whether candidates identified with the
 9 party are associated with it.

10 Eight factors, sometimes referred to as the *Sleekcraft* factors,
 11 guide the inquiry into whether a defendant's use of a mark is
 12 likely to confuse consumers: (1) the similarity of the marks;
 13 (2) the strength of the plaintiff's mark; (3) the proximity or
 14 relatedness of the goods or services; (4) the defendant's intent
 15 in selecting the mark; (5) evidence of actual confusion; (6) the
 16 marketing channels used; (7) the likelihood of expansion into
 17 other markets; and (8) the degree of care likely to be exercised
 18 by purchasers of the defendant's product. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979). The
Sleekcraft factors are not a scorecard, a bean-counter, or a
 checklist. *Thane*, 305 F.3d at 901. “Some factors are much
 more important than others, and the relative importance of
 each individual factor will be case-specific.” *Brookfield*
Communs., 174 F.3d at 1054.

19 *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt.*, 618 F.3d 1025,
 20 1030-1 (9th Cir. 2010). The *Fortune Dynamic* court noted that after-the-fact (“post-
 21 purchase”) confusion is relevant to the analysis. *Id.* at 1032. Thus, the Court should
 22 consider the “post-purchase” evidence from 2010 post-election media coverage detailing
 23 whether the Republican Party had gained control of the Washington legislature based on
 24 election of candidates who expressed a Republican preference on the ballot.

25 Considering each of the *Sleekcraft* factors in connection with the State’s
 26 implementation of I-872 makes it clear that by widely adopted and understood standards,
 27
 28

1 there is a likelihood of confusion arising from the State's implementation of I-872.

2 **1. Similarity of mark.**

3 The State uses the exact name of a political party in its preference statement if a
4 candidate so requests. The widespread use of the Republican Party's name, the alternative
5 abbreviation "GOP," or other recognized abbreviations for the Party name on State-published
6 ballots, voters' pamphlets and political advertising is clear.

7 **2. Strength of mark.**

8 The Republican Party brand is one of the strongest voting cues influencing voter's
9 decision. *See, e.g.,* Ex. 450. Secretary Reed acknowledges that candidates invoking the
10 Republican name obtain a electoral advantage. Ex. 104.

11 **3. Proximity of marking.**

12 The use of the Republican "brand" by the State and the Party is for the same purposes
13 - to provide political information to voters about candidates and their positions and to
14 influence the voter's decision about how to cast his or her vote.

15 **4. The defendant's intent in selecting the mark.**

16 The State's intent in adopting I-872 was clearly to allow candidates to "continue" to
17 use the Republican brand when running for office. Ex. 369.

18 The primary was intended to mimic the blanket primary, both in form and function:

19 Would the primary ballot look any different to the voter?

20 No. At the primary, the candidates for each office will be listed under the title of that
21 office, the party designations will appear after the candidates' names, and the
22 voters will be able to vote for any candidate for that office (just as they did
under the blanker primary).

23 Ex. 369. "[I]f the court rules against the blanket primary and the Legislature doesn't adopt
24 a system that preserves the rights that voter now enjoy under the blanket primary, we are
25 ready with an initiative that will do just that." Ex. 380.

26 The State recognizes that the candidates' use of the Republican brand provides an
27 electoral advantage over candidates who use other ballot identifiers. Ex. 104. By enabling
28

1 voters to advance more than one Republican-identified candidate to the general election, the
2 State sought to avoid the constitutional safeguards required by *California Democratic Party*
3 *v. Jones* and *Democratic Party v. Reed*.

4 **5. Evidence of actual confusion.**

5 There is substantial evidence that voters, media, the general public, and even state
6 officials believe that a candidate is associated with the Republican Party if the candidate's
7 declaration of candidacy and ballot position state "prefers Republican Party." The State's
8 contention that its public education efforts avoided confusion is rebutted by the KOMO
9 public service announcements which refer to candidates in the same party advancing. Exs.
10 559, 560.

11 **6. Marketing channels used.**

12 The Republican Party uses the same channels as candidates use. The State's political
13 advertising statutes mandate that the Republican Party, and any other political advertiser,
14 include the candidate's stated preference for the Party. The unauthorized use occurs in
15 exactly the same channels as the authorized use.

16 **7. Likelihood of expansion.**

17 The Republican Party intends to have authorized candidates associated with and
18 nominated by it in partisan races for the foreseeable future. The State intends to let every
19 candidate who lists a preference for the Republican Party use its name on ballots, campaign
20 advertising and state published voting materials for the foreseeable future as well.

21 **8. The degree of care exercised by voters.**

22 There is no evidence that voters exercise care to discern the special meanings and
23 limitations the State seeks to attribute to its use of the Republican Party's name, including
24 the talismanic effect ascribed to "preference." Despite the State's assertions, "preference"
25 for a party is not new, or unique to I-872. Exs. 369, 380. The State's ballots and election
26 materials under the Montana primary used the term "preference" when voters affiliated with
27

1 a party on its consolidated ballots. *See, e.g.*, Exs. 532-545.

2 **C. The State's implementation of I-872 interferes with the WSRP's ability to**
 3 **communicate with its members about its nominees.**

4 The government may not regulate paying for political speech without a compelling
 5 interest, and only through a narrowly tailored statute to meet the compelling interest. The
 6 valid interests of the State are severely circumscribed: “[P]reventing corruption or the
 7 appearance of corruption are the only legitimate and compelling government interests thus
 8 far identified for restricting campaign finances.” *Davis v. FEC*, 554 U.S. 724, 741 (2008)
 9 (quoting *Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)). The
 10 State has repeatedly represented that the Republican nominating process has been completely
 11 privatized by I-872, but still seeks to regulate how the Party pays for its own internal
 12 procedures.⁶ It offers no justifying and compelling interest for regulating how the GOP pays
 13 for its now-private nomination process, a process which elsewhere the State determines is
 14 ineffective to connect the party to candidates on the ballot in any fashion. *See* Ex. 197
 15 (Attorney-General client advice memorandum. The risk of corruption or appearance of
 16 corruption is not presumed; the government bears the burden of showing it. *McConnell v.*
 17 *FEC*, 540 U.S. 93, 185 n.72 (2003) (overruled in party *Citizens United v. FEC*, 130 S.
 18 Ct. 876, 175 L.Ed. 2d 753 (2010)). The State offers no evidence to show why regulating the
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23 ⁴ *Compare* Tr. Oral Arg., Dkt. 101, 79:5-10, the oral argument at the Supreme Court in this case, “The parties can
 24 select their standardbearers without any State interference, adopting their own nomination process.” Tr. 26:6-8,
 25 http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-713.pdf (last visited 9/13/10), the State’s
 26 merits brief, “[I-872] returns the relationship between the political parties and the state to what existed before the
 27 state required a party primary nominating process, and returns to the parties the ability to select their nominees
 28 however they choose.” Br. Pet. 37 http://www.oyez.org/sites/default/files/cases/2000-2009/2007/2007_06_713/briefs/petitioner/Brief%20for%20Petitioner%20State%20of%20Washington:%20Rob%20McKenna.%20Attorney%20General:%20Sam%20Reed.%20Secretary%20of%20State.pdf (last visited 9/13/10) and St. Mot. S. J., 22.

1 WSRP's internal procedures is needed under the State's self-described "paradigm shift." *See*
2 *fn.6, supra* Br. Pet. at 37.

3
4 **D. The State's implementation of I-872 regarding precinct committee officer
elections invades core rights of political association.**

5 PCO elections are governed by RCW 29A.80.051, which includes a requirement that
6 PCO candidates achieve at least 10% of the vote of the top vote-getter on the ballot of the
7 same party. The State acknowledges that PCO elections are an "intra-party" election. WAC
8 434-230-100(2). The drafters of I-872 were aware of PCO elections, referring to them in
9 Section 9 of the initiative. Dkt 239, n.11. The State acknowledges that Washington's
10 Constitution "requires that any legislation amending an existing statute set forth at statute in
11 full (Wash. Const. Art. II, §37), [so] it was necessary for the initiative to set forth the
12 reference to PCO elections even though it was not affected." *Id.* The Secretary of State's
13 office adopted WAC 434-262-075 to eliminate the statutory 10% threshold for election as
14 a precinct committee officer. In adopting the rules, the Secretary of State explained that
15 "[t]hese rules implement Initiative 872 (Top Two Primary) for partisan public office, and
16 implement the elections of precinct committee officers and president and vice president in
17 the context of Initiative 872." WSR 08-15-052.⁷

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21 Elsewhere, the Secretary of State explained that "[t]his change in primary election
22 system necessitates changes in the administrative rule relating to the format of ballots and
23 the administration of political party precinct committee officer elections." Ex. 67 at 1. The
24 State's implementation treats the PCO statutes as having been impliedly *amended* by I-872,
25 notwithstanding the constitutional prohibition on multiple subjects and the constitutional
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⁷ <http://apps.leg.wa.gov/documents/laws/wsr/2008/15/08-15-052.htm> (last visited 1/9/11).

1 requirement that amended statutes be reproduced in full.⁸ Any assertion that PCO elections
2 are a “wholly independent statutory scheme” is contradicted by the State’s own guidance on
3 implementing I-872. *See Ex. 300.*

4
5 *In Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277 (2003), the Ninth Circuit
6 held that “allowing nonmembers to vote for precinct committeemen violates the party's
7 associational rights.” 351 F.3d at 1281. The Arizona statute permitting non-members of the
8 party to vote for precinct committee officers infringed on the First Amendment right of
9 association because state law vested the PCOs with authority to fill vacancies for candidates
10 and made the PCOs members of the governing body of the political party. Washington law
11 makes PCOs members of the governing body of the Republican Party. PTO, Agreed Facts,
12 ¶¶14-15. Washington law also vests PCOs with authority to fill vacancies in partisan office
13 where the officeholder was of the same party. Wash. Const. Art. II, Sec. 15. Partisan
14 vacancies have been filled using this process for officeholders elected under I-872. PTO,
15 Agreed Facts, ¶16.

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17
18 It is not the election of PCOs that violates the rights of the Republican Party or its
19 members. It is *allowing* nonmembers to elect PCOs that is the problem.

20
21 Moreover, that Washington has allowed PCOs to be elected from the general
22 population since before I-872 hardly insulates the provision from challenge,
23 given that the state’s earlier election scheme was struck down as
24 unconstitutional for exactly that reason. *See Reed*, 343 F.3d at 1203.

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⁸ The Republican Party is not hereby attempting to invalidate I-872 based on state constitutional defects. However, the State has expressly invoked the provision in defending I-872, and the Court should not adopt a reading of the statute or state legal analysis that would violate the strictures of Article II, Section 37 of the State constitution.

1 Dkt. 184 at 11 n.5. An assertion that voting is limited to party members is unsupported by
2 the structure of the election or even by the instructions on the ballot itself. Precinct
3 committee officers are elected on a consolidated ballot with all other offices. These ballots
4 are distributed to all voters, regardless of their political affiliation. The State has made no
5 effort to limit distribution of ballots that would elect Republican precinct committee officers
6 to Republican voters. Although the Attorney General recommended separate ballots, but
7 separate ballots were rejected in the face of objections from election administrators. *See* Exs.
8 107-109. Despite concerns that the State's implementation of I-872 regarding PCO elections
9 was another issue that put the entire initiative at risk,⁹ the State used a consolidated ballot,
10 rejecting any effort to obtain even a minimal expression of affiliation from voters. "To avoid
11 needing a pick a party box, we are putting all the candidates under the same contest –
12 grouped by party – and when a voter votes for one candidate, that is their [*sic*] party
13 affiliation statement." Ex. 107 at 2. The State's published summary of its Top Two Primary
14 rules states:
15

- 16 • Voters are not required to affiliate with a political party in order to
17 vote in the Primary.
- 18 • For each race, voters may vote for any candidate listed on the
19 ballot.

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23 ⁹ "My main comment on PCOs – and I know this is not doable at this time – is that they may kill the Top-Two
24 all by themselves, so, at the least, move them to the General." Ex. 129. The State implemented the consolidated
25 ballot in the face of warning from its counsel that the single-ballot option imperiled all of I-872:

26 From a legal standpoint, including precinct committee officers on the Top Two Primary ballot could
27 cause voter confusion. . . . To emphasize the difference between PCOs and other offices, the Attorney
28 General's Office has recommended that a separate ballot be required.

Ex. 109 at 2. The State received feedback from election administrators. *See, e.g.*, Ex. 112. Some of the feedback
indicated that separate ballots would be an administrative burden. One even suggested that in view of the
administrative burdens, "[i]f we can't handle it, then let the Top Two Primary go down." Ex. 108.

- 1 • Voters in the Primary are voting for candidates, not choosing a
2 political party's nominees.
- 3 • The purpose of the Primary is to winnow the number of candidates
4 to two for the General Election.

5 WAC 434-230-055.

6 Republican PCOs are selected at the primary, where "voters may vote for any
7 candidate listed on the ballot." The instructions for voting for PCOs do not prevent non-
8 members from voting for Republican PCOs. The ballot instructions do not advise non-party
9 voters that they *should* not vote for PCO. Ex. 335. The State may adopt rules to ensure that
10 intra-party competition is resolved democratically, but that does not permit the State to
11 disregard the Republican Party's associational rights. *See California Democratic Party v.*
12 *Jones*, 530 U.S. 567, 572-73 (2000).

14 The State's implementation of I-872 in connection with PCO elections harms the
15 Republican Party by enabling non-Republicans to run and be elected as Republican precinct
16 committee officers. In 2008, five young Libertarian activists filed as Republican precinct
17 committee officers in Chelan County. Their purpose was to change the Party and its
18 positions. These individuals disagree with a substantial portion of the Republican platform.
19 Similar efforts occurred in Island County. The presence of non-Republicans as Republican
20 PCOs seriously impairs its ability to organize its voters and turn them out. If such PCOs
21 work at all, their political agendas will be at cross-purposes with most of the Party
22 organization.
23
24

25 The issuance of Certificates of Election to PCO candidates who do not obtain 10%
26 of the vote received by the highest Republican vote-getter in the precinct contradicts the
27
28

1 Republican Party's rules. Those rules exist so that PCO candidates work to be elected and
2 demonstrate they have at least some support among Republican voters in the precinct.

3
4 The State now refuses to count votes cast (or release documents to determine votes
5 cast) in some PCO elections, preventing the Republican Party from enforcing its vote
6 threshold requirement. It has done so based on I-872's severance of *all* connection between
7 parties and candidates on the ballot.

8
9 The State treats the mere casting of a vote by any person as adequate affiliation with
10 the Republican Party to select Republican Party leaders. WAC 434-230-100(6). In doing
11 so, the State re-defines the scope of the Republican Party's association, contrary to the
12 Party's definition of that association. Ex. 349. The State's redefinition is contrary to law.
13 The Supreme Court has recognized the strong interest that a political party has in selecting
14 its own leaders, including limiting that selection process to party members. *Eu v. San*
15 *Francisco County Democratic Cent. Comm.*, 484 U.S. 214, 230-31 (1989).

16
17 **E. The State's implementation of I-872 negates authorized association between**
18 **candidates and the Republican Party, which invades core rights of political**
19 **association.**

20 The State's implementation of I-872 in connection with PCO elections has much
21 broader implications. Under the State's implementation, I-872 now does away with political
22 affiliation between candidates and parties entirely – negating the concept of nomination – and
23 rendering illusory its representations throughout this litigation that the Republican Party may
24 still nominate its candidates. The State's implementation goes beyond how candidates
25 appear on the ballot - candidates are not “of” a political party, even if nominated by the party.
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1 “Major political party” status under RCW 29A.04.086 requires that “[a]t least one
2 nominee for president, vice president, United States senator, or a statewide office receive at
3 least 5% of the total vote cast at the last preceding state general election in an even-numbered
4 year.” This status continues “until the next even-year election at which a *candidate of that*
5 *party* does not achieve at least 5% of the vote from one of the previously specified offices.”
6 RCW 29A.04.086 (emphasis added). “If *none* of these offices appear on the ballot in an
7 even-year general election, the major party retains its status as a major party through that
8 election.” *Id.* (emphasis added). In the 2010 U.S. Senate race, Dino Rossi was the
9 Republican nominee and appeared on the general election ballot. Yet, in determining
10 whether PCO candidates were elected, the State has determined that there were no candidates
11 of the Republican Party on the ballot.
12
13

14 By the State’s implementation, Washington will cease to have *any* major political
15 parties after the 2010 general election.¹⁰ The implementation of I-872 appears to be a
16 backdoor effort to abolish major political parties without legislative authorization. The
17 existence and operation of “major political parties” permeates Washington’s election and
18 governmental system. All other political parties in the State are defined in counterpoint to
19 a “major political party.” RCW 29A.04.097. The Presidential Primary is conducted
20 regarding candidates seeking “a major political party nomination for president.” RCW
21 29A.56.030(1). The State’s process for “certification and training of election administrators,
22 assistant election administrators, and county canvassing board members” requires notice of
23
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26 ¹⁰ This is so unless the statutes are construed so that, for example, Rossi is a “candidate of the party” under RCW
27 29A.04.086, but not a “candidate of the . . . party” under RCW 29A.80.051. Such is an absurd construction, and
28 especially so given that the 5% and 10% thresholds under the two statutes both look to votes cast for the candidate
on the State’s ballot.

1 reviews be given to “the chairs of the state committees of any major political party,” as does
 2 processing of absentee ballots. WAC 434-260-040; WAC 434-250-110. The Secretary of
 3 State must develop a checklist for review of county election procedures and provide it “to
 4 the chairs of the state central committees of each major political party at least once per year.”
 5 WAC 434-26-110. A “caucus political committee” is “a political committee organized and
 6 maintained by the members of a major political party in the state senate or state house of
 7 representatives.” RCW 42.17.020(10). The legislative “joint committee on energy supply
 8 and energy conservation” is made up of “four members from the senate” and “four members
 9 from the house of representatives.” “Two members from each major political party must be
 10 appointed [from each house].” RCW 44.39.015. *See also, e.g.,* RCW 90.86.020 (Joint
 11 legislative committee on water supply during drought); RCW 47.60.310(3) (ferry/board) (“
 12 . . . not more than three members shall at the time of their appointment be members of the
 13 same major political party.”).

17 CONCLUSION

18 The Court should rule that Washington’s implementation of I-872 violates the First
 19 amendment.

20 DATED this 10th day of January, 2011

21
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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2011, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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