

NO.05-35774 & 05-35780

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

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE;
BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS;
MICHAEL YOUNG, Plaintiffs-Appellees,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT;
LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS,
Plaintiff-Intervenors - Appellees,

v.

STATE OF WASHINGTON; ROB MCKENNA, Attorney General; SAM REED, Secretary
of State, Defendant-Intervenors - Appellants,

and

WASHINGTON STATE GRANGE, Defendant-Intervenor - Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CV 05-00927

The Honorable Thomas S. Zilly, United States District Court Judge

SUPPLEMENTAL BRIEF OF STATE OF WASHINGTON

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I. INTRODUCTION

This supplemental brief is submitted by the State of Washington and the other state appellants in response to this Court's Order dated July 3, 2008, asking the parties to "submit supplemental briefs . . . addressing the impact of the Supreme Court's ruling in *Washington State Republican Party v. Washington*, 128 S. Ct. 1184 (2008), on the issues raised but not resolved in the appeal before this three-judge panel." The Order also asks the parties to "address any intervening authority on the ballot access and trademark claims that has been filed since these issues were originally briefed."

The Supreme Court's opinion either expressly or by necessary implication resolves all of the issues properly appealed to this Court, and none of the remaining issues has merit.

II. BACKGROUND: THE SUPREME COURT OPINION

The United States Supreme Court upheld the facial constitutionality of Initiative 872 and rejected the First Amendment challenge raised by the political parties. *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). The Supreme Court held:

Immediately after implementing regulations were enacted, respondents obtained a permanent injunction against the

enforcement of I-872. *The First Amendment does not require this extraordinary and precipitous nullification of the will of the people.* Because I-872 does not on its face provide for the nomination of candidates or compel political parties to associate with or endorse candidates, and because there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters, I-872 does not on its face severely burden respondents' associational rights. *We accordingly hold that I-872 is facially constitutional.* The judgment of the Court of Appeals is reversed.

Id. at 1195–96 (emphasis added).

The effect of the Supreme Court's decision was to reverse and vacate the injunction entered by the district court, which the Supreme Court termed an "extraordinary and precipitous nullification of the will of the people[.]" *Id.* at 1196. A decision by the Supreme Court is immediately effective, and binds the lower courts as law of the case. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427–28, 98 S. Ct. 702, 54 L. Ed. 2d 659 (1978) (mandamus lies to restrain a lower court from enforcing an injunction that the Supreme Court reversed). "The right to remedial relief falls with an injunction which events prove was erroneously issued[.]" *United States v. United Mine Workers of America*, 330 U. S. 258, 295, 67 S. Ct. 677, 91 L. Ed. 884 (1947) (citations omitted). *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869, 871 (9th Cir. 1992) ("[o]nce an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be

enforced.”); *I.T.S. Rubber Co. v. Tee Pee Rubber Co.*, 295 F. 479, 481–82 (6th Cir. 1924) (“[I]n this case the order of injunction was a single, unitary decree . . . and in the mandate the decree below was reversed and the cause remanded. This is not a modification of the injunction, but a vacating of the decree and a dissolution of the injunction.”).¹ Thus, the injunction previously entered is no longer effective.

On April 16, 2008, the Secretary of State proposed rules to implement the initiative, and implemented emergency rules on May 2, 2008 (attached as Appendix A). During the week of June 2, candidates filed for office, and the State will conduct its first primary under the new law on August 19, 2008.

III. IMPACT OF THE SUPREME COURT’S DECISION ON ARGUMENTS NOT ADDRESSED BY THIS COURT

The Ninth Circuit’s decision in this case indicated that “[b]ecause we have held Initiative 872 to be unconstitutional under the First and Fourteenth

¹ Nor may the injunction be given effect based on the notion that its entry by the trial court was supported by an alternative ground. *Washington Legal Found. v. Henney*, 128 F. Supp. 2d 11, 14-15 (D.D.C. 2000) (an injunction cannot be enforced when the only basis for its entry is reversed). The District Court did not ground its injunction in any alternative holding, other than the theory of facial invalidity under the First Amendment that the Supreme Court rejected. *See generally Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005). Nor did this Court affirm the injunction upon any alternative basis. *See generally, Washington State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006).

Amendments, we do not reach any of the other arguments that the political parties advance with respect to Initiative 872.” *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1124 n.28 (9th Cir. 2006). To the extent the Ninth Circuit did not address some arguments, they are resolved by principles established in the Supreme Court’s decision, are not properly before the Court, or otherwise are unsound.

A. Principles In The Supreme Court’s Decision

There are five basic principles in the Supreme Court’s decision.

First, the “I-872 primary does not, by its terms, choose parties’ nominees. The essence of nomination—the choice of a party representative—does not occur under I-872 . . . [because the] top two candidates from the primary election proceed to the general election regardless of their party preferences.” *Washington State Grange*, 128 S. Ct. at 1192.

Second, under I-872 “parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington’s prior regulations governing party nominations.” *Id.* at 1192-93.

Third, the “First Amendment does not give political parties a right to have their nominees designated as such on the ballot.” *Id.* at 1193 n.7.

Fourth, “I-872 does not on its face . . . compel political parties to associate with or endorse candidates[.]” *Id.* at 1196.

Fifth, “because there is no basis in this facial challenge for presuming that candidates’ party-preference designations will confuse voters, I-872 does not on its face severely burden respondents’ associational rights.” *Id.*

These principles resolve many issues that this Court did not address.²

B. Arguments That The Ninth Circuit Did Not Address Are Resolved By The Supreme Court’s Decision

1. Equal Protection

The Republican Party argued that I-872 violated the Equal Protection Clause because under it, minor parties, but not major parties, were permitted to nominate candidates for office by convention, and have their nominated candidates appear, designated as such, on the ballot. Resp. Br. of Republicans to Opening Br. of Grange at 42-46. As the Supreme Court

² The District Court reserved ruling on an argument by the Republican Party that the “Montana primary” used in Washington after 2003 (and used while the constitutionality of I-872 was still pending) was also unconstitutional. State ER 586–88. If the Supreme Court had affirmed the lower courts on the constitutionality of I-872, it would have been necessary to address this “Montana primary” claim. However, in light of the Supreme Court holding that I-872 is constitutional, there is no need to conduct any more “Montana primaries” in Washington and the only issue reserved by the District Court is moot.

decision makes clear, there is no basis for this claim. Under I-872, parties may “nominate candidates by whatever mechanism they choose because I-872 repealed Washington’s prior regulations governing party nominations.” *Washington State Grange*, 128 S. Ct. at 1192–93. In addition, no candidate is designated as a party nominee on the ballot. “The law never refers to the candidates as nominees of any party, nor does it treat them as such.” *Id.* at 1192. “[P]arties may no longer indicate their nominees on the ballot[.]” *Id.* at 1193 n.7. Wash. Admin. Code § 434-215-130 expressly addresses this point. The rule provides that under “the election system enacted as [I-872], there is no distinction between major party candidates, minor party candidates, or independent candidates filing for partisan congressional, state, or county office.” Wash. Admin. Code § 434-215-130(1) (Attached as Appendix A). “All candidates filing for these partisan offices have the same filing and qualifying requirements.” *Id.*

All parties may nominate their candidates however they choose, and no candidate appears on the ballot designated as a party’s nominee. For these reasons, the Republicans’ “equal protection” issue is now moot.

2. Ballot Access

The Libertarian Party argued that I-872 deprives the Libertarian Party of reasonable ballot access. Libertarian Resp. Br. at 19-23. The Party cited case law relating to the question of ballot access for minor parties, all of it in the context of and dependent upon, a party nominating election system. I-872 does not nominate party candidates. “The essence of nomination—the choice of a party representative—does not occur under I-872.” *Washington State Grange*, 128 S. Ct. at 1192. As the Supreme Court observed, party nomination is “*simply irrelevant*” to this system. *Id.* (emphasis added).

Moreover, ballot access is wide open under I-872. The initiative establishes a two-stage election system in which any candidate (with or without expressing a party preference) may compete in the primary, and the top two vote-getters (regardless of party preference) advance to the general election. No political party will have its nominee designated on the ballot, but the “First Amendment does not give political parties a right to have their nominees designated as such on the ballot.” *Id.* at 1193 n.7.

The “ballot access” argument advanced by the Libertarian Party has been rendered meaningless because I-872 is not a party candidate nominating primary, and because Washington law provides wide open ballot

access, permitting any candidate to file for office. Accordingly, there is no remaining basis for the Libertarians' minor party "ballot access" challenge to I-872.³

C. The Supreme Court Decision Raises No Additional Issues For Consideration By This Court

The Supreme Court reversed the decision below. In footnote 11 of its decision, the Supreme Court noted some arguments made by the Libertarian Party that were not within the Question Presented. *Washington State Grange*, 128 S. Ct. at 1195 n.11. The Supreme Court did not purport to determine whether those issues are properly before this Court. The footnote reads:

Respondent Libertarian Party of Washington argues that I-872 is unconstitutional because of its implications for ballot access, trademark protection of party names, and campaign finance. 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: "Does

³ The Libertarian Party also raised two claims in this Court that it did not plead or brief in the district court, contending that I-872 runs afoul of the federal qualifications clause and the date upon which federal elections are to be held. Libertarian Resp. Br. at 25-28. "As a general rule, [the Ninth Circuit] do[es] not consider issues raised for the first time on appeal." *Manta v. Chertoff*, 518 F.3d 1134, 1144 (9th Cir. 2008). Moreover, arguments previously submitted demonstrate the lack of merit of these claims. Reply Br. of Appellants State of Washington at 23-27; Appellant Grange's Reply Br. at 5-6.

Washington's primary election system . . . violate the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot? Pet. for Cert. in No. 06-730, p. i. The campaign finance issue also was not addressed below and is more suitable for consideration on remand.

Washington State Grange, 128 S. Ct. at 1195 n.11. The footnote identifies three issues: ballot access, trademark protection, and campaign finance. All of these are attributed solely to the Libertarian Party. All three have been resolved by the principles established in the Supreme Court's decision, or were not properly raised in this case, and so, are not before this Court.

1. Ballot Access

The Libertarian Party made the same ballot access argument to the Supreme Court that it made in the Ninth Circuit. For reasons already explained, the principles established in the Supreme Court's decision resolve that argument. *See supra* pp. 7-8.

2. Trademark

a. The Libertarian Party's Trademark Claim Was Resolved By The Supreme Court's Decision

The Libertarian Party has a trademark on the name "Libertarian Party." Libertarian Resp. Br. at 7, citing SER 169-172. The only reference to trademark in the entirety of the Libertarians' complaint appears in its

“Facts” section, and in the context of the complaint, can only be taken as a fact offered in support of the Libertarians’ First Amendment claim:

I-872 deprives the LP of its proprietary right to the use of the party name, *thus leading to voter confusion regarding which candidate(s) are speaking for the party and which are imposters or renegades appropriating the party name for their own purposes.* The name “Libertarian Party” is a nationally trademarked name and therefore may be used by candidates only with LP consent.

Libertarian Party’s Complaint To Intervene For Declaratory Judgment And Other Relief ¶ 20 (emphasis added). State ER 77. The Libertarian Party’s trademark claim was made to support its First Amendment argument that I-872 was unconstitutional. Libertarian Resp. Br. at 7-13. The thrust of the Libertarian Party’s argument was that the public will confuse candidates who prefer the Libertarian Party with candidates nominated by the party.

The Supreme Court rejected this argument. “I-872 does not on its face . . . compel political parties to associate with or endorse candidates[.]” *Washington State Grange*, 128 S. Ct. at 1196. Moreover, “there is no basis in this facial challenge for presuming that candidates’ party-preference designations will confuse voters, I-872 does not on its face severely burden respondents’ associational rights.” *Id.* The fact that the Libertarian Party

has a trademark on its name does not undermine the holding of the Supreme Court on this issue.

b. A Claim Of Trademark Infringement By The Libertarian Party Is Not Properly Before The Ninth Circuit

The Libertarian Party's Complaint pleads no cause of action and seeks no relief under trademark law. Libertarian Party's Complaint To Intervene For Declaratory Judgment And Other Relief, Causes of Action ¶¶ 28-41; Prayer for Relief ¶¶ 1-10. State ER 79-83. The Libertarian Party referenced its trademark only to support its First Amendment argument that I-872 was unconstitutional.

Trademarks are governed by the Lanham Act, 15 U.S.C. §§ 1051-1141n. The Libertarians neither cited nor discussed the Lanham Act or any authority relating to trademark infringement claims. Libertarian Resp. Br. at 7-13.

For the first time in its briefing to the Supreme Court, the Libertarian Party argued that its trademark would be infringed by I-872, and referred to the Lanham Act.⁴ For this reason, the Libertarian Party's trademark

⁴ Pages 14 through 18 of the Libertarian Party's Supreme Court brief, which discuss a trademark claim, are attached as Appendix B.

infringement claim is not properly before the Ninth Circuit. *Sec. & Exch. Comm'n (S.E.C.) v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1167 (9th Cir. 2007) (“We will not consider arguments raised for the first time on appeal absent exceptional circumstances.”).

c. Even If The Libertarian Party’s Trademark Infringement Claim Were Before The Court, There Is No Merit To The Claim

Even if the Libertarian Party’s trademark infringement claim were properly before the Court, there is no basis for the claim. “[T]rademark infringement law prevents only unauthorized uses of a trademark in connection with a commercial transaction in which the trademark is being used to confuse potential consumers.” *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005). This is consistent with intervening trademark authority. To prevail on a claim of trademark infringement, a plaintiff must establish, among other things that, (1) defendant’s use of the mark occurred in commerce, (2) defendant used the mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services, and (3) defendant used the mark in a manner likely to confuse consumers. *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1218 (11th Cir. 2008).

These statutory requirements of the Lanham Act, 15 U.S.C. § 1114(1)(a), cannot be established in the context of this case. First, the Libertarian's trademark is not infringed or diluted by allowing candidates to indicate a party preference on the ballot. Trademark infringement and trademark dilution claims only apply to "uses in commerce[.]" 15 U.S.C. § 1125(a)(1); *see also* 15 U.S.C. § 1114(1)(a). Casting a ballot in an election is not commerce; it is part of the political process. *Tax Cap Comm. v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D. Fla., 1996). Second, there is only infringement if the trademark is used in a way that will confuse consumers. The Supreme Court held that "there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters[.]" *Washington State Grange*, 128 S. Ct. at 1196.

3. Campaign Finance

a. The Campaign Finance Issue Raised By The Libertarian Party Is Not Properly Before This Court

The Libertarian Party also raised a campaign finance claim for the first time in the Party's briefing at the Supreme Court.⁵ There is no discussion of it in either its complaint or briefs to this Court. State

⁵ Pages 20 through 22 of the Libertarian Brief filed in the Supreme Court are attached as Appendix C.

ER 70-84; *see generally*, Libertarian Resp. Br. Therefore, the claim is not properly before this Court. *S.E.C.*, 509 F.3d at 1167.

b. Even If The Libertarian Party's Campaign Finance Claim Were Before The Court, There Is No Merit To The Claim

Even if the campaign finance claim were properly raised, it would have no merit, and it does not implicate I-872 in any event. A Washington statute completely different from I-872, Wash. Rev. Code § 42.17.640, sets campaign contribution limits, including limits for “bona fide political parties.” Wash. Rev. Code § 42.17.640(1)(g). The Libertarians contended in their Supreme Court brief that I-872 would remove the opportunity for the Libertarian Party to qualify as a “bona fide political party” for purposes of qualifying for higher campaign contribution limits as set forth in Wash. Rev. Code § 42.17.640. The agency responsible for administering Washington’s campaign finance laws has adopted an administrative rule in light of the Supreme Court’s decision, expressly providing that any party that qualified as a “bona fide political party” at any time within the last five years will continue to hold that status. Wash. Admin. Code § 390-05-196 (as amended June 30, 2008) (attached as Appendix D). The claim accordingly has no merit.

Moreover, even if this campaign finance claim were before the Court, it properly would present only a challenge to the campaign finance statutes, not to I-872.

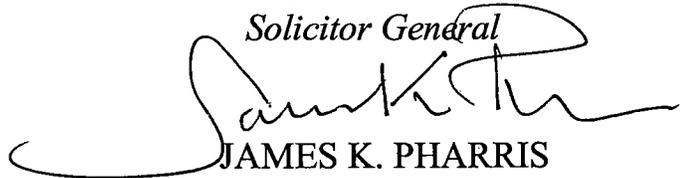
IV. CONCLUSION

For the reasons stated above, this Court should grant the State's pending motion for vacation of attorney fees previously awarded to the political parties, and dismiss this case.

RESPECTFULLY SUBMITTED this 4th day of August, 2008.

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APPENDIX A



RULE-MAKING ORDER

CR-103 (June 2004) (Implements RCW 34.05.360)

Agency: Office of the Secretary of State, Elections Division

- Permanent Rule
- Emergency Rule

Effective date of rule:

Permanent Rules

- 31 days after filing.
- Other (specify) _____ (if less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Effective date of rule:

Emergency Rules

- Immediately upon filing.
- Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes
 - No
- If Yes, explain:

Purpose:

The purpose of this rule is to implement Initiative 872 for the 2008 Primary and General Elections.

Citation of existing rules affected by this order:

Repealed: 434-220-010, 434-220-020, 434-220-030, 434-220-040, 434-220-050, 434-220-060, 434-220-070, 434-220-080, 434-220-090, 434-230-020, 434-230-040, 434-230-050, 434-230-080, 434-230-150, 434-230-160, 434-230-170, 434-230-190, 434-230-200, 434-230-210, 434-230-220,
 Amended: 434-208-060, 434-215-025, 434-230-010, 434-230-060, 434-250-040, 434-250-050, 434-250-310, 434-253-020, 434-253-025, 434-262-031, 434-262-160, 434-335-040, 434-335-445, 434-381-120.
 Suspended:

Statutory authority for adoption: RCW 29A.04.611

Other authority :

PERMANENT RULE ONLY (Including Expedited Rule Making)

Adopted under notice filed as WSR _____ on _____ (date).

Describe any changes other than editing from proposed to adopted version:

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: _____ phone () _____
 Address: _____ fax () _____
 e-mail _____

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

On March 18, 2008, the United States Supreme Court issued *Washington State Grange v. Washington State Republican Party, et al.* 552 U.S. ___, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). In this opinion, the Court reversed a Ninth Circuit opinion that had declared Washington's Top Two Primary system unconstitutional. The impact of this ruling is that the primary system enacted by Initiative 872 (Chapter 2, Laws of 2005) is now in effect. This change in primary election systems necessitates changes in the administrative rules relating to filing for office, the format of ballots and ballot materials, information submitted for appearance in the state voters' pamphlet, and the administration of primary and general elections. Pursuant to RCW 29A.24.081, the Secretary of State's Office and county auditors may begin to accept declarations of candidacy beginning May 16, 2008. The regular candidate filing period ends June 6, 2008. Ballots will be formatted and sent to print in June. There is insufficient time to adopt these rules through the standard rulemaking process. The Secretary of State's Office did send a draft of the proposed rules to stakeholders and interested parties on April 16, 2008, posted the draft rules on the agency's website, and accepted public comment through April 22, 2008.

Date adopted: May 2, 2008

NAME (TYPE OR PRINT) Steve Excell

SIGNATURE

TITLE Assistant Secretary of State

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
 STATE OF WASHINGTON
 FILED

DATE: May 02, 2008
TIME: 12:20 PM

WSR 08-10-055

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	_____	Amended	_____	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	<u>19</u>	Amended	14	Repealed	<u>20</u>
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	_____	Repealed	_____

AMENDATORY SECTION (Amending WSR 06-23-094, filed 11/15/06, effective 12/16/06)

WAC 434-208-060 Electronic filings. In addition to those documents specified by RCW 29A.04.255, the secretary of state or the county auditor shall accept and file in his or her office electronic transmissions of the following documents:

(1) The text of any proposed initiative, referendum, or recall measure and any accompanying documents required by law;

(2) Any minor party or independent candidate filing material for president and vice-president, except nominating petitions;

(3) Lists of presidential electors selected by political parties or independent candidates;

(4) Voted ballots, provided the voter agrees to waive the secrecy of his or her ballot;

(5) Resolutions from cities, towns, and other districts calling for a special election;

(6) ~~((Filling of vacancies on the ticket by a major political party,~~

~~(7))~~) Voter registration form.

NEW SECTION

WAC 434-208-110 Applicable dates and deadlines. If dates, deadlines, and time periods referenced in chapter 2, Laws of 2005, conflict with subsequently enacted law, such as chapter 344, Laws of 2006, the subsequently enacted law is effective.

AMENDATORY SECTION (Amending WSR 07-09-036, filed 4/11/07, effective 5/12/07)

WAC 434-215-025 (~~Declaration of candidacy~~) Filing fee petitions. (1) When a candidate submits a filing fee petition in lieu of his or her filing fee, as authorized by RCW 29A.24.091, voters eligible to vote on the office in the general election are eligible to sign the candidate's filing fee petition.

(2) The filing fee petition described in RCW 29A.24.101(3) does not apply. The filing fee petition must be in substantially the following form:

The warning prescribed by RCW 29A.72.140; followed by:

"We, the undersigned registered voters of [the jurisdiction of the office], hereby petition that [candidate's] name be printed on the ballot for the office of [office for which candidate is filing a declaration of candidacy]."

NEW SECTION

WAC 434-215-120 Political party preference by candidate for partisan office. (1) On a declaration of candidacy, a candidate for partisan congressional, state, or county office may state his or her preference for a political party, or not state a preference. The candidate may use up to sixteen characters for the name of the political party. A candidate's party preference, or the fact that the candidate states no preference, must be printed with the candidate's name on the ballot and in any voters' pamphlets printed by the office of the secretary of state or a county auditor's office.

(2) If a candidate does not indicate a party that he or she prefers, then the candidate has stated no party preference and is listed as such on the ballot and in any voters' pamphlets.

(3) The filing officer may not print on the ballots, in a voters' pamphlet, or other election materials a political party name that is obscene. If the name of the political party provided by the candidate would be considered obscene, the filing officer may petition the superior court pursuant to RCW 29A.68.011 for a judicial determination that the party name be edited to remove the obscenity, or rejected and replaced with "states no party preference."

(4) A candidate's preference may not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate. If the name of the political

party provided by the candidate implies that the candidate is nominated or endorsed by a political party, or that a political party approves of or associates with that candidate, the filing officer may petition the superior court pursuant to RCW 29A.68.011 for a judicial determination that the party name be edited, or rejected and replaced with "states no party preference."

NEW SECTION

WAC 434-215-130 Minor political party candidates and independent candidates. (1) In the election system enacted as chapter 2, Laws of 2005, there is no distinction between major party candidates, minor party candidates, or independent candidates filing for partisan congressional, state, or county office. All candidates filing for these partisan offices have the same filing and qualifying requirements. All candidates for partisan office have the option of stating on the ballot their preference for a political party, or stating no party preference. The party preference information plays no role in determining how candidates are elected to public office.

(2) The requirements in RCW 29A.20.111 through 29A.20.201 for minor political party candidates and independent candidates for partisan office to conduct nominating conventions and collect a sufficient number of signatures of registered voters do not apply to candidates filing for partisan congressional, state, or county office. The requirements in RCW 29A.20.111 through 29A.20.201 for minor political party candidates and independent candidates only apply to candidates for president and vice-president of the United States.

NEW SECTION

WAC 434-215-140 Voids in candidacy and vacancies in office.

(1) The procedures established in RCW 29A.24.141 through 29A.24.191 for reopening candidate filing due to a void in candidacy or a vacancy in office apply to partisan congressional, state, or county office.

(2) As established in RCW 29A.24.141, a void in candidacy only occurs when no valid declaration of candidacy has been filed, or all persons who filed have either died or been disqualified. There is no void in candidacy as long as there is at least one candidate.

(3) If dates, deadlines, and time periods referenced in chapter 2, Laws of 2005, conflict with subsequently enacted law, such as chapter 344, Laws of 2006, the subsequently enacted law is

effective.

NEW SECTION

WAC 434-215-150 No major party ticket. The procedures in RCW 29A.28.011 allowing a major party to fill a vacancy on a major party ticket do not apply. The predecessor statute, RCW 29A.28.010, was repealed by chapter 2, Laws of 2005 (Initiative 872). Pursuant to chapter 2, Laws of 2005, there is no "major party ticket."

NEW SECTION

WAC 434-215-160 Ranked choice voting. If a charter county elects candidates for county office by ranked choice voting, and if the charter specifically grants political parties the authority to determine which candidates for partisan office may run as candidates of the party, the county auditor may modify the requirements of this chapter in order to accommodate the requirements of a ranked choice voting election.

REPEALER

The following chapter of the Washington Administrative Code is repealed:

WAC 434-220-010	Partisan primaries.
WAC 434-220-020	Definitions.
WAC 434-220-030	Ballot layout and color-- Consolidated ballots.
WAC 434-220-040	Ballot layout and color--Physically separate ballots.
WAC 434-220-050	Order of political parties.
WAC 434-220-060	Ballot programming--Consolidated ballots.
WAC 434-220-070	Polling place procedures-- Physically separate ballots.
WAC 434-220-080	No record of political party affiliation.
WAC 434-220-090	Partisan primary recounts.

AMENDATORY SECTION (Amending WSR 06-14-049, filed 6/28/06, effective 7/29/06)

WAC 434-230-010 Sample ballots. Sample paper ballots shall be printed in substantially the same form as official ballots, but shall be a different color than the official ballot. Sample ballots (~~((for counties using electronic or mechanical voting systems))~~) shall be printed in a manner that makes them easily distinguishable from the official ballot. Sample ballots shall be available (~~((starting))~~) at least fifteen days prior to an election. Such sample ballots shall be made available through the office of the county auditor and at least one shall be available at all polling places on election day.

~~((Names of the candidates in each office to appear on the primary ballot shall be arranged on the sample ballot in the order provided by RCW 29A.36.121. The names of the candidates in each office to appear on the general election ballot shall be listed on the sample ballot in the order in which their names appear on the official ballot. State measures and local measures shall be in the same order as they appear on the official ballot.))~~

At any primary or election when a local voters' pamphlet is published which contains a full sample ballot, a separate sample ballot need not be printed.

Counties with populations of over five hundred thousand may produce more than one sample ballot for a primary or election, each of which lists a portion of the offices and issues to be voted on at that election. Sample ballots may be printed by region or area (e.g., legislative district, municipal, or other district boundary) of the county, provided that all offices and issues to be voted upon at the election appear(~~((s))~~) on at least one of the various sample ballots printed for such county. Each regional sample ballot shall contain all offices and issues to be voted upon within that region. A given office or issue may appear on more than one sample ballot, provided it is to be voted upon within that region. Sample ballots shall be made available and distributed to each polling place and to other locations within the appropriate region or area.

NEW SECTION

WAC 434-230-015 Ballot format. (1) Each ballot shall specify the county, the date, and whether the election is a primary, special or general.

(2) Each ballot must include instructions directing the voter how to mark the ballot, including write-in votes.

(3) Each ballot must explain, either in the general instructions or in the heading of each race, the number of candidates for whom the voter may vote (e.g., "vote for one").

(4)(a) If the ballot includes a partisan office, the ballot must include the following notice in bold print immediately above the first partisan congressional, state or county office: "READ: Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."

(b) When the race for president and vice-president appears on a general election ballot, the ballot must include the following notice in bold print after president and vice-president but immediately above the first partisan congressional, state or county office: "READ: Each candidate for president and vice-president is the official nominee of a political party. For other partisan offices, each candidate may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."

(c) The same notice may also be listed in the ballot instructions.

(5) Counties may use varying sizes and colors of ballot cards if such size and color is used consistently throughout a region, area or jurisdiction (e.g., legislative district, commissioner district, school district, etc.). Varying color and size may also be used to designate absentee ballots, poll ballots, or provisional ballots.

(6) Ballots shall be formatted as provided in RCW 29A.36.170. Ballots shall not be formatted as stated in RCW 29A.04.008 (6) and (7), 29A.36.104, 29A.36.106, 29A.36.121, 29A.36.161(4), and 29A.36.191.

NEW SECTION

WAC 434-230-025 Order of offices. Measures and offices must be listed in the following order, to the extent that they appear on a primary or election ballot:

- (1) Initiatives to the people;
- (2) Referendum measures;
- (3) Referendum bills;
- (4) Initiatives to the legislature and any alternate proposals;
- (5) Proposed constitutional amendments (senate joint resolutions, then house joint resolutions);
- (6) Countywide ballot measures;

- (7) President and vice-president of the United States;
- (8) United States senator;
- (9) United States representative;
- (10) Governor;
- (11) Lieutenant governor;
- (12) Secretary of state;
- (13) State treasurer;
- (14) State auditor;
- (15) Attorney general;
- (16) Commissioner of public lands;
- (17) Superintendent of public instruction;
- (18) Insurance commissioner;
- (19) State senator;
- (20) State representative;
- (21) County officers;
- (22) Justices of the supreme court;
- (23) Judges of the court of appeals;
- (24) Judges of the superior court; and
- (25) Judges of the district court.

For all other jurisdictions, the offices in each jurisdiction shall be grouped together and listed by position number according to county auditor procedures.

NEW SECTION

WAC 434-230-035 Office format. (1) The name of each office must be printed on the ballot.

(2) The description "nonpartisan office" must be printed either for each office or as a heading above a group of nonpartisan offices.

(3) If the term of office is not a full term, a description of the term (e.g., short/full term, two-year unexpired term) must be printed with the office name.

(4) Following each list of candidates shall be a response position and a space for writing in the name of a candidate.

(5) Each office or position must be separated by a bold line.

(6) On a general election ballot in a year that president and vice-president are elected, each political party's candidates for president and vice-president shall be provided one vote response position for that party.

NEW SECTION

WAC 434-230-045 Candidate format. (1) For each office or position, the names of all candidates shall be listed together. If the office is on the primary election ballot, no candidates skip the primary and advance directly to the general election.

(2)(a) On the primary election ballot, candidates shall be listed in the order determined by lot.

(b) On the general election ballot, the candidate who received the highest number of votes in the primary shall be listed first, and the candidate who received the second highest number of votes in the primary shall be listed second.

(c) The political party that each candidate prefers is irrelevant to the order in which the candidates appear on the ballot.

(3) Candidate names shall be printed in a type style and point size that can be read easily. If a candidate's name exceeds the space provided, the election official shall take whatever steps necessary to place the name on the ballot in a manner which is readable. These steps may include, but are not limited to, printing a smaller point size or different type style.

(4) For partisan office:

(a) If the candidate stated his or her preference for a political party on the declaration of candidacy, that preference shall be printed below the candidate's name, with parentheses and the first letter of each word capitalized, as shown in the following example:

John Smith

(Prefers Example Party)

(b) If the candidate did not state his or her preference for a political party, that information shall be printed below the candidate's name, with parentheses and the first letter of each word capitalized, as shown in the following example:

John Smith

(States No Party Preference)

(c) The party preference line for each candidate may be in smaller point size or indented.

(d) The same party preference information shall be printed on both primary and general election ballots.

(5) If the office is nonpartisan, only the candidate's name shall appear. Neither "nonpartisan" nor "NP" shall be printed with each candidate's name.

(6) The law does not allow nominations or endorsements by interest groups, political action committees, political parties, labor unions, editorial boards, or other private organizations to be printed on the ballot.

NEW SECTION

WAC 434-230-055 Partisan primary. In a primary for partisan congressional, state or county office conducted pursuant to chapter 2, Laws of 2005 (Initiative 872):

(1) Voters are not required to affiliate with a political party in order to vote in the primary election. For each office, voters may vote for any candidate in the race.

(2) Candidates are not required to obtain the approval of a political party in order to file a declaration of candidacy and appear on the primary or general election ballot as a candidate for partisan office. Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate. A candidate's political party preference is not used to determine which candidates advance to the general election.

(3) Based on the results of the primary, the two candidates for each office who receive the most votes and who receive at least one percent of the total votes cast for that office advance to the general election. The primary election does not serve to nominate any political party's candidates, but serves to winnow the number of candidates down to a final list of two for the general election. Voters in the primary are casting votes for candidates, not choosing a political party's nominees. RCW 29A.36.191 does not apply since the predecessor statute, RCW 29A.36.190, was repealed in chapter 2, Laws of 2005.

(4) Chapter 2, Laws of 2005 repealed the prior law governing party nominations. Political parties may nominate candidates by whatever mechanism they choose. The primary election plays no role in political party nominations, and political party nominations are not displayed on the ballot.

(5) If dates, deadlines, and time periods referenced in chapter 2, Laws of 2005, conflict with subsequently enacted law, such as chapter 344, Laws of 2006, the subsequently enacted law is effective.

AMENDATORY SECTION (Amending WSR 07-24-044, filed 11/30/07, effective 12/31/07)

WAC 434-230-060 Primary votes required for appearance on general election ballot. Following any ((nonpartisan)) primary, ((no)) a candidate's name shall be entitled to appear on the general election ballot ((unless)) if he or she receives the greatest or the next greatest number of votes for the office and additionally receives at least one percent of the total votes cast for the office.

~~((Following any partisan primary, no major political party~~

~~candidate's name shall be entitled to appear on the general election ballot unless he or she receives a plurality of votes cast for the candidates of his or her party for that office. The requirement in RCW 29A.36.191 that a candidate for partisan office receive at least one percent of the votes cast for that office in order to appear on the general election ballot is unenforceable based on *Libertarian Party v. Sam Reed*, Thurston County Superior Court No. 04-2-01974-2 (2004).)~~

NEW SECTION

WAC 434-230-085 Candidate who qualifies for more than one office. In the event a candidate, as a result of write-in votes in the primary, qualifies to appear on the general election ballot for more than one office, the candidate may notify the county auditor in writing within three days of certification of the primary of the single office for which he or she desires to appear on the general election ballot. If the candidate fails to notify the county auditor, the county auditor shall determine the single office for which the candidate shall appear on the general election ballot. Any void in candidacy for other positions thus created will be handled as provided by law.

NEW SECTION

WAC 434-230-095 When a candidate dies or is disqualified. The procedures in RCW 29A.28.021 allowing a political party to appoint a replacement candidate if the party's candidate dies or is disqualified do not apply. The predecessor statute, RCW 29A.28.020, was repealed by chapter 2, Laws of 2005 (Initiative 872).

NEW SECTION

WAC 434-230-110 President and vice-president of the United States. (1) When the race for president and vice-president appears on a general election ballot, the candidates for these offices must be paired together.

(2) The full name of the political party, rather than an abbreviation, must be provided for each pair of candidates, with a

designation that these candidates are the nominees of the party. The first letter of each word in the political party name must be capitalized. For example:

Example Party Nominees

(3) The order that candidates appear on the ballot is based on their political party. The political party that received the highest number of votes from the electors of this state for the office of president at the last presidential election must appear first, with the candidates of the other political parties following according to the votes cast for their nominees for president at the last presidential election. Candidates of parties that did not have nominees in the last presidential election follow in the order of their qualification with the secretary of state.

NEW SECTION

WAC 434-230-120 Ranked choice voting. If a charter county elects candidates for county office by ranked choice voting, and if the charter specifically grants political parties the authority to determine which candidates for partisan office may run as candidates of the party, the county auditor may modify the requirements of this chapter in order to accommodate the requirements of a ranked choice voting election.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 434-230-020	Placement of state ballot measures.
WAC 434-230-040	Candidate's political party designation--Primary to general.
WAC 434-230-050	Candidate nominated by two or more political parties or for two or more offices.
WAC 434-230-080	Judicial ballots--Form.
WAC 434-230-150	Ballot uniformity.
WAC 434-230-160	Poll-site voting instructions.
WAC 434-230-170	Ballot form.
WAC 434-230-190	Paper ballot uniformity.
WAC 434-230-200	Paper ballot instructions.
WAC 434-230-210	Paper ballots--Ballot form.
WAC 434-230-220	Same party designations used for primary and general elections.

AMENDATORY SECTION (Amending WSR 07-24-044, filed 11/30/07, effective 12/31/07)

WAC 434-250-040 Instructions to voters. (1) ~~((In addition to the instructions required by chapters 29A.36 and 29A.40 RCW, instructions for properly voting and returning))~~ Instructions that accompany an absentee ballot must ((also)) include:

(a) ~~How to ((correct a ballot by crossing out the incorrect vote and voting the correct choice))~~ cancel a vote by drawing a line through the text of the candidate's name or ballot measure response;

(b) Notice that, unless specifically allowed by law, more than one vote for an office or ballot measure will be an overvote and no votes for that office or ballot measure will be counted;

(c) Notice that, if a voter has signed or otherwise identified himself or herself on a ballot, the ballot will not be counted;

(d) An explanation of how to complete and sign the affidavit on the return envelope;

(e) An explanation of how to make a mark, witnessed by two other people, if unable to sign the affidavit;

(f) An explanation of how to place the ballot in the security envelope and place the security envelope in the return envelope;

(g) An explanation of how to obtain a replacement ballot if the original ballot is destroyed, spoiled, or lost;

(h) Notice that postage is required, if applicable; ~~((and))~~

(i) Notice that, in order for the ballot to be counted, it must be either postmarked or deposited at a designated deposit site no later than election day; ~~((and))~~

(j) ~~((How a voter can))~~ An explanation of how to learn about the locations, hours, and services((~~r~~)) of voting centers and ballot deposit sites, including the availability of accessible voting equipment((~~r~~));

County auditors may use existing stock of instructions appearing on absentee ballot ((instructions)) envelopes until December 1, 2008;

(k) For a primary election that includes a partisan office, a notice on a separate insert printed on colored paper explaining:

"Washington has a new primary. You do not have to pick a party. In each race, you may vote for any candidate listed. The two candidates who receive the most votes in the August primary will advance to the November general election.

Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."

(l)(i) For a general election that includes a partisan office, the following explanation:

"Washington has a new election system. In each race for partisan office, the two candidates who receive the most votes in the August primary advance to the November general election.

Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."

(ii) In a year that president and vice-president appear on the general election ballot, the following must be added to the statement required by (1)(i) of this subsection:

"The election for president and vice-president is different. Candidates for president and vice-president are the official nominees of their political party."

(m) Any other information the county auditor deems necessary.

(2) Instructions that accompany a special absentee ballot must also include:

(a) A listing of all offices and measures that will appear upon the ballot, together with a listing of all persons who have filed for office or who have indicated their intention to file for office; and

(b) Notice that the voter may request and subsequently vote a regular absentee ballot, and that if the regular absentee ballot is received by the county auditor prior to certification of the election, it will be tabulated and the special absentee ballot will be voided.

AMENDATORY SECTION (Amending WSR 07-24-044, filed 11/30/07, effective 12/31/07)

WAC 434-250-050 (~~(Ballot materials-)~~) **Envelopes.** (~~(In addition to the instructions and in addition to materials required by chapters 29A.36 and 29A.40 RCW, each)~~) Absentee ballots must be accompanied by the following:

(1) A security envelope, which may not identify the voter and must have a hole punched in a manner that will reveal whether a ballot is inside;

(2) A return envelope, which must be addressed to the county auditor and have a hole punched in a manner that will reveal whether the security envelope is inside. The return envelope must display the official election materials notice required by the United States Postal Service, the words "POSTAGE REQUIRED" or "POSTAGE PAID" in the upper right-hand corner, and the following oath with a place for the voter to sign, date, and write his or her daytime phone number:

I do solemnly swear or affirm under penalty of perjury
that:
I am a citizen of the United States;

I am a legal resident of the state of Washington;
I will be at least 18 years old on or before election day;
I am not presently denied my voting rights as a result of
being convicted of a felony;
I have not been judicially declared mentally incompetent;
I have not already voted in this election; and
I understand it is illegal to cast a ballot or sign a ballot
envelope on behalf of another voter.

Attempting to vote when not qualified, attempting to vote
more than once, or falsely signing this oath is a felony
punishable by a maximum imprisonment of five years, a
maximum fine of \$10,000, or both.

Signature _____ Date _____

The return envelope must include space for witnesses to sign.
The return envelope must conform to postal department
regulations.

County auditors may use existing stock of absentee envelopes
until December 1, 2008.

NEW SECTION

WAC 434-250-150 Ranked choice voting. If a charter county
elects candidates for county office by ranked choice voting, and if
the charter specifically grants political parties the authority to
determine which candidates for partisan office may run as
candidates of the party, the county auditor may modify the
requirements of this chapter in order to accommodate the
requirements of a ranked choice voting election.

AMENDATORY SECTION (Amending WSR 07-20-074, filed 10/1/07,
effective 11/1/07)

WAC 434-250-310 Notice of elections by mail. (1) A
jurisdiction requesting that a special election be conducted
entirely by mail, as authorized by RCW 29A.48.020, may include the
request in the resolution calling for the special election, or may
make the request by a separate resolution. Not less than forty-
seven days prior to the date for which a mail ballot special
election has been requested, the county auditor shall inform the
requesting jurisdiction, in writing, whether the request is granted
and, if not granted, the reasons why.

(2) In the event that a primary is to be conducted by mail,
the auditor must notify the jurisdiction involved not later than
seventy-nine days before the primary date.

(3) (~~In addition to the information required in the notice of election published pursuant to RCW 29A.52.351 and 29A.52.311,~~) A county auditor conducting an election by mail, including a county auditor that conducts every election by mail, must ((also)) state:

(a) The election will be conducted by mail ((and regular polling places will not be open));

(b) The precincts that are voting by mail if it is only specific precincts rather than the entire county;

(c) The location where voters may obtain replacement ballots;

(d) Whether return postage is required;

(e) The dates, times and locations of designated deposit sites and voting centers; and

(f) If the county auditor does not conduct all elections by mail, the fact that regular polling places will not be open.

AMENDATORY SECTION (Amending WSR 07-20-074, filed 10/1/07, effective 11/1/07)

WAC 434-253-020 Polling place--Election supplies. Polling places shall be provided, at a minimum, with the following supplies at every election:

- (1) Precinct list of registered voters or a poll book, which shall include suitable means to record the signature and address of the voter;
- (2) Inspector's poll book;
- (3) Required oaths/certificates for inspectors and judges;
- (4) Sufficient number of ballots as determined by election officer;
- (5) Ballot containers;
- (6) United States flag;
- (7) Voting instruction signs;
- (8) Challenge and provisional ballots and envelopes;
- (9) Cancellation cards due to death;
- (10) Voting equipment instructions;
- (11) Procedure guidelines for inspectors and judges and/or precinct election officer guidebooks;
- (12) Keys and/or extra seals;
- (13) Pay voucher;
- (14) Ballots stub envelope;
- (15) Emergency plan of action;
- (16) Either sample ballots or voters' pamphlets;
- (17) HAVA voter information poster;
- (18) A sign listing the date of the election and the hours of voting on election day; and
- (19) Voter registration forms (~~(, and~~
- ~~(20) For partisan primaries in counties using physically separate ballots, an "unvoted ballots" container with a numbered seat).~~

AMENDATORY SECTION (Amending WSR 08-05-120, filed 2/19/08, effective 3/21/08)

WAC 434-253-025 Polling place--Items to be posted. The following items must be posted or displayed at each polling place while it is open:

- (1) United States flag;
- (2) HAVA voter information poster;
- (3) A sign listing the date of the election and the hours of

voting on election day;

(4) Voting instructions printed in at least 16 point bold type;

(5) Either sample ballots or voters' pamphlets;

(6) Voter registration forms;

(7) Election materials in alternative languages, if so required by the Voting Rights Act (42 U.S.C. 1973aa et seq.);
(~~and~~)

(8)(a) For a primary election that includes a partisan office, the same notice provided to absentee voters by WAC 434-250-040 (1)(k);

(b) For a general election that includes a partisan office, the same notice provided to absentee voters by WAC 434-250-040 (1)(l); and

(9) Any other items the county auditor deems necessary.

NEW SECTION

WAC 434-253-330 Ranked choice voting. If a charter county elects candidates for county office by ranked choice voting, and if the charter specifically grants political parties the authority to determine which candidates for partisan office may run as candidates of the party, the county auditor may modify the requirements of this chapter in order to accommodate the requirements of a ranked choice voting election.

AMENDATORY SECTION (Amending WSR 07-20-074, filed 10/1/07, effective 11/1/07)

WAC 434-262-031 Rejection of ballots or parts of ballots.

(1) The disposition of provisional ballots is governed by WAC 434-253-047. The county canvassing board must reject any ballot cast by a voter who was not qualified to vote, or for other reasons required by law or administrative rule. A log must be kept of all voted ballots rejected, and must be included in the minutes of each county canvassing board meeting.

(2) Ballots or parts of ballots shall be rejected by the canvassing board in the following instances:

(a) Where ~~((two ballots are found folded together, or where))~~ a voter has already voted ~~((more than))~~ one ballot;

(b) Where two voted ballots are contained within a returned mail ballot envelope containing only one valid signature under the affidavit, unless both ballots are voted identically, in which case one ballot will be counted. If there are two valid signatures under the affidavit, both ballots must be counted;

(c) Where a ballot or parts of a ballot are marked in such a way that it is not possible to determine the voter's intent consistent with WAC 434-261-086;

(d) Where the voter has voted for candidates or issues for whom he or she is not entitled to vote;

(e) Where the voter has voted for more candidates for an office than are permissible(~~(7~~

~~(f) In the case of a partisan primary, where the voter has voted for a write-in candidate for partisan office who has not filed a write-in declaration of candidacy, thereby affiliating with a major party.~~

~~(3) For physically separate ballots in a partisan primary:~~

~~(a) If more than one ballot is returned but only one ballot is voted, the voted ballot must be counted.~~

~~(b) When a voted nonpartisan ballot and a voted party ballot are both returned, and the nonpartisan section of the party ballot was not voted, the votes from both ballots must be duplicated onto a blank party ballot and counted.~~

~~(c) When a voted nonpartisan ballot and a voted party ballot are both returned, and nonpartisan races and ballot measures were voted on both ballots, the nonpartisan and ballot measure votes that are the same on each ballot and the partisan votes must be duplicated onto a blank party ballot and counted.~~

~~(d) When more than one voted party ballot is returned, the partisan votes may not be counted but the nonpartisan and ballot measure votes that are the same on both ballots must be duplicated onto a blank nonpartisan ballot and counted)).~~

AMENDATORY SECTION (Amending WSR 97-21-045, filed 10/13/97, effective 11/13/97)

WAC 434-262-160 Write-in-voting--Voter intent. (1) In all cases of write-in votes the canvassing board shall exercise all reasonable efforts to determine the voter's intent. (~~Write-in votes are to be counted where abbreviations are used for office, position, or political party.~~) Write-in votes in the general election are not to be counted for any person who filed for the same office as either a regular or write-in candidate at the preceding primary and failed to qualify for the general election. If a write-in declaration of candidacy has been filed, the voter need only write in that candidate's name in order for the vote to be counted; the candidate's party preference does not impact whether the write-in vote shall be counted. If no declaration of write-in candidacy has been filed, the voter must write in the name of the candidate (~~, the political party, if applicable,~~) and, if the office (~~and/~~) or position number cannot be determined by the location of the write-in on the ballot, the office and position number, in order for the write-in vote to be counted.

(2)(a) If a write-in candidate for partisan office does not file a write-in declaration of candidacy but does qualify for the general election ballot, the candidate has not stated a preference for a political party and therefore shall have "(states no party preference)" printed on the general election ballot.

(b) If a write-in candidate for partisan office files a write-in declaration of candidacy and qualifies for the general election ballot, the party preference stated on the write-in declaration of candidacy, if any, shall be printed on the general election ballot.

NEW SECTION

WAC 434-262-210 Ranked choice voting. If a charter county elects candidates for county office by ranked choice voting, and if the charter specifically grants political parties the authority to determine which candidates for partisan office may run as candidates of the party, the county auditor may modify the requirements of this chapter in order to accommodate the requirements of a ranked choice voting election.

AMENDATORY SECTION (Amending WSR 06-11-042, filed 5/10/06, effective 6/10/06)

WAC 434-335-040 Voting system requirements. (1) No voting device or its component software may be certified by the secretary of state unless it:

- (a) Secures to the voter secrecy in the act of voting;
- (b) Permits the voter to vote for any person for any office and upon any measure that he or she has the right to vote for;
- (c) Correctly registers all votes cast for any and all persons and for or against any and all measures;
- (d) Provides that a vote for more than one candidate cannot be cast by one single operation of the voting device or vote tally system except when voting for President and Vice-President of the United States;

(e) Produces a machine countable and human readable paper record for each vote that may be accepted or rejected by the voter before finalizing his or her vote. The paper record of an electronic vote may not be removed from the device by the voter. If the voting device is programmed to display the ballot in multiple languages, the paper record produced must be printed in the language used by the voter; and

(f) Has been tested and approved by the appropriate independent testing authority approved by the United States election assistance commission(, ~~and~~

~~(g) For a partisan primary, prevents the counting of votes for candidates of more than one political party)).~~

(2) No vote tabulating system may be certified by the secretary of state unless it:

- (a) Correctly counts votes on ballots on which the proper number of votes have been marked for any office or issue;
- (b) Ignores votes marked for any office or issue where more than the allowable number of votes have been marked, but correctly counts the properly voted portions of the ballot;
- (c) Accumulates a count of the specific number of ballots tallied for each precinct, total votes by candidate for each office, and total votes for and against each ballot measure on the ballot in that precinct;

(d) Produces precinct and cumulative totals in printed form; and

(e) Produces legislative and congressional district totals for statewide races and issues in electronic and printed form.

(3) A vote tabulating system must:

- (a) Be capable of being secured with lock and seal when not in use;
- (b) Be secured physically and electronically against unauthorized access;

(c) Not be connected to, or operated on, any electronic network including, but not limited to, internal office networks, the internet, or the world wide web. A network may be used as an internal, integral part of the vote tabulating system but that network must not be connected to any other network, the internet, or the world wide web; and

(d) Not use wireless communications in any way.

(4) Transfer of information from a remote tabulating system may be made by telephonic transmission only after the creation of a disk, paper tape, or other physical means of recording ballot results.

(5) The source code of electronic voting system software that has been placed in escrow must be identical to the source code of software that has been tested and certified by the federal independent testing authority and installed in the county. The applicant must place in escrow both the human-readable source code and the working or compiled version. In lieu of placing them in escrow, the source code and the working or compiled version may be deposited with the national software reference library. The software may be verified by matching the system's digital software signatures with the digital signatures the elections assistance commission has on file, when available.

AMENDATORY SECTION (Amending WSR 08-05-120, filed 2/19/08, effective 3/21/08)

WAC 434-335-445 The preparation of logic and accuracy test decks. (1) Each county shall produce a test deck of ballots to be used in the official logic and accuracy test to verify that the vote tabulating system is programmed to correctly count the ballots.

(2) The pattern to mark the test deck shall begin by giving the first candidate in each race one vote, the second candidate in each race two votes, the third candidate in each race three votes, etc. Once the pattern is completed for each race and issue, each remaining precinct or ballot style must be tested by using a minimum of one ballot that has a first choice marked for each race and issue. Additional votes may be added to ensure all responses for a race or issue have unique results. Another pattern may be used if it meets the requirements outlined in this section and is approved by the secretary prior to marking the test deck.

(3) The test deck must also test that the vote tabulating system is programmed to accurately count write-in votes, overvotes and blank ballots. The test deck must also include a sampling of all ballots that will be used during the election, including ballot on demand, alternative language ballots, and ballots marked with an electronic ballot marker.

~~((4) In a partisan primary:~~

~~(a) When a consolidated ballot is used, the test deck must test that the partisan and nonpartisan votes are counted properly for situations where just one party is selected, no party is selected, and both parties are selected, and~~

~~(b) When separate ballots are used, a test deck for each party must be prepared in addition to a test deck for nonpartisan races.)~~

AMENDATORY SECTION (Amending WSR 08-05-120, filed 2/19/08, effective 3/21/08)

WAC 434-381-120 Deadlines. (1) Candidate statements and photographs shall be submitted to the secretary of state (~~(-~~

~~(a) For candidates who filed during the regular filing period,~~) within seven calendar days after filing their declaration of candidacy (~~(-~~

~~(b) For candidates who filed during a special filing period, or were selected by a political party pursuant to either RCW 29A.52.010 or 29A.24.140, within seven calendar days after the close of the special filing period or selection by the party).~~

(2) For ballot measures, including initiatives, ~~((referendums))~~ referenda, alternatives to initiatives to the legislature, and constitutional amendments, the following documents shall be filed with the secretary of state on or before the following deadlines:

(a) Appointments of the initial two members of committees to prepare arguments for and against measures:

(i) For an initiative to the people or referendum measure: Within ten business days after the submission of signed petitions to the secretary of state;

(ii) For an initiative to the legislature, with or without an alternative, constitutional amendment or referendum bill, within ten business days after the adjournment of the regular or special session at which the legislature approved or referred the measure to the ballot:

(b) Appointment of additional members of committees to prepare arguments for and against ballot measures, not later than the date the committee submits its initial argument to the secretary of state;

(c) Arguments for or against a ballot measure, no later than twenty calendar days following appointment of the initial committee members;

(d) Rebuttals of arguments for or against a ballot measure, by no later than fourteen calendar days following the transmittal of the final statement to the committees by the secretary. The secretary shall not transmit arguments to opposing committees for the purpose of rebuttals until both arguments are complete.

(3) If a ballot measure is the product of a special session of the legislature and the secretary of state determines that the deadlines set forth in subsection (2) of this section are impractical due to the timing of that special session, then the secretary of state may establish a schedule of deadlines unique to that measure.

(4) The deadlines stated in this rule are intended to promote the timely publication of the voters pamphlet. Nothing in this rule shall preclude the secretary of state from accepting a late

filing when, in the secretary's judgment, it is reasonable to do so.

NEW SECTION

WAC 434-381-200 Political party preference information. If a state voters' pamphlet includes a race for partisan office, the pamphlet must include an explanation that each candidate for partisan office may state a political party that he or she prefers, and that a candidate's preference does not imply that the candidate is nominated or endorsed by the party or that the party approves of or associates with that candidate. The pamphlet must also explain that a candidate can choose to not state a political party preference.

APPENDIX B

Nos. 06-713 & 06-730

IN THE
Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

-and-

WASHINGTON, *et al.*,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR RESPONDENT
LIBERTARIAN PARTY OF WASHINGTON**

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I-872 UNLAWFULLY CONVERTS THE LIBERTARIAN PARTY NAME TO THE STATES' OWN USE

The name "Libertarian Party" is a registered trademark of the Libertarian National Committee that has been in use since 1972.⁵⁰ The Libertarian Party has had a presidential candidate on the Washington State ballot every four years since then, in addition to several other statewide and local contests, thus making it an established name identifying a specific organization. I-872 unlawfully authorizes Washington, and candidates authorized by Washington, to assume and exercise rights of ownership over personal property, in this case a trademarked organizational name, belonging to the Libertarian Party.

Washington argues the Libertarian Party is not entitled to trademark protection because a statement of "party preference" on an election ballot it is not a use "in commerce."⁵¹ First, I-872 requires a candidate's "party preference" to appear not only on the ballot, but also in Washington's published voter's pamphlet.⁵² Further, there is nothing within I-872 to prevent any candidate, who has thus been encouraged by Washington to declare a "party preference" for Washington's own purpose, from declaring and using that "party preference" in soliciting donations, preparing press releases, holding public meetings and press conferences, and otherwise engaging in the activities of a typical political campaign.

50. JA - 346-351.

51. Wash. Br. at 47 (citing, *inter alia*, to 15 U.S.C. §§ 1114(1)(a), 1125(a)(1)).

52. Initiative-872 § 11, JA - 417.

The right to enjoin infringement of a trade or service mark “is as available to public service organizations as to merchants and manufacturers.”⁵³ Retention of a distinct identity by a non-profit organization that sells no goods is just as important as it is to a commercial organization.⁵⁴ The Lanham Act has been applied to a wide variety of non-commercial public and civic situations,⁵⁵ and specifically to political organizations.⁵⁶ In *United We Stand Am., Inc.* the Second Circuit articulated sound policy reasons for including political organizations within the protection of the Lanham Act.

A political organization that adopts a platform and endorses candidates under a trade name performs the valuable service of communicating to voters that it has determined that the election of those

53. *N.A.A.C.P. v. N.A.A.C.P. Legal Defense and Educ. Fund*, 559 F. Supp. 1337, 1342 (D.D.C. 1983), *rev'd on other grounds*, 753 F.2d 131 (D.C. Cir.), *cert. denied*, 472 U.S. 1021(1985).

54. 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 9:5 (4th ed. 1996).

55. *See, e.g., United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86 (2d Cir. 1997) and the cases cited therein.

56. *See Brach Van Houten Holding, Inc. v. Save Brach's Coalition For Chicago*, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994) (soliciting donations, preparing press releases, holding public meetings and press conferences, and organizing on behalf of its members' interests was performing “services” within the meaning of the Lanham Act); and *Committee for Idaho's High Desert v. Yost*, 881 F. Supp. 1457, 1470-71 (D. Idaho 1995), *aff'd*, 92 F.3d 814 (9th Cir. 1996)(non-profit organization engaged in dissemination of information about environmental causes via news releases, newsletters, and public advocacy entitled to Lanham Act protection even if it did not “place products into the stream of commerce.”)

candidates would be beneficial to the objectives of the organization. Thus voters who support those objectives can support the endorsed candidates with some confidence that doing so will advance the voters' objectives. If different organizations were permitted to employ the same trade name in endorsing candidates, voters would be unable to derive any significance from an endorsement, as they would not know whether the endorsement came from the organization whose objectives they shared or from another organization using the same name. Any group trading in political ideas would be free to distribute publicity statements, endorsements, and position papers in the name of the "Republican Party," the "Democratic Party," or any other. The resulting confusion would be catastrophic; voters would have no way of understanding the significance of an endorsement or position taken by parties of recognized major names. The suggestion that the performance of such functions is not within the scope of "services in commerce" seem to us to be not only wrong but extraordinarily impractical for the functioning of our political system.⁵⁷

Washington's own common law also prohibits deceptive non-commercial uses of organizational names.⁵⁸ An instructive

57. *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86 (2d Cir. 1997) (citing to *Tomei v. Finley*, 512 F. Supp. 695, 698 (N.D. Ill. 1981) (preliminary injunction issued because of strong likelihood of confusion resulting from political party's use of acronym designed to deceive voters into thinking the candidate was of the opposing political party))(footnotes omitted).

58. E.g., *Prince Hall Lodge v. Univ. Lodge*, 62 Wn.2d 28, 35 (1963).

1924 Washington Supreme Court decision involved Progressive Party presidential candidate Robert LaFollette.⁵⁹ In that year citizens of Washington organized the “LaFollette State Party” and nominated several candidates for public office, including Mr. LaFollette for the federal office of President, all without Mr. LaFollette’s authorization and against his wishes. Members of the Progressive Party of Washington, which had also nominated Mr. LaFollette for President, sought a writ of mandate preventing the Secretary of State from placing the candidates nominated by the “LaFollette State Party” on the general election ballot. In authorizing a writ directing the Secretary to strike the word “LaFollette” and to show on the ballot instead that the “State Party” had made the disputed nominations the court said:

Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. Nor is it necessary that it be alleged or proved that such unauthorized use will damage him.⁶⁰

While *Hinkle* involved an individual’s name, it clearly demonstrates the Washington Supreme Court places a significant value on the exclusive right of ownership to an established name beyond its use in commerce, including particularly within the realm of political speech.

59. *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924).

60. *Hinkle*, 131 Wash., at 93.

The very idea that any government could convert political party names to its own use was, prior to I-872, *unimaginable*. Nonetheless, relying on *Norman v. Reed*,⁶¹ Washington apparently theorizes that if a State may not regulate a candidate's use of a political party's name then neither may a political party regulate the use of its own name. The Grange argues similarly; that the Ninth Circuit decision turned the primary election ballot into a "speech free zone."⁶² *Norman* itself belies this astounding logic. This Court said that the ills of misrepresentation and/or electoral confusion caused by multiple uses of a political party name within a defined geographical area may be prevented "by requiring the candidates to get formal permission to use the name from the established party they seek to represent, . . ."⁶³

*I-872 SEVERELY BURDENS LIBERTARIAN PARTY ASSOCIATIONAL RIGHTS*⁶⁴

A fundamental rule of the First Amendment is that a speaker has the autonomy to choose the content of his own message.⁶⁵ Judicial deference should normally be given to association assertions regarding nature of their own expression and what would impair that expression.⁶⁶ Political parties have the right

61. 502 U.S. 279 (1991).

62. Washington State Grange opening brief on the merits, at 22-28 (hereinafter Grange Br.).

63. *Norman*, 502 US at 290.

64. The Libertarian Party generally agrees with the associational rights arguments made by its co-Respondents, Washington State Republican Party and Washington Democratic State Central Committee, although it would perhaps emphasize different points of those arguments. Nonetheless, to avoid unnecessary duplication the Libertarian Party will focus instead on aspects of this case that uniquely affect the Libertarian Party.

65. *Hurley*, *supra*.

66. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

APPENDIX C

particularly who may be a candidate of the party, by allowing any candidate to associate with the Libertarian Party merely by stating a “party preference” on the ballot. Even if this court were somehow to accept Washington’s arguments and conclude the burdens placed upon the Democratic Party and the Republican Party by I-872 are something less than “severe”, I-872 still severely burdens the Libertarian Party by destroying its ability to include in its message to voters the fact that ALL “Libertarian Party” candidates have affirmatively subscribed a “no first use” pledge.⁷³

I-872 SEVERELY BURDENS THE LIBERTARIAN PARTY’S RIGHT TO FINANCIALLY SUPPORT IT’S NOMINEES

Washington law allows “major parties” and “*bona fide* political parties” to contribute more than 2.3 million dollars (\$0.70 per state registered voter per cycle) to each of its candidates for statewide office.⁷⁴ A “major party” is one whose candidate receives 5% or more of the vote in a statewide general election.⁷⁵ In order for the Libertarian Party to become a “major party” under I-872 at least one statewide Libertarian Party candidate must earn perhaps 34% of a primary vote to even reach the general election.

If the district court correctly determined that I-872 “impliedly repealed” Washington’s minor party nomination

73. *Compare Ray v. Blair*, 343 U.S. 214 (1952) (parties may require candidate to execute pledge prior to certification as presidential elector).

74. Wash. Rev. Code § 42.17.640(4) As of July 27, 2007 Washington had 3,301,802 active registered voters. See [http://www.secstate.wa.gov/elections/vrdb/pdf/Voter%20Registration%20Report%20\(July%2027%202007\).pdf](http://www.secstate.wa.gov/elections/vrdb/pdf/Voter%20Registration%20Report%20(July%2027%202007).pdf) (Last viewed July 28, 2007).

75. Wash. Rev. Code § 29A.04.086.

statutes,⁷⁶ I-872 also abolished the statute authorizing minor party “certificates of nomination”.⁷⁷ A “certificate of nomination” is a statutory prerequisite to becoming a “*bona fide* political party” for campaign contribution purposes.⁷⁸ If the Libertarian Party is neither a “major party” nor a “*bona fide* political party”, the most it can contribute to its statewide candidates is \$1400.⁷⁹

This is yet another example of how I-872 institutionalizes the two major parties, and impairs the First Amendment rights of Libertarians and other minor parties. Financing regulations are especially crucial in modern elections. The cost of a successful statewide campaign in Washington runs in the hundreds of thousands or millions of dollars.⁸⁰ A candidate’s fundraising ability also has a direct effect on media coverage, which in turn influences voter preferences in both the primary and the general election.

*Lubin v. Panish*⁸¹ invalidated on equal protection grounds filing fee statutes that required payment of a few hundred

76. *Logan, supra*, Pet. App. 79a-84a.

77. Wash. Rev. Code § 29A.20.161.

78. Wash. Rev. Code § 42.17.020(6).

79. *Id.*

80. As of April 10, 2005, Washington’s Secretary of State, Sam Reed, received and disbursed \$651,319.93 in connection with his 2004 reelection campaign. See http://hera.pdc.wa.gov/wx/viewdoc_new.asp?strAppName=PDC&nZoomPercent=100&nDocId=788209&nQRSeq=4&nCurrentIndex=1&nPageNum=1&UseIrc=no As of June 29, 2005, Washington’s Governor, Christine Gregoire, received and disbursed \$6,364,683.93 in connection with her 2004 election campaign. See http://hera.pdc.wa.gov/wx/viewdoc_new.asp?strAppName=PDC&nZoomPercent=100&nDocId=808539&nQRSeq=6&nCurrentIndex=1&nPageNum=1&UseIrc=no (Last viewed July 26, 2007).

81. 415 U.S. 709 (1974).

dollars for ballot access, unless the state also had available a non-economic means of ensuring the “seriousness” of a candidate. Prior to I-872 Washington had allowed the Libertarian Party an opportunity to qualify as a “*bona fide* political party” and raise and spend funds at the same levels as the Democratic Party and Republican Party. If I-872 is upheld it is no longer possible for the Libertarian Party to become a “*bona fide* political party” and it can only become a “major party” if one of its candidates wins or places second in the primary.

The Equal Protection defect of I-872 in the campaign finance arena is that it deprives the Libertarian Party of that opportunity to raise funds in amounts comparable to those allowed to major parties. I-872 thus severely undermines the political viability of the Libertarian Party and its candidates, meanwhile insulating the major parties and their candidates from competition, regardless of the credentials or political views of the individual candidates.

**I-872 IS NOT THE KIND OF “NONPARTISAN
BLANKET PRIMARY” DISCUSSED IN JONES**

Washington and the Grange argue strenuously that under I-872 “primary voters are not choosing a party’s nominee,” as if that fact proves I-872 is constitutional under this Court’s holding in *Jones*.⁸² They are wrong.

I-872 IS IN NO MEANINGFUL SENSE NON-PARTISAN

I-872 retains partisan labels for the use of all candidates regardless of the scope of their affiliation with the party. Washington attempts to downplay the significance of party

82. Wash Br. – 27.

APPENDIX D

WSR 08-14-108

EMERGENCY RULES

PUBLIC DISCLOSURE COMMISSION

[Filed June 30, 2008, 11:21 a.m. , effective June 30, 2008, 11:21 a.m.]

Effective Date of Rule: Immediately.

Purpose: Adoption of new WAC 390-05-196 to clarify the difference between bona fide political parties and other political committees for the purpose of contribution limitations following of the United States Supreme Court ruling upholding Washington's top two primary system.

Statutory Authority for Adoption: RCW 42.17.370.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Recently, the United States Supreme Court upheld Washington's top two primary system which was enacted into law by the voters in 2004 through the passage of I-872. Under the new primary system, chapter 29A.20 RCW which has been relied on to distinguish bona fide political parties from other political committees has been effectively repealed and chapter 42.17 RCW has not been amended by the legislature to remove reference to chapter 29A.20 RCW. To preserve the general welfare and given the timing restriction for rule making in RCW 42.17.370(1), the new rule is needed immediately for the 2008 election season to clarify which minor party organizations satisfy the definition of bona fide political party in RCW 42.17.020.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 1, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 1, Amended 0, Repealed 0.

Date Adopted: June 26, 2008.

Vicki Rippie

Executive Director

OTS-1713.1

NEW SECTION

WAC 390-05-196 Bona fide political party -- Application of term. An organization that filed a valid certificate of nomination with the secretary of state or a county elections official under chapter 29A.20 RCW in any year from 2002 through 2007 is deemed to have satisfied the definition of bona fide political party in RCW 42.17.020.

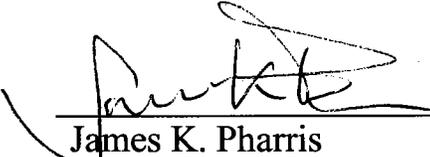
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**Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Circuit Rule 32-1 for Case Nos. 05-35774/05-35780**

I certify that the attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with a page or size-volume limitation established by separate court order dated July 3, 2008, and is proportionally spaced, has a typeface of 14 points or more and does not exceed 15 pages.

4th Sept 2008
Date


James K. Pharris
WSBA #5313

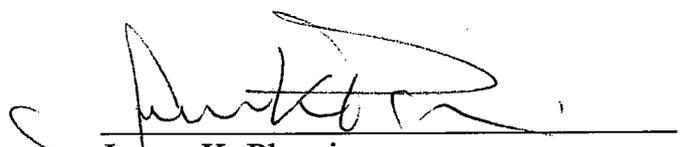
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Supplemental Brief of State of Washington to be served on the following persons in the manner set forth below:

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DATED this 4th day of August, 2008.



James K. Pharris
Deputy Solicitor General