No. _____

In The
Supreme Court of the United States

WASHINGTON STATE
DEMOCRATIC CENTRAL COMMITTEE,

Petitioner,

v.

WASHINGTON STATE GRANGE, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After this Court in *Washington State Grange v. Washington State Republican Party* ("*Grange*"), 552 U.S. 442 (2008), held that Washington's proposed top two partisan primary, Initiative-872, was not facially unconstitutional, the state's political parties continued with an as-applied challenge. On a summary judgment record, the Ninth Circuit Court of Appeals held that Washington's implementation of I-872 does not violate the First Amendment associational rights of political parties.

The questions presented are:

1. Where Washington asserts that a general disclaimer prevents voter perceptions that candidates are associated with the political party ballots say the candidates "prefer," does Washington bear the burden of showing the risk of forced association is in fact reduced to a constitutionally acceptable level by the disclaimer?

2. Should the principles articulated by federal courts evaluating trademark misuse claims be applied by analogy in evaluating the likelihood of voter confusion under top two systems?

3. If Washington's partisan top two system as implemented need not pass strict scrutiny, does it nevertheless fail to qualify as a reasonable and politically neutral regulation that advances an important state interest?

PARTIES TO THE PROCEEDINGS

Petitioner, the Washington State Democratic Central Committee, was an appellant in the court below.

Other appellants below were the Washington State Republican Party, Steve Neighbors, Marcy Collins, William Michael Young, Diane Tebelius, Bertabelle Hubka, and Mike Gaston; and the Libertarian Party of Washington State, Ruth Bennett, and J.S. Mills.

Respondents, Washington State Grange; Sam Reed, Secretary of State; Rob McKenna, Attorney General; and the State of Washington, were the appellees in the court below.

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PETITION FOR CERTIORARI

Top two partisan election systems – where the candidate for office may choose to appear on the ballot in conjunction with a political party's name without the party's consent – are proliferating. Washington, California, and Louisiana presently have top two systems, while legislation to implement a top two system is being or has been considered in Alaska, Arizona, Mississippi, Oregon, and Wyoming. It is critical that lower courts have guidance as to evidence required to correctly assess the constitutionality of implementations of these systems.

In the case below, the Ninth Circuit held that Washington's top two system as implemented "eliminated the risk" of widespread voter confusion about whether candidates are associated with the political party that appears on the ballot after the candidate's name. Despite evidence that Washington residents widely perceive candidates to be associated with the political parties for which they state a preference at filing, the Ninth Circuit held that Washington's later distribution of a partial disclaimer that appears on the ballot and in related informational materials eliminates the risk of such confusion occurring during voting. The court reached this holding without requiring any evidence from Washington demonstrating that the disclaimer and informational materials were read by voters and, if read, had any impact on the existence of voter confusion regarding a candidate's association with a political party. Other courts and legislatures considering top two partisan system

implementations would benefit from guidance by this Court as to whether *Grange* creates a safe harbor for systems using a disclaimer without regard to the effectiveness of the disclaimer.

This case also provides this Court with the opportunity to answer the legal question of whether the "possibility of widespread voter confusion" should be assessed using the analytical techniques courts have developed to evaluate likelihood of confusion in trademark cases. The Ninth Circuit rejected arguments by the political parties that these techniques were appropriate. But members of this Court have recognized that the issues presented in this case are quite similar to those presented in a trademark case.

Chief Justice Roberts observed at oral argument in *Grange*:

> [C]learly, it's just like a trademark case. I mean, they're claiming their people are going to be confused. They are going to think this person is affiliated with the Democratic or Republican Party when they may, in fact, not be at all. . . . I think I said it was just like the same analysis. And I don't know why you would give greater protection to the makers of products than you give to people in the political process.

Transcript of Oral Argument at 26:23-27:17, *Grange*, 552 U.S. 442 (06-713, 06-730).

Justice Scalia also noted the similarity of issues between this case and trademarks in his dissent in *Grange*:

> Washington's electoral system permits individuals to appropriate the parties' trademarks, so to speak, at the most crucial stage of election, thereby distorting the parties' messages and impairing their endorsement of candidates.

Grange, 552 U.S. at 471 (Scalia, J., dissenting).

In placing the burden on political parties to show that Washington's disclaimer is ineffective to dispel confusion rather than placing the burden of showing effectiveness on Washington, the Ninth Circuit acted in stark contrast to its own past actions, and those of other Circuits, in addressing similar issues in commercial contexts involving trademarks and disclaimers. In the commercial setting, federal courts have been skeptical of the effectiveness of disclaimers to prevent or dispel consumer confusion. Federal courts have required the defendant in a trademark action, upon a showing of similarity of marks, to prove the effectiveness of a disclaimer of any relationship between the marks. There is no dispute that Washington's system uses labels that include political parties' names without consent. Similarity exists that would, in the commercial context, require the defendant to demonstrate the effectiveness of its disclaimer in order to continue appropriating the plaintiff's name.

By assuming that Washington's disclaimer in this case is effective rather than requiring Washington to prove its efficacy, the Ninth Circuit required the millions of political partisans in America to carry a heavier burden to protect their First Amendment right of association than a commercial enterprise must carry to protect the use of its trademark. Petitioners do not believe this Court intended such a result in light of *Grange*.

The Ninth Circuit also held that, due to this Court's conclusion that I-872 facially advanced an important regulatory interest, Washington's subsequent implementation of the system necessarily survived rational basis scrutiny. The Ninth Circuit did not independently analyze whether, as implemented, Washington's system is a reasonable, politically neutral regulation that serves an important regulatory interest when the system provides potentially misleading or inaccurate information. Washington's legislature has found that a statement by a candidate that indirectly implies that an organization associates with or endorses the candidate subjects the organization to contempt, ridicule, and reproach, and deprives the organization of public confidence, amounting to defamation per se. This Court should clarify whether in Washington it is reasonable and politically neutral to place a party preference after candidate names on ballots without first providing the party so named a right to object to the use of its name in conjunction with the candidate's in state-sponsored publications.

Certiorari should be granted to clarify the principles to be applied in evaluating as-applied right of association challenges to top two partisan election systems.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is not yet reported and is reproduced at App. 1.

The District Court's summary judgment is unreported and is reproduced at App. 31.

JURISDICTION

The Ninth Circuit Court of Appeals rendered its decision on January 19, 2012. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

The Fourteenth Amendment to the Constitution provides in part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The relevant Washington election statutes may be found at Washington Revised Code Titles 29A and 42. The relevant Washington election regulations may be found at Washington Administrative Code Titles 390 and 434. All are produced in the appendix to this petition. App., *infra*, 66-113.

STATEMENT OF THE CASE

This case raises the question of whether a ballot disclaimer is per se sufficient to prevent a forced association of political parties with candidates they do not support or wish to associate with. The case also asks whether permitting ballot use of party names is rational when political parties cannot disclaim association. These issues arise in the context of Washington's new partisan election system that was intended to permit candidates to unilaterally affiliate with political parties by selecting a political party preference to be printed after their names on partisan primary and general election ballots. The political party so selected may not object to the use of its name on ballots and in state-sponsored publications. In *Grange*, 552 U.S. 442 (2008), this Court rejected a facial challenge and reserved constitutional challenges to the system based upon voter perceptions of association between candidates and parties for as-applied challenges where an evidentiary record would be available.

The case continued as an as-applied challenge. The evidentiary record below now demonstrates that under Washington's top two system, the voting public widely believes that candidates are associated with the party whose name the candidate selects at filing to appear after the candidate's name on ballots. Washington law states that a candidate's party will be printed after the candidate's name on ballots, creating an expectation that the candidate belongs to whatever party name is used by the candidate. In addition to printing the candidate's choice on the ballot, Washington requires the party selected by a candidate at filing to be clearly identified in all political advertising and electioneering communications about the candidate. Washington publishes a list of symbols and abbreviations that "clearly identify political party affiliation" for advertising and electioneering sponsors to use for this purpose. Experimental evidence suggests that voters perceive candidates to be associated with the party printed after the candidates' names on the ballot.

The Ninth Circuit determined that, as implemented, Washington's new election system "eliminated the risk" that voters would perceive candidates as associated with the political party after their name on ballots, relying upon the presence of a disclaimer and an absence of evidence of actual confusion among voters at the moment of voting. No evidence was introduced to show that voters read or understand the disclaimer, or that doing so would affect voter perceptions of the candidate-party association. The Ninth

Circuit apparently concluded that as a matter of law, the presence of a disclaimer is per se sufficient to eliminate any risk that voters perceive candidates as nominated by, endorsed by, approved of, or associated with the political party whose name is printed after theirs on the ballot. In effect, the Ninth Circuit interpreted this Court's prior decision to create a "safe harbor" for top two partisan election systems possessing certain features, without regard to whether those features as implemented actually protect First Amendment rights.

The Ninth Circuit's opinion affirmed summary judgment for the State of Washington by the district court in *Washington State Republican Party v. Washington Grange* (W.D. Wash. Jan. 11, 2011) (App. 31). The district court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1334(a).

A. Enactment of Washington's Top Two Partisan Election System and Pre-Implementation Facial Challenges

Following this Court's landmark decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) invalidating California's blanket primary election, the Ninth Circuit struck down Washington's nearly identical system. *Democratic Party of Wash. v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1412 (2004) (mem.); 124 S. Ct. 1663 (2004) (mem.). In response, the Washington State Grange proposed, and Washington voters approved in 2004, I-872.

Before I-872 could be implemented, the district court enjoined the system on the basis of facial unconstitutionality. *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005), *aff'd*, *Wash. State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006). In I-872's place, Washington implemented a "pick a party" partisan system in which voters demonstrated party affiliation by selecting a "party preference" in order to participate in that party's primary and select its nominees. Washington performed elections using the pick-a-party system until this Court found I-872 facially constitutional in 2008. *See Grange*, 552 U.S. at 457.

B. *Grange* and Washington's Top Two System's Facial Validity

In *Grange*, the Court held that I-872 did not facially create a severe burden on First Amendment associational rights:

> 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.

552 U.S. at 458-59. The Court held that political party arguments depended upon a presumption that voters would interpret party preference labels as

indicating the candidate is "the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Id.* at 454. On a facial challenge, the Court held there was "no basis" for the presumption and deferred consideration of the arguments to an as-applied challenge where the Court would have an evidentiary record upon which to evaluate the risk of such voter perceptions. *See id.* at 455, 457-58.

The Court stated that "there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion." *Id.* at 456. These ways included "prominent disclaimers" stating that a candidate's preference statement reflected only the self-designation of the candidate and not the official endorsement of the party; a preference statement on the ballot that emphasized the candidate's personal determination such as "My party preference is the Republican Party"; and educating the public through advertising and materials enclosed with ballots. *Id.* at 456-57.

Accordingly, the Court held that, on its face, I-872 did not severely burden political party associational rights and was justified by Washington's asserted interest in providing voters with relevant information. *Id.* at 458. Therefore, the facial challenge failed and challenges based on voter perception of association would be resolved in the context of as-applied challenges. *See id.* at 457-58.

Chief Justice Roberts, joined by Justice Alito, concurred. *Id.* at 459-62 (Roberts, C.J., concurring).

The Chief Justice believed that "whether voters *perceive* the candidate and the party to be associated" was "relevant to the constitutional inquiry." *Id.* at 459. Thus, if the ballot were "designed in such a manner that no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to 'prefer,'" then I-872 would likely pass constitutional muster. *Id.* at 460.

Justice Scalia, joined by Justice Kennedy, would have found I-872 facially unconstitutional. *Id.* at 462-71 (Scalia, J., dissenting). The dissent argued that, regardless of the design of the ballot, the parties' freedom of association would be damaged by candidates' "unwelcome, self-proclaimed association" that could not be disavowed on the ballot. *Id.* at 466. In addition to this distortion of the parties' message, according to the dissent, the parties' goodwill would be "hijacked" by "encourag[ing] voters to cast their ballots based in part on the trust they place in the party's name and the party's philosophy." *Id.* Nor would Justice Scalia have waited to see the law's effect on voter perception of the political parties; according to Justice Scalia, none of the Court's precedents required the parties to be placed to the "perhaps-impossible task" of marshalling evidence to show that "forced association affects their ability to advocate for their candidates and their causes." *Id.* at 469. Justice Scalia, unlike the majority, would have rejected I-872's attempt to "positively impair . . . the legitimate role of political parties." *Id.* at 471.

The dissent also questioned whether I-872 even survived rational basis review. *Id.* According to the dissent, I-872 reflected Washington's "view that adherence to party philosophy is 'an important – perhaps paramount – consideration in the citizen's choice.'" *Id.* (citing *Anderson v. Martin*, 375 U.S. 399, 402 (1964)). If this were true, then the dissent believed it "irrational not to allow the party to disclaim that self-association, or to identify its own endorsed candidate." *Id.*

Following this decision, Washington replaced the "pick a party" system with I-872 and implemented the new system.

C. Washington's Top Two System's Statutory and Regulatory Framework as Implemented.

Washington generally implemented I-872 such that (1) a candidate alone chooses his or her party preference upon filing, Wash. Rev. Code § 29A.24.030(3); (2) the candidate's party preference is printed after the candidate's name on the ballot in the form "(Prefers ___ Party)," Wash. Admin. Code § 434-230-045(a); (3) the candidate's party preference is used to satisfy Washington's requirement that "[t]he political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate" on ballots, Wash. Rev. Code § 29A.36.121(3); (4) the party selected by the candidate at filing is required to be included in all political advertising and

electioneering communications about the candidate, Wash. Rev. Code § 42.17A.320(1); (5) ballot materials contain a general statement that a candidate's party preference does not imply an association with the party, Wash. Admin. Code § 434-230-015(6)(a); (6) party nominees are not de jure selected by voters, *Grange*, 552 U.S. at 453; (7) all voters may participate in the primary and vote for any candidate in the race, Wash. Rev. Code § 29A.52.112(3); and (8) the two candidates with the most votes advance to the general election without regard to party affiliation, if any. *Id.*

1. Filing and Pre-Election Provisions

At filing, a candidate for partisan office shall "indicate his or her major or minor party preference, or independent status." Wash. Rev. Code § 29A.24.030(3). This designation will appear in conjunction with the candidate's name on both the primary and general election ballots. Wash. Admin. Code § 434-230-045(4).

The candidate's self-selected party preference also appears in any voters' pamphlets published by state or local election officials. Wash. Admin. Code § 434-215-120(1). Candidates, but only candidates, are permitted to make statements of up to 300 words in the pamphlets. Wash. Rev. Code § 29A.32.121(1). The party selected by the candidate is not provided any space/forum in the pamphlets or on ballots to disclaim association with the candidate using its

name. *See id.*; *Grange*, 552 U.S. at 468 (Scalia, J., dissenting).

The candidate's selected party name must be "clearly" identified in all electioneering communications, independent expenditures, and political advertising that mentions the candidate's name, regardless of the sponsor of the material. Wash. Rev. Code § 42.17A.320(1). To facilitate this required public association of candidate and party, Washington publishes a list of abbreviations and symbols "that clearly identify political party affiliation" and may be used "to identify a candidate's political party." Wash. Admin. Code § 390-18-020(3). No disclaimer of association is required in electioneering communications or advertising, nor must a candidate emphasize that the party label used reflects only his or her personal preference rather than the party's endorsement.

Various other statutes and regulations treat a candidate's party preference statement made at filing as a statement of the candidate's party affiliation. *See, e.g.*, Wash. Rev. Code § 42.17A.205(2)(f) (former Wash. Rev. Code § 42.17.040(f)) (requiring political committees to disclose "name, office sought, and party affiliation" of each candidate it supports); Wash. Rev. Code § 29A.36.121(3); Wash. Admin. Code § 390-05-274.

2. The Ballots

On both primary and general election ballots, Washington prints the party preference chosen by the candidate after the candidate's name as follows:

> John Smith
> (Prefers ___ Party)

Wash. Admin. Code § 434-230-045(a). No other indication of the candidate's party appears on the ballot.

Before the ballot's first partisan office, a bold-typed disclaimer states:

> 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.

Wash. Admin. Code §§ 434-230-015(6)(a).[1] For a period of time, Washington provided separate ballot inserts containing a similar disclaimer but no longer does so. Wash. Admin. Code § 434-250-040(1)(j),(k) (repealed Jan. 6, 2012). The wording of the disclaimer intentionally fails to unambiguously disavow association between the candidate and the party conjoined on the ballot or in the pamphlet. 9th Cir. Oral Argument at 34:25-36:00.

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[1] This disclaimer is also required to be included in voters' pamphlets published by Washington. Wash. Admin. Code § 434-381-200.

3. The Parties' Role

Parties are permitted to nominate candidates outside of the primary system. *See Grange*, 552 U.S. at 453. However, party nominations are not displayed on the ballot or in informational materials. Wash. Admin. Code § 434-230-055(4).

Candidates "are not required to obtain the approval of a political party" in order to use the party's name on the ballot. Wash. Admin. Code § 434-230-055(2). Most critically, the political party may not refuse to permit a candidate to file with the party's name. *See Grange*, 552 U.S. at 468 (Scalia, J., dissenting).

While the candidate is permitted numerous publicly-financed opportunities to emphasize his or her party preference, a party itself is not afforded any similar opportunity to inform voters of whom it endorses or to disavow association with a candidate who uses the party's name without consent.

4. Harm From False Claims of Support or Endorsement

Washington has proscribed political advertising or electioneering communication that "makes either directly or indirectly, a false claim stating or implying the support or endorsement of any . . . organization when in fact the candidate does not have such support or endorsement." Wash. Rev. Code § 42.17A.335(1)(c). Such statements are deemed defamatory per se because they "deprive the . . . organization of the

benefit of public confidence and/or will expose the . . . organization to contempt, ridicule, or reproach, or injure . . . the organization in their business or occupation" and "damage the integrity of elections by distorting the electoral process." 2009 Session Laws c. 222 Finding of Intent 4, 5 (App. 93-94).

Washington provides candidates, but not parties, the general opportunity to set aside elections that are affected by violations of public disclosure and advertising statutes. *See* Wash. Rev. Code § 42.17A.750(1)(a). No mechanism is provided for a political party to require Washington to refrain from publishing a false claim of association by a candidate on ballots and in voters' pamphlets. *See id.*

D. Washington's Top Two Partisan System's Context

When Washington implemented I-872, the term "party preference" was already understood in Washington to mean party membership or affiliation. From the 1930s to 2004, Washington used a blanket primary in which party candidates were nominated by the general voting public. The Ninth Circuit held Washington's blanket primary system unconstitutional, rejecting arguments by Washington that its voters could not be partisans without being registered as one:

> That the voters do not reveal their *party preferences* at a government registration desk does not mean that they do not have

> them. The Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters *whose preference is for the other party*. . . .

Reed, 343 F.3d at 1203-04 (emphasis added).

In response to the Ninth Circuit decision, proponents of the blanket primary (led by the Grange) brought I-872 to the ballot in 2004. I-872 was to become effective only if the Ninth Circuit's decision invalidating the blanket primary survived appeal. § 18. I-872 asserted the right of any voter to vote for any candidate without any limitation based on "party preference or affiliation." *Id*. § 3. The Grange told voters that if I-872 passed, "[c]andidates for partisan offices would continue to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots." 9th Cir. Appellants' Excerpts of Record ("ER") 126. "Party preference" in the context of I-872 was intended to identify a candidate's party affiliation to the voter.

While I-872 was enjoined, Washington continued to expressly equate "party preference" and "party affiliation." It replaced the blanket primary with a "pick a party" primary in which ballots were required to contain "a question asking the voter to indicate the major political party with which the voter chooses to affiliate." Wash. Rev. Code § 29A.36.106(2). Ballots

used with the "pick a party" primary instructed voters:

Before proceeding, please indicate the political party with which you choose to affiliate.

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

See App. 130. Use of the "pick a party" ballots continued until the *Grange* decision, after which Washington substituted the current ballots as part of its implementation of I-872.

The continuing mindset in Washington that "party preference" and "party affiliation" are synonymous is demonstrated in a 2008 Washington RFP about I-872 issued shortly after this Court's decision in *Grange*. In the Introduction to the RFP Washington noted: "[I-872] allows candidates to file for partisan office and *list on the ballot a party affiliation*, regardless of whether the candidate has been nominated or endorsed by that party." ER 270 (emphasis added).

There is no reason to believe that this widespread common perception has changed after the implementation of I-872. In fact, Washington's own expert in this case, Dr. Todd Donovan, testified that when he said "Democratic *candidates* listed on the [t]op [t]wo general election ballot," he meant the candidates identified by "(Prefers Democratic Party)" on the ballot. ER 209 (emphasis added).

E. Washington's Top Two Partisan System in Practice

1. Evidence of Voters' Perceptions

Expert testimony provided by Washington established that voters in the state come to the top two ballot with widespread confusion. Washington asserted this widespread confusion as a defense to political party evidence that voters interpreted Washington's top two ballots as indicating that parties were associated with the candidates using their names. Dr. Donovan explained that because "voter confusion is widespread and constant," an experiment to measure confusion actually caused by the top two system would require determining "a baseline level of voter confusion independent of the key features of the state's ballot design," and specifically data showing how voters would perceive a ballot without a disclaimer. ER 1055.

Dr. Donovan merely assumed that the disclaimer would reduce the confusion to some degree; he could not estimate the degree because he had no data, did no experiment, and would not guess about the

disclaimer's impact. *See* Dist. Ct. Dkt. 279-3 at 10 (conceding that he had "no estimate as to the effectiveness of the disclaimer at reducing confusion").

The political parties' expert, Dr. Mathew Manweller, did gather experimental data about the effect of the form of the ballot and the disclaimer on voter impressions. Dr. Manweller's experiment sought to observe voter reactions to a sample ballot similar to the one used by Washington, which included the exact disclaimer and candidate format required by Washington law. *See* App. 132-33.

When Dr. Manweller experimented using a model general election ballot, 35% of the active voters participating perceived the ballot to indicate the candidates were nominees of their party, 49% perceived the ballot to indicate the candidates were representatives of the party, 76.6% perceived the ballot to indicate that the candidates were affiliated with the party, and 83.8% perceived the ballot to indicate that the candidates were associated with the party they were indicated as preferring. ER 330.

Dr. Manweller also found strong perceptions of association when he experimented with a model primary election ballot. In this experiment, 72.2-75.6% of the active voters participating in the experiment and viewing the sample ballot perceived it to indicate that candidates were affiliated with or associated with the party indicated after their name. *Id.*

In Dr. Manweller's experiment, the disclaimer occupies almost one fourth of the sample ballot and is

immediately adjacent to one of the two races on the ballot. *See* App. 132-33. For comparison purposes, an actual November 2008 election ballot from Washington is reprinted in the Appendix at 128-29. The disclaimer on the actual ballot occupies perhaps 1/25 of the first page of a two page ballot and is visually contained within a boxed area that may suggest it applies only to federal partisan offices within the same boxing. *See* App. 128.

2. Evidence of Frequent Association of Candidate and Party

The statutory requirement that filing papers include party preference statements and all subsequent political advertising include the candidate's party preference not only creates voter confusion, but also causes the political party to be associated with candidates who may not reflect well on the party or who, by use of the party's name, draw votes away from a party's actual nominee. For example, on June 11, 2010, although the Democratic Party nominated a single candidate for Congressional District 5, the Spokane *Spokesman Review* reported right after filings closed:

> Last week, Eastern Washington Democrats were scrambling to find one candidate to challenge Republican Rep. Cathy McMorris Rodgers for her first term. *This week they have four* – a perennial candidate and a trio of novices, one of them a relative newcomer, one known for telling television viewers

> about the weather and a third who lives on the other side of the state.

ER 231 (emphasis added). In fact the Democratic Party had nominated only one candidate; the others simply chose the Democratic Party at filing. ER 1114. Of those three self-declared candidates, the *Spokesman Review* reported that one candidate had been recently arrested for DUI and possession of marijuana and had allegedly engaged in sexual misconduct with a client – hardly the candidate the Democratic Party would choose for itself as its representative, but one with whom the Party was forced to be associated. *See* ER 231. Another candidate was unknown to the Party with no apparent connection to the Party's issues. *Id.*

Similarly, the Northwest Progressive Institute Blog's "Filing Week: Final Report" (June 6, 2008) identified each candidate who stated a Democratic Party preference as a "Democrat" in the race. Candidates such as "Goodspaceguy Nelson" were improperly presented to the public as representatives of the Democratic Party. *Id*.

The *Yakima Herald* reported, "Republicans' State Rep. Charles Ross got a Democratic opponent Friday . . . ." and, after running down a list of names of candidates noted, "all filed as Republicans on Friday." ER 501. From the *Peninsula Daily News*, "Doug Cloud . . . filed Monday as a Republican to challenge Dicks." ER 491. At the close of filing in 2008, *The Seattle Times* headline noted, "Many of November's

legislative races will be single-party . . . only Republicans or only Democrats filed for office." ER 496. The *Sammamish Review*, *Port Townsend & Jefferson County Leader*, *The Olympian*, and *The News-Tribune* all described candidates in the 2010 election cycle as Republican or Democrat based on their filing statement. ER 482-83; 522-23; 1097-98; 1099.

The record below was replete with evidence of candidates for office being described by party name, "Republican" or "Democrat," in the media based on their filing.[2] Candidates can, and do, appropriate votes from a party's base by simply identifying themselves with that party's label. According to Secretary of State Sam Reed, "[B]y indicating Democrat or Republican," a candidate can "pick up a little bit of a base," or "a start." ER 520.

This siphoning of votes by use of party name has significant consequences for the parties and their nominees, as it dilutes the drawing power of the party name for the party's legitimate nominees and can change the outcome of elections. For example, the Democratic Party selected incumbent Senator Jean Berkey as its nominee for the partisan position of State Senator from the 38th District. ER 1114. Both Berkey and another candidate, Nick Harper, specified the Democratic Party in their declarations

[2] *E.g.*, ER 798; 799; 801-02; 803-04; 805-06; 807; 818-19; 821; 822; 825; 829; 840; 841-42; 843; 846-47; 924.

of candidacy. ER 187. The final results of the primary for State Senate in the 38th District were:

Legislative District 38, State Senator (Partisan office, 4-year term) Snohomish		
Candidate	**Vote**	**Vote%**
Nick Harper (Prefers Democratic Party)	7,193	35.09%
Jean Berkey (Prefers Democratic Party)	6,591	32.16%
Rod Rieger (Prefers Conservative Party)	6,713	32.75%
Total Votes	**20,497**	**100.00%**

Id. Under the rules of the top two system, the party's nominee, Senator Berkey, fell short of advancing to the general election by a mere 123 votes. Mr. Harper, using the Democratic Party's name without consent, received 7,193 votes. If only 1.8% of Mr. Harper's vote came to him as a result of his Democratic ballot designation, then his unauthorized use of the Party's name changed the outcome of the election. It seems likely this occurred given the Washington Legislature's finding that false implications of association damage the integrity of elections by distorting the electoral process. 2009 Session Laws c. 222 Finding (5) (App. 94).

F. The Lower Courts' Review on the As-Applied Challenge

On remand after *Grange*, this case continued in the district court as a challenge to I-872 as implemented. After discovery, the parties filed cross-motions for summary judgment. In its cross-motion for summary judgment, and on appeal, the Democratic Party requested only that Washington be enjoined from printing candidates' party preference on ballots and in voters' pamphlets without the party's consent. The district court denied this relief and granted summary judgment to Washington because it had "implemented I-872 uniformly consistent with several of the 'ways' the Supreme Court envisioned would be consistent with the Constitution. . . ." App. 46-47.

The Ninth Circuit affirmed, holding that Washington designed its election ballots in a manner that "eliminates the risk of widespread voter confusion." App. 3. In order to trigger strict scrutiny, the Ninth Circuit required that political parties show that "a well-informed electorate will interpret a candidate's party preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." App. 13 (citing *Grange*, 552 U.S. at 454).

The Ninth Circuit held that the form of Washington's ballot "plainly" supported the conclusion that I-872 does not impose a severe burden on the parties' First Amendment freedom of association, relying

upon the presence of the disclaimer and the use of "(Prefers ___ Party)" to designate party preference. *See* App. 13.

The Ninth Circuit required no evidence that Washington's disclaimer was read by anyone or had any impact on the extent to which voters were or remained confused about association between the candidates and the parties after their names. *See* App. 13. The Ninth Circuit held that it was the political parties' burden to show that the disclaimer did not work as opposed to Washington's burden to show it protected First Amendment rights. *See* App. 13-14. Additionally, in light of the ballot design, the Ninth Circuit concluded, the political parties were required to show *actual* confusion, not a *risk* of widespread confusion as *Grange* had required. *See* App. 3 ("Given the design of the ballot, and in the absence of evidence of actual voter confusion . . . Washington's top two primary system, as implemented by the state, does not violate the First Amendment associational rights of the state's political parties . . . .").

The court held that the parties' "evidence of actual voter confusion" was insufficient to create a triable issue of "widespread voter confusion." App. 14. The court recognized that Dr. Manweller's cognitive experiments "suggest[ed] voter confusion." *See* App. 14. It nevertheless found the evidence irrelevant because the experiments did not include ballot inserts and voters' pamphlets, and because the disclaimer on the experiment's sample ballots was placed on the

bottom-left corner instead of immediately above the first partisan race. App. 14-15.

In ruling for Washington, the court relied upon the disclaimer in voters' pamphlets and stated that "[e]very voter receives a 'Voters' Pamphlet' before each primary and general election." App. 10. This was incorrect, as Washington's Director of Elections testified that Washington published no primary election voters' pamphlets in 2010. ER 199. She further testified that perhaps 25% of voters read the general election voters' pamphlet. ER 198-99. She gave no specifics about which sections were read by voters who do read the pamphlet. *See id.*

The court also rejected arguments that a well-informed electorate should be presumed to know relevant election law statutes and regulations which might lead to confusion, finding "implausible the premise that even well-informed voters are aware of the intricacies of Washington's election regulations." App. 16. Even so, the court opined that the statutory references to "party affiliation" were not inconsistent with the term "party preference" because:

> [A] candidate who has declared a preference for a political party *has* affiliated with that party. The confusion at issue here is whether voters mistakenly believe *the party* has affiliated with the candidate, not vice versa.

Id. The court did not discuss Washington Revised Code § 29A.36.121(3), which continues Washington's

long tradition of requiring a candidate's party to be printed after the candidate's name on the ballot and Washington's use of the party preference statement to meet this statutory requirement.

The panel also disregarded the historical context in which the ballot was developed, namely as a replacement for the "pick-a-party" ballot on which party affiliation was indicated by voters by selecting a party preference.

Finally, the court rejected the Democratic Party's contention that the failure to see its preferred candidate proceed to the general election as a result of close primary elections showed a risk of constitutional injury from voter confusion. App. 17. The court faulted the Democratic Party for failing to produce evidence that nominees lost votes because of use by others of the party label rather than voter preference for the other candidate, such as evidence in the form of "surveys of actual voters showing that they voted for a candidate they mistakenly believed to be an official party nominee or representative." *Id.*

Accordingly, the court granted summary judgment to Washington on the basis that it need only show that its implementation advanced an important regulatory interest and that it had done so by providing voters relevant information. App. 17.

This Petition followed.

REASONS FOR GRANTING THE PETITION

I. Multiple States Have Implemented Or Considered The Top Two Primary And, Unless Reviewed, The Ninth Circuit's Opinion Will Be The Guideline For Evaluating Top Two Implementations.

Washington is not alone in adopting a top two partisan election system, and consideration of adoption of such systems is spreading. Unless the Ninth Circuit's decision in this case is reviewed, it will become the guideline to which other courts refer when hearing as-applied challenges to top two partisan systems.

- California has implemented Proposition 14, which provides for a top two partisan election. Ballots contain a disclaimer and a candidate statement phrased, "Party Preference: ___." *See* Cal. Elec. Code § 13105(a).

- A group in Arizona has proposed a constitutional amendment that would create a partisan top two system. Az. Open Elections/Open Gov't Act, No. C-03-2012 (filed Sept. 26, 2011). Similarly to Washington and California, a candidate for partisan office in Arizona would declare a "party preference" as it appears on his or her voter registration form, which would then appear next to the candidate's name on the ballot as "Registered as ___." *Id*. § 3. The ballots would also contain a disclaimer. *Id.*

- Partisan top two primaries have been introduced by legislative bodies in Alaska, Oregon, and

Wyoming, although they have not been enacted. *See* H.B. 77, 27th Leg., 2011 Session (Alaska 2011); Or. Measure 65 (2004); S.B. 56, 61st Leg., Gen. Session (Wyo. 2012); *see also* S.B. 1350, 95th Leg., Reg. Session (Mich. 2010) (proposing major party nominating primary that permitted crossover voting). A common feature among these proposed measures is the use of a ballot disclaimer.

As did the proponents of I-872, those in favor of similar measures have pointed to a reduction in party effectiveness as an intended effect of adoption of the measure. For example, in California's official voter guide, Prop. 14's proponents repeated a newspaper's endorsement: "The best part of the open primary is that it would lessen the influence of the major parties, which are now under control of the special interests."[3] Arizona's proposed initiative intends to change electoral outcomes, to elect "candidates who better represent all the people of Arizona rather than just the political parties," but with the parties' labels. *See About the Initiative*, Az. Open Elections/Open Gov't Comm., *available at* http://azopengov.org/about Initiative.aspx.

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[3] Cal. Sec'y of State, Official Voter Information Guide, *Prop. 14, Increases Right to Participate in Primary Elections*, "Argument in Favor of Prop. 14," *available at* http://www.voterguide.sos.ca.gov/past/2010/primary/propositions/14/arguments-rebuttals.htm (accessed March 20, 2012) (quoting Jim Boren, *Watch the Political Parties Try to Kill Open Primary Plan*, *Fresno Bee*, Feb. 22, 2009, at J1).

Without clear guidance from this Court on the proper test for determining the likelihood of voter confusion in an as-applied challenge, these primaries will likely pass constitutional muster under the Ninth Circuit's uncritical test no matter what the disclaimer used says or whether it has any effect of protecting First Amendment rights of association.

II. The Court Should Clarify Whether *Grange* Creates A "Safe Harbor" Within Which Top Two Partisan Election Systems Are Effectively Immunized From Constitutional Challenge.

The Court has long recognized the importance to democracy of having political party messages delivered by messengers selected by the party. "[F]orced association has the likely outcome – indeed, in this case the intended outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom." *Cal. Democratic Party*, 530 U.S. at 581-82. The Court has similarly recognized that forcing a group to appear to be associated with an individual who holds antithetical beliefs might also create an impression that the group approves of or tolerates the individual's message and thus severely burdens rights of association. *See Dale v. Boy Scouts of Am.*, 530 U.S. 640, 648 (2000); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 580-81 (1995).

The Court's long history of affirmatively protecting First Amendment rights is difficult to reconcile with the Ninth Circuit's "form over substance" approach to evaluating the risk of voter confusion under Washington's top two system. The Ninth Circuit apparently adopted Washington's view that the Court in *Grange* created a safe harbor:

> Q. (by Judge Fisher): Are you suggesting that . . . so long as you copy what one justice said would solve the problem, even if it doesn't solve the problem, and there is rampant evidence of voter confusion the courts can't look to that and somehow say 'well, you didn't have the evidence before you, Mr. Chief Justice, and you sent it back for a trial and evidence on voter confusion and we can't look to anything beyond the ballot?'
>
> A. (by Deputy Solicitor General Jeff Even): I think that's correct. . . .

9th Cir. Oral Argument at 42:26-43:04.

Consistent with this sentiment, the Ninth Circuit opinion relied heavily, and almost completely, on the *mere presence* of the ballot disclaimer. This is made clear by the panel's discussion of Dr. Manweller's study. The panel recognized that Dr. Manweller's results "suggest voter confusion," but discredited the relevance of his findings because his test ballot did not resemble an official ballot due to the location of the disclaimer. App. 14-15. As is apparent from a comparison of Dr. Manweller's test ballots, App. 132-33, and the official state ballots, App. 126-29, the

disclaimer in Dr. Manweller's study is substantially more prominent than an official ballot disclaimer. Even this more prominent disclaimer did not work to dispel voter confusion.

The Court should clarify whether *Grange*, in which the majority referred to "prominent disclaimers" as a means of eliminating confusion, *see* 552 U.S. at 456, meant *effective* disclaimers. Such clarification will reduce any potential for confusion among lower courts and clarify that where the First Amendment is concerned, substance is the focus. The Ninth Circuit's decision to absolve Washington of any need to prove its disclaimer worked should be reviewed.

III. The Court Should Clarify That The Principles Used To Evaluate Likelihood Of Confusion In Trademark Cases Should Be Used To Evaluate Likelihood Of Confusion In Top Two Cases.

After *Grange*, this case (and others like it) turns on an evaluation of the risk of voter confusion about the meaning of conjoining a candidate's name and a political party's name on ballots used in a historically partisan context. As both Chief Justice Roberts and Justice Scalia observed, the issues in this case substantially resemble those in a trademark case, with the exception that fundamental First Amendment rights rather than commercial interests are at stake.

Federal courts have devoted years to developing consistent approaches to evaluating the likelihood of

consumer confusion when trademarks are used without consent. Political parties should not have a greater burden in proving risk of confusion to obtain protection against the misuse of their names than commercial interests have to prove likelihood of confusion when asserting misuse of their trademarks. The Ninth Circuit's approach is inconsistent with that utilized in trademark cases. It should be reviewed and a proper and consistent approach to evaluating potential consumer/voter confusion should be established.

The Ninth Circuit had before it substantial evidence that Washington voters come to the ballot thinking that political parties are associated with the candidates who have appropriated their name under Washington's system. Washington's defenses to this constitutional challenge were essentially that disclaimers after *Grange* are presumed wholly effective to dispel such confusion and Washington need not provide any evidence of its disclaimer's effectiveness. Moreover, Washington asserted that voter confusion is irrelevant to the constitutional questions unless shown to be specifically and solely caused by Washington's ballot.

Federal courts, however, have long recognized that when evaluating the likelihood of confusion, one factor to be considered is the degree of care likely to be exercised by the audience. *E.g.*, *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983); *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979). Voters who come to the polls already believing that

candidates and parties are associated are likely to be unaffected by a disclaimer that, at best, says a candidate and a party *may* not in fact be associated. The existing confusion prevalent among voters should be relevant in constitutional analysis as well as in trademark analysis. Similarly, voters who come to the polls aware of Washington's electoral history and statutes are expecting to see a party affiliation after the candidate's name on the ballot and may not even connect the disclaimer with the races in which they are voting. The Ninth Circuit discounted the effect of Washington's statutes, finding it "implausible" that well-informed voters would be aware of them. App. 16. Knowledge of Washington's laws should be assumed, however, when looking through the lens of the well-informed voter. *See Field v. United States*, 34 U.S. 182, 195 (1835) ("Every citizen is bound to know the law of the land.").

Similarly, courts evaluating likelihood of confusion when the asserted defense is a disclaimer have held that the defendant, not the trademark owner, must show the effectiveness of a disclaimer. *Home Box Office, Inc. v. Showtime/The Movie Channel Inc*., 832 F.2d 1311, 1315-16 (2d Cir. 1987) (requiring infringer to show effectiveness of disclaimer, and noting "body of academic literature that questions the effectiveness of disclaimers in preventing consumer confusion as to the source of a product"); *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006); *Basile S.p.A. v. Basile*, 899 F.2d 35, 38 (D.C. Cir. 1990). This is part of the courts' "justifiably skeptical"

approach to the effectiveness of disclaimers. *See Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1077 (9th Cir. 2006). The Ninth Circuit's opinion turns this doctrine on its head, requiring the injured parties to prove the negative that the disclaimer is *not* effective.

An assumption that Washington's disclaimer works is a speculative assumption. Under Washington's implementation of I-872, its disclaimer is read, if at all, long after candidates' filings and advertising have drawn interest and supporters to their campaigns. Disclaimers and voting materials distributed at the end of the campaign should not be assumed to correct the damage of initial interest confusion created by unilateral associations. And even if the disclaimer worked to remedy misinformation or confusion, it "cannot prevent the damage of initial interest confusion, which will already have been done by the misdirection" of voters to the free-riding candidates. *See Australian Gold, Inc.*, 436 F.3d at 1240.

The principles used to evaluate risk of constitutional injury should be consistent with the principles used to evaluate the risk of commercial injury or, if there are to be two different sets of principles, the reason for applying new principles in constitutional cases should be enunciated so that lower courts may develop the case law along the appropriate path.

IV. The Rational Basis Test Should Not Be Used As A Rubber Stamp.

The Ninth Circuit jumped to a conclusion that Washington's implementation of I-872 passed the rational basis test merely because a candidate's party preference statement provides "relevant information" to voters. *See* App. 17 (citing *Grange*, 552 U.S. at 458).[4] But this Court has not held that states may freely place "relevant information" on ballots without consideration of the common-sense impact of doing so. In *Anderson v. Martin*, 375 U.S. 399, 402 (1964), the Court struck down a state law requiring a candidate's race to be disclosed on ballots. The Court accepted that the information would be relevant to voters but looked further and struck down the statute because it encouraged the voters to racially discriminate and hence potentially caused unreasonable injury to candidates and their supporters. *Id.* at 403.

In this case, the Ninth Circuit did not follow the teachings of *Anderson*. It refused to consider the highly likely impact of party preference statements in siphoning off party base votes from party nominees and changing the outcome of elections, instead requiring after-the-fact proof of actual vote diversion.

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[4] Under the rational basis test, "[w]hen a state electoral provision places no heavy burden on associational rights, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Clingman v. Beaver*, 544 U.S. 581, 586-87 (2005) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

Washington's expert, Dr. Donovan, testified that party labels – including Washington's party preference statement – are the most important voting cues, particularly in low information races. ER 206. They are thus very likely to siphon votes when candidates other than the authorized party candidate are permitted to use them. Indeed, the argument that the information is relevant to voters necessarily argues that it will divert their votes in some measure. Washington's Secretary of State himself described a candidate's party designation as providing "a base" or "a start." ER 520. Washington's Legislature has concluded that false implications of association damage the integrity of elections by distorting the electoral process. 2009 Session Laws c. 222 Finding (5). In these circumstances, it is not reasonable and politically neutral to provide information that facilitates false implications of association when Washington could readily and without burden ask the named party whether it objected to the candidate's use of its name.

The Ninth Circuit failed to consider whether this refusal to provide a right for political parties to object to false implications of association, endorsement, or nomination, coupled with the known risks of vote diversion and voter confusion, resulted in a system that was not reasonable and politically neutral. *Cf. Cook v. Gralike*, 531 U.S. 510, 525 (2001) (rejecting argument that statement on ballot indicating that candidate did not support constitutional term limits amendment "'merely' informs . . . voters about a

candidate's compliance with Article VII," because ballot designation was an impermissible attempt to "handicap candidates for U.S. Congress."). Washington should justify why its goal of providing relevant information about candidates' "adherence to party philosophy," while refusing to permit parties to refute these statements, is not "irrational." *See Grange*, 552 U.S. at 470 (Scalia, J., dissenting).

Petitioner believes that Washington's I-872 implementation severely burdens the party's associational rights and that the Ninth Circuit grievously erred in concluding that it did not. But even under the Ninth Circuit's conclusion that only a modest burden resulted, the rational basis test should not have been treated as a rubber stamp. The Democratic Party made a simple, reasonable, common-sense request for relief: ask a political party if it consents to the use of its name on the ballot by a candidate and if it does not, simply have the candidate run as an independent. Because Washington does not afford such a right, this Court should grant certiorari and hold that Washington's implementation of the top two system fails the rational basis test.

V. This Case Presents An Ideal Vehicle For Resolution Of These Important Issues.

The procedural posture of this case makes it an excellent vehicle for resolving the questions presented.

No factual disputes are present in this case that would interfere with the Court's straightforward consideration of the issues presented. The case was resolved on cross-motions for summary judgment. App. 32-33. If Washington argues that a genuine issue of material fact exists, the Court will be entitled to review the propriety of granting Washington summary judgment on the assumption that such issues would be resolved in favor of the party against whom judgment was granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Similarly, if the political parties provided substantial evidence on a factual issue and Washington and Grange failed to dispute it this Court may review the issues on the basis that the facts are as the political parties' evidence suggests. *See id.* at 248.

In addition, the bottom-line issues presented are practical and factually simple: who should bear the burden of proof in connection with disclaimers and their impact on confusion? Should principles from trademark law be used in this inquiry? Should all elements of the rational basis test have been examined? And should a political party have the right to consent to the use of its name?

This case presents important issues that should be resolved by this Court, and it presents them in a context that facilitates the Court's resolution of the issues.

CONCLUSION

The Court should grant the petition.

DATED this 18th day of April, 2012.

Respectfully submitted,

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2012 WL 149475 (C.A.9 (Wash.))

United States Court of Appeals,
Ninth Circuit.

WASHINGTON STATE REPUBLICAN PARTY,
Steve Neighbors; Marcy Collins; William Michael Young; Diane Tebelius, Bertabelle Hubka; Mike Gaston, Plaintiffs,
Libertarian Party of Washington State; Ruth Bennett, J.S. Mills, Intervenor-Plaintiffs,
and
Washington State Democratic Central Committee, Intervenor-Plaintiff-Appellant,
v.
WASHINGTON STATE GRANGE; Sam Reed, Secretary of State; State of Washington; Rob McKenna, Intervenor-Defendants-Appellees.
Washington State Republican Party,
Plaintiff-Appellant,
and
Washington State Democratic Central Committee; Libertarian Party of Washington State; Ruth Bennett; J.S. Mills, Intervenor-Plaintiffs,
v.
Washington State Grange; State of Washington; Rob Mckenna; Sam Reed, Secretary of State, Intervenor-Defendants-Appellees.
Washington State Republican Party, Plaintiff,
Washington State Democratic Central Committee, Intervenor-Plaintiff,
and
Libertarian Party of Washington State; Ruth Bennett; J.S. Mills,
Intervenor-Plaintiffs-Appellants,
v.

Washington State Grange; State of Washington;
Rob McKenna; Sam Reed, Secretary of State,
Intervenor-Defendants-Appellees.

Nos. 11-35122, 11-35124, 11-35125.
Argued and Submitted Nov. 29, 2011.
Filed Jan. 19, 2012.

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Appeal from the United States District Court for the Western District of Washington, John C. Coughenour, District Judge, Presiding. D.C. No. 2:05-cv-00927-JCC.

Before DOROTHY W. NELSON, RAYMOND C. FISHER and MILAN D. SMITH, JR., Circuit Judges.

OPINION

FISHER, Circuit Judge:

We address whether the State of Washington has designed its election ballots in a manner that eliminates the risk of widespread voter confusion, a question left unresolved in *Washington State Grange v. Washington State Republican Party* ("*Grange*"), 552 U.S. 442 (2008). We hold that the state has done so. The ballots, and related informational materials, inform voters that, although each candidate for partisan office may specify 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. Given the design of the ballot, and in the absence of evidence of actual voter confusion, we hold that Washington's top two primary system, as implemented by the state, does not violate the First Amendment associational rights of the state's political parties, the appellants here. We also affirm the district court's dismissal of the plaintiffs' ballot access and trademark claims. We reverse the district court's order granting the state's request for reimbursement of attorney's fees paid in accordance with a 2006 stipulation.

I. Background

In 2003, this court invalidated Washington's blanket primary as a violation of political parties' First Amendment freedom of association. *See Democratic Party of Wash. State v. Reed,* 343 F.3d 1198, 1201 (9th Cir. 2003). In response to that decision, the Washington State Grange proposed the People's Choice Initiative of 2004, or Initiative 872 (I-872), as a replacement. *See Grange,* 552 U.S. at 446-47. The initiative passed with nearly 60 percent of the vote and became effective in December 2004. *See id.* at 447.

I-872 created a "top two" primary, in which the primary serves as a means of winnowing the candidates to two rather than selecting party nominees. "Under I-872, all elections for 'partisan offices' are conducted in two stages: a primary and a general election." *Id.* (footnote omitted).[1] "To participate in the primary, a candidate must file a 'declaration of candidacy' form, on which he declares his 'major or minor party preference, or independent status .'" *Id.*

[1] A "partisan office" is "a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." Wash. Rev. Code § 29A.04.110. Partisan offices include U.S. senator and U.S. representative, all state offices, including legislative offices, except judicial offices and the office of superintendent of public instruction, and all county offices except judicial offices and those offices for which a county home rule charter provides otherwise. *See id.*

(quoting former Wash. Rev. Code § 29A.24.030, superseded in part by Wash. Rev. Code § 29A.24.031). "Each candidate and his party preference (or independent status) is in turn designated on the primary election ballot," and "[a] political party cannot prevent a candidate who is unaffiliated with, or even repugnant to, the party from designating it as his party of preference." *Id.* (citing former Wash. Admin. Code § 434-215-015). "In the primary election, voters may select 'any candidate listed on the ballot, regardless of the party preference of the candidates or the voter.'" *Id.* (quoting former Wash. Admin. Code § 434-262-012). "The candidates with the highest and second-highest vote totals advance to the general election, regardless of their party preferences." *Id.* at 447-48. "Each candidate's party preference is listed on the general election ballot, and may not be changed between the primary and general elections." *Id.* at 448 (citing former Wash. Admin. Code § 434-230-040).

In May 2005, the Washington State Republican Party filed suit against the state, challenging I-872 on its face. *See id.* "The party contended that the new system violates its associational rights by usurping its right to nominate its own candidates and by forcing it to associate with candidates it does not endorse." *Id.* The Washington State Democratic Central Committee and Libertarian Party of Washington State joined the suit as plaintiffs, and the Washington State Grange joined as a defendant. *See id.* The district court granted the plaintiffs' motions for summary judgment and enjoined the implementation of I-872, *see Wash.*

State Republican Party v. Logan, 377 F. Supp. 2d 907, 932 (W.D. Wash. 2005), and this court affirmed, *see Wash. State Republican Party v. Washington,* 460 F.3d 1108, 1125 (9th Cir. 2006). In a separate order, we also awarded attorney's fees on appeal to the plaintiffs and against the state under 42 U.S.C. § 1988.

The Supreme Court reversed. The Court began by reciting the general principle that "[e]lection regulations that impose a severe burden on associational rights are subject to strict scrutiny," and will be upheld "only if they are 'narrowly tailored to serve a compelling state interest.'" *Grange,* 552 U.S. at 451 (quoting *Clingman v. Beaver,* 544 U.S. 581, 586 (2005)). "If a statute imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." *Id.* at 452 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)).

The Court next determined that I-872 did not on its face severely burden the plaintiffs' associational rights. First, the Court rejected the plaintiffs' argument that I-872 allows primary voters who are unaffiliated with a party to choose the party's nominees. *See id.* at 452-53. The flaw in the parties' argument was that "the I-872 primary does not, by its terms, choose parties' nominees" – the parties are free to "nominate their own candidates outside the state-run primary . . . by whatever mechanism they choose." *Id.* at 453.

Second, and relevant here, the Court considered the plaintiffs' argument that I-872 "burdens their associational rights because voters will assume that candidates on the general election ballot are the nominees of their preferred parties." *Id.* at 454.[2] Rejecting this argument, the Court said there was "no basis to presume that a well-informed electorate w[ould] interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Id.* The Court recognized that it was "*possible* that voters w[ould] misinterpret the candidates' party-preference designations as reflecting endorsement by the parties. But these cases involve a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion." *Id.* at 455.

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[2] The Court summarized the plaintiffs' claims as follows:

> At bottom, respondents' objection to I-872 is that voters will be confused by candidates' party-preference designations. Respondents' arguments are largely variations on this theme. Thus, they argue that even if voters do not assume that candidates on the general election ballot are the nominees of their parties, they will at least assume that the parties associate with, and approve of, them. This, they say, compels them to associate with candidates they do not endorse, alters the messages they wish to convey, and forces them to engage in counterspeech to disassociate themselves from the candidates and their positions on the issues.

Grange, 552 U.S. at 454.

Because the Court was considering a facial challenge, the question was "whether the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment." *Id.* at 456. The Court said it was "not difficult to conceive of such a ballot." *Id.*

> For example, petitioners propose that the actual I-872 ballot could include prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party. They also suggest that the ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as "my party preference is the Republican Party." Additionally, the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots. We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion. And without the specter of widespread voter confusion, respondents' arguments about forced association and compelled speech fall flat.

Id. at 456-57 (footnotes omitted). In the Court's view, "these implementations of I-872 would be consistent with the First Amendment." *Id.* at 457.

Given that I-872 did not on its face severely burden the plaintiffs' associational rights, strict scrutiny did not apply and the state had to demonstrate only that I-872 furthered important regulatory interests. The Court held this lesser scrutiny was satisfied because I-872 served the state's important regulatory interest in "providing voters with relevant information about the candidates on the ballot." *Id.* at 458. The Court remanded, however, allowing the plaintiffs to challenge I-872 as applied. Anticipating that challenge, the Court said that "whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot." *Id.* at 455.

The state subsequently implemented I-872 in a manner consistent with the Supreme Court's suggestions. *First,* each primary and general election ballot includes a disclaimer informing voters of the absence of an association between the candidate and the preferred party. This disclaimer states:

> 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.

Wash. Admin. Code § 434-230-015(4)(a). *Second,* the ballots denote a candidate's party preference in the form of a candidate statement that emphasizes the candidate's personal choice rather than the party's acceptance of the candidate. Rather than

designating a candidate's party preference with a simple "D" or "R," or with the words "Democrat" or "Republican," under each candidate's name the ballots contain a parenthetical such as "(Prefers Democratic Party)" or "(Prefers Republican Party)." *Third,* the state requires explanatory materials to be mailed to voters.[3] Every voter receives a "Voters' Pamphlet" before each primary and general election. The pamphlet includes "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." Wash. Admin. Code § 434-381-200. Voters also receive along with their ballots an insert stating:

> 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.

Id. § 434-250-040(1)(j)-(k). *Fourth,* the state disseminated educational information to the public about the new ballots before the 2008 primary by airing public service announcements on radio and television.

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[3] Over 90 percent of Washington voters vote by mail. *See Grange,* 552 U.S. at 456 n. 8.

In the district court on remand, the plaintiffs argued that I-872, as implemented by the state, violated their First Amendment associational rights. They contended that strict scrutiny applied because the state had failed to show that its implementation of I-872 eliminated the risk of widespread voter confusion. They faulted the state for failing to present affirmative evidence to show that the ballot disclaimer and related voter information were read and understood by voters, or that these materials were effective at eliminating the risk of confusion. They also offered evidence purporting to show actual voter confusion regarding the I-872 ballot.

On cross motions for summary judgment, the district court granted the defendants' motions on the plaintiffs' as-applied associational rights claims. The court emphasized that the state had implemented I-872 in accordance with the Supreme Court's suggestions, and that the plaintiffs' evidence of actual voter confusion was either legally irrelevant or factually insufficient to create a triable issue of widespread voter confusion.

The district court also disposed of the remaining issues in the case. The court granted summary judgment to the plaintiffs on their claim that the manner in which the state provided for the election of local party officials – precinct committee officers, or PCOs – violated the parties' associational rights. The court granted the defendants' motions to dismiss the plaintiffs' ballot access and trademark claims, denied the plaintiffs leave to amend their complaints to add a

claim under the Washington Constitution and granted the state's motion for reimbursement of the attorney's fees it paid in connection with the previous Ninth Circuit appeal.

The plaintiffs timely appealed. The defendants did not cross appeal the court's ruling on the PCO elections. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse in part.

II. Discussion

A. Freedom of Association Claims

The district court granted the defendants summary judgment on the plaintiffs' claims that I-872 violates their First Amendment associational rights as applied. Reviewing de novo, *see Humane Soc'y of U.S. v. Locke,* 626 F.3d 1040, 1047 (9th Cir. 2010), we affirm.

To trigger strict scrutiny, the plaintiffs must show that the state's implementation of I-872 severely burdens their freedom of association.[4] To do so,

[4] The plaintiffs dispute this proposition, arguing that the burden was on the state to prove that its implementation of I-872 eliminates any risk of voter confusion. We disagree. Under the First Amendment, plaintiffs bear the initial burden of demonstrating that a challenged election regulation severely burdens their First Amendment rights. *See Prete v. Bradbury,* 438 F.3d 949, 951 & 953 n. 5 (9th Cir. 2006). The burden then falls on the state to demonstrate either that the regulation is narrowly tailored to achieve a compelling state interest or, if the regulation imposes only a modest burden on First Amendments

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they must show that "a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange,* 552 U.S. at 454. This inquiry "depend[s] in significant part on the form of the ballot." *Id.* at 455.

1. Form of the Ballot

The "form of the ballot" plainly supports the conclusion that I-872 does not impose a severe burden on the plaintiffs' freedom of association. As described above, the state in implementing the ballot adopted each of the Supreme Court's suggestions. *See Grange,* 552 U.S. at 456. The ballot includes a prominent disclaimer explaining that party preference reflects only the self-designation of the candidate and not an endorsement by the party. The ballot describes a candidate's party preference as "(Prefers Republican Party)" rather than as "R," "Republican" or "Republican Party." Voters' Pamphlets and ballot inserts also inform voters that party preference reflects only a candidate's self-designation. The form of the ballot thus points to an absence of voter confusion.

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rights, that the regulation furthers the state's important regulatory interests. *See id.* at 961. Here, it was the plaintiffs' burden to demonstrate the existence of widespread voter confusion, not the defendants' burden to demonstrate its absence.

2. Evidence of Actual Voter Confusion

The plaintiffs attempt to rebut this inference with evidence of actual voter confusion. This purported evidence falls into four categories, which we address in turn. As did the district court, we find this evidence insufficient to create a triable issue of widespread voter confusion.

First, the plaintiffs rely on newspaper articles in which the news media and elected officials refer to candidates as "Democrats" or "Republicans" when they are not official party nominees or representatives but have simply declared a preference for the Democratic or Republican Party. Such statements do not establish that members of the media or elected officials are confused about these candidates' party affiliations, however. The speakers in these examples may simply be "using shorthand" to indicate the party preference the candidate listed on his or her declaration of candidacy. As the district court explained, these "isolated incidents do not show the type of widespread voter confusion the Supreme Court contemplated in its review."

Second, the plaintiffs introduced a study of voter confusion by Mathew Manweller, a professor of political science. Manweller conducted cognitive experiments to determine whether voters are likely to perceive candidates listed on the I-872 primary and general election ballots as nominees or representatives of the political parties the candidates have declared as their preference. His results suggest voter

confusion, but Manweller did not give the subjects in his experiments the ballot inserts and voter pamphlets the state provides to the actual electorate. The sample ballots Manweller used also did not conform to the ballots used in actual elections: whereas state law requires that the disclaimer regarding the lack of party association appear "immediately above the first partisan congressional, state or county office," Wash. Admin. Code § 434-230-015(4)(a), the ballots used in the study placed the notice on the bottom-left corner, below the first partisan race. Manweller's results therefore are not relevant evidence of whether "a *well-informed electorate* will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange,* 552 U.S. at 454 (emphasis added).

Third, the plaintiffs argue that Washington's statutes and regulations create voter confusion over whether political parties associate with or approve of candidates who specify a preference for that party on their declarations of candidacy. The plaintiffs point to two sections of Washington election law that refer to a candidate's statement of party preference as that candidate's "party affiliation." *See* Wash. Rev. Code § 42.17A.205(f)[5]; Wash. Admin. Code § 390-05-274.[6]

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[5] Formerly codified as Washington Revised Code § 42.17.040(f).

[6] The language of these sections may reflect the state's efforts to harmonize I-872's concept of self-declared "party

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They contend that, if voters were to read these sections and see that the state equates a candidate's "party preference" with that candidate's "party affiliation," they would come away with the impression that candidates are official representatives of their "preferred" parties. We disagree. In the first place, we find implausible the premise that even well-informed voters are aware of the intricacies of Washington's election regulations. It is highly unlikely that voters would read and rely on §§ 42.17A.205(f) and 390-05-274 to obtain an understanding of I-872. Even if voters were aware of those provisions, we do not find them confusing. There is nothing inherently misleading about equating a candidate's self-declared party preference with party affiliation: a candidate who has declared a preference for a particular political party *has* affiliated with that party. The confusion that is at issue here is whether voters mistakenly believe *the party* has affiliated with the candidate, not vice versa. In light of the clear language of the ballot, the Voters' Pamphlet and the ballot insert, no reasonable voter would be confused by §§ 42.17A.205(f) and 390-05-274.[7]

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preference" with existing election laws using pre-I-872 terminology.

[7] Section 390-05-274(1), in fact, states: "A candidate's preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate."

Fourth, the Democratic Party complains that in several I-872 primary elections its official nominee failed to advance to the general election. It attributes those results to voter confusion, speculating that its nominee failed to finish among the top two votegetters because another self-declared Democrat entered the race and siphoned votes from the official nominee. The plaintiffs offer no evidence, however, that these election results reflect voter confusion rather than voters' actual preferences. The plaintiffs have not, for example, produced surveys of actual voters showing that they voted for a candidate they mistakenly believed to be an official party nominee or representative. That official party nominees have failed to advance does not, without more, suggest voter confusion.

In sum, the plaintiffs have not demonstrated a triable issue that the state's implementation of I-872 imposes a severe burden on their freedom of association. The state therefore need show only that I-872 furthers an important regulatory interest. They have done so, because, as the Supreme Court held in *Grange,* I-872 serves the state's important regulatory interest in "providing voters with relevant information about the candidates on the ballot." 552 U.S. at 458. We therefore affirm summary judgment in favor of the defendants on the plaintiffs' as-applied freedom of association claims.

B. Ballot Access Claims

The Libertarian Party argues that I-872 violates its fundamental right of access to the ballot by making it difficult for a minor-party candidate to qualify for the general election ballot. We review de novo the district court's dismissal of these claims under Federal Rule of Civil Procedure 12(b)(6). *See Cook v. Brewer,* 637 F.3d 1002, 1004 (9th Cir. 2011).

When evaluating the constitutionality of ballot access regulations, we weigh the degree to which the regulations burden the exercise of constitutional rights against the state interests the regulations promote. *See Libertarian Party of Wash. v. Munro,* 31 F.3d 759, 761 (9th Cir. 1994). If the burden is severe, the challenged procedures must be narrowly tailored to achieve a compelling state interest. *See id.* If the burden is slight, the procedures will survive review as long as they further a state's "important regulatory interests." *Nader v. Brewer,* 531 F.3d 1028, 1035 (9th Cir. 2008) (quoting *Burdick v. Takushi,* 504 U.S. 428, 434 (1992)) (internal quotation marks omitted). In determining whether the burden is severe, "[t]he question is whether 'reasonably diligent' minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Libertarian Party of Wash.,* 31 F.3d at 762; *accord Nader,* 531 F.3d at 1035.

Here, the Libertarian Party acknowledges that it has broad access to the I-872 primary. To qualify for the primary ballot, a candidate – whether from a

major or minor party – need only (1) file a declaration of candidacy and (2) either pay a filing fee equal to 1 percent of the annual salary for the office or submit a signature petition in lieu of the filing fee. *See* Wash. Rev. Code §§ 29A.24.031, 29A.24.091. The Libertarian Party argues, however, that its rights are violated because I-872 makes it difficult for a minor-party candidate to progress to the *general* election ballot. A candidate, whether from a major or minor party, can attain a place in the general election only by finishing in the top two in the primary.

The Libertarian Party relies on cases invalidating early filing deadlines for minor-party and independent candidates seeking access to general election ballots. In *Anderson v. Celebrezze,* 460 U.S. 780 (1983), the Court struck down a statute requiring an independent candidate for president to file a statement of candidacy and nominating petition in March in order to appear on the November general election ballot. The Court held that the early filing deadline placed an unconstitutional burden on voting and associational rights because it prevented independents from taking advantage of unanticipated political opportunities that might arise later in the election cycle and required independent candidates to gather petition signatures at a time when voters were not attuned to the upcoming campaign. *See Anderson,* 460 U.S. at 786, 790-92.

By giving minor-party candidates access to the August primary ballot rather than the November

general election ballot, I-872 poses, albeit to a lesser extent, some of these same concerns. I-872, however, is distinguishable from the ballot access rules invalidated in *Anderson.* First, the I-872 primary is in August, not March. Second, unlike the system challenged in *Anderson,* in which independent candidates were required to file petitions before the major parties selected their nominees, the Libertarian Party participates in a primary at the same time, and on the same terms, as major party candidates. Libertarian Party candidates thus have an opportunity to appeal to voters at a time when election interest is near its peak, and to respond to events in the election cycle just as major party candidates do. In addition, whereas conventional systems guarantee major-party candidates a place on the general election ballot, I-872 gives minor-party candidates the same opportunity as major-party candidates to advance to the general election.

In light of these distinctions, we hold that I-872 does not impose a severe burden on the Libertarian Party's rights. *See Munro v. Socialist Workers Party,* 479 U.S. 189, 199 (1986) ("It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election."). The Party has not shown that I-872 impermissibly "limit[s] the field of candidates from which voters might choose." *Anderson,* 460 U.S. at 786 (quoting *Bullock v. Carter,* 405 U.S. 134, 143

(1972)) (internal quotation marks omitted). In addition, because I-872 gives major- and minor-party candidates equal access to the primary and general election ballots, it does not give the "established parties a decided advantage over any new parties struggling for existence." *Williams v. Rhodes,* 393 U.S. 23, 31 (1968).

We recognize the possibility that I-872 makes it more difficult for minor-party candidates to qualify for the general election ballot than regulations permitting a minor-party candidate to qualify for a general election ballot by filing a required number of petition signatures. This additional burden, however, is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems. *See Cal. Democratic Party v. Jones,* 530 U.S. 567, 585-86 (2000). The district court therefore properly dismissed these claims.

C. Trademark Claims

The Libertarian Party also contends that the state's implementation of I-872 infringes its rights under federal trademark law. We review de novo the district court's Rule 12(b)(6) dismissal of these claims. *See Cook,* 637 F.3d at 1004.

To establish a federal trademark infringement claim, the Libertarian Party is required to show that the defendant – here, the State of Washington – uses the Party's registered mark "in connection with the

sale, offering for sale, distribution, or advertising of any *goods or services.*" 15 U.S.C. § 1114(1)(a) (emphasis added). This "does not require any actual *sale* of goods [or] services." *Bosley Med. Inst., Inc. v. Kremer,* 403 F.3d 672, 679 (9th Cir. 2005). At minimum, however, the plaintiff must show that the defendant "offers *competing* services to the public." *Id.*

The Libertarian Party correctly points out that "services" can include activities performed by a political party. *See United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.,* 128 F.3d 86, 90 (2d Cir. 1997). But it has not plausibly alleged that the *state* uses party labels on the ballot to perform a service in competition with the Libertarian Party. Nor has it even attempted to make this showing. On the contrary, although the district court focused on this weakness in the Party's case, and although the state presses the same issue in its brief on appeal, the Party has not explained how the state uses the Party's mark in connection with the provision of competing services. We therefore affirm dismissal of the trademark claims.[8]

[8] The plaintiffs suggest for the first time in the Democratic Party's reply brief that the state could be liable for trademark infringement on a theory of contributory infringement. We decline to reach this issue because it was not timely raised. *See Eberle v. City of Anaheim,* 901 F.2d 814, 818 (9th Cir. 1990).

D. Attorney's Fees

In 2006, after ruling in the plaintiffs' favor on the merits, we issued an order awarding attorney's fees on appeal to the plaintiffs and against the state under 42 U.S.C. § 1988. The parties subsequently entered into a settlement governing the amount and payment of those fees. They reduced their settlement to a written stipulation, which was filed in this court. The Supreme Court thereafter granted certiorari and reversed our decision, and the state then moved for reimbursement of the fees, arguing that the plaintiffs were no longer prevailing parties. The plaintiffs opposed the motion, arguing that the settlement had definitively resolved the fee issue, irrespective of further proceedings. The district court granted the motion, and the plaintiffs appeal. Because this issue turns on a question of contract interpretation, we review de novo. *See Doe I v. Wal-Mart Stores, Inc.,* 572 F.3d 677, 681 (9th Cir. 2009) ("Contract interpretation is a question of law that we review *de novo.*").

Under Washington law, contracts are interpreted in accordance with the context rule. *See Spectrum Glass Co. v. Pub. Util. Dist. No. 1,* 119 P.3d 854, 858 (Wash. Ct. App. 2005). "Under the context rule, extrinsic evidence is admissible to assist the court in ascertaining the parties['] intent and in interpreting the contract." *Id.* "The court may consider (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties'

respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties." *Id.* "Such evidence is admissible regardless of whether the contract language is deemed ambiguous," though "[e]xtrinsic evidence cannot be considered: (a) to show a party's unilateral or subjective intent as to the meaning of a contract word or term; (b) to show an intention independent of the instrument; or (c) to vary, contradict, or modify the written word." *Id.*

The state argues that the stipulation expressly reserved its right to reimbursement. The stipulation states in relevant part:

> The parties agree that this stipulation relates only to fees and costs incurred by appellees in the appeal of the District Court's July 29, 2005 Order ("the Appeal") to the date of this Order. Appellees are not entitled to an award of any fees or costs incurred in the Ninth Circuit portion of the Appeal beyond the amounts awarded under this stipulation and order, to the date of this Order. *No waiver is intended of any claims for further proceedings in the appeal or in any other aspect of the case* (*including district court proceedings*).

(Emphasis added.) We do not agree with the state that this language unequivocally reserved the state's right to seek reimbursement in the event of a favorable ruling from the Supreme Court. The reservation

could reasonably be understood as definitively resolving liability for fees associated with the Ninth Circuit appeal, while reserving the parties' rights to seek additional fees for further proceedings on appeal, including proceedings in the Supreme Court, or proceedings on remand from the Supreme Court. We therefore look to extrinsic evidence to discern the meaning of the parties' settlement.

That evidence supports the plaintiffs' position. In a September 15, 2006 email discussing the proposed settlement, counsel for the Democratic Party wrote: "We understand this settlement to be final as to our claims for attorneys' fees and costs for the Ninth Circuit proceedings related to the appeal of Judge Zilly's July, 2005 decision through the date of settlement, *irrespective of further proceedings in the case*" (emphasis added). Counsel for the Republican Party sent a similarly worded email. These emails, which were sent to counsel for the state, plainly contemplated that the settlement would definitively resolve the question of fees for the Ninth Circuit appeal, irrespective of further proceedings in the case. *See Spectrum Glass,* 119 P.3d at 858 (explaining that "statements made by the parties in preliminary negotiations" are admissible to assist the court in ascertaining the parties' intent in forming the contract). One would have expected the state either to respond to the emails or to include a much clearer reservation of rights in the stipulation if the state believed the parties' settlement preserved a right to reimbursement in the event of a reversal by the Supreme Court.

We conclude that the settlement definitively resolved the state's liability for fees. The order granting the state's request for reimbursement is therefore reversed.[9]

E. Leave to Amend

The plaintiffs challenge the district court's decision denying leave to amend their complaints to add a new claim that the enactment of I-872 violated article II, section 37 of the Washington Constitution. We review for an abuse of discretion both denial of leave to amend, *see In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,* 546 F.3d 981, 990 (9th Cir. 2008), and a district court's decision to decline supplemental jurisdiction, *see Trs. of Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc.,* 333 F.3d 923, 925 (9th Cir. 2003).

"Under Federal Rule of Civil Procedure 15(a), leave to amend shall be freely given when justice so

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[9] Even if the extrinsic evidence does not show that this was the parties' shared understanding, it at least shows that the state was on notice of the meaning attached to the agreement by the plaintiffs. *See* Restatement (Second) of Contracts § 201(2) (1981) ("Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party.").

requires," but a "district court may exercise its discretion to deny leave to amend due to 'undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . , [or] futility of amendment.'" *Carvalho v. Equifax Info. Servs., LLC,* 629 F.3d 876, 892 (9th Cir. 2010) (*quoting Foman v. Davis,* 371 U.S. 178, 182 (1962)).

Here, the district court reasonably concluded that the plaintiffs had failed to provide "any reasonable justification for not bringing this claim in [their] initial Complaint[s]." Furthermore, the court concluded that "even if the parties had a reasonable justification for failing to raise this claim at the outset, the Court would decline to exercise supplemental jurisdiction" because the "applicability of article II, section 37 to I-872's enactment undoubtedly raises novel and complex issues of state constitutional law best decided by the state courts." *See* 28 U.S.C. § 1367(c)(1) (providing that a district court may decline to exercise supplemental jurisdiction when "the claim raises a novel or complex issue of State law"). There was no abuse of discretion.

F. Compelled Speech

The plaintiffs challenge a provision of Washington law providing that "[f]or partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party

or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising." Wash. Rev. Code § 42.17A.320(1).[10] The plaintiffs contend this provision requires them to engage in compelled speech, in violation of the First Amendment. Specifically, they complain that they are impermissibly required to repeat a candidate's self-professed party preference in the party's own political advertising, even if the party disagrees with the candidate's self-described party preference.

We decline to reach this issue because it does not appear that the plaintiffs sought the invalidation of § 42.17A.320(1) in their initial or amended complaints. Although the plaintiffs' pleadings sought the invalidation of numerous sections of the Washington election code, § 42.17A.320(1) was not among them. Accordingly, we deem this issue waived.

G. Severability

The plaintiffs argue that I-872 is not severable, and that its entire implementation should be enjoined as a result of the district court order declaring the

[10] Formerly codified as Washington Revised Code § 42.17.510(1).

election of precinct committee officers (PCOs) unconstitutional. We disagree.[11]

Under Washington law, "[o]rdinarily, only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact." *In re Parentage of C.A.M.A.,* 109 P.3d 405, 413 (Wash. 2005) (quoting *Guard v. Jackson,* 921 P.2d 544, 548 (Wash. Ct. App. 1996)) (internal quotation marks omitted). "An unconstitutional provision may not be severed, however, if its connection to the remaining, constitutionally sound provision is so strong that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *Id.* (quoting *Guard,* 921 P.2d at 548) (internal quotation marks omitted).

Here, the plaintiffs' argument that voters would not have approved I-872's top two primary for partisan offices if they could not also vote for PCOs defies common sense. As the state's brief says, "[i]t strains credulity to suggest that Washington's voters would choose to discard the entire Top Two primary if it did

[11] "[S]everability is a question of state law that we review de novo." *Ariz. Libertarian Party, Inc. v. Bayless,* 351 F.3d 1277, 1283 (9th Cir. 2003) (per curiam).

not include PCO elections." The plaintiffs' severability argument is without merit.[12]

III. Conclusion

We reverse the order granting the state's request for reimbursement of attorney's fees. In all other respects, we affirm the district court. Each party shall bear its own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART.

[12] We need not reach the state's two alternative reasons for rejecting the plaintiffs' severability argument – that the plaintiffs abandoned this theory on summary judgment and that Washington's laws governing PCO elections are not part of I-872 and, therefore, no question arises as to whether I-872 can be severed from them.

2011 WL 92032

United States District Court, W.D. Washington, at Seattle.

WASHINGTON STATE REPUBLICAN PARTY, Bertabelle Hubka, Steve Neighbors, Marcy Collins, Michael Young, Diane Tebelius, Mike Gaston, Plaintiffs,
and
Washington State Democratic Central Committee, Paul Berendt, Plaintiff-Intervenors,
and
Libertarian Party of Washington State, Ruth Bennett, J.S. Mills, Plaintiff-Intervenors,
v.
WASHINGTON STATE GRANGE, Defendant-Intervenor,
and
State of Washington, Rob McKenna, Sam Reed, Defendant-Intervenors.

No. C05-0927-JCC. | Jan. 11, 2011.

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Opinion

ORDER

JOHN C. COUGHENOUR, District Judge.

This matter comes before the Court on Defendant-Intervenor State of Washington's ("Washington") motion for summary judgment (Dkt. No. 239), Plaintiff-Intervenor Washington State Democratic Central Committee's ("Democratic Party") motion for partial summary judgment (Dkt. No. 247), Defendant-Intervenor Washington State Grange's ("Grange") motion for summary judgment (Dkt. No. 249), Plaintiff Washington State Republican Party's ("Republican Party") motion for partial summary judgment (Dkt. No. 250), Washington's motion to strike certain witnesses (Dkt. No. 287), and the parties' multiple responses and replies, including those of Plaintiff-Intervenor Libertarian Party of Washington State ("Libertarian Party"). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and grants in part and denies in part Washington's and the Grange's motions for summary judgment (Dkt. Nos. 239, 249). The Court likewise grants in part and

denies in part the Democratic and Republican Parties' motions for partial summary judgment (Dkt. Nos. 247, 250). The Court concludes that I-872 as implemented in partisan elections is constitutional because the ballot and accompanying information eliminate the possibility of widespread confusion among the reasonable, well-informed electorate. The Court further concludes that Washington's method of electing political-party precinct committee officers is unconstitutional because it allows non-party members to vote for officers of the political parties. The Court strikes the trial date and denies as moot the pending motion to strike certain witnesses.

I. BACKGROUND

From 1935 until 2003, candidates for state and local office in Washington State were nominated through a "blanket primary," whereby all candidates from all parties were placed on a single ballot and voters could select a candidate from any party. *See Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 445 (2008). The candidate who won the plurality of votes within each major party became that party's nominee in the general election. *Id.* The Ninth Circuit Court of Appeals, relying on the Supreme Court's landmark decision in *California Democratic Party v. Jones,* 530 U.S. 567 (2000), struck down Washington's blanket-primary system because that system violated the political parties' First Amendment right of free association by mandating

that those parties allow nonmembers to participate in selecting their nominees. *Democratic Party of Wash. State v. Reed,* 343 F.3d 1198, 1207 (9th Cir. 2003).

In 2004, Washington voters approved Initiative 872 ("I-872"), which established a new primary system. *Wash. State Grange,* 552 U.S. at 446-47. Under this system, all elections for "partisan office" start with a primary in which every candidate filing a "declaration of candidacy" competes. *Id.* at 447. Each candidate declares his or her "party preference or independent status," which is designated on the primary ballot with the candidate's name. *See id.;* Wash. Rev. Code § 29A.24.031(3). A candidate may state a party preference for any party he or she desires, even if that political party would itself prefer otherwise. *See Wash. State Grange,* 552 U.S. at 447. Voters may select any candidate listed on the ballot, regardless of party preference, and the two candidates that receive the highest votes, also regardless of party preference, advance to the general election. *Id.* at 447-48; Wash. Rev. Code § 29A.52.112(2). In this manner, the general election becomes a runoff between the top-two vote getters in the primary.

On May 19, 2005, the Republican Party filed this action to have I-872 declared unconstitutional and to enjoin its implementation. (Dkt. No. 1.) That same day, the Democratic Party and Libertarian Party moved to intervene as plaintiffs. (Dkt. Nos. 2, 3.) The Republican Party alleged that the new election scheme (1) compels it to associate with any candidate

who expressed a "preference" for the party, thereby diluting the party's message; (2) allows candidates to "appropriate" the party's name without permission; (3) allows party nominees to be determined by voters whose beliefs were antithetical to those of the party, in violation of *Jones,* 530 U.S. at 586; and (4) impermissibly denies major parties protections that it offers to minor parties, in violation of the Equal Protection Clause.[1] (Dkt. No. 1 at 5-7.) The Democratic Party made identical claims. (*See* Dkt. No. 31.) The Libertarian Party made similar First Amendment claims; additionally, it alleged that I-872 arbitrarily deprived minor parties access to the general election ballot.[2] (*See* Dkt. No. 28.)

The Court set an expedited briefing schedule and required that the parties stipulate to the legal issues that would be covered in the motions. (*See* Dkt. Nos.

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[1] Prior to the enactment of I-872, minor-party candidates, unlike major-party candidates, were selected through party nominating conventions. (*See* Dkt. No. 87 at 5.) The Republican Party premised its equal-protection argument on its understanding that these provisions survived the enactment of I-872.

[2] Whereas the Republican and Democratic Party's equal-protection arguments were premised on the assumption that minor parties could still nominate their candidates through nomination conventions, the Libertarian Party's ballot-access argument was based on the reverse assumption – that I-872 did not distinguish between major and minor parties, so the only way for a candidate to advance to the general election was to be in the two highest vote getters. (*See* Dkt. No. 28.)

40, 45.) On July 15, 2005, the Court[3] granted the political parties' motions for summary judgment. (Dkt. No. 87.) The Court held that I-872 still served to "nominate" party candidates, despite Washington's characterization of I-872 as a "winnowing" or a "qualifying" primary. (*Id.* at 25-26.) On the basis of that holding, the Court concluded that I-872 was unconstitutional on two grounds: First, like the blanket primary invalidated in *Jones,* the I-872 primary "force[d] political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival," in violation of the freedom of association. (*Id.* at 28.) Second, the Court held that by "allowing *any* candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation," I-872 would "foster confusion and dilute the party's ability to rally support behind its candidates." (*Id.* at 30.) The Court concluded that the unconstitutional provisions of I-872 could not be severed from the remaining provisions and therefore struck down the initiative in its entirety. (*Id.* at 38-39.)

The Ninth Circuit affirmed. *Wash. State Republican Party v. Washington,* 460 F.3d 1108, 1125 (9th Cir. 2006). The Ninth Circuit held that a candidate's

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[3] Judge Thomas S. Zilly presided over the initial stages of this litigation.

self-identification of party preference necessarily created an association between the candidate and the party. *Id.* at 1119-20. By allowing candidates to create such an association against the party's will, I-872 constituted "a severe burden on political parties' associational rights" that could not be justified as narrowly tailored to compelling state interests. *Id.* at 1121, 1123. Accordingly, the Ninth Circuit held that I-872 was unconstitutional on its face. *Id.* at 1124.

The Supreme Court, however, granted certiorari and reversed on the merits. *Wash. State Grange,* 552 U.S. at 459. The Supreme Court emphasized that the political parties' challenge, as it had appeared before the lower courts, was to I-872's constitutionality on its face and hence could only succeed if Plaintiffs demonstrated that "the law [was] unconstitutional *in all of its applications." Id.* at 449 (emphasis added); *see also id.* ("[A] plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid. . . ." (quotation marks omitted)). Significantly, the Supreme Court concluded that "the I-872 primary does not, by its terms, choose parties' nominees. . . . Whether parties nominate their own candidates outside the state-run primary is simply irrelevant. In fact, parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations." *Id.* at 453. If a political party chose to nominate a candidate through outside means, that nomination would not be so designated on the ballot,

but "[t]he First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Id.* at 453 n. 7.

The Supreme Court further determined that each of the political parties' arguments relied on an assumption that voters would *misinterpret* a candidate's self-identified party preference as some form of endorsement by or association with the political party. *Id.* at 454. Having concluded that each of the political parties' arguments "rests on factual assumptions about voter confusion," the Supreme Court held that "each fails for the same reason: In the absence of evidence, we cannot assume that Washington's voters will be misled." *Id.* at 457. Holding that any potential confusion "will depend in significant part on the form of the ballot," the Supreme Court explained that I-872 could be implemented in such a way as to make clear that a candidate's party-preference designation does not constitute an endorsement of or association with that political party. *Id.* at 455; *see also id.* at 456 ("[We must] ask whether the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment."); *id.* at 460 (Roberts, C.J., concurring) (emphasizing the importance of the form of the ballot with respect to possible voter confusion). Accordingly, the Supreme Court rejected the political parties' facial challenge to I-872. *Id.* at 457-59.

On remand, the Ninth Circuit vacated its opinion and remanded the case back to this Court with

instructions to (1) "dismiss all facial associational rights claims challenging [I-872]"; (2) "dismiss all equal protection claims," because I-872 repealed the regulations differentiating between major and minor parties; and (3) "dismiss as waived all claims that [I-872] imposes illegal qualifications for federal office, sets illegal timing for federal elections or imposes discriminatory campaign finance rules because these claims were neither pled by the parties nor addressed in summary judgment by the district court." *Wash. State Republican Party v. Washington,* 545 F.3d 1125, 1126 (9th Cir. 2008). In contrast, the panel suggested that this Court "may allow the parties to further develop the record with respect to the claims that [I-872] unconstitutionally constrains access to the ballot." *Id.*

Thereafter, Defendants Washington and the Grange moved to dismiss this action in its entirety (Dkt. Nos. 133, 134), and the Republican and Democratic Parties sought leave to amend their Complaints (Dkt. Nos. 137, 140). They sought to supplement the Complaints with additional factual allegations to support as-applied challenges to the implementation of I-872 that Washington adopted after the Supreme Court's decision. (*See* Dkt. No. 137 at 8; Dkt. No. 140 at 2.) The Court concluded that the political parties had already alleged as-applied challenges to I-872's primary scheme and that those claims remained unresolved. (Dkt. No. 184 at 8.) The Court determined that the political parties could submit evidence to demonstrate that (1) the State's

actual implementation of I-872 (including its interaction with the state's campaign disclosure laws) leads to voter confusion and (2) that this resulting confusion severely burdens the political parties' freedom of association. (*Id.* at 11.) The Court further concluded that Plaintiffs could demonstrate that the application of I-872 to certain elected offices (i.e., party precinct committee officers) specifically burdens the party's right to associate. (*Id.*)

The political parties have amended their complaints, alleging that I-872 is unconstitutional as applied in Washington because it creates voter confusion that unconstitutionally infringes on their First Amendment associational freedoms. The political parties also allege that Washington's implementation of the election for the parties' precinct committee officers in light of I-872 violates their associational rights. Washington, the Grange, and the political parties have at this crucial juncture marshaled their evidence-offering in particular the form of ballot used in Washington-and they ask the Court to finally resolve this long-running saga over the form of political elections in Washington.[4]

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[4] Washington, the Grange, and the political parties all seek summary judgment on all the issues presented. Although the filing of cross-motions for summary judgment does not vitiate the Court's responsibility to determine whether disputed issues of material facts are present, *see Fair Hous. Council of Riverside Cnty. v. Riverside Two,* 249 F.3d 1132, 1136 (9th Cir. 2001), the universal request for summary judgment strongly indicates that this case is ripe for resolution. The political parties do not

(Continued on following page)

II. DISCUSSION

A. Absence of Voter Confusion

As applied, Washington's implementation of I-872 "eliminate[s] the possibility of widespread voter confusion and with it the perceived threat to the First Amendment." *See Wash. State Grange,* 552 U.S. at 456. The Supreme Court held that the political parties' assertion that voters will misinterpret the party-preference designation is "sheer speculation" that depends on the erroneous belief that voters can be misled by party labels. *Id.* at 454. The Supreme Court elaborated that its cases "reflect a greater faith in the ability of individual voters to inform themselves about campaign issues" and that there is "no basis to presume that a *well-informed electorate* will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Id.* (emphasis added).

The Supreme Court was unable to review whether I-872 in operation would confuse the reasonable, well-informed electorate because Washington had not yet developed the ballot and accompanying informational material that voters would receive during the

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dispute the manner in which Washington has implemented I-872; they challenge the constitutionality of that implementation. Moreover, no one has requested a jury trial. The Court concludes that the record is sufficiently developed to resolve this dispute without a bench trial.

election cycle and on Election Day. Now that Washington has deployed I-872, this Court can thoroughly evaluate it. Washington's ballot contains a prominent, unambiguous, explicit statement that a candidate's party preference does not imply a nomination, endorsement, or association with the political party. The ballot repeatedly states that candidates merely "prefer" the designated parties. Ballot inserts and the Voters' Pamphlet further explain the new system. Washington employed a widespread education campaign via various media outlets to inform voters about the new system. And Washington voters themselves, not simply their elected representatives, approved I-872. These factors demonstrate to the Court that Washington's implementation of I-872 eliminates the possibility of widespread confusion among the reasonable, well-informed electorate.

Most persuasive, the ballot Washington uses to implement I-872 is uniformly consistent with the Supreme Court's conception of a constitutional ballot. The Supreme Court emphatically maintained that "whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot." *Id.* at 455; *see also id.* at 460 (Roberts, C.J., concurring) ("What makes this case different . . . is the place where the candidates express their party preferences: on the ballot. And what makes the ballot 'special' is precisely the effect it has on voter impressions. . . . If the ballot is designed in such a manner that no reasonable voter would believe that the candidates listed there are

nominees or members of, or otherwise associated with, the parties the candidates claimed to 'prefer,' the I-872 primary system would likely pass constitutional muster." (citations omitted)). When considering "whether the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion," the Supreme Court concluded that such a ballot "is not difficult to conceive." *Id.* at 456.

The Supreme Court explained that a constitutional ballot "could include prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party." *Id.* at 456. The Washington ballot does precisely that. Each ballot contains the following prominent and clear explanation:

> 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.

(Dkt. No. 242 at 4.) The Washington Secretary of State requires that that [sic] this language appear on primary- and general-election ballots. Wash. Admin. Code § 434-230-015(4)(a). This clear explanation included on the ballot may alone be sufficient to withstand the political parties' constitutional concerns about the possibility of confusion among the well-informed electorate.

But Washington does more. The Supreme Court stated that Washington could provide "explanatory materials mailed to voters along with their ballots." *Id.* at 456. Washington so complies. Voters' Pamphlets 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." Wash. Admin. Code § 434-381-200. A statement nearly identical to the ballot disclaimer also appears along with each mailed ballot for the primary and general election.[5] *Id.* § 434-250-040(1)(j)-(k) ("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."). In addition to including the same information in the Voters' Pamphlet mailed to every voter in the state, many Voters'

[5] Notably, approximately 90 percent of the Washington electorate votes via mail. *Wash. State Grange,* 552 U.S. at 456 n. 8.

Pamphlets provide further explanation of how the new system operates. (Dkt. No. 245 at 9 ("Our new Top 2 Primary on August 19 will give you maximum choice, allowing you the independence and freedom to 'vote for the person, not the party.' . . . Our new voter-approved primary no longer nominates a finalist from each major party, but rather sends the two most popular candidates forward for each office. It's a winnowing election to narrow the field. Your candidates have listed the party they prefer, but that doesn't mean the party endorses or affiliates with them.").) The cover of the 2008 Voters' Pamphlet also included an explanation of the top-two system and of the candidates' statements of personal party preference. (*Id.* at 8.)

The Supreme Court also held that "the State could decide to educate the public about the new primary ballots through advertising." *Wash. State Grange,* 552 U.S. at 456. Washington again complies. Washington conducted an extensive voter education campaign designed to explain the new election system to voters. The 2008 education campaign included, among other things, a detailed Web site and a series of public-service announcements run on television and radio stations during the primary- and general-election seasons. (Dkt. No. 246 at 8-22.) Transcripts from these advertisements reinforced the point: "A candidate's party preference doesn't mean the party endorses or approves of that candidate." (*Id.* at 20.)

Finally, the Supreme Court explained that ballots "might note preference in the form of a candidate

statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate." *Wash. State Grange,* 552 U.S. at 456. Although the ballot does not include a separate statement such as "I, John Doe, prefer the Democratic Party," the ballot explicitly states under each candidate name that the candidate "prefers" a particular party (e.g., "(Prefers Republican Party)"). (Dkt. No. 242 at 4.) The statement does not say that the political party approves of the candidate or even that the party endorses the candidate; it states only a personal preference.[6] Nor does the statement include a simple abbreviation like "D" or "R" coupled with the absence of a statement of preference. It is obvious from the ballot format that the party-preference statement is merely that – a preference – that does not imply one way or another whether the political parties endorse, approve, or affiliate with that candidate. The Supreme Court held that it was "satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion." *Wash. State Grange,* 552 U.S. at 456. Washington has implemented I-872 uniformly consistent with several of the "ways" the Supreme Court envisioned would be consistent with

[6] Tellingly, in the party precinct-committee-officer races where voters select a political party's representative, listed below the candidate's name is a clear statement of party affiliation, and it omits the passive parentheses (e.g., "Republican Party Candidate"). (Dkt. No. 243 at 4).

the Constitution, and this Court therefore concludes that I-872 complies with the Constitution.

The standard by which the Court must evaluate the possibility of widespread confusion is from the perspective of a reasonable, well-informed electorate. *See Wash. State Grange,* 552 U.S. at 456. Yet the political parties offer evidence of what they contend shows actual voter confusion that is both irrelevant and unpersuasive. For example, the parties offer evidence of newspaper articles and other materials showing that some voters and news media speak loosely about the relationship between political parties, the candidates, and the election process. (*See* Dkt. No. 257 at 6-8; Dkt. No. 260 at 3-6; Dkt. No. 272 at 9.) That is, some speakers, perhaps using shorthand, indicate that a candidate who lists a particular party preference on the ballot is in fact that party's nominee. Washington cannot control what the newspapers print, lest it run afoul of yet another provision of the First Amendment, freedom of the press. Nor can Washington be held responsible for the words used by private parties that might foster some negligible confusion. And to the extent that state officials have occasionally used similarly loose language, those isolated incidents do not show the type of widespread voter confusion the Supreme Court contemplated in its review.

The political parties additionally argue that not all voters read the ballot instructions or the instructional material included with the ballot. That may be true, but a voter who ignores or refuses to read basic

ballot instructions is no longer a reasonable voter, and surely not a well informed one. The Court cannot and will not consider the constitutionality of I-872 from the viewpoint of such an unreasonable, uninformed voter.

The Court also declines the political parties' invitation to review the possibility for voter confusion under traditional trademark analysis. (*See* Dkt. No. 257 at 18-20.) Quite simply, trademark law does not lie in the First Amendment associational rights implicated in this matter. Trademark law is designed to protect the proprietary rights of private parties from improper commercial uses. This case does not involve the propriety rights of the political parties or Washington's commercial use of any trademark.[7] The comparison is inapposite.

The political parties also argue that I-872 has harmed them because some of their official nominees have not advanced past the primary election to the general election. (Dkt. No. 257 at 11-14.) The Democratic Party complains, for example, that in one particular race its official nominee lost the primary election because "the Democratic Party was forced by the State's implementation of the Top Two [system] to have three other 'Democratic candidates' on the

[7] Although it does not wholly resolve the matter, the Court previously concluded that, as presented, "the State's expression of candidates' party preference on the ballot and in the voter pamphlets may not form the basis of a federal or state trademark violation." (Dkt. No. 184 at 17.)

[primary] ballot" alongside the Democratic Party's chosen nominee. (Dkt. No. 257 at 13.) The argument misses the point: "Whether parties nominate their own candidates outside the state-run primary is simply irrelevant. In fact, parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations." *Wash. State Grange,* 552 U.S. at 453. The primary ballot did not include "three other Democratic candidates." It included four candidates who stated a preference for the Democratic Party, one of whom the Democratic Party officially endorsed. "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot," *id.* at 453 n. 7, and the political parties are not entitled as a matter of law to have their nominated candidates appear on the general-election ballot. I-872 did not prevent the Democratic Party's nominee from advancing to the general election; the voters did. The political parties may not admire Washington's new election system in which their designated candidates do not always advance to the general election, but that disappointment does not raise constitutional concerns.

The political parties also offer as evidence a study purporting to show that voters presented with the new ballots were confused about candidates' political-party association, or lack thereof. (Dkt. No. 265-1 at 10-48.) It is not entirely clear whether the Court should consider such a study – particularly given the study's limited parameters that did not

include all of the educational information provided to voters – when the Court is presented with a legal question of whether the implementation of I-872 would create the possibility for widespread confusion among a reasonable, well-informed electorate. *See Wash. State Grange,* 552 U.S. at 461-62 (Roberts, C.J., concurring) ("Nothing in my analysis requires the parties to produce studies regarding voter perceptions on this score, but I would wait to see what the ballot says before deciding whether it is unconstitutional."). For example, the federal courts consider in their Establishment Clause jurisprudence whether a reasonable observer – mindful of the history, purpose, and context of a government monument or practice – would perceive a government endorsement of religion without resort to social or cognitive experiments. *See, e.g., Van Orden v. Perry,* 545 U.S. 677 (2005); *Barnes-Wallace v. City of San Diego,* 607 F.3d 1167, 1175 (9th Cir. 2010) ("The United States Supreme Court adopts the perspective of a reasonable observer when determining Establishment Clause questions."). The Court sees no reason why a different approach should apply here.

It seems particularly unwise to resort to these experiments in this context because a battle of experts would likely emerge revealing no clear answer from competing social experiments. Furthermore, the political parties have not shown how widespread voter confusion among a reasonable, well-informed electorate may be systematically and reliably measured or what its measured results may require. For

example, what is the constitutional result if studies show that voters in one particular county fully understand the top-two system while voters in another county do not? What is the constitutional result if government officials in a county that purportedly does not understand the electoral system embark on an aggressive educational campaign immediately thereafter? Must the county then affirmatively show the federal courts through a subsequent study that its citizens are wise enough to join their neighbors who use the top-two system? How would varying county standards apply to statewide offices? These questions remain unanswered. Social science experiments and studies are exceptional tools for improved understanding of society, and the Court does not intend to diminish their general value. But their applicability to the nuances of constitutional review in a case such as this do not, as of yet, appear particularly practical.[8]

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[8] The Court need not rely on Washington's expert to conclude that the presence of general confusion about matters of politics and elections is common. (*See* Dkt. No. 279 at 8.) If any political party – or voter for that matter-must only show the presence of some confusion in order to successfully challenge the constitutionality of an electoral system, then any method of conducting partisan elections would be vulnerable to constitutional attack. *See Storer v. Brown,* 415 U.S. 724, 730 (1974) ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."). In a state whose population is fast approaching seven million residents, the political parties are bound to find voters who are confused

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In any event, the political parties have not shown under the offered study that Washington's implementation of I-872 has created the possibility of widespread voter confusion among a reasonable, well-informed electorate. The study is neither limited to Washington voters nor inclusive of the entire state's electorate. The "new voters" the study evaluated were students at one university, which likely included residents from outside Washington. (*See* Dkt. No. 265 at 3.) The study does not establish what percentage of participants tested are likely to vote in an election. The study drew its "active voters" from emails provided by the Republican and Democratic Parties. (*Id.*) And the Court is unaware if representatives from all Washington counties participated.

Nowhere does the study evaluate whether the selected individuals represent the reasonable, well-informed voter from Washington. To the point, the study did not provide its participants with the explanatory materials mailed to voters along with their ballots, and the study makes no reference to whether its participants were exposed to Washington's

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about the electoral process. But the political parties have not shown that Washington's implementation of I-872, as opposed to a basic misunderstanding of the electoral system, creates any widespread confusion. And with each passing election, the number of uninformed voters should gradually decline. Moreover, it is unreasonable to conclude that Washington citizens may never change their electoral system simply because some voters have grown accustomed to and understand the current system.

education campaign conducted through various media outlets. Moreover, the study participants did not receive a ballot consistent with the one Washington actually uses. Washington administrative code requires that the important disclaimer regarding the lack of party association appear "immediately *above* the first partisan congressional, state or county office." Wash. Admin. Code § 434-230-015(4)(a) (emphasis added). Yet the ballots used in the study placed the notice on the bottom-left corner, *below* the first partisan race. (Dkt. No. 265-1 at 32-33.) Moreover, Washington law requires that the notice say, "READ." Wash. Admin. Code § 434-230-015(4)(a). But the notice in the study said, "VOTERS-PLEASE READ," which participants may have interpreted as a passive request rather than a mandatory instruction. The Court does not know how those changes may have affected the study's results, and the Court is unconvinced that the study accurately reflects the well-informed electorate – an electorate in whom the Supreme Court has noticeable confidence.[9] *See Wash. State Grange,* 552 U.S. at 455 ("Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.").

Finally, the Court rejects the contention that Washington's financial disclosure laws create the

[9] The Court applies the same principles to the political parties' reliance on the "Elway Research," which did not present to its participants the ballot Washington implemented. (*See* Dkt. No. 260 at 6.)

possibility for widespread confusion among the reasonable, well-informed electorate. Washington law requires that "[f]or partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising." Wash. Rev. Code § 42.17.510(1). As the Public Disclosure Commission details, the law requires that a candidate disclose his or her stated party *preference*: "All forms of advertising must clearly state a candidate's party preference if the candidate is seeking partisan office."[10] *See* Public Disclosure Commission's 2008 "Political Advertising" Brochure, http://www.pdc.wa.gov/archive/guide/brochures/pdf/2008/2008.Bro.Adv.pdf. Under the Court's freedom-of-association analysis, these disclosure requirements, which speak of a candidate's party "preference," do not create the type of voter confusion that would result in an

[10] The political parties contend that the Public Disclosure Commission confuses voters by occasionally referring to political "affiliation." (*See* Dkt. No. 260 at 16.) But the Commission's rules make clear that any reference to "affiliation" means merely the candidate's stated party preference. Wash. Admin. Code § 390-05-274 (" 'Party affiliation' as that term is used in chapter 42.17 RCW and Title 390 WAC means the candidate's party preference as expressed on his or her declaration of candidacy. A candidate's preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate. . . . A reference to 'political party affiliation,' 'political party,' or 'party' on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate's self-identified party preference.").

unconstitutional burden on the political parties' First Amendment rights.[11]

Accordingly, the Court concludes that Washington's implementation of I-872 does not create the possibility of widespread confusion among the reasonable, well-informed electorate. Therefore, Washington does not need to assert a compelling governmental interest in pursuing I-872. Its previously asserted interest "in providing voters with relevant information about the candidates on the ballot is easily sufficient to sustain I-872." *Wash. State Grange,* 552 U.S. at 458; *see also Anderson v. Celebrezze,* 460 U.S. 780, 796 (1983) ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election.").

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[11] The Court also rejects the Republican Party's one-paragraph contention that Washington's campaign-finance laws unconstitutionally interfere with its ability to communicate with its members. (*See* Dkt. No. 260 at 19-20.) The Republican Party alleges that because political parties nominate candidates outside the state's primary system, Washington's campaign-finance laws no longer serve a compelling governmental interest. (*See id.*) But the elimination of the state-funded nomination process neither eliminated the pervasiveness of money in politics nor the government's paramount interest in curtailing corruption or the appearance of corruption of elected officials. Moreover, the Republican Party does not sufficiently respond to Washington's assertion that this legal issue currently stands before the state court. *See State ex rel. Wash. State Public Disclosure Comm'n v. Wash. State Republican Party,* King County Superior Court No. 08-2-34030-9.

B. Associational Burdens in Electing Precinct Committee Officers

Although Washington's implementation of I-872 is constitutional with respect to partisan elected offices, Washington's current process for electing the major political parties' Precinct Committee Officers ("PCO") does not pass constitutional muster.[12]

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[12] Washington and the Grange contend that the Court should refrain from reaching the PCO-election issue because "Washington's law governing PCO elections is not part of I-872." (*See* Dkt. No. 239 at 20.) To the contrary, sufficient evidence demonstrates that Washington's implementation of I-872 affected PCO elections. *See* 08-15 Wash. Reg. 52 (July 11, 2008) ("These rules implement Initiative 872 (top two primary) for partisan public office, and implement the elections for precinct committee officers and president and vice-president in the context of Initiative 872."); (Dkt. No. 269-4 at 19 (Rule-Making Order explaining, "This change in primary election systems necessitates changes in the administrative rules relating to the format of ballots, and administration of political party precinct committee officer elections.").) Moreover, Washington and the Grange concede that because the new system no longer serves to determine the nominees of a political party, Washington necessarily eliminated the 10 percent threshold for election of precinct committee officers. (Dkt. No. 255 at 3); *see also* Wash. Rev. Code § 29A.80.051 ("[T]o be declared elected, a[PCO] candidate must receive at least ten percent of the number of votes cast for the candidate of the candidate's party receiving the greatest number of votes in the precinct."). I-872 undoubtedly had an impact on PCO elections. Additionally, requiring that the political parties file yet another complaint to reach the merits of this issue would serve no useful purpose, as Washington and the Grange have had ample notice of the allegation and opportunity to respond. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.,* 460 F.3d 1217, 1228, 1248 (9th Cir. 2006) ("We have often said that

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All Washington voters receive the same primary ballot regardless of the presence or absence of a voter's party affiliation, because "the primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." *See Wash. State Grange,* 552 U.S. at 453 (quotation marks omitted). Nonetheless, PCOs are elected on the same ballot used in the top-two primary. The parties agree that PCOs are officers of the major political parties, forming the grassroots level of political-party organization. Although PCOs may perform limited public functions, they are not public officials: "Precinct Committee officers organize their local precinct for their party. . . ." (Dkt. No. 250 at 3.). Unlike candidates in the partisan primary who have the option of listing a party *preference,* candidates seeking election as party PCOs must be members of the political party. *See* Wash. Rev. Code § 29A.80.041. Importantly, voters in the partisan "party preference" races are selecting individuals to serve as members of a government office; voters in the PCO races, on the other hand, are selecting individuals to serve as members of the political parties. This distinction is critical.

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the public policy favoring disposition of cases on their merits strongly counsels against dismissal. . . . It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.").

In *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 230-31 (1989), the Supreme Court held that California's restrictions on how parties should be organized and how they select their leaders unconstitutionally burdened political parties' freedom of association. The Supreme Court recognized the strength of a party's interest in selecting its own leaders and noted the important role party leaders play in shaping the party's message. *Id.* at 230, 231 n. 21. Applying *Eu* to Arizona's PCO-election scheme, the Ninth Circuit held that "allowing nonmembers to vote for party precinct committeemen violates the Libertarian Party's associational rights. Precinct committeemen are important party leaders who[, like Washington PCOs,] choose replacement candidates for candidates who die or resign before an election." *Ariz. Libertarian Party, Inc. v. Bayless,* 351 F.3d 1277, 1281 (9th Cir. 2003). Here, the political parties contend that because all Washington voters receive the same primary ballot, which includes PCO elections, Washington similarly allows nonmembers to vote for party PCOs.

Without more, it seems that *Bayless* plainly holds that Washington's system for electing PCOs is unconstitutional. But it is not so simple. In *Bayless,* Arizona conducted a "semiclosed primary system" in which "voters who are unaffiliated, registered as independents, or registered as members of parties that are not on the primary ballot may vote in the party primary of their choice." *Id.* at 1280. Because Arizona law

authorized independent voters and voters registered as affiliating with other political parties to vote for political-party PCOs, Arizona's system was unconstitutional. In Washington, however, PCO candidates appear in a separate location from the partisan "party preference" candidates. More importantly, Washington requires that the ballots state the following: "Precinct committee officer is a position in each major political party. For this office only: *If you consider yourself a democrat or republican, you may vote for a candidate of that party.*"[13] Wash. Admin. Code § 434-230-100(5)(c) (emphasis added). Accordingly, Washington and the Grange argue that because voters must consider themselves members of either party, Washington law, unlike Arizona law, does not authorize unaffiliated voters or members of third parties to participate in the election of a party's PCO; only voters who have affiliated with or are members of a particular party may vote in the PCO election of that party, and only that party.[14]

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[13] Although the administrative code uses lowercase typeface, the ballots use uppercase typeface for "Democrat" and "Republican." (*See* Dkt. Nos. 242 at 5, 243 at 4, 7.)

[14] In essence, with respect to the PCO elections, Washington has created a blend between an "open primary" and a "closed primary." In an open primary, "the voter can choose the ballot of either party but then is limited to the candidates on that party's ballot." *See Democratic Party of Wash. v. Reed,* 343 F.3d 1198, 1203 (9th Cir. 2003). Many states operate open primaries, but the Supreme Court has not ruled on whether open primaries comply with the Constitution. *See Jones,* 530 U.S. at 577 n. 8 ("This case does not require us to determine the constitutionality

(Continued on following page)

The Court agrees with the political parties that the personal "consideration" of party association is insufficient to withstand constitutional scrutiny. In *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 212 (1986), the Republican Party of Connecticut, recognizing the demographic importance of independent voters, adopted an organizational rule that permitted independent (or unregistered) voters to participate in Republican Party primaries. Yet Connecticut enforced a law that required voters in a political primary to register as members of a particular party. *Id.* at 210-11. The Supreme Court held that Connecticut's law violated the Republican Party's right to freely associate in part because "the freedom to join together in furtherance of common political beliefs necessarily presupposes the freedom to identify the people who constitute the association." *Id.* at 214 (quotation marks omitted).

Here, Washington's PCO election similarly infringes on the political parties' freedom to identify the

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of open primaries."). In a closed primary, "only voters who register as members of a party may vote in primaries to select that party's candidates." *See Reed,* 343 F.3d at 1203; *see also Jones,* 530 U.S. at 577 ("Under [a closed-primary] system, even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'cross over,' at least he must formally *become a member of the party;* and once he does so, he is limited to voting for candidates of that party."). Here, of course, the voter must "consider" him or herself a Republican or a Democrat before so voting.

people who constitute their associations. *See Boy Scouts of Am. v. Dale,* 530 U.S. 640, 648 (2000) ("[F]reedom of association plainly presupposes a freedom not to associate." (quoting *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984))). The Republican and Democratic parties are not satisfied that the voters' in-the-moment self-consideration of party association is sufficient to identify its true party members.[15] The system allows the electorate to participate in the selection of the political parties' officers even though the parties may not prefer to associate with voters who consider themselves members in a fleeting moment in a voting booth. At worst, a voter who has for years expressly affiliated with a rival party may attempt to sabotage the other parties' election by silently declaring for a fraction of a minute cross-party affiliation. The system allows non-party members to vote for officers of the political parties, and the First Amendment does not permit Washington to impose that type of membership when the parties have not so consented.

The political parties have suggested several alternative methods that would satisfy them that

[15] It is merely a distinction without meaning that in *Tashjian* Connecticut attempted to limit the political parties' voter membership whereas Washington's system arguably expands party membership. The central holding is that the political parties, not the government, are free to define the scope of their membership.

particular voters are indeed members of their respective parties. For example, the political parties have suggested that it would identify as members of its party voters who take a party oath.[16] (Dkt. No. 250 at 7-8.) The current system does not facilitate an oath. (*See* Dkt. No. 245 at 12 (Information Washington provides its voters explains eligibility in PCO elections: "You do not have to formally join the Democratic or Republican Party, you do not have to sign a party oath, and voting in this election will not put your name on any party lists.").) The political parties note that they would be satisfied of party membership if voters accepted a separate ballot with only a specific party's candidates. (Dkt. No. 250 at 6.) The current system does not facilitate separate ballots for PCO elections. The political parties further suggest that they might be satisfied of party membership if a voter checked a box indicating affiliation with the particular party. (*Id.* at 9.) Again, the current system does not facilitate a check box. Regardless of what would satisfy the Republican and Democratic Parties, those parties have made it abundantly clear that they do not accept as members of their respective parties voters who must ask, at the prompting of the ballot, only whether they "consider" themselves party members. *See Democratic Party of Wash.,* 343 F.3d at 1204 ("The Washington scheme denies party adherents the

[16] The Democratic Party agrees with the Republican Party's positions, having joined the Republican Party's motion for partial summary judgment. (Dkt. No. 247 at 1.)

opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party. . . . Even a single election in which the party nominee is selected by nonparty members could be enough to destroy the party." (quotation marks omitted)); *see also Jones,* 530 U.S. at 574 ("Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." (punctuation omitted)). The system does not allow the political parties to identify their members in a manner they so choose, and it therefore severely burdens the political parties' associational rights.

Because Washington's PCO elections severely burden the political parties' associational rights, the Court may uphold the form of those elections only if Washington shows that its election method is narrowly tailored to serve a compelling governmental interest. *See Wash. State Grange,* 552 U.S. at 446. Washington has not provided any such justification that would survive this high standard. *See id.* Accordingly, the Court grants in part the political parties' partial motions for summary judgment.

Finally, the Court rejects the political parties' request that the Court enter an injunction ordering that Washington implement its PCO elections in a particular manner. *See generally Stanley v. Univ. of S. Cal.,* 13 F.3d 1313, 1320 (9th Cir. 1994) ("A mandatory injunction goes well beyond simply maintaining

the status quo *pendente lite* and is particularly disfavored. When a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." (punctuation and citations omitted)). As noted earlier, the political parties offer multiple approaches that would satisfy them that only party members select their PCOs. Washington may also decide to implement PCO elections in a manner not yet conceived but ultimately satisfactory to the political parties. Washington may even implement PCO elections in a way that severely burdens the political parties' associational rights but does so in a manner narrowly tailored to serve a compelling governmental interest. Or Washington may decide to stop conducting public elections of PCOs. Given the wide range of options, the Court declines to order an injunction imposing a particular form of election.

III. CONCLUSION

Put simply, Washington's implementation of I-872 with respect to partisan offices is constitutional because the ballot and accompanying information concisely and clearly explain that a candidate's political-party 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. These instructions – along with voters' ability to understand campaign issues and the fact that the voters themselves approved the new election system through the initiative process – eliminate the possibility of

widespread voter confusion and with it the threat to the First Amendment. The reasonable, well-informed electorate understands that the primary does not determine the nominees of the political parties but instead serves to winnow the number of candidates to a final list of two for the general election.

On the other hand, Washington's method of electing precinct committee officers is unconstitutional because it severely burdens the political parties' ability to identify and associate with members of their respective parties. Precinct committee officers are grassroots representatives of the political parties, yet all voters, regardless of party affiliation, receive the same candidate ballot and have an opportunity to elect those officers. The political parties have a right to object to Washington's method of determining party affiliation for these officers, and Washington has not shown that its interests in using this system outweigh the First Amendment's special associational protections.

Accordingly, the Court GRANTS IN PART and DENIES IN PART Washington's and the Grange's motions for summary judgment (Dkt. Nos. 239, 249). The Court likewise GRANTS IN PART and DENIES IN PART the Democratic and Republican Parties' motions for partial summary judgment (Dkt. Nos. 247, 250). The Court STRIKES the trial date. The Court DENIES AS MOOT Washington's motion to strike certain witnesses (Dkt. No. 287).

Revised Code of Washington
(Wash. Rev. Code or RCW)
Selected Provisions

RCW 29A.04.311
Primaries. (*Effective until January 1, 2012*.)

Nominating primaries for general elections to be held in November, and the election of precinct committee officers, must be held on the third Tuesday of the preceding August.

RCW 29A.04.311
Primaries. (*Effective January 1, 2012*.)

Primaries for general elections to be held in November, and the election of precinct committee officers, must be held on the first Tuesday of the preceding August.

RCW 29A.20.121
Nomination by convention or write-in – Dates – Special filing period.

(1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the first Saturday in May and not later than the second Saturday in May or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with RCW 29A.28.041; (b) as provided by RCW 29A.60.021; or (c) as otherwise provided in this section. Minor

political party and independent candidates may appear only on the general election ballot.

(2) Nominations of candidates for president and vice president of the United States other than by a major political party may be made either at a convention conducted under subsection (1) of this section, or at a similar convention taking place not earlier than the first Saturday in June and not later than the fourth Saturday in July. Conventions held during this time period may not nominate candidates for any public office other than president and vice president of the United States, except as provided in subsection (3) of this section.

(3) If a special filing period for a partisan office is opened under RCW 29A.24.211, candidates of minor political parties and independent candidates may file for office during that special filing period. The names of those candidates may not appear on the general election ballot unless they are nominated by convention held no later than five days after the close of the special filing period and a certificate of nomination is filed with the filing officer no later than three days after the convention. The requirements of RCW 29A.20.131 do not apply to such a convention.

(4) A minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position. For the purpose of nominating candidates for the offices of president and vice president, United States senator, United States

representative, or a statewide office, a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention obtained in support of the candidate or candidates in order to obtain the number required by RCW 29A.20.141. For all other offices for which nominations are made, signatures of the requisite number of registered voters must be obtained at a single convention.

RCW 29A.24.030
Declaration of candidacy.

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

RCW 29A.20.151
Nominating petition – Requirements.

A nominating petition submitted under this chapter shall clearly identify the name of the minor party or independent candidate convention as it appears on the certificate of nomination as required by RCW 29A.20.161(3). The petition shall also contain a statement that the person signing the petition is a registered voter of the state of Washington and shall have a space for the voter to sign his or her name and to print his or her name and address. No person may sign more than one nominating petition under this chapter for an office for an election.

RCW 29A.20.171
Multiple certificates of nomination.

(1) If two or more valid certificates of nomination are filed purporting to nominate different candidates for the same position using the same party name, the filing officer must give effect to both certificates. If conflicting claims to the party name are not resolved either by mutual agreement or by a judicial determination of the right to the name, the candidates must be treated as independent candidates. Disputes over the right to the name must not be permitted to delay the printing of either ballots or a voters' pamphlet. Other candidates nominated by the same conventions may continue to use the partisan affiliation unless a court of competent jurisdiction directs otherwise.

(2) A person affected may petition the superior court of the county in which the filing officer is located for a judicial determination of the right to the name of a minor political party, either before or after documents are filed with the filing officer. The court shall resolve the conflict between competing claims to the use of the same party name according to the following principles: (a) The prior established public use of the name during previous elections by a party composed of or led by the same individuals or individuals in documented succession; (b) prior established public use of the name earlier in the same election cycle; (c) the nomination of a more complete slate of candidates for a number of offices or in a number of different regions of the state; (d) documented affiliation with a national or statewide party organization with an established use of the name; (e) the first date of filing of a certificate of nomination; and (f) such other indicia of an established right to use of the name as the court may deem relevant. If more than one filing officer is involved, and one of them is the secretary of state, the petition must be filed in the superior court for Thurston county. Upon resolving the conflict between competing claims, the court may also address any ballot designation for the candidate who does not prevail.

RCW 29A.24.050
Declaration of candidacy – Certain offices, when filed. (*Effective until January 1, 2012.*)

Except where otherwise provided by this title, declarations of candidacy for the following offices shall be filed during regular business hours with the filing officer no earlier than the first Monday in June and no later than the following Friday in the year in which the office is scheduled to be voted upon:

(1) Offices that are scheduled to be voted upon for full terms or both full terms and short terms at, or in conjunction with, a state general election; and

(2) Offices where a vacancy, other than a short term, exists that has not been filled by election and for which an election to fill the vacancy is required in conjunction with the next state general election.

This section supersedes all other statutes that provide for a different filing period for these offices.

RCW 29A.24.050
Declaration of candidacy – Certain offices, when filed. (*Effective January 1, 2012.*)

Except where otherwise provided by this title, declarations of candidacy for the following offices shall be filed during regular business hours with the filing officer beginning the Monday two weeks before

Memorial day and ending the following Friday in the year in which the office is scheduled to be voted upon:

(1) Offices that are scheduled to be voted upon for full terms or both full terms and short terms at, or in conjunction with, a state general election; and

(2) Offices where a vacancy, other than a short term, exists that has not been filled by election and for which an election to fill the vacancy is required in conjunction with the next state general election.

This section supersedes all other statutes that provide for a different filing period for these offices.

RCW 29A.28.011
Major party ticket.

If a place on the ticket of a major political party is vacant because no person has filed for nomination as the candidate of that major political party, after the last day allowed for candidates to withdraw as provided by RCW 29A.24.131, and if the vacancy is for a state or county office to be voted on solely by the electors of a single county, the county central committee of the major political party may select and certify a candidate to fill the vacancy. If the vacancy is for any other office the state central committee of the major political party may select and certify a candidate to fill the vacancy. The certificate must set forth the cause of the vacancy, the name of the person nominated, the office for which the person is nominated, and other pertinent information required in an

ordinary certificate of nomination and be filed in the proper office no later than the first Friday after the last day allowed for candidates to withdraw, together with the candidate's fee applicable to that office and a declaration of candidacy.

RCW 29A.28.041
Congress – Special election. (*Effective until January 1, 2012.*)

(1) Whenever a vacancy occurs in the United States house of representatives or the United States senate from this state, the governor shall order a special election to fill the vacancy. Minor political party candidates and independent candidates may be nominated through the convention procedures provided in chapter 29A.20 RCW.

(2) Within ten days of such vacancy occurring, he or she shall issue a writ of election fixing a date for the special vacancy election not less than ninety days after the issuance of the writ, fixing a date for the primary for nominating major political party candidates for the special vacancy election not less than thirty days before the day fixed for holding the special vacancy election, fixing the dates for the special filing period, and designating the term or part of the term for which the vacancy exists. If the vacancy is in the office of United States representative, the writ of election shall specify the congressional district that is vacant.

(3) If the vacancy occurs less than six months before a state general election and before the second Friday following the close of the filing period for that general election, the special primary, special vacancy election, and minor party and independent candidate nominating conventions must be held in concert with the state primary and state general election in that year.

(4) If the vacancy occurs on or after the first day for filing under RCW 29A.24.050 and on or before the second Friday following the close of the filing period, a special filing period of three normal business days shall be fixed by the governor and notice thereof given to all media, including press, radio, and television within the area in which the vacancy election is to be held, to the end that, insofar as possible, all interested persons will be aware of such filing period. The last day of the filing period shall not be later than the sixth Tuesday before the primary at which major political party candidates are to be nominated. The names of major political party candidates who have filed valid declarations of candidacy during this three-day period shall appear on the approaching primary ballot. The requirements of RCW 29A.20.131 do not apply to a minor political party or independent candidate convention held under this subsection.

(5) If the vacancy occurs later than the second Friday following the close of the filing period, a special primary, special vacancy election, and the minor party and independent candidate conventions to fill the position shall be held after the next state

general election but, in any event, no later than the ninetieth day following the November election.

RCW 29A.28.041
Congress – Special election. (*Effective January 1, 2012.*)

(1) Whenever a vacancy occurs in the United States house of representatives or the United States senate from this state, the governor shall order a special election to fill the vacancy. Minor political party candidates and independent candidates may be nominated through the convention procedures provided in chapter 29A.20 RCW.

(2) Within ten days of such vacancy occurring, he or she shall issue a writ of election fixing a date for the primary at least seventy days after issuance of the writ, and fixing a date for the election at least seventy days after the date of the primary. If the vacancy is in the office of United States representative, the writ of election shall specify the congressional district that is vacant.

(3) If the vacancy occurs less than eight months before a state general election and before the close of the filing period for that general election, the special primary, special vacancy election, and minor party and independent candidate nominating conventions must be held in concert with the state primary and state general election in that year.

(4) If the vacancy occurs on or after the first day for filing under RCW 29A.24.050 and on or before the close of the filing period, a special filing period of three normal business days shall be fixed by the governor and notice thereof given to all media, including press, radio, and television within the area in which the vacancy election is to be held, to the end that, insofar as possible, all interested persons will be aware of such filing period. The names of major political party candidates who have filed valid declarations of candidacy during this three-day period shall appear on the approaching primary ballot. The requirements of RCW 29A.20.131 do not apply to a minor political party or independent candidate convention held under this subsection.

(5) If the vacancy occurs later than the close of the filing period, a special primary and vacancy election to fill the position shall be held after the next state general election but, in any event, no later than the ninetieth day following the November election.

RCW 29A.28.061
Congress – General, primary election laws to apply – Time deadlines, modifications.

The general election laws and laws relating to partisan primaries shall apply to the special primaries and vacancy elections provided for in chapter 29A.28 RCW to the extent that they are not inconsistent with the provisions of these sections. Minor political party and independent candidates may appear only on the

general election ballot. Statutory time deadlines relating to availability of ballots, certification, canvassing, and related procedures that cannot be met in a timely fashion may be modified for the purposes of a specific primary or vacancy election under this chapter by the secretary of state through emergency rules adopted under RCW 29A.04.611.

RCW 29A.32.010
Printing and distribution.

The secretary of state shall, whenever at least one statewide measure or office is scheduled to appear on the general election ballot, print and distribute a voters' pamphlet.

The secretary of state shall distribute the voters' pamphlet to each household in the state, to public libraries, and to any other locations he or she deems appropriate. The secretary of state shall also produce taped or Braille transcripts of the voters' pamphlet, publicize their availability, and mail without charge a copy to any person who requests one.

The secretary of state may make the material required to be distributed by this chapter available to the public in electronic form. The secretary of state may provide the material in electronic form to computer bulletin boards, print and broadcast news media, community computer networks, and similar services at the cost of reproduction or transmission of the data.

RCW 29A.32.032
Party preference.

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

RCW 29A.32.121
Candidates' statements – Length.

(1) The maximum number of words for statements submitted by candidates is as follows: State representative, one hundred words; state senator, judge of the superior court, judge of the court of appeals, justice of the supreme court, and all state offices voted upon throughout the state, except that of governor, two hundred words; president and vice president, United States senator, United States representative, and governor, three hundred words.

(2) Arguments written by committees under RCW 29A.32.060 may not exceed two hundred fifty words in length.

(3) Rebuttal arguments written by committees may not exceed seventy-five words in length.

(4) The secretary of state shall allocate space in the pamphlet based on the number of candidates or nominees for each office.

RCW 29A.36.106
Partisan primary ballots – Required statements.

(1) If the consolidated ballot format is used, the major political party identification check-off box must appear on the primary ballot before all offices and ballot measures. Clear and concise instructions to the voter must be prominently displayed immediately before the list of major political parties, and must include:

(a) A statement that, for partisan offices, the voter may only vote for candidates of one political party;

(b) A question asking the voter to indicate the major political party with which the voter chooses to affiliate;

(c) A statement that, for a major political party candidate, only votes cast by voters who choose to affiliate with that same major political party will be tabulated and reported;

(d) A statement that votes cast for a major political party candidate by a voter who chooses to affiliate with a different major political party will not be tabulated or reported;

(e) A statement that votes cast for a major political party candidate by a voter who selects more than one major political party with which to affiliate will not be tabulated or reported; and

(f) A statement that party affiliation will not affect votes cast for candidates for nonpartisan offices, or for or against ballot measures.

(2) If the physically separate ballot format is used, clear and concise instructions to the voter must be prominently displayed, and must include:

(a) A statement that, for partisan offices, the voter may only vote for candidates of one political party;

(b) A statement explaining that only one ballot may be voted;

(c) A statement explaining that if more than one party ballot is voted, none of the partisan races will be tabulated or reported; and

(d) A statement explaining that the nonpartisan ballot only lists nonpartisan races and ballot measures and does not list partisan races.

RCW 29A.36.121
Order of offices and issues – Party indication.

(1)(a) The positions or offices on a primary consolidated ballot shall be arranged in substantially the following order: United States senator; United States representative; governor; lieutenant governor; secretary of state; state treasurer; state auditor; attorney general; commissioner of public lands; superintendent of public instruction; insurance commissioner; state senator; state representative; county officers;

justices of the supreme court; judges of the court of appeals; judges of the superior court; and judges of the district court. For all other jurisdictions on the primary consolidated ballot, the offices in each jurisdiction shall be grouped together and be in the order of the position numbers assigned to those offices, if any.

(b)(i) The positions or offices on a primary party ballot must be arranged in substantially the following order: United States senator; United States representative; governor; lieutenant governor; secretary of state; state treasurer; state auditor; attorney general; commissioner of public lands; insurance commissioner; state senator; state representative; and partisan county officers. For all other jurisdictions on the primary party ballot, the offices in each jurisdiction must be grouped together and be in the order of the position numbers assigned to those offices, if any.

(ii) The positions or offices on a primary nonpartisan ballot must be arranged in substantially the following order: Superintendent of public instruction; justices of the supreme court; judges of the court of appeals; judges of the superior court; and judges of the district court. For all other jurisdictions on the primary nonpartisan ballot, the offices in each jurisdiction must be grouped together and be in the order of the position numbers assigned to those offices, if any.

(2) The order of the positions or offices on an election ballot shall be substantially the same as on a primary consolidated ballot except that state ballot

issues must be placed before all offices. The offices of president and vice president of the United States shall precede all other offices on a presidential election ballot. The positions on a ballot to be assigned to ballot measures regarding local units of government shall be established by the secretary of state by rule.

(3) The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot. A candidate shall file a written notice with the filing officer within three business days after the close of the filing period designating the political party to be indicated next to the candidate's name on the ballot if either: (a) The candidate has been nominated by two or more minor political parties or independent conventions; or (b) the candidate has both filed a declaration of candidacy declaring an affiliation with a major political party and been nominated by a minor political party or independent convention. If no written notice is filed the filing officer shall give effect to the party designation shown upon the first document filed. A candidate may be deemed nominated by a minor party or independent convention only if all documentation required by chapter 29A.20 RCW has been timely filed.

RCW 29A.52.112
Top two candidates – Party or independent preference.

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in RCW 29A.36.170.

(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

RCW 42.17A.205
Statement of organization by political committees. (*Effective January 1, 2012.*)

(1) Every political committee shall file a statement of organization with the commission. The statement

must be filed within two weeks after organization or within two weeks after the date the committee first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier. A political committee organized within the last three weeks before an election and having the expectation of receiving contributions or making expenditures during and for that election campaign shall file a statement of organization within three business days after its organization or when it first has the expectation of receiving contributions or making expenditures in the election campaign.

(2) The statement of organization shall include but not be limited to:

(a) The name and address of the committee;

(b) The names and addresses of all related or affiliated committees or other persons, and the nature of the relationship or affiliation;

(c) The names, addresses, and titles of its officers; or if it has no officers, the names, addresses, and titles of its responsible leaders;

(d) The name and address of its treasurer and depository;

(e) A statement whether the committee is a continuing one;

(f) The name, office sought, and party affiliation of each candidate whom the committee is supporting or opposing, and, if the committee is supporting the entire ticket of any party, the name of the party;

(g) The ballot proposition concerned, if any, and whether the committee is in favor of or opposed to such proposition;

(h) What distribution of surplus funds will be made, in accordance with RCW 42.17A.430, in the event of dissolution;

(i) The street address of the place and the hours during which the committee will make available for public inspection its books of account and all reports filed in accordance with RCW 42.17A.235;

(j) Such other information as the commission may by regulation prescribe, in keeping with the policies and purposes of this chapter;

(k) The name, address, and title of any person who authorizes expenditures or makes decisions on behalf of the candidate or committee; and

(l) The name, address, and title of any person who is paid by or is a volunteer for a candidate or political committee to perform ministerial functions and who performs ministerial functions on behalf of two or more candidates or committees.

(3) No two political committees may have the same name.

(4) Any material change in information previously submitted in a statement of organization shall be reported to the commission within the ten days following the change.

(5) As used in this section, the "name" of a sponsored committee must include the name of the person that is the sponsor of the committee. If more than one person meets the definition of sponsor, the name of the committee must include the name of at least one sponsor, but may include the names of other sponsors. A person may sponsor only one political committee for the same elected office or same ballot measure per election cycle.

RCW 42.17A.320
Identification of sponsor – Exemptions. (*Effective January 1, 2012*.)

(1) All written political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name and address. All radio and television political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name. The use of an assumed name for the sponsor of electioneering communications, independent expenditures, or political advertising shall be unlawful. For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising.

(2) In addition to the information required by subsection (1) of this section, except as specifically addressed in subsections (4) and (5) of this section, all

political advertising undertaken as an independent expenditure or an electioneering communication by a person or entity other than a bona fide political party must include as part of the communication:

(a) The statement: "No candidate authorized this ad. It is paid for by (name, address, city, state)";

(b) If the sponsor is a political committee, the statement: "Top Five Contributors," followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement or communication; and

(c) If the sponsor is a political committee established, maintained, or controlled directly, or indirectly through the formation of one or more political committees, by an individual, corporation, union, association, or other entity, the full name of that individual or entity.

(3) The information required by subsections (1) and (2) of this section shall:

(a) Appear on the first page or fold of the written advertisement or communication in at least ten-point type, or in type at least ten percent of the largest size type used in a written advertisement or communication directed at more than one voter, such as a billboard or poster, whichever is larger;

(b) Not be subject to the half-tone or screening process; and

(c) Be set apart from any other printed matter.

(4) In an independent expenditure or electioneering communication transmitted via television or other medium that includes a visual image, the following statement must either be clearly spoken, or appear in print and be visible for at least four seconds, appear in letters greater than four percent of the visual screen height, and have a reasonable color contrast with the background: "No candidate authorized this ad. Paid for by (name, city, state)." If the advertisement or communication is undertaken by a nonindividual other than a party organization, then the following notation must also be included: "Top Five Contributors" followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement. Abbreviations may be used to describe contributing entities if the full name of the entity has been clearly spoken previously during the broadcast advertisement.

(5) The following statement shall be clearly spoken in an independent expenditure or electioneering communication transmitted by a method that does not include a visual image: "No candidate authorized this ad. Paid for by (name, city, state)." If the independent expenditure or electioneering communication is undertaken by a nonindividual other than a party organization, then the following statement must also be included: "Top Five Contributors" followed by a listing of the names of the five persons or

entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement. Abbreviations may be used to describe contributing entities if the full name of the entity has been clearly spoken previously during the broadcast advertisement.

(6) Political yard signs are exempt from the requirement of subsections (1) and (2) of this section that the name and address of the sponsor of political advertising be listed on the advertising. In addition, the public disclosure commission shall, by rule, exempt from the identification requirements of subsections (1) and (2) of this section forms of political advertising such as campaign buttons, balloons, pens, pencils, sky-writing, inscriptions, and other forms of advertising where identification is impractical.

(7) For the purposes of this section, "yard sign" means any outdoor sign with dimensions no greater than eight feet by four feet.

RCW 42.17A.335
Political advertising or electioneering communication – Libel or defamation per se. (Effective January 1, 2012.)

(1) It is a violation of this chapter for a person to sponsor with actual malice a statement

constituting libel or defamation per se under the following circumstances:

(a) Political advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office;

(b) Political advertising or an electioneering communication that falsely represents that a candidate is the incumbent for the office sought when in fact the candidate is not the incumbent;

(c) Political advertising or an electioneering communication that makes either directly or indirectly, a false claim stating or implying the support or endorsement of any person or organization when in fact the candidate does not have such support or endorsement.

(2) For the purposes of this section, "libel or defamation per se" means statements that tend (a) to expose a living person to hatred, contempt, ridicule, or obloquy, or to deprive him or her of the benefit of public confidence or social intercourse, or to injure him or her in his or her business or occupation, or (b) to injure any person, corporation, or association in his, her, or its business or occupation.

(3) It is not a violation of this section for a candidate or his or her agent to make statements described in subsection (1)(a) or (b) of this section about the candidate himself or herself because a person cannot defame himself or herself. It is not a violation of this section for a person or organization referenced

in subsection (1)(c) of this section to make a statement about that person or organization because such persons and organizations cannot defame themselves.

(4) Any violation of this section shall be proven by clear and convincing evidence. If a violation is proven, damages are presumed and do not need to be proven.

[2009 c 222 § 2; 2005 c 445 § 10; 1999 c 304 § 2; 1988 c 199 § 2; 1984 c 216 § 3. Formerly RCW 42.17.530.]

Notes:

Intent – Findings – 2009 c 222: "(1) The concurring opinion of the Washington state supreme court in *Rickert v. State, Public Disclosure Commission*, 161 Wn.2d 843, 168 P. 3d 826 (2007) found the statute that prohibits persons from sponsoring, with actual malice, political advertising and electioneering communications about a candidate containing false statements of material fact to be invalid under the First Amendment to the United States Constitution because it posed no requirement that the prohibited statements be defamatory.

(2) It is the intent of the legislature to amend *chapter 42.17 RCW to find that a violation of state law occurs if a person sponsors false statements about candidates in political advertising and electioneering communications when the statements are made with actual malice and are defamatory.

(3) The legislature finds that in such circumstances damages are presumed and do not need to be established when such statements are made with actual malice in political advertising and electioneering communications and constitute libel or defamation per se. The legislature finds that incumbents, challengers, voters, and the political process will benefit from vigorous political debate that is not made with actual malice and is not defamatory.

(4) The legislature finds that when such defamatory statements contain a false statement of material fact about a candidate for public office they expose the candidate to contempt, ridicule, or reproach and can deprive the candidate of the benefit of public confidence, or prejudice him or her in his or her profession, trade, or vocation. The legislature finds that when such statements falsely represent that a candidate is the incumbent for the office sought when in fact the candidate is not the incumbent they deprive the actual incumbent and the candidates of the benefit of public confidence and injure the actual incumbent in the ability to effectively serve as an elected official. The legislature further finds that defamatory statements made by an incumbent regarding the incumbent's challenger may deter individuals from seeking public office and harm the democratic process. Further, the legislature finds that when such statements make, either directly or indirectly, a false claim stating or implying the support or endorsement of any person or organization when in fact the candidate does not have such

support or endorsement, they deprive the person or organization of the benefit of public confidence and/or will expose the person or organization to contempt, ridicule, or reproach, or injure the person or organization in their business or occupation.

(5) The legislature finds that defamatory statements, made with actual malice, damage the integrity of elections by distorting the electoral process. Democracy is premised on an informed electorate. To the extent such defamatory statements misinform the voters, they interfere with the process upon which democracy is based. Such defamatory statements also lower the quality of campaign discourse and debate, and lead or add to voter alienation by fostering voter cynicism and distrust of the political process." [2009 c 222 § 1.]

***Reviser's note:** Provisions in chapter 42.17 RCW relating to campaign finance were recodified in chapter 42.17A RCW by 2010 c 204, effective January 1, 2012.

Finding – Intent – 1999 c 304: "(1) The Washington supreme court in a case involving a ballot measure, *State v. 119 Vote No! Committee*, 135 Wn.2d 618 (1998), found the statute that prohibits persons from sponsoring, with actual malice, political advertising containing false statements of material fact to be invalid under the First Amendment to the United States Constitution.

(2) The legislature finds that a review of the opinions indicates that a majority of the supreme

court may find valid a statute that limited such a prohibition on sponsoring with actual malice false statements of material fact in a political campaign to statements about a candidate in an election for public office.

(3) It is the intent of the legislature to amend the current law to provide protection for candidates for public office against false statements of material fact sponsored with actual malice." [1999 c 304 § 1.]

RCW 42.17A.750
Civil remedies and sanctions – Referral for criminal prosecution. (*Effective January 1, 2012.*)

(1) In addition to the penalties in subsection (2) of this section, and any other remedies provided by law, one or more of the following civil remedies and sanctions may be imposed by court order in addition to any other remedies provided by law:

(a) If the court finds that the violation of any provision of this chapter by any candidate or political committee probably affected the outcome of any election, the result of that election may be held void and a special election held within sixty days of the finding. Any action to void an election shall be commenced within one year of the date of the election in question. It is intended that this remedy be imposed freely in all appropriate cases to protect the right of the electorate to an informed and knowledgeable vote.

(b) If any lobbyist or sponsor of any grass roots lobbying campaign violates any of the provisions of this chapter, his or her registration may be revoked or suspended and he or she may be enjoined from receiving compensation or making expenditures for lobbying. The imposition of a sanction shall not excuse the lobbyist from filing statements and reports required by this chapter.

(c) A person who violates any of the provisions of this chapter may be subject to a civil penalty of not more than ten thousand dollars for each violation. However, a person or entity who violates RCW 42.17A.405 may be subject to a civil penalty of ten thousand dollars or three times the amount of the contribution illegally made or accepted, whichever is greater.

(d) A person who fails to file a properly completed statement or report within the time required by this chapter may be subject to a civil penalty of ten dollars per day for each day each delinquency continues.

(e) A person who fails to report a contribution or expenditure as required by this chapter may be subject to a civil penalty equivalent to the amount not reported as required.

(f) The court may enjoin any person to prevent the doing of any act herein prohibited, or to compel the performance of any act required herein.

(2) The commission may refer the following violations for criminal prosecution:

(a) A person who, with actual malice, violates a provision of this chapter is guilty of a misdemeanor under chapter 9.92 RCW;

(b) A person who, within a five-year period, with actual malice, violates three or more provisions of this chapter is guilty of a gross misdemeanor under chapter 9.92 RCW; and

(c) A person who, with actual malice, procures or offers any false or forged document to be filed, registered, or recorded with the commission under this chapter is guilty of a class C felony under chapter 9.94A RCW.

Washington Administrative Code
(Wash. Admin. Code or WAC)
Selected Provisions

WAC 390-05-274
Party affiliation, party preference, etc.

(1) "Party affiliation" as that term is used in chapter 42.17A RCW and Title 390 WAC means the candidate's party preference as expressed on his or her declaration of candidacy. A candidate's preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate.

(2) A reference to "political party affiliation," "political party," or "party" on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate's self-identified party preference.

WAC 390-18-020
Advertising – Political party identification.

(1) According to RCW 42.17A.320, sponsors of advertising supporting or opposing a candidate who has expressed a party or independent preference on the declaration of candidacy must clearly identify the candidate's political party or independent status in the advertising.

(2) According to RCW 42.17A.320, sponsors of electioneering communications identifying a candidate who has expressed a party or independent preference on the declaration of candidacy must clearly

identify the candidate's political party or independent status in the advertising.

(3) To assist sponsors in complying with this requirement, the commission shall publish a list of abbreviations or symbols that clearly identify political party affiliation or independent status. These abbreviations may be used by sponsors to identify a candidate's political party.

WAC 434-215-012
Declaration of candidacy.

Declarations of candidacy filed either in person or by mail shall be in substantially the following form:

Washington State Declaration of Candidacy

office

jurisdiction and office name | position number

personal information

as registered to vote

first name | middle | last

date of birth (mm / dd / yyyy) | phone number

residential address | city / zip

ballot information

exact name I would like printed on the ballot

political party I prefer, if filing for partisan office:

○ (Prefers _____ Party)

○ (States No Party Preference)

campaign information

campaign address (if different from residential address) | city / zip

email address | phone number

website

filing fee

○ The office has no fixed annual salary: no filing fee

○ The office has a fixed annual salary of $1,000 or less: $10

○ The office has a fixed annual salary over $1,000: 1% of salary

○ I am submitting a filing fee petition instead of a filing fee

oath

I declare that the above information is true, that I am a registered voter residing at the address listed above, that I am a candidate for the office listed above, and that, at the time of filing this declaration, I am legally qualified to assume office.

I swear, or affirm, that I will support the Constitution and laws of the United States, and the Constitution and laws of the State of Washington.

sign here | date here

for office use only

date | voter registration number

office code | fee

02/2010

The filing officer must provide a paper or electronic copy of the filed declaration of candidacy to the candidate and to the public disclosure commission.

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."

WAC 434-230-015
Ballots and instructions.

(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 if candidate races appear on the ballot.

(3) Instructions that accompany a ballot must:

(a) Instruct the voter how to cancel a vote by drawing a line through the text of the candidate's name or ballot measure response;

(b) Notify the voter 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) Explain how to complete and sign the ballot declaration. The following declaration must accompany the ballot:

"I do solemnly swear or affirm under penalty of perjury that I am:

A citizen of the United States;

A legal resident of the state of Washington;

At least 18 years old on election day;

Voting only once in this election;

Not under the authority of the Department of Corrections for a Washington felony conviction; and

Not disqualified from voting due to a court order.

It is illegal to forge a signature or cast another person's ballot. 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."

The declaration must include space for the voter to sign and date the declaration, for the voter to write his or her phone number, and for two witnesses to sign if the voter is unable to sign.

County auditors may use existing stock of declarations until June 1, 2012.

(d) Explain how to make a mark, witnessed by two other people, if unable to sign the declaration;

(e) Explain how to place the ballot in the security envelope and place the security envelope in the return envelope;

(f) Explain how to obtain a replacement ballot if the original ballot is destroyed, spoiled, or lost;

(g) Explain that postage is required, if applicable;

(h) Explain that, in order for the ballot to be counted, it must be either postmarked no later than election day or deposited at a ballot drop box no later than 8:00 p.m. election day;

(i) Explain how to learn about the locations, hours, and services of voting centers and ballot drop boxes, including the availability of accessible voting equipment;

(j) Include, for a primary election that includes a partisan office, a notice on an insert explaining:

"In each race, you may vote for any candidate listed. The two candidates who receive the most votes in the primary will advance to the 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."

(k)(i) Include, for a general election that includes a partisan office, the following explanation:

"If a primary election was held for an office, the two candidates who received the most votes in the primary advanced to the 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 (k)(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."

(4) Instructions that accompany a special absentee ballot authorized by RCW 29A.40.050 must also explain that the voter may request and subsequently vote a regular ballot, and that if the regular ballot is received by the county auditor, the regular ballot will be tabulated and the special absentee ballot will be voided.

(5) 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").

(6)(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, instead of the notice required by (a) of this subsection, 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.

(7) Counties may use varying sizes and colors of ballots, provided 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 various types of ballots.

(8) 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 (5), and 29A.36.191.

(9) Removable stubs are not considered part of the ballot.

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.

WAC 434-230-035
Office format.

(1) The name of each office must be printed on the ballot.

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

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.

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.

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.

[LOGO] ***Complete Text of***

INITIATIVE MEASURE NO. 872

AN ACT Relating to elections and primaries; amending RCW 29A.04.127, 29A.36.170, 29A.04.310, 29A.24.030, 29A.24.210, 29A.36.010, 29A.52.010, 29A.80.010, and 42.12.040; adding a new section to chapter 29A.04 RCW; adding a new section to chapter 29A.52 RCW; adding a new section to chapter 29A.32 RCW; creating new sections; repealing RCW 29A.04.157, 29A.28.010, 29A.28.020, and 29A.36.190; and providing for contingent effect.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

TITLE

NEW SECTION. **Sec. 1.** This act may be known and cited as the People's Choice Initiative of 2004.

LEGISLATIVE INTENT: PROTECTING VOTERS' RIGHTS AND CHOICE

NEW SECTION. **Sec. 2.** The Washington Constitution and laws protect each voter's right to vote for any candidate for any office. The Washington State Supreme Court has upheld the blanket primary as protecting compelling state interests "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." *Heavey v. Chapman*, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980). The Ninth

Circuit Court of Appeals has threatened this system through a decision, that, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington.

WASHINGTON VOTERS' RIGHTS

NEW SECTION. **Sec. 3.** The rights of Washington voters are protected by its Constitution and laws and include the following fundamental rights:

(1) The right of qualified voters to vote at all elections;

(2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;

(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

DEFINITIONS

NEW SECTION. **Sec. 4.** A new section is added to chapter 29A.04 RCW to read as follows:

"Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

Sec. 5. RCW 29A.04.127 and 2003 c 111 s 122 are each amended to read as follows:

"Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) *for* public office ((~~at the polls~~)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

Sec. 6. RCW 29A.36.170 and 2003 c 111 s 917 are each amended to read as follows:

(1) ((~~Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan~~)) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name((~~s~~)) of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes ((~~for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted,~~)) will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for ((~~any other nonpartisan~~)) an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.130.

(2) ((~~On the ballot at the general election~~)) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed ((~~under the title of the office~~)) for that position on the ballot at the general election.

NEW SECTION. **Sec. 7.** A new section is added to chapter 29A. 52 RCW to read as follows:

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in RCW 29A.36.170.

(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

CONFORMING AMENDMENTS

Sec. 8. RCW 29A.04.3 10 and 2003 c 111 s 143 are each amended to read as follows: ((~~Nominating~~))

Primaries for general elections to be held in November must be held on:

(1) The third Tuesday of the preceding September; or ((~~on~~))

(2) The seventh Tuesday immediately preceding ((~~such~~)) that general election, whichever occurs first.

Sec. 9. RCW 29A.24.030 and 2003 c 111 s 603 are each amended to read as follows:

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate ((~~a~~)) his or her major or minor party

((~~designation, if applicable~~)) preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

Sec. 10. RCW 29A.24.210 and 2003 c 111 s 621 are each amended to read as follows:

Filings for a partisan elective office shall be opened for a period of three normal business days whenever, on or after the first day of the regular

filing period and before the sixth Tuesday prior to ((~~a primary~~)) an election, a vacancy occurs in that office, leaving an unexpired term to be filled by an election for which filings have not been held.

Any ((~~such~~)) special three-day filing period shall be fixed by the election officer with whom declarations of candidacy for that office are filed. The election officer shall give notice of the special three-day filing period by notifying the press, radio, and television in the county or counties involved, and by ((~~such~~)) any other means as may be required by law.

Candidacies validly filed within the special three-day filing period shall appear on the primary or general election ballot as if filed during the regular filing period.

The procedures for filings for partisan offices where a vacancy occurs under this section or a void in candidacy occurs under RCW 29A.24.140 must be substantially similar to the procedures for nonpartisan offices under RCW 29A.24.150 through 29A.24.170.

NEW SECTION. **Sec. 11.** A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

Sec. 12. RCW 29A.36.010 and 2003 c 111 s 901 are each amended to read as follows:

On or before the day following the last day allowed for ((~~political parties to fill vacancies in the ticket as provided by RCW 29A.28.010~~)) candidates to withdraw under RCW 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party ((~~designation, if any~~)) preference or independent designation as shown on filed declarations.

Sec. 13. RCW 29A.52.010 and 2003 c 111 s 1301 are each amended to read as follows:

Whenever it shall be necessary to hold a special election in an odd-numbered year to fill an unexpired term of any office which is scheduled to be voted upon for a full term in an even-numbered year, no ((~~September~~)) primary election shall be held in the odd-numbered year if, after the last day allowed for candidates to withdraw, ((~~either of the following circumstances exist:~~

~~(1) No more than one candidate of each qualified political party has filed a declaration of candidacy for the same partisan office to be filled; or~~

~~(2)~~)) no more than two candidates have filed a declaration of candidacy for a single ((~~nonpartisan~~)) office to be filled.

In ((~~either~~)) this event, the officer with whom the declarations of candidacy were filed shall immediately notify all candidates concerned and the names of the candidates that would have been printed upon the ((~~September~~)) primary ballot, but for the provisions of this section, shall be printed as ((~~nominees~~)) candidates for the positions sought upon the ((~~November~~)) general election ballot.

Sec. 14. RCW 29A.80.010 and 2003 c 111 s 2001 are each amended to read as follows:

(((~~(1)~~))) Each political party organization may((~~:~~

~~(a) Make its own~~)) adopt rules ((~~and regulations; and~~

~~(b) Perform all functions inherent in such an organization.~~

~~(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in RCW 29A.28.010~~)) governing its own organization and the nonstatutory functions of that organization.

Sec. 15. RCW 42.12.040 and 2003 c 238 s 4 are each amended to read as follows:

(1) If a vacancy occurs in any partisan elective office in the executive or legislative branches of state government or in any partisan county elective office before the sixth Tuesday prior to the ((~~primary for the~~)) next general election following the occurrence of the vacancy, a successor shall be elected to that office

at that general election. Except during the last year of the term of office, if such a vacancy occurs on or after the sixth Tuesday prior to the ((~~primary for that~~)) general election, the election of the successor shall occur at the next succeeding general election. The elected successor shall hold office for the remainder of the unexpired term. This section shall not apply to any vacancy occurring in a charter county ((~~which~~)) that has charter provisions inconsistent with this section.

(2) If a vacancy occurs in any legislative office or in any partisan county office after the general election in a year that the position appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified as defined in RCW ((~~29.01.135~~)) 29A.04.133 and shall continue through the term for which he or she was elected.

CODIFICATION AND REPEALS

NEW SECTION. **Sec. 16.** The code reviser shall revise the caption of any section of Title 29A RCW as needed to reflect changes made through this Initiative.

NEW SECTION. **Sec. 17.** The following acts or parts of acts are each repealed:

(1) RCW 29A.04.157 (September primary) and 2003 c 111 s 128;

(2) RCW 29A.28.010 (Major party ticket) and 2003 c 111 s 701, 1990 c 59 s 102, 1977 ex.s. c 329 s 12, & 1965 c 9 s 29.18.150;

(3) RCW 29A.28.020 (Death or disqualification – Correcting ballots – Counting votes already cast) and 2003 c 111 s 702, 2001 c 46 s 4, & 1977 ex.s. c 329 s 13; and

(4) RCW 29A.36.190 (Partisan candidates qualified for general election) and 2003 c 111 s 919.

NEW SECTION. **Sec. 18.** This act takes effect only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect.

Vote Both Sides — *Vote en Ambos Lados de la Página*

OFFICIAL BALLOT
YAKIMA COUNTY, WASHINGTON
Primary
August 19, 2008 - 19 de agosto del 2008

BOLETA OFICIAL
CONDADO DE YAKIMA, WASHINGTON
Elección Primaria
Precinct Recinto 0101

SAMPLE

Instructions:
1. Use a black pen to fill in the box next to your choice.
2. To vote for a person whose name is not printed on the ballot, completely fill in the box next to the words "Write-in" and write the candidate's name on the line provided.
3. If you make a mistake: Draw a line through the entire candidate's name. You then have the option of making another choice if you wish. The instructions on your outer envelope may be used to change your vote to another choice.

Instrucciones:
1. Use una pluma de tinta negra para llenar la casilla a un lado de su selección.
2. Para votar por una persona que no se encuentra en la boleta, llene completamente la casilla a un lado de las palabras "Agregado por escrito" y anote el nombre del candidato en la línea provista.
3. Si comete un error: Tache el nombre completo del candidato. Tiene la opción de hacer otra selección, si así lo desea.
También podrá seguir las instrucciones en el sobre exterior para hacer cambios a su voto.

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.

LEER: Todo candidato que se postule para un puesto partidista podrá declarar el partido político de su preferencia. La preferencia en partido político del candidato no significa que el partido político haya nominado o que apoye al candidato, ni que el partido político aprueba o se asocie con ese candidato.

Federal Partisan Office
Cargo Partidista Federal

U.S. Congressional District 4, Representative
2 Year Term Vote for One
Distrito Congresista Federal 4, Representante
Término de 2 años Vote por uno

- [ ] Doc Hastings (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] George Fearing (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Gordon Allen Pross (Prefers Grand Old Party) (Prefiere al Gran Viejo Partido)
- [ ] Write-in Agregado por escrito

State Partisan Offices
Cargos Partidistas Estatales

Governor
4 Year Term Vote for One
Gobernador
Término de 4 años Vote por uno

- [ ] Dino Rossi (Prefers G.O.P. Party) (Prefiere al Partido G.O.P. (en inglés))
- [ ] Will Baker (Prefers Reform Party) (Prefiere al Partido Reformista)
- [ ] Christine Gregoire (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Duff Badgley (Prefers Green Party) (Prefiere al Partido Verde)
- [ ] John W. Aiken, Jr. (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Christian Pierre Joubert (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Christopher A. Tudor (States No Party Preference) (No Declara Preferencia de Partido)
- [ ] Javier O. Lopez (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Mohammad Hasan Said (States No Party Preference) (No Declara Preferencia de Partido)
- [ ] James White (Prefers Independent Party) (Prefiere al Partido Independiente)
- [ ] Write-in Agregado por escrito

Lt. Governor
4 Year Term Vote for One
Vicegobernador
Término de 4 años Vote por uno

- [ ] Brad Owen (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Marcia McCraw (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Arlene A. Peck (Prefers Constitution Party) (Prefiere al Partido Constitucional)
- [ ] Jim Wiest (Prefers G.O.P. Party) (Prefiere al Partido G.O.P. (en inglés))
- [ ] Randel Bell (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Write-in Agregado por escrito

Secretary of State
4 Year Term Vote for One
Secretario de Estado
Término de 4 años Vote por uno

- [ ] Sam Reed (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Mark Greene (Prefers Party Of Commons Party) (Prefiere al Partido Común)
- [ ] Jason Osgood (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Marilyn Montgomery (Prefers Constitution Party) (Prefiere al Partido Constitucional)
- [ ] Write-in Agregado por escrito

State Treasurer
4 Year Term Vote for One
Tesorero Estatal
Término de 4 años Vote por uno

- [ ] Allan Martin (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Jim McIntire (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] ChangMook Sohn (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Write-in Agregado por escrito

State Auditor
4 Year Term Vote for One
Auditor Estatal
Término de 4 años Vote por uno

- [ ] Brian Sonntag (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Glenn Freeman (Prefers Constitution Party) (Prefiere al Partido Constitucional)
- [ ] J. Richard (Dick) McEntee (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Write-in Agregado por escrito

Attorney General
4 Year Term Vote for One
Procurador General
Término de 4 años Vote por uno

- [ ] John Ladenburg (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Rob McKenna (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Write-in Agregado por escrito

Commissioner of Public Lands
4 Year Term Vote for One
Comisionado de Tierras Públicas
Término de 4 años Vote por uno

- [ ] Peter J. Goldmark (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Doug Sutherland (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Write-in Agregado por escrito

State Nonpartisan Office
Cargo No Partidista Estatal

Superintendent of Public Instruction
4 Year Term Vote for One
Superintendente de Instrucción Pública
Término de 4 años Vote por uno

- [ ] John Patterson Blair
- [ ] Don Hansler
- [ ] Randy Dorn
- [ ] David Blomstrom
- [ ] Enid Duncan
- [ ] Teresa (Terry) Bergeson
- [ ] Write-in Agregado por escrito

State Partisan Office
Cargo Partidista Estatal

Insurance Commissioner
4 Year Term Vote for One
Comisionado de Seguros
Término de 4 años Vote por uno

- [ ] Mike Kreidler (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] John R. Adams (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Curtis Fackler (States No Party Preference) (No Declara Preferencia de Partido)
- [ ] Write-in Agregado por escrito

State Legislative Partisan Offices
Cargos Partidistas de la Legislatura Estatal

Legislative District 14, Senator
4 Year Term Vote for One
Distrito Legislativo 14, Senador
Término de 4 años Vote por uno

- [ ] Curtis King (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Write-in Agregado por escrito

Legislative District 14, Representative, Position 1
2 Year Term Vote for One
Distrito Legislativo 14, Representante, Puesto 1
Término de 2 años Vote por uno

- [ ] J. J. Sandlin (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Norm Johnson (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Al Schweppe (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Aubrey C. Reeves, Jr. (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Robert (Bob) McLaughlin (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Scott D. Hess (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Vickie Ybarra (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Write-in Agregado por escrito

Legislative District 14, Representative, Position 2
2 Year Term Vote for One
Distrito Legislativo 14, Representante, Puesto 2
Término de 2 años Vote por uno

- [ ] Charles Ross (Prefers Republican Party) (Prefiere al Partido Republicano)
- [ ] Christopher Ramirez (Prefers Democratic Party) (Prefiere al Partido Demócrata)
- [ ] Write-in Agregado por escrito

Judicial Nonpartisan Offices
Cargos No Partidistas Judiciales

SAMPLE

10000020110026

40000765117

0973031154

App. 126

Vote Both Sides — *Vote en Ambos Lados de la Página*

WSRP v. Reed
D-I_00352

OFFICIAL BALLOT
YAKIMA COUNTY, WASHINGTON
Primary
August 19, 2008 - 19 de agosto del 2008

BOLETA OFICIAL
CONDADO DE YAKIMA, WASHINGTON
Elección Primaria

Precinct Recinto 0101

State Supreme Court Justice, Position 3
6 Year Term Vote for One
Juez de la Corte Suprema Estatal, Puesto 3
Término de 6 años Vote por uno

- [ ] Mary Fairhurst
- [ ] Michael J. Bond
- [ ] Write-in Agregado por escrito

State Supreme Court Justice, Position 4
6 Year Term Vote for One
Juez de la Corte Suprema Estatal, Puesto 4
Término de 6 años Vote por uno

- [ ] Charles W. Johnson
- [ ] C. F. (Frank) Vulliet
- [ ] James M. Beecher
- [ ] Write-in Agregado por escrito

State Supreme Court Justice, Position 7
6 Year Short/Full Term Vote for One
Juez de la Corte Suprema Estatal, Puesto 7
Término corto/completo de 6 años
Vote por uno

- [ ] Debra L. Stephens
- [ ] Write-in Agregado por escrito

Court of Appeals Judge, Division III, District 3, Position 1
6 Year Term Vote for One
Juez del Tribunal de Apelaciones, División III, Distrito 3, Puesto 1
Término de 6 años Vote por uno

- [ ] Stephen M. Brown
- [ ] Write-in Agregado por escrito

Yakima County Superior Court Judge, Department 5
4 Year Term Vote for One
Juez del Tribunal Superior del Condado de Yakima, Departamento 5
Término de 4 años Vote por uno

- [ ] Rob Lawrence-Berrey
- [ ] David Elofson
- [ ] Write-in Agregado por escrito

Election of Political Party Precinct Committee Officer

Elección del Funcionario del Comité de Recinto Para los Partidos Políticos

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

El cargo de funcionario del comité de recinto es un puesto dentro de cada partido político. Para este cargo solamente: Si se considera demócrata o republicano, podrá votar por un candidato de ese partido.

0101 Precinct Committee Officer
For a write-in candidate, include party
2 Year Term Vote for One
0101 Funcionario del Comité de Recinto
Incluya el partido político para los candidatos agregados por escrito
Término de 2 años Vote por uno

- [ ] Ronald J. Bonlender
  Democratic Party Candidate
  Candidato del Partido Demócrata
- [ ] Write-in Agregado por escrito

OFFICIAL BALLOT
GENERAL ELECTION
JEFFERSON COUNTY, STATE OF WASHINGTON
TUESDAY, NOVEMBER 4, 2008

IMPORTANT VOTING INSTRUCTIONS - PLEASE USE BLACK INK

VOTE FOR ONLY ONE CANDIDATE IN EACH RACE

Blacken the oval beside the name of your choice, like this ( ). If you wish to vote for a candidate not printed on the ballot, write the name of the candidate in the space provided and blacken the oval next to the write-in line. **IF YOU MAKE A MISTAKE: Draw a line through your incorrect choice like this: ~~George Washington.~~**
You then have the option of making another choice if you wish. 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. If a voter has signed or otherwise identified himself or herself on a ballot, the ballot will not be counted.

Proposed By Initiative Petition

INITIATIVE MEASURE NO. 985

Initiative Measure No. 985 concerns transportation.

This measure would open high-occupancy vehicle lanes to all traffic during specified hours, require traffic light synchronization, increase roadside assistance funding, and dedicate certain taxes, fines, tolls and other revenues to traffic-flow purposes.

Should this measure be enacted into law?

- ◯ Yes
- ◯ No

INITIATIVE MEASURE NO. 1000

Initiative Measure No. 1000 concerns allowing certain terminally ill competent adults to obtain lethal prescriptions.

This measure would permit terminally ill, competent, adult Washington residents, who are medically predicted to have six months or less to live, to request and self-administer lethal medication prescribed by a physician.

Should this measure be enacted into law?

- ◯ Yes
- ◯ No

INITIATIVE MEASURE NO. 1029

Initiative Measure No.1029 concerns long-term care services for the elderly and persons with disabilities.

This measure would require long-term care workers to be certified as home care aids based on an examination, with exceptions; increase training and criminal background check requirements; and establish disciplinary standards and procedures.

Should this measure be enacted into law?

- ◯ Yes
- ◯ No

Local Measure

JEFFERSON COUNTY
Proposition No. 1
Local Power Authorization

Shall Public Utility District No. 1 of Jefferson County construct or acquire electric facilities for the generation, transmission or distribution of electric power?

- ◯ Yes
- ◯ No

Federal - Partisan Offices

President / Vice-President of the United States
4 Year Term — Vote for one

- ◯ Barack Obama / Joe Biden — Democratic Party Nominees
- ◯ John McCain / Sarah Palin — Republican Party Nominees
- ◯ Ralph Nader / Matt Gonzalez — Independent Candidates
- ◯ Gloria La Riva / Eugene Puryear — Socialism & Liberation Party Nominees
- ◯ James E. Harris / Alyson Kennedy — Socialist Workers Party Nominees
- ◯ Bob Barr / Wayne A. Root — Libertarian Party Nominees
- ◯ Chuck Baldwin / Darrell L. Castle — Constitution Party Nominees
- ◯ Cynthia McKinney / Rosa Clemente — Green Party Nominees
- ◯ Write-in

TURN OVER TO CONTINUE VOTING

Federal - Partisan Offices

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.

United States Representative
6th Congressional District
2 Year Term — Vote for one

- ◯ Norm Dicks (Prefers Democratic Party)
- ◯ Doug Cloud (Prefers Republican Party)
- ◯ Write-in

State - Partisan Offices

Governor
4 Year Term — Vote for one

- ◯ Christine Gregoire (Prefers Democratic Party)
- ◯ Dino Rossi (Prefers G.O.P. Party)
- ◯ Write-in

Lieutenant Governor
4 Year Term — Vote for one

- ◯ Brad Owen (Prefers Democratic Party)
- ◯ Marcia McCraw (Prefers Republican Party)
- ◯ Write-in

Secretary of State
4 Year Term — Vote for one

- ◯ Sam Reed (Prefers Republican Party)
- ◯ Jason Osgood (Prefers Democratic Party)
- ◯ Write-in

State Treasurer
4 Year Term — Vote for one

- ◯ Allan Martin (Prefers Republican Party)
- ◯ Jim McIntire (Prefers Democratic Party)
- ◯ Write-in

Typ:01 Seq:0001 Spl:01

D | E | F

State - Partisan Offices

State Auditor
4 Year Term — Vote for one

- Brian Sonntag (Prefers Democratic Party)
- J. Richard (Dick) McEntee (Prefers Republican Party)
- Write-in

Attorney General
4 Year Term — Vote for one

- Rob McKenna (Prefers Republican Party)
- John Ladenburg (Prefers Democratic Party)
- Write-in

Commissioner of Public Lands
4 Year Term — Vote for one

- Doug Sutherland (Prefers Republican Party)
- Peter J. Goldmark (Prefers Democratic Party)
- Write-in

State - Nonpartisan Office

Superintendent of Public Instruction
4 Year Term — Vote for one

- Teresa (Terry) Bergeson
- Randy Dorn
- Write-in

State - Partisan Office

Insurance Commissioner
4 Year Term — Vote for one

- Mike Kreidler (Prefers Democratic Party)
- John R. Adams (Prefers Republican Party)
- Write-in

Legislative District 24 - Partisan Offices

State Senator
4 Year Term — Vote for one

- Jim Hargrove (Prefers Democratic Party)
- Write-in

State Representative Pos. No. 1
2 Year Term — Vote for one

- Kevin Van De Wege (Prefers Democratic Party)
- Thomas Thomas (Prefers G.O.P. Party)
- Write-in

State Representative Pos. No. 2
2 Year Term — Vote for one

- Lynn Kessler (Prefers Democratic Party)
- Robert (Randy) Dutton (Prefers Republican Party)
- Write-in

County - Partisan Offices

County Commissioner Dist. No. 1
4 Year Term — Vote for one

- Phil Johnson (Prefers Democratic Party)
- Dennis A. Schultz (Prefers Republican Party)
- Write-in

County Commissioner Dist. No. 2
4 Year Term — Vote for one

- David W. Sullivan (Prefers Democratic Party)
- Sandy Hershelman (Prefers Independent/No Party)
- Write-in

Judicial - Nonpartisan Offices

State Supreme Court Justice Pos. No. 3
6 Year Term — Vote for one

- Mary Fairhurst
- Write-in

State Supreme Court Justice Pos. No. 4
6 Year Term — Vote for one

- Charles W. Johnson
- Write-in

State Supreme Court Justice Pos. No. 7
Short & 6 Year Term — Vote for one

- Debra L. Stephens
- Write-in

Court of Appeals
Div. 2, Dist. 2, Pos. No. 1
6 Year Term — Vote for one

- (Joyce) Robin Hunt
- Write-in

Superior Court Judge Pos. No. 1
4 Year Term — Vote for one

- Craddock Verser
- Write-in

Local - Nonpartisan Office

Public Utility Dist. No. 1
Commissioner Dist. No. 2
6 Year Term — Vote for one

- Ken McMillen
- Jim Pivarnik
- Write-in

TURN OVER TO CONTINUE VOTING

D | E | F | Typ:01 Seq:0001 Spl:01

App. 129

WSRP v. Reed
D-I_06771

OFFICIAL BALLOT - KING COUNTY, WASHINGTON
PRIMARY AND SPECIAL ELECTIONS, SEPTEMBER 19, 2006

INSTRUCTIONS TO VOTERS:

Use a dark pen to fill in the oval next to your choice. VOTE LIKE THIS: ● Fill in the oval completely.
If you vote in error at the polls, return the ballot to a poll worker and get another one.

IMPORTANT PRIMARY VOTING INSTRUCTIONS

1. **Select one political party preference below.**
   If you do not select a party preference or if you select more than one party, your votes for partisan candidates will not count.
2. **Vote for candidates from the party you selected.**
   This ballot is color-coded to assist you in selecting contests which correspond to your party selection. Votes for another party's candidates will not count.
3. **Vote for nonpartisan offices and ballot measures.**
   These votes will be counted, even if you do not mark a political party.

Nonpartisan: Not associated with any one political party
Primary: In the Primary you choose candidates who will run in the General Election

INSTRUCTIONS FOR A WRITE-IN VOTE: To cast a write-in vote for a candidate not listed on the ballot, print his or her name on the blank line and completely fill in the oval.
INSTRUCTIONS TO ABSENTEE VOTERS ONLY: *If you make an error in voting, draw an "X" through the error and fill in the correct oval.*

Before proceeding, please indicate the political party with which you choose to affiliate.

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

Party Preference
Vote for One

- DEMOCRATIC
- REPUBLICAN

Note: This selection is private and no record of your choice is maintained.

Please continue voting. Remember to vote only for candidates that correspond with your party preference.

For Democratic Preference Start Voting Here

FEDERAL

United States Senator
Vote for One

- Michael Goodspaceguy Nelson
- Mike The Mover
- Mohammad H. Said
- Hong Tran
- Maria Cantwell
- Write-in

United States Representative Congressional District No. 7
Vote for One

- Donovan Rivers
- Jim McDermott
- Joshua Smith
- Write-in

STATE OF WASHINGTON

LEG. DIST. NO. 37

Senator
Vote for One

- Adam Kline
- Write-in

Representative Position No. 1
Vote for One

- Sharon Tomiko Santos
- Write-in

Representative Position No. 2
Vote for One

- Eric Pettigrew
- Write-in

KING COUNTY

Prosecuting Attorney
Vote for One

- Write-in

PRECINCT COMMITTEE OFFICER

Vote for One

- Write-in

END OF DEMOCRATIC
Continue Voting On Nonpartisan Races

For Republican Preference Start Voting Here

FEDERAL

United States Senator
Vote for One

- Mike McGavick
- Brad Klippert
- William Edward Chovil
- Gordon Allen Pross
- Warren E. Hanson
- B. Barry Massoudi
- Write-in

United States Representative Congressional District No. 7
Vote for One

- Steve Beren
- Write-in

STATE OF WASHINGTON

LEG. DIST. NO. 37

Senator
Vote for One

- Write-in

Representative Position No. 1
Vote for One

- Write-in

Representative Position No. 2
Vote for One

- Kwame Wyking Garrett
- Write-in

KING COUNTY

Prosecuting Attorney
Vote for One

- Norm Maleng
- Write-in

Continued on reverse side

PRECINCT COMMITTEE OFFICER

Vote for One

Write-in

END OF REPUBLICAN
Continue Voting On Nonpartisan Races

NONPARTISAN *RACES AND MEASURES*

These votes will be counted, even if you do not mark a political party.

STATE SUPREME COURT

Justice Position No. 2
Descriptors added to distinguish candidates with the same last name. All candidates for this office are attorneys, as required by law.
Vote for One

- Michael Johnson, attorney
- Stephen Johnson, attorney/state senator
- Richard Smith
- Norman J. Ericson
- Susan Owens
- Write-in

Justice Position No. 8
Vote for One

- John Groen
- Gerry L. Alexander
- Write-in

Justice Position No. 9
Vote for One

- Jeanette Burrage
- Tom Chambers
- Write-in

COURT OF APPEALS DIV. NO. 1, DIST. NO. 1

Judge Position No. 4
Vote for One

- Ronald E. Cox
- Write-in

Judge Position No. 7
Vote for One

- Marlin J. Appelwick
- Write-in

KING COUNTY

KING COUNTY PROPOSITION NO. 1
REGULAR PROPERTY TAX LEVY
AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM SERVICES

The King County Council passed Ordinance No. 15537 concerning this proposition for the Automated Fingerprint Identification System (AFIS) levy. This proposition would fund the continued operation and enhancement of the AFIS program, which assists law enforcement agencies in identifying and convicting criminals. It would authorize King County to levy an additional regular property tax of not more than $0.0568 (5.68 cents) per $1,000 of assessed valuation for collection in 2007 and levy the tax each year thereafter as allowed by chapter 84.55 RCW for each of the five succeeding years. Should this proposition be:

- APPROVED
- REJECTED

CITY

THE CITY OF SEATTLE
INITIATIVE NO. 88
PROPERTY TAX LEVY LID LIFT FOR SCHOOLS

Seattle Initiative Measure No. 88 concerns tax levies to fund the Seattle School District's educational programs.

If enacted, this measure would allow increased property taxes to be collected in 2008 through 2013 to provide funding for educational programs of the Seattle School District. It would lift the RCW 84.55 limit on regular property taxes so that the total regular tax limit for collection in 2008 would be $3.27/$1,000 assessed value. Each year from 2009 through 2013, the additional regular property taxes that could be collected would increase at the same rate as the consumer price index.

Should this levy lid lift be approved?

- LEVY YES
- LEVY NO

Vote both sides of ballot

Nonpartisan Top-Two Primary Ballot

Directions: Examine the sample ballot below and pretend that you will be participating in an election to select one of the candidates below. After reading the ballot carefully, answer the questions on the other side of the page.

KITTITAS COUNTY BALLOT
Primary Election August 25th, 2008

	STATE PARTISAN OFFICES
Marking your ballot: Please use a black or blue INK PEN to mark your ballot. To vote for your choice in each contest, completely fill in the box provided to the left of your choice. To vote for a person whose name does not appear on the ballot, completely fill in the box next to the words "write-in" and write in the candidate's name on the line provided.	**Governor** **4 year term** **Vote for ONE** †□John Smith (Prefers Democratic Party) †□George Marker (Prefers Republican Party) †□Mark Allen (Prefers Republican Party) †□Joe Keen (Prefers Democratic Party) †□Kirk Freeman (States No Party Preference) †□Write-in _____
	LEGISLATIVE PARTISAN OFFICES
VOTER-PLEASE 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.	**State Representative** **Legislative District 1, Pos. 1** †□Jane Miller (Prefers Republican Party) †□Mary Johnson (Prefers Democratic Party) †□Kate Bell (States No Party Preference) □ Write-in _____

Nonpartisan Top-Two General Election Ballot

Directions: Examine the sample ballot below and pretend that you will be participating in an election to select one of the candidates below. After reading the ballot carefully, answer the questions on the other side of the page.

KITTITAS COUNTY BALLOT

General Election November 5th, 2008

	STATE PARTISAN OFFICES
Marking your ballot: Please use a black or blue INK PEN to mark your ballot. To vote for your choice in each contest, completely fill in the box provided to the left of your choice. To vote for a person whose name does not appear on the ballot, completely fill in the box next to the words "write-in" and write in the candidate's name on the line provided.	**Governor** **4 year term Vote for ONE** †□John Smith (Prefers Democratic Party) †□Mark Allen (Prefers Republican Party) †□Write-in _____
	LEGISLATIVE PARTISAN OFFICES
VOTER-PLEASE 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.	**State Representative** **Legislative District 1, Pos. 1** †□Jane Miller (Prefers Republican Party) †□Mary Johnson (Prefers Democratic Party) †□Write-in _____