

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN
PARTY, et al.,

Plaintiffs,

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON
STATE, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE,

Defendant Intervenor.

No. CV05-0927 JCC

PRETRIAL ORDER

JURISDICTION

This is an action pursuant to 42 U.S.C. § 1983 et seq. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 2201 and 2202.

CLAIMS AND DEFENSES

Plaintiff and Plaintiff-Intervenors (collectively “Plaintiffs”) assert that they will pursue at trial the following claims:

1. Claims for injunctive relief based on conducting an invalid primary, as generally set forth in the Democratic Party’s First Amended and Supplemental Complaint (“Democratic Complaint”) First Cause of Action, to the extent that the Top Two Primary as implemented by the State results in the selection of de facto party nominees;
2. Claims for injunctive relief based on forced association, as generally set forth in the Second Cause of Action stated in the Democratic Complaint;
3. Claims for injunctive relief against the de facto denial of the rights of Plaintiff and Plaintiff-Intervenors to exercise their right of free speech by nominating candidates for the general election ballot ;
4. Claims for injunctive relief as set forth in the following paragraphs of the Fourth Cause of Action stated in the Democratic Complaint:
 - a. Paragraph 56;
 - b. Paragraph 57 to the extent de facto nominees and candidates are selected;
 - c. Paragraph 58;
 - d. Paragraph 59;
5. Claims for injunctive relief as set forth in Paragraph 52 of the First Cause of Action

1 state in the Republican Complaint.

2 6. The following paragraphs of the Prayer for Relief in the Democratic Complaint:

- 3 a. Paragraph 2;
- 4 b. Paragraph 3 to the extent that RCW 29A.36.010 results in the use of the names
- 5 of Plaintiff and Plaintiff-Intervenors without their consent in conjunction with
- 6 the certified candidate's name on ballots and other state materials;
- 7 c. Paragraph 5, limited to RCW 29A.52.112(3) to the extent that statute results in
- 8 the use of the names of the Plaintiff or the Plaintiff-Intervenors without their
- 9 consent in conjunction with the certified candidate's name on ballots and other
- 10 state materials;
- 11 d. Paragraph 6, limited to claims that I-872 as implemented is unconstitutional;
- 12 e. Paragraph 8(a), (b) except the relief requested is narrowed to simply enjoining
- 13 the State from accepted a statement of party preference from a candidate
- 14 without requiring the consent of the party identified by the candidate, (c) and
- 15 (d);
- 16 f. Paragraph 10; and
- 17 g. Paragraph 11.

18 Defendant Intervenors (collectively "Defendants") assert the following defenses and

19 claims for relief:

- 20 1. Plaintiffs are barred by the doctrines of *res judicata* and law of the case from
- 21 pursuing claims that have already been resolved in this action in prior decisions of
- 22 this Court, the United States Court of Appeals for the Ninth Circuit, or the United
- 23 States Supreme Court. This includes, without limitation:
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- 1 a. The Libertarian Party of Washington State’s claim that the three political
2 parties in this case have a right to have their nominees designated as such
3 on the ballot.
- 4 b. The Libertarian Party of Washington State’s claim that Initiative 872
5 denies the three political parties in this case a right to reasonable access to
6 the November election ballot, or that those three political parties have a
7 constitutional right to have their nominees appear on the November
8 election ballot without regard to whether those nominees finished in the top
9 two at the election’s primary.
- 10 c. The Washington State Republican Party’s and the Washington State
11 Democratic Central Committee’s claim that the Top Two primary selects
12 the political parties’ nominees (*de facto* or otherwise).
- 13
- 14
- 15 2. Plaintiffs cannot meet their burden of proving that the State’s implementation of
16 Initiative 872 causes widespread voter confusion that severely burdens their
17 freedom of association under the First Amendment of the U.S. Constitution.
- 18 3. The election of Precinct Committee Officers (“PCOs”) under the State’s PCO
19 election laws is not part of Initiative 872, and Plaintiffs’ claims regarding PCO
20 elections do not state any cause of action upon which declaratory or injunctive
21 relief against I-872 can be based.
- 22
- 23 4. Political parties do not have a constitutional right to have their officers (*e.g.*,
24 PCOs) selected at public expense.
- 25 5. The State’s Public Disclosure Commission campaign financing and advertising
26 laws (PDC laws) are not part of Initiative 872, and Plaintiffs’ claims regarding

1 those PDC laws do not state any cause of action upon which declaratory or
2 injunctive relief against I-872 can be based.

3 6. Plaintiffs fail to state any cause of action or claim upon which relief can be
4 granted.

5 7. Plaintiffs' complaints should be dismissed with prejudice.

6
7 ADMITTED FACTS

8 The following facts are admitted by the parties:

9 1. Washington law defines a "major political party," in part, as:

10 a political party of which at least one nominee for president, vice
11 president, United States senator, or a statewide office received at least
12 five percent of the total vote case at the last preceding state general
13 election in an even-numbered year. A political party qualifying as a
14 major political party under this section retains such status until the next
15 even-year election at which a candidate of that party does not achieve
at least five percent of the vote for one of previously-specified offices.
If none of these offices appear on the ballot in an even-year general
election, the major party retains its status as a major party through that
election.

16 RCW 29A.04.086. The office of United States Senator appeared on the 2010
17 general election ballot.

18 2. A "minor political party" means a political organization other than a major
19 political party. RCW 29.04.097.

20 3. "Bona fide political parties" are defined for purposes of Washington campaign
21 finance law as including both "major political parties" and "minor political
22 parties," and are permitted by state law to contribute greater sums to candidates
23 than other donors. RCW 42.17.020.

24 4. From 1935 until 2003, Washington voters selected the nominees for partisan office
25 of major political parties using a "blanket primary" that placed candidates from all
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1 parties on one ballot and allowed voters to select candidates from any party.

2 Under this system, the candidate who won a plurality of votes within each major
3 party became that party's nominee in the general election. At that time, minor
4 parties selected their nominees by convention, but their nominees advanced to the
5 general election only if they received at least one percent of the vote cast for that
6 office at the primary.
7

8 5. In 2000, the United States Supreme Court held a blanket primary system used in
9 California to be unconstitutional. In 2003, the Court of Appeals for the Ninth
10 Circuit ruled that Washington's blanket primary was also unconstitutional as being
11 materially indistinguishable from the California system.

12 6. In 2004, Washington adopted a replacement system, under which candidates filed
13 a declaration of candidacy for nomination to partisan office and indicated their
14 party. All candidates seeking a major political party's nomination for an office
15 appeared separately on the primary ballot, and voters were limited to voting in a
16 single party's nomination races. The candidate receiving the plurality of votes
17 among candidates for the same nomination advanced to the general election as that
18 party's nominee. Minor parties continued to nominate candidates by convention.
19 Washington used this system at the 2004 primary. Washington also continued to
20 use this system from 2005 through 2007, while an injunction against the
21 implementation of I-872 was in place.
22

23 7. The Washington State Grange proposed I-872 as a replacement for the blanket
24 primary. It appeared on the November 2004 general election ballot and the voters
25 approved it by a margin of 59.8% "yes" to 40.2% "no". Under I-872, all elections
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1 for partisan offices are conducted in two stages: a primary and a general election.
2 To participate in a primary, a candidate files a declaration of candidacy form on
3 which he or she may declare his or her major or minor party preference or
4 independent status. In the primary, voters may select any candidate listed on the
5 ballot, regardless of the party preference of the candidates or the voter. The
6 candidates with the highest and second-highest vote totals at the primary advance
7 to the general election, regardless of their party preferences.
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- 9 8. Before the 2008 primary election, the Secretary of State revised WAC 434-230-
10 045, implementing I-872. As revised, WAC 434-230-045(4) stated (and continues
11 to state):

12 For partisan office:

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

16 John Smith

17 (Prefers Example Party).

18 (b) If the candidate did not state his or her preference for a political party, that
19 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:

20 John Smith

21 (States No Party Preference)

- 22 9. Before the 2008 primary election, the Secretary of State revised WAC 434-230-
23 015, implementing I-872. As revised, WAC 434-230-015(4)(a) stated (and
24 continues to state):

25 If the ballot includes a partisan office, the ballot must include the
26 following notice in bold print immediately above the first partisan
congressional, state or county office: "READ: Each candidate for

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

5 10. Before the 2008 primary election, the Secretary of State revised WAC 434-250-
6 040(1)(k), implementing I-872. As revised, WAC 434-250-040(1)(k) stated (and
7 continues to state):

8 For a primary election that includes a partisan office, a notice on a
9 separate insert [must accompany an absentee ballot] explaining:

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

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

18 11. Before the 2008 primary election, the Secretary of State revised WAC 434-250-
19 040(1)(l), implementing I-872. As revised, WAC 434-250-040(1)(l) stated (and
20 continues to state):

21 (i) For a general election that includes a partisan office, the following
22 explanation [must accompany an absentee ballot]:

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

26 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 (l)(i) of this subsection:

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

1 12. A political party cannot prevent a candidate who is unaffiliated with, or even
2 repugnant to, the party from designating it as his party preference.

3 13. The Secretary of State publishes Voters' Pamphlets which are printed and mailed
4 to every place of residence in Washington. In addition to the printed Voters'
5 Pamphlets, the Secretary of State maintains a website containing information about
6 voting and elections, including information about the Top Two primary as
7 established by I-872.
8

9 14. Precinct committee officers (PCO's) are officers of the major political parties. The
10 office is voted upon at the primaries, and the names of all candidates appear on the
11 ballot for the primary for each even-numbered year,. Subsequent to the
12 implementation of I-872, candidates for PCO appear under a heading that reads:

13 Election of Political Party Precinct Committee Officer

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

17 15. The PCO's in each county collectively constitute the County Central Committee of
18 the Party. In addition to their other duties, the PCOs elect the Chair and Vice
19 Chair of the County Central Committee. RCW 29A.80.030. The County Central
20 Committee of each county elects two representatives who, in conjunction with the
21 representatives from the other counties, collective constitute the State Committee
22 of the Party. The State Committee elects the Chair and Vice Chair of the State
23 Committee. RCW 29A.80.020.
24

25 16. When a vacancy in the Legislature or in partisan county office occurs, the person
26 appointed to fill the vacancy must be from a list of three individuals provided by

1 the County Central Committee or State Committee of the same Party as the office
2 holder whose office has been vacated. Article II, Section 15, Washington State
3 Constitution.

4 17. In 2009, party County Central Committees or State Committees provided lists of
5 individuals to fill three vacancies in state legislative offices for candidates elected
6 in 2008 who had been nominated by a political party and whose offices
7 subsequently became vacant. In each case, the relevant county legislative body
8 filled the vacancy from those lists.

9
10 18. Washington law calls for a presidential primary to be conducted in years in which
11 the President of the United States is elected, at a time separate from the primary
12 for other elected offices. The presidential primary is for major parties only. State
13 law directs that the presidential primary be conducted in substantially the same
14 manner as the partisan primary for other offices except as necessary to
15 accommodate political parties rules or as otherwise provided in RCW 29A.56.
16 The presidential primary differs from the Top Two Primary used with regard to
17 other elected offices in that only candidates for President appear on the ballot,
18 candidates appear separately based upon political party, and the major political
19 parties are authorized to limit participation in the presidential primary to those
20 voters who sign a declaration affiliating with that political party. Washington law
21 governing the presidential primary is codified at RCW 29A.56.010 through RCW
22 29A.56.060; related regulations are codified at WAC 434-219. Washington
23 conducted its first presidential primary in 1992, and has conducted one every
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1 presidential election year since then, except in 2004 when it was suspended by the
2 legislature.

3 19. Political advertising is regulated by the Public Disclosure Commission (“PDC”)
4 pursuant to RCW 42.17.510 through RCW 42.17.540. For partisan office, if a
5 candidate has expressed a party or independent preference on the declaration of
6 candidacy, that party or independent designation shall be clearly identified in
7 electioneering communications, independent expenditures, or political advertising.
8 RCW 42.17.510(1). In order to assist sponsors of advertising in complying with
9 RCW 42.17.510(1), the PDC publishes a list of abbreviations or symbols that the
10 PDC “believes clearly identify political party preference” and “may be used by
11 sponsors to identify a candidate’s political party.”
12

13 20. The Washington Republican Party nominated candidates for one or more partisan
14 offices in the 2008 and 2010 elections.

15 21. The Washington Democratic Party nominated candidates for one or more partisan
16 offices in the 2008 and 2010 elections.

17 22. In the 1980 primary election (under the “blanket” primary system no longer used
18 in Washington), John D. Spellman ran to become the State Republican Party’s
19 nominee for governor. In that 1980 “blanket” primary, Mr. Spellman received the
20 highest number of votes among candidates for that nomination and therefore was
21 the State Republican Party’s nominee for that office on the November ballot. Two
22 candidates who ran to become the State Democratic Party’s nominee for governor,
23 Jim McDermott and Dixie Lee Ray, both received more total votes than Mr.
24 Spellman in that 1980 “blanket” primary. Mr. McDermott was the State
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1 Democratic Party's nominee for that office on the November ballot because he
2 received the highest number of votes among the candidates running for the State
3 Democratic Party's nomination. In the November 1980 general election, Mr.
4 Spellman defeated Mr. McDermott and was elected governor for a four-year term.

5
6 23. Before the 2008 primary election, the Secretary of State engaged in a voter
7 education campaign regarding the Top Two primary to voters. The campaign
8 included information specifically stating that, under I-872, a candidate's
9 expression of preference for a political party does not imply that the candidate is
10 nominated or endorsed by the party, or that the party approves of or associates
11 with that candidate. The Secretary of State engaged in further voter education
12 regarding the Top Two primary in 2009 and 2010.

13
14 24. The ballot the voter votes on is one document that every voter has when voting.

15 The plaintiffs contend as follows:

- 16 1. Public perception of a political party's views on public issues is substantially
17 determined by public perception of the views of the party's candidates and leaders.
18 2. Political parties seek to promote the election of candidates who will implement the
19 parties' views.
20 3. Political parties devote substantial resources to making their names trusted
21 symbols of certain approaches to governance. They then encourage voters to cast
22 their votes for the candidates that carry the party name.
23 4. Party labels are a central consideration for most voters in deciding how to vote.
24 5. More than half of the voters in Washington think of themselves as "Democrats" or
25 "Republicans" and vote only for candidates of their party. Still other voters do not
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1 think of themselves as “Democrats” or “Republicans” but in any given year wish
2 to vote preferentially for candidates associated with one party over those
3 associated with another.

4 6. As I-872 has been implemented by the State, permitting a candidate to explicitly
5 declare a preference for a political party, which “party preference” must then be
6 designated with the candidate’s name on ballots, in voters’ pamphlets, in all
7 political advertising, and in public disclosure filings, likely leads to
8 inferences/beliefs by many voters that the candidate is associated with or
9 approved by the political party whose name appears next to the candidate’s.

10 7. As I-872 has been implemented by the State, permitting a candidate to explicitly
11 declare a preference for a political party, which “party preference” must then be
12 designated with the candidate’s name on ballots, in voters’ pamphlets, in all
13 political advertising, and in public disclosure filings, leads to inferences by many
14 voters in the general election that a primary winner is the nominee or
15 representative of the political party whose name appears next to the candidate’s.

16 8. A voter’s belief that a candidate is associated with a particular political party will
17 significantly affect the likelihood that the voter will vote for that candidate.

18 9. A substantial proportion of the voting population relies on party affiliation as
19 shown on the State’s election ballots in deciding how to vote, particularly in low-
20 information partisan elections.

21 10. As I-872 has been implemented by the State, a voter looking at a partisan ballot
22 will be unable to distinguish any difference between the political party information
23 associated with a party’s nominee and the political party information associated
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1 with any candidate who designated that party as his or her preference but was not
2 nominated by the party.

3 11. A party nominee appearing on the same ballot as multiple other candidates who
4 are also associated with the same party will receive fewer votes from voters
5 seeking to vote for that party's candidates in the election than a party nominee who
6 is the only candidate on the ballot associated with his or her party.

7
8 12. Whether or not a party's nominee advances to the general election ballot under
9 Washington's Top Two primary system is frequently determined by 5% or less of
10 the voters participating in a primary.

11 13. In 2010 the Washington State Democratic Party (the "Democrats") nominated a
12 candidate for United States Representative for Congressional District 5. In the
13 2010 primary, the Democrats' nominee, Clyde Cordero, garnered 6.35 percent of
14 the vote (10, 787 votes total) and failed to receive enough votes to advance to the
15 general election. Another candidate on the primary ballot who had "(prefers
16 Democratic Party)" printed next to his name, but who was not the Democrats
17 previously-noted nominee, was one of the top two vote-getters for the position and
18 advanced to the general election ballot.

19
20 14. In 2010 the Washington State Democratic Party (the "Democrats") nominated a
21 candidate for State Representative Position 2, Legislative District 5. In the 2010
22 primary, the Democrats' nominee, Dean Willard, garnered 17.03 percent of the
23 vote (5,535 votes total) and failed to receive enough votes to advance to the
24 general election. Another candidate on the primary ballot who had "(prefers
25 Democratic Party)" printed next to his name, but who was not the Democrats
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1 previously-noted nominee, was one of the top two vote-getters for the position and
2 advanced to the general election ballot.

3 15. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
4 candidate for State Representative Position 1, Legislative District 22. In the 2010
5 primary, the Democrats’ nominee, Stew Henderson, garnered 23.10 percent of the
6 vote (7,950 votes total) and failed to receive enough votes to advance to the
7 general election. Another candidate on the primary ballot who had “(prefers
8 Democratic Party)” printed next to his name, but who was not the Democrats
9 previously-noted nominee, was one of the top two vote-getters for the position and
10 advanced to the general election ballot.
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12 16. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
13 candidate for State Representative Position 2, Legislative District 34. In the 2010
14 primary, the Democrats’ nominee, Marcee Stone, garnered 14.23 percent of the
15 vote (x votes total) and failed to receive enough votes to advance to the general
16 election. Two candidates on the primary ballot who had “(prefers Democratic
17 Party)” printed next to their names, but who were not the Democrats previously-
18 noted nominee, were the top two vote-getters for the position and advanced to the
19 general election ballot.
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21 17. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
22 candidate for State Senator, Legislative District 38. In the 2010 primary, the
23 Democrats’ nominee, Jean Berkey, garnered 32.16 percent of the vote (6,591 votes
24 total) and failed to receive enough votes to advance to the general election.
25
26 Another candidate on the primary ballot who had “(prefers Democratic Party)”

1 printed next to his name, but who was not the Democrats previously-noted
2 nominee, was one of the top two vote-getters for the position and advanced to the
3 general election ballot.

4 18. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
5 candidate for State Representative Pos. 1, Legislative District 40. In the 2010
6 primary, the Democrats’ nominee, Tom Pasma, garnered 15.70 percent of the vote
7 (5,308 votes total) and failed to receive enough votes to advance to the general
8 election. Another candidate on the primary ballot who had “(prefers Democratic
9 Party)” printed next to his name, but who was not the Democrats previously-noted
10 nominee, was one of the top two vote-getters for the position and advanced to the
11 general election ballot.
12

13 19. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
14 candidate for State Representative Position 1, Legislative District 42. In the 2010
15 primary, the Democrats’ nominee, Richard May, garnered 14.30 percent of the
16 vote (4,963 votes total) and failed to receive enough votes to advance to the
17 general election. Another candidate on the primary ballot who had “(prefers
18 Democratic Party)” printed next to his name, but who was not the Democrats
19 previously-noted nominee, was one of the top two vote-getters for the position and
20 advanced to the general election ballot.
21

22 20. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
23 candidate for County Clerk, Island County. In the 2010 primary, the Democrats’
24 nominee, Patricia Terry, garnered 24.62 percent of the vote (5,528 votes total) and
25 failed to receive enough votes to advance to the general election. Another
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1 candidate on the primary ballot who had “(prefers Democratic Party)” printed next
2 to her name, but who was not the Democrats previously-noted nominee, was one
3 of the top two vote-getters for the position and advanced to the general election
4 ballot.

5
6 21. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
7 candidate for County Assessor, Mason County. In the 2010 primary, the
8 Democrats’ nominee, Marcie Lohmeyer, garnered 25.27 percent of the vote (4,103
9 votes total) and failed to receive enough votes to advance to the general election.
10 Another candidate on the primary ballot who had “(prefers Democratic Party)”
11 printed next to her name, but who was not the Democrats previously-noted
12 nominee, was one of the top two vote-getters for the position and advanced to the
13 general election ballot.
14

15 22. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
16 candidate for County Commissioner, Position 3, Mason County. In the 2010
17 primary, the Democrats’ nominee, Ross Gallagher, garnered 13.82 percent of the
18 vote (707 votes total) and failed to receive enough votes to advance to the general
19 election. Another candidate on the primary ballot who had “(prefers Democratic
20 Party)” printed next to her name, but who was not the Democrats previously-noted
21 nominee, was one of the top two vote-getters for the position and advanced to the
22 general election ballot.
23

24 23. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
25 candidate for County Assessor, Thurston County. In the 2010 primary, the
26 Democrats’ nominee, Dennis Pulsipher, garnered 20.73 percent of the vote (11,532

1 votes total) and failed to receive enough votes to advance to the general election.
2 Another candidate on the primary ballot who had “(prefers Democratic Party)”
3 printed next to his name, but who was not the Democrats previously-noted
4 nominee, was one of the top two vote-getters for the position and advanced to the
5 general election ballot.
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7 24. In 2010 the Washington State Democratic Party (the “Democrats”) nominated a
8 candidate for County Treasurer, Thurston County. In the 2010 primary, the
9 Democrats’ nominee, Noah Crocker, garnered 15.97 percent of the vote (9.010
10 votes total) and failed to receive enough votes to advance to the general election.
11 Another candidate on the primary ballot who had “(prefers Democratic Party)”
12 printed next to his name, but who was not the Democrats previously-noted
13 nominee, was one of the top two vote-getters for the position and advanced to the
14 general election ballot.
15

16 25. In 2008 the Washington State Republican Party (WSRP) nominated Christine
17 Webb as its candidate for U.S. Representative in Washington’s Third
18 Congressional District. Another candidate, Michael Delavar, also appeared on the
19 primary ballot, expressing a preference for the Republican Party, but was not the
20 WSRP’s nominee. Mr. Delavar, was one of the top two vote-getters for the
21 position and advanced to the general election ballot carrying the Republican Party
22 name. He was not authorized to use the Republican Party name, and received no
23 support from the party. The WSRP’s nominee failed to receive enough votes to
24 advance to the general election.
25

26 26. By statute, a candidate for PCO is not elected unless he or she receives at least

1 10% of the vote cast in the precinct for the highest vote-getter of the same Party as
2 the candidate seeks to represent. RCW 29A.80.051. The State ignores this
3 requirement in determining the results of the PCO elections on the basis that there
4 are no other candidates of the same Party on the ballot in light of the Top Two
5 Primary. WAC 434-262-075. The State does not recognize statements of Party
6 preference, nomination by a Party or endorsement by a Party of a candidate for a
7 non-PCO office as designating to the State that a candidate of the same Party as a
8 PCO candidate is on the ballot for purposes of enforcing RCW 29A.080.051.

9
10 27. The State of Washington permits any registered voter to appear on the ballot as a
11 candidate for the office of party precinct committee officer without regard to
12 whether the voter is or is not a member of that party.

13
14 28. As I-872 has been implemented by the State, the use of the same ballot for the
15 election of precinct committee officers as is used for the election of candidates
16 qualified to appear on the general election ballot permits persons not affiliated
17 with a political party to cast ballots for its party leaders and contributes to voter
18 confusion regarding the meaning of party preference and party designations.

19
20 29. As I-872 has been implemented by the State, the counting of votes for a precinct
21 committee officer candidate is not limited to votes received from persons affiliated
22 with the political party of the PCO candidate.

23
24 30. As I-872 has been implemented by the State, election officials do not ascertain
25 whether a precinct committee officer candidate has received the minimum number
26 of votes required by RCW 29A.80.050 before declaring the candidate elected.

31. As I-872 has been implemented by the State, the State continues to impose

1 substantial restriction the political parties' nomination process by restricting how
2 the parties may pay for the process and communicate with their members
3 regarding party nominees.

4 32. Washington's campaign finance laws are an integral part of its primary and general
5 election system.

6
7 33. In August 2008, the Republican Party circulated, exclusively to its members,
8 information identifying its nominated candidate for governor (listed on the ballot
9 as "prefers GOP party") and calling for his support and the support of the rest of
10 the Republican-nominated state slate in that primary. Multiple candidates who
11 were not the Party's nominee would appear on the ballot as "prefers Republican
12 Party." In September 2008, the State Public Disclosure Commission found the
13 communication violated Washington's campaign finance laws regarding source of
14 payment, and commenced civil proceedings seeking penalties. On December 22,
15 2009, the King County Superior Court granted summary judgment to the State on
16 the grounds that the communication mailed by the Republican Party violated state
17 law governing source of funds to pay for such a communication.

18
19 34. In 2008, five members of the Libertarian Party sought election as Republican
20 precinct committee officers in Chelan County, and appeared on the ballot for that
21 office with the intention of changing the Republican Party's positions on certain
22 issues to those of the Libertarian Party.

23
24 35. The Washington Libertarian Party nominated candidates for one or more partisan
25 offices in the 2008 and 2010 elections.

26 36. In 2010, no Libertarian Party nominee received enough votes to advance to the

1 general election.

2 37. As I-872 has been implemented by the State of Washington, minor parties in
3 Washington State are denied any meaningful opportunity to communicate their
4 political endorsements and political message to the voters during the primary and
5 general election process in any official election materials furnished by the
6 Defendant State of Washington to the voters.

7
8 38. As I-872 has been implemented by the State of Washington, minor parties in
9 Washington State are denied any meaningful opportunity to participate in the
10 general election process in any electoral race where there are two major parties on
11 the primary election ballot.

12 The defendants contend as follows:

- 13
- 14 1. Given the language included with each ballot and in other official state-sponsored
15 materials, the reasonable, well-informed voter understands that a candidate's
16 statement of his or her preference for a political party does not mean that he or she
17 is nominated or endorsed by that party, or that the party approves of or associates
18 with that candidate.
 - 19 2. The State's implementation of I-872, including the use of explanatory statements
20 on ballots, in Voters' Pamphlets, on the Secretary of State's website, and in
21 information distributed to voters, confirms to voters that the Top Two primary
22 does not select a political party's nominee for "partisan office".
 - 23 3. Under I-872, all political parties and organizations, major, minor, or otherwise, are
24 free to nominate, endorse, support, and campaign for candidates for "partisan
25 office" in both the primary and in the November general election.
26

- 1 4. The Plaintiffs' evidence does not prove widespread voter confusion that a
2 candidate's statement of his or her preference for a political party means that he or
3 she is nominated or endorsed by that party, or that the party approves of or
4 associates with that candidate.
- 5 5. If the Plaintiffs show widespread voter confusion, they cannot meet their burden of
6 proving that the confusion was caused by the State's implementation of I-872.
- 7 6. The political parties cannot meet their burden of proving that the State's
8 implementation of I-872 has caused them unconstitutionally "severe harm" by
9 showing it is less convenient, less desirable, or more expensive for them to
10 participate in a Top Two election system than in other types of election systems.
- 11 7. Plaintiffs' evidence does not prove a severe burden to the political parties' First
12 Amendment right of association by being widespread in scope and forcing an
13 actual association between the party and the candidate, in contrast to the mere
14 impression of association.
- 15 8. Washington voters are presumed to know the essential elements of the law.
- 16 9. Washington voters are not stupid.
- 17 10. Washington voters are not lazy.
- 18 11. The State's Public Disclosure Commission campaign financing and advertising
19 laws (PDC laws) were not adopted as part of I-872 and serve an independent
20 purpose unrelated to the Top Two election system. The implementation of the
21 PDC laws is not the implementation of I-872.
- 22 12. The State's laws providing for the election of Precinct Committee Officers (PCOs)
23 were not adopted as part of I-872 and serve an independent purpose unrelated to
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1 the Top Two election system. The implementation of the PCO election laws is not
2 the implementation of I-872.

3 ISSUES OF LAW

4 Plaintiffs contend the issues of law to be determined by the court are:

- 5
- 6 1. Should the State be enjoined from accepting a candidate's self-designation of party
7 preference in the candidate's declaration of candidacy unless the party so
8 designated has consented to the use by the candidate of its name on the ballot and
9 instead, if the party so designated has not consented, treat the candidate as having
10 filed stating an independent status?
- 11 2. Should the State be enjoined from forcing political parties to be affiliated with
12 candidates claiming a "preference" of that party regardless of the candidates actual
13 political positions?
- 14 3. Should the State be enjoined from denying political parties the right to
15 communicate their nominations and their candidate preferences through the ballot
16 and through the official communications from the Defendant State of Washington
17 to the voters?
- 18 4. Should the State be enjoined from counting a ballot in the election of a party's
19 precinct committee officers unless the voter who submitted the ballot has voted in
20 partisan races on the same ballot only for candidates designated as preferring the
21 party of the precinct committee officer to be elected?
- 22
- 23

24 Defendants contend the issues of law to be determined by the Court are:

- 25 1. Can the Plaintiff political parties prove, under an objective standard, that there is
26 widespread voter confusion among reasonable and well-informed Washington

1 voters as to whether a candidate's statement of preference for a particular political
2 party means that the candidate is nominated or endorsed by that party, or that the
3 party approves of or associates with that candidate?

- 4
- 5 2. If so, is that widespread voter confusion caused by the State's implementation of I-
6 872?
- 7
- 8 3. If so, does that voter confusion severely burden the political parties' right of
9 association under the First Amendment, by being widespread in scope and forcing
10 an *actual* association between the party and the candidate, in contrast to the mere
11 *impression* of association?
- 12
- 13 4. Do the State's Precinct Committee Officer election laws severely burden the First
14 Amendment association rights of the three political parties in this case? If so, does
15 that conclusion regarding the PCO election laws entitle Plaintiffs to declaratory or
16 injunctive relief against I-872?
- 17
- 18 5. Does the State's sponsor disclosure law severely burden the First Amendment
19 association rights of the three political parties in this case? If so, does that
20 conclusion regarding the sponsor disclosure law entitle Plaintiffs to declaratory or
21 injunctive relief against I-872?

22 EXPERT WITNESSES

23 (a) The parties shall be limited to no more than the four expert witness listed
24 below on the issues listed for each witness.

25 (b) The names and addresses of the expert witnesses to be used by each party at
26 the trial and the general nature of the topics upon which each will testify (subject to
defendants' pending motion to strike Dr. Orbell based on untimely disclosure and the

1 litigants' motions in limine (if any) filed before trial):

2 1. On behalf of plaintiffs:

- 3 a. **Dr. Mathew Manweller**, Assistant Professor in the Political
4 Science Department of Central Washington University, testifying
5 regarding his published paper *The Very Partisan Non-Partisan Top-*
6 *Two Primary: Understanding What Voters Don't Understand*.
7 Address: 400 E. University Way, Ellensburg, WA 98926. Will
8 testify.
- 9 b. **Dr. Todd Donovan**, Professor in the Political Science Department
10 of Western Washington University, testifying regarding voter
11 confusion. Address: Political Sciences Department, Western
12 Washington University, 516 High Street, Bellingham, WA 98225.
13 Will testify.
- 14 c. **Dr. John Orbell**, Professor Emeritus of Political Science at the
15 University of Oregon, testifying regarding political science
16 experiments, and responding to the testimony of Dr. Donovan with
17 respect to Dr. Manweller's experiment. Address: Department of
18 Political Science, 1284 University of Oregon, Eugene, OR 97403-
19 1284. Possible witness only.
- 20 d. **Mr. Richard Winger**, elections expert and author/editor of *Journal*
21 *of Election Law*, the *Fordham Urban Law Review*, and other
22 publications, testifying about instances and effects of instances
23 where candidates have been permitted to falsely claim the mantle of
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1 a political party to benefit from the public standing of that party and
2 about the effects of I-872 on the ability of minor parties to present
3 their message on the general election ballot. Address: Ballot
4 Access News, P.O. Box 470296, San Francisco, CA 94147.
5 Possible witness only.
6

7 2. On behalf of defendants:

- 8 a. **Dr. Todd Donovan**, Professor in the Political Science Department
9 of Western Washington University, testifying about the two reports
10 he produced for this matter ((1) *Report on Paper by Mathew*
11 *Manweller*, August 2010 (N.B., title shown on table of contents is
12 *Report on Factual Political Knowledge and Voter Confusion*); and
13 (2) *Report on Factual Political Knowledge and Voter Confusion*,
14 August 2010), and responding to Plaintiffs' expert testimony.
15 Address: Political Sciences Department, Western Washington
16 University, 516 High Street, Bellingham, WA 98225. Will testify.
17

18 OTHER WITNESSES

19 The names and addresses of witnesses, other than experts, to be used by each party at
20 the trial and the general nature of the testimony of each (subject to defendants' pending
21 motion to strike certain Plaintiffs' witnesses based on untimely disclosure, and the litigants'
22 motions in limine (if any) filed before trial):
23

24 1. On behalf of plaintiffs:

- 25 a. **Todd C. Nichols**, chair of the WSDCC Rules Committee, testifying
26 with regard to State Democratic Party rules as they relate to

1 selection of delegates to Party conventions, nomination and election
2 of Party officers and nomination of Party candidates. Address:
3 Cogdill Nichols Rein Wartelle Andrews, 3232 Rockefeller Avenue,
4 Everett, WA 98201. Possible witness only.

5
6 b. **Dwight Pelz**, Washington State Democrats Chair, testifying
7 regarding (a) confusion among voters and party members resulting
8 from use of the Party's name in filing, in the voter's pamphlet and
9 on ballots in connection with the Top Two primary as implemented
10 by the State; (b) impact on party-supported candidates of the
11 confusion; and (c) subject matter also testified to by Mr. Nichols.
12 Address: Washington State Democrats, PO Box 4027, Seattle, WA
13 98104. Possible witness only.

14
15 c. **Jaxon Ravens**, Executive Director of the Washington State
16 Democrats, testifying as to same subject matter as Mr. Pelz and Mr.
17 Nichols. Address: Same as Mr. Pelz. Possible witness only.

18 d. **Paul Berendt**, former Washington State Democrats Chair,
19 testifying to the same subject matter as Mr. Pelz and Mr. Ravens.
20 Address: Strategies 360, 1505 Westlake Ave. N., Suite 1000,
21 Seattle, WA 98109. Possible witness only.

22
23 e. **Curtis Fackler**, former candidate for statewide office, former
24 Spokane County GOP chairman, Member Republican State
25 Committee of Washington, testifying regarding the structure of
26 local Republican parties and his own experience running for state

1 office. Address: 3327 W. Indian Trail Road #165, Spokane, WA
2 99208. Possible witness only.

- 3 f. **Luke Esser**, Chairman Washington State Republican Party,
4 testifying regarding the history, purpose and organization of the
5 Republican Party, its efforts to convey its political message to
6 voters and the public, the impact of I-872 on the Party's message
7 and candidates, and incidents of confusion regarding candidates and
8 their association or lack thereof with the Republican Party.

9 Address: 2840 Northup Way, Ste. 140, Bellevue, WA 98004.
10 Possible witness only.

- 11 g. **Dan Brady**, Executive Director Washington State Republican
12 Party, testifying to the same subject matter as Mr. Esser. Address:
13 2840 Northup Way, Ste. 140, Bellevue, WA 98004. Same as Mr.
14 Esser. Possible witness only.

- 15 h. **Sam Reed**, Secretary of State for Washington, 520 Union Avenue
16 SE, Olympia, WA 98504 and contact number 360-902-4180. The
17 Secretary is expected to testify regarding Washington's
18 implementation of I-872. Address: Office of the Secretary of State,
19 Legislative Building, P.O. Box 40220, Olympia, WA 98504-0220.
20 Possible witness only.

- 21 i. **Fredi Simpson**, Member Republican National Committee from
22 Washington, former state and county Party officer, testifying
23 regarding the impact of I-872 on local Republican Parties, selection
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1 of Party officers, and impact on Party message and candidate
2 positions in strongly Republican jurisdictions. Address: 504
3 Kittitas St., Wenatchee, WA 98807. Possible witness only.

4 j. **Reuven Carlyle**, State Representative, testifying regarding
5 organization of the legislature, the effect of I-872 on candidate
6 messages, and political campaigns, including the information
7 conveyed to voters by party designations on the ballot and other
8 election-related material. Address: 3131 Western Ave., Suite 421,
9 Seattle, WA 98121. Possible witness only.

10 k. **Dave Ammons**, employee Secretary of State of Washington,
11 testifying regarding the Top Two Primary system. Address: Office
12 of the Secretary of State, Legislative Building, P.O. Box 40220,
13 Olympia, WA 98504-0220. Possible witness only.

14 l. **Mary Jane Aurdal Olson**, testifying regarding the issuance of
15 certificates of election as Republican precinct committee officers in
16 Island County by election officials, to individuals who were not
17 Republicans and were hostile to the party's agenda, and the
18 disruption of party activities by PCOs elected who do not actually
19 share the principles of the Republican Party. Address: PO Box 407,
20 Clinton, WA 98236. Possible witness only.

21 m. **David Postman**, testifying to conversations with Secretary of State
22 Sam Reed, and the content of newspaper articles written while a
23 reporter with the *Seattle Times*, including but not limited to the
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1 accuracy of quotations and other material contained in articles
2 written by him. Address: 505 Fifth Avenue South, Seattle, WA
3 98104. Possible rebuttal witness only.

4 n. **Chris Mulick**, testifying to conversations with Secretary of State
5 Sam Reed, and the content of newspaper articles written while a
6 reporter with the *Tri-city Herald*, including but not limited to the
7 accuracy of quotations and other material contained in articles
8 written by him. Address: P.O. Box 40464, Olympia, WA 98504-
9 0464. Possible rebuttal witness only.

10 o. **Sam Taylor**, testifying to conversations with Todd Donovan, and
11 the content of newspaper articles written while a reporter with the
12 *Bellingham Herald*, including but not limited to the accuracy of
13 quotations and other material contained in articles written by him.
14 Address: 1155 N. State St., Suite 200, Bellingham, WA 98225.
15 Possible rebuttal witness only.

16 p. **Lori Sotelo**, testifying regarding communications from King
17 County Election Officials regarding implementation of the top-two
18 election system, and the impact of state implementation on the
19 election of Republican Precinct Committee Officers. Address: 845
20 106th Ave NE, #110, Bellevue, WA 98004. Possible witness only.

21 q. **Catherine Blinn**, Deputy Director of Elections, Office of the
22 Secretary of State, testifying regarding the implementation of the
23 procedures under I-872, and voter and election official confusion.
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1 Address: Office of the Secretary of State, Legislative Building, P.O.
2 Box 40220, Olympia, WA 98504-0220. Possible witness only.

3 r. **Sheryl Moss**, Office of the Secretary of State, Certification and
4 Training Manager, testifying regarding the creation and
5 implementation of I-872 as well as training provided to county
6 auditors in relation to the election. Address: Office of the Secretary
7 of State, Legislative Building, P.O. Box 40220, Olympia, WA
8 98504-0220. Possible witness only.

10 s. **Brian Zystra**, Deputy Communications Director, Office of the
11 Secretary of State for Washington, testifying regarding information
12 sources for preparation of news releases, state promotions, etc. in
13 preparation for and under the I-872 Primary system. Address:
14 Office of the Secretary of State, Legislative Building, P.O. Box
15 40220, Olympia, WA 98504-0220. Possible witness only.

17 t. **Stuart Elway**, communication strategy researcher, testifying
18 regarding the surveys and polls conducted by Elway Research, Inc.
19 at the request of the Secretary of State regarding the
20 implementation and results of I-872. Address: Elway Research,
21 Inc. 7107 Greenwood Avenue, Seattle, WA 98103. Possible
22 witness only.

24 u. **Pam Roach**, Senator for District 31, testifying regarding the
25 composition and purpose of A Top Two primary system as it
26 applies to the political structure in Washington State. Address: 202

1 Newhouse Building, P.O. Box 40431, Olympia WA 98504-0431.

2 Possible witness only.

3 2. On behalf of defendants:

4 a. **Nick Handy**, Director of Elections, Office of the Secretary of State
5 of Washington, testifying regarding the State's election process,
6 including the manner of conducting primary and general elections
7 under Initiative 872, communications between State and county
8 election officials concerning the implementation of I-872 and the
9 operation of elections, and the State's efforts to educate voters
10 about the Top Two election system. Address: 520 Union Avenue
11 SE, Olympia, WA 98504. Will testify.

12
13 b. **Catherine S. Blinn**, Assistant State Elections Director, Office of
14 the Secretary of State of Washington, testifying regarding the
15 State's election process, including the manner of conducting
16 primary and general elections under Initiative 872, communications
17 between State and county election officials concerning the
18 implementation of I-872 and the operation of elections, and the
19 State's efforts to educate voters about the Top Two election system.
20 Address: 520 Union Avenue SE, Olympia, WA 98504. Will
21 testify.

22
23 c. Defendants reserve the right to call any witness listed by Plaintiffs
24 if not called by them.
25
26

EXHIBITS

Per agreement between the parties and with consent of the Court, the parties submit the exhibits in this case in the form of the matrices attached to this Pre-Trial Order. Per CR 16.1, the matrices are divided by: admissibility stipulated; authenticity stipulated, admissibility disputed; and authenticity and admissibility disputed.

ACTION BY THE COURT

(a) This case is scheduled for trial without a jury on January 18, 2011, at Seattle, Washington.

(b) Trial briefs shall be submitted to the court on or before January 10, 2011.

This order has been approved by the parties as evidenced by the signatures of their counsel. This order shall control the subsequent course of the action unless modified by a subsequent order. This order shall not be amended except by order of the court pursuant to agreement of the parties or to prevent manifest injustice.

DATED this ____ day of January, 2011.

Hon. John C. Coughenour

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