The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff-Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff-Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant-Intervenors,

WASHINGTON STATE GRANGE,

Defendant-Intervenor.

NO. C05-0927-JCC

STATE'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:

September 17, 2010

No oral argument requested

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

I. MOTION

The State of Washington, Rob McKenna, Attorney General of the State of Washington, and Sam Reed, Secretary of State of the State of Washington (hereinafter "State"), Defendant-Intervenors in the captioned action, hereby move for summary judgment in favor of the Defendants on all issues remaining before the Court. This Motion is based upon the accompanying Memorandum with accompanying declarations and exhibits.

II. MEMORANDUM

A. INTRODUCTION

This case is a challenge by the Republican, Democratic, and Libertarian parties ("political parties") to the constitutionality of Initiative Measure 872 (I-872), which was enacted by popular vote in November of 2004, and which established a new "top two" system of electing candidates for "partisan office" in Washington. Wash. Rev. Code 29A.04.110. In 2008, the United States Supreme Court upheld I-872 against the political parties' facial challenge. *Washington State Grange v. Washington State Republican Party* ("*Grange*"), 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). The Supreme Court did not consider any as-applied claims.

On remand to this Court, the Defendant-Intervenors State and Washington State Grange moved to dismiss all remaining claims (Dkt. Nos. 133 and 134) and two of the Plaintiff political parties moved to amend and supplement their complaints (Dkt. Nos. 137 and 140). In response to these motions, the Court entered an Order on August 20, 2009, dismissing certain claims by the political parties, identifying claims that could be maintained,

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

and authorizing amendment of the political parties' complaints. (August 20 Order) (Dkt. No. 184).

First, the Court allowed the political parties to bring a claim that "I-872, as implemented in practice, creates the sort of voter confusion that might support a First Amendment claim for violation of the political parties' association rights." August 20 Order at 9. The Court noted that "[t]o succeed on their as-applied challenge, Plaintiffs must demonstrate that I-872 *in practice* actually creates the sort of voter confusion that would infringe upon the political parties' associational rights." *Id.* at 10.[1]

The Court also made it plain that successfully proving an as-applied challenge to aspects of the state's implementation of I-872 would not warrant the remedy of setting aside I-872 in its entirety.

> Now that the Supreme Court has held that I-872 can be implemented without violating Plaintiffs' right to association, *Plaintiffs will not be able to strike down I-872 in its entirety.* Instead, the best that Plaintiffs can achieve is to invalidate certain portions of I-872's implementation and enjoin the State from implementing I-872 in specific ways that lead to voter confusion or other forms of forced association.

August 20 Order at 21.

Second, the Court allowed the Plaintiffs to bring a claim that "I-872 is unconstitutional as-applied to the election of party Precinct Committee Officers ('PCOs')." August 20 Order at 10. The Court noted that "it seems reasonable that the application of I-872's party-preference designations and single, undifferentiated ballot to PCO elections

---

[1] The political parties also complained about certain aspects of state law regarding campaign disclosure (Wash. Rev. Code § 42.17.510). Without allowing a separate challenge to that statute, the Court noted that to the extent the campaign disclosure requirements "increase this voter confusion, that is clearly relevant to Plaintiffs' as-applied challenge." August 20 Order at 10.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

might raise associational claims that were not apparent on the face of the initiative." August 20 Order at 11.[2]

In this Memorandum, the State will show: (1) that through the ballot and other state election-related materials, the state has implemented I-872 consistent with the decision of the United States Supreme Court in *Grange*, so as to eliminate voter confusion that would severely burden the political parties' associational rights;[3] (2) that the parties cannot demonstrate such voter confusion under the informed voter standard contemplated by the United States Supreme Court in *Grange*; (3) that Washington's campaign finance disclosure law, in its interaction with the implementation of I-872, does not cause such voter confusion but, if it did, the remedy would not be invalidation of I-872, the sole remedy the political parties seek; and (4) that the manner of electing Precinct Committee Officers (PCOs) is constitutional, but if it were not, the remedy would not be to invalidate I-872 or to rewrite state law, the only types of relief the political parties seek.[4]

Based on this showing, the State is entitled to summary judgment upholding the state's implementation of I-872 in its entirety. Relief, if any, would necessarily be confined to invalidating and enjoining specific aspects of those other statutes that violate the political parties' associational rights.

---

[2] The Court barred the Plaintiffs from making as-applied challenges based upon ballot-access claims or trademark claims. August 20 Order at 11-18.

[3] As the Court in *Grange* observed, where a state law imposes only a modest burden on associational rights, the state's regulatory interests are generally sufficient to pass constitutional muster. *Grange*, 552 U.S. at 452.

[4] In addition, this Motion disposes of a claim by the Republican Party, based on a separate state court action, that its ability to communicate with its members has been impaired. *See* pages 22-23, below.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

B. ARGUMENT

1. The state has implemented I-872 as the United States Supreme Court suggested it should to eliminate any real threat of voter confusion.

The possibility of voter confusion was the primary argument advanced by the Plaintiffs in their facial challenge to I-872, and the issue of voter confusion thus was thoroughly considered by the United States Supreme Court in its 2008 opinion in *Grange*. The majority and concurring opinions in that case recognize that the issue of voter confusion is not the mere possibility that some voters will misunderstand the relationship between a given candidate and a given political party, but the possibility that state actions implementing I-872 could substantially mislead or confuse informed voters in such a way as to severely impair the First Amendment rights of the plaintiff political parties.

The majority opinion characterized the political parties' argument 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.

Grange, 552 U.S. at 454.

The Court expressly rejected these arguments:

> But respondents' assertion that voters will misinterpret the party-preference designation is sheer speculation. It "depends upon the belief that voters can be 'misled' by party labels. But '[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.'" [Citations omitted.] There is simply 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. [Citations omitted.]

Id. (emphasis added).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

The Court observed 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 Court went on to discuss how a constitutionally valid ballot under I-872 might read:

> [W]e must, in fairness to the voters of the State of Washington who enacted I-872 and in deference to the executive and judicial officials who are charged with implementing it, 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 456.

The Court explained that the State had expressed its intent to implement I-872 to avoid as-applied constitutional issues:

> 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.*

Id. at 456 (footnote omitted; emphasis added).

Chief Justice Roberts' concurrence also suggested how I-872 could be implemented to preserve its constitutionality: "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." *Id.* at 460 (Roberts, C.J., concurring). In

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

effect, these statements gave the state a blueprint for implementing I-872 in a constitutional manner.

The state has implemented I-872 as the Supreme Court suggested it should "to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment." *Id.* at 456. The Declaration of Catherine Blinn, Assistant Elections Director, with exhibits attached, shows how the state has implemented I-872. The exhibits include:

- Examples of 2008 primary ballots from several representative counties, including ballot inserts explaining the Top Two Primary (Exhibits B, C, D, and E);
- Examples of 2008 general election ballots from several representative counties, together with ballot inserts explaining the Top Two Primary as related to the general election ballot (Exhibits F, G, and H);
- A copy of the cover and relevant pages of the 2008 state Voters' Pamphlet published for the 2008 primary election, which included explanations of the Top Two Primary (Exhibit I);
- A copy of the cover and relevant pages of the 2008 state Voters' Pamphlet published for the 2008 general election, which included explanations of how candidates advance under the Top Two Primary to the general election (Exhibit J);
- Press kits, state-sponsored public service announcements, and information showing the airplay of the public service announcements explaining the Top Two Primary to voters (Exhibits K, L, M, N, O, and P);

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

- Educational and explanatory information maintained on the Secretary of State's website (Exhibits Q, R, S, and T).

These exhibits document that the state has followed the Supreme Court's suggested blueprint for implementing I-872 in a constitutional manner. Each ballot used in either the primary or general election contains the following prominent and clear explanation: *"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*." Blinn Decl., Exs. B-H. The Secretary of State adopted rules requiring this language appear both on the ballot and in the Voters' Pamphlet. Wash. Admin. Code § 434-230-015(4)(a) (requiring statement to appear on primary and general election ballots); Wash. Admin. Code § 434-381-200 (requiring statement to appear in Voters' Pamphlet). A separate sheet was also inserted with each mailed ballot for the primary and general election making the same points. Blinn Decl., Exs. B-H; Wash. Admin. Code § 434-250-040(1)(j), (k). In addition to including the same information in the Voters' Pamphlet mailed to every voter in the state, the Voters' Pamphlets provided further explanation of how the Top Two Primary system operates. Blinn Decl., Exs. I, J. An explanation of the Top Two Primary and of the candidates' statements of personal party preference was emblazoned on the cover of the 2008 statewide primary Voters' Pamphlet. *Id.*, Ex. I.

The state conducted a vigorous and sustained education program to inform voters about I-872, and specifically to clearly explain the meaning of the phrase "Prefers X Party" as the phrase appears on a primary or general election ballot. In a series of public service announcements, the state informed voters as to how the Top Two Primary would be

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

conducted, and specifically what the candidates' statements of their personal preferences for a political party did, and did not, mean. "A candidate's party preference doesn't mean the party endorses or approves of that candidate." Blinn Decl., Exs. L, M. Those public service announcements were broadcast literally thousands of times on television and radio throughout the state in the weeks preceding the 2008 primary. Blinn Decl., ¶ 11, and Exs. O, P.

The state has implemented I-872 as the *Grange* decision contemplated it could be implemented consistent with the associational interests of the political parties. The state has informed Washington voters that a candidate's statement of party preference under I-872 does not mean that the candidate is nominated or endorsed by the party or that the party approves of or associates with that candidate. The state has done so (1) on the ballot itself; (2) in a separate insert mailed to every voter with their ballots; (3) in the Voters' Pamphlet; and (4) in an extensive public education campaign.

The state has made every reasonable effort to ensure that voters in Washington have the opportunity to be well-informed and aware of the nature of the Top Two Primary and the distinctions between that system and a party nominating system. The state has done so both in the language of I-872 itself (which was after all enacted by the voters) and as the *Grange* Court contemplated, from explanations on the ballot, in the Voters' Pamphlet, and education materials widely distributed by the state. There can be no serious remaining argument that the state's implementation of I-872 would cause voters to be "confused" between a candidate who has expressed a preference for a given party and a party nominee or a candidate approved by that party.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

2. Demonstrating voter confusion requires an objective showing that the political parties cannot satisfy.

As discussed above, under *Grange*, determining whether voter confusion exists that would severely burden the associational rights of the political parties is to be based on the state's implementation of the I-872 election system, as the system relates to a "well-informed electorate" with respect to confusion between a candidate's personal party-preference designation and the chosen nominee or representative of a political party. *Grange,* 552 U.S. at 454-58. Chief Justice Roberts' concurring opinion is equally clear on these points. "It is possible that no *reasonable voter* in Washington State will regard the listed candidates as members of, or otherwise associated with, the political parties the candidates claim to prefer." *Id.* at 461 (emphasis added). Like the majority, the concurring justices assume the state's implementation of the election system will be judged against a reasonable, informed voter standard in evaluating the presence of "any real threat of voter confusion." *Id.* at 456.

Under such a standard, the Court would consider whether a reasonable, informed voter will be confused between (a) a candidate who has expressed a preference for a given political party in filing for partisan public office and (b) a candidate who has been officially nominated by, or endorsed by, or authorized to speak on behalf of, that political party. Accordingly, it would be of little or no significance whether individual voters subjectively perceived or exhibited "confusion" as to whether a candidate expressing a party preference is a nominee or spokesperson for that party. The Court would evaluate the manner in which I-872 has been implemented from the point of view of a reasonable, informed voter, based primarily, if not entirely, on a judicious evaluation of the objective effect of state action rather than subjective impressions of its effect on voters. *See also*, *Grange*, 552 U.S. at 461

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

(Roberts, C.J., concurring) (noting that if the ballot explains which party the candidate prefers, "Voters would understand that the candidate does not speak on the party's behalf or with the party's approval.").

The preference for a similar objective standard in as-applied challenges is explicit in other recent Supreme Court cases as well. A notable recent case is *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007), an "as-applied" challenge to certain portions of the federal laws regulating the sources of campaign contributions. As the lead opinion observes, "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the communication's substance rather than on amorphous considerations of intent and effect." *Id.,* 551 U.S. at 469. The Court observed that a test based on "actual effects" would "typically lead to a burdensome, expert-driven inquiry, with an indeterminate result." *Id.*[5]

The existence of voter confusion is not—cannot be—a matter for unending court battles to determine election by election, or voter by voter, whether sufficient subjective "voter confusion" exists at a particular time to justify judicial intervention into the state's chosen process for electing its officers. A subjective standard would be practically unworkable, allowing new and different challenges to the same statutory language year after year, with potentially differing results, leading in turn to constant re-examinations and frequent revisions to the way in which elections are conducted. By contrast, objective

[5] In other recent cases, the Supreme Court has expressed a preference for objective rather than subjective standards. *See, e.g., Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) (adopting an objective standard for "recklessness" for civil litigation); *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) (adopting an objective "reasonable employee" standard for interpretation of the anti-discrimination and retaliation provisions of Title VII of the Civil Rights Act of 1964).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

evaluation of the manner in which I-872 has been implemented by the state provides a judicially workable standard and avoids subjective discrepancies and variables that otherwise would characterize the inquiry.

Under such a standard, this Court would examine the language of I-872 and its implementing rules, the form of the ballot, the Voters' Pamphlet and other state-issued materials, and the state's voter education efforts, and determine from these materials whether the state's implementation of I-872 would create or foster voter confusion as defined above. The question becomes simply whether the state's implementing actions viewed objectively would create real confusion in a reasonable, informed voter.

3. The political parties' claim that Washington's sponsor disclosure provision in Wash. Rev. Code § 42.17.510(1) causes voter confusion in implementing I-872 is not well taken, and does not warrant the only relief that the political parties seek, invalidating I-872.

U.S. Supreme Court and Ninth Circuit precedent support recognition that state disclosure requirements that bring more information into the political marketplace are constitutionally valid and do not interfere with the content or quantity of advocacy. *See, e.g.*, *Citizens United v. Fed. Election Comm'n,* 558 U.S. ___, 130 S. Ct. 876, 914, 916 (2010) ("transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages" and they "do not prevent anyone from speaking"); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (noting that disclosure requirements in § 304 of the Federal Election Campaign Act "[do] not prevent anyone from speaking"); *id.* at 197 ("Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public."); *Zauderer v. Office of*

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 650, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985) ("Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech."); *Buckley v. Valeo*, 424 U.S. 1, 66-67, 81-82, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 791 (9th Cir.), *cert. denied*, 549 U.S. 886, 127 S. Ct. 261, 166 L. Ed. 2d 151 (2006); *Caruso v. Yamhill Cy.*, 422 F.3d 848, 857 (9th Cir. 2005) (upholding requirement that certain information be placed on ballot for measure that would result in increased taxes). It is against that backdrop that the Court should consider the parties' claim that a provision of state campaign disclosure laws invalidates the implementation of I-872.

The Republican and Democratic parties allege that: "The State, through its . . . campaign advertising statutes, . . . compels [the political parties] to associate with any person who files a declaration of candidacy expressing a 'preference' for the Party, regardless of whether the Party desires association with the person." Supplemental and Amended Complaint for Declaratory Judgment and for Injunctive Relief Regarding Initiative 872 and Primary Elections ¶ 14 (Republicans' Am. Compl.); First Amended and Supplemental Complaint in Intervention for Declaratory Judgment and for Injunctive Relief Regarding Initiative 872 and Primary Elections ¶ 13 (Democrats' Am. Compl.). They allege, as does the Libertarian Party, that "implementation of I-872 (including its interaction with State . . . campaign disclosure laws) will lead to voter confusion that will severely burden" their associational rights. Libertarian Party's First Amended Complaint in Intervention for Declaratory Judgment and Other Relief at 2 (Summary of Action) (Libertarian's Am. Compl.); *see also* Republicans' Am. Compl. ¶ 58; Democrats' Am. Compl. ¶ 50.

The political parties' claim refers to a portion of the Washington campaign sponsor identification statute requiring that: "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." Wash. Rev. Code § 42.17.510(1). The Republican and Democratic parties also refer for their claim to a rule enacted by the Public Disclosure Commission (PDC) and a brochure issued by the PDC in 2008. Republicans' Am. Compl. ¶ 28; Democrats' Am. Compl. ¶ 25. The PDC's rule provides that:

> (1) "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.
>
> (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.

Wash. Admin. Code § 390-05-274 (effective June 30, 2010) (provided for ease of reference as Ex. D to the Decl. of Counsel in Support of State's Motion for Summary Judgment). The 2008 PDC brochure allows candidates to use party symbols and abbreviations in designating their party preference in campaign advertising.

A reasonable, informed voter would have no reason to believe that the information required to be disclosed under Wash. Rev. Code 42.17.510(1) signifies anything other than what is on the candidate's declaration of candidacy. On its face, the single line in Wash. Rev. Code § 42.17.510(1) makes that clear, and nothing in the PDC's rule provides otherwise. In addition, an informed voter would know that I-872 fundamentally changed

Washington's election system from a nominating primary to a top two primary, and that I-872 allows a candidate to express his or her political party preference. In such a context, an informed voter would have no reason to believe that a candidate's party designation in campaign advertising signifies nomination by or approval of a party, or anything other than the candidate's party preference.

Furthermore, contrary to the political parties' suggestion, the PDC's rule plainly does not equate "party preference" with "party affiliation." It simply ensures the usability of the disclosure forms mentioned in section 2 of the rule, and clarifies that in applying Wash. Rev. Code § 42.17, the candidate's expression of party preference triggers the disclosure requirement.[6]

More to the point, the central issue now before the Court is whether the state's implementation of I-872 creates voter confusion. From its inception, this litigation has been a challenge to I-872. Wash. Rev. Code § 42.17.510(1), which addresses candidate expressions of party or independent preference for disclosure purposes, is not part of I-872. It was not enacted as part of I-872, and is not part of the state's election system. Wash. Rev. Code § 42.17.510(1); [7] *see also* Blinn Decl., Ex. A (text of I-872). As to implementation of *I-872*, the political advertising disclosure statute is tangential at best. The focus of this case is the *election* system created by I-872, and in that system, the voter is plainly informed that

---

[6] The PDC adopted the quoted rule on a temporary, emergency basis. Washington State Register, WSR 10-12-114 (June 30, 2010), available online at: http://apps.leg.wa.gov/documents/laws/wsr/2010/12/10-12-114.htm (last accessed Aug. 25, 2010).

[7] Wash. Rev. Code § 42.17.510 was originally enacted in 1984. 1984 Wash. Sess. Laws, ch. 216, § 1. Following subsequent amendments, the legislature amended it again in 2005, to make it consistent with I-872 by referring to a candidate's personal statement of party preference. 2005 Wash. Sess. Laws, ch. 445, § 9. The legislature amended it again in 2010. 2010 Wash. Sess. Laws, ch. 204, § 505.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

the candidate's statement of party preference does not signify nomination by or acceptance of the candidate by the party.

The constitutional merits of Wash. Rev. Code § 42.17.510(1) aside, the only appropriate relief would be narrowly tailored to address the statutory provision causing the confusion.[8] As this Court previously ruled, relief invalidating I-872 in its entirety is not available to the political parties following the *Grange* decision. August 20 Order at 21. In August of 2009, this Court also ruled that "it is important that plaintiffs' amended pleadings are updated to reflect not only their specific challenges to the state's implementation of I-872 but also the specific relief they request to remedy those challenges." August 20 Order at 20. In fairness, the political parties should be held to have heeded this aspect of the Court's Order. The relief that the parties have sought should be denied.

[8] Principles of severability are not directly applicable because Wash. Rev. Code § 42.17.510 is not part of I-872. Nonetheless, those principles also demonstrate the overreaching of the political parties in the relief that they request. Washington law is clear that, "Ordinarily, 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.,* 154 Wash. 2d 52, 67, 109 P.3d 405 (2005). The presence or absence of a severability clause in the legislation is not determinative. *United States v. Hoffman*, 154 Wash. 2d 730, 748, 116 P.3d 999 (2005). An unconstitutional provision of an act can be severed unless "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.'" *C.A.M.A.*, 154 Wash. 2d at 67 (quoting *Guard v. Jackson*, 83 Wash. App. 325, 333, 921 P.2d 544 (1996)).

The parties cannot plausibly contend that I-872 should be invalidated based upon the notion that Washington's voters would not have enacted it in the absence of the campaign advertising law. *This is precisely what Washington's voters did.* They enacted I-872 without making any reference to campaign advertising or to chapter 42.17 of the Revised Code of Washington.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

4. Washington's system for electing precinct committee officers is constitutional. Even if it were not, however, that would not warrant the relief that the political parties seek—invalidating I-872 or rewriting governing statutes.

Precinct Committee Officers are officers of major political parties, forming the grass roots level of political party organization. *See* Wash. Rev. Code § 29A.80.020; 030. Although PCOs are not public officials, they are elected at public expense on the same day as the state's primary occurs. Wash. Rev. Code § 29A.80.051 ("The office [of precinct committee officer] must be voted upon at the primaries, and the names of all candidates must appear under the proper party and office designations on the ballot for the primary for each even-numbered year, and the one receiving the highest number of votes will be declared elected.")

The Republican and Democratic parties allege in their amended complaints that Washington's system for electing PCOs is unconstitutional.[9] Republicans' Am. Compl. ¶¶ 30-33; Democrats' Am. Compl. ¶¶ 27-30. One basis of the political parties' claim is that PCO candidates are not required to state that they are members of the party on the candidate's declaration of candidacy. Republicans' Am. Compl. ¶ 31; Democrats' Am. Compl. ¶ 28.

Contrary to the political parties' contention, eligibility to file as a candidate for PCO is statutorily limited to "members" of a political party. Wash. Rev. Code § 29A.80.041 provides that: "Any member of a major political party . . . may . . . file his or her declaration of candidacy . . . for the office of precinct committee officer". Further, candidates for PCO

[9] Plaintiff-Intervenor Libertarian Party of Washington State makes no similar allegations, presumably because, as the Libertarian Party is a minor party, the state does not provide for the election of Libertarian PCOs. Wash. Rev. Code § 29A.80.030 (limiting PCO elections to major political parties).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

"must make a public declaration of party affiliation in the form of a precinct committee officer declaration of candidacy." Wash. Admin. Code § 434-262-075 (as amended, July 6, 2010).

In addition, the two major political parties contend that Washington's system for electing party PCOs "unconstitutionally interferes with the internal affairs of [the party] by allowing [non-members] to participate in the election of the Party's precinct committee officers". Republicans' Am. Compl. ¶ 30; Democrats' Am. Compl. ¶ 27. The parties base their argument on a decision of the Ninth Circuit, *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277 (9th Cir. 2003).

In *Arizona Libertarian Party*, the Ninth Circuit concluded that Arizona's system for electing PCOs violated the political party's associational rights because Arizona law authorized nonmembers of the party to vote for party PCOs. *Id*. at 1281. *See* Ariz. Const. art. VII, § 10, cited *id*. at 1280. Arizona conducted what the court referred to as a "semiclosed primary system," under 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." *Arizona Libertarian Party*, 351 F.3d 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 failed constitutional muster.

PCO elections in Washington are conducted differently from the Arizona elections at issue in *Arizona Libertarian Party.* Unlike Arizona, Washington does not conduct a party nominating primary. It does not prepare separate primary ballots for each political party and

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

then make them available to be voted by any voter. Most important, unlike Arizona, Washington law does not authorize unaffiliated voters or members of third parties to participate in the election of a party's PCOs.

Under Washington's election system, candidates for PCO appear in a distinct location on the single primary election ballot, separate from candidates for public offices. The heading of that part of the ballot reads, "Election of Political Party Precinct Committee Officer." Wash. Admin. Code § 434-230-100(5). Washington explicitly advises voters, *on the ballot*, that voting for PCOs is limited to party members. By rule, before listing PCO candidates, the ballot is required to state:

> 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.

Id.; *see also* Blinn Decl., Ex. B (example of Top Two Primary ballot). Thus, the ballot explains that PCOs are political party offices, and that voting for them is limited to party members.

The rules of the Secretary also explain that, "For the limited purpose of voting in a precinct committee officer election, a voter affiliates with a major political party when he or she votes for a candidate of that party." Wash. Admin. Code § 434-230-100(6). Through these measures, Washington thus avoids the critical feature of the Arizona law that led to its invalidation in *Arizona Libertarian Party*. Washington does not authorize nonmembers of a political party to vote for precinct committee officers of that party.

Even if Washington's method of electing PCOs were constitutionally infirm, however, the only appropriate legal relief would be for the Court to invalidate the offending

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

statutes or practices and preclude the state from implementing them. But, here again, that is not the relief that the political parties seek. Rather, based upon their challenge to the constitutionality of PCO elections, the Republican and Democratic parties ask this Court to declare that I-872 is unconstitutional. Republicans' Am. Compl. ¶ 59; Democrats' Am. Compl. ¶ 51. This position is untenable. Washington's law governing PCO elections is not part of I-872. It is a wholly independent statutory scheme. Only a few statutes touch upon the election of PCOs. None of them were enacted or amended through I-872.[10] Similarly, nothing in I-872 addresses PCO elections.[11] Blinn Decl., Ex. A (copy of I-872). As discussed above, even if it were applicable, the test for severability of unconstitutional provisions under Washington law would not support the political parties' requested relief. *See infra* 16 n.8.

Later in their amended complaints, the political parties take a different tack, and ask this Court to affirmatively legislate to change Washington law governing PCO elections. The political parties ask for an order restraining the state from:

---

[10] One of those statutes simply directs that PCO elections occur at the same time as the state primary. Wash. Rev. Code § 29A.04.311. That statute was originally enacted in 2004, prior to the enactment of I-872, and was later amended in 2006. 2004 Wash. Sess. Laws, ch. 271, § 105; 2006 Wash. Sess. Laws, ch. 344, § 1. Neither act was part of I-872. *See* Blinn Decl., Ex. A (copy of I-872); *see also* 2005 Wash. Sess. Laws, ch. 2 (session law compilation of I-872). The statute specifically governing PCO elections, which requires that they be conducted in conjunction with the state primary in even-numbered years, was similarly enacted in 2004, before I-872 was submitted to the voters. Wash. Rev. Code § 29A.80.051 (enacted by 2004 Wash. Sess. Laws, ch. 271, § 149). This statute was not amended by I-872, nor has it been amended since I-872 was adopted.

[11] The only reference to PCOs in I-872 occurs in section 9, which amends the statute governing declarations of candidacy and carries forward, without change, pre-existing language requiring a separate declaration of candidacy form for PCOs. I-872, § 9 (amending Wash. Rev. Code § 29A.24.030). Section 9 of I-872 made other amendments regarding the declaration of candidacy. Because the Washington Constitution requires that any legislation amending an existing statute set forth that statute in full (Wash. Const. art. 2, § 37), it was necessary for the initiative to set forth the reference to PCO elections even though it was not affected.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

> Conducting elections of officers of the Party, directly or indirectly, including Precinct Committee Officers, *in any manner that is not approved by the Party* provided that conducting such elections in a manner that is the same as, or substantially similar to, the process approved by the Party for the selection of this state's delegates to the Party's National Convention shall be deemed acceptable for the selection of Precinct Committee Officers.

Republicans' Am. Compl., Prayer for Relief ¶ 8(d); Democrats' Am. Compl., Prayer for Relief, ¶ 8(d).

The political parties have suggested no basis upon which this Court may amend Washington law to provide for a different system of conducting PCO elections. The political parties do not contend that they have a constitutional right for the state to conduct elections for their party officers, nor could they. State law currently calls for this only because the legislature has determined that the state should conduct PCO elections. *See Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wash. 2d 284, 289, 174 P.3d 1142 (2007) (noting the fundamental principle that the plenary authority to determine what state laws should provide is vested in the legislature).

Contrary to the political parties' request that this Court rewrite the PCO statutes, this Court's role is limited to determining whether current law passes constitutional scrutiny. "It is not our role as a court to rewrite the plain language of a state statute." *Palmer v. United States*, 945 F.2d 1134, 1136 (9th Cir. 1991). While courts will indulge a reasonable construction of a statute in order to avoid a constitutional deficiency, federal courts do not "'rewrite' the statute to save it". *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

In sum, Washington's system for electing PCOs does not run afoul of the associational rights of the parties. Even if it did, however, the parties have sought no relief to which they would be entitled and, therefore, the parties' request for relief should be denied.

5. State campaign finance disclosure law does not restrict the ability of the Republican Party to communicate with its members.

In a claim specific to it, the Republican Party wrongly alleges Washington's campaign finance laws violate its association and speech rights "by restricting its ability to communicate to its members the identity of Party nominees . . . ." Republicans' Am. Compl. ¶ 38; *see also* ¶ 52. It bases its allegations on a state enforcement proceeding commenced against the Republican Party currently pending in state superior court.

The state court lawsuit, *State ex rel. Washington State Public Disclosure Commission v, Washington State Republican Party*, King County Superior Court No. 08-2-34030-9 (*State v. WSRP*), is currently set for trial on penalties and costs on December 6, 2010, following partial summary judgment in favor of the State. The Republican Party mischaracterizes the State's enforcement case against it as an action by the State to penalize it for engaging in communications with its members as to the identity of its privately-nominated candidate for governor in 2008. Republicans' Am. Compl. ¶ 38. To the contrary, the case involves the State's claims that the Republican Party misused its statutorily-authorized exempt funds to pay for political advertising. *State v. WSRP*, State's 1st Am. Compl. ¶¶ 5.1, 5.2 (attached as Ex. A to Counsel Decl.).

Wash. Rev. Code § 42.17.640(15) provides for entities to receive funds exempt from contribution limits for use in specifically-enumerated ways. The State alleged in that case, in part, that the Republican Party improperly used exempt funds for a mailing urging support

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

for its gubernatorial candidate Dino Rossi "and our entire State Republican Team" in the August 2008 primary, a purpose not authorized under the statute. *State v. WSRP*, State's 1st Am. Compl. ¶ 3.9 (attached as Ex. A to Counsel Decl.). Contrary to the Republican Party's claim, the State did not contend that the Republican Party was prohibited from communicating with its members. *Id.*, ¶ 3.10. The State alleged that this "Rossi" mailing violated state law because it was improperly paid for with funds exempt from contribution limits. *Id.* The trial court agreed, granting partial summary judgment in favor of the State. Order on Partial Summary Judgment Re: The "Rossi Mailings" (attached as Ex. C to Counsel Decl.). In doing so, the court rejected the Republican Party's argument that the mailings were member communications for which exempt funds could be spent under the terms of the statute as it existed at that time. *See* Counsel Decl., Ex. B at 7-8 (Republican Party's Answer in state court proceeding);[12] *see also* Counsel Decl., Ex. C (Order on Partial Summary Judgment).

The Republicans' claim is without merit, and this Court should grant summary judgment dismissing the allegations stated in paragraphs 38 and 52 of the Republicans' Amended Complaint.

[12] The legislature amended Wash. Rev. Code § RCW 42.17.640(15) in 2010 to add electioneering communications to the list of purposes for which exempt funds may be legally expended. 2010 Wash. Sess. Laws, ch. 204, § 602(15).

III. CONCLUSION

For the reasons stated above, the Court should grant summary judgment in favor of the State and deny the relief sought by the political parties..

DATED this 26th day of August 2010.

ROBERT M. MCKENNA
Attorney General

s/ James K. Pharris
James K. Pharris, WSBA #5313
Deputy Solicitor General

s/ Jeffrey T. Even
Jeffrey T. Even, WSBA #20367
Deputy Solicitor General

s/ Allyson Zipp
Allyson Zipp, WSBA #38076
Deputy Solicitor General

PO Box 40100
Olympia, WA 98504-0100
360-664-3027
e-mail: jamesp@atg.wa.gov
jeffe@atg.wa.gov
allysonz@atg.wa.gov
Attorneys for Defendant-Intervenors

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed State's Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Executed this 26th day of August, 2010, at Olympia, Washington.

ROBERT M. MCKENNA
Attorney General

s/ James K. Pharris
James K. Pharris

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200