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 TRIAL BRIEF

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I. INTRODUCTION

This case is before this Court on remand from the United States Supreme Court's decision upholding Washington's Initiative 872 (I-872) from a facial constitutional challenge. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 444, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). On remand, the residual as-applied claims require the political parties to provide actual evidence demonstrating their "factual assumptions about voter confusion." *Id.* at 457. That is, the political parties must prove that the State's implementation of I-872 causes widespread voter confusion sufficient to severely burden the political parties' associational rights. However, at trial, objective evaluation of the evidence will establish that the State has implemented the Top Two primary created by I-872 so as to "eliminate any real threat of voter confusion." *Id.* at 456. "And without the specter of widespread voter confusion, [the political parties'] arguments about forced association and compelled speech fall flat." *Id.* at 456-57 (footnotes omitted). For this reason, the political parties' as-applied challenge to I-872 must fail.

II. ISSUES FOR TRIAL

1. Can the Plaintiff political parties prove, under an objective standard, that there is widespread voter confusion among reasonable and well-informed Washington voters as to whether a candidate's statement of preference for a particular political party means that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate?

2. If so, is that widespread voter confusion caused by the State's implementation of I-872?

3. If so, does that voter confusion severely burden the political parties' right of association under the First Amendment, by being widespread in scope and forcing an *actual* association between the party and the candidate, in contrast to the mere *impression* of association?

4. Do the State's Precinct Committee Officer election laws severely burden the First Amendment association rights of the three political parties in this case? If so, does

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that conclusion regarding the PCO election laws entitle Plaintiffs to declaratory or injunctive relief against I-872?

5. Does the State's sponsor-disclosure law severely burden the First Amendment association rights of the three political parties in this case? If so, does that conclusion regarding the sponsor-disclosure law entitle Plaintiffs to declaratory or injunctive relief against I-872?

III. BACKGROUND

This case is a challenge by the Republican, Democratic, and Libertarian parties ("political parties") to the constitutionality of I-872. The voters enacted I-872 at the November 2004 general election in order to establish a "Top Two" system of electing candidates for "partisan office" in Washington.[1] The Top Two system provides for a two-stage election process, under which the primary "does not, by its terms, choose the parties' nominees." *Grange*, 552 U.S. at 453. "To the contrary, the election regulations specifically provide that the primary 'does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election.'" *Id.* (quoting former Wash. Admin. Code § 434-262-012).

Under I-872, all candidates for public office have access to the primary election ballot, and the two candidates receiving the most votes advance to the general election. Wash. Rev. Code § 29A.36.170. Candidates may, if they choose, express their personal preference for a political party, and have that preference shown on the ballot. Wash. Rev. Code § 29A.52.112(3). Election officials, however, do not use that preference in determining

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[1] Washington law defines the term "partisan office" as:

> a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:
>
> (1) United States senator and United States representative;
>
> (2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;
>
> (3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

Wash. Rev. Code § 29A.04.110

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which candidates advance to the general election. "The law never refers to the candidates as nominees of any party, nor does it treat them as such." *Grange*, 552 U.S. at 453.

The primary question for trial is whether the political parties can prove that the State's implementation of I-872 has caused widespread confusion among reasonable, well-informed voters as to whether a candidate who expresses a preference for a political party is actually the party's official nominee, or is otherwise actually associated with the party. If so, does the voter confusion severely burden the political parties' right to association by being widespread and forcing an actual association between the party and the candidate who prefers it? The evidence will establish that the State has designed and used ballots and other official voting materials consistent with the United States Supreme Court's decision, explaining to the voters that a candidate's statement of party preference is nothing more than just that—the candidate's statement of preference.

IV. THE POLITICAL PARTIES CANNOT MEET THEIR BURDEN OF PROOF

A. The Political Parties Cannot Demonstrate, Objectively, That The State's Implementation Of I-872 Causes Widespread Voter Confusion That Severely Burdens Them

The political parties face a daunting burden of proof at trial. As this Court has previously articulated, "[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." Order at 10 (August 20, 2009) [Dkt. 184]. To prove their case, the political parties must establish three elements by sufficient evidence: (1) that, as an objective matter, voter confusion exists such that the reasonable and well-informed voter would believe that a candidate's statement of preference for a particular political party means that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate; (2) that any such confusion is caused by the State's implementation of I-872; *and* (3) that this confusion severely burdens the First

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Amendment freedom of association rights of the three political parties in this case, by being widespread in nature and creating an actual association between the party and the candidate.

Plaintiffs must prove all three of these elements—*objective confusion, causation,* and *severe burden*—by sufficient evidence in order to prevail in their as-applied challenge to I-872. Considering the anticipated trial testimony in light of each element in turn, first by clarifying the nature of each element, and then by summarizing the anticipated evidence relating to each, clearly shows that Plaintiffs cannot carry their burden.

1. The Political Parties Must Objectively Prove Widespread Confusion By The Reasonable, Well-Informed Voter As To Whether A Candidate's Statement Of Party Preference Means That The Party Has Nominated, Endorsed, Or Supported That Candidate

The opinion of the United States Supreme Court makes clear that the political parties cannot satisfy their burden of proving the element of *objective confusion* merely by proving confusion in the abstract. Rather, the Court stated that the political parties must prove that "a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange*, 552 U.S. at 454.

Moreover, the question of confusion must be judged against an objective standard. As discussed more fully in prior briefing, the State's implementation of I-872 must be judged in light of a "well-informed electorate."[2] *Grange*, 552 U.S. at 454-58. As Chief Justice Roberts' concurring opinion confirmed, the question is not whether any voter might be confused, but whether any "*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). Stated differently, the political parties' allegations regarding voter confusion must be judged from the point of view of the

[2] *See* State's Motion for Summary Judgment at 10-12. [Dkt. 239]; *see also* Grange's Summary Judgment Motion at 4-5 [Dkt. 249].

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reasonable well-informed voter, not based on subjective impressions of individual voters. *See id.* at 462 (Roberts, C.J., concurring) (consideration of a challenge to the implementation of I-872 would depend on "what the ballot says" rather than upon subjective evidence or studies).

The Supreme Court identified steps that the State could take on remand to ensure that its implementation of the facially constitutional initiative did not run afoul of the First Amendment:

> [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.
>
> It is not difficult to conceive of such a ballot.

Grange, 552 U.S. at 456 (citations omitted).

The steps the Supreme Court said would avoid widespread voter confusion include placing on the ballot "prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party." *Id.* In addition, the ballots could underscore, through their phrasing, that the candidate's preference is his or her "personal determination rather than the party's acceptance of the candidate". *Id.* Finally, the State could engage in voter education efforts regarding the new primary system and the meaning of the candidate preference statement. *Id.*

The evidence at trial will demonstrate that the State has implemented I-872 in the manner suggested by the Supreme Court, by informing the voters, on the ballot and elsewhere, that the candidates' statements of party preference *do not mean* that the political party has nominated or endorsed that candidate, or that it associates with or approves of that candidate. In doing so, the State has "eliminate[d] any real threat of voter confusion," from an objective, reasonable voter perspective. *Id.*

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The evidence will show that the State has implemented I-872 by, in part, explaining to the voters *on the ballot itself* exactly what a candidate's statement of party preference means, and what it does not mean. The Secretary of State requires, by administrative rule, that every ballot that includes a partisan office must include a notice in bold print immediately before the first partisan office, explaining:

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

Wash. Admin. Code § 434-230-015(4)(a). Ballots for primary and general elections conducted after I-872 was implemented in 2008 demonstrate the appearance of this explanatory statement on the actual ballots.[3] As noted, the Supreme Court explained that one way that the State could implement I-872 "to eliminate the possibility of widespread voter confusion" would be to include such a statement on the ballot. *Grange*, 552 U.S. at 456.

The evidence will also demonstrate that a candidate's statement of party preference is not shown on the ballot merely by placing a party's name or abbreviation after the candidate's name on the ballot. The ballots clearly state that the candidate "Prefers _____ Party," or that he or she "States No Party Preference." Wash. Admin. Code § 434-230-045(4). Ballots for primary and general elections conducted after I-872 was implemented also reveal this manner of presentation.[4] As noted, the Supreme Court stated that such phrasing would be among the ways that the State could implement I-872 to eliminate widespread voter confusion. *Grange*, 552 U.S. at 455 (describing the statement that a candidate "prefers a particular party" as "a clear statement.")

[3] Exhibits A-2a through A-40a (2008 primary ballots); A-41a through A-42a (2008 general election ballots); A-43a (Clark County 2009 primary ballot); A-44a (Clark County 2009 general election ballot); A-75a through A-113a (2010 primary ballots); and A-116a through A-154a (2010 general election ballots).

[4] *See* exhibits cited in footnote 3.

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The State's implementation of I-872 did not stop at explaining the party preference on the ballot. The Secretary of State has also provided for other materials that additionally explain the fact that the parties claim is confusing. In Washington, virtually all ballots are distributed to voters by mail. By administrative rule, the Secretary of State has required that all primary ballots distributed by mail include a notice on a separate insert explaining:

> Washington has a new primary. You do not have to pick a party. In each race, you may vote for any candidate listed. The two candidates who receive the most votes in the August primary will advance to the November general election.
>
> Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

Wash. Admin. Code § 434-250-040(1)(j). Similarly, an administrative rule applicable to general election ballots requires that a similar explanation must accompany all mailed ballots:

> Washington has a new election system. In each race for partisan office, the two candidates who receive the most votes in the August primary advance to the November general election.
>
> Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

Wash. Admin. Code § 434-250-040(1)(k)(i). The exhibits offered at trial demonstrate that such explanatory statements have in fact been prepared.[5] For those few remaining voters who continue to vote at polling places, the State has also required that notices reading the same as these ballot inserts be posted or displayed at every polling place. Wash. Admin.

[5] Exhibits A-2b through A-40b (2008 primary ballots); A-41b through A-42b (2008 general election ballots); A-43b (Clark County 2009 primary ballot); A-44b (Clark County 2009 general election ballot); A-75b through A-113b (2010 primary ballots); and A-116a through A-154a (2010 general election ballots). In these ranges of exhibits, the ballots themselves are assigned numbers ending in "a" while the corresponding explanatory inserts receive numbers ending in "b".

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Code § 434-253-025. As noted, the Supreme Court also suggested that such explanatory materials would be an additional way that the State could implement I-872 without widespread voter confusion. *Grange*, 552 U.S. at 456.

The State has also explained the Top Two primary in the Voters' Pamphlet, which is distributed to every place of residence in the state. Wash. Const. art. II, § 1(e).[6] The State implemented the Top Two system for the first time in 2008, and included an extensive explanation of the new primary in the primary Voters' Pamphlet. The Secretary of State began by emblazing, directly on the cover of the Pamphlet where it was highly visible:

> Washington's New Top 2 Primary
>
> Washington has a new primary. You do not have to pick a party. In each race, you may vote for any candidate listed. The two candidates who receive the most votes in the August primary will advance to the November general election.
>
> Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

Ex. A-45 at 1. The first page of the Voters' Pamphlet was a letter to the voters from Secretary Reed, explaining the new Top Two primary and including the explanation that:

> Our new voter-approved primary no longer nominates a finalist from each major party, but rather sends the two most popular candidates forward for each office. It's a winnowing election to narrow the field. Your candidates have listed the party they prefer, but that doesn't mean the party endorses or affiliates with them. Some candidates prefer major parties, some prefer minor parties and some express no party preference. All have a chance to advance to the November ballot.

Id. at 2. An entire page of the Voters' Pamphlet was devoted to an explanation of the Top Two system. This included an explanation of the "party preference":

[6] The Voters' Pamphlet is constitutionally required at state general elections. A Voters' Pamphlet was also distributed to every place of residence in the state at the 2008 primary.

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> 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.
>
> Candidates may choose not to state a political party preference.

Id. at 4. A similar explanation appeared on page 6. *Id.* at 6. The notice on the front cover was repeated on the back cover.

The State repeated these explanations in the Voters' Pamphlet for the 2008 general election. The cover of the Voters' Pamphlet again sets forth an explanation of the meaning of a candidate's statement of preference for a political party. Ex. A-46 at 1. The first page again included an explanatory letter from Secretary Reed. *Id.* at 2. Page 4 again included a full explanation of the Top Two system, including the candidates' statement of party preference. *Id.* at 4. A further explanation appeared again, later in the pamphlet. *Id.* at 77. The notice from the front cover was repeated on the back cover.

The State again included similar explanatory material in the 2010 statewide Voters' Pamphlet. The Secretary of State explained that under Washington law, "Candidates represent themselves—not a political party." Ex. 114 at 4. The explanation continued:

> In each race, the two candidates who received the most votes in the August Primary appear on your November General Election ballot.
>
> It is possible the two candidates in a race prefer the same party. This is because political parties no longer have a guaranteed spot on the ballot. If two candidates who prefer the same party receive the most votes in the Primary, both will advance to the General Election.

Id. The pamphlet again explained the candidate's statement of party preference:

> What is "party preference"?
>
> Each candidate for partisan office may state a political party that he or she prefers.

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> John Doe
> (*Prefers Republican Party*)
>
> 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.
>
> Candidates may choose to not state a political party preference.
>
> Jane Doe
> (*States No Party Preference*)

Id. Again, such methods of explaining the party preference to the voters are among the steps suggested by the Supreme Court by which the State could implement I-872 without the possibility of widespread voter confusion. *Grange,* 552 U.S. at 456.

The evidence that the meaning of party preference statements is clear, not confusing, does not end with the ballot, the explanatory inserts provided with the ballots, and the official Voters' Pamphlets mailed to every place of residence in the state. The Secretary of State also produced press kits, explaining the new system to reporters. Ex. A-47. The Secretary also presented, through his office web site, "frequently asked question" documents and other materials explaining the Top Two system. Exs. A-59, A-60, A-74. The Secretary's online version of the Voters' Pamphlet contains, on its first page, the same explanation of candidates' statements of party preference previously described. Ex. A-115.

Additionally, the Secretary of State accompanied the first implementation of I-872 with a widespread public education campaign. The Secretary contracted for television and radio public service announcements that explained the Top Two system in terms such as:

> This summer, Washington State residents will vote in a new top-two primary. Approved by voter initiative, the top-two primary means you vote for the person rather than the party. The two candidates for each partisan office with the most votes go to the general election in November. A candidate's party preference doesn't mean the party endorses or approves of that candidate. To find out more, including how to register to vote, visit vote.wa.gov, brought to you by the Washington Secretary of State's Office.

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Ex. A-49. The exhibits and the evidence will further show that these public service announcements were broadcast thousands of times on television and radio throughout Washington in the weeks leading up to the 2008 primary. Exs. A-57 through A-58.

The Supreme Court directed the inquiry regarding voter confusion to consideration of a specific fact: does "a well-informed electorate . . . interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange*, 552 U.S. at 454. In light of the anticipated evidence, the political parties face the task of proving that the reasonable, well-informed voter is somehow confused into thinking that a candidate's statement of preference for a political party means *precisely the opposite* of what voters are told it means:

- on the ballot;
- on the explanatory inserts that accompany the ballots;
- in the Voters' Pamphlet;
- on the Secretary of State's Web page;
- and in thousands of television and radio public service announcements that preceded the initial implementation of the Top Two system.

These are precisely the steps that the Supreme Court explained the State could take to implement I-872 so as to "eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment." *Grange*, 552 U.S. at 455-56. As the Supreme Court put it, "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues" than the political parties would credit. *Id.* at 454 (quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986)).

The political parties cannot, and do not, offer evidence that when the ballot (for example) explains that, "[a] candidate's preference *does not imply* that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that

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candidate", (Wash. Admin. Code § 434-230-015(4)(a), emphasis added), the reasonable, well-informed voter thinks that it actually means, "a candidate's preference *means* that the candidate is nominated or endorsed by the party, and that the party approves of and associates with that candidate." Such a voter would hardly be the reasonable, well-informed voter with whom the Supreme Court was concerned. *Grange*, 552 U.S. at 455-56.

The political parties are likely to attempt to meet their burden of proof through the testimony of their retained expert, Dr. Matthew Manweller. Dr. Manweller—who also serves as the chair of the Kittitas County Republican Central Committee—purports to demonstrate that voters mistakenly believe that candidates who express a preference for a party are the nominees of that party. Ex. 359 at 20. Dr. Manweller's analysis is "flawed on several fundamental points," as demonstrated by the State's expert, Dr. Todd Donovan. Ex. 339 at 1. Dr. Donovan concludes that these flaws include a problematic research design, the use of a highly biased sample of participants not representative of actual voters, flawed statistical analysis, problems with survey response rates, a lack of statistically significant effects, mistaken measurement of voter "errors" caused by poor survey design and flawed question wording, the failure to validly measure perceptions of official party nominees, etc., and counting responses as errors that may have been correct in the context of the survey instrument. *Id.* at 1-2. Dr. Donovan concludes that such errors "act individually and cumulatively to inflate the measured rates of 'voter confusion.'" *Id.* at 48. His report also "demonstrates that none of the conclusions in the Manweller paper about a potential relationship between the Top Two ballot and voter confusion are defensible, and that there is no way to generalize from Dr. Manweller's biased samples to the population of actual voters in the state of Washington." *Id.* at 49.

The political parties appear to be prepared to offer additional vaguely-articulated notions of general confusion. It is anticipated that the parties' evidence of what they call "confusion" will consist of incidents in which voters, in fact, demonstrated that they

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understood the explanations of party preference to mean just what they say, and not the opposite. Examples could include testimony that voters ask which candidate in a particular race is the party's chosen candidate. Such questions demonstrate that the voter understands the candidate's statement of party preference is not the same thing as a party nomination or endorsement, or does not necessarily mean that the party approves of or associates with the candidate. That is, such questions are provoked not by voter confusion about the meaning of the party preference, but by voter understanding of what preference means and a desire for further information that indicates how the party feels about the candidate.

The political parties also apparently intend to offer as trial exhibits hundreds of news stories and blogs, the relevance (if any) of which seem to be limited to the fact that they use the words "Democrat" or "Republican" somewhere within them. Such material accounts for more than 360 of the 563 exhibits the political parties have listed as trial exhibits. *See* Pretrial Order [Dkt. 300]. But such material does not demonstrate "confusion" on any subject, much less confusion about the specific fact that the political parties must prove. Such exhibits do not establish that any voter believes that a candidate's statement of political party preference means the opposite of what the ballot, and other official election materials, say it means. They might indicate that reporters, like other people, may speak loosely in terms of identifying candidates as "Republicans" or "Democrats." But the political parties do not even suggest that such statements are factually incorrect—that is, that a candidate referred to as a "Republican" or a "Democrat" is actually not one.[7] Casual phrasing by the press, which may well be factually accurate, is not evidence of confusion by the reasonable, well-informed voter that a candidate's statement of party preference means that the party has nominated, endorsed, or supported that candidate.

[7] For example, it is not evidence of confusion to describe Governor Gregoire or Senator Murray as Democrats or Attorney General McKenna or Dino Rossi as Republicans; these are merely statements of fact.

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Because the parties cannot prove this *objective confusion* element of their claim, their challenge based upon voter confusion fails.

2. The Political Parties Must Prove That Confusion Is Caused By The State's Implementation Of I-872

Plaintiffs also bear the burden of proving the element of *causation*, that is to show that any voter confusion they can establish results from the State's implementation of I-872. *Grange,* 552 U.S. at 455 (stressing the importance of the State's implementation of I-872). The Supreme Court has already ruled that the electoral system established by I-872 is constitutional. *Id.* at 459. As this Court has observed, the remaining inquiry must focus on "specific ways" in which the State has implemented the measure "that lead to voter confusion or other forms of forced association." Order at 21 (August 20, 2009) [Dkt. 184]. The political parties cannot prevail merely by showing that a certain level of confusion regarding election systems exists among voters, but must show that the State's implementation of I-872 caused confusion specifically as to the meaning of a candidate's statement of preference for a political party.

The State's expert, Dr. Donovan, has documented that "confusion about matters of politics is common and widespread regardless of the political phenomena being considered." Ex. 338 at 4 (Report of Todd Donovan, PhD). As Dr. Donovan states in one of his two expert reports, "confusion about political facts—particularly about matters related to political parties and political processes—is the norm among voters." *Id.* at 1. Voter knowledge about political parties and candidate partisanship is "particularly low." *Id.* at 5. Accordingly, when considering any evidence of "confusion" among voters, it is critical to keep in mind that only "confusion" that is *caused by* the State's implementation of I-872 is at all relevant, over and above any confusion that would be present but for the steps the State has taken. If all that were necessary for the political parties to meet their burden were proof of some ambient level of confusion among voters, then no change to the electoral system would ever be possible.

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The political parties can only prevail by proving a sufficient level of relevant confusion—meaning confusion about the specific fact at issue—caused by the State's implementation of I-872.

The political parties can only reasonably contend that the State has caused "confusion" if it resulted from the steps the Secretary of State has taken to implement I-872. But those steps included explicitly telling the voters that "A candidate's preference [for a political party] does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate." Wash. Admin. Code § 434-230-015(4)(a). Even the political parties' expert cannot tie any alleged "confusion" to any action of the State in implementing I-872. Ex. 359 at 20. As discussed, this explanation is presented to voters in multiple forms and locations. It is not reasonable to suggest that this explanation could somehow cause confusion that the opposite of the explanation is true.

Alternatively, the political parties may attempt to concoct evidence of confusion from the host of news stories, blogs, and other material they have identified as trial exhibits. Those documents, however, were not produced by the State or under State control. The political parties cannot reasonably suggest that press descriptions of candidates are an aspect or a result of the State's implementation of I-872. Such an argument would depend upon the notion that, at least where a Top Two system is adopted in a state that formerly held partisan primaries, any continuing tendency of the press—or even the general public—to speak loosely about party affiliation must be charged against the State's implementation of the Top Two system. In effect, this would mean that changing to a Top Two system is constitutionally hopeless and impossible, but that would be tantamount to arguing that a Top Two system is automatically and inevitably unconstitutional—an argument rejected by the Supreme Court. *Grange*, 552 U.S. at 458.

Because the parties cannot prove this *causation* element of their claim, their challenge based upon voter confusion fails.

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3. The Political Parties Must Prove That They Are Severely Burdened

The political parties must also prove that they have been severely burdened by the State's implementation of I-872. *Id.* at 458 (plaintiffs' burden on an as-applied challenge is to prove that I-872 imposes a "severe burden" on their constitutional rights). To do so, the Supreme Court's decision establishes that they must establish that any relevant voter confusion caused by the State's implementation of I-872 is *both* widespread *and* so severe that it amounts to forced *actual* association between the political party and the candidate. Proving a mere *impression* of association is insufficient.

Showing that they have suffered a "severe burden" through the State's implementation of I-872 is critical to the political parties' case, because without it—even if they show some modest burden—they cannot invoke strict scrutiny. As the Supreme Court explained in the context of the facial challenge, if "I-872 does not severely burden [the political parties' rights], the State need not assert a compelling interest." *Id.* at 458 (citing *Clingman v. Beaver*, 544 U.S. 581, 593, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005)). "When a state electoral provision places no heavy burden on associational rights, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Clingman*, 544 U.S. at 593 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997)). As the Supreme Court has already held in this case, absent the parties demonstrating a severe burden, "[t]he State's asserted interest in providing voters with relevant information about the candidates on the ballot is easily sufficient to sustain I-872." *Grange*, 552 U.S. at 458. In other words, without a severe burden, this case is resolved under the rational basis test, and under the rational basis test the Supreme Court has already concluded that the State wins. *Id.*

That voter confusion must be "widespread" is evident from the Court's reliance on that characterization twice within its opinion. First, the Court described the issue in the facial challenge that was then before it as, "whether the ballot could conceivably be printed in such

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a way as to eliminate the possibility of *widespread* voter confusion and with it the perceived threat to the First Amendment." *Id.* at 456 (emphasis added). This indicates that now, in an as-applied challenge, the question has become whether the ballot was actually printed in that way. *Id.* Second, the Court explained that, "without the specter of *widespread* voter confusion, [the political parties'] arguments about forced association and compelled speech fall flat." *Id.* at 456-57 (emphasis added; footnotes omitted).[8] Clearly, without widespread voter confusion there can be no severe burden.

The Supreme Court also made clear that evidence of a mere *impression* of an association would be insufficient to prove a claim of forced association. Rather, in order to show a severe burden the political parties must prove that the State has implemented I-872 so as to force them into an *actual* association with candidates with whom they do not wish to associate. The Court rejected the political parties' reliance on two recent leading forced-association cases[9] for the proposition that by allowing candidates to express their personal preferences for a political party, the State was forcing the parties to associate with the candidates. The Court distinguished those cases on the basis that, "[i]n those cases, *actual* association threatened to distort the groups' intended messages." *Grange*, 552 U.S. at 457, n.9. The Court further explained that it was "aware of no case in which the mere *impression* of association was held to place a severe burden on a group's First Amendment rights". *Id.* In other words, the political parties cannot establish a severe burden by showing a mere impression on the part of voters that a candidate who expresses a preference for a political

[8] The Supreme Court continued, in footnote, by rejecting any claim based on a compelled speech theory. *Grange,* 552 U.S. at 457, n.10. The Court only preserved the possibility of an as-applied challenge as to the political parties' forced association theory. *Id.* at 459.

[9] "*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (holding that a State may not require a parade to include a group if the parade's organizer disagrees with the group's message), and *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) (holding that the Boy Scouts' freedom of expressive association was violated by a state law requiring the organization to admit a homosexual scout master)." *Grange*, 552 U.S. at 457, n.9.

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party is really that party's nominee—despite being told on the ballot itself that this is not true.[10]

As to demonstrating this element, once again, the testimony of the political parties' proffered expert is insufficient. As explained by Dr. Donovan, given the flaws in Professor Manweller's study, his report can suggest nothing more than, at most, the notion that a few voters have a vague impression of an association between candidates and political parties.

The political parties also contend that they are "harmed" because their chosen nominees do not always advance to the general election. But as the Supreme Court has already held, the fact that a party's nominees might not advance to the general election does not constitute a severe burden on the parties because "the I-872 primary does not, by its terms, choose parties' nominees." *Grange*, 552 U.S. at 453. If a nominated candidate fails to advance, the obvious reason is that the candidate in question failed to garner enough voter support to place first or second in the primary. *Munro v. Socialist Workers Party,* 479 U.S. 189, 199, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986) (associational rights are not severely burdened merely because activity must be channeled into a campaign at the primary rather than the general election). As *Grange* establishes, the Top Two primary leaves the parties with their full panoply of associational rights, which does not include a right to see their nominated candidate advance to the general election despite failing to win the voters' support. *Grange*, 552 U.S. at 453 ("Whether the parties nominate their own candidates outside the state-run primary is simply irrelevant."); *see also id.* at 453 n.7 (noting that it is "unexceptional" that the parties may no longer indicate their nominees on the ballot, because the First Amendment does not guarantee such a right).[11]

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[10] The Court explained that it need not decide in *Grange* whether a case of forced association could ever be based upon an impression, but it would presumably take more than the ordinary impression to suggest such a claim. *Grange,* 552 U.S. at 457 n.9.

[11] Nor would it be sufficient for the political parties to demonstrate that voters find knowledge of which political party a candidate prefers can be helpful to them in their voting decisions. The Supreme Court has already held that, "[t]he State's asserted interest in providing voters with relevant information about the candidates on the ballot is easily sufficient to sustain I-872." *Grange*, 552 U.S. at 458. Evidence that voters

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Because the parties cannot prove this *severe burden* element of their claim, their challenge based upon voter confusion fails.

B. The Political Parties' Remaining Claims Were Fully Briefed Previously

The political parties bring several other tertiary claims, including assertions that the system for electing Precinct Committee Officers is unconstitutional and that the state's campaign finance laws that were not amended by I-872 contribute to the alleged of voter confusion. These other claims were fully briefed previously, and the legal arguments presented there need not be repeated here.[12]

C. The Remedies Available To The Political Parties Do Not Include Invalidating I-872

This Court has already established the relief that could be granted following trial:

> 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.

Order at 21 (August 20, 2009) [Dkt. 184].

The political parties seem to suggest that if this Court finds any flaw in the implementation of I-872, or in the interrelationship between I-872 and another law, the Court should broadly invalidate the initiative enacted by the people. This Court has already explained why this is not so in the quoted passage. Instead, if the political parties prove any facts at trial sufficient to justify an award of any relief in their favor, that relief should be

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find that information helpful no more aids the political parties now than it did on their facial challenge, which the Court already rejected.

[12] *See* State's Motion for Summary Judgment [Dkt. 239]; State's Response to Democratic Party's Motion for Partial Summary Judgment [Dkt. 255]; State's Response to Republican Party's Motion for Partial Summary Judgment [Dkt. 256]; and State's Reply in Support of Motion for Summary Judgment [Dkt. 279]; *see also* Grange's Summary Judgment Motion [Dkt. 249]; Grange's Response To Wash. State Republican Party's Partial Summary Judgment Motion [Dkt. 267]; Grange's Response To Wash. State Democratic Central Committee's Partial Summary Judgment Motion [Dkt. 268]; and Grange's Reply In Support Of Summary Judgment [Dkt. 283].

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narrowly tailored to avoid nullifying more of a state law than necessary so as not to frustrate the intent of the people and their duly elected representatives. *Grange*, 552 U.S. at 456 (citing *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)).

V. CONCLUSION

For these reasons, the evidence adduced at trial will support a judgment in favor of the State. This Court should accordingly deny the political parties any relief and dismiss their complaints with prejudice.

DATED this 10th day of January, 2011.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I electronically filed the foregoing State's Trial Brief with the clerk of the court using the CM/ECF system which will send notification of such filing to the following:

John White and Kevin Hansen, attorneys for Republican Party

David McDonald and Emily Throop, attorneys for Democratic Central Committee

Orrin Grover and John Mills, attorneys for Libertarian Party

Thomas Ahearne, Marco Magnano, and Kathryn Carder, attorneys for Washington State Grange

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