NOS. 11-1263, 11-1266

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE,

Petitioner,

v.

WASHINGTON STATE GRANGE, ET AL.,

Respondents.

LIBERTARIAN PARTY OF WASHINGTON STATE, RUTH BENNETT, AND JOHN S. MILLS,

Petitioners,

v.

WASHINGTON STATE GRANGE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF WASHINGTON'S BRIEF IN OPPOSITION TO PETITIONS

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QUESTIONS PRESENTED

After this Court held that Washington's top two primary is facially constitutional in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), two lower courts determined that the primary, as implemented, did not violate associational rights of three political parties. Two of those political parties have petitioned for a writ of certiorari. Their seven questions presented, fairly restated, are:

1. Where the summary judgment record showed that ballots, voter pamphlets, and a public educational campaign allowed well-informed voters to know that a candidate's personal statement of party preference does not mean that the candidate is the nominee of, or endorsed or approved by, the party the candidate prefers, and where the political parties did not offer relevant evidence that well-informed voters would be confused about these subjects, did the lower courts correctly determine that Washington's top two primary did not impose severe burdens on associational rights of political parties?

2. In a First Amendment associational rights challenge to a state's law governing primary elections, should courts borrow principles from trademark infringement principles to answer the constitutional question of whether a candidate's stated preference for a party in a top-two primary imposes a severe burden on a political party's associational rights?

3. Where the *Grange* Court held that Washington's interest in providing voters with relevant information through candidates' personal statements of party preference on the ballot is "easily sufficient to sustain I-872" in the absence of a severe burden on associational rights, and where evidence concerning implementation of I-872 demonstrated that it did not impose that severe burden, is Washington's election system constitutional?

4. Does Washington deny minor parties reasonable access to the ballot where every candidate has equal access to a primary ballot and equal opportunity to advance to the general election?

5. After this Court in *Grange* reaffirmed that a political party does not have a constitutional right to designate its nominee on the ballot, does the Libertarian Party have such a constitutional right, or a corollary right, to state on the ballot that it disavows a candidate?

6. Did the Libertarian Party state a federal trademark violation claim on the basis that Washington does not allow political parties to designate nominees on the ballot, or to disavow on the ballot candidates who express a personal preference for the party?

7. For the purposes of a federal trademark violation, does a state compete with the Libertarian Party by printing ballots that allow a candidate to state the candidate's preferred party?

PARTIES

Petitioner, the Washington State Democratic Central Committee, No. 11-1263.

Petitioners, the Libertarian Party of the State of Washington, Ruth Bennett, John S. Mills, No. 11-1266.

Respondents, the State of Washington, Washington State Secretary of State Sam Reed, Washington State Attorney General Robert M. McKenna, Washington State Grange, No. 11-1263 and No. 11-1266.

Other appellants below were the Washington State Republican party, Steve Neighbors, Marcy Collins, William Michael Young, Diane Tebelius, Bertabelle Hubka, and Mike Gaston.

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BRIEF IN OPPOSITION

The Attorney General of Washington, on behalf of the state, and Washington Secretary of State Sam Reed, on his own behalf, asks the Court to deny the petitions for writs of certiorari.

INTRODUCTION

In 2004, Washington's voters approved Initiative 872 (I-872), establishing a "top two" primary as the first stage in electing candidates for public office. *See* Wash. Rev. Code § 29A.04.110. This Court upheld I-872 against a First Amendment facial challenge to its constitutionality. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). The Court explained that whether the political parties challenging I-872 could succeed in an as-applied challenge would depend on whether the state implemented the primary in a way that would eliminate any real threat of widespread confusion among well-informed voters as to the meaning of candidates' personal statements of their party preference. *Grange*, 552 U.S. at 455. "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." *Grange*, 552 U.S. at 456.

The state implemented its top two primary according to each of the steps described in *Grange* to "eliminate any real threat of voter confusion." *Id.* Petitioners, in contrast, did not show that the state had implemented I-872 in a manner that would cause widespread confusion among well-informed voters. Faced with the state's compliance with *Grange*, and no showing of a severe burden on

associational rights, the inevitable thrust of the Democratic Party petition is to ask the Court to revisit issues already decided by *Grange*. The Libertarian Party, in contrast, asks the Court to review questions already decided by *Grange* and other decisions of this Court. The Court should deny both petitions.

STATEMENT

A. Washington State's Top Two Primary

Washington's voters enacted I-872 in the 2004 general election to establish a new qualifying primary for electing candidates for public office. Under I-872, any qualified candidate may appear on the primary ballot. Candidates may then state the name of a political party that he or she prefers (if any), and that preference will be shown on the ballot as "Prefers _____ Party." Wash. Rev. Code § 29A.52.112(3) (authorizing candidates to express personal party preference); App. 110 (Wash. Admin. Code § 434-230-045(4)(a) (prescribing manner of presenting party preference on ballot)). I-872 "never refers to candidates as nominees of any party, nor does it treat them as such." *Grange*, 552 U.S. at 453. Under the I-872 primary, voters may vote for any candidate, regardless of the candidate's expression of party preference. Then, the two candidates receiving the most votes advance to the general election. Wash. Rev. Code § 29A.36.170. In the general election, voters may vote for one of the two candidates who received the most votes in the qualifying primary. The primary thus "'serves to winnow the number of candidates to a final list of two for the general election.'" *Grange*, 552 U.S. at

453 (quoting former Wash. Admin. Code § 434-262-012 (recodified as Wash. Admin. Code § 434-230-055(3))).

B. *Grange* Rejected Petitioners' Facial First Amendment Challenge to I-872

Three political parties—the Washington State Democratic Central Committee, Libertarian Party of Washington State, and the Washington State Republican Party—challenged I-872 before it was implemented, claiming it burdened their First Amendment associational rights "by usurping [a party's] right to nominate its own candidates and by forcing it to associate with candidates it does not endorse." *Grange*, 552 U.S. at 448. This Court rejected the facial challenge. First, it squarely rejected the argument that the primary "allows primary voters who are unaffiliated with a party to choose the party's nominee." *Id.* at 452. To the contrary, "the I-872 primary does not, by its terms, choose parties' nominees." *Id.* at 453. Rather, "[t]he top two candidates from the primary election proceed to the general election regardless of their party preferences. Whether parties nominate their own candidates outside the state-run primary is simply irrelevant." *Id.*

Because I-872 does not nominate a party's candidate, the *Grange* Court focused on the parties' secondary argument that "even if the I-872 primary does not actually choose parties' nominees, it nevertheless burdens their associational rights because voters will assume that candidates on the general election ballot are the nominees of their preferred parties." *Id.* at 454. The Court rejected the argument that "voters will be confused as to the

meaning of the party-preference designation." *Grange*, 552 U.S. at 454. The parties relied on "sheer speculation." *Id.* "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." *Id.*

The Court, however, acknowledged that "it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties." *Id.* at 455. But "whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot." *Id.* A 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. "For example . . . 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." *Id.* Ballots could show preference "in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate." *Id.* Moreover, "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." *Id.* Therefore, "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. Implementation of I-872 could take these types of

steps and be "consistent with the First Amendment[.]" *Grange*, 552 U.S. at 457.

Because the I-872 top two primary did not on its face severely burden the parties' associational rights, the Court held that "the State need not assert a compelling interest[.]" *Id.* at 458. "The State's asserted interest in providing voters with relevant information about the candidates on the ballot is *easily sufficient* to sustain I-872." *Id.* (emphasis added). Therefore, the Court found I-872 is facially constitutional and reversed the lower court opinions to the contrary.[1]

C. Washington Implemented I-872 In 2008

Washington implemented I-872 starting in 2008. Each candidate's party preference statement was reflected as a statement by the candidate, describing his or her personal preference for a party. The statement appeared as a parenthetical after the candidate's name, "(Prefers _____ Party)." *See* Wash. Admin. Code § 434-230-045(4)(a) (App. 110). The state took multiple steps to ensure reasonable well-informed voters would understand that a candidate's party preference statement did not imply that the

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[1] The Court also rejected the parties' argument that I-872 was unconstitutional because they "may no longer indicate their nominees on the ballot[.]" *Grange*, 552 U.S. at 453 n.7. This feature of I-872 was "unexceptionable" because "[t]he First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Id.* Similarly, the Court rejected the political parties' arguments that relied on a "mere *impression* of association[.]" *Id.* at 457 n.9. The Court noted that mere impression of association had never been sufficient to sustain a claim based on associational rights. *Id.*

candidate was nominated or endorsed by the party or that the party approved of or associated with the candidate. [2]

First, the state required each primary ballot and general election ballot to include an explanation telling voters that a candidate's personal statement of party preference does not imply an association between the political party the candidate prefers, if any, and the candidate. App. 43. The required explanation states:

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

App. 105-06 (Wash. Admin. Code § 434-230--015(6)(a)).[3]

Second, Washington votes almost entirely by mail. State law required every ballot be accompanied by an insert explaining the top two primary and the candidates' statements of party preference. App. 44. The required insert explains:

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[2] The citations in this brief to the secretary of state's administrative rules vary somewhat from the citations used in the opinion of the Ninth Circuit because the secretary amended and reorganized those rules after this case was briefed and argued below. Wash. State Reg. 11-24-064 (Dec. 6, 2011). The substance of the rules has not changed materially.

[3] Offices for which a candidate may state his or her personal preference are denominated "partisan offices" by state law. Wash. Rev. Code § 29A.04.110.

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

App. 104 (Wash. Admin. Code § 434-230-015(3)(j)); *see also* App. 104-05 (Wash. Admin. Code § 434-230--015(3)(k) (requiring similar insert for general election ballots)). The Democratic Party incorrectly claims that Washington no longer requires such inserts. Dem. Pet. 15. The Appendix sets forth the provisions cited above, and these provisions confirm that the state requires such inserts. App. 104-05 (Wash. Admin. Code § 434-230-015(3)(j), (k)).

Third, Washington extensively described its new primary in its Voters' Pamphlet, a document mailed to every residence in the state. App. 44. The state required that every edition of the Voters' Pamphlet include an explanation of a candidate's statement of personal party preference. App. 113 (Wash. Admin. Code § 434-381-200 ("[The] pamphlet must include an explanation that each candidate for partisan office may state a political party that he or she prefers, and that a candidate's preference does not imply that the candidate is nominated or endorsed by the party or that the party approves of or associates with that candidate. The pamphlet

must also explain that a candidate can choose to not state a political party preference.")).

Fourth, before I-872 was first implemented in 2008, Washington "disseminated educational information to the public about the new ballots . . . by airing public service announcements on radio and television." App. 10. As the district court recounted: "Transcripts from these advertisements reinforced the point: 'A candidate's party preference doesn't mean the party endorses or approves of that candidate.'" App. 45 (quoting the state's educational advertisements).

D. The District Court Dismissed The Parties' Challenge To I-872 As Implemented

The district court granted the political parties leave to amend their complaints to pursue a challenge based on the state's implementation of I-872. App. 40. Before resolving the case on summary judgment, however, the district court disposed of two issues relevant to the pending petitions. First, it dismissed the Libertarian Party claim that it was denied ballot access. The court held that I-872 imposed no barrier to ballot access because candidates preferring a minor party are treated the same as all other candidates and may appear on the primary ballot and compete for voter support among the full electorate. *See* Dkt. No. 184. Second, the court ruled that the political parties did not assert trademark violation claims in their complaints. Dkt. No. 184. It would, however, be futile to amend the complaints to assert trademark claims because the candidate preference statement did not involve the state's use of a trademark in

competition with a trademark holder and "may not form the basis of a federal or state trademark violation." App. 48 n.7.

On summary judgment, the district court dismissed the parties' associational rights challenge. The court started with undisputable facts about the form of the ballot and preference statement. "[T]he ballot Washington uses to implement I-872 is uniformly consistent with [the *Grange* Court's] conception of a constitutional ballot." App. 42. The state included a "prominent and clear explanation" of the party preference statement on every ballot, advising voters that "[a] candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate." App. 43; *see also Grange*, 552 U.S. at 456 (discussing how the ballot might include an explanation). "This clear explanation included on the ballot may alone be sufficient to withstand the political parties' constitutional concerns about the possibility of confusion among the well-informed electorate." App. 43. "But Washington does more." App. 44.

The district court also examined the materials the state provided to voters in the Voters' Pamphlet and on inserts accompanying ballots. App. 44-45; *see also Grange*, 552 U.S. at 456 (discussing how state might supply voters with additional materials). The court also observed that the state had "educate[d] the public about the new primary ballots through advertising." App. 45; *see also Grange*, 552 U.S. at 456 (discussing possible educational campaign). The court concluded that Washington "has implemented I-872 uniformly consistent with several of the 'ways'

the Supreme Court envisioned would be consistent with the Constitution," and concluded that "I-872 complies with the Constitution." App. 46, 47.

Next, the district court concluded that the political parties' evidence and arguments were "both irrelevant and unpersuasive" (App. 47) and did not show "the possibility of widespread confusion [] from the perspective of a reasonable, well-informed electorate." App. 47 (citing *Grange*, 522 U.S. at 456). The political parties offered "newspaper articles and other materials showing that some voters and news media speak loosely about the relationship between political parties, the candidates, and the election process." App. 47. That evidence was irrelevant; it showed only that private parties, or isolated state officials, could use words that "might foster some negligible confusion" but did not show "the type of widespread voter confusion" contemplated in *Grange*. App. 47. The political parties' claim that "not all voters read the ballot instructions or the instructional material included with the ballot" was likewise irrelevant to evaluating well-informed voters. App. 48. The court then "decline[d] the political parties' invitation to review the possibility for voter confusion under traditional trademark analysis." App. 48. "Quite simply, trademark law does not lie in the First Amendment associational rights implicated in this matter," because, as the court explained, trademark law and the First Amendment protect different interests. App. 48.

The political parties also offered anecdotes that candidates who were officially nominated by a party did not receive sufficient votes to advance to the general election. The court found this was

insufficient, because "I-872 did not prevent the Democratic Party's nominee from advancing to the general election; the voters did." App. 49. The political parties' argument also "misse[d] the point: 'Whether parties nominate their own candidates outside the state-run primary is simply irrelevant. In fact, parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations.'" App. 49 (quoting *Grange*, 552 U.S. at 453).

The district court concluded that a study submitted by the political parties could not show "the possibility of widespread voter confusion among a reasonable, well-informed electorate." App. 52. The study was neither "limited to Washington voters nor inclusive of the entire state's electorate." App. 52. The study did not "evaluate whether the selected individuals represent the reasonable, well-informed voter from Washington." App. 52. The study failed to provide the small group of participants with explanatory materials that Washington provided to voters with their ballots, failed to reference Washington's education campaign conducted through the media, and failed to use "a ballot consistent with the one Washington actually uses." App. 52-53. The district court, therefore, was "unconvinced that the study accurately reflects the well-informed electorate—an electorate in whom the Supreme Court has noticeable confidence." App. 53 (citing *Grange*, 552 U.S. at 455). Finally, the district court rejected the political parties' arguments relying on state regulations applying to political advertising. App. 54-55.

The district court found no issue for trial on whether implementation of I-872 "create[d] the possibility of widespread confusion among the reasonable, well-informed electorate." App. 55. The record showed that the top two primary, as implemented, did not impose a severe burden on the parties' associational rights and, therefore, "Washington [did] not need to assert a compelling governmental interest in pursuing I-872." App. 55. Instead, the state's "previously asserted interest 'in providing voters with relevant information about the candidates on the ballot is easily sufficient to sustain I-872.'" App. 55 (quoting *Grange*, 552 U.S. at 458).

E. The Court Of Appeals Affirmed

The Court of Appeals for the Ninth Circuit affirmed, holding that the political parties failed to show a basis for a freedom of association claim based on implementation of I-872. "The 'form of the ballot' plainly supports the conclusion that I-872 does not impose a severe burden on the [political parties'] freedom of association." App. 13; *see also Grange*, 552 U.S. at 456. Like the district court, the court of appeals found unavailing the evidence the political parties offered. This included: newspaper articles in which candidates were referred to as "Democrats" or "Republicans"; the study that the court concluded was "not relevant" with respect to voter confusion under I-872 as implemented; the regulations applying to political advertising that formed no part of I-872; and the evidence that the Democratic Party's official nominee did not always succeed in the primary. App. 14-17.

Like the district court, the court of appeals concluded the political parties "have not demonstrated a triable issue that the state's implementation of I-872 imposes a severe burden on their freedom of association." App. 17. Therefore, the court was required only to address whether "I-872 furthers an important regulatory interest." App. 17. The court held that the state had met this burden "because, as the Supreme Court held in *Grange*, I-872 serves the state's important regulatory interest in 'providing voters with relevant information about the candidates on the ballot.'" App. 17 (quoting *Grange*, 552 U.S. at 458).

The court of appeals also rejected claims pursued by the Libertarian Party. It held that I-872 did not unconstitutionally deny ballot access because candidates who prefer the Libertarian Party, like all other candidates, can readily appear on the primary ballot and compete for the support of the full electorate. App. 18-19. The Libertarian Party "participates in a primary at the same time, and on the same terms, as major party candidates." App. 20. The fact that candidates compete at the primary stage does not impermissibly limit the field of candidates presented to voters. App. 20. (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983)). The court also found no merit to the Libertarian Party's trademark claim. App. 21-22. The Libertarian Party could not "plausibly allege" that the state competes with the Libertarian Party in providing goods or services. App. 22.

REASONS FOR DENYING THE PETITIONS

Two of the three political organizations that originally challenged I-872—the Washington State Democratic Central Committee and the Libertarian Party of Washington State—timely filed petitions for writs of certiorari. Their petitions raise seven questions for review. At least four questions depend in significant part on ignoring the Court's decision in *Grange*, or seek to revisit the decision rejecting the facial challenge. All the questions presented by the Libertarian Party raise issues this Court already has decided in *Grange* and in other cases, and raise trademark law claims that are unsupported by law or the record. None of the seven questions presented merit this Court's review and, therefore, the petitions should be denied.

The Democratic Party's first question ignores holdings in *Grange*. The question asks if the state "bear[s] the burden of showing the risk of forced association is in fact *reduced to a constitutionally acceptable level* by the disclaimer" it placed on its ballots. Dem. Pet. i (emphasis added). The question presumes that forced association *above* a "constitutionally acceptable level" exists and needs to be "reduced." This question and presumption cannot be squared with the ruling in *Grange* that "[t]here 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." *Grange*, 552 U.S. at 454. Moreover, the question asks the Court to focus artificially on the disclaimer alone, when several other factors showed

that reasonable well-informed voters would understand that they were not selecting a party's nominee, and would understand that a candidate's statement of party preference did not imply that the party endorsed or associated with the candidate.

The Democratic Party's second question also tries to circumvent *Grange* by asking the Court to decide whether principles applicable to trademark misuse should "be applied by analogy" in this First Amendment claim. There is no need to address petitioner's analogy to trademark disclaimers because the analogy is flawed. For example, the trademark disclaimer cases cited by petitioner examine a disclaimer *after* a trademark holder proves a violation and consumer confusion. In contrast, *Grange* rejected any presumption of voter confusion and constitutional harm. Moreover, the state implemented I-872 using multiple strategies to ensure that well-informed voters will understand that preference statements by candidates do not imply that the candidate is a party's nominee, or imply that the party approved of or associated with the candidate.

The Democratic Party's third question asks this Court to revisit the *Grange* Court's holding that I-872 reasonably advances important state interests by providing information to voters. Petitioner, however, did not make the arguments in its third question to the court of appeals. Moreover, there is no reason to revisit the *Grange* Court's ruling that in the absence of severe burdens on associational rights, I-872 satisfies the Constitution.

Similarly, the four questions presented by the Libertarian Party's petition should be denied because they seek to revisit rulings by this Court. The party's first question would ask whether I-872 denies the party access to voters. Under I-872, the Libertarian Party has access to Washington's voters on the same terms as any party. Therefore, the party's first question is answered by this Court's previous decisions. *E.g.*, *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986) ("It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election."). The Libertarian Party's second question asks whether the party has a constitutional right to disavow a candidate on the ballot itself. Petitioner offers no argument for review of this question and, like the first question, the issue has been answered by previous decisions of this Court. *E.g.*, *Grange*, 552 U.S. at 453 n.7 ("The First Amendment does not give political parties a right to have their nominees designated as such on the ballot."). The Libertarian Party's third and fourth questions ask the Court to examine whether Washington's ballot or other election publications violate a trademark. There is no colorable basis for a claim of trademark infringement. The state does not use a party's name to compete with the party in providing customers with goods or services.

A. The Court Of Appeals Applied *Grange* To The Political Parties' Freedom Of Association Claims

The court of appeals correctly applied *Grange* to dismiss the petitioners' challenge to I-872 as implemented.

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

App. 12-13. Following the teaching of *Grange*, the court of appeals focused first on the ballot. "[T]he state in implementing the ballot adopted each of the Supreme Court's suggestions." App. 13. "The form of the ballot thus points to an absence of voter confusion." App. 13.

The court of appeals then applied the holdings and reasoning of *Grange* to reject the political parties' "attempt to rebut this inference [of an absence of voter confusion] with evidence of actual voter confusion." App. 14. First, the newspaper articles cited by parties "do not establish that members of the media or elected officials are confused about these candidates' party affiliations[.]" App. 14. These speakers "may simply be 'using shorthand'" to indicate the candidate's stated party preference. App. 14. Such "'isolated incidents do not show the type of widespread voter confusion the

Supreme Court contemplated in its review.'" App. 14 (quoting district court).

Second, the numerous flaws in the study offered by the challengers meant that the results of the study were "*not relevant evidence* of whether '*a well-informed electorate* will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate.'" App. 15 (first emphasis added) (quoting *Grange*, 552 U.S. at 454 ([second] emphasis added)).

Third, the court relied on the *Grange* examination of well-informed voters to reject the parties' reliance on state campaign finance statutes that "refer to a candidate's statement of party preference as that candidate's 'party affiliation.'" App. 15. It is "implausible . . . that even well-informed voters are aware of the intricacies of Washington's election regulations" and "highly unlikely that voters would read and rely on [these two sections] to obtain an understanding of I-872." App. 16. The statutes in question, therefore, were not relevant to showing a burden on associational rights. "The confusion that is at issue here is whether voters mistakenly believe the party has affiliated with the candidate, not vice versa. In light of the clear language of the ballot, the Voters' Pamphlet and the ballot insert, no reasonable voter would be confused by [the identified sections]." App. 16.

Finally, the court of appeals rejected the anecdotal showing that in several I-872 primary elections a party's "official nominee failed to advance to the general election." App. 17. This result was immaterial because there is no showing "that these election results reflect voter confusion rather than voters' actual preferences." App. 17. The fact "[t]hat official party nominees have failed to advance does not, without more, suggest voter confusion." App. 17.

Therefore, in finding no "triable issue that the state's implementation of I-872 imposes a severe burden on their freedom of association," the court of appeals followed *Grange* precisely. App. 17. It also applied *Grange* when it concluded that I-872, as implemented, advanced important state interests: "[A]s the Supreme Court held in *Grange*, I-872 serves the state's important regulatory interest in 'providing voters with relevant information about the candidates on the ballot.'" App. 17 (quoting *Grange*, 552 U.S. at 458).

B. Petitioners Exaggerate The Relevance Of Their Claims To Other State Primaries

Petitioners argue that the Court should grant review because, they say, top two primary systems are "spreading" and the Court needs to provide guidance to avoid "potential" future disputes. Dem. Pet. 30; Lib. Pet. 9. There is no substance to their claim that top two primaries are spreading in any significant manner. Two other states have top two primaries, California and Louisiana, and those primaries do not necessarily present the same implications for associational rights. For example, voters in California and Louisiana may identify or

register by party in order to vote. The top two primaries in those states then use the party of the candidate's voter registration on the ballot. *See* Cal. Elec. Code §§ 8002.5(a), 2151(a); La. Rev. Stat. § 18:551D. As a result, the implementation of the primary election systems in those two states presents different considerations with respect to issues of associational rights.[4]

At most, the primaries in other states show that this Court may, someday, face other cases applying the principles established in *Grange* in the context of other primaries. Therefore, the instant case does not present a unique or urgent opportunity for the Court to address any of the petitioners' seven questions.

C. The Democratic Petition Raises Questions That Seek To Relitigate Or Ignore The Holdings In *Grange*

Each of the Democratic Party's three questions implicitly attempts to relitigate this Court's rulings in *Grange*. Because there is no conflict presented, and the petitioner does not provide reasons to revisit this Court's rulings in *Grange*, the petition should be denied.

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[4] Arizona voters may consider whether to adopt a top two primary system, at the November 2012 election, if a circulating initiative garners enough signatures. Like the California and Louisiana systems, the proposed Arizona system would derive a candidate's party preference from voter registration by political party. Az. Open Elections/Open Gov't Act, No. C-03-2012 § 3.E (filed Sept. 26, 2011).

1. Contrary To *Grange* And The Record, The Democratic Party's First Question Presumes That The State Primary Imposes A Severe Burden On Associational Rights

The Democratic Party's first question asks the Court to decide, "does Washington bear the burden of showing the risk of forced association *is in fact reduced to a constitutionally acceptable level* by the disclaimer?" Dem. Pet. i (emphasis added). The Democratic Party argues this question should be granted to clarify whether "prominent disclaimers" are sufficient to avoid a constitutional violation. Dem. Pet. 34. As a threshold matter, the claimed need for clarification on this subject is refuted by the fact that four judges in two courts applied *Grange* without expressing any need for clarification, and without internal division.

The Democratic Party's first question should be denied because it is predicated on the same unsupported presumptions that the political parties advanced as the basis for their facial challenge in *Grange*. The question assumes a constitutionally significant level of confusion by well-informed voters based, apparently, on the mere existence of Washington's law. This Court, however, flatly rejected the political parties' presumption of constitutionally significant voter confusion in *Grange*. *Grange*, 552 U.S. at 454 ("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."). The

Democratic Party's first question simply repackages the same presumptions that were the premise for the failed challenge in *Grange*. For example, the presumption explicitly reappears when the question asks the Court to decide whether the state must show that burdens have been "reduced to a constitutionally acceptable level by the disclaimer[.]" Dem. Pet. i. The Court should decline petitioner's invitation to insert presumptions of constitutional harm that the Court addressed and rejected in *Grange*.

Moreover, the lower courts correctly applied the burden discussed in *Grange* and in other cases involving associational rights and elections. For example, the court of appeals required petitioners to demonstrate that I-872, as implemented, severely burdened associational rights. App. 12 ("To trigger strict scrutiny, the plaintiffs must show that the state's implementation of I-872 severely burdens their freedom of association."). Only after the political parties demonstrated the burden, if any, on associational rights must the state "demonstrate either that the regulation is narrowly tailored to achieve a compelling state interest or, if the regulation imposes only a modest burden on First Amendments rights, that the regulation furthers the state's important regulatory interests." App. 12-13 n.4. The court of appeals decision regarding the burden of proving I-872 is unconstitutional comes straight from the *Grange* opinion and does not

warrant the Court's further review. *Grange*, 552 U.S. at 551-52.[5]

Finally, the Democratic Party's first question is unlikely to be reached. The question asks about the state's burden with specific regard to the ballot disclaimer. Petitioner claims this is an appropriate question because the court of appeals "relied heavily, and almost completely, on the *mere presence* of the ballot disclaimer" to overcome alleged harm to associational rights. Dem. Pet. 33. But this is not true. As shown at pages 12-13 of the Appendix, the court of appeals did not rely on the ballot disclaimer in isolation. The court of appeals recognized that Washington had adopted each of the suggestions given by the Court in *Grange* for implementing I-872. App. 13. The ballot disclaimer is simply one of a "variety of ways" Washington implemented I-872 to "eliminate any real threat of voter confusion." *Grange*, 552 U.S. at 456. Because the alleged violation of associational rights is bound up in a variety of facts, not merely the disclaimer, the Court should deny review of the first question.

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[5] *See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). Under *Timmons*, a court determines if the burden on associational rights is severe by "weigh[ing] the character and magnitude of the burden the State's rule imposes" on such rights. *Id.* at 358 (internal quotation marks omitted). Courts do not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Id.* at 364 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)). The lower courts answered the constitutional question presented by this case, whether I-872 imposes a severe burden on associational rights, consistent with these principles.

2. Review Is Not Warranted To Consider If Trademark Principles Apply By Analogy To This First Amendment Claim

The Democratic Party argues that its second question would allow the Court to address whether certain principles articulated by federal courts to remedy trademark misuse and consumer confusion should be applied by analogy to evaluate a claim that I-872 imposes a severe burden on associational rights. As with their first question, the "trademark by analogy" argument focuses primarily on the ballot disclaimer, ignoring the breadth of the *Grange* discussion of well-informed voters, and the lower courts' examination of the other factors affecting a well-informed voter. As with their first question, petitioner's "trademark by analogy" arguments seek to foist an inapposite burden on the state. That is, the arguments depend on presuming, rather than showing, that I-872 imposes a severe burden. As such, the second question presented is equally precluded by the holdings in *Grange* that rejected presumptions that the I-872 top two primary imposes severe burdens on associational rights of political parties.

Petitioner, for example, declares that under a trademark analysis, "the defendant, not the trademark owner, must show the effectiveness of a disclaimer." Dem. Pet. 36; *see also* Dem. Pet. 37 (equating the political parties in Washington with "injured parties" that have shown trademark infringement). The trademark disclaimer cases, however, are not analogous at all. In the cases presented by the petitioner, the burden on a party to

demonstrate the effectiveness of a disclaimer in the trademark context arises only *after* a trademark holder proves infringement. *See*, *e.g.*, *Home Box Office, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1315 (2d Cir. 1987) (turning to analysis of disclaimer after first agreeing with district court that HBO had satisfied its "burden of demonstrating that Showtime's use of its trademark would confuse and mislead consumers"); *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006) (considering disclaimer in remedy phase as alternative to injunction); *Basile, S.p.A. v. Basile*, 899 F.2d 35, 38 (D.C. Cir. 1990) (where confusion was undeniable given two competitors' goods are sold under same name, junior user almost uniformly bound to display negative disclaimer). In contrast, the explanation on Washington's ballot is not a disclaimer analyzed at the remedy stage of trademark infringement. To the contrary, the ballot explanation is one of several reasons why the parenthetical party preference statement does not impose a severe burden.[6]

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[6] Moreover, addressing the Democratic Party's analogy to trademark disclaimers does not fully address the facts of this case because it would not decide the constitutional issue of whether I-872, as implemented, imposed a severe burden on associational rights. As discussed above at page 23, the lower court decisions were not based "heavily, and almost completely" on the ballot disclaimer, as petitioner mistakenly argues. *See* Dem. Pet. 33. The Court cannot address the associational rights claim without considering the entire summary judgment record that shows multiple reasons why well-informed voters would not suffer widespread confusion regarding the I-872 top two primary.

The Democratic Party's "trademark by analogy" argument fares no better when petitioner argues that the Court should selectively borrow from court of appeals cases that articulated a multi-factor test for consumer trademark confusion.[7] As the Court held in *Grange*, there is no basis to assume well-informed voters are careless and ignore information provided. An analogy to consumer confusion, therefore, does not apply. Moreover, the petitioner shows no need to resort to consumer trademark cases. As the lower courts demonstrated, a court may decide the constitutional question directly by considering what a well-informed voter would be charged with knowing to access associational rights burdens.

Trademark law is not designed to address competing First Amendment rights—the rights of political parties, candidates, and citizen voters. *Grange*, 552 U.S. at 451. These are the values at stake when political parties challenge the parenthetical personal preference statement on the I-872 ballot. In contrast, the risk of injury in trademark infringement is that one private party, the trademark owner, may lose money while another, the alleged infringer, may gain through unlawful use of the trademark. The competing proprietary and commercial interests at stake in trademark disputes are substantially different from the constitutional rights and public interests at stake when a party challenges a state's primary election

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[7] Dem. Pet. 35 (citing *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979); *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983)).

system. Therefore, the district court and the court of appeals properly rejected trademark by analogy arguments and focused on the actual constitutional question presented by this case: does the top two primary, as implemented, impose a severe burden on associational rights? This question did not require the lens of trademark law because, contrary to the trademark law analogies, a state primary election system should not start from a presumption of infirmity.

3. The Court Of Appeals Followed *Grange* To Conclude That The I-872 Primary Advances Important State Interests

The Democratic Party's third question asks if I-872 is "a reasonable and politically neutral regulation that advances an important state interest." Dem. Pet. i, 38-39. This question does not warrant review because it was not presented below and because it asks this Court to rehear a question it answered in *Grange*.

Petitioner presented five issues to the court of appeals. *See* Dkt. No. 15-1, Brief Of Appellant, Washington State Democratic Central Committee at 4, 47-53 (June 6, 2011). Petitioner did not present the argument it now musters under its third question. Rather than address whether I-872 was unconstitutional under the standard of scrutiny identified in *Grange*, the Democratic Party's arguments focused on claiming that I-872 imposed a severe burden on the party's associational rights so that strict scrutiny applied. This Court does not address arguments not preserved below, including

new arguments that ask the Court to apply a different level of scrutiny. *See Heller v. Doe*, 509 U.S. 312, 319 (1993) (argument based on a different level of scrutiny was "not properly presented" where party did not present the argument to the lower court).[8]

Moreover, the Court should deny review of the Democratic Party's third question presented because it simply asks the Court to revisit the *Grange* Court's conclusion on the same issue. The *Grange* Court 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. This holding in *Grange* is consistent with this Court's prior holdings that "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Id.* (quoting *Anderson v. Celbrezze,* 460 U.S. 780, 796 (1983)).

Petitioner suggests that its third question would allow this Court to decide if the court of appeals should have followed "teachings" from a 1964 decision that invalidated a state election law requiring a candidate's race to be identified on the ballot. *See* Dem. Pet. 38 (citing *Anderson v. Martin*, 375 U.S. 399, 402 (1964)). The court of appeals did

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[8] In its reply brief below, the Democratic Party summarily and belatedly argued that it should prevail even without showing that I-872 imposed a severe burden on associational rights. Dkt. No. 37, Reply Br. Of Appellant, Washington State Democratic Central Committee at 22. But, even then, the Democratic Party did not present the authorities or arguments it now raises as its third question presented. *See* Dem. Pet. 38-40.

not address teachings from *Martin* because petitioner made no such argument below. Moreover, this is not a serious issue for review because there is no comparison between stating a candidate's race on the ballot, which invites racial discrimination in voting, and the provision of information about a candidate's personal preference for a particular political party, which provides unquestionably legitimate information to voters.[9]

In passing, petitioner's third question also claims that I-872 is not "politically neutral." Dem. Pet. i, 39. Petitioner does not explain the term. Petitioner argues simply that political neutrality is offended because stating a party preference allows a candidate to attract or "siphon" votes. Dem. Pet. 38. This argument is the same argument petitioner already raised in its prior facial challenge. *Cf. Grange*, 552 U.S. at 465 (Scalia, J., dissenting) (arguing that the I-872 party preference statement patently allows candidates to draw upon the goodwill a party has developed). There is no substance to petitioner's undeveloped references to "political neutrality."[10]

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[9] Petitioner also cites *Cook v. Gralike*, 531 U.S. 510 (2001), where the Court rejected a state law requiring a ballot notation regarding a candidate's position on term limits that was described as a "scarlet letter" against the candidate. Dem. Pet. at 39. As with *Martin*, the facts in *Cook* are not comparable. Moreover, the Court in *Cook* did not address burdens on associational rights.

[10] This Court has never construed the term "politically neutral" to create a level of scrutiny different from scrutiny applied to the I-872 primary in *Grange*. For example, the *Grange* Court cited *Burdick v. Takushi*, 504 U.S. 428, 438

D. The Libertarian Party Petition Does Not Raise Questions That Warrant Review

1. I-872 Does Not Place An Unconstitutional Burden On Minor Parties Or Minor Party Candidates With Regard To Access To The Ballot

The Libertarian Party's first question asks the Court to decide whether I-872 unconstitutionally denies access to the ballot.[11] This question does not warrant review because I-872 freely places all candidates onto the primary ballot simply by the candidate filing a declaration of candidacy and paying a filing fee. Therefore, all candidates have an equal opportunity to be one of the top two candidates in the general election. Moreover, candidates in the top two primary compete for the votes of the entire

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(1992), where the Court used the phrase "reasonable, politically neutral regulations" to describe Hawaii's prohibition on write-in voting. *Grange*, 552 U.S. at 452. *Burdick*, in turn, cited the holding in *Munro* where the Court concluded that Washington's primary did not burden minor political parties. More recently, in *Clingman v. Beaver*, 544 U.S. 581, 604 (2005) (O'Connor, J., concurring), Justices O'Connor and Breyer wrote separately and agreed with the rest of the Court that Oklahoma's "semiclosed primary law imposes only a modest and politically neutral burden on associational rights." As used in election cases, the term "politically neutral" refers simply to the absence of discrimination or favoritism towards specific political viewpoints. As in *Clingman*, *Munro*, and *Burdick*, the term has no application here because I-872 treats all political parties the same.

[11] Neither the Democrats nor the Republicans joined the Libertarians in asserting this claim below. *See* App. 18-21 (describing this only as a claim asserted by the Libertarians).

electorate, not a more limited set of voters who affiliate with a single political party. Based on these undisputed facts, the court of appeals rejected the Libertarians' ballot access claim. App. 18-21.

The ballot access question is not appropriate for review because the ruling below is a straightforward application of this Court's prior decisions. The court of appeals concluded first that *Anderson v. Celbrezze*, 460 U.S. 780 (1983), did not support the Libertarian's claim. That case addressed a system where minor parties were required to file in March, before major party nominations, for the minor party candidate to appear in a November general election. In contrast to *Celbrezze*, the I-872 primary occurs in August, and a candidate is not required to act before the major parties select their nominees. Therefore, a minor party candidate participates "at the same time, and on the same terms, as major party candidates" in the I-872 primary. App. 20. Based on this fact, the court of appeals followed this Court's ruling in *Munro*. "'It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election.'" App. 20 (quoting *Munro*, 479 U.S. at 199). Accordingly, the court of appeals held that I-872 does not impermissibly limit the field of candidates from which voters might choose or impose any relevant burden on the Libertarian Party. App. 18.

The Libertarian's "ballot access" question also ignores the teaching of *Grange* that, by decoupling the election system from a party nomination system, a "top two" election makes it irrelevant to talk about

the access of a party, major or minor, to the general election ballot. *Grange*, 552 U.S. at 453. Candidates file for office and qualify for the general election ballot without reference to their status as nominees of any political party. *Grange*, 552 U.S. at 453. Candidates on the primary ballot advance to the general election ballot by becoming one of the top two vote-getters for an office. If the candidate does not qualify, it is because he or she did not receive sufficient support from the voters in the primary, not because of any barrier based on party status.[12]

2. The Libertarian Party's Second Question Has Been Previously Decided, And The Petition Does Not Provide Any Argument Supporting Review

The Libertarian Party's second question asks whether I-872 violates associational rights because the state provides no official publication in which the party can state who its nominees are or, alternatively, disavow "false candidates." Lib. Pet. i. This Court should deny review of this question for two reasons. First, petitioner offers no argument addressing why the Court should grant a writ of certiorari on this issue; it abandons the question

[12] In addition to the above reasons, this question is inappropriate for review because the Libertarian party argues it based on a declaration that was not before the trial court. Lib. Pet. 27-28 (citing Decl. of Richard Winger). The district court dismissed the Libertarian's ballot access claim in August 2009, but the Libertarians did not submit Winger's declaration until over a year later. That declaration cannot be used to bolster or review the court's decision dismissing their ballot access claim.

after stating it. *See* Lib. Pet. 9-28 (providing no argument regarding second question presented). Second, this Court has already decided this question. "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Grange*, 552 U.S. at 453 n.7 (citing *Timmons v. Twin Cities Areas New Party*, 520 U.S. 351, 362-63 (1997)). As this Court explained: "Parties do not gain such a right simply because the State affords candidates the opportunity to indicate their party preference on the ballot." *Id.* Because petitioner offers no explanation why the Court should revisit this ruling, the Libertarian Party's second question does not warrant review.

3. I-872 Does Not Deny The Libertarian Party Trademark Protection Under Federal Law Or Violate The Party's Rights Under The Lanham Act

The Libertarian Party petition uses two pages to allude to its third and fourth questions that ask the Court to address whether the party may claim that I-872 literally violates trademark law.[13] Petitioner does not claim there is any conflict among

[13] The Libertarian Party's third question asks whether by denying the party the opportunity "to disavow false candidacies or to acknowledge its nominee on the ballot or in any official publication, does I-872 deny the Libertarian Party trademark protection guaranteed by federal law?" Lib. Pet. i. The fourth question asks if "unauthorized use of the trademarked name 'Libertarian Party' by the state on election ballots to indicate 'party preference' of unaffiliated candidates constitutes competition with the Libertarian Party in violation of the Lanham Act?" Lib. Pet. i.

lower courts that supports this Court's review of these two questions. Nor does petitioner show why there is a significant federal question on the Lanham Act that requires this Court's resolution.

When the state prints ballots, it does not "compete" with the Libertarian Party, or anybody else who attempts to advocate for or against candidates or issues. As the court of appeals concluded, the Libertarian Party "has not plausibly alleged that the *state* uses party labels on the ballot to perform a service in competition with the Libertarian Party." App. 22. Thus, there is no factual showing to support a trademark claim having a colorable basis under the Lanham Act.

For the above reasons, the Libertarian Party's third and fourth questions are novel issues that do not warrant review by this Court.

CONCLUSION

The petitions for writs of certiorari should be denied.

RESPECTFULLY SUBMITTED this 22nd day of June 2012.

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