NOS. 05-35780 & 05-35774

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et al.,
Appellees/Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.
Appellees/Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,
Appellee/Plaintiff Intervenors,

v.

DEAN LOGAN, King County Records & Elections Division Manager, et al.,
Defendants,

STATE OF WASHINGTON, et al.
Appellants/Defendant Intervenors,

WASHINGTON STATE GRANGE,
Appelant/Defendant Intervenor

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE
No. C05-0927
The Honorable Thomas S. Zilly
United States District Court Judge

AMICI CURIAE BRIEF OF FAIRVOTE – THE CENTER FOR VOTING AND DEMOCRACY, JACK BENNETTO, JOHN R. BURBANK, GEORGE K. CHEUNG, JEROME R. CRONK, TODD DONOVAN, GERRICK W. DUDLEY, ROBERT KELLER, DAVID KORTEN, FRANCES KORTEN, BECKY LIEBMAN, KRIST NOVOSELIC, AND NADINE SHIROMA, IN SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Ninth Circuit Rule 26.1, Amicus Curiae FairVote – The Center for Voting and Democracy ("FairVote") hereby states that it is a non-profit corporation organized under the laws of the District of Columbia under the name "Center for Voting and Democracy." FairVote has no parent corporation, and no publicly traded company owns 10 percent or more of the stock of FairVote, given that FairVote issues no stock and thus has not shareholders.

Dated: October 25, 2006

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes and Regulations

Constitutions

Other Authorities

INTERESTS OF AMICI

FairVote - The Center for Voting and Democracy ("FairVote") is a national non-partisan, non-profit corporation incorporated in the District of Columbia for educational purposes. FairVote researches and distributes information on the impact of electoral structures on voter participation and representation and advocates for fairer electoral systems that would benefit the public interest. FairVote has been active in encouraging government officials, judges and the public to explore alternatives to current approaches to plurality elections and winner-take-all electoral systems, and has over the years done extensive work in attempting to implement electoral reforms in Washington state, including instant runoff voting. Visit www.fairvote.org

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STATEMENT OF THE CASE

Washington state voters, in approving Initiative 872 (hereinafter "I-872") last fall, instituted what is popularly known as a top-two primary system. Candidates seeking nomination to office under this system have their names placed on a single ballot with their self-declared party preference. Voters may select a single candidate of their choice for each position and the two candidates receiving the highest number of votes advance to the general election, regardless of party affiliation.

Proponents of the top-two primary system, including the Washington state Grange, argued it created a greater range of choices for voters by allowing them to freely vote for primary election candidates without limiting the choices based on their own party registration or preference. Opponents of this system and the Plaintiffs in this case alleged it violated political parties' constitutionally protected free association rights. As a result, the state Republican, Democratic and Libertarian parties sued in May to block implementation of the system.

In July of 2005, U.S. District Judge Thomas S. Zilly struck down the system as unconstitutionally burdening the First Amendment rights of political

parties by allowing candidates to run on a party's label without the party's permission and by permitting voters to skip back and forth among parties as they pick a favorite candidate for each office. Judge Zilly found the Plaintiffs unable to demonstrate a sufficiently compelling state interest "allowing any voter, regardless of their affiliation to a party, to choose a party's nominee" and "allowing any candidate, regardless of party affiliation or relationship to a party, to self-identify as a member of a political party and to appear on the primary and general election ballots as a candidate for that party" (p. 39).

The effect of Zilly's ruling means the state defaults to a "Montana-style" primary system, as was used in last fall's election. Under that system, rejected by voters in the referendum on I-872, voters choose a single party's ballot and are limited to the choices within that ballot. Washington state officials, Secretary of State Sam Reed and Attorney General Rob McKenna, joined by the Grange, appealed to the 9th U.S. Circuit Court of Appeals, which recently granted an expedited appeal of these issues.

SUMMARY OF ARGUMENT

In this Brief, FairVote - The Center for Voting and Democracy, joined by Washington state organizations and citizens, seeks to provide information that would persuade the Court of Appeals to affirm the ruling of the District Court in ruling that electoral systems that burden political parties' free association and first amendment rights by creating vote-splitting problems are unconstitutional and to narrow the scope of the District Court ruling. Additionally, amici curiae herein seek to draw attention to a small modification to the top-two system that would alleviate the concerns of all parties involved and remove many of the constitutional problems created by the particular method of implementation of this top-two system. In particular, we assert that adding a ranked choice feature to the primary would alleviate many of the free association problems found by the District Court, and we correspondingly recommend such a system for use in Washington, in lieu of the top-two or Montana systems.

We do not directly challenge the District Court's holding in this case, but advocate for a more nuanced reasoning that will provide guidance for Washington State in devising a constitutional voting system that reflects the preferences underpinning the top-two primary system that gained such

strong voter support in Initiative 872. Likewise, should the appeal fail, we hope the backers of the top-two system will gain information from this brief that allows them to craft an electoral system in the future that meets their initial goal of expanding voter choice, while passing constitutional muster. As a result, we hope that the Court of Appeals, in passing judgment on the constitutionality of electoral systems, will confirm that the various modifications and alternatives to the top-two system discussed herein are fully constitutional and compatible with Washington State law.

Specifically, this Brief argues that the First Amendment problems the court has found in the top-two primary system are not inherent to the overall system, but only to the system when it is used in conjunction with its current ballot marking and tabulation methods. That is because District Court was concerned with candidates being able to run with a party's label without that party's consent, and the overall dilution to the party's name and candidates that would result. A key concern acknowledged by the Court here is in vote-splitting or spoiling between candidates that a party cannot control, due to the self-identification of party label allowed by I-872. For example, under the I-872 top-two system, seven Democrats and two Republicans could run in the primary with the result being that two Republicans advance to the

second round because the seven self-proclaimed Democrats each split their vote. This practical problem lies at the heart of the Court's correct finding that the top-two system violates political parties' free association rights.

By implementing a ranked choice voting method, as already found to be constitutional by the Washington Supreme Court, Washington State would solve vote-splitting problems and gain the flexibility to create a system that retains the benefits, if not the actual form, of the top-two primary system while alleviating some or all of the court's First Amendment concerns. Additionally, once a ranked choice voting system is adopted, parties could institute nominating conventions or an endorsement process without diminishing the added voter choice intended by the top-two system. We urge the court to clarify its ruling to this effect and the parties to take under consideration the proposed modifications rather than simply institute the unpopular Montana primary. Particularly, the Court of Appeals should clarify that the top-two system is not inherently violative of parties' First Amendment and free association rights, rather this constitutional violation is limited to the particular application of a top-two system attempted here.

ARGUMENT

I. VOTING SYSTEMS ARE COMPOSED OF MULTIPLE PARTS WITH DISCRETE POSITIVE AND NEGATIVE EFFECTS THAT SHOULD BE ANALYZED AND CAN BE MODIFIED SEPARATELY

A. No Voting System Is Perfect, But All Can Be Tailored to Better Meet Desired Goals

Voting systems are composed of multiple parts, including methods for ballot marking, vote tabulation, and determination of the winner. The manner in which each of these parts is carried out has discrete positive and negative effects. As Kenneth J. Arrow demonstrated in his work credited with earning him a Nobel Prize, no overall voting system is perfectly representative and cannot therefore possibly satisfy every potential voting system goal. *See* Kenneth J. Arrow, Social Choice and Individual Values (Yale University Press 1963). Some may achieve better majority representation at the expense of minority protection. Others may provide for geographic representation but suffer from decreased political competition or a lack of group representation. As a result, a useful assessment of any voting system must hinge on both a fine-grained analysis of the impact of each part of the system and a clear sense of what the paramount values to be achieved are.

This Brief will analyze the current system in such a fashion, focusing in

particular on the relevant values of free association, voter choice, and political party vote-splitting. The Brief also demonstrates how the top-two primary system does not inherently injure free association, but certain aspects of its execution may. A few modifications to its execution may resolve the Parties' concerns and better achieve their declared values. This Brief will discuss a number of possible modified systems that have been used in the United States in the past and are valid under both the United States and Washington State Constitutions. Other modified systems may also be devised using the analysis pursued in this Brief.

B. At Least Some of Initiative 872's First Amendment Problems Arise from Electoral Consequences Not Intrinsic to the Top-Two System

The District Court, in ruling that printing a candidate's self-identified party affiliation on a ballot without the party's consent unconstitutionally burdened that party's First Amendment rights, justified this position by stating that "the Court is persuaded by Plaintiffs' arguments that allowing any candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates" (Pg. 30). The court, in discussing a party's potential vote dilution, was specifically referring to the Washington State Republican Party's expressed fear in their

Complaint that the top-two primary election system, by opening the door to an uncontrolled number of candidates running under their party banner, would lead to the dilution of their voter support. The Plaintiffs legitimately argue that one consequence of this inability to control use of its party label would be that a party with greater overall voter support than its opposition might still fail to advance a candidate to the general election if their votes are dispersed among a greater number of candidates. They provide an example of two Democrats each with 15% of the vote advancing ahead of seven Republicans each receiving 10% of the vote. The Republican Party fails to elect a candidate in this scenario despite on the whole receiving 70% of the vote -- more than twice the percentage of the vote received by the two Democratic Party candidates.

This indicates that the court is correctly recognizing the First Amendment burden placed on political parties as not merely cosmetic, but of practical consequence in electoral terms. The First Amendment problem is not created alone by the appropriation of the party label by officially unaffiliated candidates, however, but by the possibility that such appropriation will crucially undermine the parties' power to harness their supporter's votes to elect their candidates. In fact, the District Court specifically notes that, "The

Democratic Party argues that it has expended considerable time and expense to develop a coherent set of goals and principles that guide the party, and that candidates asserting an affiliation with the party will receive numerous votes based solely on their proclaimed affiliation with the party, and implied adoption of its message and principles" (Pg. 30). Again, the First Amendment claim in question is clearly linked to the potential siphoning of votes alleged to result from the top-two system's implementation.

Without this effect, the First Amendment burden on the Plaintiffs would be greatly minimized. Political parties exist, as the court noted, to nominate and get candidates elected. If these goals are not being frustrated, it is harder to argue that the constitutional burden on them is significant. Indeed current electoral systems do not always result in the nomination of candidates who have the support of traditional party members.

The crucial electoral aspect of the First Amendment burden is therefore not inherent in the top-two primary system generally, but to the system when used in conjunction with its current traditional plurality ballot marking and tabulation methods. Ranked choice voting systems, when used within the top-two system or even in lieu of it, would avoid this danger, and the Court

here should recognize this distinction.

II. MODIFYING THE TOP-TWO PRIMARY WITH A RANKED CHOICE VOTING METHOD WOULD ALLEVIATE THE FIRST AMENDMENT BURDENS PLACED ON PARTIES BY THE SELF-IDENTIFICATION PROVISION OF INITIATIVE 872, WHILE RETAINING INCREASED VOTER CHOICE

A. The Top-Two Primary System in Question Could Be Easily Modified to Use a Ranked Choice Voting System, Without Losing the Defining Characteristics of the Challenged Top-Two System

Should the Court of Appeals and the parties to this case seek to salvage Initiative 872 from its current constitutional defects, minor modifications could be adopted that would preserve the defining characteristics of the embattled top-two system, while remedying the First Amendment problems noted by the District Court. In particular, a top-two primary system with an added ranked choice voting feature would function much like Initiative 872's top-two system, except whereby a ranked choice voting method is used in the first round to narrow the field of candidates to two candidates who, regardless of party affiliation, then advance to a general election to determine a winner. Such a minor modification will remedy many of the alleged First Amendment defects in the top-two system, while retaining the key benefits of greater flexibility and choice for voters.

With a top-two "ranked choice" election, each voter ranks the candidates for

office in his or her order of preference, from the first choice down through as many candidates as the voter chooses to rank, or as many as the rules permit. In the usual tabulation method, votes are counted in a series of rounds. Each round eliminates the candidate with the fewest votes and redistributes ballots to those voters' next choices. This process of redistribution and elimination is repeated in subsequent rounds and the top ranked candidates advance to the general election. Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333, 342 (1998). This method could be used within the confines of the top-two system, with the field narrowed to only two candidates after the first round of voting. This option would be a close approximation of the system adopted with Initiative 872. The system also could be expanded to allow for a greater number of candidates to advance to the general election. These additional options would be more desirable to all parties with a ranked choice voting system in place, given the elimination of the vote-splitting problem.

B. Ranked Choice Voting Systems Would Eliminate the Danger of Multiple Candidates Diluting a Party's Overall Electoral Strength

Ranked choice voting methods, such as "instant runoff voting" and "choice voting" (also historically termed as "preferential voting", "preference

voting" and “the single transferable vote”), allow voters to rank candidates in order of preference, thereby expressing not just which candidates voters support, but also the relationship of their selections to one another. As a result, these systems are able to greatly mitigate the Plaintiffs’ free association concerns, while mirroring the goals of the top-two primary organizers in providing voters more meaningful choices than in traditional plurality elections.

Instant runoff voting is a ranked choice system for use in single-seat elections and requires a majority of votes to win, while choice voting is used in multi-seat elections and results in like-minded groupings of voters being able to elect seats in proportion to their support among voters so that, for example, roughly 25% of the votes will elect one of four seats in a multi-seat legislative district. Though their tabulation methods differ slightly, their features for how voters mark ballots are identical. The key tabulation feature that the systems share is that as tabulation rounds proceed, ballots for less popular candidates are continually redistributed upward to the more popular candidates until winners are declared. Under these ranked choice voting methods, party supporters could rank all the candidates running under their party banner above other candidates. The ultimate effect is of votes for the

party bloc, however individually ranked, converging on the most popular candidates of that party. The number of candidates in the bloc in no way diminishes the power of the overall vote for the bloc, thereby eliminating the primary concern driving the First Amendment arguments of the District Court and the Parties. Referring back to the aforementioned vote-splitting example, a ranked choice voting problem would eliminate the problem of seven Republicans splintering their vote if only two Democrats run for office in the first round election.

C. Modifying Initiative 872 with a Ranked Choice Voting Method Would Allow for the Self-Identification Provision to be Dispensed with Entirely While Allowing for Parties to Nominate or Endorse Candidates Without Diminishing the Intended Voter Choice Benefits

Additionally, once a ranked choice voting system is implemented, the self-identification provision of Initiative 872 can be dispensed with entirely without diminishing the intended voter choice benefits of the initiative. Hence, instead of allowing self-identification, parties could be allowed to nominate or endorse their own candidates as under the Montana system. However, in order to re-create the voter choice benefits of Initiative 872, parties would be allowed to nominate or endorse multiple candidates for office, as is the case in ranked ballot elections to the Australian House of Representatives. Without a ranked choice voting system, nominating or

endorsing multiple candidates would obviously create vote dispersion problems, leading to an unconstitutional electoral system and parties would have no incentive to put up more than one candidate.

With ranked choice voting, as explained in Part II.B. of this Brief, parties could be assured of their votes converging on their most popular candidates. Parties would hence have great incentive to nominate a diverse field of qualified candidates from within their party in order to bring a wider swath of their supporters to the polls, while nominating the most electable of them. This modified system completely eliminates the free association problems created by self-identification while still allowing voters a greater range of choices in the primary election. Of course, the distinct cross-nominating First Amendment burden recognized by the District Court remains. However, the implementation of ranked choice voting facilitates further modifications that are responsive to this other burden.

Modifying the top-two primary system with a ranked choice voting method, as well as a party nomination or endorsement system hence increases the chances of the system passing constitutional muster by reducing the First Amendment burden placed on political parties. At the same time, these

modifications preserve the increased voter choice benefits of the system.

D. Ranked Choice Voting Methods Have Been And Are Currently Used In The United States And In Other Countries

Ranked choice voting is and has been in use in the United States and abroad. Instant runoff voting is currently used in San Francisco, California municipal elections. The "choice voting" method of ranked choice voting is currently used in school board and city council elections in Cambridge, Massachusetts. Choice voting has historically been used in a number of other United States jurisdictions, including New York City and Cincinnati. Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867, 1878-79 & n.61. Ranked ballot voting is also used at the national level in several countries, including Ireland and Australia. *Id.* at 1879. It is recommended In Robert's Rules of Order for electing a group's officers with a mail-in ballot.

E. Washington State Has in the Past Used Ranked Choice Voting Methods, and Interest in these Fair and Efficient Voting Systems Grows Throughout the State

Washington has a history of using ranked choice voting methods for primary elections, as such a system was upheld for use within the state in the earlier part of the 20th century, when a populist reform movement brought direct

primaries to voters. See *State v. Nichols*, 50 Wash. 508, 97 P. 728 (1908). In the 21st century, interest in ranked choice voting systems has grown rapidly, with residents of Vancouver, WA successfully adopting a 1999 charter amendment allowing the city to use the instant runoff form of ranked choice voting for city elections. Vancouver, WA City Charter § 9.03 (2004). In 2005, this prompted the state legislature to pass, and Gov. Christine Gregoire to sign into law legislation giving the cities of Vancouver, Tacoma, and Spokane the option of using instant runoff voting for city elections. 2005 Wa. ALS 153.

F. Additional Methods of Implementing Ranked Choice Voting Systems In Washington Exist, And Their Flexibility In Implementation Allows Them To Be Used Both Within or In Place of the Top-Two System

Beyond the modest alterations to the top-two primary systems outlined above, various other ranked choice voting systems can be implemented while retaining the top-two primary, or alternatively, they can be used in lieu of the system. This flexibility allows for numerous ways of implementing the systems, but additional relevant options for using them are listed below. The difference between using instant runoff voting and choice voting would likely be based on a decision of whether to use multi-seat district elections where more than one candidate is elected in a constituency or single-seat

elections.

Choice voting in multi-seat district elections would reduce the threshold of support needed to win a seat and would result in a more balanced representation of supporters of different parties, while instant runoff voting in single-seat elections would result in individual officeholders elected by a majority of voters. Below we discuss two more intrusive modifications to the top-two primary system, both of which would provide much greater voter choice than either the top-two system or the Montana system, and both of which would alleviate many of the First Amendment concerns raised by the District Court. Believing these options to be debated vigorously in Washington State and neighboring states in the 9th Circuit, we ask the Court to provide direction to their constitutionality.

1. A One-Round "Blanket" Ranked Choice General Election Without Either a Primary or Any Kind of Nominating Process

The top-two primary system even with ranked choice voting still suffers from the policy problem of severely narrowing the field of candidates during the first primary election, when voter turnout has historically been low. Richard Derham, *The "Cajun" Primary: Unintended Consequences in Political Reform,* Washington Policy Center (January 1, 2005) *at*

http://www.washingtonpolicy.org/ElectionLaws/PNPrimary 01-10.html. By the time of the general election, when significantly more citizens come out to vote, the field contains only two candidates who may not well represent the views of first-round voters, let alone general election voters. These problems can be resolved with a further modification made possible by the implementation of a ranked ballot voting method

Folding the primary election into the general election would eliminate the remaining First Amendment problems and shift the increased voter choice of the primary to the general election. The implementation of a ranked choice system in this manner creates a means by which all First Amendment burdens recognized by the District Court can be alleviated and the policy concern discussed can be resolved. With ranked choice voting systems, two discrete elections, and their attendant costs, as currently provided for, are not necessary. Instead, voters can express their ranked preferences for all candidates on a single ballot. This election can produce winners in one round, simply by continuing to eliminate the weakest candidates and redistributing their votes to remaining candidates. Hence Washington could dispense with a primary election entirely and utilize a ranked choice voting method in a single general election -- an approach that was implemented

successfully in New York City for five partisan elections to the city council from 1937 to 1945. Hugh Bone and Belle Zeller, *The Repeal of PR in New York City: Ten Years in Retrospect*, American Political Science Review 42, 1127-48 (December 1948). This modified system eliminates the First Amendment problem created by having non-affiliated voters control a party's nomination by eliminating any primary, nominating or otherwise. Instead there is left only a general election where all candidates meeting the basic qualification to run for office are free to compete. The elimination of primary elections also avoids the problem of low turnout primary elections severely narrowing the field and incidentally reduces the overall cost of holding elections. At the same time, this modification in no way undoes the increased voter choice benefits of the Initiative 872 system. This system meets all of the goals of Initiative 872 without any of the Initiative 872's constitutional violations or policy problems.

2. Multi-Seat Districts with a Choice Voting Method for the Election of State Representatives

Parts I and II of this Brief demonstrates examples of ways in which innovative use of ranked choice voting can be used to achieve the desired effect of the top-two primary without creating any of the top-two system's attendant problems. Examining the whole panoply of options for ballot

marking, vote tabulation, and district may yield other solutions that better meet the state's declared values.

As mentioned in Part II (a) of this Brief, the proposed modifications to the top-two system could utilize multi-seat districts with choice voting, either in a one-round "blanket election" or in a two-round system. Elaborating on a one-round choice voting system that allows parties to nominate candidates, however, yields a promising permutation of the electoral system options. Should the state wish to do away entirely with Initiative 872, choice voting could also be combined with expanded multi-seat districting to achieve increased voter choice and more balanced representation without triggering First Amendment concerns. Under this hypothetical system, current two-member House districts could be combined or reconfigured into larger multi-member districts. Parties would then nominate candidates in numbers equal to or greater than the number of seats open in each district. All of a district's candidates for all open seats would then be voted for simultaneously with a choice voting method in a single election.

This system would give voters vastly greater choice than under the pre-Initiative 872 system, while still allowing parties to exercise control over

which candidates use their party label. As discussed in Part II of this Brief, the parties' voter support dilution concerns would be remedied by the ranked ballot marking method. At the same time, independent voters who do not wish to vote along any party line may now select candidates from a larger mixed pool thus expanding their choice. Parties retain control of the nomination process so there is no danger of any person co-opting their party label.

Furthermore, multi-seat districting systems possess the added benefit of better accommodating population shifts and migration than single-member districting systems do. Governments must frequently redraw districts in order to ensure their compliance with the Equal Protection clause's "one person, one vote" requirement. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)**.** Such redistricting is very costly and if not done frequently enough may leave districts malapportioned for years at a time. This problem is particularly acute in a highly mobile state like Washington. Geographical Mobility: 1995-2000, Census 2000 Brief *at* http://www.census.gov/prod/2003pubs/c2kbr-28.pdf. Multi-seat districting by increasing the size of districts blunts the distorting effect of population shifts.

The record of choice voting elections in major cities in the United States like Cincinnati, Cleveland and New York City indicate that members of councils elected by this system were generally understood to be high-powered representatives at least as able to achieve consensus in policy-making as representatives elected by previous winner-take-all elections. Furthermore, choice voting can be used with relatively few numbers of seats. For example, using a choice voting method with nine-member districts, as done for thirty years in Cincinnati, a candidate could be elected with the support of just over 12% of voters within the multimember district. By contrast, with four-member districts a candidate would need the support of more than 20% of the voters. When Illinois elected its house of representatives by a similar proportional system in three-seat constituencies from 1870 to 1980, winners needed 25% support to be certain of victory. Major party nominees won almost all the seats; however, nearly every three-member district resulted in both parties electing at least one candidate.

III. THE PROPOSED REFORMS ARE VALID UNDER FEDERAL LAW AND THE FEDERAL CONSTITUTION

The proposed reforms fully comply with all relevant Federal law and Constitutional provisions. The reforms comply with the Voting Rights Act because they have been proven to provide fair opportunities to racial and

ethnic minorities without employing racial quotas. *See Holder v. Hall*, 512 U.S. 874, 912 (June 30, 1994), Justice Thomas, Concurring. Voters of all races and racial groups have successfully used ranked choice voting methods in racially diverse cities such as New York City and San Francisco. They also comply with constitutional guarantees of equal protection.

A. Ranked Choice Voting Methods Are Fully Compatible With The Voting Rights Act As They Protect Minority Voting Strength In Multi-Seat Districts

In order to survive § 2 challenges under the Voting Rights Act, a voting system must not unlawfully dilute minority voting strength. Such dilution occurs if, in the totality of the circumstances, "the political processes leading to nomination or election... are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (2004). At its essence, any vote dilution claim under § 2 is a claim that "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Though proof of a discriminatory intent is not required for a successful § 2 suit, *id.* at 35, *Gingles* does require that any vote dilution

claim meet three preconditions: (1) the minority group is large enough and located in a sufficiently compact geographical area that it is possible to create a single member district in which they are a majority; (2) the minority group is politically cohesive; (3) the majority group votes sufficiently in a bloc to enable it to usually defeat the minority's preferred candidate. *Id.* at 50-51.

Choice voting, the ranked choice voting method used in multi-seat districts, allows racial and ethnic minorities to elect their candidates of choice by enabling candidates to be elected with less than half the votes. Mathematically, the threshold of exclusion under choice voting can be calculated using the formula: 1 / (number of seats to be filled + 1). Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1880. If the minority group's share of the population exceeds that threshold, the group can elect its candidate of choice. In jurisdictions in which it has been employed, choice voting has been successful in providing fair representation for racial and ethnic minorities, providing evidence both of the power of lowering ht threshold of exclusion and of all voters' ability to make effective use of the system. *See id.* at 1893; Douglas Amy, *Real Choices, New Voices* 137-38 (1993). *See also McSweeney v. City of*

Cambridge, 665 N.E.2d 11, 15 (Mass. 1996) (noting that choice voting "seeks more accurately... to provide for the representation of minority groups") (internal quotations omitted). As a result, any claim that choice voting unlawfully dilutes minority voting strength would fail under the third *Gingles* precondition.

B. A Ranked Ballot Voting Method Is Consistent With The United States Constitution's One Person One Vote Requirements

A ranked choice voting method is fully consistent with the Equal Protection Clause's "one person one vote" requirement. At its core, this requirement means that there must be "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). Although ranked choice voting methods allow citizens to express a preference for more than one candidate, all voters have an equal opportunity to rank as many and whichever candidates they wish. Though ranked choice voting methods redistribute one candidate's excess or eliminated votes to other candidates, equality is preserved because each "voter is entitled to cast an *effective* vote for only one candidate" in any given round of counting. *Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222, 238 (Mass. 1941) (emphasis added). Ranked choice voting thus comports with the Equal Protection Clause.

IV. THE PROPOSED REMEDIES ARE ALL VALID UNDER THE WASHINGTON STATE CONSTITUTION

No provision of the Washington State Constitution poses any barrier to the remedies discussed above. Ranked choice voting methods do not interfere with voters' guaranteed right to free and equal election as they do not frustrate the voters' will and allow each voter an equal opportunity to rank their choices. Wash. Const. art. I, § 19. In the face of a § 19 challenge, the Supreme Court of Washington, in fact, upheld a ranked choice voting system very similar to the one proposed for a state primary. *State v. Nichols*, 50 Wash. 508, 97 P. 728 (1908).

Finally, the state constitution's redistricting requirements of population equality, geographic contiguity, and compactness are in no way violated by the proposed expansion of multi-member districts. Wash. Const. art. 2, § 43. Multi-member districts can easily be configured according to the state constitution's specifications. The number of members assigned to each district, for instance three or seven, can easily be selected to create the desired threshold for victory while maintaining geographic cohesion and population equality. No other constitutional restrictions apply.

CONCLUSION

We urge the Parties and Court to consider the above analysis in honing in more precisely on which aspects of the voting system in question raise constitutional concerns, as well as in narrowing the scope of the District Court ruling. This exercise should aid in devising tailored remedies for the constitutional violations found, specifically using a ranked choice voting system, with or without a political party nominating or endorsement process. Constitutional violations found in the Initiative 872 system are in fact specific only to the particular methods by which the system is executed, and the Court's ruling should reflect that fact.

In fact, the holding of the District Court should not signify the unconstitutionality of the top-two system on the whole, but only of the particular aspects of its methodology that create the constitutional difficulties in question in this appeal. As a result, remedies should be correspondingly aimed at modifying the specific problematic methods used. With the ranked choice modifications discussed in this Brief available, the top-two primary or its underlying values can be preserved without creating constitutional violations. The expansion of voter choice and the protection of party associative rights are each one of many important goals for a well-

functioning state democracy. With the proposed analysis and reforms as available tools, Washington State need not choose between them.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached amicus curiae brief is proportionally spaced, has a typeface of 14 points or more, Times New Roman font style, and contains 7000 words or less.

Dated this 25th day of October 2005.

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