UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; and MICHAEL YOUNG,

Plaintiffs,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; and PAUL BERENDT,

Plaintiffs in Intervention,

v.

DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor; GREG KIMSEY, Clark County Auditor; CHRISTINA SWANSON, Cowlitz County Auditor; VERN SPATZ, Grays Harbor County Auditor; PAT GARDNER, Pacific County Auditor; DIANE L. TISCHER, Wahkiakum County Auditor; and DONNA M. ELDRIDGE, Jefferson County Auditor,

Defendants.

No.

COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF REGARDING INITIATIVE 872 AND PRIMARY ELECTIONS

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NATURE OF ACTION

1. The First and Fourteenth Amendments to the United States Constitution guarantee the right of individuals to associate in a political party, the right of that party to select its nominees for partisan political office, and the right of the individuals and their party to limit participation in the process of selecting nominees to those voters the party identifies as sharing its interests and persuasions. As the Ninth Circuit noted in striking down Washington's blanket primary, " … the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office." *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004) ("*Reed*").

2. One of the fundamental purposes of the First Amendment is to provide for and promote competition between ideas in American civilization. This purpose is advanced by requiring that the selection of a political party's candidates and nominees be done by adherents of the party rather than by those opposed to or indifferent to the party.

3. The State of Washington (the "State") has enacted Initiative 872, attempting to prevent the Washington State Democratic Party (the "Party") and its adherents from selecting their nominees, and to force the Party to be associated publicly with candidates who have not been nominated by the Party, who will alter the political message and agenda the Party seeks to advance, and who will confuse the voting public with respect to what the Party and its adherents stand for. The State seeks to appropriate the use of the Democratic Party's name in primaries and general elections in order to protect the political interests of the incumbent and the well-known at the expense of the committed and the innovative. Acting under color of law, State and local officials force the Party and its adherents to include supporters of other

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parties and political interests in determining which, or whether any, candidate will carry the Democratic Party name in the general election.

4. Initiative 872, as set forth in both Section 2 ("In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective….") and Section 18, was expressly intended to defeat the constitutional right of the Party and its adherents to nominate candidates, recognized by the U.S. Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402, 147 L. Ed. 2d 502 (2000) and *Reed*. The Initiative, as implemented by State officials, eliminates mechanisms previously enacted by the State to protect the First Amendment rights of the Party and its adherents and provides no effective substitute mechanism for the Party to exercise its right to limit participation in the nomination process and thereby protect its adherents' right of association from forced dilution.

5. This is an action to protect the First Amendment rights of the Party and its adherents to advocate and promote their vision for the future without subtle or overt censorship or interference by the State through the County Auditors acting under color of the laws of the State of Washington. Initiative 872 is unconstitutional.

JURISDICTION AND VENUE

6. Plaintiffs' rights of political association and political expression are guaranteed against abridgement by the State and those acting under color of its laws by the First and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983. This case presents a federal question involving federally-protected rights, including freedom of association and protection against state intervention into the association rights of the Party and its adherents, set out in *Reed*. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 2201 and 2202.

7. Defendants reside in the Western District of the State of Washington (the "Western District") and the conduct and threatened conduct that gives rise to Plaintiffs'

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claims substantially occurred and threatens to occur within the Western District. Venue for this action lies within the Western District pursuant to 28 U.S.C. §§ 1391(a) and 1391(b).

PARTIES

Plaintiffs

8. The Party is a "major political party" as defined in RCW 29A.04.086 and is organized for the purposes of promoting the political beliefs of its adherents, selecting and supporting candidates who support the political beliefs of the Party's adherents and electing public officials who will conduct government affairs in a manner consistent with the Party's philosophy. The Party has all the powers inherent in a political organization and is empowered to perform all functions inherent in a political party.

9. Intervenor-Plaintiff Paul Berendt is a resident of the Western District. He is the elected Chairman of the Washington State Democratic Central Committee, the governing body of the Party pursuant to its Charter, and is the political and administrative head of the Party pursuant to its Charter and Bylaws and RCW 29A.80.020, *et seq.*

10. Defendant Dean Logan, King County Records & Elections Division Manager and Bob Terwilliger, Snohomish County Auditor, Vicky Dalton, Spokane County Auditor, Greg Kimsey, Clark County Auditor, Christina Swanson, Cowlitz County Auditor, Vern Spatz, Grays Harbor County Auditor, Pat Gardner, Pacific County Auditor and Diane L. Tischer, Wahkiakum County Auditor (the "County Auditors") are election officers in the State, having the overall responsibility under RCW 29A.04.025 to conduct primary elections within their respective counties, of primary elections and are responsible, consistent with the rules established by the Secretary, to provide and tabulate ballots for such elections. The County Auditors, except Vicky Dalton, reside in the Western District of Washington.

WASHINGTON'S PARTISAN PRIMARY

11. The Defendants will administer partisan primaries this September. Pursuant to the laws of the State, including RCW 29A.04.311, 29A.20.121, and 29A.52.116, the Party is

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required to advance its candidates for Congressional, State and County offices by means of partisan political primaries administered by the Secretary of State ("the Secretary") and the County Auditors. RCW 29A.52.116 states: "Major political party candidates for all partisan elected offices, except for president and vice-president ... must be nominated at primaries held under this chapter." The mandatory notice of the primary must contain "the proper party designation" of each candidate in the primary. RCW 29A.52.311. RCW 29A.52.112, adopted by I-872, requires that "For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots …." The same statute also provides that the "top two" vote-getters in the primary will advance to the general election. The Secretary has asserted that only the two candidates who receive the most votes will on primary day will advance to the primary even if both candidates are associated with the same political party. Defendants Logan and Terwilliger have each asserted, "At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary."

12. Neither the laws of the State nor the rules adopted or proposed by the Secretary provide any mechanism for the Party to effectively exercise its right of association in connection with the partisan primary in which it is forced by State law to participate. Any individual may appropriate the Party's name, regardless of whether the Party desires affiliation with that person.

13. The State, through its filing statute, compels the Party to associate with any person who files a declaration of candidacy expressing a "preference" for the Party, regardless whether the Party desires association with the person.

14. In addition to requiring the Party to accept as its candidate any individual without regard to the individual's political philosophy or participation in Party affairs, RCW 29A.04.127 forces the Party to permit any voter to participate in selection of the Party's

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standard-bearer without regard to the voter's partisan affiliation or beliefs. The State thus forces the Party and its adherents to associate with those who do not share their beliefs or are openly antagonistic to them. Initiative 872 was intended to establish *a de facto* blanket primary in response to a declaration that the blanket primary is unconstitutional and to facilitate cross-over and ticket-splitting voting, thus depriving the Party of its right to prevent supporters of other political parties and interests from participating in its candidate selection and nomination processes. It was intended to force the Party to modify its message or have a modified message forced upon it by the simple expedient of eliminating the Party's selected spokesperson in favor of a spokesperson selected by non-adherents of the Party. The sponsors' official statement in support of the Initiative states, "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." This attempt at forced message modification was rejected as a legitimate state interest by both the Supreme Court in *Jones* and the Ninth Circuit in *Reed*.

15. The other interests asserted as the basis for adopting I-872, codified as RCW 29A.04.206, were also rejected in *Reed* as legitimate grounds for invading the right of political association.

16. The Party and its adherents are irreparably injured by the forced adulteration of the Party's nomination process, by the State's active encouragement of cross-over and ticket-splitting, and by the resulting dilution and potential suppression of its message. The presence and participation of non-party voters in the partisan primary inevitably alters candidates' messages and actions and thereby dilutes the Party's message and influence. Dilution of the Party's vote in any partisan primary carries with it the risk that the Party will be denied a place on the general election ballot to the extent that only the "top two" vote-getters will appear on the general election ballot. For example, if seven candidates carrying the Party name each receive 10% of the vote at a partisan primary, and two candidates of other parties each receive 15%, the Secretary maintains there would be no Party candidate on the general

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election ballot, despite the receipt by candidates with the Party's identification or 70% of the total vote.

DENIAL OF EQUAL PROTECTION OF LAWS

17. In contrast to its invasion of the associational rights of the Party, by denying a right to nominate candidates, the State expressly authorizes minor parties to nominate candidates through a convention process. RCW 29A.20.121 provides, "Any nomination of a candidate for partisan public office by other than a major political party may be made only in a convention ...." (internal punctuation omitted).

18. The State also affords minor political parties a mechanism to protect themselves from individuals or groups who attempt to hijack the party name or force an association with the minor political party. RCW 29A20.171(1) recognizes that there can be only one nominee of a minor political party. RCW 29A.20.171(2) provides for "a judicial determination of the right to the name of a minor political party ...." The Defendants intend to administer the State's partisan primary in a manner that denies the Party the right to nominate its candidates and the right to its name. In doing so, the State improperly protects the First Amendment right of association to minor political parties and their adherents, but denies the same protection to Plaintiffs.

DEMOCRATIC PARTY OF WASHINGTON V. REED

19. In *Reed*, the Ninth Circuit held that Washington cannot force a political party and its adherents to adulterate their nomination process. The *Reed* decision overturned Washington's blanket primary system, which -- like I-872 -- prevented the Party from controlling its own nomination process. The court, rejecting a litany of "compelling interests" advanced by the State to justify the invasion of First Amendment rights, stated that "[t]he remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests is to vote for someone else,

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not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-1207.

20. In *Jones*, the Supreme Court noted that forced political association violates the principles set forth in earlier cases, by forcing "political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." 530 U.S. at 577. The Supreme Court also noted that "a corollary of the right to associate is the right not to associate. 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' In no area is the political association's right to exclude more important than in the process of selecting its nominee." 530 U.S. at 574-575 (citations omitted). The Ninth Circuit decision followed the U.S. Supreme Court decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Reed*, 343 F.3d at 1201.

21. There is no constitutionally significant difference between Washington's previous blanket primary system held unconstitutional by the Ninth Circuit and the "People's Choice" primary system. Indeed, the voter's pamphlet statement prepared by I-872's proponents stated that "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary."

DEPRIVATION OF CIVIL RIGHTS BY STATE OFFICIALS

UNDER COLOR OF LAW

22. The Washington State Democratic Central Committee has adopted rules governing the nomination of its candidates and prohibiting candidates not qualified under Party rule to represent themselves as candidates or the Party. The Party has provided those rules to the Defendants.

23. The conduct of any partisan primary by State officials without implementation of an effective mechanism for the Party to exercise its right to limit participation in

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connection with that primary to adherents of the Party is action by those State officials under law and color of law that deprives Plaintiffs of their civil rights.

24. If the County Auditors are permitted to conduct a "qualifying" partisan primary with multiple "Democratic" candidates listed and not chosen by the Party, plaintiffs will be denied their First Amendment rights and will be irreparably injured. Moreover, if the State conducts partisan primaries pursuant to procedures which are known to be unconstitutional, then there is a substantial risk that the results of those primaries will be invalid.

FIRST CAUSE OF ACTION: CONDUCTING AN INVALID PRIMARY

25. Plaintiffs reallege and incorporate by reference Paragraphs 1-24.

26. An actual controversy exists between Plaintiffs and Defendants with regard to the exercise of Plaintiffs' federally protected rights. Plaintiffs are entitled to declaratory judgment establishing the unconstitutionality of the State's primary system.

27. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the County Auditors to permit non-affiliates of the Party to participate in the Party's nominee selection process.

28. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the Secretary and County Auditors to facilitate cross-over voting and ticket-splitting by placing Democratic primary races on the same ballot as primary races for other political parties or affiliations over the objection of the Party and without requiring mechanisms to prevent voting in violation of the Party's associational rights.

29. Initiative 872 lacks a severability clause. Therefore, if any portion of I-872 is unconstitutional, the entire enactment is void.

30. Pursuant to 42 U.S.C. § 1983, *et seq.*, Plaintiffs are entitled to a declaratory judgment regarding their rights under the First Amendment and to their reasonable attorneys' fees and costs in this case.

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SECOND CAUSE OF ACTION: FORCED ASSOCIATION

31. Plaintiffs reallege and incorporate by reference Paragraphs 1-30.

32. RCW 29A.24.030, RCW 29A.24.031 and RCW 29A.36.010 are unconstitutional under the First Amendment to the extent that they permit the State to compel the Party during a primary to publicly affiliate with candidates other than those who are qualified under Party rules to represent themselves as candidates of the Party.

33. The State's primary system, including RCW 29A.36.170, is unconstitutional under the First Amendment to the extent that it places upon the general election ballot as a candidate of the Party for any office the name of an individual who has been selected though a voting system that deprives the Party of the ability to limit participation in nominee selection to those the Party has determined should be included.

THIRD CAUSE OF ACTION: DENIAL OF EQUAL PROTECTION UNDER LAW

34. Plaintiffs reallege and incorporate by reference Paragraphs 1-33.

35. The State, through RCW 29A.20.171, provides protection for minor political parties from forced association with candidates who may not share the goals or objectives of the minor political party and its adherents. Through the convention process and the statutory procedures to resolve competing claims to the use of a minor political party's name, those parties and their adherents may prevent misrepresentations of affiliation on primary ballots prepared by the Defendants. The State discriminates among political parties by providing a mechanism for minor political parties to protect themselves from forced affiliation with candidates, but denying the same right to the Party and its adherents under RCW 29A.24.030 and RCW 29A.24.031 by permitting any person to represent himself or herself as a candidate of the Party.

36. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983, *et seq.*

FOURTH CAUSE OF ACTION: INJUNCTIVE RELIEF

37. Plaintiffs reallege and incorporate by reference Paragraphs 1-36.

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38. There exists an imminent and ongoing threat by State officials to deprive Plaintiffs of their civil rights by requiring Plaintiffs to select the candidates and nominees of the Party through a primary process in which Plaintiffs are not permitted to exercise their First Amendment rights of association and exclusion.

39. Plaintiffs will suffer irreparable injury if the Party's candidates and nominees are selected in a process in which the Party is deprived of its right to define participation.

40. Plaintiffs are entitled to preliminary and permanent injunctive relief restraining State officials from:

a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's exercise of its right to select the candidates who participate in that primary associated with the Party's name;

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary;

d) placing on a primary ballot the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party.

41. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983, *et seq.*

PRAYER FOR RELIEF

Plaintiffs respectfully request the Court enter judgment:

1. Declaring RCW 29A.04.127 unconstitutional;

2. Declaring RCW 29A..24.030 and RCW 29A24.031 unconstitutional to the

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extent they authorize placing on a primary ballot the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party;

3. Declaring RCW 29A.36.010 unconstitutional;

4. Declaring RCW 29A.36.170 unconstitutional;

5. Declaring RCW 29A.52.112 unconstitutional;

6. Declaring Initiative 872 unconstitutional and declaring that the primary system in effect immediately before the passage of I-872 remains in effect;

7. Permanently restraining the County Auditors and all those acting in active concert and participation with them from:

a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's exercise of its right to select the candidates who participate in that primary associated with the Party's name;

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary;

d) placing on a primary ballot the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party.

8. Awarding Plaintiffs their reasonable attorneys' fees and costs; and

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9. Granting such further relief as the Court deems appropriate.

DATED this ____ day of June, 2005.

PRESTON GATES & ELLIS LLP

By_____
David T. McDonald, WSBA #5260
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