The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

v.

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

Defendants,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff-Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff-Intervenors,

STATE OF WASHINGTON, et al.,

Defendant-Intervenors,

WASHINGTON STATE GRANGE,

Defendant-Intervenors.

No. CV05-0927Z

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION FOR SUMMARY JUDGMENT

Noted for Oral Argument:
July 13, 2005

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I. INTRODUCTION

Initiative 872 creates a primary election system in which the candidates carrying the Democratic Party's message to the public are not chosen by the members of the Democratic Party. Instead, the Democratic Party is forced to be associated with these candidates by the State.

This system violates First Amendment associational rights in fundamental ways. It violates the Democratic Party's right to define for itself the extent of its association and to limit participation in its affairs to that association. Under Initiative 872, any person may self-identify themselves as a Democrat when filing for partisan office. RCW 29A.52, Section 8(3).[1] The candidate will then be identified on the primary and general election ballots and in voter's guides as a Democratic candidate, without any involvement by the Party and in contravention of the Party's rules for selecting the candidates who will carry the Party's message to the public. RCW 29A.52, Section 7(3). If there are multiple Democrats who seek to represent the Party in an election, Initiative 872 prohibits the Party from consolidating its support. In addition, it forces the Party to allow people who do not adhere to Democratic principles and who may in fact openly oppose the Democratic Party to make the decision as to which Democrat would best articulate and carry the Party's message to the public. RCW 29A.52, Section 3(3).

Because Initiative 872 severely burdens core First Amendment rights, it must be declared unconstitutional unless the State can demonstrate that it is narrowly tailored to advance a compelling -- and legitimate -- state interest. The proponents of Initiative 872 cannot meet this burden of proof. This Court should grant summary judgment declaring Initiative 872 unconstitutional and permanently enjoining its implementation.

[1] The entire text of Initiative 872 is printed in the 2005 Supplementary Pamphlet for RCW Titles 29 and 29A. The text appears at RCW 29A.52, preceding the numbered sections of that statute.

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II. FACTUAL BACKGROUND

A. The Washington State Democratic Party and Washington's Election System.

1. The Washington State Democratic Party exists to select and promote candidates who support democratic principles and work together.

The Washington State Democratic Party (the "Party") is a "major political party" as defined in RCW 29A.04.086. The Party is governed by Plaintiff in Intervention the Washington State Democratic Central Committee. *See* Declaration of Paul Berendt ("Berendt Decl."), Ex. A (Charter of the Democratic Party of the State of Washington ("Charter"), Article III).

The Party is organized for the purpose of adopting and promoting statements of policy that serve as standards for Democratic elected officials, and it works with those officials at all levels to help achieve the goals of the Party. *See* Charter, Article 1.A. It also exists to: "Nominate and assist in the election of Democratic candidates at all levels who support the goals of the Party." *Id.*

The Party Charter contemplates a close relationship between those elected as Democrats and the Party's principles: "Those elected as Democrats have the obligation to support the principles of the Democratic Party." Charter, Article VII.E. This relationship is fostered by requiring that the Party's electoral nominees be chosen by Party members. "Democratic nominees, candidates and delegates shall be selected by Democrats." Charter, Article VII.C.3 (as amended).[2] Party membership is open to: "All residents of the State of Washington who are willing to support the principles and goals of the Democratic Party as expressed in the Charter and wish to be known as Democrats." Charter, Article I.B.4.[3]

[2] Where indicated, the language quoted reflects recent amendment to the Charter. The amended language is inserted as a separate page after the text of the unamended Charter.

[3] The Party's Charter permits the Party's Central Committee to allow voters who apparently support the Party's principles but do not wish to be known as Democrats to participate in the selection of Democratic candidates and nominees. *Id.* The Central Committee has determined to allow voters who are not members of other political parties to participate if the selection is done by means of a public primary in which such voters participate only in the

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In order to advance its goals, the Party has established rules for selecting candidates and nominees to carry the Democratic Party banner in partisan elections. These rules are applicable to any candidate for public office who "intends to be, or is, associated with the Democratic Party, directly or indirectly, on any ballot used in a publicly financed election or candidate selection process." Berendt Decl., Ex. B (Rules for the Selection of Candidates and Nominees for Public Office ("Nominating Rules"), Sec. I). The Nominating Rules require that "Candidates and nominees for public office must be selected by one of the means specified in these Rules." *Id*., Sec. II. Generally, the rules provide that candidates and nominees are to be selected from among interested Democrats by means of a public primary if that primary is structured to prevent participation by members of other political parties. Nominating Rules, Sections IV, V. If no such primary is available, the rules provide for selection of candidates by a party convention process and prohibit use of the Party name by candidates who are not so selected. *Id.*

2. Prior to the passage of Initiative 872, Washington allowed the adherents of each political party to select the candidates who would be associated with the party on the general election ballot and who would be the publicly identified carriers of the party's political message.

For over 100 years, Washington has had a partisan election system. Historically, voters at the general election were provided a choice between representatives of each qualifying political party. In the early days of the State those party representatives were chosen by convention. Then, in 1907, the State compelled the political parties to choose their representatives by means of a public primary.[4] From 1907-1935, each party had a separate

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Democratic Party's primary. Declaration of David T. McDonald ("McDonald Decl."), Ex. A (Bylaws, Art XI.B); Berendt Decl., Ex. B (Nominating Rules, Article IV). The primary established by Initiative 872 does not meet this criteria.

[4] Washington adopted a direct primary law in 1907, requiring political parties to nominate by public primary rather than convention. The primary required a public oath of affiliation with a political party to vote in its primary, which requirement was challenged as violating the State constitution by adding to the qualifications of electors. The challenge was rejected by the Washington Supreme Court which held that a primary was not an election under the state constitution. *See State ex. Rel. Zent v. Nichols*, 50 Wash. 508, 522 (1908).

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primary ballot, listing only those individuals who sought to advance to the general election bearing that party's label. Voters chose to participate in a party's primary by publicly indicating that they would like that party's ballot.

In 1935, the State changed the law and required the parties to allow any voter -- even one who belonged to an adverse party -- to participate in the selection of the candidates who would bear the party's label for the general election. This system is known as a blanket primary, and it continued in use for the selection of major party candidates until its use was enjoined by the federal court in 2004.[5] Minor political parties continued to select their candidate by convention.

In 2000, the United States Supreme Court declared the blanket primary system unconstitutional because it encroached on the political parties' First Amendment rights of free association. *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402 (2000). In 2003, the Ninth Circuit followed *Jones* and invalidated Washington's blanket primary system. *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003) (cert. denied, *Reed v. Democratic Party of Washington*, 540 U.S. 1213, 124 S.Ct. 1412 (2004)). Fundamental to both decisions was the recognition that the right of a political party to select its candidates -- its messengers -- is a core First Amendment freedom which the State can infringe only in very limited circumstances.

The First Amendment guarantees political parties "the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association and to limit the association to those people

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[5] A "major" political party is one that had at least one statewide candidate receive 5% of the vote at the immediately preceding general election. RCW 29A.04.086. In 2004, Washington had three major political parties, the Democrats, the Libertarians and the Republicans. The Libertarians did not achieve 5% of the vote in 2004 and no longer are a major political party. Under Washington law, any party that is not a major party is a "minor" political party. RCW 29A.04.097. An Independent candidate is treated as a nominee of a minor political party. *See, e.g.*, 29A.36.020.

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only." *Jones*, 530 U.S. at 574 (internal quotations and citations omitted). "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." *Reed*, 343 F.3d at 1204. Because a blanket primary denies political party adherents the right to select the party's candidates, it is unconstitutional. *Jones*, 530 U.S. at 586; *Reed*, 343 F.3d at 1207.

After the Ninth Circuit struck down the blanket primary and the Supreme Court denied review, Washington adopted a new primary system. *See, e.g.*, RCW 29A.36.101; RCW 29A.36.104; RCW 29A.36.106. The new primary system is often referred to as a "Montana style" system because it is also used in that state. Under the Montana system, a public primary is used to determine which representatives of each major political party will advance to the general election. Multiple candidates from each major party may run in the primary, and the top vote getter from each major party advances to the general election. Any voter may participate in a party's primary (but only that party's primary) by choosing that party's ballot on primary day. The voter's affiliation with that Party is inferred from the choice of ballot. *See* RCW 29A.36.104; RCW 29A.52.151(c). Only those voters who affirmatively affiliate with one of the major political parties may validly vote for candidates from that party. RCW 29A.36.106. A voter's choice of ballot is not recorded and no public declaration of affiliation is required.

3. <u>After Initiative 872, adherents of political parties are denied the opportunity to select their public representatives and are forced to be associated in the public mind with whatever candidates -- and messages -- are favored by non-adherents.</u>

Proponents of the blanket primary -- including Defendants in Intervention the Washington State Grange -- refused to accept the constitutional limitation on their ability to force a political party to allow non-adherents to select the Party's candidates. After the State adopted the Montana primary, they proposed to return to the blanket primary, with only

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meaningless changes, by means of Initiative 872:

"*I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary*." Declaration of John White in Support of Motion for Preliminary Injunction ("White Decl."), Docket No. 8, Ex. 1, p. 8 (emphasis added).[6] Promotional material compared Initiative 872 to the old blanket primary this way: "Q: Would the primary ballot look any different to the voter? A: No. At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary)." White Decl., Ex. 2, p. 17. "Through this initiative, *we can continue to have all of the benefits of the blanket primary, including the right of a voter to pick any candidate for any office*." *Id*. (emphasis added).

The proponents of Initiative 872 made clear that they were seeking to burden the parties' First Amendment rights by forcing the parties to modify their policy goals and their political communications. Proponents of Initiative 872 said:

> With [the Initiative 872 primary], the results are more representative of the political preferences and opinions of the voters. As a result, these officials are likely to be much more responsive to the interests of the people they represent, not just the interest of the political parties.

McDonald Decl., Ex. B at 2.

Exactly this kind of alteration in the behavior of candidates was found by the Supreme Court in *Jones* to be a severe burden on First Amendment rights:

> Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions -- and, should he be elected, will continue to take somewhat different positions in order to be renominated… It encourages candidates -- and officeholders who hope to be renominated -- to curry favor with persons whose views are more "centrist" than those of the party base.... That party nominees will be equally observant

[6] The page numbers given for exhibits to the White Declaration refer to the sequentially numbered pagination covering the entire set of exhibits, found in the lower left corner of each exhibit page.

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> of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems to us improbable. Respondents themselves suggest as much when they assert that the blanket primary system "'will lead to the election of more representative 'problem solvers' who are less beholden to party officials.'" Brief for Respondents 41.

Jones, 530 U.S at 579-581 (internal citations and quotations omitted).

The express intent of Initiative 872 was to force political party candidates to alter their message so as not to focus on articulating the concerns of party members but instead to speak to different issues:

> Qualifying primaries are more likely to produce public officials who represent the political preferences and opinions of a broad cross-section of the voters. Candidates will need to appeal to all the voters, partisan and independent alike. They will not be able to win the primary by appealing only to party activists.

White Decl., Ex. 4., p. 25.

In *Jones*, the Supreme Court found that changing the primary law so as to have the likely outcome of changing a political party's message is an extreme burden on core First Amendment rights:

> In sum, Proposition 198 forces petitioners to adulterate their candidate -- selection process -- the "basic function of a political party," ibid. -- by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome -- indeed, in this case the intended outcome -- of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest. *See Timmons*, 520 U.S., at 358 ("Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest").

Jones, 530 U.S. at 579-582 (emphasis added) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364 (1997)).

The only difference between the blanket primaries held unconstitutional by the Supreme Court and the Ninth Circuit and the system created by Initiative 872 is a cosmetic one: Instead of choosing only one general election candidate for the political party, non-party adherents can choose one or two general election candidates for the political party. (The

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Initiative proponents, however, urged that choosing two candidates from the same party was highly unlikely to actually occur, raising a significant question whether even a cosmetic change exists between the blanket primary and the Initiative 872 primary. *See* McDonald Decl., Ex. B at 2). In all other material respects, Initiative 872 continues the forced association and forced adulteration of the candidate selection process that rendered the blanket primary unconstitutional.

Association with candidates is forced by Initiative 872 because candidates are permitted to use the Party's name without permission from the Party. RCW 29A.52, Section 7(3). Election officials are compelled to associate the candidate with the Party in voter's guides and on the public ballot, without regard to whether the Party consents to the association. *Id*., Sections 7(3), 11. The Secretary of State is directed to specify abbreviations for the name of each political party and to use those abbreviations to associate the name of the candidate with the party on the public ballot. *Id*., Section 7(3). All political advertising in support of the candidate is required by law to state -- and thereby reinforce -- the association of the candidate with the party he or she has chosen, without regard to whether the party accepts the choice. RCW 42.17.520.

Association with non-adherents of the Party is forced by Initiative 872 because, whether or not a primary voter is an adherent of a political party or otherwise authorized by party rule, he or she may vote in the primary to select party-associated candidates to advance to the general election. RCW 29A.52., Section 5.[7]

Nor, under Initiative 872, are political parties allowed to select which candidates will appear on the primary ballot associated with the party's name. If the parties do select their candidates through a convention or other means, the State will nevertheless allow any other

[7] RCW 29A.36.121(3) and WAC 434-230-040 require that the general election ballot indicate a candidate's political party as specified by the candidate in his or her declaration of candidacy. McDonald Decl., Ex. C at 3.

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candidate to also associate themselves with the party by placing themselves on the primary ballot. *See* McDonald Decl., Ex. C at 5-6 (Emergency Rulemaking Order from the Washington Secretary of State, WAC 434-215-015).

III. RELIEF REQUESTED

Initiative 872 is a replacement primary system. It did not repeal the existing Montana primary. *See* RCW 29A.36.104; RCW 29A.36.106; RCW 29A.36.161. The Democratic Party asks the Court, pursuant to 42 U.S.C. § 1983, *et seq.*, to declare Initiative 872 unconstitutional and enjoin its implementation. Granting this relief will not leave Washington without a primary system. Washington election officials will simply continue running primary elections as required by the laws adopted by the State in early 2004. Enjoining the implementation of Initiative 872 will return Washington to the status quo.

IV. ARGUMENT

The Court has requested that the parties address several specific issues as set forth in a stipulation filed June 10, 2005. For purposes of providing context, this brief will first address the applicable First Amendment principles and applicable standards of review, and then, with that background, will address the specific questions raised in the stipulation.

A. Political Parties Have a Constitutionally Protected Right to Nominate Their Candidates and to Choose with Whom They Associate.

It is a basic function of political parties to select the candidates that will run in association with the party name and other party candidates. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Jones*. at 574. The members of a political party have a constitutional right to select their candidates for office. *Reed*, 343 F.3d at 1204 ("Party adherents are entitled to associate to choose their party's nominees for public office."). This right is given special protection under

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the First Amendment. *Jones*, 530 U.S. at 575 ("Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"). Adhering to this principle, the Court has repeatedly recognized that "the First Amendment 'protects the freedom to join together in furtherance of common political beliefs,' which 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.'" *Id*. at 574 (citing *Tashjian v. Republican Party of Conn*., 479 U.S. 208, 214-15, 107 S.Ct. 544 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follett*, 450 U.S. 107, 122, 101 S.Ct. 1010 (1981)).

B. The State Can Force a Party to Use a Public Primary to Select Its Candidates but if It Does, It Must Allow the Party to Define Who Can Participate in the Primary.

The State has a limited ability to regulate the selection of candidates by political parties. The State has the right to require that the party use a partisan public primary to select its candidate. *American Party of Texas v. White*, 415 U.S. 772, 781, 94 S.Ct. 1296 (1974). But if the State does choose to require the use of a primary, it cannot force the party to allow non-adherents to vote in the primary to choose the candidates who will be associated with the party in the general election. In *Jones*, the Supreme Court made clear that "the processes by which political parties select their nominees are ... [not] wholly public affairs that States may regulate freely. To the contrary, we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution." *Jones*, 530 U.S. at 572-73.

C. Neither the State nor any Candidate has the Right to Force a Political Party to Accept Association with a Candidate.

Fundamental to the exercise of the right of association are the rights of an organization to: (1) determine who presents its message to the public, and (2) require its leaders to adhere to its essential principles. The First Amendment therefore protects an association's right to

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limit its membership and define its communication. For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 566, 115 S.Ct. 2338 (1995), the Supreme Court held that a private association could not be required by the State to admit a parade contingent expressing a message not of the organizers' choosing. *See also Boy Scouts of America v. Dale*, 530 U.S. 640, 659, 120 S.Ct. 2446 (2000) (First Amendment protects Boy Scouts' right to exclude leader whose presence would express a message at odds with Boy Scout policies). It is equally true that the State of Washington may not force the Party to accept into its "parade" of candidates anyone who wants to join.

It is also established that a candidate may not make the Party an "unwilling partner" in his quest for office. In *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992), the court upheld the right of the Republican Party to exclude David Duke as a Republican candidate. "The Republican Party enjoys a constitutionally protected freedom which includes the right to identify the people who constitute this association that was formed for the purpose of advancing shared beliefs and to limit association to those people only." "The necessary corollary to this is that Duke has no right to associate with the Republican Party if the Republican Party has identified Duke as ideologically outside the party." *Duke*, 954 F.2d at 1530-31 (internal citations omitted); *see also Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996) (Duke had right to espouse his beliefs but did not have right to espouse his beliefs as Republican over party objection, and Duke supporters had right to vote for him, but not as a Republican).

D. State Laws which Severely Burden First Amendment Rights Must be Narrowly Tailored to Advance a Compelling State Interest.

State laws which impose severe burdens on First Amendment rights, as Initiative 872 does, are unconstitutional unless those laws are narrowly tailored and advance a compelling state interest. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364 (1997); s*ee also Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059 (1992). This is

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referred to as "strict scrutiny." The Supreme Court emphasizes that laws "rarely survive" this test. *Burson v. Freeman*, 504 U.S. 203, 200, 112 S.Ct. 1846 (1991); *Timmons*, 520 U.S. at 358.

Whether a burden on a party's associational rights is "severe" can be determined as a question of law. *See Eu v. San Francisco Country Democratic Central Committee*, 489 U.S. 214, 220, 109 S.Ct. 1013 (1989). A law that has the effect of altering a political party's selection of candidates or altering its message is the severest burden on associational rights imaginable. *Jones*, 530 U.S. at 581-82 ("We can think of no heavier burden on a political party's association freedom" than forced message modification).

The Court in *Jones* made clear that a primary system that forces political parties to associate with outsiders in the selection of their candidates severely burdens associational rights. "Proposition 198 forces 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." *Id*. at 577. This "is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'cross over,' at least he must formally become a member of the party; and once he does so, he is limited to voting for candidates of that party." *Id*.

The Court saw the mere *threat* of cross-over voting as sufficient to establish a severe burden on the associational rights of the political parties; the parties were burdened because they were forced to modify their principles and message to appeal to cross-over voters. "Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions -- and, should he be elected, will continue to take somewhat different positions in order to be *re*nominated." *Id*. at 580.

> Such forced association has the likely outcome -- indeed, in this case the intended outcome -- of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is

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> therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.

Id. at 581-82.

E. The Burden of Proof is on the Proponents of Initiative 872 to Demonstrate That It Passes Strict Scrutiny.

Because the blanket primary imposes a severe burden upon the Party's First Amendment rights of association, the Court must subject the statute to strict scrutiny. The burden of proof is on the defenders of the Initiative to demonstrate that it advances a compelling state interest, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407 (1978); *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057-1058 (9th Cir. 2000), and to show that it "is narrowly drawn to achieve that end." *Boos v. Berry*, 485 U.S. 312, 321, 108 S.Ct. 1157 (1988); *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45,103 S.Ct. 948 (1983). When determining whether an interest is compelling, the asserted interest "must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264 (1996). The defenders must also show that the Initiative is drawn as narrowly as possible to achieve that compelling state interest. *Boos*, 485 U.S. at 324.[8] The Court can resolve these issues on summary judgment. *Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000).

When faced with a summary judgment with respect to issues upon which they bear the burden of proof, the defenders of the primary statute cannot rest on general or conclusory allegations. They must come forward with evidence of "specific facts showing that there is a

[8] Even if the Court were to conclude that the burdens imposed upon political parties by Washington's scheme of forced candidate associations were slight, the State would nevertheless be required to prove that the resulting primary system was not discriminatory and the slight burden was outweighed by "important regulatory interests." *Lightfoot v. Eu*, 964 F. 2d 865, 871 (9th Cir. 1992) ("Though we conclude that the burden section 6661(a) places upon the Party's associational rights is slight, we must nevertheless evaluate the significance of the State's interest."). "'Important regulatory interests' will usually be sufficient to justify 'reasonable, non-discriminatory restrictions.'" *Timmons*, 520 U.S. at 358.

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genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586, 106 S.Ct. 1048 (1986) (*quoting* Fed. R. Civ. P. 56(e)); *see Celotex Corp. v. Catratt*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). Factual issues that are irrelevant or unnecessary should not be considered. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

F. The State does not Have a Legitimate Interest, Much Less a Compelling One, in Allowing Candidates Associated with a Political Party to be Selected by the Public at Large.

The fundamental interest put forward by the State to support of Initiative 872 is the goal of greater openness and choice for voters in the electoral process. Initiative 872 has as its stated purpose the protection of "each voter's right to vote for any candidate for any office." RCW 29A.52, Section 2. But the Supreme Court and the Ninth Circuit Court of Appeals have already held that this is not a legitimate interest that justifies forced association in violation of the First Amendment:

> We have said, however, that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications… The voter's desire to participate does not become more weighty simply because the State supports it… The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of choice, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs.

Jones, 530 U.S. at 583-84 (citing *Tashjian*, 479 U.S. at 215-16, n. 6) (emphasis in original). As the Ninth Circuit affirmed in *Reed*: "The supposed unfairness of depriving those voters who do not choose to affiliate with a party from picking its nominee 'seems to us less unfair than permitting nonparty members to hijack the party.'" *Reed*, 343 F.3d at 1205 (citing *Jones*). In rejecting a litany of "compelling interests" advanced by the State to justify the invasion of First Amendment rights, the Ninth Circuit stated: "[t]he remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates

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carrying a message adverse to their interests is to vote for someone else, not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-07.

V. DIRECT RESPONSE TO STIPULATED LEGAL ISSUES

A. Does the Primary System Established by Initiative 872 Nominate Political Party Candidates for Public Office?

The primary established by Initiative 872 is clearly a nominating primary. Its purpose is to select two candidates and present them to the public at the general election in order to fill a partisan elective office. RCW 29A.52, Sections 4, 7(2). "Nominate" means "to propose, select, or formally enter by any of various methods (as the caucus, the convention, the primary or petition) as a candidate for public office." Webster's 3rd New International Dictionary (1966). Prior to the passage of Initiative 872, RCW 29A.04.128 defined "primary" or "primary election" as a statutory procedure for "nominating candidates to public office at the polls." This definition applied to all primaries in Washington, whether a partisan primary where one candidate from each major party was chosen, or a non-partisan primary where the field of potential candidates was cut to only two for the general election. Although Initiative 872 tinkered with the wording of the definition of "primary" to avoid using the word "nominating" (*see* RCW 29A.52, Section 5), word-play in describing the procedure does not alter the substance of the procedure: The primary remains a nominating procedure.

It is equally indisputable that the candidates selected are political party candidates. By statute, the Party is required to advance candidates for Congressional, State and County offices by means of these partisan nominating primaries. 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." *See also* RCW 29A.52.111.

Any candidate for partisan office who declares a party preference thereby undertakes, as a matter of state law, to thereafter identify themselves as affiliated with that party in all

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advertising. RCW 42.17.510(1) ("The party with which a candidate files shall be clearly identified in political advertising for partisan office."); *see also* WAC 390-18-020:

> [S]ponsors of political advertising supporting or opposing a candidate for partisan office must clearly identify the candidate's political party in the advertising. To assist sponsors in complying with this requirement, the commission shall publish a list of abbreviations or symbols that clearly identify political party affiliation. These abbreviations may be used by sponsors of political advertising to identify a candidate's political party.

Further, pursuant to the State constitution, when any legislative position or partisan local office becomes vacant between elections, it must be filled by picking a person "from the same political party" as the office holder and must be one of "three persons who shall be nominated by the county central committee of that party." Wash. Const., Art. 2, Sec. 15.

Initiative 872 does not establish a "nonpartisan blanket primary" akin to the one discussed briefly by Justice Scalia in *Jones*. *Jones*, 530 U.S. at 585-86. In dicta, Justice Scalia suggested that a "nonpartisan blanket primary" that advanced the top two vote-getters to the general election might survive constitutional muster. He indicated that under this system, "the State determines what qualifications it requires for a candidate to have a place on the primary ballot -- which may include nomination by established parties and voter-petition requirements for independent candidates." *Id*. at 585. "Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election." *Id*.

Justice Scalia indicated that such a primary might pass constitutional muster because in such a primary the voters were not choosing the party's nominees. Nomination by the parties of their candidates *before* the primary was a component of the scheme referred to by Justice Scalia. Justice Stephens confirmed this in his dissenting opinion. *See Jones*, 530 U.S. at 598, n. 8 ("It is arguable that, under the Court's reasoning combined with *Tashjian*, the only nominating options open for the States to choose without party consent are (1) to not have primary elections, or (2) to have what the Court calls a 'nonpartisan blanket primary' …

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in which candidates previously nominated by the various political parties and independent candidates compete.") (Stephens, J., dissenting). Obviously, if the political parties nominate their candidates prior to the primary, then allowing anyone to vote in the primary does not violate the right of the party to select the candidates campaigning under the party label -- the selection has already been made.

Initiative 872, however, does not provide for prior nomination by the political parties of their candidate. Instead, it allows any candidate to misappropriate the party name and appear on the ballot as a Democratic candidate, *despite* any party nominating process. Accordingly, it is unconstitutional because it forces the political parties to adulterate their candidate selection process with non-members of the party and their candidate "parade" with unwelcome crashers.

In fact, in all constitutionally relevant respects, Initiative 872 is *identical* to the blanket primary invalidated in *Reed*. Like the previous blanket primary, Initiative 872: (1) allows candidates to self-select their party identification when filing for office, without the participation of the political parties; (2) requires that major political party candidates be nominated in Washington's primary, *see* RCW 29A.52.116; (3) identifies candidates on the primary ballot with their party affiliation; (4) allows voters to vote for any candidate for any office without regard to party affiliation; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and that facilitates crossover voting; and (6) advances major party candidates from the primary to the general election based on open, "blanket" voting. RCW 29A.52.

B. <u>If the Primary System Under Initiative 872 does not Nominate Political Party Candidates for Public Office, does Each Political Party Have the Right to Select for Itself the Only Candidate Who Will be Associated with It on Either a Primary or General Election Ballot?</u>

It is well-settled law that members of a political party have a constitutionally protected right to nominate their candidates for partisan office. *Jones*, 530 U.S. at 575; *Reed*, 343 F.3d

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at 1204; *Eu*, 489 U.S. at 224. This is an inherent right and part of the basic function of a political party. The choice of whether to nominate one or multiple candidates for an office, which directly impacts the ability of the party to focus its resources and campaign effectively, belongs to the party.

The only notable difference between Initiative 872 and the invalid blanket primary is that under I-872, only the "top two" candidates advance to the general election ballot, regardless of their party affiliation. Under this scheme, two Republicans could theoretically advance, or two Democrats. This system enables another practice that will seriously burden the party's associational rights. "Raider" candidates -- recognizing that the presence of multiple candidates from the opposing party could dilute that party's voting strength and eliminate it from the general election -- may put up candidates to declare themselves as members of the opposing party. Under Initiative 872, the County Auditors will be required to include this self-selected party identification on the primary election ballot. RCW 29A.52, Section 7(3). The presence of multiple party candidates -- not chosen by the party -- will split and dilute the party's overall vote, potentially preventing any candidate of that party from advancing to the general election.

Moreover, party candidates that are dissatisfied with the result of the party's internal nominating conventions now have the opportunity for a "second bite at the apple." Party candidates who lose at the convention may still file a declaration of candidacy and appear on the primary ballot as a party candidate, right alongside the party-selected candidate that prevailed at the Convention. At least one Republican candidate for the King County Council who lost at the Republican nominating convention on June 11, 2005 has indicated that he may pursue this course. McDonald Decl., Ex. D ("State GOP picks Hammond, Dunn will still run in primary for 9th District," The King County Journal, reprinted at msnbc.msn.com). Such "rogue" candidacies will further dilute the Party's ability to select its own standard bearers and will further invade its associational rights.

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But "raider" or "rogue" candidacies are not the only way that the Party's voting strength will be diluted in a "top two" system. The mere presence of multiple party candidates in a system that only advances the "top two" primary candidates to the general election ballot will have the same effect. For example, if there are two Republicans and four Democrats listed on a primary election ballot, with the Republicans splitting 40% of the vote and the Democrats splitting the remaining 60%, the two Republicans would advance to the general election ballot despite the fact that Democratic candidates received 60% of the total primary vote. The Party's inability to advance candidates to the general election in spite of majority support is another harm resulting from the Party's inability to select its own primary candidates and voters.

The Party has a fundamental First Amendment right to prevent these harms by selecting the only candidates who will appear on the ballot associated with the party name. That is the gravamen of *Jones*, *Reed*, and their progeny.

C. If the Primary System under Initiative 872 Nominates Political Party Candidates for Public Office, does Initiative 872 Violate the First Amendment by Compelling a Political Party to Associate with Unaffiliated Voters and Members of other Political Parties in the Selection of Its Nominees?

The Washington State Democratic Party has adopted rules which limit participation in the selection of Democratic candidates to members of the Democratic Party and, in public primaries, to voters who choose a Democratic ballot. Initiative 872 nevertheless requires that voters be allowed to vote on the selection of Democratic candidates without any limitation based on party preference or affiliation. RCW 29A.52, Section 5. Accordingly, the Initiative unconstitutionally interferes with the right of the Democratic Party to determine the limits of its association with voters in the selection of its candidates. It is unconstitutional under *Jones* and *Reed*.

The Court in *Jones* found that in such a primary system, the parties' First Amendment rights were severely burdened because they were forced to modify their principles and

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message to appeal to cross-over voters. "Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions -- and, should he be elected, will continue to take somewhat different positions in order to be *re*nominated." *Id*. at 580. Similarly, in *Reed*, the Ninth Circuit found that allowing non-members to participate in the selection of party nominees severely burdened First Amendment rights. In *Reed*, the Ninth Circuit evaluated the same impact on the parties as discussed by the Supreme Court in *Jones*. Because of the open nature of Washington's blanket primary, the Court found a risk that the parties would be "swamped by voters whose preference is for the other party." *Reed*, 343 F.3d at 1204. This would permit "non-party members to hijack the party." *Id*. (citing *Jones*, 530 U.S at 584). They also saw a risk that party adherents would lose their ability to "further their party's program for what they see as good governance," because such an open primary allowed voters who did not share these principles to participate in selecting the party's candidates. *Id*.

The Supreme Court recently reiterated in *Clingman*: "Primaries constitute both a 'crucial juncture' in the electoral process, and a vital forum for expressive association among voters and political parties." *Clingman*, ___ U.S. ___, 125 S.Ct. 2029, 2042 (May 23, 2005) (citing *Jones*, 530 U.S. at 567). "A basic function of a political party is to select the candidates for public office to be offered to the voters at general elections, and a prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process." *Id*. (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58, 94 S.Ct. 303 (1973)). This "preserve[s] the political parties as viable and identifiable interest groups, insuring that the results of a primary election, in a broad sense, accurately reflect the voting of the party members." *Id*. at 2039.

D. Does Washington's Filing Statute Impose Forced Association of Political Parties with Candidates in Violation of the Parties' First Amendment Associational Rights?

Initiative 872 provides that any candidate may self-designate a party preference and

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that party's name will be printed on public ballots and in voter's guides after the candidate's name. RCW 29A.52, Section 7(3). The party is given no choice with respect to whether such a public association is made. The association is therefore forced. Additionally, as a result of self-designating a party preference, the candidate is required by RCW 42.17.510 to thereafter advertise him or herself as affiliated with the party. Again, the party is given no choice with respect to whether such a public association will be made.

Each political party has a clear First Amendment right to determine which candidates it will be publicly associated with. "[T]he First amendment 'protects the freedom to join together in furtherance of common political beliefs,' which 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.'" *Jones*, 530 U.S. at 574 (citing *Tashjian*, 479 U.S. at 214-15; *La Follett*, 450 U.S. at 122). Unless the State can demonstrate that its filing statute is narrowly tailored to advance a compelling state interest, the statute violates the First Amendment and is unconstitutional.

The right to select the candidates that appear on the ballot is particularly important because the Democratic Party name serves an important function in communicating meaningful political information to the electorate. For over 100 years the association between parties and candidates has been indicated to voters by placing the name of the candidate and the party together on the ballot. Candidates who run as Democrats are viewed by the public as speaking the Democratic message. Because of the historic association, candidates who run as Democrats can, and no doubt do, receive numerous votes solely because of their proclaimed affiliation with the Party and their implied adoption of its message and principles. The Party has expended considerable time and expense to develop a coherent set of goals and principles that guide the Party, and to create a corresponding "brand awareness" among the electorate for candidates identified as Democrats. Berendt Decl., ¶ 10.[9] Even non-

[9] The PDC has recognized this by publishing a list of approved political party abbreviations to

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commercial associations, such as the Democratic Party, are entitled to protect such brand awareness from misappropriation and misuse leading to confusion and deception. *See, e.g., Most Worshipful Universal Grand Lodge*, 62 Wn.2d at 37-38. "The underlying concept is that of unfair competition in matters in which the public generally may be deceived or misled."[10] *Id*. at 35; *see also Hurley*, 515 U.S. at 566 (private association could not be required to admit a parade contingent expressing a message not of the organizers' choosing); *Boy Scouts*, 530 U.S. at 659 (First Amendment protects Boy Scouts' right to exclude leader whose presence would express a message at odds with Boy Scout policies).

Allowing any candidate, including those who may oppose the Party's principles and goals, to appear on a ballot as a Democratic candidate will foster confusion and will dilute the Party's ability to rally all its support behind candidates who consistently best communicate its message so as it increase the political value of being associated with the Democratic Party label and its message. Initiative 872 therefore strikes at the heart of the Party's associational rights protected by the First Amendment. The Party has a fundamental right to select its own candidates for public office. Absent a constitutionally sound public primary, the State can not encroach on that right by forcing the Party to associate with candidates and with voters that

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be used in identifying the Party in political advertising. Approved abbreviations for the Democratic party include: "D, Dem, Demo." "The PDC believes they clearly identify political party affiliation." McDonald Decl., Ex. E.

[10] The court quoted at length from a United States Court of Appeals case which noted:

> In the case at bar, complainant for more than a quarter of a century had enjoyed the use of its name and had built up thereunder a large fraternal order among the colored people of the United States. Its fraternal, charitable, and educational activities had commended it to the public, and had given membership therein a value to the people from whom it recruited its membership. It was entitled to enjoy the fruits of the organization which it had built up, unhampered by the efforts of others to appropriate to themselves its corporate name with the advantages thereto attaching.

Most Worshipful Universal Grand Lodge, 62 Wn.2d at 38 (quoting *Grand Lodge of Improved, Benevolent and Protective Order of Elks of the World v. Grand Lodge, Improved, Benevolent and Protective Order of Elks of the World, Inc*., 50 F.2d 860,864 (4th Cir., 1931)).

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are not affiliated with the Party. Initiative 872 is a law which has the likely -- and apparently intended -- effect of forcing the Democratic Party and its candidates to modify their message. It is not narrowly tailored and it does not advance any compelling state interest. Initiative 872 is unconstitutional.

E. Does Initiative 872's Limitation of Access to the General Election Ballot to Only the Top Two Vote Getters in the Primary for Partisan Office Unconstitutionally Limit Ballot Access for Minor Parties?

Initiative 872 does not address minor political parties. Under existing law, minor political parties and independent candidates appear only on the general election ballot. By emergency regulation, the Secretary of State has directed that minor party and independent candidates must appear on the primary ballot and will not be allowed to appear on the general election ballot unless they are one of the top two vote getters. McDonald Decl., Ex. C (WAC 434-215-015; WAC 434-230-060). As a practical matter, the Secretary has now required minor party candidates and independents to obtain at least one-third of the total vote in order to be guaranteed access to the general election ballot. This is far in excess of any reasonable requirement and thus unconstitutionally limits ballot access for minor parties. *See Munro v. Socialist Worker's Party*, 479 U.S. 189, 193, 107 S.Ct. 533 (1986) (State may condition access to the general election ballot by a minor party or independent candidate on a "modicum" of support and may reasonably respond to risk of ballot overcrowding; upholding Washington's then 1% primary support requirement as a "significant modicum.").

VI. CONCLUSION

Initiative 872 -- Washington's modified blanket primary -- flatly prohibits the exercise of a fundamental right of political association protected by the First Amendment. Indeed, it was specifically designed to do so. As in *Jones* and in *Reed*, this Court should declare

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Initiative 872 unconstitutional, and enjoin its enforcement.

DATED this 17th day of June, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2005, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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