The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON STATE, et al,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE, et al,

Defendant Intervenors.

No. CV05-0927 TSZ

MOTION TO AMEND AND SUPPLEMENT COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF REGARDING INITIATIVE 872 AND PRIMARY ELECTIONS
Noted for May 12, 2008
No oral argument requested

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Pursuant to CR 15(a) and (d), the Washington State Democratic Central Committee requests leave of court to amend and supplement its Complaint in Intervention as set forth in the attached proposed First Amended and Supplemental Complaint in Intervention. The proposed amended and supplemental pleading:

1) Deletes and adds parties to reflect dismissals, withdrawals, substitutions and interventions that have occurred since the original Complaint in Intervention was filed;

2) Supplements the factual allegations with respect to the proposed implementation of Initiative-872 ("I-872") to conform to evidence received and considered by the Court after the date of the original pleading;

3) Supplements the factual allegations to set forth material transactions, events and occurrences that have happened after the date of the original Complaint in Intervention in connection with the proposed new implementation of I-872 that the State proposes to substitute for the proposed implementation of I-872 previously submitted to the Court by the State;.

4) Supplements the Democratic Party's cause of action for forced association to encompass the associations forced upon the Party by the State's newly proposed implementation of I-872;

5) Supplements the Democratic Party's cause of action for injunctive relief to include as a basis selective enforcement of election laws by State officials; and

6) Adds a new cause of action challenging the constitutionality of I-872 in light of the State's position taken in this proceeding after the date of the original Complaint in Intervention, and in its proposed implementation of I- 872, that I-872 impliedly repealed or amended various election laws that were not included in the text of the initiative as required by Article II, § 37 of Washington's constitution.

A copy of the proposed First Amended and Supplemental Complaint in Intervention,

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as well as a mark-up version showing changes to the original complaint, are attached as **Attachments 1 and 2**, respectively.

BACKGROUND

On May 19, 2005 the Republican Party brought this action challenging the constitutionality of I-872. The Democratic Party intervened, also challenging I-872 because "The Initiative, as implemented by State and local 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 mechanisms for the Party and its adherents to protect their rights of association and of determining the Party's message." Complaint in Intervention 3:8-12. The Complaint alleged that I-872 was "intended to establish a *de facto* blanket primary." *Id.* at 6:3-7. The Complaint specifically alleged a cause of action for forced association to the extent that Washington's election system as modified by I-872 will require the Party publicly affiliate with candidates not selected by the party. *Id.* at 10:3-6. The Complaint also specifically alleged that an I-872 election scheme would deny the Democratic Party equal protection of the law, in as much as it would protect the rights of some, but not all, parties; pointing as an example to minor party nomination statutes. *Id.* 10:14-22.

On May 26, 2005 the Republican Party moved for a preliminary injunction.

The State of Washington moved to intervene as a defendant and, in its answer, requested the Court enter judgment that "Washington's election laws, and the conduct of elections under those laws, do not deprive the Plaintiffs of any legally cognizable constitutional or other rights protected by either the Constitution and laws of the United States or of the State of Washington." Answer of State of Washington Intervenors 8:9-12.

At the Court's request, on June 17, 2005 the Republican, Democratic, and Libertarian Parties filed motions for summary judgment based on certain issues to enjoin implementation of I-872.

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The State of Washington responded to the political parties' motions for summary judgment with a cross-motion for summary judgment in its favor. As part of its response, the State tendered to the Court for consideration its proposed implementation of I-872, noting that "To implement the Initiative, the Secretary of State adopted emergency rules on May 18, 2005." State's Response at 9:5-7. A copy of the implementation rules was provided as Exhibit C to the Declaration of James K. Pharris. (Dkt. No. 66) (hereinafter "Pharris Decl.").

These implementation rules provided a new form of declaration of candidacy. Pharris Decl., Exhibit C, OTS-8074.3[4]. The declaration of candidacy for partisan office asked the candidate to check one of two options:

"my party preference is _____"

or

"I am an independent candidate."

The form noted that "The party preference will be listed on the ballot exactly as provided unless limited space necessitates abbreviation."

The State proposed to use the same ballot forms as it had been using prior to I-872, except that WAC 434-230-170 (the regulation specifying the ballot form) was amended to delete the language "together with political party designation certified by the secretary of state as provided in RCW 29A.36.010 or the word 'non-partisan' or 'NP' as applicable." In lieu of that language new language was added to the regulation stating that:

> If the position is a partisan position, the party preference or independent status of each candidate *shall be listed next to the candidate*. The party preference *must be listed exactly as provided by the candidate on the declaration of candidacy* unless limited space on the ballot necessitates abbreviation or the party description is, in the opinion of the county auditor, obscene.

RCW 29A.36.010 (as amended; emphasis added).

This Court granted the political parties motions for summary judgment and entered

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permanent injunctive relief. In its Order, the Court noted that its order was limited to the political parties' facial challenge to the Initiative and that the Court was reserving the issues related to the plaintiffs' as applied challenges. Order at 13, n.13 ("The Court has previously directed the parties to limit their briefs to Plaintiffs' facial challenge of Initiative 872. The Court reserved issues related to Plaintiffs' as applied challenge.").

The State and Grange appealed the Court's order. The Ninth Circuit upheld the Court, based in part upon the fact that the form of the ballot to be used in implementing I-872 was to be the same as used under the blanket primary. The State and Grange then petitioned for a writ of *certioriari* from the United States Supreme Court, which subsequently was granted on February 26, 2007. In its Reply Brief on the merits before the Supreme Court, the Grange proposed for the first time that the State might use a new form of ballot rather than the one specified by the State in the proposed implementation adopted by the State on May 18, 2005. The Supreme Court reversed the Ninth Circuit's affirmance of this Court's summary judgment, holding in part that the challenge to the constitutionality of I-872 depended upon the threat of confusion between the party's actual candidates and candidates merely "preferring" the Democratic Party. In light of the suggestion by the Grange that a form of ballot different than that previously proposed might be used, the Court concluded it had no evidentiary basis to evaluate the risk of confusion in the context of a facial challenge. The Supreme Court's decision did not grant summary judgment to the State or Grange, did not declare (as requested by the State in its answer) that "the conduct of elections under [Washington's election] laws, do[es] not deprive the Plaintiffs of any legally cognizable constitutional or other rights protected by either the Constitution and laws of the United States

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or of the State of Washington and on its face did not fully resolve the case, only the facial challenge. The Supreme Court expressly recognized that it was not reaching all issues, only those issues encompassed by the question on which it granted certiorari. *Washington State Grange v. Washington Republican Party*, 128 S. Ct. 1184, 1195 n.11 (2008).

Upon learning of the Supreme Court's opinion, the Secretary of State immediately announced that I-872 would be implemented for this fall's elections. McDonald Decl. ¶2, Exhibit A (E-mail from Secretary Reed, stating "I am thrilled to announce that the U.S. Supreme Court upheld the Top Two Primary, I-872! We plan to implement the Top Two in 2008."). His office then issued draft regulations which it proposed to adopt pursuant to emergency powers. *Id.* at ¶3, Exhibit B (E-mail and attached documents from Assistant Director of Elections Katie Blinn providing new draft regulations and Declaration of Candidacy). These regulations materially changed the form of the declaration of candidacy from what the State had submitted to this Court in 2005 with respect to the manner in which I-872 would be implemented.[1]

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[1] For example, these rules change the proposed ballot design submitted to the Court in 2005 while adding additional explanatory verbiage. *Compare* WAC 434-230-170 as reproduced in Pharris Decl., Exhibit C (stating "party preference or independent status of each candidate shall be listed next to the candidate. The party preference must be listed exactly as provided by the candidate on the declaration of candidacy unless limited space on the ballot necessitates abbreviation . . . .") *with* proposed WAC 434-230-045(4)(a) as reproduced in McDonald Decl. ¶3, Exhibit B-3 ("If the candidate stated his or her preference for a political party on the declaration of candidacy, that preference shall be printed below the candidate's name, with parentheses and the first letter of each word capitalized, as shown in the following example:

JOHN SMITH
(Prefers Example Party)").

Moreover, while WAC 434-215-015 presented to this Court stated that "A candidate for partisan office who does not provide a political party preference is deemed to be an independent candidate;" the Secretary of State's new proposed WAC 434-230-045(4)(b) does away with independent status completely: "If the candidate did not state his or her preference for a political party, that information shall be printed below the candidate's name, with parentheses and the first letter of each word capitalized, as shown in the following example:

JOHN SMITH
(States No Party Preference)."

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In addition, while appeal was pending in this matter, the Washington Supreme Court issued its opinion in *Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 171 P.3d 486 (2007), determining that an initiative is unconstitutional if it does not comply with the Washington Constitution's requirement (Article II, Section 37) that proposed legislation print in full the text of statutes it seeks to amend and identify statutes it will repeal. The Court found that such a requirement "protects [both] legislators and voters by insisting that amendatory legislation *accurately* set forth the law to be amended as measured at the time of the enacting vote." *Id.* at 162 (emphasis in original). Because this Court's 2005 decision, in part, held that various statutes affecting minor political parties were repealed even though not mentioned in I-872, this subsequent State Supreme Court opinion raises colorable questions of state law as to whether (1) I-872 was is a valid enactment in the first place and (2) the extent to which it can be held to have repealed or amended statutes by implication.

ARGUMENT

In light of the Supreme Court's opinion reversing this Court's grant of summary judgment of facial invalidity, this case must go on to consider the issues related to the Democratic Party's as applied challenges to I-872. This Court (in its Order at note 13), appreciated that there were further issues to be tried in the case and the United States Supreme Court (in its opinion at n. 11) recognized that it was not resolving all the issues in the case, only those upon which it granted certiorari. The proposed amended complaint does not alter the essence of this case; it simply updates the set of facts upon which the "as applied" challenge is premised to reflect altered positions adopted by the State in response to this

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See McDonald Decl. ¶3, Exhibit B-3.

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litigation. There is no prejudice to the State or the Grange from permitting this amendment.

Federal Rule of Civil Procedure 15(a) provides that leave of court to amend a pleading should be "freely given when justice so requires." FED. R. CIV. P. 15(a). Moreover, Rule 15(d) provides that parties may upon reasonable notice and on just terms supplement pleadings to set out any transaction, occurrence or event that happened after the date of the pleading to be supplemented.

This Court is already well versed in the issues related to the constitutionality of I-872 and will be taking up the issues related to the parties as applied challenges to I-872. Justice will be best served if this court reviews all of the issues related to the as applied challenges to the Initiative. With respect to the Party's new claims under the Washington Constitution, federal law mandates that district courts "shall have supplemental jurisdiction" precisely to fully resolve "other claims that are so related to claim in the action … that they form part of the same case or controversy [.]" 28 U.S.C. § 1367(a). The express purpose of this mandatory jurisdiction is to advance "the impulse [of the Federal Rules] toward entertaining the broadest possible scope of action consistent with fairness to the parties," and thus "joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966).[2] It is too plain for argument that the state-law and federal law claims challenging the constitutionality of I-872 in the Amended Complaint "derive from a common nucleus of operative fact" such that a party "would ordinarily be expected to try

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[2] Although district courts have discretion to decline to exercise supplemental jurisdiction over state law claims based upon one of the conditions listed in § 1367(c), this decision "is informed by the *Gibbs* values 'of economy, convenience, fairness, and comity.'" *Acri v. Varian Associates, Inc.* 114 F.3d 999, 1001 (9th Cir. 1997).

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them all in one judicial proceeding." *Id.* at 725.

CONCLUSION

Permitting amendment and supplementation of the Complaint in Intervention does not alter the nature or direction of this case; it brings the pleadings up to date. Discovery has not yet begun in the case. Granting leave will not prejudice to the Defendants. The motion to amend and supplement should be granted.

DATED this 1st day of May, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2008, 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:

James Kendrick Pharris

Thomas Ahearne

Richard Dale Shepard

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s/David T. McDonald
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ATTACHMENT 1

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
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AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

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Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON STATE, et al,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE, et al,

Defendant Intervenors.

No. CV05-0927 TSZ

FIRST AMENDED 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.

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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' 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

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 Dwight Pelz 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. The Defendants are Sam Reed, in his capacity as Secretary of State of the State of Washington; Robert McKenna, in his capacity as Attorney General of the State of Washington; and the State of Washington. Secretary Reed is the chief officer in the State, having the overall responsibility to conduct primary elections within each respective county, including providing and tabulating ballots for such elections. Secretary Reed and Attorney General McKenna intervened as defendants. The State was substituted as a defendant for the original defendants (the County Auditors) by an agreed order of the Court on July 13, 2005.

WASHINGTON'S PARTISAN PRIMARY

11. The Defendants will administer partisan primaries in 2008. Defendants intend to implement Initiative 872, filed in January of 2004 in lieu of the primary system

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subsequently enacted by Washington's Legislature in 2004, 2006 and 2007 though Initiative 872 does not repeal that system.

12. Defendants-Intervenors Washington State Grange filed Initiative 872 in January 2004 seeking to convert the State's then blanket primary election system into a Top Two primary system. During the 2004 legislative session, the Grange lobbied aggressively for the Washington legislature to adopt a primary election system that was substantially similar to Initiative 872. In response, Washington's legislature adopted a "Top Two" primary in 2004, along with an alternative "Montana" primary. On April 1, 2004, then-Governor Gary Locke vetoed the "Top Two" components of the legislation but signed the "Montana" primary components. Upon information and belief, the legislative purpose in adopting the "Top Two" primary with an alternative "Montana" primary backup was not to circumvent the Grange's filed then-initiative. As the sponsor of Initiative 872, the Grange then sued, seeking to overturn the Governor's veto and effectively reinstitute the "Top Two" primary. The Washington State Supreme Court upheld the veto.

13. Following the veto, the Grange initiated a signature gathering campaign to place Initiative 872 on the November 2004 ballot. This campaign's promotional materials represented to voters that the Initiative would "restore the kind of choice that voters enjoyed for seventy years under the blanket primary." The promotional materials also represented that "minor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the ballot for each office (as they do now)." On April 19, 2004, counsel for the Democratic Party advised the Grange that petitions for Initiative 872 being circulated for signature, contained material inaccuracies because the

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Initiative was drafted and filed prior to a major change in the election laws of the State. Despite this warning, the Grange continued to pursue Initiative 872 as filed in January 2004.

14. Pursuant to the laws of the State, including the Montana primary system adopted by the Legislature and RCW 29A.04.311, 29A.20.121, and 29A.52.116, the Party is 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.36.106(1)(a), enacted in 2007, requires that unless party ballots are used, each ballot must contain a statement that for partisan offices the voter may vote for candidates of only one party. RCW 29A.04.311, enacted in 2006, requires that on the third Tuesday in August the state hold elections of precinct committee officers for the parties and nominating primaries for the general elections in November.

15. Sections 5, 7 and 8 of I-872, filed in January of 2004, call for a Top Two primary to be held on the third Tuesday in September prior to November general elections. Section 6 of I-872 limits appearance on the general election ballot to the two candidates who receive the most votes in the September primary. Section 7 of I-872 also provides 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

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two" vote-getters in the primary required by I-872 will advance to the general election. The Secretary has asserted that only the two candidates who receive the most votes on primary day will advance to the primary even if both candidates are associated with the same political party. Former 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."

16. Neither the laws of the State as applied by the Secretary in implementing his decision to implement I-872's qualifying primary in lieu of the nominating primary required by Washington law nor the rules 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.

17. The State, through its filing and campaign advertising statutes, also 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. In addition, the State through its Voter's Pamphlet propagates to all voters claims of Party endorsement or nomination by candidates without regard to whether the Party has in fact endorsed or nominated the candidates. Election officials advise that under their proposed implementation of Initiative 872 candidates may run as members of political parties and even associate themselves with factions of political parties. As reported by the Olympian on April 17, 2008:

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> Officials also did not rule out that a candidate could say he or she was a "Tim Sheldon Democrat," "Sam Reed Republican," or "Tax Cut GOP" or "Enviro Dem" or "No War Dem."
>
> "The candidate provides the name of the party. So it's up to the candidate," said Katie Blinn, assistant state elections director....
>
> Thurston County Auditor Kim Wyman told fellow Republicans last weekend at their county convention that the state's new primary could let a candidate run as a "Kim Wyman Republican."
>
> People laughed, but Wyman wasn't joking.

18. In addition to requiring the Party to accept as one of its candidates any individual without regard to the individual's political philosophy or participation in Party affairs, implementation of RCW 29A.04.127 would force the Party to permit any voter to participate in selection of the Party's 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*.

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19. 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.

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

DENIAL OF EQUAL PROTECTION OF LAWS

21. 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).

22. 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

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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

23. 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, not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-07.

24. 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

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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.

25. 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

26. 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.

27. 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 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.

28. The conduct of any partisan primary by State officials in which the state promotes, permits or encourages claims by candidates in or on widely distributed State election materials, including ballots and voter's pamphlets, to be associated with, members of, endorsed by or nominated by the Democratic Party without regard to whether such candidates are in fact associated with, members of, endorsed by or nominated by the Democratic Party modulates and alters, and thus interferes with, the political message of the Democratic Party. The conduct of any partisan primary by State officials in which the Democratic Party is

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required to repeat in its own materials unwanted claims of association by candidates unconstitutionally compels political speech from the Party.

29. If the State is 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

30. Plaintiffs reallege and incorporate by reference Paragraphs 1-29.

31. 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 as applied to them.

32. 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.

33. 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.

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

35. 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

36. Plaintiffs reallege and incorporate by reference Paragraphs 1-35.

37. 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.

38. 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.

39. Initiative 872 is unconstitutional because, both in isolation and in conjunction with other laws governing elections and election campaigns, it will confuse voters as to whether candidates publically affiliated with the Democratic Party are, in fact, affiliated with the Democratic Party or represent its views, and will further confuse voters regarding whether messages advanced by candidates bearing the Democratic Party name on ballots, in the voter's pamphlet, and in political advertising are those of the Democratic Party. Initiative 872 constitutes a misappropriation by the Defendants and potentially by unauthorized candidates of the Party's name, which is associated in the mind of the public with the Party and its positions on important issues of the day.

THIRD CAUSE OF ACTION: DENIAL OF EQUAL PROTECTION UNDER LAW

40. Plaintiffs reallege and incorporate by reference Paragraphs 1-39.

41. The State, through RCW 29A.20.171 and other provisions of state law, 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

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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.

42. 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:
VIOLATION OF THE WASHINGTON STATE CONSTITUTION

43. Plaintiffs reallege and incorporate by reference Paragraphs 1 – 42.

44. I-872 identified the portions of Washington's primary and general election laws both that it amended and repealed, as well as any new provisions it added to the statutory scheme.

45. I-872 did not include in its text the provisions of existing state law (or prior state law) regarding the August "Montana" primary, minor party convention rights, or protections for unauthorized use of minor party political names by candidates that would be repealed or amended by I-872. Nor did I-872 include such statutory provisions in its list of sections of the law to be repealed.

46. As approved by the voters in November 2004, Initiative 872's text violates of Article II, Section 37 of the Washington State Constitution and is void.

47. Both the text of Initiative 872 and the sponsor's materials presented to the voters in the course of its signature gathering campaign (as well as the general election campaign for the Initiative) mislead and confused voters regarding the effect of the Initiative,

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violating Article II, Section 37 of the State Constitution.

FIFTH CAUSE OF ACTION: INJUNCTIVE RELIEF

48. Plaintiffs reallege and incorporate by reference Paragraphs 1-47.

49. There exists an imminent and ongoing threat by State officials to deprive Plaintiffs of their civil rights by selectively enforcing laws and permitting the State to blur 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.

50. 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.

51. 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 or general election ballot or in any officially distributed election materials 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.

52. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection

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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 under the Constitution of the United States to the 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;

7. Declaring that the primary system in effect immediately before the passage of I-872 remains in effect;

8. Declaring Initiative 872 unconstitutional for violating Article II, section 37 of the Washington State Constitution and declaring the primary system in effect immediately prior to passage of the Initiative remains in effect;

9. Permanently restraining Defendants 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;

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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 or general election ballot or in other officially distributed election material 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.

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

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

DATED this 1st day of May, 2008.

s/David T. McDonald
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ATTACHMENT 2

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON STATE, et al,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE, et al,

Defendant Intervenors.

No. CV05-0927 TSZ

FIRST AMENDED 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.

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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' 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~~ Dwight Pelz 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. The Defendants are Sam Reed, in his capacity as Secretary of State of the State of Washington; Robert McKenna, in his capacity as Attorney General of the State of Washington; and the State of Washington. ~~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~~ Secretary Reed is the chief ~~election~~ officer in the State, having the overall responsibility to conduct primary elections within each respective county, ~~of primary elections and are responsible, consistent~~

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~~with the rules established by the Secretary, to~~ including providing and tabulating ballots for such elections. Secretary Reed and Attorney General McKenna intervened as defendants. The State was substituted as a defendant for the original defendants (the County Auditors) by an agreed order of the Court on July 13, 2005. ~~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 ~~in 2005~~. Defendants intend to implement Initiative 872, filed in January of 2004 in lieu of the primary system subsequently enacted by Washington's Legislature in 2004, 2006 and 2007 though Initiative 872 does not repeal that system.

12. Defendants-Intervenors Washington State Grange filed Initiative 872 in January 2004 seeking to convert the State's then blanket primary election system into a Top Two primary system. During the 2004 legislative session the Grange lobbied aggressively for the Washington legislature to adopt a primary election system that was substantially similar to Initiative 872. In response, Washington's legislature adopted a "Top Two" primary in 2004, along with an alternative "Montana" primary. On April 1, 2004, then-Governor Gary Locke vetoed the "Top Two" components of the legislation but signed the "Montana" primary components. Upon information and belief, the legislative purpose in adopting the "Top Two" primary with an alternative "Montana" primary backup was not to circumvent the Grange's filed then-initiative. As the sponsor of Initiative 872, the Grange then sued, seeking to overturn the Governor's veto and effectively reinstitute the "Top Two" primary. The Washington State Supreme Court upheld the veto.

13. Following the veto, the Grange initiated a signature gathering campaign to

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place Initiative 872 on the November 2004 ballot. This campaign's promotional materials represented to voters that the Initiative would "restore the kind of choice that voters enjoyed for seventy years under the blanket primary." The promotional materials also represented that "minor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the ballot for each office (as they do now)." On April 19, 2004, counsel for the Democratic Party advised the Grange that petitions for Initiative 872 being circulated for signature contained material inaccuracies because the Initiative was drafted and filed prior to a major change in the election laws of the State. Despite this warning, the Grange continued to pursue Initiative 872 as filed in January 2004.

14. Pursuant to the laws of the State, including the Montana primary system adopted by the Legislature and RCW 29A.04.311, 29A.20.121, and 29A.52.116, the Party is 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.36.106(1)(a), enacted in 2007, requires that unless party ballots are used, each ballot must contain a statement that for partisan offices the voter may vote for candidates of only one party. RCW 29A.04.311, enacted in 2006, requires that on the third Tuesday in August the state hold elections of precinct committee officers for the parties and nominating primaries for the general elections in November.

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15. Sections 5, 7 and 8 of I-872, filed in January of 2004, call for a Top Two primary to be held on the third Tuesday in September prior to November general elections. Section 6 of I-872 limits appearance on the general election ballot to the two candidates who receive the most votes in the September primary. Section 7 of I-872 also provides 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 required by I-872 will advance to the general election. The Secretary has asserted that only the two candidates who receive the most votes on primary day will advance to the primary even if both candidates are associated with the same political party. Former 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."

16. Neither the laws of the State as applied by the Secretary in implementing his decision to implement I-872's qualifying primary in lieu of the nominating primary required by Washington law 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.

17. The State, through its filing and campaign advertising statutes, also 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.

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In addition, the State through its Voter's Pamphlet propagates to all voters claims of Party endorsement or nomination by candidates without regard to whether the Party has in fact endorsed or nominated the candidates. Election officials advise that under their proposed implementation of Initiative 872 candidates may run as members of political parties and even associate themselves with factions of political parties. As reported by the Olympian on April 17, 2008:

> Officials also did not rule out that a candidate could say he or she was a "Tim Sheldon Democrat," "Sam Reed Republican," or "Tax Cut GOP" or "Enviro Dem" or "No War Dem."
>
> "The candidate provides the name of the party. So it's up to the candidate," said Katie Blinn, assistant state elections director....
>
> Thurston County Auditor Kim Wyman told fellow Republicans last weekend at their county convention that the state's new primary could let a candidate run as a "Kim Wyman Republican."
>
> People laughed, but Wyman wasn't joking.

18. In addition to requiring the Party to accept as one of its candidates any individual without regard to the individual's political philosophy or participation in Party affairs, implementation of RCW 29A.04.127 forces ~~would force~~ the Party to permit any voter to participate in selection of the Party's 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

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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*.

19. 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.

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

DENIAL OF EQUAL PROTECTION OF LAWS

21. 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

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candidate for partisan public office by other than a major political party may be made only in a convention ...." (internal punctuation omitted).

22. 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

23. 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, not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-07.

24. 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

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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.

25. 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

26. 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.

27. 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 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.

28. The conduct of any partisan primary by State officials in which the state promotes, permits or encourages claims by candidates in or on widely distributed State

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election materials, including ballots and voter's pamphlets, to be associated with, members of, endorsed by or nominated by the Democratic Party without regard to whether such candidates are in fact associated with, members of, endorsed by or nominated by the Democratic Party modulates and alters, and thus interferes with, the political message of the Democratic Party. The conduct of any partisan primary by State officials in which the Democratic Party is required to repeat in its own materials unwanted claims of association by candidates unconstitutionally compels political speech from the Party.

29. If the State is ~~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

30. Plaintiffs reallege and incorporate by reference Paragraphs 1-29.

31. 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 as applied to them.

32. 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.

33. 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

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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.

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

35. 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.

SECOND CAUSE OF ACTION: FORCED ASSOCIATION

36. Plaintiffs reallege and incorporate by reference Paragraphs 1-35.

37. 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.

38. 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.

39. Initiative 872 is unconstitutional because, both in isolation and in conjunction with other laws governing elections and election campaigns, it will confuse voters as to whether candidates publically affiliated with the Democratic Party are, in fact, affiliated with the Democratic Party or represent its views, and will further confuse voters regarding whether messages advanced by candidates bearing the Democratic Party name on ballots, in the voter's pamphlet, and in political advertising are those of the Democratic Party. Initiative 872 constitutes a misappropriation by the Defendants and potentially by unauthorized candidates

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of the Party's name, which is associated in the mind of the public with the Party and its positions on important issues of the day.

THIRD CAUSE OF ACTION: DENIAL OF EQUAL PROTECTION UNDER LAW

40. Plaintiffs reallege and incorporate by reference Paragraphs 1-39.

41. The State, through RCW 29A.20.171 and other provisions of state law, 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.

42. 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:
VIOLATION OF THE WASHINGTON STATE CONSTITUTION

43. Plaintiffs reallege and incorporate by reference Paragraphs 1 – 42.

44. I-872 identified the portions of Washington's primary and general election laws both that it amended and repealed, as well as any new provisions it added to the statutory scheme.

45. I-872 did not include in its text the provisions of existing state law (or prior state law) regarding the August Montana primary, minor party convention rights or protections for unauthorized use of minor party political names by candidates that would be

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repealed or amended by I-872. Nor did I-872 include such statutory provisions in its list of sections of the law to be repealed.

46. As approved by the voters in November 2004, Initiative 872's text violates of Article II, Section 37 of the Washington State Constitution and is void.

47. Both the text of Initiative 872 and the sponsor's materials presented to the voters in the course of its signature gathering campaign (as well as the general election campaign for the Initiative) mislead and confused voters regarding the effect of the Initiative, violating Article II, Section 37 of the State Constitution.

FIFTH ~~FOURTH~~ CAUSE OF ACTION: INJUNCTIVE RELIEF

48. Plaintiffs reallege and incorporate by reference Paragraphs 1-49.

49. There exists an imminent and ongoing threat by State officials to deprive Plaintiffs of their civil rights by selectively enforcing laws and permitting the State to blur ~~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.

50. 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.

51. 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

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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 or general election ballot or in any officially distributed election materials 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.

52. 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 under the Constitution of the United States to the 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;

7. Declaring that the primary system in effect immediately before the passage of I-872 remains in effect;

8. Declaring Initiative 872 unconstitutional for violating Article II, section 37 of the Washington State Constitution and declaring the primary system in effect immediately

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prior to passage of the Initiative remains in effect;

9. Permanently restraining Defendants ~~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 or general election ballot or in other officially distributed election material 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.

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

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

DATED this 30th ~~8th~~ day of April, 2008 ~~June 2005~~.

s/ David T. McDonald
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2008, 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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John James White, Jr.

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