The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, and 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., Defendants, and WASHINGTON STATE GRANGE, Defendant Intervenors.	No. C05-0927Z PLAINTIFF INTERVENOR WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT PLAINTIFF INTERVENOR WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S OPPOSITION TO THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT **Noted for Oral Argument: July 13, 2005 @ 9:00 a.m.**

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I. INTRODUCTION

2 The defense of Initiative 872 presented by the Grange and the State ignores rather than
3 addresses the constitutional infirmity created by the statute. The simple and undeniable fact is
4 that Initiative 872 forces a political party to be publicly associated with and represented by
5 messengers that its members did not choose. The Grange and the State make no attempt to
6 show that Initiative 872 is narrowly tailored to advance a compelling state interest. This
7 Court should declare Initiative 872 unconstitutional, grant a permanent injunction preventing
8 its enforcement, and deny the Cross-Motion for Summary Judgment filed by the State.

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II. ARGUMENT

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A. The Right of Political Parties to Nominate and the Burden Placed Upon that Right by Initiative 872 is not disputed.

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12 Neither the State nor the Grange disputes that a political party has an inherent right to
13 nominate its own candidates. Grange Brief at 27[1]; State Brief at 24:4-6[2]. In fact, a political
14 party's right to nominate is a constitutionally protected right of association:

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> [The] right [of "those who actively participate in partisan activities"] to freely associate . . is thwarted because 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.

19 *Democratic Party of Washington State v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003).[3]

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[1] "The parties are free to select whatever person they want to be *their* 'nominees' for public office, and limit the persons making the parties' selection of *their* nominees to *their* so-called 'members." (emphasis in original).

[2] "Through the internal process each party has selected, the 'right to nominate' of each party has been fully satisfied. Washington law in no way limits or burdens the right of any party to use such processes."

[3] Washington law expresses a policy favoring nomination of candidates and expressly requires that candidates for partisan office be nominated. RCW 29A.52.111 ("Candidates for the following offices shall be nominated at partisan primaries. . .") and RCW 29A.52.116 ("Major political party candidates for all partisan elected offices . . must be nominated at primaries. . .").

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Instead, the Grange and the State argue that the State can substitute a right to endorse (that is, to indicate a preference for some candidates using the party name over other candidates using the party name) for the right to nominate (that is, to select the candidates who will bear the party name and exclude others from using the name). This argument has been soundly rejected by the Supreme Court:

> The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.... We are similarly unconvinced by respondents' claim that the burden is not severe because Proposition 198 does not limit the parties from engaging fully in other traditional party behavior, such as ensuring orderly internal party governance, maintaining party discipline in the legislature, and conducting campaigns.

California Democratic Party v. Jones, 530 U.S. 567, 580-81, 120 S.Ct. 2402 (2000).

Similarly, the undisputed evidence is that the burdens imposed by Initiative 872 upon core First Amendment associational freedoms of the Democratic Party are severe and substantial. The Grange and State do not deny the testimony of Paul Berendt, State Democratic Party Chair, that the primary system created by Initiative 872 is inconsistent with the Party's rules for candidate selection. Declaration of Paul Berendt ("Berendt Decl."), Docket No. 56. Nor do they deny that Initiative 872 will: (1) substantially interfere with the Party's pursuit of its political strategies and charter-defined goals (Berendt Decl. ¶¶ 5-8), (2) dilute

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Initiative 872 did not repeal either statute although, as argued by the State, passage of the Initiative may have impliedly repealed the requirement that the nomination occur by means of public primaries. As the Grange points out in its Brief at 18-19, citizens are presumed to know the law. They therefore should be presumed not to have intended to repeal statutes that Initiative 872 did not identify as being repealed. If any implied repeal is allowed, it must be narrowly confined to only such portions of the statutes as are clearly in conflict with the Initiative. Requiring pre-primary nomination by parties of partisan candidates is not inconsistent with the top two primary concept. Indeed, it is conceded by the Grange that the Grange told voters that the Initiative was drafted to conform to the Supreme Court's description in *Jones* of a non-partisan blanket primary and that the Court's description encompassed primaries in which prior nomination by an established political party was a qualification for access by a candidate to the primary ballot unless the candidate runs as an independent. *See* Grange Brief at 24:12-25:11.

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1 and weaken the Party's ability to effectively communicate its message (Berendt Decl. ¶ 9), (3)
2 undermine the Party's long-standing efforts to develop a brand awareness among the electorate
3 for candidates identified as Democrats (Berendt Decl. ¶ 10), (4) interfere with the Party's
4 mobilization of its supporters (Berendt Decl. ¶ 11), and (5) substantially increase the
5 difficulty of recruiting candidates and growing support in areas in which the Democratic Party
6 is weak (Berendt Decl. ¶ 12).

7 Where a statutory scheme severely burdens core First Amendment rights, the scheme
8 must be found unconstitutional unless the State affirmatively demonstrates that the scheme is
9 narrowly tailored to advance a compelling state interest. Both the State and the Grange
10 misconstrue the legal standard to be used by this Court in evaluating Initiative 872. First
11 Amendment law does not require that the political parties "establish that no set of
12 circumstances exists under which [the] Initiative would be valid." Grange Brief at 16. Where
13 a statute on its face forces a political party to permit anyone to: (1) participate in its candidate
14 selection process or, (2) impose themselves on the party as its candidate, *the burden is on the*
15 *State* to justify the statute by proving that it survives strict scrutiny. As the Ninth Circuit
16 stated in *Reed*:

17 > This is a facial challenge to a statute burdening the exercise of a First Amendment right.... In *Jones*, the Court read the state
18 > blanket primary statutes, determined that on their face they restrict free association, accordingly subjected them to strict
19 > scrutiny, and only then looked at the evidence to determine whether the State satisfied its burden of showing narrow
20 > tailoring toward a compelling state interest.

21 *Reed*, 343 F.3d at 1203.

22 The burden on associational rights is just as evident here as it was in *Reed*. The
23 Grange, having lost the *Reed* case, ignored the teaching of *Reed* and *Jones* and created
24 Initiative 872 to promote exactly the same invasion of constitutional rights that had just been
25 enjoined in connection with the blanket primary. The Grange advertised: "Through this
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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*." Declaration of John White in Support of Motion for Preliminary Injunction, Docket No. 8, Ex. 2, page 17 (emphasis added).

It is not the political parties' task to show that there are no circumstances in which this flawed initiative might operate constitutionally. Rather, it is the State's burden to show it is narrowly tailored, i.e., that it goes no further than necessary to advance a compelling and legitimate state interest. Neither the State nor the Grange has made such a showing here. This Court should permanently enjoin the implementation of Initiative 872 and the related emergency regulations adopted by the Secretary of State.[4]

B. A Candidate's Right of Self-Expression Does Not Include the Right To Commandeer the Name of an Organization and, in Any Event, the Candidate's Right of Self-Expression Does Not Create a Right in the State to Force Association on Political Parties in State Publications.

The Grange and the State alternatively base their defense of Initiative 872 on a claimed right of individual candidates to be associated with any political party, in the candidate's sole discretion, on public ballots, in voter's pamphlets and in political advertising. Whether or not a candidate has a First Amendment right to state in public debate a preference for a political party, he or she clearly has no right to imply an association with such an

[4] The Secretary of State has, by emergency regulation, "instruct[ed] election officials which statutes..are now limited in their scope or are no longer inoperable." *See* State Brief at 9 and note 6. The Secretary's regulations tell election officials to ignore statutes which were neither repealed by Initiative 872 nor by the legislature when it met after the passage of Initiative 872. The Secretary bases his authority to instruct election officials to ignore the law upon a factually incorrect premise that "Initiative 872 ...was already circulating for signatures when the 2004 primary legislation was enacted, and thus, Initiative 872 obviously had no opportunity to repeal or amend all the statutes added to the code [in 2004]." State's Brief at 9, note 6. On the contrary, proponents of Initiative 872 had every opportunity to address 2004 legislation in their initiative as they began to gather signatures only *in response to*, not in ignorance of, *the primary laws enacted by the legislature in 2004*. *See* Second Declaration of David McDonald, Exhibits A, B (Grange press release; minutes of Grange Executive Committee). Voters were entitled to assume that any statute not expressly repealed by Initiative 872 was intended by 872 to be used in conjunction with Initiative 872 unless irretrievably inconsistent with the Initiative.

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1 established organization against its will. For example, a candidate has no right to "express a
2 preference" for Starbuck's coffee by plastering his literature and yard-signs with statements of
3 the form "Joe Smith-Starbuck's" and liberally applying the Starbuck's logo. The law has long
4 recognized that such forced association is wrongful and constitutes irreparable injury
5 warranting an injunction.[5]

6 The right of even non-commercial organizations to protect their name against misuse
7 is well-recognized. "Where it is perfectly clear that the use of the name is a simulation of a
8 name already in use, relief has been granted to non-commercial organizations without need to
9 show there has been unfair 'business' competition." *Cornell Univ. v. Messing Bakeries, Inc.*,
10 285 A.D. 490, 492 (1955). This right is recognized in Washington. The Most Worshipful
11 Hall Grand Lodge of Washington, a legitimate Masonic lodge that could trace its ancestry
12 back to the original African-American Freemason organization, successfully sought an
13 injunction from the Supreme Court of Washington restraining two other lodges from use of
14 the terms "Ancient Free and Accepted Masons," "A. F. & A. M," or any variation thereof. *Most
15 Worshipful Prince Hall Grand Lodge of Washington v. Most Worshipful Universal Grand
16 Lodge, A. F. & A. M. of Washington*, 62 Wn.2d 28, 35, 381 P.2d 130 (1963) ("We are of the
17 opinion that an established fraternal organization is entitled to relief when its name or one so
18 similar as to be deceiving is adopted by another organization and used in a manner which is
19 confusing and deceiving to the public and is detrimental to the organization already using the
20 name.").

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22 [5] The Ninth Circuit has long held that when the name of another is misappropriated causing a
23 likelihood of confusion, irreparable injury is presumed and a plaintiff is entitled to a
preliminary injunction without any further showing of injury. *Micro Star v. Formgen Inc.*,
24 154 F.3d 1107, 1109 (9th Cir.1998) (holding that because a showing of likelihood of success
on the merits raises a presumption of irreparable injury, the plaintiff need only show
25 likelihood of success on the merits for the preliminary injunction to issue); *Apple Computer,
Inc. v. Formula International Inc.*, 725 F.2d 521, 525 (9th Cir.1984) ("A showing of a
26 reasonable likelihood of success on the merits in a copyright infringement claim raises a
presumption of irreparable harm.")

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In the political sphere, Washington State expressly provides a summary procedure to allow courts to protect minor political party names from misuse. *See* RCW 29A.20.171(2).[6] But Initiative 872 would throw a major political party's name up for grabs without even extending to the major political party the protection of its name that Washington grants to minor parties. The result would be discriminatory. Although reasonable, non-discriminatory regulations can usually be justified by any important state interest, that lesser standard does not apply to discriminatory regulations. *See Burdick v. Takushi*, 504 U.S. 428, 437-38, 112 S.Ct. 2059 (1992). "[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson v. Celebrezze*, 460 U.S. 780, 792-93, 103 S.Ct. 1564 (1983). *See also Bullock v. Carter*, 405 U.S. 134, 144, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (invalidating high candidate filing fees partially because they burdened a particular type of voter). There is no constitutionally permissible basis for providing minor political parties with protection of their names while allowing citizens at random to hijack the names of major political parties.

The Democratic Party has expended great effort and expense in building a brand

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[6] The statute provides:

> A person affected may petition the superior court of the county in which the filing officer is located for a judicial determination of the right to the name of a minor political party, either before or after documents are filed with the filing officer. The court shall resolve the conflict between competing claims to the use of the same party name according to the following principles: (a) The prior established public use of the name during previous elections by a party composed of or led by the same individuals or individuals in documented succession; (b) prior established public use of the name earlier in the same election cycle; (c) the nomination of a more complete slate of candidates for a number of offices or in a number of different regions of the state; (d) documented affiliation with a national or statewide party organization with an established use of the name; (e) the first date of filing of a certificate of nomination; and (f) such other indicia of an established right to use of the name as the court may deem relevant.

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1 awareness for the Democratic name that will be undermined by Initiative 872. Berendt Decl.
2 ¶ 10. It has been held as "undisputed that the use of the name 'Democratic Party' has substantial
3 value" and that:

4 the value goes beyond the effect the term 'Democratic Party' has on ignorant or undecided voters, for it permits a group to
5 identify itself with an historical tradition, a national and regional political organization, and a well-established structure
6 to facilitate fund-raising.

7 *Riddell v. Nat'l Democratic Party*, 50 F.2d 770, 775 (5th Cir. 1975) (where Democratic
8 National Committee had recognized group as the representative of National Democratic Party,
9 State could not bar that group from using the name of the Democratic Party).

10 Candidates who seek and lose the Democratic Party's nomination have no greater
11 rights to use the Party's name without permission than anyone else. For example, an
12 association's name is protected from use by disgruntled members or a local chapter following
13 secession from the larger organization. The Fourth Circuit enjoined use of the name
14 'Methodist Episcopal Church, South' by former members displeased with the union of three
15 Methodist branches, *Purcell v. Summers*, 145 F.2d 979, 991 (4th Cir. 1944), finding that to
16 hold otherwise would allow "the new organization to strengthen itself at the expense of the old,
17 . inevitably result in much confusion and . . cause injury and damage to the old organization."
18 Similarly, the national and California branches of the Junior Chamber of Commerce
19 movement successfully sought an injunction restraining a disaffiliated local chapter from
20 using the terms 'Junior Chamber of Commerce,' 'Junior Chamber,' 'Jaycees,' or 'J.C.'s' in its name.
21 *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 354 F. Supp. 61, 78-
22 79 (N.D. Cal. 1972).

23 The risk that printing a candidate's name on the ballot followed by a political party
24 name, as required by Initiative 872, will cause voters to believe that candidate is affiliated
25 with that party or its nominee is particularly acute in Washington given that for over 100
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1 years the association of a candidate's name and a political party on a general ballot has
2 indicated that the candidate is a nominee of the political party and on a primary ballot has
3 indicated that the candidate is a candidate of the political party.

4 In any event, while a candidate may have a right, in the context of political discourse,
5 to state in a manner not intended to cause confusion that he or she prefers a particular political
6 party over other parties but does not represent that political party and is not campaigning
7 under its label, the State has no right when it makes statements by printing ballots and voting
8 pamphlets to force the political party to be associated with the candidate without consent. It is
9 the State's action, not the candidate's, which is at issue here. Yet Initiative 872 creates just
10 such a State-required association by requiring that the name of the political party chosen by a
11 candidate be printed "after the name of the candidate on the primary and general election
12 ballots" and by granting the candidate a right to have his or her preference appear on the ballot
13 "in conjunction with" the candidate's name. *See* RCW 29A.52 (Initiative 872, Sections 4, 7).
14 The use of the phrase "in conjunction with" makes it clear that a forced association is the
15 intended, not the accidental, result of the statute.[7] It is well-established that a political party
16 has a core First Amendment right to limit its association with individuals that is severely
17 burdened when the State forces the party to associate against its will. *Reed*, 343 F.3d at 1204;
18 *Jones*, 530 U.S. at 574.

19 **C. The State Cannot Force Political Parties to Permit Individuals to Self-Nominate**
20 **as Party Candidates.**

21 In essence, what Initiative 872 does is to force the political parties to replace their
22 current nominating rules with a process in which individual candidates nominate themselves
23 as party candidates. A political party might choose to adopt such a system but the State

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25 [7] *See* Random House Dictionary of the English Language, Second Edition Unabridged (1987): "Conjunction. 3. the state of being conjoined; union; association: *The police, in conjunction with the army, established order.*" (italics in original).
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1 cannot force such a system on a political party:

2 > What we have not held, however, is that the processes by which political parties select their nominees are, as respondents would 3 have it, wholly public affairs that States may regulate freely. To the contrary, we have continually stressed that when States 4 regulate parties' internal processes they must act within limits imposed by the Constitution.

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6 *Jones*, 530 U.S. at 572-73. (footnotes and citations omitted).

7 Rather than meet their burden to justify Initiative 872, the Grange and the State seek to 8 evade the issue by arguing that the candidates who appear on primary and general election 9 ballots are not candidates "of the party" even though they are identified on both ballots as 10 associated with the party. This word-play defense is substantially the same as the defense 11 these entities offered when the blanket primary was challenged in *Reed*. There, they argued 12 that the candidates who were selected in the blanket primary to advance to the general 13 election were not candidates of the party but instead were candidates "of the people." The Ninth 14 Circuit readily dismissed this argument in *Reed* and it is no stronger here. "As for the State of 15 Washington's argument that the party nominees chosen at blanket primaries 'are the 'nominees' 16 not of the parties but of the electorate,' that is the problem with the system, not a defense of it. 17 Put simply, the blanket primary prevents a party from picking its nominees." *Reed*, 343 F.3d at 18 1204.

19 **D. Initiative 872 is Not Severable and Must be Declared Unconstitutional in Toto,**

20 The clear and stated intent of the proponents of Initiative 872 was to have a system 21 that allowed any voter, regardless of party affiliation, to participate in the selection of a 22 political party's candidates. This unconstitutional purpose pervades the initiative and cannot 23 be severed out. The burden on First Amendment rights is created by Section 4's requirement 24 that a candidate's selection of a party be printed on the ballot in conjunction with his or her 25 name. That requirement is repeated in Section 7 and Section 11, which forces the association 26 to be repeated in the voter's pamphlet. At a minimum, these three sections would have to be

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1 severed from the Initiative along with any "implied repeal" carried out by the Secretary of State's
2 emergency regulations based upon these sections. Section 5, which purports to give every
3 voter the right to vote in the selection of partisan candidates without regard to the voter's
4 affiliation or the party's rules, would also have to be severed, along with any associated
5 "impliedly repealed" regulations. The result would be an unworkable hodgepodge primary
6 system in which each party has a separate primary ballot, only the top vote getter from each
7 party is eligible to go to the general election ballot, and, in addition, of those eligible to go
8 forward, only the top two would go forward. This result would be consistent with at least one
9 asserted interest of the proponents, namely guaranteeing that the eventual winner is elected by
10 a majority of those voting. But it would not be consistent with their purpose of forcing
11 political party candidates to be selected by voters regardless of the voter's party affiliation. In
12 such circumstances, severance is not possible. *See State v. Anderson,* 81 Wn.2d 234, 236
13 (1972) (severance not permissible if it cannot reasonably be believed that the remaining act
14 would be capable of accomplishing the legislative purpose).

15 If, however, the Court concludes that voters were primarily interested in limiting the
16 number of candidates on the general election ballot to no more than two in order to guarantee
17 election by majority and that voters viewed as only incidental creating a right for non-party
18 members to choose a party's candidates, then the statutory framework may be made
19 constitutional.[8] The Court need only hold that the Initiative's requirement that a political party
20 name be printed after a candidate's name is applicable if, and only if, the candidate has first
21 been selected by the political party whose name he or she seeks to invoke, pursuant to the
22 rules of that party. No candidate will be denied access to the ballot thereby. Any candidate
23 not selected by a political party remains free to run as an independent candidate as permitted
24 by law. This result is consistent with the existing state law requirements that candidates for
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26 [8] Provided, of course, that the result does not create an unconstitutional obstacle to ballot access by third parties.

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1 partisan office must be nominated by political parties or run as independents, while also
2 implementing 872's articulated goal that public primaries not be the vehicle used for
3 nominating political party candidates.

4 **E. The Parties are Entitled to an Injunction.**

5 Forcing an association upon a political party violates a clear First Amendment right
6 entitling the political party to an injunction prohibiting the conduct. *Reed*, 343 F.3d at 1207
7 ('This case presents a facial constitutional challenge, and the Washington blanket primary
8 statute is on its face an unconstitutional burden on the rights of free association of the [parties]
9 who have brought this suit. We...REMAND for entry of...an injunction in favor of the
10 appellants.') Entry of an injunction will not require the Court to write or administer a new
11 primary system. Washington already has a fully developed primary system on its books that
12 was enacted by its legislature which remains the law if Initiative 872 is enjoined. Enjoining
13 Initiative 872 simply preserves the *status quo ante.*

14 **III. CONCLUSION**

15 The Supreme Court has noted that "Representative democracy...is unimaginable without
16 the ability of citizens to band together in promoting among the electorate candidates who
17 espouse their political views. The formation of national political parties was almost
18 concurrent with the formation of the Republic itself." *Jones*, 530 U.S. at 574. Protecting
19 political parties' right of association, granted by the First Amendment, is fundamental to our
20 country's culture and its strength. Initiative 872 broadly and directly attacks and burdens that
21 right of association without serving any compelling interest. Initiative 872 should be declared
22 unconstitutional, its implementation enjoined, and the State's cross-motion for summary
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judgment should be denied.

DATED this 6th day of July, 2005.

s/David T. McDonald
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 6, 2005, I caused to be electronically filed the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification of such
4 filing to the following:

5 **James Kendrick Pharris**

6 **Richard Dale Shepard**

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