NO. 05-35774

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, ET AL.,
PLAINTIFFS/APPELLEES,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, ET AL.
PLAINTIFF INTERVENORS/APPELLEES,

LIBERTARIAN PARTY OF WASHINGTON STATE, ET AL.
PLAINTIFF INTERVENORS/APPELLEES

V.

STATE OF WASHINGTON, ET AL,
DEFENDANTS/APPELLANTS,

WASHINGTON STATE GRANGE, ET AL.
DEFENDANT INTERVENORS/APPELLANTS.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
THE HONORABLE THOMAS S. ZILLY

RESPONSE BRIEF OF APPELLEE, WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, PLAINTIFF IN INTERVENTION, RESPONDING TO THE OPENING BRIEF OF DEFENDANT INTERVENORS/APPELLANTS WASHINGTON STATE GRANGE

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2. Where Initiative 872 compels political parties to be associated on election ballots with candidates their membership has not selected, and where the Grange does not argue that Initiative 872 is narrowly tailored to advance a compelling state interest, was the Democratic Party entitled to summary judgment declaring Initiative 872 unconstitutional?

3. Where the ballot title for an unconstitutional Initiative told voters that "Ballots would indicate party preference," is the appellant's suggestion that the Court can sever the Initiative and convert the State's partisan election system into a non-partisan election system well-founded?

COUNTERSTATEMENT OF THE CASE

In 2003, this Court declared unconstitutional Washington's blanket primary election system. After the Supreme Court denied the Grange's petition for a writ certiorari, the Grange promoted a public initiative, Initiative 872, which created a "modified blanket primary." This initiative passed in November, 2004. Initiative 872 made only cosmetic changes to Washington's invalidated blanket primary system.

The Washington State Republican Party challenged the constitutionality of Initiative 872's replacement blanket primary. The Democratic Party and

Libertarian Party intervened on the side of the Republican Party. The Grange intervened on the side of the State. The political parties moved for summary judgment. On July 15, 2005, after extensive briefing and argument, the district court granted the political parties' motion for summary judgment and preliminarily enjoined the implementation of Initiative 872. On July 29, 2005, the district court permanently enjoined the implementation of Initiative 872. The Grange brought this appeal immediately thereafter.[1]

COUNTERSTATEMENT OF FACTS

The Grange was the original proponent of the blanket primary, which this Court declared unconstitutional in *Democratic Party v. Reed*, 343 F.3d 1198 (2003). After this Court's decision, the Grange filed Initiative 872 "to protect the state's primary system" and to "preserve the rights that voters now enjoy under the blanket primary." ER 512. In a FAQ explaining the initiative, the Grange told voters that, if the initiative passed, the primary ballot would be just like the primary ballot under the blanket primary:

> At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do under the blanket primary).

ER 22.

"Our initiative will put a system in place which looks almost identical to the blanket primary system we've been using for nearly 70 years," said Grange

[1] There are two appeals pending from Judge Zilly's ruling. The Grange's appeal is docketed as Court of Appeals docket number 05-35774. The State's appeal is docketed as Court of Appeals docket number 05-35780. The appeals have not been consolidated and both the Grange and the State filed opening briefs. Appellee the Washington State Democratic Central Committee is therefore filing two response briefs, one responding to the Grange and the other responding to the State. The briefs are complementary but not intended to overlap.

President Terry Hunt. ER 501. "The only difference is that this system will satisfy the constitutional requirements set forth by the courts." *Id*. The Grange explained to voters that passage of its Initiative would "restore the kind of choice that voters enjoyed for seventy years under the blanket primary." ER 257.

The ballot title for Initiative 872 read: "This measure would allow voters to select among all candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving most votes advance to the general election, regardless of party." ER 255. In the Explanatory Statement provided by the Attorney-General, voters were told:

> **The effect of the proposed measure, if it becomes law**:
>
> This measure would change the system used for conducting primaries and general elections for partisan offices. … Candidates would be permitted to express a party preference or declare themselves independents, and their preference or status would appear on the ballot.… The general election ballot would be limited to the two candidates who receive the most votes for each office at the primary, whether they are of the same or different political preference.… This measure would change the way that candidates qualify to appear on the general election ballot, but would not otherwise change the way general elections are conducted. This measure would not change the way that primaries or general elections are conducted for nonpartisan offices.

ER 256.

Initiative 872 requires the State to permit every candidate who files for partisan office to self-designate a party preference. If the candidate designates the Democratic Party, the State is compelled to print the candidate's name on the primary ballot "next to" the Democratic Party's name. No provision is made for approval or rejection of the candidate by the Democratic Party. ER 377-378 (WAC 434-230-170, as amended). On primary election day, just as was the case under the blanket primary, any voter—whether or not the voter is affiliated with the Democratic Party or a competing political party—may vote for any candidate

for a partisan office. ER 434 (Initiative 872, Sec. 3). The two most popular candidates advance to the general election, where they again have their names printed on the ballot "in conjunction with" the party indicated by each candidate at the time of filing. ER 434 (Initiative 872, Sec. 4); ER 376 (WAC 434-230-040, as amended). If one (or both) of the two most popular candidates self-designated a Democratic Party preference, his or her name will be printed on the general election ballot "next to" and "in conjunction with" the Democratic Party's name, even though the candidate has never been selected by the members of the Democratic Party as a standard bearer for the Party.

State election officials refuse to recognize party nomination processes other than Initiative 872. ER 372 (WAC 434-215-015); ER 377-78 (WAC 434-230-170, as amended). Therefore, a political party is not permitted to object to the use of its name by candidates or to limit the number of candidates who use its name.

As the district court found, Initiative 872 has all of the constitutionally significant elements of an invalid blanket primary:

> In all constitutionally relevant respects, Initiative 872 is identical to the blanket primary invalidated in Reed: (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party; (2) requires that political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

See Washington State Republican Party et al. v. Logan, *et al*., 377 F.Supp.2d 907, 924 (W.D. Wash. Jul. 15, 2005) (hereinafter "*Order*").

Initiative 872, like its predecessor blanket primary, was intended to force political parties to modify their message and their candidate recruitment:

> Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters.

ER 257 (Voters' Guide statement in support of Initiative 872).

The Grange does not argue that Initiative 872 is narrowly tailored to advance any compelling State interest.[2]

SUMMARY OF THE ARGUMENT

The district court correctly found that Initiative 872 violated the First Amendment associational rights of political parties in two fundamental ways: (1) it forced the parties to associate with candidates on the primary and general election ballots regardless of the candidates' affiliation with the party, and (2) it forced the parties to have their nominees chosen by voters who refuse to affiliate with the party and who may be affiliated with a rival. *See Order*, 377 F.Supp.2d at 927. Both violations constitute severe burdens on First Amendment rights. Accordingly, unless Initiative 872 is shown to be narrowly tailored to advance a compelling state interest, it must be declared unconstitutional. *California Democratic Party v. Jones*, 530 U.S. 567, 582, 120 S.Ct. 2401 (2000); *Reed*, 343 F.3d at 1204.

Here, although it was faced with summary judgment, the Grange did not

[2] The Grange does describe the burden placed on First Amendment rights of association as "slight when compared to the countervailing interests served by the Initiative's new top two system." Grange's Opening Brief at 14. Even assuming that the Grange contends the "countervailing interests" listed there are compelling, it does not demonstrate that the Initiative is narrowly tailored. Indeed, two of the interests (disclosure of candidate's party preference and voter privacy) are met by the State's current Montana primary system. To the extent that the State has a compelling interest in limiting the general election to two candidates, such a limitation could readily be achieved by a primary system that preserved political parties' rights to choose their own candidates. The remaining interest listed by the Grange—allowing any voter to vote for any candidate in the primary—has already been rejected by the Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) as "hardly a compelling state interest, if it indeed it is even a legitimate one."

argue that Initiative 872 is narrowly tailored to advance a compelling state interest. Accordingly, if this Court concurs with the district court's conclusion that Initiative 872 severely burdens First Amendment rights, this Court should affirm the district court's order declaring Initiative 872 unconstitutional.

The Grange does not seriously dispute the burden placed upon the First Amendment right of association of political parties by Initiative 872. Instead, it argues that allowing political parties to determine the scope of their association at the critical moment of selecting their standard-bearer "flips the First Amendment on its head." Grange's Opening Brief at 1. In the Grange's view, any person has the unfettered right to appropriate the name of a political party with State assistance in order to advance his or her personal political interest. *See* Grange's Opening Brief at 15-26.

However, it is well established that a candidate may not make a political party an "unwilling partner" in his quest for office. *Duke v. Cleland*, 954 F.2d 1526, 1530 (11th Cir. 1992); *see also LaRouche v. Fowler*, 152 F.3d 974, 996-97 (D.C. Cir. 1998). As noted by the Supreme Court in *Jones*, "a non-member's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Jones*, 530 U.S. at 583 (citations omitted). As the Ninth Circuit held in *Reed*, the Grange's remedy for this perceived grievance 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.

The Initiative cannot be severed. The problems with the Initiative are pervasive. This Court should affirm Judge Zilly's well-reasoned decision invalidating Initiative 872.

ARGUMENT

A. Standard of Review.

The constitutionality of a state statute is reviewed *de novo*. *Delano Farms Co. v. California Table Grape Comm'n*, 318 F.3d 895, 897 (9th Cir. 2003). Where a statute on its face severely burdens First Amendment rights, the statute must be declared unconstitutional unless the defenders of the statute demonstrate that the statute is narrowly tailored to advance a compelling state interest. *Jones*, 530 U.S. at 582; *Reed*, 343 F.3d at 1204. The Grange did not argue to the District Court that Initiative 872 is narrowly tailored to advance a compelling state interest. *See Order*, 377 F.Supp.2d at 28. It has not done so here either.

B. Political Parties Have a First Amendment Right to Limit Their Affiliation with Candidates that are Severely Burdened by Initiative 872.

1. Political Parties Have the Right *Not* to Associate.

It is well-settled law that the First Amendment right of association protects the right of political parties to reject an association as well as to form an association. "[A] corollary of the right to associate is the right not to associate." *Jones*, 530 U.S. at 574. It is undisputed that the effect of Initiative 872 is to require a political party to be associated with candidates on public ballots and in advertising without providing the party any way to approve or reject the association. On that basis alone, Initiative 872 imposes a severe burden on well-settled and core First Amendment rights—it effectively prohibits their exercise.

2. The Right to Be Selective About Political Associations Is Important to the Democratic Party.

The right to limit association is important to the Democratic Party. The

Democratic Party has expended great effort and expense in building "brand awareness" for the Democratic name. As noted by the district court:

> The association of a candidate with a particular party may be the single most effective way to communicate what the candidate represents. *See Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992)("[P]arty candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most important determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth.").

Order, 377 F.Supp.2d at 23. The importance of having a party's name after the candidate's name on the ballot is underscored by Initiative 872 itself. *See* ER 435-36 (Initiative 872, Sec. 7) (noting that party labels are for the information of voters); *see also* ER 179 (Declaration of Paul Berendt ("Berendt Decl."), ¶ 10).

3. Initiative 872 Damages the Democratic Party.

Initiative 872 would severely undermine the political value of the Democratic Party name. As Judge Zilly held:

> Party name and affiliation communicate meaningful political information to the electorate.... The Court is persuaded by Plaintiffs' arguments that allowing any candidate, including those who may oppose the party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates.

Order, 377 F.Supp.2d at 926-27.

Indeed, the evidence that Initiative 872 will impose severe burdens upon core First Amendment associational freedoms of the Democratic Party was undisputed. Neither the Grange nor the State denied 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. ER 175–199 (Berendt Decl., ¶¶ 5-8, Exs. A-B). Nor did they deny that Initiative

872—by forcing the parties to associate with candidates and by allowing any voter regardless of party to participate in the selection of party nominees—will: (1) substantially interfere with the Party's pursuit of its political strategies and charter-defined goals (Berendt Decl. ¶¶ 5-8); (2) dilute and weaken the Party's ability to effectively communicate its message (Berendt Decl. ¶ 9); (3) undermine the Party's long-standing efforts to develop a brand awareness among the electorate for candidates identified as Democrats (Berendt Decl. ¶ 10); (4) interfere with the Party's mobilization of its supporters (Berendt Decl. ¶ 11); and (5) substantially increase the difficulty of recruiting candidates and growing support in areas in which the Democratic Party is weak (Berendt Decl. ¶ 12).

In fact, Initiative 872 was expressly intended to have such effects. During the initiative campaign, Initiative sponsors the Grange repeatedly asserted that Initiative 872 would modify the message and the communication from party candidates. "[T]hese officials are likely to be much more responsive to the interests of the people they represent, not just the interest of the political parties." ER 218. "Candidates will need to appeal to all the voters, partisan and independent alike. They will not be able to win the primary by appealing only to party activists." ER 29.

In *Jones*, the Supreme Court held that such forced modification of candidate and party messages constituted a severe burden on First Amendment rights. "Such forced association has the likely outcome—indeed, in this case the intended outcome—of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest." *Jones*, 530 U.S. at 579-582 (emphasis added) (citing *Timmons v. Twin Cities Area*

New Party, 520 U.S. 351, 358, 117 S.Ct, 1364 (1997) ("Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest")).

Initiative 872 imposes the same burdens on First Amendment rights that California's Proposition 198 imposed. Like Proposition 198, it is unconstitutional because it is not narrowly tailored to advance a compelling state interest.

C. The Right of Organizations to Protect Their Names from Political Hi-jacking is Well-Established.

The Grange does not dispute that Initiative 872 forces an association upon political parties.[3] Rather, the Grange argues that candidates have an unfettered First Amendment right to force—with the State's help—associations on political parties.[4] There appears to be no legal support for this proposition. The Grange does not point to any case which grants individuals the right to appropriate, with the force of the State behind them, organizational names in order to advance their personal political interests. In fact, courts have expressed just the opposite view. "The necessary corollary to this is that Duke has no right to associate with the Republican Party if the Republican Party has identified Duke as ideologically outside the party." *Duke*, 954 F.2d at 1530-31 (internal citations omitted); *see also*

[3] It would be difficult to dispute given the explicit requirements of the Initiative. Section 4 of Initiative 872 defines a partisan office as one for which a candidate may state a party preference and have that party preference "appear on the primary and general election ballot in conjunction with his or her name." ER 434. Section 7 of the Initiative requires that if a candidate states a party preference "then that preference will be shown after the candidate's name on primary and general election ballots." ER 435-36.

[4] The Grange argues that the district court's injunction is a "prior restraint" on the speech of candidates. This argument is inapposite. Nothing about the injunction restrains the speech of any candidate. The injunction restrains *the State* from imposing an association upon political parties.

Duke v. Massey, 87 F.3d 1226, 1234 (11th Cir. 1996) (Duke had right to espouse his beliefs but did not have right to espouse his beliefs as Republican over party objection, and Duke supporters had right to vote for him, but not as a Republican); *see also LaRouche*, 152 F.3d at 996-97 ("The Court's cases have made clear that the very actions at issue here—the Party's decisions about who can be nominated as delegates and even about who can be considered a Democrat—are themselves clothed in First Amendment protection.").[5]

Fundamental to the exercise of the right of freedom of association are the rights of an organization to: (1) determine who presents its message to the public, and (2) require its leaders to adhere to its essential principles. The First Amendment therefore protects an association's right to limit its membership and to control the use of its name in an associational context. For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 566, 115 S.Ct. 2338 (1995), the Supreme Court held that a private association could not be required by the State to admit a parade contingent expressing a message not of the organizers' choosing. *See also Boy Scouts of America v. Dale*, 530 U.S. 640, 659, 120 S.Ct. 2446 (2000) (First Amendment protects Boy Scouts' right to exclude leader whose presence would express a message at odds with Boy Scout policies). It is equally true that the State of Washington may not force the Party to accept into its "parade" of candidates anyone who wants to join.

Contrary to the Grange's argument,[6] the right of even non-commercial organizations to protect their name against misuse is well-recognized. "Where it is

[5] The *LaRouche* court further noted: "Moreover, the Party's interest is not merely legitimate. … The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define itself." *LaRouche*, 152 F.3d at 996.

[6] Grange's Opening Brief at 21.

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

Moreover, an association's name is protected from use by disgruntled members or a local chapter following secession from the larger organization. The Fourth Circuit enjoined use of the name "Methodist Episcopal Church, South" by former members displeased with the union of three Methodist branches, *Purcell v. Summers*, 145 F.2d 979, 991 (4th Cir. 1944), finding that to hold otherwise would allow "the new organization to strengthen itself at the expense of the old, … inevitably result in much confusion and … cause injury and damage to the old organization." Similarly, the national and California branches of the Junior Chamber of Commerce movement successfully sought an injunction restraining a disaffiliated local chapter from using the terms 'Junior Chamber of Commerce,'

'Junior Chamber,' 'Jaycees,' or 'J.C.'s' in its name. *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 354 F. Supp. 61, 78-79 (N.D. Cal. 1972).

D. The grange's Artificial Distinction Between Stating a "Party Preference" and Stating a "Party Affiliation" was Correctly Rejected by the District Court.

The Grange seeks to draw a distinction between stating a "party preference" and stating a "party affiliation." There is no evidence that Washington law or Washington voters make such a distinction. Indeed, the FAQ provided by the Grange to voters during the campaign expressly said: "…the candidates for partisan offices would *continue* to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots." ER 21 (emphasis supplied). The Grange apparently concedes that, prior to the Initiative, candidates were expressing a party affiliation when they expressed their party preference on official declarations of candidacy. Grange's Opening Brief at 16, note 9. It must be assumed that the voters understood and intended the effect of the Initiative was to "continue" the practice of expressing party affiliation that had theretofore existed.

The district court correctly and soundly rejected the Grange's artificial distinction:

> Party affiliation undeniably plays a role in determining the candidate voters will select, whether it is characterized as "affiliation" or "preference." *Tashjian*, 479 U.S. at 220, 107 S.Ct. 544. Party labels provide a shorthand designation of the views of party candidates on matters of public concern and play a role in the exercise of voting rights. *Id*. Candidates identified with their "preferred" party designation will "carry [the party] standard in the general election." Any attempt to distinguish a "preferred" party from an "affiliated" party is unavailing in light of Washington law.

Order, 377 F.Supp.2d at 922 (some internal citations omitted).

E. Initiative 872 is an Unwarranted Interference with the Right of Political Parties to Select Their Nominees.

The Grange stridently objects to the assertion by the political parties that under Initiative 872 their general election candidates are being chosen in a blanket primary, claiming that no nomination of candidates takes place in its top two blanket primary.[7] The Grange cannot deny, however, that a blanket primary is used to select two candidates who will advance to the general election and those candidates will have party designations after their names if they stated party preferences when they filed. Choosing candidates who will advance to the next level of election is clearly nominating candidates. "Nominate" means "[t]o propose by name as a candidate, especially for election." *The American Heritage Dictionary of the English Language* (4th Ed. 2000).[8] Similarly, the Grange cannot

[7] The Grange's over-the-top argument accusing the political parties' of using the "Big Lie" propaganda technique favored by the Nazi's under Goebbels is inappropriate. *See* Grange's Opening Brief at 27, note 14. The Grange might be better served to look to its own arguments and reflect upon the truth of Shakespeare's line that "the lady doth protest too much" and the wisdom of the fairy tale of the Emperor who had no clothes.

[8] The Grange appears to argue that because there may be two candidates who advance to the general election bearing the Democratic Party label, instead of one, there is no "nomination" of a candidate. There is no basis for this argument. The fact that two people may be proposed for an office simply means that two nominees have been proposed. *See, e.g.*, Washington Constitution, Art. 1, Sec. 15 (regarding appointments to fill legislative vacancies):

> … the person appointed to fill the vacancy … shall be one of three persons who shall be nominated by the county central committee of that party, and in case a majority of the members of the county legislative authority do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person….

The general election has always had multiple nominees. I-872 merely allows more than one nominee from a single party.

deny that Washington law provides no nomination procedure for political parties other than the primary election. ER 46; ER 372 (WAC 434-215-015). At best, the Grange's argument is that while Initiative 872 nominates partisan candidates, they are not nominated by the parties. This is simply a rehash of the argument made by the blanket primary's defenders in the *Reed* case to the effect that because all voters voted in the primary, the resulting general election candidates were nominees "of the people" and not of the parties. As the *Reed* court noted:

> As for the … argument that the party nominees chosen at blanket primaries "are the 'nominees' not of the parties but of the electorate," that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees… Thus under Jones the Washington blanket primary system is materially indistinguishable from the California blanket primary system and is unconstitutional unless the defendants bear their burden of demonstrating that "it is narrowly tailored to serve a compelling state interest."

(footnotes omitted).[9] There has been no demonstration that Initiative 872 is narrowly tailored to serve a compelling state interest. Accordingly, it is unconstitutional and the district court's decision should be affirmed.

F. Initiative 872 is not Severable and Must be Declared Unconstitutional in Total.

Under Washington law, an unconstitutional provision of a statute may not be severed if its connection to the constitutionally sound provision is so strong that "it

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[9] The Grange argues at page 34-35 of its brief that Initiative 872 was drafted to conform to the dicta in *Jones* describing a non-partisan blanket primary. *Jones*, 530 U.S. at 585-586. It may have been the Grange's intent to conform to this dicta but, if so, the Grange fell short of the mark. The *Jones* dicta suggests that the State can have a primary in which voters choose among partisan candidates who have already been nominated (whether by parties or, for example, by petitions from registered members of the parties). *See Jones*, 530 U.S. at 598, n.8 (Stevens, J. dissenting). The *Jones* dicta does not describe a system such as Initiative 872 in which party labels are associated with candidates without regard to the desire of party adherents to be associated with the candidates.

could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *Leonard v. City of Spokane*, 127 Wn.2d 194, 201, 897 P.2d 358 (1995); *see also Guard v. Jackson*, 83 Wn.App. 325, 333, 921 P.2d 544 (1996). If the voters would not have adopted Initiative 872 without the unconstitutional provisions, the proper result is invalidation rather than severance. *Griffin v. Eller*, 130 Wn.2d 58, 69-70, 922 P.2d 788 (1996).

The clear and stated intent of the proponents of Initiative 872 was to have a partisan system that allowed any voter, regardless of party affiliation, to participate in the selection of political party candidates. This unconstitutional purpose pervades the initiative and cannot be severed out. The Grange suggests that the Court could save the statute by simply severing out the portions of the Initiative that relate to the use of party names on ballots. In effect, the Grange asks this Court to convert the State of Washington from a partisan election system to a non-partisan one by performing surgery on the Initiative. Even assuming that the State's elections could be changed from partisan to non-partisan without amending the State constitution, accepting the Grange's suggestion would be carrying out a huge fraud on Washington's voters who were clearly told in their election materials that if the Initiative passed they would continue to have a partisan system.

In any event, the surgery requested by the Grange is far from simple. The problems with the Initiative are pervasive. The burden on First Amendment rights is created by Section 4's requirement that a candidate's selection of a party be printed on the ballot in conjunction with his or her name. That requirement is

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

Noting that Initiative 872 lacked a severability clause, Judge Zilly correctly concluded that the unconstitutional provisions of Initiative 872 could not be severed from the statute as a whole. He concluded that the constitutional infirmity would invalidate Sections 4,5, 7(2), 7(3), 9(3), 11, and 12 of the statute. These provisions could not be deleted without fundamentally altering the overall effect of the statute. "The deletion of the unconstitutional portions of the Initiative leaves

virtually nothing left of the system approved by the voters." *Order*, 377 F.Supp.2d at 932.

G. The Democratic Party is Entitled to an Award of Attorney's Fees Against the Grange.

Plaintiff in Intervention the Democratic Party is entitled to an award of attorney's fees against the Grange. A plaintiff in intervention is entitled to its attorney's fees when they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the action." *See Wilder v. Bernstein*, 965 F.2d 1196, 1201-02 (2d Cir. 1992) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933 (1983)). Allowing intervenors to recover prevailing party attorney's fees furthers "judicial economy." *Id*. at 1202. As an example, in the prior *Reed* case this Court awarded attorney's fees to intervenor the Republican Party. *See Washington State Democratic Party v. Reed*, 388 F.3d 1281 (9th Cir. 2005) ("*Reed II*") (opinion regarding fee award).

In *Reed II*, this Court held that the Grange was not liable for the political parties' attorneys' fees for the prior appeal, finding that "§ 1988 fee awards should be made against losing intervenors 'only where the intervenors' action was frivolous, unreasonable, or without foundation." *Reed II*, 388 F.3d at 1288.

In this case, the Grange's actions were frivolous, unreasonable, and without foundation. After this Court declared Washington's blanket primary unconstitutional, the Grange refused to accept the constitutional limitations confirmed in *Reed.* It sponsored an initiative that imposed a primary system that in all constitutionally material respects was indistinguishable from the invalid blanket primary. It did so while telling voters that "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." ER 22. The Grange's Initiative 872 therefore directly and intentionally contradicted the reasoning behind the Ninth Circuit's decision in *Reed*.

Although this conduct might not alone give rise to liability under 42 U.S.C. § 1983, the Grange waived any quasi-legislative immunity it might otherwise be entitled to by *voluntarily* joining itself to this lawsuit *as a defendant* to defend the constitutionality of I-872 and by initiating an appeal independent from that of the State. *See Planned Parenthood v. Attorney General of the State of N.J.*, 297 F.3d 253, 264 (3d Cir. 2002). Moreover, in its answer to the complaint the Grange prayed for affirmative relief, asking the Court to declare "that Washington's election law as established by Initiative 872 does not deprive the plaintiffs of any legally cognizable rights protected by the constitution or laws of the United States or the State of Washington." ER 112. Moreover, the Grange requested "entry of a judgment awarding [it] recovery of its costs and attorney fees," presumably to be awarded against the political parties.

The Grange has asserted throughout this litigation, including this appeal, that the rights of its members trump the associational rights of the political parties. In making this argument on appeal, the Grange completely ignores contrary, binding authority that was cited and relied upon by the political parties and the district court below. Its arguments are unreasonable and without foundation.

The Grange's separate and separately briefed appeal has compelled the political parties to incur the additional expense of preparing a second brief, with the possibility that the additional expense may not be recoverable against the State. This Court should follow *Planned Parenthood* in limiting the "frivolous,

unreasonable, or without foundation" standard to "blameless" intervenors. The Grange should share the State's liability for the Party's fees and costs.

CONCLUSION

The Democratic Party has a well established constitutional right to limit its associations with candidates and to determine for itself its candidates for public office. Initiative 872 severely burdens that right. Indeed, according to the Grange's own statements advocating for the Initiative, it was specifically intended to do so. Judge Zilly correctly invalidated Initiative 872 on First Amendment grounds.

DATED this 24th day of October, 2005.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,081 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2003 in 14 point font size and Times New Roman type style.

DATED October 24, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on the below date I caused two true and correct copies of Plaintiff-Intervenors - Appellees' Response Brief to be served via First Class U.S. mail for delivery on the following persons as follows:

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