No. 06-713

In The Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE OF WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2004 Washington adopted a primary system for its partisan offices in which political parties are not permitted to select their own candidates. Under Washington's system any and all persons who desire to appear on primary election ballots in conjunction with a political party's name may do so, and the political party must accept as a general election candidate any such person who is one of the two top vote getters in a primary in which all voters, not merely party adherents, are allowed to vote. The State neither recognizes party-run nomination processes nor provides any mechanism for the party to reject unwanted candidates.

This Court has long recognized that:

> [T]he First Amendment protects the freedom to join together in furtherance of common political beliefs which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. That is to say, 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.

California Democratic Party v. Jones, 530 U.S. 567, 574-75 (2000) (internal citations and quotations omitted).

Does prohibiting a political party from selecting the candidates who will use its name on election ballots in a partisan election system severely burden the political party's freedom of association?

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STATEMENT OF THE CASE

Since 1890, Washington has conducted elections in which candidates for partisan office have their party affiliation printed after their name on the general election ballot. Political parties have selected their candidates for partisan offices either by a party-run convention or, since 1935, through a compulsory public primary.

In 2004 the Washington voters passed Initiative 872, which changed Washington's partisan primary system.[1] Under the compulsory primary system in place prior to Initiative 872, one Democratic candidate was selected to run in the general election from among all candidates who filed to run in the primary election as a Democrat. The selection was made by voters who indicated their affiliation in a private manner with the Democratic Party at the time of voting, by self-selecting a Democratic Party ballot.[2]

This system, which was adopted by the Legislature in early 2004 to replace Washington's unconstitutional blanket primary, is popularly known in Washington State as a "Montana" primary system because that nearby state uses a similar system. Initiative 872 adopted a different system so as to permit all voters, including affiliates of rival political parties and unaffiliated voters, to select the candidates from among those candidates who filed to run

[1] From 1935 until 2004 Washington utilized a blanket primary. The blanket primary was declared unconstitutional in 2004 and shortly thereafter the Legislature adopted the primary system described in this paragraph.

[2] By statute, the act of choosing a Party ballot or voting in a Party primary creates an inference of affiliation with the Party even though the Party is unaware of any individual voter's act of implied affiliation. RCW 29A.36.106(1)(a) and (2)(c).

in the primary election as Democrats, to run in the general election as Democrats. Under this revised system, the two highest vote getters in the primary would advance to the general election, even if they were from the same party.

The proponents of Initiative 872 sought to reinstitute with only cosmetic changes the State's "blanket" primary system that had been declared unconstitutional in light of this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004), and *cert. denied*, 541 U.S. 957 (2004).[3] As in the *Jones* case, Initiative 872 was intended by its sponsor to change the candidates that would be selected to represent the political parties and to modulate the political messages of the political parties. "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters." Ct. App. ER 257. "[Candidates] will not be able to win the

[3] Initiative 872 was filed during the pendency of appeals from federal court decisions declaring Washington's blanket primary unconstitutional. The Washington State Grange announced that it had sponsored Initiative 872 "to protect the state's [blanket] primary system" and to "preserve the rights that voters now enjoy under the [unconstitutional] blanket primary." Ct. App. ER 512. In a "Frequently Asked Question" statement explaining its initiative, the Grange told voters that, if the initiative passed, the primary ballot would be just like the primary ballot under the unconstitutional 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).

Ct. App. ER 257. "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 President Terry Hunt. Ct. App. ER 501.

primary by appealing only to party activists."[4] Ct. App. ER 29.

1. Initiative 872 Forces Association Between Candidates and Political Parties on General Election Ballots Without Mutual Consent.

Consistent with Washington's long partisan election history, Initiative 872 defines partisan elections as those in which the political party indicated by a candidate when he or she files for office is printed after the candidate's name on the ballot. Grange App. 117a (I-872 § 4). All candidates for partisan office are required to participate in a public primary in which all voters, irrespective of partisan affiliation, may vote for any candidate for any office. Grange App. 118a (I-872 § 5). Any candidate may identify a political party at the time of filing and the candidate's selection of party is required to be printed thereafter on all ballots after his or her name. A candidate who does not select a party is identified on ballots as an independent.

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[4] In *Jones*, this Court summarized the effects of the blanket primary:

> In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process – the "basic function of a political party," – by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome – indeed, in this case the intended outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest").

530 U.S. at 581-82 (internal citation omitted).

Grange App. 119a (I-872 § 7). Although the Democratic Party has rules requiring that its candidates for public office be selected by Democrats, either in a public primary or a party-run caucus, under Initiative 872 a candidate may self-select their party affiliation without consent from the political party at issue, and may be the party's candidate in the election. Washington election officials refuse to recognize party-run nomination processes. Ct. App. ER 45-53.

In sum, under Initiative 872 members of the Democratic Party are deprived of any opportunity to determine the candidates with whom they will be associated on primary and general election ballots.

Initiative 872 was passed by the voters in November, 2004. Shortly thereafter, the Republican Party of Washington filed suit seeking an order declaring Initiative 872 unconstitutional. The Democratic Party intervened as an additional plaintiff.

2. Proceedings in the District Court.

The political parties moved for summary judgment and entry of a permanent injunction against implementation of Initiative 872 on the basis that the Initiative severely burdened First Amendment rights of association and was not narrowly drawn to advance a compelling state interest.

The district court summarized the constitutionally relevant aspects of the primary election system created by Initiative 872:

> (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.

Grange App. 72a.

The United States District Court for the Western District of Washington (Zilly, J.) noted that "A basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." Grange App. 74a. The district court found that Initiative 872 "denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party." Grange App. 75a, *quoting Reed*, 343 F.3d at 1024. The district court concluded that Initiative 872 imposed a severe burden on First Amendment rights and was therefore unconstitutional unless it was narrowly tailored to advance a compelling state interest. Neither the Grange nor the State of Washington had argued that the Initiative was narrowly tailored to advance a compelling state interest. Accordingly, the district court found Initiative 872 to be unconstitutional and enjoined its implementation. Grange App. 91a-92a.

The district court rejected the Grange's argument that, under Initiative 872, candidates were not associating with a political party by listing the name of that political

party after the candidate's name on an election ballot, and that candidates were instead only stating a "preference" for a party for "the information of voters":

> Party affiliation plays a role in determining which candidates voters select, whether characterized as "affiliation" or "preference." . . . Parties cannot be forced to associate on a ballot with unwanted party adherents. The right to select the candidate that will appear on the ballot is important to political parties that invest substantial money and effort in developing a party name.

Grange App. 78a (internal citations omitted).

As part of its decision, the district court concluded that, within the context of Initiative 872's blanket primary, allowing candidates to unilaterally associate themselves with political parties on ballots was unconstitutional. Grange App. 79a. The Republican Party, which has adopted rules requiring that candidates demonstrate a minimal level of support within the Party before filing for public office, asked the district court to further determine that allowing candidates to self-associate with a political party is also unconstitutional within the context of a primary such as the Montana system in which party adherents, and not the general election public, are determining which candidates seeking their nomination will appear on the general election ballot.[5] The district court declined to address that issue and expressly clarified that its order did not determine the constitutionality of a filing

[5] The Democratic Party supported the Republican Party's request.

statute like I-872's within the context of a Montana system. Grange App. 99a.

3. United States Court of Appeals for the Ninth Circuit Proceedings.

The State and the Grange appealed the district court's decision. The Ninth Circuit characterized Initiative 872 as a "modified" partisan blanket primary. Grange App. 3a. On appeal, the Grange sought to characterize Initiative 872 as a non-partisan blanket primary of the kind described in *Jones*, 530 U.S. at 585-86. In response, the Ninth Circuit pointed out that the primary created by Initiative 872, in which none or two candidates might emerge as a party's standard bearers, was not one contemplated by the *Jones* dicta:

> This is not a situation squarely contemplated by *Jones* or the cases upon which it relies, all of which share the underlying assumption that only one candidate emerges from a partisan primary as the party nominee. *See Jones*, 530 U.S. at 585-86 (asserting that the "constitutionally crucial" element in the inquiry is the parties' choice of their own representative and noting that states may condition access to a primary ballot in part on prior and independent nomination by an established political party).

Grange App. 18a-19a n.14. The Ninth Circuit disagreed with the Grange's characterization of Initiative 872 as a non-partisan primary, determining that a non-partisan election is one in which candidates' party affiliations are not identified on the ballot. Grange App. 17a-18a. Initiative 872, it found, created an "overtly partisan" primary. Grange App. 19a.

Accordingly, the Ninth Circuit affirmed the district court decision, finding that:

> By including candidates' self-identified party preferences on the primary ballot, Washington permits all voters to select individuals who may effectively become the parties' standard bearers in the general election[.]

Grange App. 19a.

> The net effect [of Initiative 872] is that parties do not choose who associates with them and runs using their name; that choice is left to the candidates and forced upon the parties by the listing of a candidate's name in conjunction with that of the party on the primary ballot. Such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights.

Grange App. 25a (internal citations and quotations omitted).

The Ninth Circuit rejected the Grange argument that candidates have a First Amendment right to force political parties to associate with them on election ballots.[6] Grange App. 26a. The Ninth Circuit found that, within the context of Initiative 872's primary system, such a forced association allowed the political message of political parties to be improperly controlled by other parties:

[6] The Ninth Circuit expressly limited its holding to the context of the election ballot created by Initiative 872 and did not address the extent to which a candidate in other contexts may imply an association between him or herself and a political party.

> When a law impermissibly requires someone to associate with speech with which [he or she] may disagree that person may be forced to either appear to agree or to respond . . . That kind of forced response is antithetical to the free discussion the First Amendment seeks to foster. (internal citation omitted).

Grange App. 28a n.22. The Ninth Circuit found that a statement of party preference on the ballot is "an expression of partisanship and occupies a privileged position as the only information about the candidates (apart from their names) that appears on the . . . ballot." It noted, as this Court had in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986), that "party labels provide a shorthand designation of the views of party candidates on matters of public concern." Grange App. 20-21a.

> [T]o the extent Initiative 872 allows candidates to self-identify with a particular party – even if only as a "preference" – it cloaks them with a powerful voting cue linked to that party.
>
> Given that the statement of party preference is the sole indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate.

Grange App. 22a.

The Ninth Circuit found that "such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights." Grange App. 25a.

Accordingly, since no compelling state interest had been articulated that would justify the burden, the Ninth Circuit found the modified blanket primary created by Initiative 872 to be unconstitutional.

REASONS FOR DENYING THE PETITION

The Grange is correct in stating that this case concerns the lifeblood of democracy in our country. Grange Pet. at 13. That lifeblood, however, is not state-run elections as the Grange asserts. State-run elections occur, often with extremely high turnout, under many dictatorships around the world. The lifeblood of democracy in this country is the right, enshrined in the First Amendment, of the people to assemble and peaceably petition their government for the redress of grievances through the promotion of candidates for public office and other forms of political expression, a right which the State may not abridge.

Organizations have a recognized First Amendment free speech right to control their message and to determine the messengers who will deliver it. *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (First Amendment protects Boy Scouts' right to exclude leader whose presence would express a message at odds with Boy Scout policies). The First Amendment protects the right of an association to limit its membership and control the use of its name in an associational context. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 566 (1995) (private association cannot be required by the State to admit into their parade a contingent expressing a message not of the parade organizers' choosing). Accordingly,

candidates do not have the right to force themselves upon political parties. *Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996) (Duke had the right to espouse his beliefs but did not have the right to espouse his status as a Republican over party objection and Duke supporters had right to vote for him but not as a Republican).

The Ninth Circuit correctly protected these core rights by holding that Initiative 872 severely burdens fundamental First Amendment rights by denying people who assemble themselves into political parties the critical right to choose who will deliver their message to voters and who will lead their efforts, if elected, to enact their chosen policies into law. For that reason alone the Grange Petition for a Writ of Certiorari should be denied. In addition, the arguments made by the Grange in support of its Petition lack merit and do not warrant Supreme Court review of the Ninth Circuit opinion in this matter.

1. The Ninth Circuit Did Not Err In Applying *Jones*.

This Court long ago noted that:

> It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Freedom of association means not only that an individual voter has the right to associate with the political party of her choice but also that a political party has a right to identify the people who constitute the association, and to select a standard bearer who best represents the party's ideologies and preferences.

Eu v. San Francisco Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (internal citations and quotations omitted).

In *Jones*, the Court emphasized the importance to our system of government of allowing political parties to choose their own candidates.

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.
>
> . . . .
>
> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard bearer who best represents the party's ideologies and preferences.

530 U.S. at 574 (internal quotation omitted).

The Court in *Jones* strongly rejected California's blanket primary system which, like Initiative 872, forced a political party to allow voters who did not affiliate with that party to participate in the selection of the party's general election candidate for partisan office.

> In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process – the basic function of a political party, – by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome – indeed, in this case the intended outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom.

Id. at 582-83 (internal citation and quotation omitted).

In rejecting California's blanket primary, the Court also disagreed with its proponents that various alleged state interests were compelling. The Court went on to note:

> Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a nonpartisan blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.

Id. at 585.

Significantly, the Court did not identify as part of its nonpartisan blanket primary system the use of a political party's name along with the candidate's on election ballots. Moreover, although the Court indicated that the State could prescribe the number of candidates who would advance from the primary to the general election, the Court did not suggest that the candidates could or would be from the same political party. Two primary systems obviously fit the Court's description. One is a system in which party affiliations are not identified on the ballots themselves but political parties have a right to nominate

candidates who will appear on the ballots. The other, summarized by Justice Stevens in a footnote in his dissenting opinion, is "what the Court calls a 'nonpartisan primary' – a system presently used in Louisiana – in which candidates previously nominated by the various political parties and independent candidates compete." *Id.* at 598 n.8.

Contrary to the Grange argument in its Petition, the primary system created by Initiative 872 is neither of the systems contemplated by the Court's description in *Jones* of a hypothetically constitutional primary. Under Initiative 872, party affiliations of candidates do appear on election ballots and party candidates are not previously nominated by the political parties with whom they are associated on the ballots.

Instead of creating a primary system consistent with the Court's reasoning in *Jones*, Initiative 872 creates a system which is wholly antithetical to the basic premise of the Court's decision in *Jones*. The primary crafted by the authors of Initiative 872 was not "specifically drafted and enacted to comply with this Court's ruling in *Jones*." Grange Pet. at 16. If anything, it was specifically drafted to perpetuate the very unconstitutional interference with the right of association that the Court had just struck down in *Jones*.

The primary system established by Initiative 872 destroys the right of a political party to select its candidates. That is hardly consistent with the Court's emphasis in *Jones* that "our cases vigorously affirm the . . . special protection [the First Amendment] accords [for] the process by which a political party select[s] a standard bearer who best represents the party's ideologies and preferences."

Jones, 530 U.S. at 575 (internal quotation marks omitted). The Ninth Circuit correctly realized that upholding Initiative 872 would elevate form over First Amendment substance. The State is not permitted to interfere with a political party's selection of its candidates. That rule is not dependent upon whether the State forces only one candidate on the party or instead forces two. The Grange argument trivializes the protection of the right of association that this Court has vigorously protected. The Ninth Circuit did not err in following this Court's lead.

2. Candidates have no First Amendment Right to Force an Association of Political Parties and their Members.

This case does not involve the right of a candidate to generally express his or her views on public issues. It involves the very narrow question of whether a political party can be forced to associate on an election ballot with a candidate it has not selected as its candidate. As the Ninth Circuit noted, "Ballots serve primarily to elect candidates, not as forums for political expression." Grange App. 26a (citing *Timmons*, 520 U.S. at 363). The Ninth Circuit decision did not make election ballots into a "speech-free zone" as the Grange asserts. It simply reaffirmed that ballots are a "forced association-free zone" where a political party has the constitutional right to control who is presented to voters by the State as its standard bearers.

3. Separation of Powers Does Not Require Federal Courts to Allow States to Ignore First Amendment Rights.

The Grange asserts that the Ninth Circuit violated the separation of powers doctrine by reviewing the constitutionality of Initiative 872 because the State has the power to regulate the time, place and manner of elections. It is well-settled, however, that the State's ability to regulate procedural aspects of elections is limited by the obligation to respect First Amendment rights. "[This Court has] continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution." *Jones*, 530 U.S. at 573.

The Grange's footnoted request for *certiorari* based on its severance argument is equally unavailing. Under Washington law, the unconstitutional provisions of a statute may not be severed if their connection to the constitutionally sound provisions is so strong that "it 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*, 897 P.2d 358, 362 (Wash. 1995); *see also Guard v. Jackson*, 921 P.2d 544, 548 (Wash. App. 1996). If the voters would not have adopted Initiative 872 without the unconstitutional provisions, invalidation is the proper result. *Griffin v. Eller*, 922 P.2d 788, 793 (Wash. 1996). Here, the district court and Ninth Circuit correctly concluded that the numerous unconstitutional provisions in Initiative 872 were so intertwined and interdependent that a severance was not possible. Indeed, any attempt to rewrite the statute would violate the separation of powers. Grange App. 86a, 89a.

Separation of powers has not been violated in this case. Since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), the federal judiciary has operated within the confines of "judicial review," in which federal courts are called upon to review state actions and state statutes for constitutionality within the federal framework. In this case, both the district court and the Ninth Circuit reviewed Washington's primary election statute within the framework of the Constitution of the United States. Both courts concluded that Washington's statute was unconstitutional within that framework. This is exactly the proper role for the federal judiciary within our republican federal system.

4. Neither the District Court nor the Ninth Circuit Rendered Any Opinion Affecting the Election Laws of Any State Other than Washington.

The district court explicitly stated that it was not determining whether the Washington candidate filing statute would be unconstitutional in connection with the Montana primary system. The Ninth Circuit therefore did not review any decision involving the Montana primary system. No other state has the primary election system created by Initiative 872. No state's election system, other than Washington's, is affected by the Ninth Circuit opinion in this case.

The Grange Petition asks this Court to ignore the district court's clarification of its Order and to render an advisory opinion about the constitutionality of the Montana primary system, an issue which has not been addressed by either lower court and which has not been briefed in either Court. This Court has made it clear that it does not issue advisory opinions. *See, e.g.*, *Muskrat v.*

United States, 219 U.S. 346, 362 (1911) ("If such actions . . . to determine the validity of legislation [are sustained] the result will be that this court, instead of keeping within the limits of judicial power . . . will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning."). This is not an appropriate case in which to reconsider that position.

CONCLUSION

The Ninth Circuit was correct in affirming the district court's conclusion that Initiative 872 unconstitutionally invaded core First Amendment rights of association. The Grange Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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