NOS. 05-35780

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 APPELLANT THE STATE OF WASHINGTON

David T. McDonald, WSBA # 5260
Jay Carlson, WSBA # 30411
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104-1158
Tel: (206) 623-7580

Attorneys for Plaintiff Intervenors - Appellees
Washington State Democratic Central Committee, et al.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Constitutional Provisions

BACKGROUND STATEMENT

In 2003, this Court declared Washington's blanket primary election system unconstitutional because it prevented political parties from selecting their nominees for partisan office. *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (2003), cert. denied *Reed v. Democratic Party of Washington*, 540 U.S. 1213, 124 S.Ct. 1412 (2004) and *Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957, 124 S.Ct. 1663 (2004). Washington State then adopted a replacement primary system which was used in the 2004 election. However, despite the adoption of the replacement system, Initiative 872 was adopted at the 2004 general election. Initiative 872 required the State to return to a "modified blanket primary" election system that would "give [voters] the kind of control that they exercised for seventy years under the blanket primary." Initiative 872 is simply an unconstitutional blanket primary modified so that only two candidates (who may be candidates of the same political party) advance to the general election, rather than a variety of candidates (no more than one of which can be from a given political party).

Under Initiative 872: (1) candidates self-designate their party preference when they file for partisan office without any opportunity for the party to approve or reject the association, (2) that preference is printed in conjunction with the candidate's name on the primary ballot, (3) all voters (without regard to the voter's party preference) participate in the primary, and (4) the two most popular candidates (without regard to the candidate's party preference) in the primary election advance to the general election. In essence, Initiative 872 deprives a political party of any effective means to identify the candidates who will be the party's standard bearers in partisan elections and to limit the candidates associated

on the ballot with the party to the standard bearers chosen by the party.

STATEMENT OF ISSUES

1. Is the primary election system created by Initiative 872 materially distinguishable in any constitutionally relevant way from the blanket primary struck down by this Court in *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003)?

2. Has the State demonstrated that the primary election system created by Initiative 872, unlike the blanket primary which it seeks to emulate, is narrowly tailored to advance a compelling state interest?

STATEMENT OF THE CASE

1. Nature of the Case.

Political parties have established fundamental First Amendment rights to select their standard bearers and to identify and limit their associations. Washington's Initiative 872 severely burdens these rights of the Democratic Party by (a) requiring the Party to be associated on the primary ballot with any candidate who self-designates as a Democrat at filing time, on the one hand, and (b) refusing, on the other hand, to recognize any Party nomination process (or provide a public substitute) that would allow the Party to effectively choose which of the self-designating candidates will be the Party's standard bearers on the general election ballot. Washington does not and cannot point to any legitimate compelling state interest that Initiative 872 is narrowly tailored to advance. This case addresses whether, in these circumstances, the district court's decision to enjoin implementation of Initiative 872 was correct.

Contrary to arguments by the State (*e.g.* State's Opening Brief at 31, 33-35) the political parties do not seek a guaranteed place on the general election ballot

nor do they seek to prevent any candidate who chooses to do so from running for partisan office. All that is sought by the each of the political parties is the protection of the fundamental constitutional right of its adherents to select the candidates who run for partisan office using the party's name. Initiative 872 prohibits the exercise of that right and is therefore unconstitutional.

2. Course of Proceedings and Disposition Below.

Initiative 872 passed on November 2, 2004. ER 428. On May 19, 2005, the Washington State Republican Party brought this action challenging the constitutionality of Initiative 872. The Democratic Party, along with the Libertarian Party of Washington, intervened as a party plaintiff on June 7, 2005. The Republican, Democratic and Libertarian Parties moved for summary judgment. After extensive briefing and argument, the district court issued a 40-page order on July 15, 2005 concluding that Initiative 872 severely burdened First Amendment rights and that it was not narrowly tailored to advance any legitimate compelling state interest. The district court preliminarily enjoined the implementation of Initiative 872. On July 29, 2005, the preliminary injunction was made permanent and this appeal immediately followed.[1]

STATEMENT OF FACTS

1. Partisan elections in Washington from statehood to 2004.

Washington has had a partisan election system for over 100 years. At the general election, voters are provided a choice between candidates of each

[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. Because the appeals have not been consolidated, 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.

qualifying political party. In the early days of the State, those candidates were chosen by party convention. Then, in 1907, the State compelled the parties to choose their representatives by means of a public primary.[2] *See State ex. Rel. Zent v. Nichols*, 50 Wash. 508, 522 (1908); *see also Washington State Republican Party et al. v. Logan, et al.*, 377 F.Supp.2d 907, 910-11 (W.D. Wash. Jul. 15, 2005) (hereinafter "*Order*").

From 1907-1935, each party had a separate primary ballot, listing only those candidates who sought to advance to the general election bearing as that party's nominee. Voters chose to participate in a party's "closed" primary by publicly indicating that they would prefer that party's ballot. See *Order*, 377 F.Supp.2d at 910 (citing *State ex rel. Wells v. Dykeman*, 70 Wn. 599, 127 P. 218 (1912)).

In 1935, the State changed the law and required the parties to allow any voter -- even one who belonged to an adverse party -- to participate in the selection of candidates who would bear the party's label for the general election. Under this system, voters could "choose candidates from some parties for some positions, others for other positions, and engage in cross-over voting or 'ticket splitting.'" *Order*, 377 F.Supp.2d at 911. This type of primary election system is known as a blanket primary system and remained Washington's primary election system until it was declared unconstitutional.

2. Blanket primary determined to be unconstitutional.

In 2000, the United States Supreme Court declared California's blanket

[2] Washington adopted a direct primary law in 1907, requiring political parties to nominate by public primary rather than convention. The primary required a public oath of affiliation with a political party to vote in its primary, which requirement was challenged as violating the State constitution by adding to the qualifications of electors. The challenge was rejected by the Washington Supreme Court, which held that a primary was not an election under the state constitution.

primary system unconstitutional because it encroached on the political parties' First Amendment rights of free association. *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402 (2000). The Washington State Democratic Party then challenged Washington's blanket primary. In 2003, the Court of Appeals for the Ninth Circuit followed *Jones* and declared Washington's blanket primary system invalid. *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003). The United States Supreme Court denied petitions for a writ of certiorari seeking review of that decision. *Reed v. Democratic Party of Washington*, 540 U.S. 1213, 124 S.Ct. 1412 (2004) and *Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957, 124 S.Ct. 1663 (2004).

3. In response, the Washington Legislature adopted a "Montana-style" nominating primary.

After the Ninth Circuit struck down the blanket primary and the Supreme Court denied review, the Washington legislature adopted a new primary system. *See, e.g.*, RCW 29A.36.101; RCW 29A.36.104; RCW 29A.36.106. The new primary system is often referred to as a "Montana style" system because it is also used in that state. Under the Montana system, a public primary is used to determine which representatives of each major political party will advance to the general election. Multiple candidates from each major party may run in the primary, and the top vote getter from each major party advances to the general election. Any voter may participate in a party's primary -- but *only* that party's primary -- by choosing that party's ballot on primary day. The voter's affiliation with that Party is inferred from the choice of ballot. *See* RCW 29A.36.104; RCW 29A.52.151(c). Only those voters who affirmatively affiliate with one of the major political parties may validly vote for candidates from that party. RCW

29A.36.106. A voter's choice of ballot is not recorded and no public declaration of affiliation is required.

4. Initiative 872 re-imposes a blanket primary in Washington.

Proponents of the blanket primary -- including initiative sponsors the Washington State Grange -- refused to accept the constitutional limitation on their ability to force a political party to allow non-adherents to select the Party's candidates. On January 8, 2004, the Grange issued a press release announcing "GRANGE FILES INITIATIVE [872] TO PRESERVE STATE'S PRIMARY SYSTEM." ER 512. According to the Grange, under Initiative 872, "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." *Id*. Voters were told that primary ballots would look exactly the same as they had under the blanket primary, including the listing of the party designation after the candidate's name. ER 22. The Grange promised that voters would have "the kind of choice that voters exercised for seventy years under the blanket primary." ER 257.

As had been the case under the blanket primary, Initiative 872 allowed candidates to continue to indicate at filing a party preference and have that party preference printed on primary and general election ballots "in conjunction with" the candidate's name. ER 434 (Initiative 872, Sec. 4); ER 377-78 (WAC 434-230-170, as amended).[3]

[3] Under Section 9 of Initiative 872, a candidate for partisan office "who desires to have his or her name printed on the ballot ... shall complete and file a declaration of candidacy," which includes "a place for the candidate to indicate his or her major or minor party preference, or independent status." ER 436-437. The candidate's "political preference [must] appear on the primary and general election ballot in conjunction with his or her name." ER 434 (Initiative 872, Sec. 4); *see also* ER 439 (Initiative 872, Sec. 7(3)). The candidate's "preference" must also appear in the official voters' pamphlet. ER 438 (Initiative 872, Sec. 11).

As was the case under the blanket primary, Initiative 872 allows any voter, regardless of their affiliation with a political party, to vote in the primary. The statute purports to grant to all voters "[t]he right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." ER 434 (Initiative 872, Sec. 3(3)). Therefore, just as with the blanket primary invalidated in *Reed*, Initiative 872 allows unfettered primary election cross-over voting. Republican voters may freely vote for Democratic candidates, and vice-versa. And, as was the case under the blanket primary, candidates advancing to the general election would have their name -- and self-selected party designation -- printed on the general election ballot for the voter's information in choosing public officials.

As the supporters noted in their press release: "Through this initiative, we can continue to have all of the benefits of the blanket primary, including the right of a voter to pick any candidate for any office." ER 22. Among the blanket primary benefits that proponents of Initiative 872 told voters they would enjoy were forcing political parties to modify their policy goals and the content of their political communications. Proponents of Initiative 872 said:

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

ER 29.

5. Like its predecessor blanket primary, Initiative 872 creates forced political associations, message dilution and message content alteration.

Initiative 872 provides that any candidate may use the party's name on the ballot without permission. ER 436 (Initiative 872, Sec. 7(3)). A Republican is able to demand to appear on the ballot as a Democrat, if he or she so chooses, potentially weakening legitimate Democrats running for office, without regard to whether the Democratic Party wishes to have the candidate appear on the ballot as a Democrat. Election officials are compelled to repeat the forced association in voter's guides and on the ballot, again without the Party's consent. ER 436, 438 (Initiative 872, Secs. 7(3), 11).[4] And all political advertising in support of the candidate is required by law to state -- and thereby reinforce -- the association of the candidate with the Democratic Party, all without regard to whether the Party wishes to be associated with the candidate. RCW 42.17.520. In addition, the Democratic Party may not select which -- or even limit how many -- candidates appear on the ballot using the party's name. If the Democratic Party selects a candidate or candidates through a convention or other means, the State must still allow any other candidate to use the Democratic Party label, based merely on the demand of that candidate. ER 372 (WAC 434-215-015). Washington election officials will not recognize any nomination process for candidates in partisan races except the primary created by Initiative 872. ER 46-53. Initiative 872 thus creates, at best, a cacophony of candidates presented to the public as "Democrats," all diluting the political message that the Democratic Party is trying to present to the

[4] Moreover, the Secretary of State is compelled to specify abbreviations for each political party and to use those abbreviations in conjunction with the name of the candidate on the ballot. ER 439 (Initiative 872, Sec. 7(3)).

public through the candidates it selects as its standard bearers.

Initiative 872 also forces an association with non-party voters because, whether or not a voter is an adherent of the party or otherwise authorized by party rules, he or she may vote in the primary to select party-associated candidates to advance to the general election. ER 435 (Initiative 872, Sec. 5).[5] Judge Zilly concluded: "Initiative 872 burdens the rights of the political parties to choose their own nominee by compelling the parties to accept any candidate who declares a 'preference' for the party, and allowing unaffiliated voters to participate in the selection of the party's candidate." *Order*, 377 F.Supp.2d at 923.

The primary system created by Initiative 872 is inconsistent with the Democratic Party's rules for candidate selection. ER 175-199 (Declaration of Paul Berendt ("Berendt Decl."), ¶¶ 5-8, Exs. A-B). 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 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).

[5] RCW 29A.36.121(3) and WAC 434-230-040 require that the general election ballot indicate a candidate's political party as specified by the candidate in his or her declaration of candidacy. ER 376.

6. The district court's injunction preserved the status quo by returning the State to the primary election system adopted in 2004.

On Tuesday, September 20, 2005, as a result of Judge Zilly's injunction prohibiting the implementation of Initiative 872, various counties in Washington conducted their primary election using the Montana-style primary approved by the Washington legislature in 2004. This system was also used during Washington's primary election in 2004. Party candidates nominated during the primary will now proceed to the general election ballot to be held on Tuesday, November 1, 2005. Washington has never held an election using Initiative 872's "top two" system.

SUMMARY OF ARGUMENT

Political parties have a fundamental First Amendment right of association, which includes the right to select the candidates who will be presented to the general electorate in association with the party's name. *California Democratic Party v. Jones*, 530 U.S. 567, 574-75, 120 S.Ct. 2401 (2000); *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003).

Washington's election system, as amended by Initiative 872, intentionally makes it impossible for political parties to exercise this fundamental right in connection with partisan elections. Accordingly, Initiative 872 severely burdens First Amendment rights and must be declared unconstitutional unless the State justifies Initiative 872 by demonstrating that it is narrowly tailored to advance a compelling state interest. The State has made no attempt to justify the burden imposed upon First Amendment rights by Initiative 872. Instead, the State argues that there is no burden on First Amendment rights under Initiative 872.

The State reads dicta in the *Jones* opinion over-expansively to suggest that

the Supreme Court has approved the primary election system created by Initiative 872. To the extent that the *dicta* is relevant, however, it does not suggest the constitutionality of Initiative 872. Rather, it indicates that every legitimate state interest asserted by the defenders of Initiative 872 could be served by a primary in which -- unlike Initiative 872 -- voters choose from independent candidates and candidates previously nominated by political parties. Such a primary preserves rather than burdens the associational rights of political parties. The *Jones* dicta conclusively demonstrates that Initiative 872 is not narrowly tailored and must be struck down.

On appeal, the State's primary argument is that Initiative 872 places no burden on the associational rights of political parties because it is a "winnowing" or "qualifying" primary, and not a "nominating" primary. The technical label the State gives to a primary election system is not constitutionally relevant. What is relevant is how the primary election system operates and how it impacts First Amendment rights.

The primary election system that results from Initiative 872 retains all of the key components of an invalid blanket primary as found in the *Jones* and *Reed* decisions. Specifically, Initiative 872 still: (1) identifies candidates by political party on the primary and general election ballots; (2) allows candidates to self-select that party identification with no involvement by the political parties; (3) allows any voter -- regardless of their party affiliation -- to vote for any party candidate in any race (i.e., allows "cross-over" voting); (4) determines which candidates associated with a political party will advance to the general election ballot based on votes cast in the primary.

In *Jones* and *Reed*, the U.S. Supreme Court and the Ninth Circuit held that

such a system severely burdens the First Amendment associational rights of political parties to select their own members and nominees. The cosmetic change relied on by the State -- that only two candidates advance to the general election rather than some other number -- does nothing to alleviate these burdens. A primary election that uses party labels and selects among multiple partisan candidates those who will advance to the general election is a partisan nominating primary. Whether it can also be described as a "winnowing" primary, a "qualifying" primary, or by some other name is irrelevant. The important fact is that candidates associated with political parties are being selected to advance to the general election for partisan political office.

Initiative 872 severely burdens First Amendment rights of freedom of association. Neither the State nor the Grange has even *attempted* to meet their burden to show that this Initiative was narrowly tailored to serve a compelling state interest. Accordingly, Judge Zilly correctly concluded that "in all constitutionally relevant respects, Initiative 872 is identical to the blanket primary invalidated in *Reed*[.]" *Order*, 377 F.Supp.2d at 924.

The unconstitutional aspects of Initiative 872 inhere in its basic concept: Requiring that voters who are not adherents of a party be allowed to choose which candidates of that party advance to the general election using the party's name. The provisions implementing this concept are pervasive in the Initiative and cannot be severed out. Judge Zilly correctly struck down the entire Initiative.

This Court should affirm Judge Zilly's well-reasoned decision.

ARGUMENT

A. The Standard of Review is *De Novo* and Strict Scrutiny is Required.

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). State laws which impose severe burdens on First Amendment rights, as Initiative 872 does, are unconstitutional unless narrowly tailored to advance a compelling state interest. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364 (1997); s*ee also Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059 (1992). The burden of proof is on the defenders of the Initiative to demonstrate that it advances a compelling state interest, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407 (1978); *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057-58 (9th Cir. 2000), and to show that it "is narrowly drawn to achieve that end." *Boos v. Berry*, 485 U.S. 312, 321, 108 S.Ct. 1157 (1988); *Perry Education Ass'n. v. Perry Local Educators Ass'n.*, 460 U.S. 37, 45,103 S.Ct. 948 (1983). When determining whether an interest is compelling, the asserted interest "must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264 (1996). The defenders must also show that the Initiative is drawn as narrowly as possible to achieve that compelling interest. *Boos*, 485 U.S. at 324; *see also Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000).

B. Initiative 872 Severely Burdens the Political Parties' Constitutionally Protected Right to Nominate Candidates and to Choose with Whom They Associate.

1. Political parties have a right to nominate their candidates for elective office and choose the candidates with whom they will be associated in the general election.

The members of a political party have a constitutional right to select their candidates for office. *Reed*, 343 F.3d at 1204 ("Party adherents are entitled to associate to choose their party's nominees for public office."). "A basic function

of a political party is to select the candidates for public office to be offered to the voters at general elections…" *Clingman v. Beaver*, ___ U.S. ___, 125 S.Ct. 2029, 2042 (May 23, 2005). "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Jones*, 530 U.S. at 574. The right of parties to choose their candidates is given special protection under the First Amendment. *Jones*, 530 U.S. at 575 ("Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'").[6] Neither the State nor the Grange disputes that a political party has an inherent right to nominate its own candidates. Grange's Opening Brief at 27[7]; State's Opening Brief at 24:4-6.[8]

This Court has previously held that a statutory scheme which prevents a party from selecting its nominees severely burdens First Amendment rights:

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

[7] "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).

[8] "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."

> As for the State of Washington's 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.

Reed, 343 F.3d at 1204.[9]

Political parties have an equally strong right to limit the candidates with whom they will be associated. The Supreme Court has repeatedly recognized that "the First Amendment 'protects the freedom to join together in furtherance of common political beliefs,' which 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.'" *Jones*, 530 U.S. at 574 (citing *Tashjian v. Republican Party of Conn*., 479 U.S. 208, 214-15, 107 S.Ct. 544 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122, 101 S.Ct. 1010 (1981)). Forcing a political party to be associated with candidates not of their choosing during a campaign is a severe burden on First Amendment rights. *Cf. Hurley v.*

[9] 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…."). 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 Opening 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's Opening Brief at 24:12-25:11.

Irish-American Gay Group of Boston, 515 U.S. 566 (1995) (requirement to admit to a parade a contingent expressing a message not of the private organizer's choosing violates the First Amendment). In *Hurley*, the Court said:

> Under [the state court's] approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those … who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

Forcing a political party to accept "all comers" into its parade of candidates during an election is a violation of the Party's autonomy to choose the content of its message.

2. Initiative 872 is a nominating primary for partisan elective offices that implicates First Amendment rights.

Undeniably, Initiative 872 creates an election system in which candidates and party names are associated on public ballots. Equally undeniably, Initiative 872 creates a system in which voters in a primary determine which candidates -- and their associated party names -- advance to the general election. The State's contention that Initiative 872 does not nominate candidates ignores the plain meaning of the term "nominate." As Judge Zilly noted, "nominate" means: "to propose by name as a candidate, especially for election." *Order*, 377 F.Supp.2d at 920, n16 (citing The American Heritage Dictionary of the English Language (4th Ed. 2000)). The purpose of Initiative 872 is to select two candidates and present them to the public at the general election in order to fill a partisan elective office. ER 434-36 (Initiative 872, Secs. 4, 7(2)). It therefore "nominates" candidates. Initiative 872 tinkered with the wording of the definition of "primary" to avoid using the word "nominating" (*see* ER 435 (Initiative 872, Sec. 5)), but word-play

in describing the procedure does not alter the substance of the procedure: The primary remains a nominating procedure.

3. Initiative 872 forces associations with candidates on political parties.

The State contends that Initiative 872 does not infringe the right of political parties to choose the candidates with whom they will be associated because, it argues, printing of the party's name after the candidate's name on the ballot does not create an association between the candidate and the party.

The State's suggestion that printing a candidate's name "in conjunction with" a political party on the primary and general election ballots is simply a statement of personal preference by the candidate and not a forced association with the party is word play at best. Historically, the printing of a party name after a candidate's name on ballots in Washington has been intended to indicate an association with the named party. Promotional materials for Initiative 872, including the State's official Explanatory Statement, indicated that the practice would continue. "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."[10] ER 256.

Washington law, and its voters, clearly contemplate that the candidates who appear on the general election ballot are the candidates of the party whose name is printed after the candidate's on the ballot. RCW 29A.52.116 states: "Major political party candidates for all partisan elected offices, except for president and

[10] A FAQ distributed by sponsors of the Initiative assured voters that candidates "will *continue* to express 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 added).

vice-president ... must be nominated at primaries held under this chapter." *See also* RCW 29A.52.111. As Judge Zilly concluded: "The State and County Auditors recognize no nomination process for a major party other than by the primary.... Under Initiative 872, the only way for a partisan candidate to reach the general election is through the 'top two' primary." *Order*, 377 F.Supp.2d at 919. There is no other route for party candidates to advance to the general election ballot except through the primary established by Initiative 872.

The party "preference" self-selected by candidates under Initiative 872 stays with that candidate throughout the electoral process. Other provisions of state law reinforce the binding nature of the party identification used on the primary ballot. For example, any candidate who declares a party preference must thereafter identify themselves as affiliated with that party in all political advertising. RCW 42.17.510(1) ("The party with which a candidate files shall be clearly identified in political advertising for partisan office."); *see also* WAC 390-18-020:

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

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

4. Initiative 872 denies the political parties the right to nominate and instead substitutes a right to "endorse."

The Appellants argue that Initiative 872 does not interfere with the parties' right to put forward candidates for elective office because, although multiple non-sanctioned candidates may identify themselves as a "Democrat" on the primary ballot, the party is free to campaign for and support only those "Democratic" candidates who have the true support of the party. In effect, therefore, both the State and the Grange 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). As Judge Zilly noted: "The position advocated by the State transforms the party's right to 'nominate' into a right to endorse.'" *Order*, 377 F.Supp.2d at 921.

5. A right to endorse is not a constitutionally acceptable substitute for the right to nominate.

The U.S. Supreme Court has soundly rejected the proposition that a state may substitute the right to endorse a candidate for the constitutionally protected right to nominate.

> 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.

Jones, 530 U.S. at 580-81.

Initiative 872 forces the political parties to replace their current nominating rules with a process in which individual candidates simply nominate themselves as

party candidates. A political party might choose to adopt such a system, but the State cannot force that system on a political party:

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

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

C. The Court's Opinion in California Democratic Party v. Jones Compels Invalidating Initiative 872.

The State contends that Initiative 872 falls within the constitutional limits enunciated in the *Jones* case, relying upon the following dicta:

> 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. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"--all without severely burdening a political party's First Amendment right of association.

530 U.S. at 585-86. However, this *dicta* does not support Initiative 872. Instead, it conclusively demonstrates that Initiative 872 is not narrowly tailored to advance a compelling state interest. The *dicta* demonstrates that every interest asserted by the defenders of Initiative 872 -- even if assumed to be compelling -- could be

protected by a system in which the State honored party nomination rules through a primary in which voters chose among candidates previously nominated by parties (and thus permissibly associated with the party on ballots) and candidates running as independents.[11] Neither the State nor the Grange has identified any State interest which would not be protected by such a system, with the possible exception of a hypothetical interest in allowing candidates to use an organization's name even though they are not authorized to do so. Even if such an interest were legitimate, there is no great burden that results from requiring candidates to run as independents unless nominated by a party. Such candidates are freely able to run and voters are freely able to support them.

Because a top two primary in which party nomination rights were honored rather than prohibited would protect all interests that defenders of Initiative 872 and the blanket primary have asserted to justify Initiative 872, it follows that Initiative 872 is not narrowly tailored. *Boos*, 485 U.S. at 324; *see also Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000).[12] Accordingly, in light of *Jones*, this

[11] The dissent in *Jones* also confirmed that a primary in which voters chose among party nominated candidates and independents was an acceptable alternative for states. *See Jones*, 530 U.S. at 598, n. 8 ("It is arguable that, under the Court's reasoning combined with *Tashjian*, the only nominating options open for the States to choose without party consent are (1) to not have primary elections, or (2) to have what the Court calls a 'nonpartisan blanket primary' … in which candidates previously nominated by the various political parties and independent candidates compete.") (Stephens, J., dissenting).

[12] At page 27 of its Brief, the State asserts, without explanation, that a system in which primary voters chose among party nominated candidates and independents would not serve the State's interest in affording voters greater choice and increasing voter participation. Since the system described does not prevent any candidate from running for office and does not prevent any voter from voting for any candidate on the ballot, the State's contention is baseless. In any event, since both of these interests were asserted by defenders of the blanket primary in *Jones*, *Jones*, 530 U.S. at 583-84, it is clear that the Supreme Court believes such a system would serve the State's interests.

Court should affirm the district court's opinion striking Initiative 872 down.

D. There is no constitutionally significant difference between the "Modified Blanket Primary" created by Initiative 872 and the Blanket primary declared unconstitutional by this court in *Reed*.

1. Word play by the proponents does not change the unconstitutional elements of Initiative 872.

The State does not deny that Initiative 872 retains the key elements of the prior blanket primary that were found unconstitutional. As with the blanket primary invalidated in *Reed*, Initiative 872 still: (1) lists political party labels with candidates on the primary and general election ballots; (2) allows all voters to vote for all candidates in all races regardless of party affiliation; (3) allows candidates to self-designate a party preference when filing for office, without the participation or consent of the party; (4) allows the use of a consolidated primary ballot that is not limited by political party and that therefore facilitates cross-over voting; and (5) advances candidates to the general election based on this open primary balloting. But by their "winnowing" argument, the State asserts that the First Amendment problems created by these features -- and discussed extensively in the cases -- simply dissolve because more than one candidate of the same party can theoretically advance to the general election. This argument has no merit. Forcing an association on a party does not become constitutionally acceptable because it is done many times instead of only once.

As Judge Zilly concluded:

> It is similarly unhelpful to rename the nominating primary a "qualifying" primary. The Court must necessarily look beyond the characterization of the Initiative by its backers. Where the primary system under Initiative 872 selects from a slate of party candidates to advance two candidates to the general election, the system has the legal effect of "nominating" the party

representatives in the partisan election.

Order, 377 F.Supp.2d at 922.

2. Initiative 872 is not a "non-partisan blanket primary."

Initiative 872 does not provide for nomination by a political party of a candidate before the candidate appears on the primary ballot with the party's name. Instead, it allows any candidate to misappropriate the party name and appear on the ballot as a Democratic candidate, *despite* any party nominating process. Accordingly, it is not a non-partisan blanket primary such as was described in *Jones*. It is unconstitutional because it forces the political parties to adulterate their candidate selection process with non-members of the party.

3. Initiative 872 is constitutionally identical to, and equally unconstitutional as, the blanket primary.

Judge Zilly succinctly noted the constitutional identity between Initiative 872 and the 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.

Order, 377 F.Supp.2d at 924.

E. Initiative 872 Severely Burdens the Democratic Party's Associational Rights.

The undisputed evidence below demonstrated is that Initiative 872 imposed

severe burdens upon core First Amendment associational freedoms of the Democratic Party, including (1) substantially interfering with the Party's pursuit of its political strategies and charter-defined goals (Berendt Decl. ¶¶ 5-8); (2) diluting and weakening the Party's ability to effectively communicate its message (Berendt Decl. ¶ 9); (3) undermining the Party's long-standing efforts to develop a brand awareness among the electorate for candidates identified as Democrats (Berendt Decl. ¶ 10); (4) interfering with the Party's mobilization of its supporters (Berendt Decl. ¶ 11); and (5) substantially increasing the difficulty of recruiting candidates and growing support in areas in which the Democratic Party is weak (Berendt Decl. ¶ 12). ER 175-182 (Berendt Decl.).

The Initiative was expressly intended to force parties to change their behavior and dance to Initiative 872's sponsor's tune. During the initiative campaign, Initiative sponsors 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. Political parties have a fundamental right to choose their own music and cannot be forced to play tunes selected by the Grange or the State.

In *Jones*, the Supreme Court held that 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*, 520 U.S. at 358 ("Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest")).

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

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

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

It is not the political parties' burden, as argued by the Grange (Opening Brief at 15), to prove that there is "no set of circumstances exists under which the text of Initiative 872 would be constitutional." Rather, *the burden is on the*

proponents to justify the statute by proving that it is narrowly tailored to serve a compelling state interest.

Under strict scrutiny, the burden of proof is on the defenders of the Initiative to demonstrate that it advances a compelling state interest, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407 (1978); *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057-1058 (9th Cir. 2000), and to show that it "is narrowly drawn to achieve that end." *Boos v. Berry*, 485 U.S. 312, 321, 108 S.Ct. 1157 (1988); *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45,103 S.Ct. 948 (1983).[13]

In *Reed*, the Ninth Circuit defined the applicable strict scrutiny analysis for a First Amendment review of a primary election statute:

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

Reed, 343 F.3d at 1203. Judge Zilly properly applied this analytical framework in his ruling below. *Order*, 377 F.Supp.2d at 916.

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

G. The State and the Grange Do Not Assert that Initiative 872 Can Survive Strict Scrutiny.

Neither the State nor the Grange has argued that Initiative 872 can survive strict scrutiny. The same was true below. "The State of Washington and the Washington State Grange … do not argue that Initiative 872 is narrowly tailored to serve a compelling state interest." *Order*, 377 F.Supp.2d at 925. This is not surprising. Both the Supreme Court and the Ninth Circuit Court of Appeals have already held that the Initiative's stated goals of greater voter choice and increased political openness are not a legitimate interest justifying forced association in violation of the First Amendment:

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

Jones, 530 U.S. at 583-84 (citing *Tashjian*, 479 U.S. at 215-16, n 6) (emphasis in original). As the Ninth Circuit affirmed in *Reed*: "The supposed unfairness of depriving those voters who do not choose to affiliate with a party from picking its nominee 'seems to us less unfair than permitting nonparty members to hijack the party.'" *Reed*, 343 F.3d at 1205 (citing *Jones*).

In *Reed*, the Ninth Circuit rejected a litany of "compelling interests" advanced by the State to justify the invasion of First Amendment rights, holding: "[t]he remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests

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

H. 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 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 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 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.

I. The Parties are Entitled to Their Reasonable Attorneys' Fees.

Plaintiff in Intervention the Democratic Party is entitled to an award of attorney's fees against the State. It is well established that a plaintiff prevailing in a civil rights action is presumptively entitled to its costs, including reasonable attorney's fees. *See* 42 U.S.C. § 1988; *Thorsted v. Gregoire*, 841 F.Supp. 1068,

1083 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996); *see also Henslet v. Eckerhart*, 461 U.S. 424, 429 (1983). And a plaintiff in intervention is entitled to its attorney's fees whenever 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 (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 against the State to intervenor the Republican Party as well as to the Democratic Party. *See Washington State Democratic Party v. Reed*, 388 F.3d 1281 (9th Cir. 2005) (opinion regarding fee award).

This is not a case of first impression. The U.S. Supreme Court and the Court of Appeals for the Ninth Circuit have previously ruled on the constitutionality of blanket primary systems. There are no circumstances to justify a departure from the presumption that the Democratic Party is entitled to its fees.

CONCLUSION

In granting the parties' Motions for Summary Judgment, Judge Zilly held: "The freedom to join together in furtherance of common political beliefs necessarily presupposes the freedom to identify the people who constitute the association." *Order*, 377 F.Supp.2d at 917 (citation omitted). Initiative 872 prohibits the exercise of this fundamental constitutional right. Indeed, according to statements by the appellant Grange, it was specifically designed to do so. This Court should affirm Judge Zilly's well-reasoned decision and allow Washington to

move forward with a constitutional election system.

DATED this 24th day of October, 2005.

Respectfully submitted,

PRESTON GATES & ELLIS LLP

By_____
David T. McDonald, WSBA # 5260
Jay Carlson, WSBA # 30411

Attorneys for Plaintiff Intervenors - Appellees Washington State Democratic Central Committee, et al.

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 9,287 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,

PRESTON GATES & ELLIS LLP

By_____
David T. McDonald, WSBA # 5260
Jay Carlson, WSBA # 30411

Attorneys for Plaintiff Intervenors - Appellees Washington State Democratic Central Committee, et al.

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:

Maureen Hart
Jeffrey Even
James Pharris
Washington State Attorney General's Office
P.O. Box 40100
Olympia, WA 98504-0100

John White, Jr.
Livengood Fitzgerald & Alskog
121 Third Avenue
Kirkland, WA 98033-0908

Richard Shepard
Shepard Law Office, Inc.
818 South Yakima Avenue
Suite 200
Tacoma, WA 98405

Thomas Ahearn
Foster Pepper & Shefelman
1111 Third Avenue
Suite 3400
Seattle, WA 98101

Dated October 24, 2005 at Seattle, Washington.

_____

Lisa R. Anderson
Secretary