CA no. 05-35774, 05-35780
DC. no. C 05-0927Z

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et al.
Plaintiff-Appellees,

v.

DEAN LOGAN, King County Records & Elections Division Manager, et al.,
Defendants,

and

WASHINGTON STATE GRANGE,
Defendant-intervenor-Appellant,

STATE OF WASHINGTON, et al.
Defendant-intervenor-Appellants,

v.

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.; and
LIBERTARIAN PARTY OF WASHINGTON STATE, et al.;
Plaintiff-intervenor-Appellees.

On Appeal From The United States District Court
for the Western District of Washington
The Honorable Thomas Zilly

APPELLANT WASHINGTON STATE GRANGE'S OPENING BRIEF

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I. SUMMARY OF THIS BRIEF

In September 2004 the State of Washington conducted a "Montana" style primary for the first time. Six weeks later the citizens of Washington voted 60%-40% to replace that Montana system with a top two system instead (Initiative 872).

On the eve of the Initiative's implementation in 2005, three political parties sought a federal court injunction invalidating its enactment – claiming the Initiative's provisions violated the First Amendment *on their face*.

The district court agreed and enjoined the Initiative's top two system – effectively ordering Washington to conduct the rejected Montana style election in 2005 instead.

This Brief explains why that decision was incorrect as a pure matter of First Amendment law.

1. Allowing the ballot to tell voters the party a candidate *prefers*: One part of Initiative 872 allows a person running for office to tell voters the political party he or she ***prefers*** after his or her name on the ballot.

Plaintiffs argue their First Amendment "association" right prohibits persons running for office from making that disclosure to the voters.

But their argument flips the First Amendment on its head. The fundamental purpose of the First Amendment is to protect unfettered free speech in the political arena. Not gag it. As Part VII of this Brief explains in more detail, the First

Amendment does not grant political parties the power to censor and restrain what a person running for office says about his or her personal preferences.

2. Changing the November election to be a "top two" runoff: The other part of Initiative 872 creates a two-stage election system with all persons running for office listed on the September ballot, and the top two vote-getters then proceeding to a runoff in November. To quote the plaintiff Republican Party's lead counsel in this case, Initiative 872 "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage."[1]

Plaintiffs argue the First Amendment prohibits such a two-stage system because it makes the September primary identical to the one invalidated in *Jones* and *Reed.*

But that argument ignores the difference between the voters' choice in a primary and the election result of a primary.

With respect to choice, it is true that the September primary under Initiative 872 is similar to the one in *Jones* and *Reed* – for all three allow voters to vote for whomever they want, regardless of the party to which the voter belongs.

But with respect to result, Initiative 872 is different.

The statutes in *Jones* and *Reed* specified that the September primary produced a partisan result. The top vote-getter among the Republican Party's

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[1] *Grange's Excerpts of Record ("Grange's ER") at 31 (W.D.Wash. Doc. No. 69, Exhibit L).*

candidates in that primary would be the Republican Party candidate on the November ballot, and the top vote-getter among the Democratic Party's candidates in that primary would be the Democratic Party candidate on the November ballot. In other words, the State statute at issue in *Jones* and *Reed* required major political parties' to use the primary to select ***their*** candidates for the November ballot.

Initiative 872 does not have that same partisan result. Instead, Initiative 872 specifies that the top two vote-getters among all candidates in September will be the two runoff candidates in November – regardless of partisanship. In other words, the primary under Initiative 872 narrows the field of all persons running for office down to the ***two most popular*** candidates overall – regardless of any party nomination, membership, or affiliation.

The non-partisan result of the September primary under Initiative 872 is further confirmed by the plaintiffs' own conduct – for the plaintiff Republican Party and plaintiff Democratic Party both held nominating conventions to select ***their*** candidates for the 2005 ballot before the district court invalidated the September primary provisions of Initiative 872.

The plaintiff political parties are of course free to abandon that use of nominating conventions to select their candidates if they wish. But as Part VII of this Brief explains in more detail, the First Amendment does not grant political parties the right to hijack the State of Washington's first-stage winnowing primary by insisting that that September primary selects their party nominees instead.

Some plaintiffs also argue that the U.S. Constitution prohibits the Initiative's top two runoff system because it prevents a third candidate from being on the November ballot.

But that's math. Not constitutional law. The constitutionally significant fact in this facial challenge is that the text of Initiative 872 treats all persons running for office equally – granting them all full access to the electorate on the first, September ballot that winnows out the top two voter-getters for a November runoff. As Part VII of this Brief explains in more detail, the U.S. Constitution does not grant or guarantee any organization, special interest group, person, or political party a spot on the second-stage, November runoff ballot.

In short, the district court erred in agreeing with the plaintiff political parties that both parts of Initiative 872 are unconstitutional *on their face*. The Appellant Washington State Grange therefore respectfully requests that this Court reverse the district court and grant judgment in the Appellants' favor as a matter of law.

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§1331 & 1343 because this case involves a claim that Washington State's election statutes violate the first and fourteenth amendments.

This Court of Appeals has jurisdiction under 28 U.S.C. §1291 because this is an appeal from a final judgment and under 28 U.S.C. §1292(a)(1) because the district court entered a permanent injunction.

This appeal is timely under FRAP 4(a)(1)(A) because the Grange filed its Notice Of Appeal on the same day the district court entered its final judgment and permanent injunction (July 29, 2005).

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Although the proceedings below addresses at least six separately stated legal issues, resolving this appeal distills down to the following four:

1. **Does the First Amendment prohibit a person running for public office from stating the political party he or she *prefers* on the ballot?**

2. **Does a ballot's stating the political party a person *prefers* make that person the party's "nominee"?**

3. **If the answer to either of the above questions is "yes", can the part of Initiative 872 which allows the ballot to state the political party a person prefers be severed to preserve the Initiative's underlying top two election system?**

4. **Does the U.S. Constitution ban top two election systems due to the fact that, by definition, they limit the *November* ballot to only *two* candidates?**

IV. STATEMENT OF THIS CASE

The nature of this case and its proceedings to date are simple:

In March 2004, the Washington legislature enacted a top two election system for the **2004** election cycle and thereafter. 2004 Wash. Laws 271, §§1-57.

After the Legislature adjourned, the out-going governor vetoed that top two legislation – which left the State with a so-called "Montana" system instead.[2]

On November 2, 2004, Washington's voters rejected that "Montana" system by a 60%-40% margin, and enacted a top two system in its place for the **2005** election cycle and thereafter (Initiative 872).[3] That top two system became the law of Washington on December 2, 2004. Washington Constitution, Article II, §1(d) (Initiatives become law 30 days after the election).

Half a year later, the plaintiff political parties pursued this suit claiming the Initiative's provisions are unconstitutional *on their face*, and that the entire Initiative therefore had to be invalidated and enjoined.[4]

The district court agreed.[5]

The Grange filed its Notice Of Appeal that same day (July 29). CA no. 05-35774. The defendant State did too. CA no. 05-35780.

On July 29, the Grange also filed a Motion To Expedite requesting an appeal schedule that would allow a ruling in time for the Legislature to enact legislation

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[2] *See Washington State Grange v. Locke, 105 P.3d 9 (Wash. 2005) (upholding veto, and explaining how veto of the enactment's top two system triggered the fallback "Montana" system).*

[3] *Grange's ER at 24 - 26 (W.D.Wash. Doc. No. 69, Exhibit J).*

[4] *E.g., Grange's ER at 2:7-8 (W.D.Wash. Doc. No. 49) ("this case is a facial challenge"). For a fuller discussion of the plaintiffs' half-year delay and its contrast with the fact that constitutional challenges to Washington Initiative measures are commonly filed within a few weeks of their November enactment instead, see the Grange's July 29 Motion To Expedite in CA no. 05-35774, at page 4 & footnote 2.*

[5] *Grange's ER at 47-86 (July 15 Preliminary Injunction Order); Grange's ER at 87 - 88 (July 29 Permanent Injunction Order).*

consistent with this Court's decision for the upcoming **2006** election cycle (i.e., a decision by mid-January, 2006).[6]

This Court has expedited this injunction appeal with Orders treating the Grange's and State's appeals together, led with the Grange's appeal number (CA no. 05-35774).

V. STATEMENT OF FACTS

Since this appeal concerns plaintiffs' *facial* challenge to the text of Initiative 872, the legally relevant "facts" are the Initiative's text. As the district court explained, in a facial challenge to a statute the "court examines solely the text of the document to determine its constitutionality." Grange's ER at 59:23-24.

That text falls into the two principle categories: (1) provisions that allow a person running for office to state on the ballot the party he or she prefers, and (2) provisions that replace the State's previously existing election system with a top two system instead.

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[6] *For a fuller discussion of the February 4, 2006 bill cutoff date and the need for a decision by mid-January, see the Grange's July 29 Motion To Expedite in CA no. 05-35774, at pages 6-7.*

A. Text Allowing The Ballot To Tell Voters The Party A Person Running For Office *Prefers.*

Initiative 872 establishes a new definition for "partisan office" includes most elected offices in the State of Washington (other than judicial offices and the State Superintendent of Public Instruction), and provides that a person running for any such office "may indicate a political party ***preference*** on his or her declaration of candidacy". Initiative §4 (emphasis added).

The heart of plaintiffs' First Amendment challenge is the text of Initiative 872 which allows a person running for such a "partisan office" to tell voters the party he or she prefers (if any) on the ballot:

> **Sec. 7** A new section is added to chapter 29A.52 RCW to read as follows: ....
>
> (3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

Addendum B, Initiative §7.[7]

[7] *Initiative §4 similarly allows the candidate's political party preference to "appear on the primary and general election ballot in conjunction with his or her name." Initiative §11 likewise allows the candidate's stated preference to be disclosed in the voters pamphlet – but the political parties do not claim that the First Amendment prohibits a candidate from telling voters the party he or she prefers in his or her voters pamphlet description.*

B. Text Creating A Top Two Election System With A November Runoff.

The text of Initiative 872 also establishes a two-stage public election system, with the November general election being a runoff between the September primary election's top two voter-getters:

> **Sec. 7** A new section is added to chapter 29A.52 RCW to read as follows:
>
> (1) A primary is a first stage in the public process by which voters elect candidates to public office.
>
> (2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in RCW 29A.36.170 [requirement candidates to receive at least 1% of the total vote].

Addendum B, Initiative §7.[8]

[8] *Initiative §5 accordingly redefined "primary" and "primary election" under Washington law to mean "a procedure for winnowing candidates for public office to a final list of two as part of a special or general election", and Initiative §6 accordingly amended the "non-partisan" top two primary provisions previously applicable to judicial races to now apply to all races instead.*

VI. SUMMARY OF ARGUMENT

Appeal Issue 1: The First Amendment ***protects*** the political free speech of a person running for office to tell voters which political party (if any) he or she prefers. The First Amendment does not grant political parties the power to ***censor*** such speech instead. The part of Initiative 872 that allows candidates to freely exercise such speech on the ballot therefore does not violate the First Amendment.

Appeal Issue 2: The text of Initiative 872 created a September primary to select the ***two most popular*** candidates for a November runoff – regardless of partisanship. That text did not create a September primary to select the ***political parties'*** candidates instead. The winnowing primary in the Initiative's top two runoff system therefore is not the same as the party-nominating primary invalidated in *Jones* and *Reed.* Indeed, the *Jones* case itself clearly explained that the nonpartisan result of such a top two primary makes a two-stage election system such as the one established by Initiative 872 constitutional.

Appeal Issue 3: If the Initiative's allowing a person to state the party he or she prefers on the ballot is unconstitutional, the remedy is to sever the part of the Initiative which allows that statement on the ballot. The remedy is not to strike down that part and the Initiative's top two runoff approach as well.

Appeal Issue 4: The two-stage public election process established by Initiative 872 does not deny any political party any constitutionally protected access to the electorate because that two-stage public process provides all parties and all candidates full access to the electorate in its first (September) stage. The

U.S. Constitution does not grant any organization, individual, or political party preferential treatment or guarantee any organization, individual, or political party a spot on a State's November ballot.

In short, plaintiffs' *facial* challenge fails as a matter of law. This Court should therefore reverse the district court's injunction orders and dismiss plaintiffs' constitutional challenge forthwith.

VII. ARGUMENT

A. Standard Of Review & other legal standards.

1. Appellate Review Standard: *De Novo.*

The Ninth Circuit reviews district court rulings on the constitutionality of a State statute *de novo*. *California First Amendment Coalition v. Calderon*, 150 F.3d 976, 980 (9th Cir. 1998) (reversing district court ruling which had invalidated a State statute under the First Amendment).

Especially in First Amendment cases, that includes *de novo* review of both the facts and the law, with no deference given to any factual conclusions made by the district court. *Tucker v. California Department of Education*, 97 F.3d 1204, 1209 n.2 (9th Cir. 1996).

2. Summary Judgment Standard: *forthwith if no material facts in dispute.*

The Civil Rules require the granting of summary judgment "forthwith" if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

This requirement includes the court's granting summary judgment to the non-moving party (such as the Appellant Grange in this case) when the record does not establish a genuine fact dispute material to the non-moving party's entitlement to judgment. E.g., *Dewitt Construction v. Charter Oak Fire Insurance*, 307 F.3d 1127, 1135 n.6 (9th Cir. 2002) (reversing district court and directing summary judgment in non-moving party's favor); *Bird v. Glacier Electric Coop*, 255 F.3d 1136, 1152 (9th Cir. 2001) (court may grant summary judgment to non-moving party; no cross-motion needed); *Cool Fuel v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982) (same).

3. Statutory Construction Standard: *interpret text to preserve constitutionality.*

Initiative 872 is a Washington State statute. E.g., *McGowen v. State*, 60 P.3d 67, 72 (Wash. 2002) (Initiatives enacted by the People are statutes just like legislative bills enacted by the Legislature, because "When the people approve an initiative measure, they exercise the same power of sovereignty as the Legislature does when it enacts a statute").

Washington law therefore provides that the text of Initiative 872 must be interpreted in a manner that preserves its constitutionality if at all possible. E.g., *Citizens for Responsible Wildlife Management v. State*, 71 P.3d 644, 650, 655-56 (Wash. 2003) (construing Initiative 713 to preserve its constitutionality); *In re Mattson*, 12 P.3d 585, 589 (Wash. 2000); *Hammock v. Monroe Street Lumber,* 339 P.2d 684, 688 (Wash. 1959); see also *McGowen v. State*, 60 P.3d 67,

75-76 (Wash. 2002) (severing unconstitutional provision from Initiative 732 to preserve it from being stricken down in its entirety).

Although State law governs the interpretation of State statutes, Appellants note that the federal case law on statutory interpretation is similar. For example, the challenger in *Scales v. United States* claimed that a federal statute criminalizing membership in the communist party violated his First Amendment freedom of association. 367 U.S. 203, 224, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961). Noting that federal courts avoid construing a statute to be unconstitutional when possible, the Supreme Court interpreted that statute to have an implied element of specific intent to overthrow the government through violence – thereby preserving the statute's constitutionality. 367 U.S. at 221-22 & 229.

4. Plaintiffs' Burden Of Proof:
heavy burden when claiming a statute is unconstitutional on its face.

Our constitutional system does not "authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *Heller v. Doe,* 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). This Court must therefore give State statutes such as Initiative 872 a strong presumption of validity. E.g., *Broadrick v. Oklahoma,* 413 U.S. 601, 611-13, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

This presumption of validity is especially strong in this case because:

> A *facial* challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 679 (1987) (emphasis added).

Although a balancing test can come into play if the plaintiff pleads and proves certain types First Amendment infringements, that balancing test was not triggered here because plaintiffs did not meet their initial burden of actually establishing such a First Amendment infringement. See, e.g., *Hotel & Motel Association of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003).

Moreover, even if plaintiffs had met their initial burden of proof to trigger First Amendment balancing, their submissions still would not prove Initiative 872 unconstitutional. That is because the "burden" (if any) which the Initiative places on the political parties by allowing candidates to tell voters the political party they prefer is slight when compared to the countervailing interests served by the Initiative's new top two system – e.g.:

- permitting the First Amendment free speech of persons running for office to inform voters of the political party they prefer;
- bolstering the election's legitimacy by having its second stage be a top two contest – which maximizes the likelihood that public officials are elected by majorities instead of mere pluralities;
- preserving voter privacy by not requiring voters to disclose their personal politics as a "poll tax" charged to vote in the first stage of the State's public election process; and
- furthering citizens' free exercise of their fundamental right to vote by allowing citizens to vote for the person they think most qualified in the public election's first stage – instead of restricting their choice to a mere subset of the persons who previously filed for office in July.

See, e.g., *LaRouche v. Fowler*, 152 F.3d 974, 994 (D.C. Cir. 1998) (ordinary balancing instead of "strict scrutiny" applies when candidates' First Amendment rights and party's claimed right of association are both involved); see generally the balancing test as explained in *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *McClaughlin v. North Carolina Board of Election*, 65 F.3d 1215, 1221 (4th Cir. 1995) (under the *Anderson* test, the court "must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests").

In short, to prevail on their facial challenge, plaintiffs had to establish that no set of circumstances exists under which the text of Initiative 872 would be constitutional. The only exception would be if plaintiffs' submissions established a First Amendment overbreadth claim and the burden which that overbreadth imposes on ***plaintiffs'*** First Amendment rights is not outweighed by the countervailing interests promoted by the Initiative's top two system.

B. The First Amendment Does Not Prohibit Persons Running For Public Office From Stating The Party They *Prefer* On The Election Ballot.

1. The speech that Initiative 872 allows on the ballot: a candidate's disclosure to voters of the political party he or she *prefers*.

As noted earlier in this Brief, the text of Initiative 872 allows a candidate to "indicate a political party ***preference*** on his or her declaration of candidacy". Initiative §4 (emphasis added).

The State of Washington's chief elections officer – the Washington Secretary of State – accordingly promulgated new State regulations in the

Washington Administrative Code ("WAC") to provide the following blank in the declaration of candidacy form that a candidate may fill in to indicate a political party preference: "my party ***preference*** is _____". WAC 434-215-012 (2005 version, before district court struck down Initiative 872) (emphasis added).[9]

Plaintiffs' First Amendment complaint is that the Initiative also allows the ballot to tell voters that preference. Initiative §7(2) ("if a candidate has expressed a party or independent ***preference*** on the declaration of candidacy, then that ***preference*** will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in the rules of the secretary of state. A candidate may express no party or independent ***preference***.") (emphasis added); accord §4 (candidate "may indicate a political party ***preference*** on his or her declaration of candidacy and have that ***preference*** appear on the primary and general election ballot in conjunction with his or her name") (emphasis added).

The actual language used by Initiative 872 – "***preference***" – is important because a fundamental precept of Washington law is that citizens are presumed to know what the law is. E.g., *Barson v. DSHS*, 794 P.2d 538, 54 n.1 (Wash.App. 1990) (appellant is presumed to know the law governing the appellate process – thus misstatements by the administrative law judge do not excuse appellant's failure to file a timely appeal); *In re Estate of Niehenke*, 818 P.2d 1324, 1329

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[9] *By way of contrast, the blank on the declaration of candidacy form under the prior blanket primary system stated "I am a candidate of the _____ party". WAC 434-215-012 (pre-2003 version).*

(Wash. 1991) (testator is presumed to the law governing wills – and is thus presumed to understand the effect of its arcane anti-lapse statute); *Watson v. Wash. Preferred Life Insurance*, 502 P.2d 1016, 1020 (Wash. 1972) (shareholders are presumed to know intricate details of corporate law – and thus know that their absence at a shareholders meeting would be taken as a "no" vote on the actions to be voted on at that meeting); *Terrace Heights Sewer District v. Young*, 473 P.2d 414, 417 (Wash.App. 1970) (citizen is presumed to know the law regarding limitations on municipal officials' ability to bind municipal entities – and thus presumed to know the municipal official with whom he contracted did not have authority to do so); *Grossman v. Will*, 516 P.2d 1063, 1068 (Wash.App. 1973) (person is presumed to know the law of agency – and thus know the other side's settlement agreement was not binding unless the other side's lawyer had express authority).

This presumption that Washington citizens know what the law says is especially appropriate here – for the law at issue is a law that over 2.6 million of them just finished voting on last year. And as written, the speech which that law allows on the ballot is a candidate's statement of the political party he or she *prefers*.

2. The First Amendment allows such speech by persons running for office because the First Amendment's central purpose is to *protect* unfettered political speech in our election process – not *gag* it.

"Protection of political speech is the very stuff of the First Amendment." *Republican Party of Minnesota v. White*, 416 F.3d 738, 748 (8th Cir. 2005). The

First Amendment's free speech guarantee accordingly "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971).

A candidate's statement to voters about what he or she believes qualifies them for public office is accordingly a core First Amendment freedom. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774, 775, 122 S.Ct. 2528, 2534, 153 L.Ed.2d 694 (2002) (striking down limitation on what judicial candidates can tell voters because the Supreme Court has "never allowed the government to prohibit candidates from communicating relevant information to voters during an election"); accord, *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-24, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (striking down limitation on what party can tell voters about a candidate [ban on endorsements] because banning speech about individual candidates "directly affects speech which is at the core of our electoral process and of the First Amendment freedoms. We have recognized repeatedly that debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution. Indeed, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (internal citations & quotation marks omitted).

Given this paramount protection of unfettered political free speech, the First Amendment protects not only truthful and accurate speech in the political arena, but also exaggeration, vilification, and outright false statements. E.g., *Cantwell v.*

State of Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940); *State of Washington Public Disclosure Commission. v. 119 Vote No! Committee*, 957 P.2d 691, 695 (Wash. 1998) (State law cannot prohibit falsity in political debate); *Rickert v. State*, -- P.3d --, 2005 WL 2140800 at *4, 10 (Wash.App. 2005) (statute barring false political advertising violates the First Amendment, and rejecting assumption that voters "are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate").

In short, plaintiffs turn our Constitution on its head by reading the First Amendment's paramount protection of political free speech to instead be a restriction that grants political organizations the power to control or censor the free speech of persons running for public office.

Indeed, the injunction that plaintiffs secured striking down the Initiative's allowing a political candidate to state on the ballot that he or she prefers one political party or another – before any such statement is even made – is a prior restraint under First Amendment law. E.g., *Cantwell v. State of Connecticut*, 310 U.S. 296, 305, 306, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940) (prior restraint occurs when the law allows a determination of whether speech falls within a forbidden category, and then censors that speech before it actually occurs).

The United States Supreme Court, however, has repeatedly reaffirmed that "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); *Freedman v. Maryland*, 380

U.S. 51, 57, 85 S.Ct. 734, 738 13 L.Ed.2d 649 (1965); *Southeastern Promotions v. Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 1246 , 43 L.Ed.2d 448 (1975); see also *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) (plaintiffs must overcome the "heavy presumption" that an injunction would be an unconstitutional restraint on free speech).

The plaintiff political parties' submissions simply did not overcome the heavy First Amendment presumption against restraints of free speech. Especially the free speech of candidates for public office in the political arena. And especially in the vacuum of a *facial* challenge without any specifics as to any particular candidate whose speech is objectionable to the plaintiff political parties.

The political parties clearly do not like the free speech that Initiative 872 allows persons running for office to exercise. But that free speech is protected – not prohibited – by the First Amendment that the political parties invoke.

3. Trademark law does not trump the First Amendment free speech rights of persons running for political office.

The plaintiffs (and district court) based a significant part of their reasoning on notions of trademark protection such as dilution, confusion, misappropriation, infringement, and unfair competition. But trademark notions do not trump the First Amendment free speech rights of persons running for office for many reasons.

First, the plaintiff political parties did not establish their exclusive ownership of the words they want to prohibit a person running for political office

from speaking – for example, generic terms like "republican", "democrat", and "libertarian".

Second, the limitations on commercial speech permitted by trademark law do not violate the First Amendment because commercial speech is accorded a less First Amendment protection that political speech. E.g., *Bland v. Fessler*, 88 F.3d 729, 739 (9th Cir. 1996). Such limitations are not allowed with the purely political speech at issue here.

Third, trademark law does not even apply because stating a political party name on the ballot is a noncommercial use. And the purpose of federal trademark law, in contrast, is to protect the use of trademarks in commercial transactions. *Bosley Medical Institute v. Kremer*, 403 F.3d 672, 676-78 (9th Cir. 2005).

For trademark law to apply, the alleged infringer must use the trademark "in connection with the sale of goods or services."[10] That threshold commercial speech requirement is crucial because it prevents trademark law from running afoul of First Amendment protections guaranteed to noncommercial speech – especially political speech.[11]

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[10] Bosley Medical Institute, *403 F.3d at 677 (9th Cir. 2005).*

[11] *4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §27.71 (4th ed. 2005) (citing legislative history of federal statute). For example, Tax Cap Committee v. Save Our Everglades, 933 F. Supp. 1077, 1079, 1081-82 (S.D. Fla. 1996), thus held that federal trademark law did not prohibit one political action committee from using a petition form that closely resembled the petition form developed by a different political action committee because the defendant was not using the form for commercial purposes. 933 F. Supp. at 1081-82; see also Bosley Medical Institute, 403 F.3d at 676-80 (defendant's use of plaintiff's trademark on website criticizing plaintiff's product was permissible).*

Under Initiative 872, neither the State nor the person running for office is using the ballot in connection with the sale of goods or services. To the contrary, the ballot is part of the State's election system – purely political (rather than commercial), and thus outside federal trademark law.

Fourth, even if federal trademark law applied, the use of a political party name to disclose the political party a person prefers would fall under the exception for comparative advertising. Even in commercial speech cases, a person can use a someone else's trademark to compare his or her own product to that other person's product. *Smith v. Chanel, Inc.*, 402 F.2d 562, 565-68 (9th Cir. 1968).

Nor is trademark law designed to protect the trademark holder's investment in the trademark.[12] For example, this Court therefore held in *Smith v. Chanel, Inc.* that the defendant was free to advertise his perfume by stating that it duplicated 100% the plaintiff's well-known Chanel #5. 402 F.2d at 563, 564-69.

Initiative 872's allowing a person to indicate his or her party ***preference*** on the ballot effectively allows that person to compare himself or herself to others. And as explained above, such a comparison is allowed even with the less constitutionally protected commercial speech under trademark law.

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[12] *Smith, 402 F.2d at 568.*

Fifth, even if federal trademark law applied, the use of a political party's name on the ballot would fall squarely into that law's "nominative use" exemption. This Court has described that exception as follows:

> [1] the product or service in question must be one not readily identifiable without use of the trademark;
>
> [2] only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and
>
> [3] the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

Playboy Enterprises, Inc. v. Welles, 279 F.3d 796, 801 (9th Cir. 2002).

In the *Playboy Enterprises* case, this Court accordingly held that Ms. Wells could use the phrase "Playboy Playmate of the Year 1981" to identify herself on her commercial website because her use of the Playboy Playmate trademark was a nominative use. *Id.* at 799. More specifically, this Court explained:

> (1) any other description would be too wordy and awkward – for it would be "impractical and ineffectual" for Ms. Wells to identify herself as the "nude model selected by Mr. Hefner's magazine as its number-one prototype woman for the year 1981";
>
> (2) Ms. Wells was only using the bare title, and not any of Playboy's specialized font or logo; and
>
> (3) Ms. Wells was not using anything else but the 1981 Playboy Playmate title to suggest sponsorship or endorsement by Playboy.

Playboy Enterprises, 279 F.3d at 802-03.

Here, a person's use of a political party name on the ballot would similarly be a nominative use permitted even by federal trademark law because:

> (1) it would be unwieldy for a person to describe his or her political party preference on the ballot other than by using that political party name – e.g., it would be "impractical and ineffectual" for a person to state on the ballot that she "prefers the conservative party represented by the elephant that currently controls the White House".

(2) the person would not be using the political party's alleged trademark beyond simply stating on the ballot that party's name in ordinary font with no logo; and

(3) Initiative 872 does not allow for a use suggesting the person is endorsed or sponsored by the political party named – indeed, the Initiative expressly provides to the contrary that the statement on the ballot is the person's preference for that party, not the party's preference for that person.

In short, notions of trademark law do not even apply to the ballot statement at issue in this case. And even if they did, the Initiative's allowing a person to state the party he or she prefers on the ballot would still be protected from the trademark-like restrictions plaintiffs invoke.

4. Neither *Jones* nor *Reed* dealt with the issue of whether the First Amendment allows a person running for office to tell voters the political party he or she *prefers*.

This point is obvious. But since the plaintiffs (and district court) placed great emphasis on the *Jones* and *Reed* decisions to invalidate all the provisions of Initiative 872, this point is also important.

Neither *Jones* nor *Reed* dealt with the issue of whether the First Amendment allows a person running for office to tell voters the political party he or she *prefers*. Those cases accordingly do not relate to whether or not the "***preference***" statement allowed by Initiative 872 violates the First Amendment.

5. Issue 1 Conclusion: the "preference" part of Initiative 872 does not violate the First Amendment.

The free speech of candidates for public office as a core guaranty (not a core prohibition) of the First Amendment. As the United States Supreme Court

unequivocally explained in the suit successfully brought by the plaintiff Republican Party in Minnesota:

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. ... [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance. It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

Republican Party of Minnesota v. White, 536 U.S. 765, 781-82, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (internal quotation marks & citations omitted, emphasis & ellipses in original).

Plaintiffs below nonetheless complained that this Initiative's allowing a person to disclose the party (if any) which he prefers would allow "a cacophony of undisciplined voices" in the political arena since the Initiative did not grant political parties the right to approve of the truthfulness of such statements and did not require a person who states he "prefers" a political party to prove that that party also prefers him.[13]

But as the above discussion confirms, a fundamental purpose of the First Amendment is to prohibit laws that "discipline" voices in the political arena or otherwise restrict a political candidate's free speech. While the plaintiff political parties might have wanted Initiative 872 to grant them the power to act as tribunals

[13] *Grange's ER at 13:24 - 14:12 (W.D.Wash. Doc. No. 52).*

of truth disciplining the content and accuracy of a person's statement that he or she prefers one party or the other, the First Amendment does not allow – never mind require – such censorship or prior restraint. The first part of Initiative 872 – namely, its allowing candidates to state the political party they *prefer* on the ballot – accordingly does not violate the First Amendment.

C. A Ballot's Stating The Political Party A Person *Prefers* Does Not Make That Person The "Nominee" Of That Political Party.

The Initiative's top two system is exactly that. A top two system. It has a September primary to select the two most popular candidates, and then a November runoff between the top two vote-getters. Nothing in the Initiative's text provides that its top two system instead selects the candidates or nominees for a political party.

1. The text of Initiative 872 does not say that its top two system nominates the *political parties'* candidates.

The plaintiff political parties assert that under Initiative 872, the September primary selects ***their*** candidate for public office – ***their*** nominee, ***their*** standard-bearer, ***their*** representative on the November ballot. Their briefing below

made that assertion repeatedly. Over and over again. As if frequently repeating it would actually make it true.[14]

But assertions in a brief are not proof.[15] And the actual evidence in this case proved the exact opposite. While Initiative 872 was in effect, the plaintiff Republican Party and plaintiff Democratic Party both held party-nominating conventions to select ***their*** candidates, ***their*** nominees, ***their*** standard-bearers, ***their*** representatives for the 2005 ballot.[16]

More importantly, however, this is a *facial* challenge to Initiative 872. And the face of that Initiative – its text – does not say that the September primary selects the candidate or nominee for a political party.

The text of Initiative 872 expressly states that a candidate's disclosure of the party he or she prefers is exactly that: a disclosure by the candidate of the party the candidate prefers.

Initiative 872 does not say that disclosure is a statement by the party of the candidate the party prefers, endorses, or nominates.

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[14] *This drumbeat-of-repetition approach is consistent with the old "Big Lie" propaganda tactic that was based on the theory that if you repeat a falsehood often enough, people will eventually begin to think that it must be the truth. See, e.g., Semon, Thomas T., The Record (Feb. 21, 1995) at p. C6. Accord, Loi, Jean, The Louisville Courier-Journal (Dec. 16, 1996) at p. 10A ("'Tell a lie often enough and big enough' [he] boasted, 'and most people will believe it'"); see also Green, Jonathan Routledge, Dictionary Of Jargon (1987) at p. 54.*

[15] *See, e.g., In Re Hanford, 894 F. Supp. 1436, 1442 (E.D.Wash. 1995) (assertions in legal memoranda are not summary judgment evidence); British Airways Board v. The Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978) (same).*

[16] *Grange's ER at 33-36, 39, 41-43, 46 (W.D.Wash. Doc. No. 69, Exhibits N-Q).*

Nor does Initiative 872 say the top two vote-getters in the September primary become the candidates of the parties which those two people said they preferred.

Cases involving statutory schemes where the ballot effectively identified the person as being a candidate of the party accordingly do not apply. For example:

- *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502, 569-70 (2000), arose under California's prior law, where the party name on the ballot identified the party of which the candidate would be "the nominee ... at the ensuing general election". Cal. Elec.Code Ann. §15451 (West 1996).
- *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), arose under Washington's prior law, where the party name on the ballot determined whether the candidate was running for that party's spot on the November ballot. Wash. Rev. Code §29.30.095 (pre-2003 version).
- *Tashjian v. Republican Party*, 479 U.S. 208, 220-21 (1986), arose in Connecticut where a candidate's name being on a particular party's primary ballot confirmed that that candidate had received at least 20% of the vote at that political party's convention – a convention which only party members could attend.
- *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), arose in Ohio where the party name on the ballot identifies "the name of the political party by which the candidate was nominated or certified". Ohio Rev. Code §3505.03.

The text of Initiative 872 is different.

Initiative 872 expressly provides that if a party name is noted on the ballot, that notation identifies the party (if any) that the candidate prefers – not the candidate (if any) that the party prefers, endorses, nominates, or selects. Initiative §7(3) & §4. As plaintiffs acknowledged below, under Initiative 872 "the party designation is to inform voters which party the candidate identifies with"[17] –

[17] *Grange's ER at 3:18-19 (W.D.Wash. Doc. No. 49) (emphasis added).*

not identify which candidate the party identifies with or selected as its nominee, standard-bearer, or representative.

Since Initiative 872 changed the State's September primary to be a contest to select the top two vote-getters for a November runoff regardless of political party or partisanship, Washington's chief elections officer (Secretary of State Sam Reed) promulgated a new WAC regulation concerning that fundamental change in Washington election law. Issued pursuant to his authority as the State's chief elections officer responsible for overseeing and implementing Washington's elections laws, this regulation concerning the Initiative's implementation provided:

> NEW SECTION
>
> **WAC 434-262-012 Partisan Primaries.** Pursuant to [Initiative 872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. The candidates also must receive at least one percent of the total votes case for that office at the primary in order to advance to the general election.
>
> Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter. Voters at the primary election are not choosing a political party's nominees.

WAC 434-262-012 (2005 version before district court invalidated the Initiative).

In short, while plaintiffs repeatedly assert that Initiative 872's top two system nominates the ***their*** candidates, that is not what Initiative 872 says.

2. The "major political party candidate" provision in the superceded Montana statute does not change the language of Initiative 872.

Since the language of Initiative 872 does not provide that its top two system nominates the ***political parties'*** candidates for public office, plaintiffs below turned to the language in Wash. Rev. Code §29A.52.116 that states "major political party candidates ... must be nominated at primaries held under this chapter."

But that language was from the Montana system statute. And as plaintiffs' own briefing below confirmed, "Initiative 872 is a replacement primary system."[18]

The fact that Initiative 872 replaced the prior Montana system is important because, as explained earlier, nominating ***the parties'*** candidates is precisely what the text of Initiative 872 does not do. Washington law accordingly holds that any language to the contrary in the prior Montana system was superceded when Initiative 872 established the new top two system in its place.

Indeed, Washington law so holds for at least three separate reasons:

First, Washington law provides that when two bills are passed in the same legislative session amending the same law, the bill that is enacted last will control if they cannot be harmonized. Wash. Rev. Code §1.12.025.

Pursuant to its legislative authority under Article II of the State Constitution, the Legislature in March 2004 enacted a statute to replace the existing system with a Montana party-nominating primary. But then pursuant to that same legislative authority under Article II of the State Constitution, the People in November 2004 enacted an Initiative to replace the existing system with a top two winnowing

[18] *Grange's ER at 189:5 (W.D.Wash. Doc. No. 55) (emphasis added).*

primary. Since the March party-nominating law (Montana statute) is inconsistent with the November top two winnowing law (Initiative 872), Washington law holds that the subsequently enacted Initiative superceded the Montana statute that the political parties now cite.

Second, Washington law holds that the People's right to enact State laws by initiative or referendum may not be frustrated by legislation passed after a ballot measure is filed but before it is voted upon. E.g., *CFRG v. City of Spokane*, 662 P.2d 845, 852 (Wash. 1983).

Here, the Montana statute provisions cited by plaintiffs were enacted after the January 2004 filing of Initiative 872. Those Montana statute provisions are therefore null and void because they are inconsistent with the Initiative's express provisions and intent to establish a September winnowing primary that is not a party nominating primary.

Third, Washington law holds that a new enactment is a "complete act" if it stands alone as the law on the particular subject it concerns. *ATU v. State*, 11 P.3d 762, 800-01 (Wash. 2000) (also explaining at page 253 that prior case law setting forth a two-prong "complete act" test is no longer applicable).

Washington law further holds that a complete act impliedly repeals and supercedes prior acts on the same subject. *ATU*, 11 P.3d at 803, accord *State v. Thorne*, 921 P.2d 514, 522-23 (Wash. 1996) (since Washington's Three-Strikes-You're-Out Initiative was a complete act, it impliedly superceded previously existing criminal statutes that provided for lower "maximum" sentences for the

crimes specified in those prior statutes); *Washington Federation of State Employees v. OFM*, 849 P.2d 1201 (Wash. 1993).

Here, Initiative 872 was a complete act with respect to the top two system it enacted, and thereby superceded the Montana enactments on the books when that Initiative was passed. As noted before, plaintiffs' own briefing below confirms this point that "Initiative 872 is a replacement primary system."

Indeed, plaintiffs' own conduct after the enactment of Initiative 872 confirms that the Initiative superceded the Montana statute's provision that "major political party candidates ... must be nominated at primaries held under this chapter" (Wash. Rev. Code §29A.52.116) – for the Republican Party nominated ***its*** 2005 candidates at a party convention (rather than primary) on June 11, 2005, and the Democratic Party nominated ***its*** 2005 candidates at a party convention (rather than primary) on June 28, 2005.[19]

In short, the Montana statute provisions plaintiffs cite do not – cannot – change the text of Initiative 872 because those Montana provisions were superceded by the top two winnowing primary that the Initiative established in the Montana system's place.

3. The sponsor's statements do not change the text of Initiative 872 to say its top two system nominates the *political parties'* candidates.

Since the text of Initiative 872 does not say its top two system nominates the ***political parties'*** candidates for public office, plaintiffs below suggested that the

[19] *Grange's ER at 33-37, 39, 41-43, 46 (W.D.Wash. Doc. No. 69, Exhibits N-Q).*

federal courts should effectively insert such language into the Initiative because the Initiative's sponsor acknowledged that under a top two system "parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters."[20]

But that's the truth about all elections. If you want to win, you have to appeal to and receive the voters' support. The plaintiff political parties' complaint about Initiative 872 is really a complaint about democracy – hardly a complaint that renders Initiative 872 unconstitutional.

Thus, even if Washington law allowed a sponsor's statement to change the text of an Initiative (it does not), the sponsor's above acknowledgment about the effect of free elections in a democracy would not convert the top two winnowing primary established by Initiative 872 into a party-nominating primary instead.

The political parties also argued below that the federal courts should read the text of Initiative 872 to be the same as the old blanket primary's party-nominating system because the Initiative's sponsor stated the Initiative restored the kind of choice that voters enjoyed in the blanket primary – i.e., allowing all voters to vote for whichever of the filed candidates they thought most qualified in a September primary.

But the result of that September primary is different under Initiative 872. The result is not the selection of any particular party's nominee for the November

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[20] *Grange's ER at 5:17-19 (W.D.Wash. Doc. No. 49); see generally id. at 5:14-8:3.*

ballot. Instead, the result is the winnowing down of the field of all declared candidates to the two most popular candidates – regardless of party nomination, party endorsement, or even party opposition.

As plaintiffs' own briefing below pointed out, voters were informed that Initiative 872 was "specifically drafted ... to conform to the Supreme Court's description of a 'nonpartisan blanket primary' and that the Initiative does not violate the Party's First Amendment rights because the voters are not selecting the political party nominees".[21]

That difference in result – which plaintiffs confirm was explained to the voters before they enacted Initiative 872 into law – is a constitutionally crucial difference under the Supreme Court's holding in *Jones*.

More specifically, the *Jones* Court described two aspects of a constitutionally valid 'nonpartisan blanket primary' – explaining the first aspect as follows:

> 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 requirement for independent candidates.

Jones, 530 U.S. at 585-86 (emphasis added).

The new election system established by Initiative 872 satisfies this first aspect, with the State-determined qualifications required for a candidate to have a place on the primary ballot readily listed in the new Declaration Of Candidacy. WAC 434-215-012. (Even though the political parties have made arguments

[21] *Grange's ER at 4:22-25 (W.D.Wash. Doc. No. 49).*

suggesting that the Supreme Court majority made a mistake and meant to say "must" instead of "may", that is not what the Supreme Court said. Nor would this Court's changing the Supreme Court's "may" to "must" change the fact that Initiative 872 is a permissible top two system under *Jones*.)

The Supreme Court then described the second aspect of a constitutionally valid 'nonpartisan blanket primary' as follows:

> 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.

Jones, 530 U.S. at 585-86 (emphasis added).

The election system established by Initiative 872 satisfies this second aspect of a constitutionally valid primary as well, for it allows every voter the choice to vote for any candidate on the September ballot, and the top two vote-getters then move on to the general election in November – regardless of partisanship.

In short, plaintiffs' invocation of the Initiative sponsor's statements does not prove this Initiative unconstitutional. Instead, the opposite is true. The explanation to voters that Initiative 872 was drafted to conform to the Supreme Court's holding in *Jones* only confirms that the Appellants' interpretation of this Initiative's text is correct. Consistent with *Jones*, Initiative 872 gives voters the same type of free choice they had with the old blanket primary, but changed the September primary's result to be different: the selection of the ***two most popular*** candidates for a November runoff instead of the selection of the ***political parties'***

candidates for a multi-candidate November election. And pursuant to *Jones*, that difference in result is "the constitutionally crucial one: Primary voters are not choosing ***a party's*** nominee." *Jones*, 530 U.S. at 585-86.

4. Issue 2 Conclusion: the top two part of Initiative 872 does not violate the First Amendment.

The text of Initiative 872 does not say that its top two system nominates a ***political party's*** candidate for public office.

Unlike the election statutes in *Jones* and *Reed* which made the candidate who prevailed in the September primary the political party's nominee on the November ballot, the top two system under Initiative 872 does not do that. And plaintiffs' various arguments do not justify the federal courts changing this State Initiative's text to say otherwise.

The nonpartisan result of the primary system established by Initiative 872 is the constitutionally crucial point in this case. And that nonpartisan result renders the Initiative's top two system constitutional under our Supreme Court's decision in *Jones*. The second part of Initiative 872 – namely, its top two system with a winnowing primary in September – accordingly does not violate the First Amendment either.

D. The Part Of Initiative 872 Which Allows The Ballot To State The Political Party A Person *Prefers* Can Be Severed If Necessary To Preserve The Initiative's Underlying Top Two System.

The Initiative's allowing a person running for office to disclose on the ballot the political party he or she prefers is at the heart of the plaintiff political parties' First Amendment arguments in this case. Eliminate that preference statement on

the ballot, and you eliminate the premise for the plaintiffs' First Amendment claims.

As the previous sections of this Brief explain, that preference statement on the ballot does not render Initiative 872 unconstitutional. But if this Court were to disagree, it should sever and invalidate just that preference statement part of the Initiative instead of nullifying the entire top two system enacted into law by the voters.

The severability of a State statute presents a question of State law. *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (finding portion of primary statute unconstitutional but remanding for severance analysis under Arizona State law standards); *Love v. Foster*, 147 F.3d 383, 385-86 (5th Cir. 1998) (applying Louisiana State severance standards to preserve remainder of top two election statute after a part of that statute had been invalidated).

And as plaintiffs acknowledged below, Washington State law holds that "in ordinary circumstances only the specific part of an enactment that is unconstitutional will be invalidated."[22]

Washington law holds that if part of a statute is unconstitutional, "only the part of [the] enactment that is constitutionally infirm will be invalidated, leaving the rest intact." *Guard v. Jackson*, 333 P.2d 544, 548 (Wash.App. 1996) (severing part of statute that violated due process rights and upholding the remainder of the statute), aff'd, 940 P.2d 642 (Wash. 1997); cf. the parallel federal law, e.g., *U.S. v.*

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[22] *Grange's ER at 9:20-21 (W.D.Wash. Doc. No. 49).*

Booker, 125 S.Ct. 738, 764, 160 L.Ed.2d 621 (2005) (courts "must refrain from invalidating more of the statute than is necessary. Indeed, [courts] must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute") (internal quotation marks & citations omitted).

Washington law also confirms that "a severability clause is not necessary in order to meet the severability test." *In re Parentage of CAMA*, 109 P.3d 405, 414 (Wash. 2005).

Washington law accordingly does not strike down a Washington statute in its entirety "unless ... it cannot reasonably be believed that the legislative body would have passed one [part] without the other, or unless the elimination of the invalid part would render the remaining part useless to accomplish the legislative purpose." *McGowan v. State*, 60 P.3d 67, 75 (Wash. 2002) (severing the unconstitutional portion of §2(1)(d) in Initiative 732, but upholding the remaining parts of that Initiative).

Washington law further holds that the legislative declaration of intent in the statute at issue can save a statute with unconstitutional provisions from being struck down in its entirety – for if the valid parts of the statute can still fulfill a declared intent, then the statute is severable and only the invalid parts will be stricken. *McGowan*, 60 P.3d at 76 (relying on Initiative's intent section to determine that unconstitutional portion of Initiative 732 could be severed).

Here, Sections 1 & 2 of Initiative 872 express the Initiative's intent. Those Sections declare an intent to allow each voter to choose from among all declared candidates in the September primary in order to winnow the list of candidates on the November ballot down to two, while maintaining the right of each voter to keep his or her personal politics absolutely secret.

That underlying purpose of the Initiative's top two system is served regardless of whether or not this Court strikes down the part of the Initiative that allows candidates to disclose the political party (if any) they prefer. Thus, if this Court were to agree with plaintiffs' argument that it is unconstitutional for Initiative 872 to allow a candidate to state on the ballot that he or she has a preference for a particular political party, then the governing severance principles of Washington law would require this Court to sever and invalidate only that preference statement part of Initiative 872 – not strike down the Initiative's enactment of a top two system in its entirety.

E. The Fact That Top Two Election Systems, By Definition, Limit The *November* Ballot To *Two* Candidates Does Not Render Them Unconstitutional.

No citizen, no private corporation, no public interest organization, no political action committee, and no political party has a constitutional "right" to have the name of the person it likes printed on a State's ***November*** election ballot.

As explained earlier, the text of Initiative 872 established a two-stage public election process. The public election's first stage is a September winnowing primary that allows all candidates who filed a declaration of candidacy in July to

appear on the ballot. And the election's second stage is a November runoff between the top two vote-getters for each public office – regardless of partisanship. As the plaintiff Republican Party's lead counsel in this case has candidly explained this public process, Initiative 872 "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage."[23]

This two-stage public election process allows all political parties to have any candidate they like printed on the ***September*** ballot – thereby providing all political parties full access to the electorate in Washington's public election process. That unfettered access to the September ballot is dispositive because, as the minor political party in this case (the Libertarian Party) acknowledged below, access to a public ballot is the key to their additional constitutional complaint:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Grange's ER at 15:16-19 (W.D. Wash. Doc. No. 52) (quoting *Williams v. Rhodes*, 393 U.S. 23 (1968)).

The top two winnowing process established by Initiative 872 does not keep any party or candidate "off the election ballot" that is available to all Washington voters in September. It does not deny any party or candidate an "equal opportunity to win votes" in that open public election. And it does not restrict voters to casting

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[23] *Grange's ER at 31 (W.D.Wash. Doc. No. 69, Exhibit L).*

a vote for only a subset of candidates in that public September election while excluded candidates are "clamoring for a place on the ballot." Initiative 872 accordingly fulfills the underlying purpose of allowing candidates of all stripes access to an open, public ballot. See also, e.g., *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-24, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (primary elections and general elections are alike in that "In both instances, the election campaign is a means of disseminating ideas as well as attaining political office"); *Dart v. Brown*, 717 F.2d 1491, 1510 (5th Cir. 1983) (Libertarian party not entitled to listing by name even on the first-stage primary ballot in Louisiana's top two system because candidates who happen to be Libertarians can place themselves on that first-stage primary ballot – that placement on the first-stage ballot grants the Libertarian Party sufficient ballot access).

Nor is it logical to read the Constitution to guarantee a particular party or organization a place on the second stage ballot in an open two-stage election process such as the top two system established by Initiative 872 – for such a reading would render all runoff elections *per se* unconstitutional by virtue of the fact that top two runoffs are all, by definition, limited to the top two vote-getters.

The Appellant Grange appreciates that the plaintiff political parties think they are very important. But the First Amendment does not grant the plaintiff Republican Party, the plaintiff Democratic Party, the plaintiff Libertarian Party, or

any other organization a constitutional "right" to have the name of the person that party or organization likes printed on a State's ***November*** election ballot.

The text of Initiative 872 establishes a two-stage election with a 'winnowing' primary under which all candidates who filed in July appear on the September ballot in the first stage, followed by a November runoff between the top two voter-getters in the second stage. The plaintiff political parties' ballot access arguments simply do not establish a constitutional "right" to be one of the top two candidates chosen by the voters in that completely open second stage.

VIII. CONCLUSION

This is a *facial* challenge to the constitutionality of Initiative 872.

But the face of that Initiative – its text – is constitutional.

The text of the Initiative allows a person running for office to state on the ballot the political party he or she prefers. That does not violate the First Amendment. To the contrary, such political speech is protected by the First Amendment.

The text of the Initiative establishes a top two election system with a September primary to select the two most popular candidates for a November runoff – regardless of partisanship. That does not establish an unconstitutional party-nominating primary like the ones invalidated in *Reed* and *Jones*. To the contrary, the nonpartisan result of the September primary's top two selection confirms that this Initiative provides the type of system the United States Supreme Court described as being constitutional in *Jones*.

Moreover, if allowing the ballot to state a candidate's personal party preference does violate the First Amendment, governing severance law would require that this Court only invalidate the preference statement part of this Initiative – not the Initiative's entire top two system as a whole.

And finally, this Initiative's establishing an entirely open, two-stage public election process does not unconstitutionally squelch ballot access. To the contrary, its creation of an entirely open ballot in September promotes wider ballot access to the electorate as a whole in the election of Washington's public officials.

This Court should accordingly reverse the district court and dismiss plaintiffs' constitutional challenge to Initiative 872 as a pure matter of law. And as explained in Appellants' July 29 Motion To Expedite, this Court should issue its decision promptly so, if that decision is anything less than a reversal and dismissal of plaintiffs' case, the Washington State Legislature can enact legislation consistent with this Court's decision in time for the upcoming 2006 election cycle (such enactment would require the Legislature to draft legislation before the February 4, 2006 bill cutoff date for the upcoming 2006 legislative session).

RESPECTFULLY SUBMITTED this 16th day of September, 2005.

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STATEMENT OF RELATED CASES

The co-defendant State of Washington (on behalf of itself, Secretary of State, Attorney General, and County Auditors) also filed an appeal from the district court's injunction orders, which was assigned 9th Circuit case no. 05-35780.

DATED this 16th day of September, 2005.

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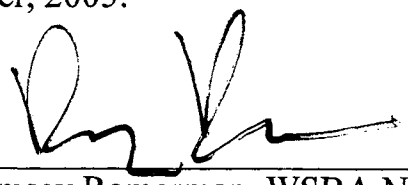
CERTIFICATE OF COMPLIANCE WITH FRAP 32(A) AND CIRCUIT RULES 28-4 AND 32-1

I certify that the attached brief complies with the type-volume limitations in that it is proportionally spaced, has a typeface of 14 points and contains 10,716 words.

DATED this 16th day of September, 2005.



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