NO. 06-713 and NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,

Petitioner,

-and-

STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY OF WASHINGTON STATE GRANGE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

There is one difference between the top-two election system enacted by Washington and the one authorized by this Court in *Jones*. Washington allows a candidate to disclose on the ballot the name of the party he or she personally prefers.

The Ninth Circuit held this violates the First Amendment. That raises a fundamental question: Does the First Amendment prohibit a State from allowing a candidate to disclose on the ballot the name of the party he or she personally prefers?

The five opposition briefs in these two cases (#06-713 and #06-730) argue this Court should not review that question. This Reply briefly responds to the eight points raised in those briefs.

1. Party's right to select ***its*** candidate.

The opposition briefs' first point is that each political party has the right to select ***its*** candidate or nominee.

Although that point is true, it is irrelevant to whether this Court should review the Ninth Circuit's ruling – for Washington's statute does not say the primary selects a ***political party's*** candidate or nominee for the November election. Instead, it says the primary selects the two ***most popular*** candidates for a November runoff, regardless of partisanship or party.

Washington's Administrative Code accordingly confirms that Washington's top-two 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. .... ***Voters at the primary election are <u>not</u> choosing a political party's nominees.***" WAC 434-262-012 (2005 version before the district court invalidated the top-two statute; emphasis added) [App. 140a].

The opposition briefing notes that <u>other</u> Washington statutes use the term "nominee" and "candidate of" a political party.[1] But that different language only confirms that the top-two statute's use of the term candidate "preference" is different from party "candidate" or "nominee".[2]

Unlike the election statutes in *Jones*, *Reed*, and the other cases cited in the opposition briefs, Washington's top-two statute says nothing at all about persons on the primary ballot being the "candidate of" a political party, or the State's September primary selecting a political party's "nominee" for the November ballot. Washington's statute therefore left each political party free to hold a convention of its own to select ***its*** party nominee. App. 22a-23a at n.17. And that is exactly what the

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[1] Republican Party's opposition (#06-730) at pp. 1-2 (quoting Wash. Rev. Code §29A.04.086).

[2] E.g., *State v. Enstone*, 974 P.2d 828, 830 (Wash. 1999) (it is an "elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent"); *Orient Foundation v. Coleman*, 60 P.3d 595, 598-99 (Wash.App. 2002) (same).

Washington Republican Party and Washington Democratic Party did while Washington's top-two statute was in effect.[3]

In short, the fact that a political party has a right to select ***its*** candidate or nominee has no bearing on whether this Court should review the Ninth Circuit's ruling that the First Amendment prohibits a State from allowing a candidate to disclose on the ballot the name of the party he or she personally prefers.

2. Party's right to dictate its "membership".

The opposition briefs' second point is that each political party has the right to exclude people it doesn't like from party membership.

Although that point is true, it is irrelevant to whether this Court should review the Ninth Circuit's holding in this case – for Washington's top-two statute does not say that a candidate can self-designate his or her party ***membership*** on the ballot. Indeed, the text of Washington's top-two statute says nothing about party ***membership*** at all.[4]

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[3] Ct. App. Grange ER at 33-36, 39, 41-41, 46.

[4] The three political parties in this case have accordingly established their own membership rules – e.g., granting membership to anyone who signs a statement saying he or she is a member, or granting membership to anyone who writes the party a check. Ct. App. Grange Supp. ER at 154:1-5, 155:14-16, 134-136, 137, 132, evidence summarized at 151:6-8 & nn. 42-43. And consistent with those membership criteria, the political parties in this case do not limit their membership to persons who share the party's political positions. For example, both the Washington Republican Party and Washington Democratic Party openly accept as members of their legislative caucuses

Instead, Washington's top-two statute states that a candidate can designate his or her personal ***preference*** on the ballot. Initiative §7(3) [App. 119a-120a].

The opposition briefing notes that other Washington statutes use the term "member" of a political party.[5] But that different language only confirms that the top-two statute's use of the term candidate "preference" is different from the term party "member".[6]

Unlike the State statutes in decisions such as the two *Duke* cases[7] cited in the opposition briefs, Washington's statute is not a State mandated nomination procedure for State party members. And unlike the *Fowler* case[8] cited by the opposition briefs, the Washington statute in this case does not select delegates for any party members' nominating convention.

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elected officials who oppose the abortion position in their respective State Party platforms. Ct. App. Grange Supp. ER at 119, 123, 139-143, 146, 148, evidence summarized at 151:9-14 & nn. 444-45. Washington's top-two statute does not prevent the political parties from changing their membership criteria to instead be based on political positions instead of cash donations. Moreover, the opposition briefs' complaint that under a top-two system "parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters" is a fundamental fact of democracy – not a point of unconstitutionality.

[5] Republican Party opposition (#06-730) at pp. 2 & 7 (citing Wash. Rev. Code §42.17.020(10)).

[6] Supra note 2 (citing *Enstone* and *Orient Foundation*).

[7] *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992); *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996).

[8] *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir 1998).

The privately sponsored parade in the *Hurley* case[9] cited by the opposition briefs similarly has no application here – for under Washington's top-two statute, the September primary is no longer the political parties' parade. No case holds that an entity which is not the parade sponsor (e.g., the Democratic Party) can commandeer and dictate rules for the entity which is the sponsor (e.g., the State).

In short, the fact that a political party has a right to exclude people it doesn't like from party ***membership*** has no bearing on whether this Court should review the Ninth Circuit's holding that the First Amendment prohibits a State from allowing a candidate to disclose on the ballot the name of the party he or she personally ***prefers***.

3. Party names in the "nonpartisan" primary authorized by *Jones*.

The Democratic Party's opposition initially argues that the "nonpartisan" primary authorized by *Jones* does not allow any party names on the primary ballot. But the "nonpartisan" term used in *Jones* refers to the nonpartisan result of the primary – i.e., the top two vote getters advance regardless of party partisanship. Indeed, *Jones* expressly noted the possibility of allowing party names on that "nonpartisan" primary ballot. 530 U.S. at 585-86 (party name can show nomination by a party).

The Democratic Party next argues that *Jones* narrowly authorized only two specific types of primaries: (1) those where no party is mentioned,

[9] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).

and (2) those where a party is mentioned only for candidates designated by a party as its nominee. This is the only-two-options reading advanced by the *Jones* dissent. It was expressly rejected by the *Jones* majority, which explained that States instead have broad flexibility to craft top-two systems as long as they have the nonpartisan result of selecting the top two vote getters overall regardless of partisan political party.

Washington's top-two statute does exactly that. The oppositions' third point therefore supports review – for the Ninth Circuit effectively held that despite the broad flexibility *Jones* granted to the States to craft top-two primaries, States are nonetheless forbidden from allowing a candidate in such a primary to disclose on the ballot the name of the party he or she personally prefers.

4. Party's ballot access.

The opposition briefs' fourth point is that a top-two system strips away a political party's "right" to have its nominees printed on the ballot. But the *Timmons* case[10] frequently cited in those briefs rebuts this claim – for *Timmons* confirms that States are not required to allow a political party to identify on the ballot the person which that party has selected as its nominee.

Moreover, the ballot access case law they cite concerned statutes where the November ballot was the only ballot to which all voters had access. Those "November access" cases do not apply here because

[10] *Timmons v. Twin City Area New Party*, 520 U.S. 351 (1997).

all voters have unfettered access to the September ballot under Washington's top-two statute, and there is no restriction (5%, 15%, or otherwise) on a candidate's access to being listed on that freely available ballot.

The only other case law they cite concerned a State statute that declared federal candidates with more than 50% of the primary vote the winner in September instead of waiting for the November federal election date.[11] That does not occur under Washington's top-two system.[12]

5. Candidate's free speech.

The fifth point made by the opposition briefing is that this Court's ruling in *Timmons* prohibits speech on the ballot.

But that is not what *Timmons* held. That case held our Constitution does not ***require*** a State to let a political party use the ballot to tell voters the name of the candidate that party selected as its nominee. That does not mean our Constitution ***prohibits*** a State from letting a candidate use the ballot to tell voters the name of the party he or she personally prefers. The oppositions' fifth point accordingly does not negate the propriety of reviewing the Ninth Circuit's decision that the First Amendment prohibits a State from allowing candidates to disclose

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[11] *Foster v. Love*, 522 U.S. 67, 70, 74 (1997).

[12] Initiative §6 [App. 118a-119a] (top two in the primary advance to the general election – with no exception for candidate who receives a majority in the primary). Washington's general election date is the same as the federal November date. Compare 2 U.S.C. §7 & §1 with Wash. Rev. Code §29A.04.321(1).

the name of the party they personally prefer on the ballot.

6. Ninth Circuit's re-writing Washington's statute (Separation of Powers).

The opposition briefs argue that courts can strike down statutes that violate the Constitution. Although that is true, it misses the separation of powers point made in the Grange's Petition.

The Ninth Circuit read Washington's statute to have the same party "candidate", "nominee", and "member" language as the statutes in cases such as *Jones*, *Reed*, and *Duke*. But Washington's statute does not have that language. It expressly states instead that the party name on a ballot is a statement by the individual candidate of his or her personal preference. The Ninth Circuit violated bedrock separation of powers principles by re-writing the Washington statute's reference to an individual candidate's personal "preference" to instead say a political party's "candidate", "nominee", or "member".

7. Ninth Circuit's using ***other*** States to limit Washington State (Federalism).

The opposition briefs assert that the federal government can force States to obey the Constitution. Although that is true, it misses the federalism point made in the Grange's Petition.

Our federal system allows States great flexibility to operate as laboratories for experiment and change. States are also free to draft new statutes to cure a prior statute's constitutional

defects.[13] Here, the State of Washington eliminated the party "candidate", "nominee", and "member" provisions in other States' election statutes, and adopted a different type of top-two statute for its citizens. The Ninth Circuit, however, based its decision on cases addressing those other States' statutes. It is that use of what other States have done to prohibit the State of Washington from doing anything different that violated the freedom our federal system grants to each State.

8. Ninth Circuit decision's significance.

The opposition briefs do not dispute that the Ninth Circuit's decision prohibiting a candidate from telling voters the party he or she personally prefers on the ballot gags the 20% of our nation that lives within the Ninth Circuit's dominion. Instead, they argue that decision is insignificant because only Washington has experimented with a top-two system different from that in other States, and that the Montana system used in 12 States was not expressly ruled upon by the Ninth Circuit.

But the political parties' own opposition briefs refute their "insignificance" claim. They insist that Washington's top-two system is unconstitutional because it "forc[es] the Party ... to accept a

[13] E.g., *Information Providers Coalition v. FCC*, 928 F.2d 866, 871 (9th Cir. 1991) (upholding dial-a-porn statute drafted in response to prior version's invalidation); *U.S. v. Dorsey*, 418 F.3d 1038, 1045 (9th Cir. 2005) (upholding school-zone-gun statute drafted in response to prior version's invalidation); *Bown v. Gwinnett County School District*, 112 F.3d 1464, 1470 (11th Cir. 1997) (upholding minute-of-silence statute drafted to say "quiet reflection" after invalidation of prior version saying "silent prayer or meditation").

candidate's self-designation",[14] and that such self-designation also renders the Montana system currently used by 12 States unconstitutional.[15]

CONCLUSION

The points raised in the political parties' five opposition briefs do not refute the fact that the Ninth Circuit's decision (1) contradicts this Court's ruling in *Jones*, (2) inverts the First Amendment to gag rather than protect political free speech, (3) overrides the two bedrock State sovereignty protections of separation of powers and federalism, and (4) has immediate impact not simply on the 59 million Americans living within the Ninth Circuit, but on the twelve States that employ the self-designation "Montana" primary system as well. The Ninth Circuit's decision should accordingly be reviewed and corrected by this Court.

RESPECTFULLY SUBMITTED.

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[14] Republican Party's opposition (#06-713) at p. 2, see also Democratic Party's opposition (#06-730) at pp. 5-7.

[15] Democratic Party's opposition (#06-713) at p.6 & n.5.