CA No. 05-35774
related appeal: CA No. 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 GRANGE'S REPLY BRIEF

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ABBREVIATIONS USED IN THIS REPLY

For the sake of consistency, the Grange's Reply Brief uses the same abbreviations used by the State's Reply Brief when referring to the parties' briefs in this case – namely:

Abbreviation	***Pleading Cited***
"Dem.Resp./Grange"	*Democratic Party's Response to the Grange's Opening Brief*
"Dem.Resp./State"	*Democratic Party's Response to the State's Opening Brief*
"Grange.Supp. ER"	*Grange's Supplemental Excerpt of Record filed with its Reply Brief*
"Grange's Brief"	*Grange's Opening Brief*
"Grange's ER"	*Grange's original Excerpt of Record filed with its Opening Brief*
"Grange's Reply"	*Grange's Reply Brief*
"Lib.Resp."	*Libertarian Party's Response to the Grange's & State's Opening Briefs*
"Rep.Resp./Grange"	*Republican Party's Response to the Grange's Opening Brief*
"Rep.Resp./State"	*Republican Party's Response to the State's Opening Brief*
"State's Brief"	*State's Opening Brief*
"State's Reply"	*State's Reply Brief*

I. SUMMARY OF GRANGE'S REPLY

The plaintiff Republican Party's Brief is right: "No state has a primary system similar to Washington's." Rep.Resp./Grange, p.15:9.

And that simple fact is why the cases and arguments upon which the political parties' rely do not apply to Washington's top-two system.

The political parties' five briefs present three types of arguments against most "top-two" systems in general:

First, they argue that limiting the November ballot to the top two vote-getters unconstitutionally limits candidates' access to the electorate – citing cases that invalidated statutes when the November ballot was the only ballot to which all voters had access. But those "November access" cases do not apply because, under Initiative 872, all voters have unfettered access to the September ballot – and there is no access restriction (5%, 15%, 33%, or otherwise) on a candidate's running on that freely available ballot. The political parties' briefs simply do not refute the Grange's showing that no person or organization has a constitutional right to be on a November (as opposed to September) ballot.

Second, the Republican Party argues that the Initiative's top-two system violates the equal protection clause because it grants minor parties special benefits not given to major parties. But the provisions it cites for those benefits are in the prior Montana statute – not Initiative 872. The Republican Party does not refute the Grange's showing that those Montana system provisions were superceded when a top-two system was enacted in its place.

Third, the Libertarian Party argues that the Initiative's top-two system violates constitutional provisions relating to congressional elections – citing case law from a State that declared candidates with more than 50% of the vote in September the winner. But that does not occur under Washington's top-two system. Instead, a candidate receiving more than 50% of the vote in September has to run against the runner-up in November – and the final winner is the one who receives the most votes in that November election.

The political parties' principle challenge is to a specific piece of Initiative 872 – namely, the piece allowing candidates to state their personal party "preference" on the ballot. But the three types of arguments they make fail as a matter of law:

First, they argue that political parties have a First Amendment right to exclude people they don't like from party membership.

That is true. And that is what the cases they cite hold.

But Initiative 872 does not say a can candidate designate his or her party membership on the ballot. Instead, its says a candidate can designate his or her party preference on the ballot. None of the political parties' briefs provide any legal authority to refute the Grange's showing that the federal courts cannot re-write "preference" to now say "membership" instead.

Second, they argue that political parties have a First Amendment right to select their own party's candidate.

That is true. And that is what the cases they cite hold.

But Initiative 872 does not say the September primary selects the political parties' candidates for November. That is why, when the Initiative was in effect last June, the Republican Party and Democratic Party both conducted nominating conventions to nominate their candidates for the 2006 election.

Under Initiative 872, the September primary selects the two most popular candidates for a November runoff. None of the political parties' briefs provide any legal authority to refute the Grange's showing that the federal courts cannot re-write this Initiative to say the primary selects the political parties' candidates for November instead.

Third, the political parties argue that if the First Amendment prohibits candidates from stating their political party "preference" on a ballot, then the entire top-two system enacted by Initiative 872 must be invalidated.

But the piece of the Initiative allowing candidates to disclose their personal party preference on the ballot is exactly that. A piece. And that piece's preference statement being or not being on the ballot does not change the underlying purpose of this Initiative – which, to quote the plaintiff Republican Party's lead counsel, was to "enact[] 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] The political parties' briefs do not refute the Grange's showing that if it is unconstitutional to allow a candidate to state his or her personal party "preference" on a ballot, then

[1] *Grange's ER at 31.*

the piece of this Initiative that allows that statement on the ballot should be severed in order to preserve the constitutionality of the Initiative's underlying top-two election system as a whole.

II. CONSTITUTIONALITY OF A "TOP-TWO" SYSTEM

A. Limiting The November Runoff To The Top Two Vote-getters Is Not An Unconstitutional Limitation On Ballot Access.

The political parties argue that candidates should have access to the electorate at large, and that limiting the November ballot to only the top two vote-getters is therefore an unconstitutional restriction on the other candidates.

But Washington's top-two statute grants all candidates for office unrestricted access to the ballot made available to all voters in the election's ***September*** stage – thereby providing all political parties full access to the electorate in Washington's public election process. None of the political parties' cases hold that our constitution requires that this access to the electorate be in the month of ***November*** instead. Grange's Brief, p.39-42.

B. Initiative 872's Top-Two System Does Not Grant Minor Parties Special Benefits.

The Republican Party argues that the Initiative's top-two system violates the equal protection clause because it grants minor parties special benefits.

But the Initiative does not treat the major and minor parties differently.

Instead, the minor party benefits cited by the Republican Party are in statutes other than Initiative 872. The Republican Party's two briefs provide no legal

authority for this Court to strike down one statute (Initiative 872) because another statute allegedly grants benefits in violation of the equal protection clause.

Moreover, the statutory provisions cited by the Republican Party were part of the prior Montana system that the voters overwhelmingly voted to replace with the Initiative's top-two system instead. As plaintiffs' briefing below confirmed, "Initiative 872 is a replacement primary system."[2] The Republican Party's two briefs do not even address (never mind refute) the Grange's showing that those Montana provisions are accordingly superceded by the Initiative's top-two system. Grange's Brief, p.30-32 (***three*** separate reasons).

C. Initiative 872's Top-Two System Does Not Violate Congressional Election Requirements.

The Libertarian Party argues that the Initiative's top-two system imposes an unconstitutional qualification requirement and date for congressional elections.

1. Qualifications.

A State law cannot impose an absolute bar to candidates who qualify for congress under Article I, or handicap a qualified class of congressional candidates. E.g., *Schaefer v. Townsend*, 215 F.3d 1031, 1035 (9th Cir. 2000).

But Initiative 872 does not do that. Requiring a congressional candidate to be one of the top two vote-getters to advance to a runoff is not an unconstitutional bar or handicap. It's democracy.

[2] *Grange's ER at 189:5 (emphasis added).*

2. Date.

State law cannot select a congressional race's winner before the federal election date in November. E.g., *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001) (State statute invalid only if election is concluded before the federal election date).

For example, the *Foster* case involved a top-two system under which any candidate receiving a majority vote in the September primary was declared elected – with no election in November. *Foster v. Love*, 522 U.S. 67, 70 (1997). Since that allowed a final selection two months before the November federal election date, the Court invalidated that top-two system's application to federal offices. *Id*. at 74.

But Initiative 872 does not do that. It always leaves the final selection of the winner to the November runoff – even when one candidate receives a majority vote in September. Initiative §6 (top two in the primary advance to the general – with no exception for candidate who receives a majority in the primary). That is fatal to the Libertarian Party's claim because Washington's general election date is the same as the November date specified for congress. Compare 2 U.S.C. §7 & §1 with RCW 29A.04.321(1).

III. CONSTITUTIONALITY OF ALLOWING A CANDIDATE TO STATE HIS OR HER PERSONAL PARTY "PREFERENCE" ON THE BALLOT

A. An Organization's Right To Exclude A Person From Its *Membership* Does Not Include A Right To Prohibit That Person From Stating His Or Her Personal *Preference* For That Organization.

1. The statute at issue.

The political parties spend a substantial portion of their five briefs reiterating that they have a First Amendment right to exclude people they don't like from party membership.

But that point isn't disputed in this case.

For example, the Boy Scouts are allowed to limit who is and is not a member of the Boy Scouts. *Boy Scouts Of America v. Dale*, 530 U.S. 640, 655-56 (2000).

The three political parties in this case have accordingly established rules to govern who is a member of their organization – for example, granting membership to anyone who signs a statement saying he or she is a member, or granting membership to anyone who writes the political party a check.[3]

Consistent with those membership criteria, the political parties in this case do not limit their membership to persons who share their party's political positions. For example, both the Republican State Party and Democratic State Party openly

[3] *Grange.Supp. ER at 154:1-5, 155:14-16, 134-136, 137, 132, evidence summarized at 151:6-8 & nn. 42-43.*

accept as members elected officials who oppose the abortion position in their respective State Party platforms.[4]

Initiative 872 does not prevent the political parties from changing their membership criteria to start identifying their membership based on political beliefs, or to now start excluding persons who oppose their party's political positions.

Indeed, the text of Initiative 872 says nothing about membership at all. For example, nowhere does it say that a candidate can designate his or her political party ***membership*** on the ballot.

Instead, the piece of the top-two statute that the political parties insist is unconstitutional says that a candidate can designate his or her personal party ***preference*** on the ballot. Initiative §7(3).[5]

And as the Grange's Brief pointed out, the language used by this Initiative – "***preference***" – is dispositive for several reasons:

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[4] *Grange.Supp. ER at 119, 123, 139-143, 146, 148, evidence summarized at 151:9-14 & nn.44-45.*

[5] *Initiative §4 similarly states the candidate "may have that **preference** appear on the primary and general election ballot in conjunction with his or her name." The Washington Administrative Code ("WAC") accordingly provided the following blank that candidates may fill in on the "declaration of candidacy" form submitted when they file with the Secretary of State in July: "my party **preference** is _____". WAC 434-215-012 (2005 version, before district court struck down Initiative 872) (emphasis added).*

*By way of contrast, the blanket primary statute invalidated by Reed provided that the party designation on a ballot signified "the **political party ... of each candidate**" (RCW 29.30.020(3)&.095 (pre-2003 version)), and the corresponding "declaration of candidacy" form accordingly stated "I am a **candidate of** the _____ party" (WAC 434-215-012 (pre-2003 version)).*

First, the political parties do not dispute that a fundamental precept of Washington law is that citizens are presumed to know what the law is. Grange's Brief, p.16-17. Thus, voters are presumed to know that a party designation on the ballot is exactly what the law says it is: the candidate's personal party ***preference***.

Second, the political parties do not dispute that this presumption is especially appropriate here since the law at issue is a voter-approved measure that over 2.6 million Washington voters just voted on last year. Grange's Brief, p.16-17. And as written, this voter-approved law says that a party designation on a ballot is the candidate's personal party ***preference***.

Third, the political parties do not dispute the district court's acknowledgment that in a facial challenge to a statute the "court examines solely the text of the document to determine its constitutionality." Grange's Brief, p.7. Washington law, moreover, holds that a statute "means exactly what it says." *State v. Chapman*, 998 P.2d 282, 289 (Wash. 2000). As the Republican Party's own brief admits, "the role of the judiciary is to pass on the constitutionality of the law as adopted by the legislature, not to rewrite legislation." Rep.Resp./Grange, p.40:6-7.

It is therefore the actual text of this statute that matters. And that text says "preference" – not "membership".

This fact about the Initiative's text is dispositive. The political parties' briefs do not refute the fact that the First Amendment protects (rather than prohibits) a candidate's statement to voters disclosing his or her personal party

preference. As our Supreme Court reiterated in the Republican Party's successful Minnesota suit: "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 (2002); accord, *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-24 (1989) (a ban on speech about individual candidates "directly affects speech which is at the core of our electoral process and of the First Amendment freedoms. .... Indeed, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.").

Nor is that free speech guaranty nullified by the political parties' claim that some opportunistic candidates might not tell the truth about which party they <u>really</u> prefer – for the First Amendment's paramount protection of unfettered free speech in the political arena protects not just truthful speech, but even exaggeration, vilification, and falsehoods. Grange's Brief, p.18-19.

2. No trademark infringement.

Nor is that political free speech guaranty nullified by the political party's "brand awareness" and pseudo-trademark infringement arguments – for those arguments ignore the ***five*** dispositive trademark points made in the Grange's Brief at 20-24.

For example, the political parties' *Most Worshipful* and *Jaycees* cases do not even address – never mind refute – those ***five*** trademark points.[6]

Indeed, the above "preference" discussion further illustrates why a citizen's statement of his or her personal party preference would be protected even if trademark law somehow applied. The First Amendment protects a candidate's right to tell voters if he or she prefers one political party over another. But to tell voters that personal party preference, the candidate must say the party's name. Thus, even if the party's name were a privately held and legally protected brand or trademark, that use would still be allowed as comparative advertising or a nominative fair use. Grange's Brief, p.22-24; see also *New Kids on the Block v. News America Publishing*, 971 F.2d 302, 306 (9th Cir. 1992) ("Indeed, it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the [allegedly infringed upon] mark").

[6] *Nor are those cases even factually similar – for they involved an infringing splinter-group organization trying to draw the original organization's members away to be members of that infringing splinter-group organization instead. Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge, 381 P.2d 130 (Wash.App. 1963); U.S. Jaycees v. San Francisco Junior Chamber of Commerce, 354 F. Supp. 61, (N.D. Cal. 1972), aff'd 513 F.2d 1226 (9th Cir. 1975); Purcell v. Summers, 145 F.2d 979 (4th Cir. 1944). Those cases might apply in a party fundraising drive between two organizations calling themselves the "Republicans" (e.g., the Minnesota Republican Party and the Washington Republican Party), but they do not apply to a personal "preference" statement made by a citizen in the public arena.*

3. Federal courts cannot re-write State statutes.

The political parties' briefs do not provide any legal authority authorizing this Court to re-write the text of a State statute.

That failure is not overcome by their observation that other Washington statutes or constitutional provisions use phrases like "members of a major political party" and party "nominee".

First, the political parties do not dispute that this Court must interpret statutes to preserve their constitutionality if at all possible. Grange's Brief, p.12-13; accord, *Personal Restraint Petition of Matteson*, 12 P.3d 585, 589 (Wash. 2000) ("Whenever possible, it is the duty of [the] court to construe a statute so as to uphold its constitutionality").

Instead, they turn that duty on its head by insisting that this Court interpret the Initiative's "preference" text in a manner that defeats its constitutionality.

Second, the fact that other statutes use different language such as "member" and "nominee", while this statute says "preference" instead, only proves that "preference" is not the same as "member" or "nominee" – for when statutes use different terms, the courts presume those statutes have a different meaning. 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).

4. "Preference" statement conclusion.

The political parties do have a First Amendment right to exclude people they don't like from party membership.

But that constitutional fact does not change the statutory fact that Initiative 872 does not say that the party designation on a ballot states the candidate's party membership.

Instead, the piece of Initiative 872 that the political parties attack says that the designation on a ballot states the candidate's personal party preference. And none of the political parties' five briefs provide any legal authority for this federal Court to re-write that text to say "membership" instead – especially when that judicial revision would be done to defeat (rather than preserve) the law at issue.

B. A Party's Right To Select Its Own Nominee Does Not Include A Right To Commandeer All State Run Primaries.

1. The statute at issue.

The political parties also spend a large part of their briefing reiterating that they have a First Amendment right to select their own nominees for elected offices.

But that point isn't disputed in this case.

The political parties nonetheless dwell on cases where the statute at issue said a party designation on the ballot made the person ***that party's*** candidate or nominee – e.g.:

- *Jones*: Statute said party's name on the ballot identifies the party of which the candidate will be "the nominee ... at the ensuing general election".[7]
- *Reed*: Statute said party's name on the ballot determines whether the candidate is running as a candidate of that party for that party's spot on the November ballot.[8]
- *Tashjian*: Statute said candidate being on the named party's primary ballot confirms that candidate's approval by that party's nominating convention.[9]
- *Rosen*: Statute said party's name on the ballot identifies "the name of the political party by which the candidate was nominated or certified".[10]
- *Duke*: Statute said candidate being on the named party's primary ballot confirms that candidate's approval by that party.[11]
- *Plonski/Chambers*: Statute said "party shall select a name and emblem to distinguish the candidates of that party for public office ... [and an under 15-letter abbreviation] ... to be used upon the ballot".[12]

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[7] *Cal.Elec.Code Ann. §15451 (West 1996); California Democratic Party v. Jones, 530 U.S. 567, 570 (2000).*

[8] *RCW 29.30.095&.020(3) (pre-2003 version); Democratic Party of Washington v. Reed, 343 F.3d 1198,1201 (9th Cir. 2003). See also the Declaration Of Candidacy under that statute, which provided that the party designation signified that the person was a "candidate of" that political party. WAC 434-215-012 (pre-2003 version).*

[9] *Tashjian v. Republican Party, 479 U.S. 208, 220-21, (1986).*

[10] *Ohio Rev.Code §3505.03; Rosen v. Brown, 970 F.2d 169, 174 (6th Cir. 1992).*

[11] *Georgia Code §21-2-193; Duke v. Cleland, 954 F.2d 1526, 1527 (11th Cir. 1992); Duke v. Massey, 87 F.3d 1226, 1230 (11th Cir. 1996).*

[12] *New York Laws, 1954, Ch.433, §1 (version in effect at time of Plonski v. Flynn, 222 N.Y.S.2d 542 (1961)); New York Laws, 1922, Ch.588, §20 (version in effect at time of Chambers v. Greenman, 58 N.Y.S.2d 637 (1945)).*

But the Washington election statute here is different. As the plaintiff Republican Party admits: "No state has a primary system similar to Washington's." Rep.Resp./Grange, p.15:9.

Nothing in the text of Initiative 872 says that the September primary selects the ***political parties'*** candidates for November. That is why, when the Initiative was in effect last June, the Republican Party and Democratic Party both conducted nominating conventions to nominate ***their*** parties' candidates for the 2005 ballot.[13]

The text of Initiative 872 provides instead that the September primary selects the two ***most popular*** candidates for a November runoff – regardless of partisanship or any other factor besides number of votes. As the Republican Party's lead counsel has confirmed, 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."[14]

Unlike the election statutes invalidated in *Jones* and *Reed*, the top-two election statute at issue in this case says nothing at all about persons being the "***candidate of***" any political party or the result of the September primary being the selection of any ***political party's*** candidate for the November ballot. Instead, the statutory language invoked by the political parties says that a party designation on

[13] *Grange's ER at 33-36, 39, 41-43, 46.*

[14] *Grange's ER at 31.*

a ballot is the candidate's personal preference for the listed party – not the political party's selection of the listed candidate.[15]

To quote plaintiffs below, under Initiative 872 "the party designation is to inform voters which party the candidate identifies with"[16] – not identify which candidate the party identifies with or selects.

And once again, the Initiative's actual text is dispositive:

First, voters who see a party designation on the top-two system's ballot are as a matter of Washington law presumed to know that that designation is exactly what the top-two statute says it is: the candidate's personal preference for the listed party – not the political party's selection of the listed candidate.

As the corresponding section of the Washington Administrative Code further confirmed for those voters: "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. .... Voters at the primary election are not choosing a political party's nominees."

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[15] *Initiative §7(3) & §4; see also footnote 5 above comparing the prior blanket primary's statute and regulations providing that persons were the "**candidate of**" the political party designated on the ballot.*

[16] *Grange's ER at 3:18-19 (emphasis added).*

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

Second, as also noted before, the presumption that voters know what the law says is especially appropriate here since the law at issue is a voter-approved measure that over 2.6 million of them just voted on. And as the Democratic Party's briefing concedes, this measure's ballot title unequivocally told each and every Washington voter that the party designation on a ballot in this new top-two system would be the candidate's party ***preference*** – nothing more. Dem.Resp./Grange, p.3:5-7.

Third, as also noted earlier, the political parties' briefs do not refute the fact that Washington law holds that a statute "means exactly what it says", and that what this Initiative's text actually says is dispositive since the court examines solely the statute's text in a facial challenge. This point is fatal to their facial challenge here because, as written, the text of this statute does not establish the September primary as the ***political parties'*** contest to select ***their*** candidates or nominees.

The privately sponsored parade case cited by the political parties accordingly has no application here – for under Initiative 872, the September primary is no longer the ***political parties'*** parade. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), does not hold that a group that is not the parade sponsor (e.g., the Republican Party) can commandeer and dictate the rules for the entity that is the parade sponsor (the State).

2. Federal courts cannot re-write State statutes.

As noted earlier, the political parties do not provide any legal authority authorizing this Court to re-write the text of a State statute, and do not dispute that it is this Court's duty to interpret this statute's text to preserve its constitutionality if at all possible.

a. Complying with Jones.

The political parties repeatedly assert this statute was drafted to "flout" and "defy" the ruling in *Reed*. But that does not create an excuse for the federal judiciary to re-write a statute's text:

First, their accusation is wrong.

This Court's decision in *Reed* was based on our Supreme Court's pronouncements in *Jones* – and the Initiative's text was specifically written to follow, not flout, that case's description of a constitutional top-two primary. As plaintiffs pointed out below, 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".[17]

A statute's being drafted to cure a prior statute's constitutional defect does not authorize a court to re-write the new statute's text to put the defect back in so it can declare the new statute unconstitutional as well. E.g., *Information Providers*

[17] *Grange's ER at 4:22-25.*

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 guns-in-school-zone 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"). As these cases illustrate, there is nothing nefarious or illegal about lawmakers enacting a new statute to comply with a court's prior ruling.

Second, the significance of this Initiative's compliance with the description of a constitutional top-two system in *Jones* is not nullified by the political parties' dismissing that description as meaningless *dicta*.

As an initial matter, that top-two primary explanation was a foundational basis for the Supreme Court's reasoning with respect to how a State election system could be constitutionally tailored to serve the types of legitimate interests identified at p.14 of the Grange's Brief. It accordingly was not meaningless *dicta*.

But even if it were *dicta*, the political parties' demand that this Court ignore it lacks merit. As this Court recently reiterated:

> [T]he Supreme Court often enough enunciates principles of law that are not actually applied in the case before it. The principles would be categorized as dicta if the court were not the Supreme Court. But these principles are treated by courts and commentators as established federal law.
>
> In the most famous and most fundamental of such readings, Chief Justice Marshall in *Marbury v. Madison*, ... set out the principle empowering the Supreme Court to invalidate an unconstitutional law.... Strictly speaking, Chief Justice Marshall's pronouncement on the comprehensive power of the judicial department to review legislation was a dictum. No one, however, doubts that it was a holding.

Bradley v. Henry, --- F.3d ---, 2005 WL 2621503, *6 (9th Cir. 2005).[18]

Third, the Initiative's compliance with *Jones'* description of a constitutional top-two system is not irrelevant. It is dispositive. Grange's Brief, p.34-36; Grange.Supp. ER at 156:14-157:1, 162:23-164:18, 166:21-25.

The political parties' respond that Washington's top-two statute cannot be a "nonpartisan" primary under *Jones* because it uses the term "partisan office".

But that response ignores the fact that *Jones* allowed its so-called "nonpartisan" primary ballot to identify party-nominated candidates. The Court's "nonpartisan primary" phrase therefore referred to the primary's nonpartisan result of selecting the top two vote-getters regardless of partisanship – not the lack of any partisan indications on the ballot.

The political parties' response also ignores the Initiative's text. The definition of "partisan office" in Initiative §4 has nothing to do with party membership or party nomination. Initiative §6 accordingly amended Washington's "nonpartisan" primary provisions to apply to all races (instead of just judicial races). That made the primary for "partisan offices" and "nonpartisan offices" under the Initiative operate the same, with the same nonpartisan result as the "nonpartisan" primary approved of in *Jones*.

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[18] *Accord, Laub v. Department of Interior, 342 F.3d 1080, 1090n.8 (9th Cir. 2003); Zal v. Steppe, 968 F.2d 924, 935 (9th Cir. 1992); Thinket Ink v. Sun Microsystems, 368 F.3d 1053, 1058&n.1 (9th Cir. 2004).*

b. Sponsor Statements.

Nor do the political parties' claims about the sponsor's statements authorize the courts to re-write the statute's text:

First, the relevant intent in an Initiative's enactment is not the intent or comments of the sponsor. It is the intent of the voters. *McGowan v. State*, 60 P.3d 67, 72 (Wash. 2002).

This Court has recognized that it can never know if individual legislators who talked about a measure represented the views of those who voted for the measure. *Voting Integrity Project v. Keisling*, 259 F.3d 1169, 1172 (9th Cir. 2001). That impossibility is even more acute with an Initiative measure such as this one – for the legislative body adopting it contained over 2.6 million voters.

The political parties' reference to *Schwenk* does establish otherwise – for that case simply observed that in light of the statute's text being gender neutral and the bill report's discussion of claims by males, a statement by the sponsor addressing the specific facts at issue in that case – rape of a male prisoner by a male prison guard – was compelling evidence to confirm that the statute's gender-neutral text applied to that precise factual situation. *Schwenk v. Hartford*, 204 F.3d 1187, 1199 (9th Cir. 2000). *Schwenk* did not hold that a bill sponsor's statements can change the bill's text.

Second, the Initiative sponsor's statements about a top-two system's restoring or preserving the type of voter choice that existed under the old blanket primary system does not change the fact that the result is dramatically different.

As *Jones* explained: the top-two 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).[19]

c. 2005 Legislature Inaction.

Nor does the fact that the 2005 Legislature declined to enact an amendment to expressly repeal the party-nominating provision of the replaced Montana statute authorize this Court to now re-write Initiative 872 to insert that party-nominating provision into the Initiative's top-two system:

First, speculation about why the Legislature declined to enact an amendment in 2005 is irrelevant to what the text of this Initiative enacted by the voters in 2004 actually says. E.g., *Spokane County Health Dist. v. Brockett*, 839 P.2d 324, 331 (Wash. 1992) ("when the Legislature rejects a proposed amendment, ...[courts] will not speculate as to the reason for the rejection"); *In re Personal Restraint of Andress*, 56 P.3d 981, 985 (Wash. 2002) (same); *Wilmot v. Kaiser Aluminum*, 821 P.2d 18, 26 (Wash. 1991) (same).

Second, the reason for declining to enact an expressed repeal of the Montana system is obvious. Such an enactment would have been superfluous since the Montana provisions had already been superceded as a matter of law. See Part II.B of this Reply (above).

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[19] *As the 1992 Washington governor's race example discussed in the district court confirms, the result of the September primary is dramatically different under the old blanket and new top-two systems. Grange.Supp. ER at 157:10-17, 125, 127, evidence summarized at 150:6-13 & nn.4-5.*

3. "Party nominee" conclusion.

The political parties do have a First Amendment right to select their own candidates for elected office.

But that constitutional fact does not change the statutory fact that Initiative 872 does not say that the first (September) stage of its top-two system selects the ***political parties'*** candidates for the November ballot.

Instead, it says that the first (September) stage selects the two ***most popular*** candidates for the November ballot – regardless of partisanship or any other factor.

The piece of this statute that the political parties' attack says that any party designation on a ballot is a statement by the candidate of the party the candidate prefers. None of the political parties' five briefs provide any legal authority for this federal court to re-write Washington's statute to instead say that the party designation on a ballot is a statement by the party of the candidate the party prefers, chooses, selects, or nominates – especially when that judicial revision would be done to invalidate (rather than preserve) the statute at issue.

C. If Necessary, The Provision Allowing Candidates To Disclose Their Personal Party Preference On The Ballot Can Be Severed To Preserve This Top-Two Statute's Constitutionality.

Washington's new top-two system is exactly that.

A top-two system.

It has a September election to select the two most popular candidates, followed by a November runoff between the top two vote-getters to select the winner. As the plaintiff Republican Party's lead counsel confirmed, this statute's

purpose was to "enact[] 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."[20]

That candid summary by plaintiffs' lead counsel is also consistent with the Initiative text declaring this statute's intent – i.e., 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. Initiative §§1&2.

This statute's fundamental top-two purpose is served regardless of whether or not this Court strikes down the piece that allows candidates to disclose the political party (if any) they personally prefer. Thus, if this Court were to agree with plaintiffs' argument that it is unconstitutional to allow a candidate to state on the ballot that he or she has a preference for any particular party, then this Court must sever and invalidate only that preference statement piece of Initiative 872 – not strike down the Initiative's enactment of a top-two system in its entirety. See Grange's Brief, p.36-39.

The political parties' five briefs do not refute this fundamental severance point. To the contrary, the *Love* litigation upon which the Libertarian Party so heavily relies confirms that severance is the proper remedy. *Love v. Foster*, 147 F.3d 383, 385-86 (5th Cir. 1998) (applying Louisiana State severance standards to

[20] *Grange's ER at 31.*

preserve remainder of top-two election statute after the part applying to federal offices was invalidated).

And despite the political parties' hyperbole to the contrary, severing the piece of the Initiative the allows a "preference" statement on the ballot is simple: Simply invalidate Initiative §7(3) and the provision in §4 that states: "and have that preference appear on the primary and general election ballot in conjunction with his or her name." See also *McGowan v. State*, 60 P.3d 67, 75 (Wash. 2002) (severing part of clause in Initiative §2(1)(d) to preserve Initiative's constitutionality).

IV. THE MAJOR POLITICAL PARTIES' ATTORNEY FEE DEMAND

The Republican Party and Democratic Party demand that the Grange pay their attorney fees. But they are not entitled to such an award against the Grange because the Grange has not violated their constitutional rights. Instead, their demand amounts to a bullying tactic to thwart citizens from daring to submit an Initiative measure that a major political party does not like – an ironic position for the plaintiff Republican Party to be taking given its official platform's claim to support citizens' exercise of their Initiative rights.[21]

This Court denied the same attorney fee request by these two political parties against the Grange in the *Reed* case, holding that "§1988 fee awards should be made against losing intervenors 'only where the intervenors' action was frivolous, unreasonable, or without foundation.'" *Reed II*, 388 F.3d at 1288.

[21] *Grange.Supp. ER at 120.*

The two major political parties nonetheless demand that this Court award fees in this case because the Grange is not a "blameless" or "innocent" intervenor and the Grange's position is "frivolous". But as explained below, the Grange's role in this case as sponsor of the citizen Initiative measure at issue here is indistinguishable from its role in *Reed* as sponsor of the citizen Initiative measure at issue there – and thus this Court should again deny the political parties' bullying demand against citizen Initiative sponsors.

First, the Grange is a "blameless or innocent" intervenor as that term applies in civil rights fee cases – for this Court has held that such blameless or innocent intervenors are "intervenors who have not been found to have violated anyone's civil rights". *Sable Communications of California v. Pacific Telephone & Telegraph*, 890 F.2d 184, 194 n.20 (9th Cir. 1989). And as this Court has already held, the Grange is not responsible for any such violation in a case like this. *Reed II*, 388 F.3d at 1288 (rejecting request for fees against the Grange because "[t]he relief sought by the plaintiffs was the abolition of the Washington 'blanket primary.' The Grange, an intervening defendant, could neither have granted that relief nor denied it.").

Indeed, the Democratic Party has admitted this point in its currently pending appeal of the attorney fee award in what is now *Reed III* – arguing to this Court that "because [the State] is responsible for instituting and maintaining the unconstitutional [blanket] primary, the State is responsible for all expenses

incurred in eliminating it." *Washington State Democratic Party v. Reed*, CA No. 05-35531, Appellant's October 24, 2005 Reply Brief, p.9.

Second, *Planned Parenthood* does not change this Court's analysis in *Reed II*. In that case the New Jersey Legislature intervened to defend the State's anti-abortion law after the State Attorney General refused to do so. *Planned Parenthood of Central New Jersey v. Attorney General*, 297 F.3d 253, 262 (3rd Cir. 2002). The Third Circuit accordingly crafted a narrow exception allowing for a fee award against one State agency (the Legislature) when it steps into the shoes of another State agency (the Attorney General) to maintain an unconstitutional statute. *Id*. at 262. The court reasoned that it would allow for a "major loophole" if the State Legislature could enact unconstitutional legislation, and then defend that legislation itself (instead of through the Attorney General) to avoid a §1988 attorney fee award against the State. *Id*.

But that is not the case here. The State of Washington and its Attorney General are actively and vigorously defending this case's top-two election statute. The Third Circuit's exception accordingly does not apply – especially to non-State agencies (like the Grange) who intervene.

Third, as the Grange's Opening Brief and this Reply demonstrate, the Grange's arguments are not "frivolous, unreasonable, and unfounded."

V. CONCLUSION

One of the powers federal courts do not have is the power to re-write the text of State statutes. Especially if that text is being re-written to make the statute unconstitutional.

Yet that is exactly what this Court must do to invalidate Washington's top-two election system.

The text of Initiative 872 says that the party designation on a ballot is the candidate's statement of his or her personal party ***preference***.

To hold that preference statement unconstitutional, this Court must re-write this State statute to instead say that the party designation on a ballot is a statement that the candidate is a ***member*** of that party. Or a statement that he or she is a ***candidate of*** that party. Or a statement that he or she is ***that party's*** nominee, representative, spokesperson, standard-bearer, ambassador, etc.

The political parties' facial challenge to the preference statement allowed by Washington's top-two election statute fails because their five briefs provide no legal authority for this Court to re-write the text of this statute to say something different from what the face of this statute says. "Preference".

Moreover, if allowing the ballot to disclose a candidate's personal party preference were unconstitutional, severance law would require this Court to invalidate only that ballot statement piece of the statute – not reach out to strike down the statute's underlying enactment of a replacement top-two system as well.

The political parties' attacks on the constitutionality of top-two systems in general also fail. Our constitution does not prohibit November runoffs of a September election's top two vote-getters. The equal protection clause does not prohibit this Initiative's treating all candidates and political parties equally in that two-stage election process. And neither the qualification nor date restrictions on congressional elections bar a top-two system's final selection of the winner on the November federal election date.

This Court should accordingly reverse the district court and dismiss the political parties' facial challenge as a pure matter of law.

As explained in the July 29 Motion To Expedite, this Court should also issue its decision promptly so, if that decision is anything less than a reversal and dismissal of this case, the Washington State Legislature can enact legislation consistent with this Court's decision in time for the upcoming 2006 election cycle. (As that Motion explained, 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 7th day of November, 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 7th day of November, 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 6,937 words.

DATED this 7th day of November, 2005.

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CERTIFICATE OF SERVICE

RODRICK J. DEMBOWSKI states:

I hereby certify that I served the above document via Federal Express and e-mail on November 7, 2005, upon the following parties:

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I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Seattle, Washington this 7th day of November, 2005.

_____
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