The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,
Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,
Plaintiff Intervenors

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,
Plaintiff Intervenors

v.

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

STATE OF WASHINGTON, et al.,
Defendant Intervenors

WASHINGTON STATE GRANGE,
Defendant Intervenors.

No. CV05-0927Z

WASHINGTON STATE GRANGE'S CONSOLIDATED RESPONSE TO THE SUMMARY JUDGMENT/INJUNCTION MOTIONS OF

(1) THE WASHINGTON STATE REPUBLICAN PARTY;

(2) THE WASHINGTON DEMOCRATIC CENTRAL COMMITTEE; &

(3) THE LIBERTARIAN PARTY OF WASHINGTON STATE

["Grange's Consolidated Response"]

Noted for Oral Argument:
9:00 a.m., Wednesday, July 13, 2005

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TABLE OF ABBREVIATIONS USED IN THIS BRIEF

Abbreviated Title		Full Title
"Democratic Party S.J. Motion"	*means*	Washington State Democratic Central Committee's Motion For Summary Judgment, filed June 17, 2005
"Grange Documents Dec."	*means*	Declaration Of Rod Dembowski In Support Of Washington State Grange's Consolidated Response To The Summary Judgment/Injunction Motions, filed July 1, 2005
"Libertarian Party S.J. Motion"	*means*	Libertarian Party's Motion For Summary Judgment, filed June 17, 2005
"Republican Party S.J. Motion"	*means*	Plaintiffs' Motion For Summary Judgment, filed June 17, 2005

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I. SUMMARY OF THIS BRIEF

Initiative 872 redefined our State's election system.

Under the prior "blanket" and "Montana" systems, the State held a September primary to select the ***political parties'*** candidates for placement on the November ballot. The State also guaranteed those selected political party candidates a spot on the November ballot.

Initiative 872 established a "top-two" system instead. It changed the State's September primary from being a contest to select the political parties' candidates to instead be a contest to determine the ***two most popular*** candidates overall. And it eliminated the guaranteed political party spots on the November ballot that political parties had come to take for granted.

The political parties do not like Washington's new top-two system.

So they sued:

- Forsaking its frequently espoused core values of judicial restraint and the upholding of voter-approved Initiative Measures,[1] the Republican Party sues to overturn Initiative 872 – and have this Court enact in its place a version of the former "Montana" statute (after severing out the parts of that prior "Montana" statute that the Republican Party does not like).
- Forsaking its core values of individual privacy and freedom from government restraint,[2] the Libertarian Party sues to squelch the voters' enactment of Initiative 872 because, among other things, that law protects the privacy of each individual voter's political leanings when they vote in September, and allows individual candidates the freedom to tell voters the political party they "prefer".
- And forsaking its self-proclaimed mantle as the proponent of the People,[3] the Democratic Party sues to nullify the People's enactment Initiative 872 – and have this Court enact in its place all of the former "Montana" statute (without severing out parts of that prior statute).

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[1] *See, e.g., Documents Dec., Ex. A, at p.7 (2004 Washington State Republican Party Platform, stating the "Proper Role of Government is to protect our inalienable rights, including: ... The initiative process provided for by the Washington State Constitution").*

[2] *See, e.g., Documents Dec., Ex. B, at p.1 (2005 Washington State Libertarian Party summary of positions on issues, stating "so long as your actions are peaceful, you should have the freedom to decide for yourself without government interference", and one's "Privacy" must be protected).*

[3] *See, e.g., Documents Dec., Ex. C, at p.5, "Government and Political Reform" (2004 Washington State Democratic Party Platform, stating that Government must be "accountable to the people", "Government embodies the people and must reflect our values as citizens"; and "Citizen participation is a right and duty of citizenship, and free, open and verifiable elections are key to our democratic process[]").*

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This brief explains why the political parties' objections to the new election system overwhelmingly enacted by their adherents (i.e., the voters of our State) fail as a matter of law.

Although the Legal Discussion in Part IV below addresses each of the stipulated legal issues one at a time, the overriding reason that the political parties' arguments fail is that those arguments have at least three fatal flaws:

First, they misconstrue State law. Under the top-two system established by Initiative 872, our State's September primary is no longer a contest to select the ***political parties'*** candidates for the November ballot. Initiative 872 changed that primary to instead be a contest to determine the ***two most popular*** candidates overall – regardless of partisanship.

Second, they turn the First Amendment on its head. The First Amendment ***protects*** speech. It doesn't ***gag*** speech. Especially speech in the political arena. The First Amendment protects, rather than prohibits, the part of this Initiative that allows candidates to tell voters the party they "prefer". A political party is not "forced" to accept, associate with, or be represented by a candidate who publicly states he "prefers" that party any more than Ford Motor Company is "forced" to accept, associate with, or be represented by a Klansman who publicly states he "prefers" Ford pick-up trucks.

Third, they ignore the fact that Initiative 872 allows all parties and all candidates to have full access to the electorate on the first, September ballot that winnows out the top two voter getters for each office. The Constitution does not grant any person, organization, or special interest group a guaranteed "right" to also be on the second, November ballot between the top two voter getters.

The political parties' leaders might sincerely believe that Initiative 872 is a stupid law or bad public policy. But that does not make Initiative 872 unconstitutional. Nor does it justify the political parties' demand that this federal court intercede, interpret Initiative 872 in a manner that makes it unconstitutional, strike it down, and then re-enact all or part of Washington's

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former "Montana" system in the Initiative's place. The Washington State Grange therefore respectfully requests that this Court resolve the political parties' summary judgment motions by dismissing this suit with prejudice as a matter of law. E.g., *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982) (summary judgment should be granted to the non-moving party if no material fact dispute precludes judgment as a matter of law).

II. CHRONOLOGY OF MATERIAL FACTS

The clearest way to organize the overlapping facts material to the political parties' legal arguments is to present those facts chronologically. The following pages accordingly do that.

A. *1935-2003:* The Old "Blanket" Primary System.

From 1935 through 2003, the State of Washington conducted what was commonly known as a "blanket" primary in September, with all candidates listed on the same ballot so each voter had the freedom to choose whichever candidate that voter wanted to vote for. RCW 29.18 (pre-2003 version).

That September primary selected the Republican Party's nominee for the November general election ballot. *Id.* That September primary also selected the Democratic Party's nominee for the November general election ballot. *Id.*

The Declaration Of Candidacy in that "blanket" system accordingly required the candidates to declare themselves as being a candidate ***of*** a particular political party:

> DECLARATION OF CANDIDACY
> * * * *
> 5. This office is:
> [ ] Nonpartisan, or
> [ ] Partisan, and ***I am*** [ ] ***a candidate of the*** _____ ***party***, or
> [ ] an independent candidate nominated pursuant to chapter 28.24 RCW

Former WAC 434-215-012 (pre-2003 version) (emphasis added).

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The top vote getter of the candidates who had declared themselves to be a candidate ***of*** the Democratic Party was then guaranteed a spot on the November ballot as the Democratic Party's nominee, and the top vote getter of the candidates who had declared themselves to be a candidate ***of*** the Republican Party was guaranteed a spot on the November ballot as the Republican Party's nominee.

For example, the top three gubernatorial vote getters in the September 1996 primary were Gary Locke, Norm Rice, and Ellen Craswell (in that order).[4] Even though Mr. Rice received the second highest number of votes, he did not proceed to the November general election because he and Mr. Locke had both filed declarations declaring themselves to be candidates ***of*** the Democratic Party – and Mr. Locke received more votes than Mr. Rice. The third highest vote getter, Ms. Craswell, also proceeded to the November ballot because she was the highest voter-getter of persons who had filed declarations declaring themselves to be candidates ***of*** the Republican Party.[5]

The old "blanket" system accordingly had two key attributes: (1) it gave each voter a free choice among all candidates in the September primary, and (2) that September primary's result was the selection of the ***political parties'*** candidates for the November ballot.

B. *December 2003:* The *Reed* Court Invalidates Washington's "Blanket" System.

In December 2003, the Ninth Circuit invalidated Washington's "blanket" system of allowing all voters to vote on the selection of a ***political party's*** nominees. *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

As the passage quoted at page 7 of the Libertarian Party's summary judgment brief explains, the Ninth Circuit invalidated Washington's blanket system because:

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[4] *Documents Dec., Ex. D (September 1996 Primary Election Results from the Washington Secretary of State's Elections Division website at p.1).*

[5] *Documents Dec., Ex. E (November 1996 General Election Results from the Washington Secretary of State's Elections Division web site at p.1).*

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> The Washington scheme denies party adherents the opportunity to nominate ***their*** party's candidate free of the risk of being swamped by voters whose preference is for the other party.
>
> Also, those who actively participate in partisan activities ... have a First Amendment right to further their party's program for what they see as good governance. Their right to freely associate for this purpose is thwarted because the Washington statutory scheme prevents those voters who share their affiliation from selecting ***their*** party's nominees.

343 F.3d at 1203-04 (emphasis added).

The Ninth Circuit based this decision on the U.S. Supreme Court's holding in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). That *Jones* decision contained the following explanation as to why, in comparison, a "nonpartisan" blanket primary is not unconstitutional:

> 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. 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.

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

C. *January 2004:* The Grange Files Initiative 872 To Establish A "Top-Two" System Starting In 2005.

On January 8, 2004, the Washington State Grange filed Initiative Measure 872 with the Secretary of State.[6] That Initiative proposed a "top-two" election system for our State.

The Washington State Grange has been an active voice on behalf of our State's citizens dating back to Washington's 1889 statehood, and in that role has a long, proud history of opposing powerbrokers and special interests.[7] After filing Initiative 872 in January 2004, the

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[6] *Documents Dec., Ex. F (Secretary of State website showing the Grange's filing through its president Terry Hunt, at "http://www.secstate.wa.gov/elections/initiatives/people.aspx?y=2004").*

[7] *Documents Dec., Ex. G summarizes that history.*

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Grange collected the signatures of over 308,400 registered voters to have this Initiative placed on the ballot at the very next general election (November 2, 2004).[8]

Adoption in November 2004 would make the Initiative's new top-two system effective in December 2004 – i.e., in time for the 2005 election cycle. Washington Constitution, Article II, §1(d) (Initiative Measures become law effective 30 days after the election).

D. *March 2004:* The U.S. Supreme Court Denies Certiorari In The *Reed* Case.

In March 2004, the U.S. Supreme Court denied certiorari in the *Reed* case, thereby rendering the invalidation of Washington's "blanket" system final.[9]

E. *April 2004:* Washington's Governor Signs A "Montana" System Into Law For The Upcoming 2004 Election.

Since the Initiative's proposed top-two system could not take effect until after the 2004 election cycle was over, the Supreme Court's March 2004 decision to deny certiorari in the *Reed* case left Washington without a primary system for that upcoming election cycle.

The Washington Legislature accordingly drafted and passed a bill to replace the invalidated "blanket" system in time for the upcoming 2004 elections – which resulted in the Governor signing what is commonly known as a "Montana" system into law on April 1, 2004. 2004 Wash. Laws 271.[10]

Under that "Montana" system, the State still conducted a primary in September to select the Republican Party's nominee for the November general election ballot. 2004 Wash. Laws 271, §173, codified at RCW 29A.52.111. And that September primary still selected the Democratic Party's nominee for the November general election ballot. Id.

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[8] *Documents Dec., Ex. H (Secretary of State website at "http://www.secstate.wa.gov/elections/initiatives/statistics_petitions.aspx").*

[9] *Democratic Party of Washington v. Reed, 343 F.3d 1198 (9th Cir. 2003), cert. denied, 540 U.S. 1213, and cert. denied sub nom. Washington State Grange v. Washington State Democratic Party, 541 U.S. 957 (2004).*

[10] *Documents Dec., Ex. I ("Montana" system statute). The State Supreme Court upheld the Governor's veto of certain sections and signing the resulting "Montana" system into law with an Order in June 2004, which it later explained in full at Washington State Grange v. Locke, 105 P.3d 9, 153 Wash.2d 475 (2005).*

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The Declaration Of Candidacy filed by candidates under that "Montana" system therefore remained the same as before. It required the candidate to declare himself or herself as being a candidate ***of*** a particular political party:

> DECLARATION OF CANDIDACY
> * * * *
> 5. This office is:
>
> [ ] Nonpartisan, or
>
> [ ] Partisan, and ***I am*** [ ] ***a candidate of the*** _____ ***party***, or
>
> [ ] an independent candidate nominated pursuant to chapter 28.24 RCW

Former WAC 434-215-012 (2004 version) (emphasis added).

As with the old "blanket" system, the subsequent "Montana" system guaranteed that the top vote getter of the candidates who had declared themselves to be a candidate ***of*** the Democratic Party would be given a spot on the November ballot as the Democratic Party's nominee, and guaranteed that the top vote getter of the candidates who had declared themselves to be a candidate ***of*** the Republican Party would be given a spot on the November ballot as the Republican Party's nominee. 2004 Wash. Laws 271, codified at RCW 29A.52.

Under the "Montana" system, however, all candidates were no longer listed on the same September ballot. Instead, a slate of those candidates self-designating themselves as a candidate ***of*** the Democratic Party were put on one ballot, and a slate of those candidates self-designating themselves as a candidate ***of*** the Republican Party were put on the Republican Party ballot – which meant that if a voter wanted to vote in September, he or she had to disclose his or her personal political leanings by asking for or selecting one political parties' ballot or the other, and then limiting his or her votes to only the subset of declared candidates listed on that ballot's slate of party candidates. 2004 Wash. Laws 271, codified at RCW 29A.52.

The former "Montana" system accordingly had two key attributes: (1) unlike the "blanket" system, it did <u>not</u> give each voter a free choice among all candidates in the September

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primary, but (2) like the "blanket" system, the September primary's result was the selection of the ***political parties'*** candidates for the November ballot.

F. *November 2, 2004:* The Voters Enact The Current "Top-Two" System Into Law For Elections After 2004.

Over 2.6 million voters voted on Initiative 872 at the November 2, 2004 election.[11]

Over 1.6 million of them voted to enact it as the law of our State (a 60% - 40% margin).[12] And it received a majority in every single one of the 39 counties across our State.[13]

Initiative 872 replaced the "Montana" system for selecting political party candidates with a "top-two" system for winnowing the aggregate pool of candidates who file for public office in July down to two names for the general election ballot.[14] As the lead counsel for the Republican Party in this case recently summarized, **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."**[15]

The Democratic Party's brief similarly confirms that the Initiative's "purpose is to select two candidates and present them to the public at the general election";[16] while the Libertarian Party's brief acknowledges that "Initiative 872 does nothing other than 'name, designate by name, appoint or propose for election or appointment' candidates for partisan public office."[17]

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[11] *Documents Dec., Ex. J (Secretary of State website at http://vote.wa.gov/general/measures.aspx?a=872#map, showing that Initiative 872 was approved by the voters Statewide by a vote of 1,632,225 for and 1,095,190 against, with the Initiative also receiving a majority in every single one of our State's 39 counties).*

[12] *Id.*

[13] *Id.*

[14] *Documents Dec., Ex. K (full text of Initiative Measure 872 as enacted).*

[15] *Documents Dec., Ex. L at p.24, first paragraph (Political Parties: Their Legal Role in Elections (June 21, 2005 Election Law CLE materials by Richard Derham and John White).*

[16] *Democratic Party S.J. Brief at 15:5-7.*

[17] *Libertarian Party S.J. Brief at 6:14-16.*

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To establish this new top-two system, Initiative 872 began by first redefining what is meant by a "partisan" office and "primary" under our State's elections laws:

> **Sec. 4.** A new section is added to chapter 29A.04 RCW to read as follows:
>
> "Partisan office" means a public office for which a 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. The following are partisan offices:
>
> (1) United States senator and United States representative;
>
> (2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public ;
>
> (3) All county offices except (a) judicial offices and (b) those offices for which a country home rule charter provides otherwise.
>
> **Sec. 5.** RCW 29A.04.127 and 2003 c 1111 s 122 are each amended to read as follows:
>
> "Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) for public office ((~~at the polls~~)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

The Secretary of State accordingly amended applicable WAC provisions to conform to the Initiative's changing Washington law to no longer select a ***political party's*** nominee.[18]

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[18] *Documents Dec., Ex. M (the revised WACs). For example, the Secretary of State issued the following redlined amendments to WAC 434-230-040 and –050:*

WAC 434-230-040 Candidate's political party ((~~designation~~)) preference – Primary to general. ((~~No person who has offered himself or herself as a candidate for the nomination of one party at the primary, shall have his or her name printed on the ballot of the succeeding general election as the candidate of another political party.~~)) A candidate for partisan office who indicated a party preference on the declaration of candidacy may not change the party preference between the primary election and the general election.

WAC 434-230-050 Candidate ((~~nominated by two or more political parties or~~)) eligible for two or more offices. ((~~In the event a candidate, as a result of write in votes, is the nominee of two or more political parties for the same office, such candidate shall designate in writing, under which political party designation he or she desires to be listed on the ballot. Such written notice shall be submitted to the county auditor within three days of the certification of the primary.~~))

In the event a candidate, as a result of write-in votes in the primary, is ((~~a nominee~~)) eligible to advance to the general election for two or more offices, the candidate shall notify the county auditor within three days of the primary certification, in writing, of the single office for which he or she desires to appear on the general election ballot. Any void candidacy for other positions thus created will be handled as provided by law.

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With those new definitions of "partisan" and "primary" in effect, Initiative 872 then amended our State's elections law to put its new top-two system for "partisan" offices on par with its previously existing top-two system for "nonpartisan" offices (emphasis added):

> **Sec. 6** RCW 29A.36.170 and 2003 c 111 s 917 are each amended to read as follows:
>
> (1) ((~~Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a **nonpartisan**~~)) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name((~~s~~)) of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes ((~~for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted,~~)) will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for ((~~any other **nonpartisan**~~))an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.130.
>
> (2) ((~~On the ballot at the general election~~)) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed ((~~under the title of the office~~)) for that position on the ballot at the general election.

The Secretary of State accordingly amended the WAC provision regarding "nonpartisan" primaries to encompass all primaries ("partisan" and "nonpartisan") alike.[19]

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[19] *That WAC amendment reads:* ***WAC 434-230-060. Primary votes required for appearance on general election ballot.*** *Following any ((~~nonpartisan~~)) primary, no candidate's name shall be entitled to appear on the general election ballot unless he or she receives the greater or the next greatest number of votes for the office and additionally receives at least one percent of the total votes cast for the office. ((~~Following any partisan primary, no political party candidate's name shall be entitled to appear on the general election ballot unless he or she receives a plurality of votes cast for the candidates of his or her party for that office and additionally at least one percent of the total votes cast for the office. An independent candidate must receive one percent of the total votes cast for the office in the primary in order for his or her name to appear on the general election ballot.~~)) The filing officer shall notify, in writing, all candidates who satisfy other requirements but who fail to meet the one percent requirement of the fact that their name will not appear on the general election ballot. ((~~In those charter counties where provision is made in the county charter for the qualification of minor party and independent candidates, the charter provisions shall apply if the candidates has chosen that method for ballot qualification.~~))*

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Having changed the definition of partisan and primary under our State's elections law, Initiative 872 then set forth the resulting top-two system for partisan and non-partisan elections in our State as follows:[20]

> **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.
>
> (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.

Thus, under the new election system established by Initiative 872, our State's September ballot determines the top two voter getters for the November ballot regardless of any political party. As our State's chief elections officer, the Washington Secretary of State accordingly promulgated a new WAC regulation concerning the Initiative's change in Washington's elections law:

> 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

[20] *Section 11 of Initiative 872 similarly provides for the candidate's stated preference to be disclosed in the voters pamphlet: "Sec. 11. A new Section is added to chapter 29A.32 RCW to read as follows: The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy."*

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> 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

The Declaration Of Candidacy filed under the Initiative's new top-two system accordingly does not allow candidates to designate themselves as being a candidate ***of*** a particular political party. Instead, it allows candidates to disclose their party ***preference***:

> DECLARATION OF CANDIDACY
> * * * *
> 5. This office is:
>
> [ ] Nonpartisan, or
>
> [ ] Partisan, and (check one) [ ] ***my party preference is*** _____, or
>
> [ ] an independent candidate

Current WAC 434-215-012 (2005 version) (emphasis added).

The top-two election system established by Initiative 872 accordingly has two key attributes: (1) it gives each voter a free choice among all declared candidates in the September primary, and (2) changes the September primary's result to be the selection of the ***two most popular*** candidates for the November ballot.

III. GENERAL LEGAL STANDARDS

A. *Summary Judgment:* Rule 56 Entitles The Non-Moving Defendants To Summary Judgment If The Facts & Law Are Not Genuinely In Dispute.

The Civil Rules require this Court to grant summary judgment if there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). That includes granting summary judgment to the non-moving party when there are no genuine disputes of material fact. E.g., *Cool Fuel, Inc. v. Connett*, 685 F.2d 309,

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311 (9th Cir. 1982) (summary judgment should be granted to the non-moving party if no material fact dispute precludes judgment as a matter of law).

That is precisely the situation here.

As a pure matter of statutory construction, Initiative 872 established a top-two winnowing system instead of a political party nominating system.

As a pure matter of constitutional law, the First Amendment protects (rather than gags) the political free speech of candidates to tell voters which political party (if any) they prefer.

And as pure matter of law, the two-stage public election process established by Initiative 872 does not on its face unconstitutionally 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.

In short, since there is no genuine issue as to any fact material to the non-moving defendants' entitlement to the dismissal of plaintiffs' facial challenge as a matter of law, this Court should resolve the plaintiffs' motions by dismissing that challenge as a matter of law.

B. *Statutory Construction:* Washington Law Requires State Statutes To Be Construed In Favor Of Rendering Them Constitutional.

The plaintiffs' constitutional claims are all premised on their interpretation of various Washington's State statutes – e.g., Initiative 872,[21] the prior "Montana" system statute, the Public Disclosure Act, etc..

As the legal discussion in the following Part IV of this brief explains, the plaintiffs' statutory interpretations are simply wrong.

Even if Initiative 872 and the other Washington statutes cited by the plaintiffs were susceptible to the interpretation that plaintiffs advance, however, Washington law would still

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[21] *Initiative 872 is a State statute. E.g., McGowen v. State, 60 P.3d 67, 72, 148 Wash.2d 278 (2002) (Initiatives enacted by the People of Washington are State 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").*

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require that interpretation to be rejected in favor of the interpretation presented by the defendants – for Washington law requires Washington State statutes to be interpreted in a manner that preserves their constitutionality if at all possible. E.g., *Citizens for Responsible Wildlife Management v. State*, 71 P.3d 644, 650, 655-56, 149 Wash.2d 622 (2003) (construing Initiative 713 to preserve its constitutionality); *In re Mattson*, 12 P.3d 585, 589, 142 Wash.2d 298 (2000); *Hammock v. Monroe Street Lumber Co.*, 339 P.2d 684, 688, 54 Wash.2d 224 (1959); see also *McGowen v. State*, 60 P.3d 67, 75-76, 148 Wash.2d 278 (2002) (severing unconstitutional provision from Initiative 732 to preserve it from being stricken down in its entirety).

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

In short, even if this Court were to conclude that the statutory interpretations plaintiffs advance to render Initiative 872 unconstitutional had some basis, this Court would still have to reject those interpretations in favor of the defendants' interpretation which preserves Initiative 872's constitutionality,

C. ***Burden Of Proof:*** **The Plaintiffs Bear A Heavy Burden To Prove A State Statute 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,*

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509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Instead, courts give State statutes 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 here, because plaintiffs are making a facial challenge,[22] and facial challenges to the constitutionality of a State statute exact a very heavy burden of proof. As the Supreme Court has explained:

> 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). Yet, as the discussion of the stipulated legal issues in Part IV of this brief confirms, the plaintiffs' June summary judgment motions do not satisfy that heavy burden of proof.

Although a balancing test can come into play if a challenger pleads and proves certain types of claims under the First Amendment, that balancing test is not triggered here because the plaintiffs' June summary judgment motions did not meet the initial burden of establishing such a viable First Amendment claim. See, e.g., *Hotel & Motel Association of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003). (This same reason defeats the Libertarian Party's suggestion that a "void-for-vagueness" claim lurks somewhere in this suit.)

Finally, even if this Court were to overlook plaintiffs' failure to meet their initial burden of proof and undertake a balancing test anyway, plaintiffs' June submissions still would not prove Initiative 872 unconstitutional under the First Amendment. That is because the "burden" (if any) which that Initiative in fact places on the political parties' claimed First Amendment rights by allowing candidates to tell voters the political party they "prefer" is so slight that a balancing of interests would still result in upholding Initiative 872 given the countervailing interests served by its new top-two system (e.g., allowing the First Amendment free speech right

[22] *E.g., Republican Party S.J. Motion at 8:7-8 ("this case is a facial challenge").*

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of candidates to inform voters of the political party they prefer; preserving voter privacy by not requiring voters to disclose their personal politics as the "poll tax" charged to exercise their right to vote in the first stage of the State's public election process; 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 (rather than pluralities); and furthering citizens' fundamental right to vote by allowing them to vote for the candidates they think most qualified in the public election's first stage, without limiting their choice to some truncated subset of the candidates who lawfully filed for public office in July). 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); *Clingman v. Beaver,* ---U.S.---, ---L.Ed.---, 125 S.Ct. 2029, 2035 (2005) (reiterating the test); *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"); see also, *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).

In short, to prevail on their facial challenge to the top-two winnowing system of Initiative 872, the plaintiffs must establish that no set of circumstances exists under which that Initiative would be valid. The only exception to that would be if the plaintiffs' June submissions established a First Amendment overbreadth claim and if the burden which that overbreadth imposed on their First Amendment rights was not outweighed by the countervailing legitimate interests Initiative 872 serves.

IV. THE LEGAL ISSUES

Parts A – G below address the 5 legal issues listed in this suit's June 10 Stipulated Statement Of Legal Issues, as slightly supplemented by the three political parties' June 17 summary judgment motions. (Instead of further belaboring the pleadings with a "supplemental"

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response brief to the Republican Party's untimely June 23 "supplemental" motion, the Grange joins in the State's response to that untimely supplement, and also addresses the statutory construction argument underlying the Republican Party's untimely submission in the statutory construction discussion in Part A.)

Finally, Part H addresses the Republican Party's preliminary injunction request.

A. *Stipulated Issue 1*: "Does the primary system established by Initiative 872 nominate political party candidates for public office?"

No. The Initiative's top-two system is exactly that: a top-two system. It determines the top two vote getters for placement on the general election ballot. It does not determine or select the candidate or nominee for any particular political party.

This first issue presents a pure question of Washington law concerning the interpretation of a Washington statute adopted by the Washington voters pursuant to Article II, §1 of the Washington State Constitution. If there is any doubt about this threshold issue of State law, this Court should certify it to the Washington Supreme Court for resolution instead of venturing an *Erie*–type "guess" as to what the Washington Supreme Court would have done if it had been allowed to decide this key State law issue.[23] RCW 2.60 (Federal Court Local Law Certificate Procedure Act); Washington Rules of Appellate Procedure RAP 16.16.

As the following paragraphs explain, however, the plaintiffs' claim of unconstitutionality has no basis because their interpretation of Initiative 872 is flatly incorrect.

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

The briefs submitted by the three political parties assert that under Initiative 872, the September primary nominates the ***political parties'*** candidate for public office – ***their*** nominees, ***their*** standard-bearers, ***their*** representatives on the November ballot. They make that assertion

[23] *The Erie doctrine is based on Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).*

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repeatedly. Over and over again. As if their repeating it frequently enough will actually make it true.[24]

But assertions in a brief – no matter how frequently repeated – are not proof.[25]

This is a facial challenge to Initiative 872. And the face of that Initiative – its text – does not say what the political parties repeatedly assert.

As detailed earlier in Part II.F of this Response, the text of Initiative 872 expressly states that the disclosure by the candidate of the party he or she prefers is exactly that: a disclosure by the candidate of the party he or she prefers.

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

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

The political parties' case law involving statutory schemes that identify the candidate as being the candidate of the party accordingly does not apply. For example, *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), arose in Ohio where the party name listed on the ballot identifies "the name of the political party by which the candidate was nominated or certified". Ohio Rev. Code §3505.03.[26]

The text of the Washington law at issue (Initiative 872) is important because a fundamental precept of Washington law is that citizens are presumed to know what the law is.

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[24] *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' [a certain propaganda artist] boasted, 'and most people will believe it'"); see also Green, Jonathan Routledge, Dictionary Of Jargon (1987) at p. 54.*

[25] *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).*

[26] *In a similar vein, Tashjian v. Republican Party, 479 U.S. 208, 220-21 (1986), arose in Connecticut where a candidate's name being listed on a particular party's primary ballot confirms that that candidate received at least 20% of the vote at that political party's convention – a convention at which only that party's members could attend.*

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E.g., *Barson v. DSHS*, 794 P.2d 538, 54 n.1, 58 Wash.App. 616 (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, 117 Wash.2d 631 (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 Ins. Co.*, 502 P.2d 1016, 1020, 81 Wash.2d 403 (1972) (shareholders are presumed to know intricate details of corporate law – and thus know that their absence at shareholder meeting would be taken as a "no" vote on the actions to be voted on at that meeting); *Terrace Heights Sewer Dist. v. Young*, 473 P.2d 414, 417, 2 Wash.App. 206 (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, 10 Wash.App. 141 (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 the voters of our State know the law is especially appropriate here – for the law in question is an Initiative Measure that over 2.6 million of them just finished voting on 8 months ago. And as the Republican Party's own brief acknowledges, under that Initiative, "the party designation is to inform voters which party ***the candidate*** identifies with"[27] – not identify which person that ***the party*** identifies with or selects as ***the party's*** nominee, standard-bearer, or representative.

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

[27] *Republican Party S.J. Motion at 10:18-19 (emphasis added).*

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2. The language of other statutes does not change Initiative 872 to say that its top-two system nominates the *political parties'* candidates.

Since the language of Initiative 872 does not provide that its top-two system nominates the ***political party's*** candidates for public office, the Democratic Party argues that other laws require the Initiative's top-two system to do that. The following explains why that is incorrect.

(a) The "major political party candidate" provision of the superceded "Montana" system does not change the language of Initiative 872.

The Democratic Party quotes the section of RCW 29A.52.116 that states "major political party candidates ... must be nominated at primaries held under this chapter."[28]

But that language is from the "Montana" system's statute. And as the Democratic Party itself confirms, "Initiative 872 is a replacement primary system."[29]

The fact that Initiative 872 replaces the prior "Montana" system is important because, as explained earlier, nominating ***the parties'*** candidates is precisely what the Initiative's replacement primary 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

[28] *Democratic Party S.J. Motion at 15:18-24.*

[29] *Democratic Party S.J. Motion at 9:5.*

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top-two system in its place.[30] (The Initiative's having superceded the prior "Montana" system it replaced also defeats the statutory interpretation underlying the Republican Party's untimely June 23 "supplement".)

Indeed, the political parties' conduct in response to Initiative 872 confirms that this Initiative superceded the Montana statute's provision that "major political party candidates ... must be nominated at primaries held under this chapter" – for the Republican Party nominated *its* King County candidates at a party convention (rather than primary) on June 11, and the

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[30] *Washington law so holds for at least three separate and independent 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. RCW 1.12.025. Pursuant to its legislative authority under Article II of the State Constitution, the Legislature enacted a statute to replace the old blanket primary law with a "Montana" party-nominating primary in March 2004, and pursuant to that same legislative authority under Article II of the State Constitution, the People enacted an Initiative Measure to replace the old blanket primary law with a top-two winnowing primary in November 2004. Since the March party nominating primary law ("Montana" statute) is inconsistent with the November top-two winnowing primary law (Initiative 872), Washington law provides that the Initiative has superceded the provisions of 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, 99 Wash.2d 339 (1983). Here, the "Montana" statute provisions cited by the political parties (such as those requiring major parties to nominate candidates in the September primary, limiting use of minor party names, and allowing minor party conventions to place names on the November ballot) were all 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, to allow all candidates to openly disclose the party they prefer, and limit the names on the November ballot to the top two vote getters from the first stage winnowing contest.*

***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, 142 Wash.2d 183 (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, 129 Wash.2d 736 (1996) (since Washington's Three-Strikes-You're-Out Initiative was a complete act, it impliedly amended and superceded previously existing criminal statutes that provided for lower "maximum" sentences for the crimes specified in those prior statutes). 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 Measure was passed. Accord, Democratic Party S.J. Motion at 9:5 ("Initiative 872 is a replacement primary system").*

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Democratic Party nominated ***its*** King County candidates at a party convention (rather than primary) on June 28.[31]

(b) The Public Disclosure Act's advertising provision does not change the language of Initiative 872.

The Democratic Party quotes language in the Public Disclosure Act stating that "the party with which a candidate files shall be clearly identified in political advertising" – and asserts that the "preference" statement a candidate files with the county auditor pursuant to Initiative 872 therefore requires that candidate to thenceforth identify himself "as affiliated with that party in all advertising."[32]

The Public Disclosure Act language the Democratic Party quotes, however, does no more than what it says. It requires political advertising to identify "the party with which a candidate files."

It does require advertising to identify "the party which a candidate states he prefers in his filing with the county auditor."

Nor does it require a candidate's advertising to identify himself "as affiliated with the party he prefers."

And, fatal to the political parties' claim, it does not re-write Initiative 872 to say that the "preference" statement in the candidate's filing with the county auditor is instead a candidacy filing with the party to be that party's candidate.

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[31] *Grange Documents Dec., Ex. N (**Republican** Party's June 11 nominating convention, in which the Republican Party permitted Democrat Barbara Bogar to vote on the Party's nominee); Grange Documents Dec., Ex. O at p.2 (the Rules Committee for the Washington State **Democratic** Central Committee's April 2, 2005 adoption of Rules for the Selection of Candidates and Nominees for Public Office, which requires nominating conventions to select the Party's "nominee") & Ex. P at pp.1-3 (Official Call and Operating Rules to "elect the Democratic Party candidates" at the Democratic Party's June 28 nominating convention); see also Grange Documents Dec., Ex. Q at Article VII.A (**Libertarian** Party organization Bylaws calling for annual conventions, the purpose of which includes "nominating or endorsing candidates").*

[32] *Democratic Party S.J. Motion at 15:25-16:5 (quoting RCW 42.17.510(1)).*

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(c) The State Constitution's vacancy provision does not change the language of Initiative 872.

The Democratic Party quotes language in the Washington Constitution requiring vacancy appointments to be filled by picking a person "from the same political party" as the vacating office holder.[33]

Once again, however, the language the Democratic Party quotes does no more than what it says. It requires vacancies to be filled with a person "***from*** the same political party" as the vacating office holder. It does not re-write Initiative 872 to say that the "preference" statement in a candidate's filing with the county auditor grants that candidate membership in that party so he or she is henceforth "from" that party.

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 party's*** candidates for public office, the Republican Party suggests this Court should "interpret" 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."[34]

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

Thus, even if the plaintiffs' June motions had submitted legal authority for their suggestion that Washington law allows a sponsor's statement to change the text of an Initiative (something they did not do), the sponsor's acknowledgment about the effect of free elections in

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[33] *Democratic Party S.J. Motion at 16:6-10 (quoting Article II, §15).*

[34] *Republican Party S.J. Motion at 13:17-19, see generally 13:14-16:3.*

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a democracy cannot be used to change the top-two winnowing primary established by Initiative 872 into a political party nominating primary instead.

The Republican Party next argues that this Court should change the text of Initiative 872 to say that the new top-two winnowing system is the same as the old blanket primary's party-nominating system because the Initiative sponsor stated this 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.[35]

But the result of that September primary is different under the Initiative. The result is not the selection of any particular political party's nominee for the November ballot. Instead, the result is the winnowing down of the field of all declared candidates to the top two vote getters – regardless of party nomination, party endorsement, or party opposition.

As the Republican Party's motion elsewhere points 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".[36]

That difference in result – which the Republican Party's motion admits was explained to the voters before they enacted Initiative 872 into law – is a constitutionally crucial difference.

The Supreme Court described the first aspect of a constitutionally valid 'nonpartisan blanket primary' 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).

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[35] *Republican Party S.J. Motion at 13:3-5.*

[36] *Republican Party S.J. Motion at 11:22-25.*

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The new election system established by Initiative 872 satisfies this first aspect – with the 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 would like to change the Supreme Court's use of "may" to "must",[37] that is not what the Supreme Court said.)

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.

In short, the Republican Party's invocation of the Initiative sponsor's statements does not prove this Initiative unconstitutional. Instead, the opposite is true. The sponsor's statements and explanation to voters that this Initiative was drafted to conform to the Supreme Court's holding in *Jones* further confirms the defendants' interpretation of this Initiative as being constitutional. Consistent with *Jones*, Initiative 872 gives voters the same type of free choice they had with the old blanket primary, but it changed the September primary's result. 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.

[37] *E.g., Republican Party's Motion at 12:7-9; Democratic Party's Motion at 16:19 – 17:2.*

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4. A political party's desire to be a truth squad to police the content of candidates' speech does not transform Initiative 872 into a *party* nominating primary.

The Libertarian Party's briefing on this first stipulated legal issue complains that allowing a candidate to disclose the party (if any) which he prefers will allow "a cacophony of undisciplined voices" in the political arena, because Initiative 872 does not grant political parties the right to approve of the truthfulness of a candidate's statement that he "prefers" that party based on truth tests such as whether "that candidate actually agrees with or subscribes to the principles of the party", and does not require a candidate who states he "prefers" a political party to demonstrate that the party also prefers him.[38]

But a fundamental purpose of the First Amendment is to prohibit laws that "discipline" voices in the political arena or otherwise restrict political candidates' free speech. While the political parties might want State law to grant them the power to act as roving truth squads disciplining the truthfulness of whether a candidate actually agrees with or subscribes to the political party's principles, the First Amendment does not allow (never mind require) it.

And the complaint that a candidate's statement that she "prefers" a party does not mean the party prefers or approves of her only confirms that, as written, Initiative 872 does not nominate the ***political parties'*** candidates. A political party's desire to "discipline" the political speech of others does not change this crucial fact about Initiative 872 or transform it into a party-nominating system.

5. Initiative 872 does not take over the *political parties'* internal affairs.

The political parties argue that the top-two winnowing system established by Initiative 872 is instead a political party-nominating system because that Initiative takes over the political parties' affairs. The Republican Party claims Initiative 872 allows non-members to "participate in the party's affairs" and violates the "right of the party to determine its own

[38] *Libertarian Party S.J. Motion at 8:24 - 9:12.*

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membership qualifications."[39] The Libertarian Party claims the Initiative "prevents the parties from settling their differences internally."[40] And the Democratic Party claims the Initiative "forces the political parties to adulterate their candidate selection process with nonmembers of their party."[41]

The text of Initiative 872, however, does no such thing. For example:

- Membership. The Democratic and Republican Parties allow you to self-designate yourself as (and become) a member by signing a check – e.g., signing a $36 check buys you a "Washington Club" membership in the Democratic Party.[42] And the Libertarian Party allows you to self-designate yourself as (and become) a member by signing a sentence that says you're non-violent.[43] Initiative 872 does nothing to change the parties' internal rules governing ***their*** membership criteria.
- Platform. The Democratic Party and Republican Party have opposite positions on abortion.[44] Initiative 872 does nothing to change the parties' internal rules governing ***their*** positions on issues.
- Adherence to Party Platform. The political parties do not currently require their members to adhere to the parties' platform. For example, the Democratic Party and Republican Party both include in their caucuses of the Washington State Legislature members who espouse positions directly at odds with the party's position on the core value issue of abortion.[45] Initiative 872 does not prohibit the parties from changing their internal rules to exclude from membership those persons who do not espouse or adhere to ***their*** core values.
- Nominee. The parties are free to select whatever person they want to be ***their*** "nominees" for public office, and limit the persons making the parties' selection

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[39] *Republican Party S.J. Motion at 8:18-19; see also Libertarian Party S.J. Motion at 8:5-6.*

[40] *Libertarian Party S.J. Motion at 8:18-19.*

[41] *Democratic Party S.J. Motion at 17:9-11.*

[42] *Grange Documents Dec., Ex. R (WSDCC membership form).*

[43] *Grange Documents Dec., Ex. S (Libertarian membership form; the sentence says: "I certify that I do not believe in or advocate the initiation of force as a means of achieving political or social goals").*

[44] *Grange Documents Dec., Ex. C at "Human Rights & Civil Rights" section, unnumbered Platform p.8 (Washington State **Democratic** Party 2004 Platform); Grange Documents Dec., Ex. A at p.5 (2004 Washington State **Republican** Party Platform).*

[45] *For example, NARAL Pro-Choice Washington identifies **Republican** State Representative Shirley Hankins and Fred Jarrett as being "PRO" [for "Pro-choice"]. Grange Documents Dec. Ex. T at pp.2 & 5 (NARAL listings). Yet the Republican Party includes representatives Hankins and Jarrett as members of the Republican House Caucus. Grange Documents Dec. Ex. U at p.2 (House Republican Caucus Members directory). Similarly, NARAL Pro-Choice Washington identifies **Democratic** State Senators Mark L. Doumit and Jim Hargrove as "ANTI" [for "Anti-choice"]. Grange Documents Dec. Ex. T at p.3 (NARAL listings). Yet the Democratic Party includes senators Doumit and Hargrove as members of the Democratic Senate Caucus. Grange Documents Dec. Ex. V at p.1 (Senate Democratic Caucus Members directory).*

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> of ***their*** nominees to ***their*** so-called "members".[46] Indeed, by superceding the prior "Montana" statute that allowed "nonmembers" to vote in that system's party-nominating primary, Initiative 872 allows the major political parties more freedom to select ***their*** nominees than the former Montana system that this Initiative replaced.

In short, the text of Initiative 872 does not dictate, govern, or control the political parties' internal membership or other affairs.

Instead, what the text of Initiative 872 does is establish a two-stage public election process – with a winnowing primary election in September and a general election between the top two vote getters in November.

The political parties' real gripe is that under the Initiative's two-stage public process, the political parties are no longer granted an automatic spot on the second, November ballot.

Despite the rhetoric in the political parties' briefs, that refusal to guarantee the political parties an automatic spot on the November ballot does not constitute the State's "hijacking" or "controlling" of the political parties' internal affairs. Nor does it constitute the State's "crashing" the political parties' private "parades".

If anything, Initiative 872 constitutes the State's refusal to allow the political parties to hijack or control the People's two-stage election process for the political parties' own use, and refusal to allow the political parties to crash or control the People's public election parade. That refusal to allow the political parties to hijack or control the new two-stage election process in our State does not constitute a takeover of the political parties' internal affairs, and does not transform Initiative 872's top-two winnowing system into a party-nominating system instead.

6. Conclusion on first stipulated legal issue.

The text of Initiative 872 does not say that its top-two system nominates the ***political parties'*** candidates for public office. And plaintiffs' various arguments to not justify this Court's changing that text to say that it does. The answer to the first (and threshold) legal

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[46] *See supra footnote 31 concerning the nominating conventions the Democratic Party and Republican Parties already held on June 11 and 28, 2005*

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issue in this case is therefore "no". The primary system established by Initiative 872 does not nominate ***political party*** candidates for public office.

B. ***Stipulated Issue 2:*** **"If the primary system under Initiative 872 does not nominate political party candidates for public office, does each political party have the right to select for itself the only candidate who will be associated with it on either a primary or general election ballot?"**

No.

A political party may have a "right" to select the candidate whom the party chooses to associate with. But as noted in the Grange's previously-filed Answers in this case, the political parties have no right to gag the free speech rights of our State's candidates for public office.

The plaintiffs' argument turns the First Amendment on its head, reading the First Amendment's paramount protection of every American's right to free speech to instead be a restriction that grants political organizations the power to gag the free speech of persons running for public office.

The First Amendment does not grant the plaintiff Republican Party the power to prevent a candidate from stating she "prefers" Republicans any more than the First Amendment grants Ford Motor Company the right to prevent a person from saying she "prefers" Fords.

1. Political Candidates' Right Of Free Speech Is A Core First Amendment Freedom.

The First Amendment's free speech guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). As the Libertarian Party's own brief explains:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

Libertarian Party S.J. Motion at 17:2-6 (quoting *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961)).

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A candidate's statement to voters about what he believes qualifies him 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 ban on speech about individual political 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 and quotation marks omitted).

Thus, for example, the First Amendment protects exaggeration, vilification, and even false statements in the political arena. 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, 135 Wash.2d 618 (1998) (State law cannot prohibit falsity in political debate).

2. The First Amendment Does Not Empower Political Parties To Re-Write State Law To Impose Prior Restraints On Political Speech.

The plaintiffs seek to enjoin this Initiative's allowing a political candidate to state on the ballot or in the voters pamphlet that he or she "prefers" one political party or another – before any such statement is even made. That is 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

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(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 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, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); *Freedman v. State of Maryland*, 380 U.S. 51, 57, 85 S.Ct. 734, 738 13 L.Ed.2d 649 (1965); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 1246 , 43 L.Ed.2d 448 (1975).

The political parties' June submissions simply do not overcome that heavy First Amendment presumption against prior 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 particular candidates whose speech or statements are supposedly objectionable.

The political parties clearly do not like the free speech that Initiative 872 allows candidates for public office in our State's new top-two winnowing process. But that free speech is protected – not prohibited – by the First Amendment that the political parties invoke.

3. Conclusion on second stipulated legal issue.

A political party's association right to chose the candidate which the party chooses to associate with does not nullify every candidate's free speech right to state the party which the candidate prefers. Indeed, the free speech of candidates for public office as a core *guarantee* (not a core *prohibition*) of the First Amendment.

As the Supreme Court has previously explained:

> [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

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> 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 citations and quotation marks omitted, emphasis and alterations original).

In short, the answer to the second legal issue in this case is "no". The political parties do not have the right to demand a prior restraint of candidates' free speech in order to control who the public might associate with them in our State's new top-two winnowing system.

C. ***Stipulated Issue 3*: "If the primary system under Initiative 872 nominates political party candidates for public office, does Initiative 872 violate the first amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees?"**

No.

The primary system established by Initiative 872 does not compel the ***political parties*** to do anything – never mind force them to include in their internal organization any "unaffiliated" voter or "member" of some other political party.

Instead, the top-two system established by Initiative 872 allows ***the candidate*** to disclose the political party which that candidate prefers. Unlike the "blanket" and "Montana" systems that required a political party to accept the candidate who prevailed in the September primary as being that party's nominee on the November ballot, the Initiative's top-two system does not require or force any ***political party*** to do anything.

For example, if the Republican Party wants to say it has nothing to do with and does not support former State Republican Chair and Congressional leader Jennifer Dunn's son (Reagan Dunn) for King County Counsel, it can do so. But it cannot co-opt the power of the government to secure a prior restraint against Reagan Dunn's stating to voters that the party he "prefers" is the Republicans.

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D. *Stipulated Issue 4*: "Does Washington's filing statute impose forced association of political parties with candidates in violation of the parties' first amendment association rights?"

No. The filing provision in Initiative 872 allows ***the candidate*** to disclose the political party (if any) which that candidate prefers. It does not force any ***political party*** to then associate with that candidate. As noted earlier, the political parties' argument turns our Constitution on its head by reading the First Amendment's paramount protection of every American's free speech – especially in the political arena – to instead be a gag on free speech in the political arena.

E. *Stipulated Issue 5*: "Does Initiative 872's limitation of access to the general election ballot to only the top two vote getters in the primary for partisan office unconstitutionally limit ballot access for minor political parties?"

No.

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 Washington's ***November*** election ballot.

As explained earlier, Initiative 872 established a two-stage public election process. The public election's first stage is a September winnowing primary that allows all candidates to appear on the ballot, and the election's second stage is a November run-off between the top two vote getters for each applicable position.

This two-stage election process allows all political parties to have any candidate they like printed on the ***September*** election ballot – thereby providing all political parties full access to the electorate in Washington's public election process. This is significant because the minor party in this case (the Libertarian Party) quotes the underlying purpose of allowing minor parties ballot access as follows:

> 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.

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Libertarian Party S.J. Motion at 15:16-19 (quoting *Williams v. Rhodes*, 393 U.S. 23 (1968)).

The winnowing process established by Initiative 872, however, does not keep any minor party's candidate off the election ballot available to all Washington voters in September. It does not deny any minor party's candidate an equal opportunity to win votes in that open election. And by allowing all candidates to have their names printed on that open September ballot, it does not restrict voters to casting a vote for only a subset of candidates while other parties are clamoring for a place on that ballot. Initiative 872 accordingly fulfills the underlying purpose of allowing minor parties access to the ballot as explained by the intervenor Libertarian Party itself.

Initiative 872's granting all candidates equal and open access to the first stage of Washington's two-stage public election process also fulfills the purpose of allowing ballot access as explained by other parties to this case – for the Republican Party and its co-plaintiffs explain that ballot access is important "because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens", and an "election campaign is a means of disseminating ideas as well as attaining political office."[47]

Guaranteeing minor parties a place on the second stage ballot in a public election process such as that established by Initiative 872 is not necessary to accomplish that purpose. Indeed, as the political parties' own case law confirms, 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." *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-24, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (emphasis added). See also *Dart v. Brown*, 717 F.2d 1491, 1510 (5th Cir. 1983) (Libertarian party not even entitled to listing by name on the first-stage primary ballot in Louisiana's top-two system as long as candidate

[47] *Republican Party S.J. Brief at 24:24 – 25:5 (quoting Anderson v. Celebrezze, 460 U.S. 780, (1983) and Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979).*

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who happens to be a Libertarian is on that first-stage primary ballot – that grants 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 because they are all, by definition, limited to the top two vote getters.

Nor is an expansion of Washington's second stage November ballot to more than the top two vote getters mandated by the case law the parties cite with respect to other election systems – for as the plaintiff Republican Party admits, "No State has a primary system similar to Washington's" current Initiative 872.[48] The ballot access case law regarding those dissimilar election systems has no application here because they (1) involved elections where the November general election was the only stage of the election open to all voters, (2) involved a primary that was a party-nominating primary, (3) involved a primary ballot that was not freely open to any candidate who wanted to be listed on that ballot without additional requirements or restrictions, or (4) did not at all address the issue of whether the election system at issue afforded the complaining party access to the electorate by being open to all voters.

F. ***Republican Party's Supplement To Issue 5:*** **"Does Washington's filing statute and Initiative 872's limitation of access to the general election ballot to only the top two vote getters in the primary for partisan office unconstitutionally limit ballot access for the Republican Party?"**

No.

The Grange recognizes that the political parties think they are very important. But the First Amendment does not grant the Republican Party, the Democratic Party, the Libertarian Party, or any other political party a constitutional "right" to have the name of the person that party likes printed on Washington's ***November*** election ballot.

[48] *Republican Party S.J. Motion at 9:9-10.*

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As the Republican Party's lead counsel in this case has candidly explained elsewhere, 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."[49] The Republican Party's June submissions do not establish any constitutional "right" to always be one of the top two candidates chosen by the voters in that new top two system.

G. ***Plaintiffs' Supplemental Issue 6:*** **"Should Initiative 872 be invalidated in its entirety?"**

No.

The Initiative's allowing a candidate to disclose the political party he "prefers" is at the heart of the political parties' complaints. And the Libertarian Party succinctly identifies the allegedly offending sections of Initiative 872:

> **Section 7(3)** of I-872 expressly provides for candidates to indicate a political party "preference" when filing a declaration of candidacy and will be shown on ballots "for the information of voters." **Section 11** expressly provides that the candidate's party "preference" will be included in the state voter's pamphlet.

Libertarian Party S.J. Motion at 7:17-20 (emphasis added).

As explained earlier, however, this "preference" disclosure part of Initiative 872 is not unconstitutional.

Moreover, even if that "preference" part were unconstitutional, that part could be invalidated without having to nullify the entire top-two system enacted into law by the voters – for as the plaintiff Republican Party's own motion acknowledges, "in ordinary circumstances only the specific part of an enactment that is unconstitutional will be invalidated."[50]

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[49] *Documents Dec., Ex. L (Political Parties: Their Legal Role in Elections (June 21, 2005 Election Law CLE materials by Richard Derham and John White) at p. 24, first paragraph.*

[50] *Republican Party S.J. Motion at 26:20-21.*

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The severability of a State statute presents a question of State law.[51]

And Washington State 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, 83 Wash.App. 325 (1996) (severing part of statute that violated due process rights and upholding the remainder of statute), aff'd, 132 Wash.2d 660, 940 P.2d 642 (1997); cf. the parallel federal law, e.g., *U.S. v. 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 citations & quotation marks omitted).

Washington law further holds that "a severability clause is not necessary in order to meet the severability test." *In re Parentage of CAMA*, 109 P.3d 405, 414, 154 Wash.2d 52 (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, 148 Wash.2d 278 (2002) (severing unconstitutional part of Section 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

[51] *Arizona Libertarian Party, Inc. v. Bayless, 351 F.3d 1277, 1283 (9th Cir. 2003) (finding portion of primary statute unconstitutional but remanding to district court to perform severance analysis according to Arizona State law standards).*

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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 of the Initiative to allow each voter to chose from among all declared candidates in the primary to winnow the list of candidates on the November ballot down to two, while maintaining each voter's right to keep his or her personal politics absolutely secret.

Those purposes can be served even if this Court strikes down the allegedly unconstitutional part of the Initiative that allows candidates to disclose the political party (if any) they prefer. Thus, if this Court agrees with the plaintiffs' arguments that it is unconstitutional for Initiative 872 to allow a candidate to state that he or she "prefers" a particular political party without that party granting the candidate permission to make that statement, then Washington law requires this Court to invalidate only that "preference" part of the Initiative instead of striking down the People's enactment in its entirety.[52]

H. ***The Republican Party's Preliminary Injunction Motion:*** **Do the Republican Party's submissions prove that this federal court should write a new law for the State of Washington's upcoming 2005 primary?**

Departing from its core value of opposing judicial activism by the federal courts, the Republican Party demands that this federal Court invalidate the top-two election system established by Initiative 872, and then effectively re-enact the prior "Montana" system after severing out and invalidating the parts of that system that the Republican Party claims are equally unconstitutional.

Even if the political parties' June motions had established that Initiative 872 is facially unconstitutional, the plaintiffs still would not be entitled to the injunction they demand unless:

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[52] *Although the plaintiff Republican Party suggests that Washington voters are too unintelligent to want to vote for a constitutional Initiative (Republican Party S.J. Motion at 27:3-4 ("It cannot be believed that voters would have passed the initiative stripped of its ... unconstitutional provisions")), it provides no support for that ad hominem attack on the citizens of our State, and the Grange accordingly does not waste time or space with an argument in reply.*

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(1) plaintiffs prove the likelihood of substantial and immediate irreparable injury, and

(2) plaintiffs establish the inadequacy of remedies at law.

G.C. & K.B. Invest. Inc. v. Wilson, 326 F.3d 1096, 1107 (9th Cir. 2003).

Moreover, since the political parties seek to restrain candidates' free speech right to express the political party they "prefer":

(3) plaintiffs must also overcome the "heavy presumption" that an injunction would be an unconstitutional restraint on free speech.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971).

This Court must also consider other factors which, as a practical matter, limit the exercise of its injunctive powers, such as the basic principle of federalism – a fundamental principle which, outside of this lawsuit, is supposedly a core value of the plaintiff Republican Party. Consistent with the principle of federalism underlying our federal constitutional system:

(4) federal courts should be hesitant to enjoin the exercise of a State's sovereign power, leaving whenever possible the construction of State laws to the courts of the State involved.

Porto Rico Tel. Co. v. Puerto Rico Communications Authority, 189 F.2d 39, 41 (1st Cir. 1951).

This Court should also consider the fact that the State of Washington has never claimed or indicated that it would not abide by the ruling on constitutionality that this Court includes in its declaratory judgment Order. That too militates against this federal court's adding a mandatory injunction as well because, as the Ninth Circuit has declared:

(5) when a State expresses its intent to follow the Court Order, the court should likewise be hesitant to issue an injunction.

Miller v. Miller, 504 F.2d 1067, 1067 (9th Cir. 1974).

Finally, FRCP 65(d) requires this Court's injunction order to "be specific in terms" and "describe in reasonable detail ... the act sought to be restrained". This Court must therefore also consider the how it can effectively write and impose the election system details that have to be included to allow the State's 2005 election cycle to proceed (e.g., wording of Declaration of Candidacies, ballot content, voters pamphlet content, September primary rules and effect of

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results, November ballot content, etc.). The pragmatic (and federalism-violating) scope of that chore also weighs against the injunction the political parties demand, because:

> (6) The difficulty of crafting and enforcing an injunctive remedy is grounds alone for denying injunctive relief.

Refrig. Eng. Corp. v. Frick Co., 370 F. Supp. 702, 715 (W.D. Tex. 1974).

Here, plaintiffs demand a declaration not only that Initiative 872 is unconstitutional, but also that parts of the former "Montana" statute were also invalid.

This Court should deny an injunction first and foremost because the political parties' June submissions did not prove their claim that Initiative 872 is unconstitutional on its face.

But if the Court were to conclude otherwise and immediately enjoin the Initiative's top-two system from proceeding, that would leave the State of Washington without an election system for the 2005 election cycle. That will in turn force this Court to either draft (or cobble together) an election system itself, or force the State of Washington to forego having orderly elections this year. Especially in light of the long drawn out litigation, turbulence, and turmoil that our State just finished going though as a result of the multiple recounts and contest litigation relating to the 2004 governor's election, a federal court injunction promoting chaos in the 2005 election cannot be said to be a wise exercise of equitable powers in the public's interest.

This Court should not take it upon itself to legislate a new Washington elections law. Nor should it cause the citizens of our State irreparable harm by forcing them to forego having an orderly 2005 election cycle. Instead, if this Court finds Initiative 872 unconstitutional, it should allow the Washington Legislature time to draft new legislation by allowing the State to proceed, commencing with the July 25 candidate filings, pursuant to the State's current top-two system for just this one year.

This approach would also be consistent with the way the federal courts allowed the blanket primary system to proceed during the blanket primary litigation. See *Reed*, 343 F.3d at 1202 (noting injunction against blanket primary was dissolved prior to the 2001 primary).

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And this approach would also be consistent with the requirement that an injunction plaintiff must prove substantial and immediate harm – for the political parties in this case have not proven that they would be substantially and immediately harmed if a single election cycle is conducted pursuant to this November 2004 law that they waited until only very recently to dispute. Moreover, this lack of harm is especially true here since 2005 is an off-year election, with relatively few offices on the ballot compared to even-numbered years.

Finally, there also is no reason to think that the State Legislature will not act within the upcoming year if this Court so allows it the opportunity to do when it reconvenes in January 2006 (it has already adjourned for 2005). For example, after the *Reed* decision striking down the old blanket primary, the State Legislature diligently drafted, and the Governor then signed into law, the "Montana" statute without the necessity of further court Order. See 2004 Wash. Laws 271.

For all the above reasons, the plaintiffs' injunction request should be denied.

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V. CONCLUSION

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

But on its face, it is constitutional.

It does not nominate the ***political parties'*** candidates.

It advances – not violates – core First Amendment freedoms in our public elections process.

And its establishing an entirely open, two-stage public election process for our State promotes – not squelches – ballot access with respect to the election of our State's public officials.

This Court should accordingly deny the political parties' various motions, and dismiss this case with prejudice as a matter of law.

RESPECTFULLY SUBMITTED this 1st day of July, 2005.

FOSTER PEPPER & SHEFELMAN PLLC

[Signed]

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