THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, v. DEAN LOGAN, et al., Defendants, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Interveners LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Interveners STATE OF WASHINGTON, et al., Interveners WASHINGTON STATE GRANGE, et al., Interveners	Case No: CV05-0927-TSZ LIBERTARIAN PARTY'S MOTION FOR SUMMARY JUDGMENT NOTE FOR MOTION CALENDAR WEDNESDAY, JULY 13, 2005 AT 9:00 AM ORAL ARGUMENT REQUESTED

SUMMARY OF MOTION

The Libertarian Party of Washington State ("the LP") seeks an order of Summary Judgment declaring Initiative 872, passed by Washington voters in 2004, is

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unconstitutional on its face, and an injunction preventing the several government defendants from implementing the initiative. The LP also requests an order preventing the defendants from identifying on any primary ballot a "Libertarian" candidate who has not been authorized to carry the Libertarian label under the rules of the LP. The LP reserves to a later date its claim that the initiative is unconstitutional as applied to the LP and its adherents.

In this motion the LP will show the primary system established under Initiative 872 violates basic First Amendment principles, primarily because I-872 allows candidates to use party labels to inform voters of their ideology while denying the political party the ability to define what the party label means. In addition, I-872 places impermissible limits on access to the general election ballot contrary to the Article 1 and the Fourteenth Amendment of the U.S. Constitution. Accordingly, it is unconstitutional on its face.

STATEMENT OF FACTS

On September 13, 2003, the Ninth Circuit Court of Appeals declared Washington's 68 year old "blanket primary[1]" unconstitutional as a violation of the political parties' First Amendment rights. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (C.A.9 2003). On January 8, 2004, Intervenor-Defendant Washington State Grange filed Initiative 872 with the Secretary of State for Washington,[2] which

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[1] The so-called "blanket primary" was adopted by the state legislature in 1935, pursuant to an earlier initiative of Intevenor-Defendant Washington State Grange.

[2] See, http://www.secstate.wa.gov/elections/initiatives/signatures.aspx?y=2004

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initiative proposed a so-called "modified blanket primary"[3] system similar to but nonetheless unlike one used in the State of Louisiana,[4] and which was expressly intended to "look nearly identical to the blanket primary system."[5]

According to Section 2 of the initiative, the stated legislative intent was to:

> Protect each voter's right to vote for any candidate for any office...[by] "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." Heavey v. Chapman, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980)...In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington.

Initiative 872, § 2.

Section 18 of the initiative specifically provided:

> This act takes effect only if the Ninth Circuit Court of Appeals' decision in Democratic Party of Washington State v. Reed, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect.

Initiative 872, § 18.

On Feb. 23, 2004, the United States Supreme Court denied the state's petition for review of the Ninth Circuit Decision. *Reed v. Democratic Party of Washington*, 540 U.S. 1213 (2004).

Later the Washington State Legislature passed, and on April 1, 2004 Governor Locke approved, an open primary system (commonly known as the "Montana" primary

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[3] The primary system introduced by I-872 has alternately been called the "modified blanket primary," the "qualifying" primary," the "Cajun" primary or the "top two" primary.

[4] The main distinction between the "modified blanket primary" introduced by I-872 and the Louisiana system is that Washington has a primary in September followed a general election in November, while Louisiana has a general election in November followed by a run-off in December. This distinction has constitutional significance, as will be explained in Part 5 of this memorandum.

[5] See, Exhibit 2, page 1, Declaration of John J. White Jr. in Support of Plaintiff's Motion for Preliminary Injunction, Clerk's Document # 8 (CD 8).

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system) wherein voters first selected a party ballot and then voted for candidates on the selected party ballot.[6] Engrossed Senate Bill 6453, Chapter 271, Laws of 2004, included provisions for both a "modified blanket" primary system similar to I-872 and a "Montana" or "open" primary system. The former primary system was described in the bill as a "qualifying" primary, while the latter system was described as a "nominating" primary. Recognizing that substantial doubt existed regarding the constitutionality of the "qualifying" primary system, Section 101 of the bill provided:

> If a court of competent jurisdiction holds that a candidate may not identify a major or minor political party as best approximating his or her political philosophy, as provided in RCW 29A.24.030(3), and all appeals of that court order have been exhausted or waived, the secretary of state shall notify the governor, the majority and minority leaders of the two largest caucuses in the senate and the house of representatives, the code reviser, and all county auditors that the state can no longer conduct a qualifying primary and instead will conduct a nominating primary.

However, the governor vetoed the "qualifying" primary portions of the bill, leaving only the "nominating" primary system in place.[7] The Washington State Supreme Court upheld the governor's veto against a constitutional challenge by Intervenor-Defendants Washington State Grange on January 20, 2005. *Washington State Grange v. Locke*, 153 Wash.2d 475, 105 P.3d 9 (2005).

On November 2, 2004, voters approved I-872.[8] In addition to the Sections identified above, Section 3 declared that Washington voters had the rights, inter alia, 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."

Section 4 of the initiative re-defined "partisan office" as

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[6] See, Declaration of Richard Shepard in Support of Summary Judgment, ¶ 2, and Exhibit A thereto.

[7] See, veto message, Dec. of Richard Shepard, Exhibit A, at pages 63-66.

[8] See, http://vote.wa.gov/general/measures.aspx?a=872

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> "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."

Section 5 of the initiative amended R.C.W. § 29A.04.127 to re-define "primary" or "primary election" as:

> a procedure for winnowing candidates for public office 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.

Section 6 amended RCW 29A.36.170, to limit access to the general election ballot:

> For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot;…

Section 7(3) of the initiative provided:

> 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.

Section 11 of the initiative stated:

> 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.

Section 17 of the initiative purported to repeal several statutes regarding elections but failed to repeal R.C.W. §§29A.20.110 through 29A.20.201, all relating to minor party nominating conventions.

Thus the stage was set for additional litigation over the right of all political parties to select their own standard bearers as well as the right of the LP to access the general election ballot.

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ARGUMENT

STANDARD OF PROOF

A party is entitled to judgment prior to trial if the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

STIPULATED ISSUES FOR ARGUMENT

1. Does the primary system established by Initiative 872 nominate political party candidates for public office?

Short Answer: Yes.

> "The nature of the nominating procedure determines the nature of the party; he who can make the nomination is owner of the party."[9]

"Nominate" according to Black's Law Dictionary (5th Ed.), means: "To name, designate by name, appoint or propose for election or appointment." Initiative 872 does nothing other than "name, designate by name, appoint or propose for election or appointment," candidates for partisan public office. Neither does I-872 implement a "*nonpartisan* blanket primary" discussed in *California Democratic Party v. Jones*, 530 U.S. 567, 585, 120 S.Ct. 2402 (U.S.Cal.,2000). See, e.g., I-872, § 4. The significant dispute appears to be who does the nominating.

Even if the persons thus nominated under I-872 are not "political party candidates," "that is the problem with the system, not a defense of it." *Reed*, 343 F.3d at 1204. In *Reed* the State argued, because it has no voter registration regime and

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[9] E.E. Schattschneider, *Party Government* 64 (1942).

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> "because of its non-partisan registration, the winners of the primary 'are the 'nominees' not of the parties but of the electorate.' Thus, the State argues, its primary is a '*nonpartisan* blanket primary' that under *Jones* does not violate the parties' associational rights."

Reed, 343 F.3d at 1203 (emphasis in original, footnotes omitted)

The Ninth Circuit dismissed the State's argument:

> "These are distinctions without a difference. That the voters do not reveal their party preferences at a government registration desk does not mean that they do not have them. 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, including activities such as holding precinct caucuses in their homes, serving on local and state party committees, contributing money to their parties, canvassing, and watching polls for their parties, 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."

Reed, 343 F.3d at 1203-1204.

Thus, not only did the Ninth Circuit reject the State's argument that the electorate "nominated" candidates without consideration of political affiliations, it embraced the proposition that the First Amendment rights of political party adherents reached well beyond the context of picnics to include the context of primaries.

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.

The defendants here have not demonstrated and cannot demonstrate any constitutionally significant difference between the party "designation"[10] made by

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[10] See, R.C.W. § 29.15.010(3) Declaration and affidavit of candidacy. Recodified as RCW 29A.24.030 pursuant to 2003 c 111 § 2401, effective July 1, 2004. The full text of now superceded R.C.W. § 29.15.010 is at Declaration of Richard Shepard, Exhibit B.

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candidates in the blanket primary and invalidated by *Reed* and a party "preference" in what they have themselves called the "modified blanket primary." The claimed "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," stated in both § 3 & 5 of the initiative, if it is a right at all, is "overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Jones*, *supra,* 530 U.S. at 583. The "rights" claimed in Sections 3 & 5 of I-872 are precisely what the Ninth Circuit held to be a clear violation of the rights of the political parties and their adherents.

> The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapes. Party adherents are entitled to associate to choose their party's nominees for public office.

Reed, 343 F.3d at 1204

Not only does I-872 infringe on political party rights, it fosters chaotic and disorderly elections, to the detriment of both political parties and voters. The "general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences." *Storer v. Brown*, 415 U.S. 724, 735, 94 S.Ct. 1274 (1974). While "states may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder...." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364 (1997), the primary system established by Initiative 872 prevents the parties from settling their differences internally and actually encourages party splintering and unrestrained factionalism, see, *Storer* 415 U.S. at 735, ("splintered parties and unrestrained factionalism may do significant damage to the fabric of government"), and see, Federalist # 10 (Madison).

Further, by allowing any person to declare a "preference" for a political party while also depriving the political party any right to approve or otherwise determine

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whether the candidate actually agrees with or subscribes to the principles of the party the State fosters voter confusion regarding what the party label actually means. This state has claimed, and the Supreme Court has agreed, reduced voter confusion was a compelling state interest that justified limiting minor party and independent candidate's access to the general election ballot, *Munro v. Socialist Worker's Party,* 479 U.S. 189 (1986).

By adopting I-872 the state has abandoned that claim, now allowing all candidates to express a "preference" for both major and minor political parties, without any requirement that the candidate demonstrate any support within the "preferred" party or even among the general public to have immediate access to the primary ballot. The logical result is a cacophony of undisciplined voices on an overcrowded primary ballot, all of which will confuse voters about the LP's message.

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?

Short Answer: Yes. To clarify, the Libertarian Party maintains it has the right to select its own standard bearers for appearance on the general election ballot regardless whether the I-872 primary system "nominates political party candidates."

> "In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."

Jones, 120 S.Ct. at 2408

The Supreme Court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution." *Jones,* 120 S.Ct. at 2407, (citing *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989), and

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Democratic Party Of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, (1981)) (footnote omitted). In *Tashjian, v. Republican Party Of Connecticut,* 479 U.S. 208 (1986), and again in *Eu, supra,* the Supreme Court said "[A] State may enact laws to 'prevent the disruption of the political parties from without' but not, as in this case, laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" *Id.*, at 227 (quoting *Tashjian,* at 224).

"Since control over participation in a primary can profoundly influence the content of the compromise emerging from the primary election, a political party's ability to define its boundaries cannot be separated from the party's ability to determine its political ideology."[11] "On several occasions this [Supreme] Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions - thus imparting the party's essential functions - and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles.'" *La Follette*, 450 U.S. at 122 (1981); (citing to *Ray v. Blair*, 343 U.S. 214, 221–222 (1952); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); and *Kusper v. Pontikes*, 414 U.S. 51, 59-60 (1973).

Historically (except for the 2002 and 2004 elections) the LP has nominated its candidates by convention as provided by prior state law. In *Reed*, while the State was attempting to explain why the blanket primary system treated minor political party candidates differently from major political party candidates it conceded "[a]llowing multiple filings by minor party candidates would further disburse the strength of small

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[11] Berdon, J. *The Constitutional Right of the Political Party to Chart its Own Course: Defining Its Membership Without State Interference,* 22 Suffolk U.L.R. 933, 965 (quoting Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 126 (1984))

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parties and would increase the possibility that if none of them gains one percent of the primary vote, no representative of that party would qualify for the general election ballot." *Brief of Appellee State of Washington*, Democratic Party of Washington v Reed (02-35428), at 47.

It then asserted, "it is virtually certain that an affiliate of each major party will advance to the general election; there is no need to 'help' large parties by allowing them to unite behind a single slate of candidates." *Id.* Implicit in that assumption of virtual certainty is the fact that Democratic and Republican Party candidates show historically strong ballot strength, and emerging political parties such as the LP have significantly lesser strength. A survey of recent statewide elections supports this fact.[12]

However, directly contrary to his argument in *Reed,* on May 18, 2005, the Secretary of State adopted emergency rules allegedly to implement I-872 that effectively preempted and eliminated existing statutory mechanisms (R.C.W. §§ 29A.20.110 through 29A.20.201) for the LP to exercise its right to nominate its candidates by convention.[13]

First, the Secretary does not have the authority under Washington law to repeal a statute. The legislature may not delegate to the executive authority the power to make law. *Morgan v. Department of Social Sec.*, 14 Wash.2d 156, 175, 127 P.2d 686 (1942). An administrative agency may not, by means of an interpretation or clarifying regulation, actually modify or amend the legislative enactment. *Hansen Baking Co. v. City of Seattle*, 48 Wash.2d 737, 742, 296 P.2d 670 (1956); *Fisher Flouring Mills Co. v. State,* 35 Wash.2d 482, 492, 213 P.2d 938 (1950).

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12 See, Declaration of Richard Shepard, at ¶ 4, and Exhibit C.
13 See, Declaration of Richard Shepard, at ¶ 5, and Exhibit D.

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Second, the Secretary is judicially estopped from taking a position inconsistent with the position he took in *Reed*. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (C.A.9 1996). I-872 does not change the status of minor political parties. They are still small and still at risk of disbursed or diluted ballot strength in connection with unwanted or unapproved candidacies. The fact that I-872 removed the so-called "one-percent rule," see, *Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499, (1986), which rule was referenced the State's argument, if relevant at all, exacerbates the ballot access burden on the Libertarian Party. See, Part 5, infra.

The Libertarian Party has the right to nominate its own candidates to the general election ballot under existing statutes and under the First and Fourteenth Amendment. Under Secretary of State's interpretation of I-872 the State deprives the LP of its First Amendment right of expressive association as well as its Fourteenth Amendment right of due process.

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?

Short Answer: Yes.

> "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together."

Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)(citation omitted)

This issue was also settled in *Reed*. There the defendants argued since the Democratic and Republican Parties had no legal or organizational basis for determining party membership, they could not demonstrate a constitutional burden on their members,

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meanwhile ignoring that the Libertarian Party had an organizational basis for determining party membership, a "non-aggression" pledge.[14] The *Reed* court disposed of the defendants' argument by observing, "That the voters do not reveal their party preferences at a government registration desk does not mean that they do not have them." *Reed, supra.*

More important, the dispositive issue is not who makes up the membership of the political parties, but whether the State can force the parties to accept the I-872 definition of political party membership, which reduced to its essence is no definition at all. The State argued to the Ninth Circuit in *Reed* that political party membership "plays no role" in its election system. See, generally *Brief of Appellee State of Washington*, Democratic Party of Washington v Reed (02-35428), at 41-44. The Grange argued the only valid definition for party membership is voter registration, which the State (and/or the citizens) have refused to enact for over 80 years. *Brief of Appellee Washington State Grange,* Democratic Party of Washington v Reed (02-35428), at 31.

The core issue in *Reed* was thus apparent. The State had co-opted political party labels and prestige into its primary election system, and at the same time deprived the political parties of the means to identify their members upon a legal basis (voter registration) and prevented them from identifying their members on an organizational basis (party rule). The *Reed* court essentially held the deprivation of both legal and organizational bases for membership was a severe constitutional burden on its face. As each relates to identification of party membership, there is no meaningful distinction between the old blanket primary and the "modified blanket primary," and I-872 is just as unconstitutional on this ground as was the old blanket primary.

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[14] See, Declaration of Richard Shepard, ¶ 6, and Exhibit E thereto.

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4. Does Washington's filing statute impose forced association of political parties with candidates in violation of the parties' First Amendment associational rights?

Short Answer: Yes.

> "[A] single election in which the party nominee is selected by nonparty members could be enough to destroy the party. … Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. '[R]egulating the identity of the parties' leaders,' we have said, 'may ... color the parties' message and interfere with the parties' decisions as to the best means to promote that message.'"

Jones, at 2410-2411, (citing *Eu*, 489 U. S., at 231, n. 21)

In addition to the burden of depriving the political parties of any meaningful way to define their membership for the purpose of nominating candidates, I-872 also purports to deprive the parties of their right to require candidates to comply with internal party rules in seeking the nomination in the name of the party.

As part of its internal rules the Libertarian Party requires all candidates who wish to represent the Libertarian Party must be members of the Libertarian Party. One becomes a member of the Libertarian Party by subscribing to or affirming a non-aggression pledge.[15] In addition, the name "Libertarian Party" is a registered trademark, and accordingly the LP has a proprietary right to determine who may use the name and for what purposes the name may be used.[16]

Federal courts have consistently held political parties have the right to insist on loyalty to party principles, *Nader v. Schafer*, 417 F.Supp. 837, 847 (D.Conn. 1976), summarily aff'd 429 U.S. 989 (1976), the right to require a loyalty pledge, *Ray v. Blair*,

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[15] See, Declaration of Richard Shepard, ¶ 6, and Exhibit E thereto

[16] See, Declaration of Richard Shepard, ¶ 7, and Exhibit F thereto.

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343 U.S. 214, 231 (1952),[17] and the right to impose tests on candidates. *Duke v Smith* 13 F.2d 388, 391 n.3 (11th Cir. 1994). "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment).

I-872 deprives the LP of its ability to enforce its requirement that candidates of the party be members of the party as well as its ability to regulate the use of the Libertarian Party name by non-members. Accordingly it forces the LP to associate with candidates who may not agree with, and who in some cases may actively oppose, the principles and message of the LP.

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?

Short Answer: Yes

> "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."

Williams v. Rhodes, 393 U.S. 23, 31, 89 S.Ct. 5 (1968).

Under I-872, instead of having a relatively modest and easily calculable threshold for access to the general election ballot, such as the so-called "one-percent rule," see, *Munro, supra,* Libertarian Party candidates now face a ballot access threshold that is a

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[17] *Reed* sets forth the basic constitutional rationale for the Libertarian Party's right to require its candidates to execute its "non-aggression" pledge, but *Blair* is directly on point and dispositive.

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moving target, which target is dependant on factors wholly outside the control of the Libertarian Party.

In a three candidate race for a partisan office the Libertarian Party candidate could need to garner more than 33% of the vote to advance to the general election. In a multiple candidate race the corresponding vote requirement would vary significantly, depending on the level of support for other candidates, the political and statistical variables increasing exponentially with the addition of each new candidate. From a historical point of view the second place candidate in a statewide primary in Washington has typically obtained between 21% and 41% of the total vote. Third place candidates, often Democratic or Republican Party candidates, typically range between 4% and 21% of the total vote.[18] Without reasonable certainty under a "top two go forward" scheme how many candidates will declare their candidacy or what portion of the vote a candidate must win to reach the general election ballot, the incentive for the Libertarian Party to place anyone on the ballot is dramatically reduced.

The void-for-vagueness doctrine is applicable to laws regulating conduct protected by the First Amendment. *Kolender v. Lawson,* 461 U.S. 352, 358 (1983). "[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S.Ct. 1316 (1964)(citations omitted). A statute is unconstitutionally vague if it does not give "a person of ordinary intelligence fair notice" of the statute's requirements. *United States v Harriss,* 347 U.S. 612, 617 (1954).

> As we said in *Smith v. People of State of California*, '* * * stricter standards of permissible statutory vagueness may be applied to a statute

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[18] See, Declaration of Richard Shepard, ¶ 4, and Exhibit C thereto.

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> having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' 361 U.S. 147, at 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205. '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.

Cramp v. Board of Public Instruction of Orange County, Fla., 368 U.S. 278, 287-288, 82 S.Ct. 275 (1961)

A vague statute is not reasonably necessary to achieve a State's interest in regulating ballot access. *Duke v. Connell*, 790 F. Supp. 50, 53-54 (DRI 1992). "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike,..." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

The Libertarian Party is a "small" party without the "strength" of the older parties, so there is no "certainty" how many, if any, of its candidates (and hence its First Amendment protected message) will reach the general election ballot. By presenting the LP with a moving target for access to the general election ballot, I-872 is unconstitutionally vague.

In addition to the "moving target" ballot access problem, I-872 also imposes an impermissible numerical barrier upon the Libertarian Party for access to the general election ballot. For the offices of U.S. Senator and Governor, for example, no other state in the nation but Washington requires voter support of more than 2.05% of the electorate for access to the general election ballot.[19] As can be seen from the historical survey, in order to move to the general election ballot in a top-two system a third party candidate is going to have to beat Democratic and Republican Party candidates who nearly always obtain 21% or more of the total vote.

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[19] See, Declaration of Richard Shepard, at ¶ 8, and Exhibit G thereto.

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The United States Constitution, Art. I, § 4, cl. 1, authorizes Congress to pre-empt state law regarding the time, place and manner of elections. Under that power Congress determined that Representatives, Senators and Presidential electors should all be elected on the second Tuesday of the November in each affected year, 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1, provided, in the event no candidate obtains a majority or other "failure to elect" a state may hold a runoff. 2 U.S.C.A. § 8; *Foster v. Love*, 522 U.S. 67, 71-72, 118 S.Ct. 464, n. 3 (1997).

Aside from thus authorizing runoffs, Congress has not directly legislated "time, place and manner" regulations that purport to "winnow" the field of candidates who may appear on the general election ballot. However,

> "For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences. See *Anderson v. Celebrezze*, 460 U.S. 780, 793-794, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 59 L. Ed. 2d 230, 99 S. Ct. 983 (1979); *Williams v. Rhodes*, 393 U.S. 23, 30-31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968). To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, see *Anderson*, supra, at 789, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance. See *Socialist Workers Party*, supra, at 184, 186."

Norman v Reed, 502 U.S. 279 288-289 (U.S., 1992)

Despite this rich history of ballot access litigation Congress has not seen fit to disturb the general election ballot access jurisprudence of the Supreme Court. While the right of a minor party or independent candidate to access to the general election ballot is not absolute, e.g., *Munro*, *supra*, none of the ballot access cases suggests that a candidate showing a "modicum of support," *Jenness*, 403 U.S. at 442, may be excluded from the general election ballot.

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In *Rhodes, supra,* the court invalidated an Ohio signature requirement of 15% of the electorate for minor party ballot access. *Jenness* approved a Georgia requirement that a candidate must file a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question, and intimated that a requirement substantially higher than 5% would be constitutionally suspect. 415 U.S., at 739, n 10.

In a later case the Supreme Court summarily affirmed a judgment of the eastern district of Arkansas that invalidated a 10% signature requirement. *Jernigan v. Lendall*, 433 U.S. 901, 97 S.Ct. 2963 (1977). While *Lendell* was a summary decision, Justice Stewart, who wrote the majority opinion in *Jenness*, voted to affirm because the 10% requirement, coupled with an early filing deadline, was "unreasonably burdensome" upon Mr. Lendell.[20] Lest the defendants argue that signature requirements for ballot access are qualitatively different from primary vote percentages, the *Munro* court was "unpersuaded, …, that the differences between the two mechanisms are of constitutional dimension" 479 U.S. at 197.

States do not have the power to adopt their own qualifications for congressional service and the power to add qualifications for the offices of congressman and senator is not part of the original powers of sovereignty which the Tenth Amendment reserved to the states. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842 (1995). I-872 enacted an election system that imposes unconstitutional numerical qualifications on federal candidates by limiting the number of general election candidates to two and by requiring candidates to show more than a "modicum of support" to appear on the general election ballot.

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[20] See, Declaration of Richard Shepard, ¶ 9, and Exhibit H thereto.

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CONCLUSION

For the foregoing reasons, this court should declare I-872 unconstitutional in its entirety, that the state has demonstrated on interest sufficiently weighty or narrowly tailored to justify the burden on the Libertarian Party, all in violation of 42 U.S.C. § 1983 et seq., and enter an order prohibiting the government defendants from implementing it.

DATED Friday, June 17, 2005, at Tacoma, Washington.

SHEPARD LAW OFFICE, INC.,

RICHARD SHEPARD, WSBA # 16194
Attorney for Proposed Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, RUTH BENNETT, and J. S. MILLS

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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

v.

DEAN LOGAN, et al.,
Defendants,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Interveners

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Interveners

STATE OF WASHINGTON, et al.,

Interveners

WASHINGTON STATE GRANGE, et al.,

Interveners

Case No: CV05-0927-TSZ

[Proposed]
ORDER GRANTING LIBERTARIAN PARTY'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

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THIS MATTER came before the Court on plaintiffs' motion of summary judgment declaring Initiative 872 unconstitutional and for permanent injunction to enjoin defendants and those acting in concert with defendants from (1) conducting primary elections under the provisions of Initiative 872, now codified under Title 29A RCW; and (2) identifying on any primary ballot a "Libertarian" candidate who has not been authorized to carry the Libertarian label under the rules of the Libertarian Party of Washington State. The Court has reviewed and considered the following:

1. Libertarian Party's Motion For Summary Judgment, dated June 17, 2005.
2. Declaration of Richard Shepard in Support of Motion for Summary Judgment, dated June 17, 2005;
3. _____
4. _____
5. _____
6. _____
7. _____

The Court finds that plaintiffs have demonstrated (1) that the "modified blanket primary," adopted through Initiative 872 in November 2004, and Washington's candidate filing statutes, RCW 29A.24.030 and .031, violate the Libertarian Party's First Amendment rights of association, that Initiative 872 violates the Libertarian Party's Fourteenth Amendment rights to ballot access, and is in excess of the state's sovereign power to add candidate qualifications for election to federal office; and (2) they constitute irreparable injury if defendants were permitted to conduct a partisan primary elections in 2005 or any later year, under the provisions of Initiative 872 or under RCW 29A.24.030 and .031.

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Now, therefore, it is hereby ORDERED that:

1. Plaintiffs' Motion for Summary Judgment and Permanent Injunction is GRANTED;

2. Initiative 872 and RCW 29A.24.030 and RCW 29A.24.031 constitute an unconstitutional burden on core First Amendment political freedoms by the State of Washington, are not supported by a compelling state interest that is narrowly tailored, and also violate 42 U.S.C. Sec. 1983;

3. Initiative 872 constitutes an unconstitutional burden on core Fourteenth Amendment political rights by the State of Washington, is not supported by a compelling state interest that is narrowly tailored, and also violates 42 U.S.C. Sec. 1983;

4. Initiative 872 constitutes an unconstitutional exercise of sovereign powers by the State of Washington, and also violates 42 U.S.C. Sec. 1983;

5. A permanent injunction is hereby issued against the defendants and those acting in concert with the defendants enjoining them, from:

   (a) Conducting partisan primary elections under the provisions of Initiative 872, as now codified in Title 29A RCW, or under any system in which voters other than those authorized by the Libertarian Party of Washington State are permitted to participate; and

   (b) Identifying on any primary ballot a "Libertarian" candidate who has not been authorized to carry the Libertarian label under the rules of the Libertarian Party of Washington State, and

   (c) Conducting partisan primary elections under the provisions of Initiative 872, as now codified in Title 29A RCW, or under any system in which any

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minor party or independent candidate must show more than a "modicum of support" for access to the general election ballot, and

(d) Conducting partisan primary elections under the provisions of Initiative 872, as now codified in Title 29A RCW, or under any system that arbitrarily limits the number of candidates who may appear on the general election ballot to any number less than the number of those candidates who have demonstrated a "modicum of support."

DATED this ____ day of July, 2005

JUDGE THOMAS S. ZILLY
UNITED STATES DISTRICT COURT

Presented by:
SHEPARD LAW OFFICE, INC.,

RICHARD SHEPARD, WSBA # 16194
Attorney for Proposed Intervenors
LIBERTARIAN PARTY OF WASHINGTON STATE,
RUTH BENNETT, and J. S. MILLS

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