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, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Interveners LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Interveners v. DEAN LOGAN, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Interveners WASHINGTON STATE GRANGE, et al., Defendant Interveners	Case No: CV05-0927-TSZ LIBERTARIAN PARTY REPLY TO THE STATE AND GRANGE RESPONSES TO THE LIBERTARIAN PARTY MOTION FOR SUMMARY JUDGMENT AND LIBERTARIAN PARTY RESPONSE TO THE STATE MOTION FOR SUMMARY JUDGMENT NOTED FOR HEARING ON: JULY 13, 2005, AT 9:00 AM.

PRELIMINARY MATTERS

First, the Libertarian Party ("the LP") does not "agree" with the State that this case is "ripe for adjudication" (CD 65, at 5). The LP expressed a preference at the June

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7th status conference to conduct discovery before seeking disposition on the merits, particularly if the defendants were going to allege the LP was not harmed by I-872. The LP filed its motion for summary judgment because the defendant County Auditors—for whom the Secretary of State has now substituted (CD 67)—demanded an accelerated disposition of the case and consequently this court's scheduling order called for *cross-motions* for summary judgment to be filed on June 17th. To the extent this case has been accelerated to accommodate the interests of other litigants, the LP's interests in a fully developed record are prejudiced. The LP objects to the state's characterization of this case as "ripe for adjudication."

Second, the State didn't move for summary judgment on the 17th as required by the court's scheduling order. Its current request for summary judgment filed on July 1, 2005 (CD 65, at 4) is therefore untimely under this court's scheduling order. If the court is going to consider the State's motion for summary judgment outside of the requirements of the scheduling order the LP should be allowed to submit responsive materials, including affidavits, declarations and other evidence, up to the date of hearing, according to the terms of Rule 56.

FACTUAL CORRECTIONS TO THE RESPONSE BRIEFS

The State incorrectly argues that the "blanket primary" invalidated by *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (C.A.9 2003)(*"Reed"*) "was designed to, and did, advance to the general election ballot a candidate representing each of the major political parties." (CD 65 at 6)[1] To the extent this is true at all it is the result of political party perseverance, and in spite of state action. Under the blanket primary system only minor political parties could directly nominate their candidates through the

[1] The Grange makes a similar mistake, claiming the "result was the selection of the ***political parties'*** candidates for the November ballot." (CD 70, at 4)(emphasis in original)

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mechanism of nominating conventions. The blanket primary allowed no similar mechanism for major political parties to qualify or screen candidates as party standard bearers. Any person could designate any major political party on his or her declaration of candidacy and there was no statutory guarantee that a plurality winner was a member of that party or adhered to its message.

Second, contrary to the State's assertions, I-872 did not "eliminat[e] party affiliation as a factor in determining whether candidates advance to the general election ballot." (CD 65, at 8) A candidate's political party "preference" is published to voters in three instances that are most critical to the election process. I-872 §§ 7(3), 11. By I-872's own terms party affiliation is "a factor" in the election system it creates.

Third, the Grange mistakenly alleges the LP is "forsaking its core values of individual privacy and freedom from government restraint," by forcing voters to disclose their "political leanings" when they vote in September, and by depriving candidates of their right to state their political "preferences." (CD 70, at 1) This is nonsense. The LP has never advocated in favor of the "Montana" primary.[2] The LP argues here for the right to nominate by convention and to have the results recognized by the State. Candidate statements of "preference," according to the LP, become problematic only when they mislead the public as to whom the candidates represent.

Finally, the Grange claims a "long, proud history of opposing powerbrokers and special interests." CD 70, at 5). The Grange fails to recognize it has been at it for so long that it has become what it opposes.[3]

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[2] Some Libertarians argue the Montana system works against the Libertarian Party. But for a sympathetic ruling in state court the LP would not have had candidates on the November 2004 ballot for Governor or U.S. Senator.

[3] "The Grange argues that Grange members support water and public utilities for farms and that its members' rights to advance their rural agenda in both parties will suffer if each Granger is forced to choose

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DISCUSSION

I. WHETHER I-872 "NOMINATES POLITICAL PARTY CANDIDATES"

Stipulated Issue #1 Is Not The Threshold Issue

The fundamental assumption of the "top two" election model is that the purpose of elections is to elect public officials, not to serve as a general forum for political expression. "If you want to win, you have to appeal to and receive the voter's support." Grange Brief (CD 70, at 23) This limited view is, at best, oversimplified and ignorant of contemporary understandings of the election process.

Modern social science theorists applying a "rational choice" model teach that political party adherents, voters and candidates all view politics as a competitive market. Under a given set of electoral rules voters and candidates make rationally self-interested decisions about politics in much the same way consumers of goods and services make decisions about economic matters.[4] The consequence is candidates often run (or not) and voters often vote (or not) not to win or back a winner but to make a political statement.[5]

Five decades ago Professor McLuhan taught us "the medium is the message." The Grange recognized that election systems are not merely administrative procedures but have substantive policy content when it argued in the Voter's Pamphlet: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." (CD 66, Exh. A at 4). Compare, *California Democratic Party v. Jones*, 530

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a party ballot. The Grange says that it spearheaded the initiative in 1933 that led Washington to adopt the blanket primary, which has successfully prevented "a politically corrupt nominating process controlled by political bosses or special interests." "Special interests" are evidently in the eye of the beholder. Some urban voters might think that special protection for rural water and electricity concerns serve a "special interest" of farmers, and that the Grange is a special interest group." Reed, 343 F.3d at 1206

[4] See e.g., John H. Aldrich, *Why Parties? The Origin And Transformation Of Political Parties In America* 12-13 (1995).

[5] See, e.g., Dennis F. Thompson, *Just Elections: Creating A Fair Electoral Process In The United States*, 24 (2002) ("Elections are not only instruments for choosing governments; they are also media for sending messages about the democratic process.").

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U.S. 567, 580 (2000) (whole *purpose* of Proposition 198 was to favor nominees with "moderate" positions)

But some political actors, such as the LP and its adherents, are more interested in effectively promulgating an ideological message than in winning. And the Supreme Court has recognized the right of individuals and political parties to do exactly that. *Norman v Reed*, 502 U.S. 279 288-289 (U.S., 1992)

This is why Stipulated Issue #1 is really not the threshold issue. The threshold issue should be: "Does I-872 impermissibly infringe upon constitutional rights of political parties, candidates and voters in a partisan election system?"

Reed puts it succinctly. "As for the State of Washington's argument that the party nominees chosen at blanket primaries are the 'nominees' not of the parties but of the electorate, that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees." 343 F.3d at 1204 (footnote omitted) Regardless how much the State and Grange want to re-characterize the issue, I-872 does the same thing.

The Grange and the State both argue because I-872 is not intended to "nominate political party candidates" it is constitutionally valid. Both seek to cut political parties out of an unequivocally partisan election system. See, e.g., I-872, § 4. The Grange virtually ignores party nomination rights; focusing instead on what it believes are the rights of candidates and voters. (CD 13, 16, 24, 29, 30, 31) The State makes the doubtful[6] claim that the right of political parties to nominate is a "private" right that the state need not recognize. (CD 65, at 12, 27, 32) Similar arguments that the political parties are free to endorse candidates were explicitly rejected in *Jones,* 530 U.S. at 580 ("The ability of

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[6] See, *Brower v. Washington*, 969 P.2d 42 (1998); cert. den., 526 U.S. 1088 (1999)(elections are public functions held for a governmental purpose)

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the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.")

The "top two" model impoverishes the First Amendment rights of voters by depriving them of substantive choices at the general election—giving them choices tantamount to "Ford" or "Chevy," meanwhile depriving them of the opportunity to choose "Dodge," "Lexus," "Hummer" or "Mini Cooper" in the election that matters.[7] It deprives candidates of First Amendment rights of association by forcing them to run as "independents" whether they want to or not. It emasculates the First Amendment association and Fourteenth Amendment liberty rights of political parties by statutorily separating them from the very process for which they are formed to participate.

By failing (or refusing) to include a political party nomination mechanism within its partisan scheme I-872 deprives all political actors of their rights. I-872 favors centrist or "moderate" candidates over ideological or programmatic candidates, which function was expressly rejected in *Jones,* 530 U.S. at 580. This is why I-872 must fail, to protect the losers.

I-872 Is Not A *Nonpartisan* Primary

The State grasps at the *nonpartisan* language in *Jones*, as it did similarly in *Reed*, to support its argument that I-872 does not nominate political party candidates.[8] But I-872 is not the "*nonpartisan* blanket primary" envisioned by *Jones.* If the sponsors of I-872 really intended for primaries to be truly *nonpartisan* they could very easily have removed all references to political parties from the statutes and adopted a general petition

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[7] "Nothing is more plain to the student of history than the tendency of one party [in a two party system] to assimilate the principles and the policies of its opponent." Andrew C. McLaughlin, *Political Parties and Popular Government*, in The Courts, the Constitution and Parties, 151 (1912). "We choose between Tweedledum and Tweedledee." Helen Keller, *Letter to Mrs. Grindon*, Jan. 12, 1911, Published in the Manchester Advertiser, Mar. 3, 1911

[8] The Grange argues the matter similarly. (CD 70, at 5, 24, 25)

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requirement for access to the ballot. Instead, the sponsors fashioned a system that not only did not remove references to political parties but also included a new section defining "partisan office." See I-872 § 4

Jones specifically contemplated a *nonpartisan* system that included "nomination by established parties ***and*** voter-petition requirements for independents." *Jones,* 530 U.S. at 585(emphasis added). Except to the extent it may have left minor party nominating statutes in place,[9] I-872 does neither. Hanging their entire analysis on the word "may" both defendants argue at great length they can add whatever qualifications for ballot access they wish, and that they are not confined to the ones outlined in the paragraph. (CD 65, at 17-19; CD 70, at 24-25) As will be seen in Part V below, the state is not free to configure ballot access qualifications outside constitutional limits.

Second, the defendants' arguments completely miss the central point of both *Jones* and *Reed.* As *Reed* explained: The rights of "those who actively participate in partisan activities … 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 1204 A thorough reading of both cases reveals the overwhelming concern of both courts was not to parse out a *nonpartisan* "safe harbor" but to ensure that the expressive association rights of political party adherents were protected where they mattered most, in the election process.

II. WHETHER POLITICAL PARTIES HAVE THE RIGHT TO NOMINATE

The State Artfully Dodges the Question

Distilled to its essence, State does not argue against a political party's right to nominate candidates per se, which right the LP contends is *sui generis,* but rather

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[9] See, Part II, infra.

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whether any candidate nominated by the political party has a right of access to the general election ballot. This issue is treated more fully in Part V, below.

Validity of the Minor Party Nominating Statutes

As previously argued, I-872 did not repeal, amend or otherwise address the minor party nominating statutes. R.C.W. §§ 29A.20.110 through 29A.20.20[10] Section 9(3) of I-872 allows any candidate access the primary ballot and to enter a minor political party "preference" on his or her declaration of candidacy without any further qualification but payment of a filing fee. However, the minor political party nominating statutes include a provision that candidates so nominated would appear on the general election ballot. R.C.W. § 29A.20.121(1).

In lengthy footnotes (CD 65, at 9 n. 6; at 16 n. 14, and at 22 n. 17) the State attempts to gloss over its treatment of the issue, arguing that I-872 impliedly repealed the minor party nominating statutes.

> Repeal or amendment by implication is never favored [in Washington]. *Generaux v. Petit*, 172 Wash. 132, 19 P.2d 911 (1933). This is even more true when a later act contains a schedule of statutes repealed and such schedule does not include the statute under consideration. *State ex rel. Spokane v. DeGraff*, 143 Wash. 326, 255 P. 371 (1927).

Washington State Welfare Rights Organization v. State, 82 Wash.2d 437, 439, 511 P.2d 990 (1973)

Section 17 of the initiative, while purportedly repealing statutes inconsistent with I-872, did not repeal the minor party nominating statutes.

The State also argues that other statutes related to primaries, such as R.C.W. § 29A.52.116 (relating to nomination of major party candidates at primaries) are "obsolete." (CD 65, at 19, n. 16) This raises the question: How much of Washington's prior election system is no longer operative after I-872?

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[10] Throughout this section references are made to the newer minor party nominating statutes. However, the reasoning should also apply to the older statutes.

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I-872 plainly did not reach the entire field of elections, because it did not address the classifications of "major" and "minor" political parties in any way. A "Major political party" is one whose candidate for statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. R.C.W. § 29A.04.086. If I-872 does not "nominate political party candidates" what is the point of the statute?

Statutes relating to Precinct Committee Officers present another problem. They are a recognized internal part of the political party organizational apparatus. See, generally, Chapter 29A.80, R.C.W. However, R.C.W. § 29A.80.051 provides that PCOs are elected at the primaries, yet the State argues the I-872 primary does not "nominate political party candidates."

The LP does not seek resolution from this court whether these provisions are impliedly repealed, amended, obsolete or otherwise inoperative. Instead, the LP merely wants to show that I-872 did not, as the both the Grange and the State suggest, "cover the entire subject matter." Here the LP is concerned solely with the validity of the minor party nominating statutes.

In determining whether I-872 impliedly repealed, amended or otherwise rendered inoperative the minor party nominating statutes, "[t]he collective intent of the people becomes the object of the court's search for 'legislative intent' when construing a law adopted by a vote of the people. E. Crawford, *The Construction of Statutes*, § 365 (1940 ed.) p. 745." *Washington State Dept. of Revenue v. Hoppe*, 82 Wash.2d 549, 552, 512 P.2d 1094 (1973) To ascertain the collective purpose and intent of the people, material in the official voters' pamphlet may be considered. *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wash.2d 455, 460-461, 722 P.2d 808 (1986) (citations omitted)

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The voter's pamphlet states, "I-872 will restore the kind of choice in the primary that voters enjoyed for 70 years in the blanket primary."[11] Until the blanket primary was invalidated it included minor party candidates who had been nominated by conventions. The pamphlet also refers voters to the I-872 sponsor's website. That website, entitled: "Initiative 872 - Preserve the Blanket Primary"[12] contains the following dialogue under "Frequently Asked Questions."

> "Would this proposal eliminate minor party candidates from the primary or general election ballot?"
>
> "No. Minor parties would continue to select candidates the same way they do under the blanket primary...."[13]

Since minor parties selected their candidates by nominating convention under the blanket primary—using the primary only for the purpose of demonstrating a "modicum of support" and thus to gain access to the general election ballot, see, *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)—the initiative sponsors may have intended that minor parties would continue nominating candidates by convention.[14] But the Grange is strangely silent on the issue and the State applied a different interpretation to the legislative intent for I-872, promulgating emergency rules[15] declaring that I-872 "impliedly amended" the minor party nominating convention statutes. (CD 65, at 22 n. 17)

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[11] See, Declaration of James Pharris, Exhibit A, page 4 (CD 66)

[12] This title to the website speaks volumes about the legislative intent of the sponsors of I-872.

[13] See, http://www.i872.org/faq.php. The entire text of the Frequently Asked Questions page from the I-872 website is already a part of the record as Exhibit 3 to the Declaration of John White (CD 8).

[14] Here the Declaration of Kevin Hansen, becomes important. The state asks this court to strike that declaration for timeliness and relevance reasons. Mr. Hansen's declaration is timely because the Libertarian Party is relying upon it in response to the State's untimely Motion for Summary Judgment. It is relevant because it shows that the President of the Senate had determined that legislation repealing the minor party nomination statutes as proposed by the Secretary of State, HB 5745, would require a 2/3 vote under Washington Constitution, Art. II, § I(c), because the bill represented a material alteration to the initiative. (CD 64, Ex. C, page 24 of 24).

[15] See, Exhibit C to Declaration of James Pharris (CD 66).

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The Grange addresses the issue only tangentially, arguing "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." (emphasis in original, citation omitted) (CD 70, at 21, n. 30) The result of this line of reasoning is merely that if any minor party nominating statutes are still effective they are the ones in effect at the time I-872 was filed (December, 2004).[16]

Identity, Not Truthfulness, Is The First Amendment Issue

The Grange complains that the LP wants the right of "prior restraint," i.e., the "right to approve of the truthfulness of a candidate's statement of preference." (CD 70, at 26, 30) This is absurd. The LP claims no right to regulate the speech of one who does not purport to speak in the name of the LP. However, the LP knows full well that political campaign speech is rarely "truthful," and it is for precisely this reason the LP claims a right to protect its identity by assuring that its message, and not someone else's, is promulgated in its name. "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (U.S., 2000). This issue is discussed in further detail at Part IV, below.

III. WHETHER I-872 COMPELS POLITICAL PARTIES TO ASSOCIATE WITH UNAFFILIATED VOTERS OR VOTERS AFFILIATED WITH OTHER PARTIES

The State concedes, if I-872 nominates political party candidates, then it "would indeed trigger a need to respect the associational rights of the political parties." (CD 65,

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[16] Chapter 29.24, R.C.W., (recodified and/or amended – depending whom you ask – approx. 2004). The significant differences between the old and new minor party rules related to the number of signatures required for a particular office and whether a certificate of nomination entitled a candidate to appear on the primary ballot or the general election ballot.

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at 25) The Grange argues that I-872 doesn't "compel the parties to do anything." (CD 70, at 32) This is simply another way of saying that the Grange wants to exclude the political parties from what is, by design, a partisan election system. As *Reed* has clearly taught us, "that is the problem with the system, not a defense of it." *Reed,* supra.

IV. WHETHER I-872 FORCES A POLITICAL PARTY TO ASSOCIATE WITH CANDIDATES WHO DO NOT SHARE THE PARTY'S MESSAGE

Here again both defendants premise their argument on the assumption that I-872 does not nominate political party candidates. (CD 65, at 28) (CD 70, at 33). And again, "that is the problem with the system, not a defense of it." *Reed,* supra.

Party Trademark or "Brand" Rights

The State suggests that I-872 makes "party nominations an entirely private process." (CD 65, at 27) Assuming for the purpose of argument that this is true then the political parties have the right, as private entities, to protect use of their trademarked names. As the LP has previously shown, the term "Libertarian Party" is a registered trademark.[17]

> The fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods. The consumer who knows at a glance whose brand he is being asked to buy knows whom to hold responsible if the brand disappoints and whose product to buy in the future if the brand pleases. … *A successful brand, however, creates an incentive in unsuccessful competitors to pass off their inferior brand as the successful brand by adopting a confusingly similar trademark, in effect appropriating the goodwill created by the producer of the successful brand.*

Ty Inc. v. Perryman, 306 F.3d 509, 510 (7th Cir., 2002)(emphasis added)[18]

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[17] See, Exhibit F to Declaration of Richard Shepard (CD 51)

[18] Many modern social scientists believe that participants view the election process as a "competitive marketplace" similar to the economic marketplace involving consumer goods and services. See, n. 8, supra. If so, then there is no reason why the protections available under trademark law should not be available to political actors.

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It is common knowledge that the name of a political party implies certain political views. The defendants obviously recognize the value of a political party name because they go to great lengths to assure that political party "information" goes to the voters whether or not the political parties have any control over who uses (or abuses) it. Just as clearly the Grange recognized a "*nonpartisan* blanket primary"[19] would increase the difficulty for each and every voter to question each and every candidate thoroughly in an effort to ascertain his or her political platform. It is the express intention of I-872 that voters use that political party name (a/k/a "information") to determine for whom to vote.

Thus the sponsors devised a scheme to co-opt the reputation and prestige of political party names but which necessarily introduces the risk that voters will get an inferior "imposter" candidate "passing off" a party name, thus misleading the voters at the expense of the political parties' rights.

The Right to Exclude Candidates Who Do Not Follow Party Rules

The state focuses on a single case (among several) involving the right of political parties to determine their association with particular candidates. *Duke v Massey,* 87 F.3d 1226 (11th Cir. 1996) Even here the State acknowledges one of the recognized bases for affirming the exclusion of David Duke from the Republican ballot was that the Republican Party did not consider Duke to be a member of the party. Despite the several other reasons that may have informed the *Massey* holding, none of the cases in this category suggest that a political party does not have the right to exclude unacceptable candidates.

In *Ray v. Blair*, 343 U.S. 214, 72 S.Ct. 654 (1952), the court held a requirement that candidates of a political party in a primary election pledge support to the party's

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[19] See, discussion supra, at n. 4, and accompanying text.

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nominees does not deny equal protection or due process. "A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party." *Blair*, 343 U.S. 214, 227, 72 S.Ct. 654 (1952)

This party right is not a function of state statute. *Democratic Party of U. S. v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 101 S.Ct. 1010 (1981) held that Democratic Party rule, not state law, determined the right. "On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing 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 (citing to *Blair,* 343 U.S. *at 221-222*) Neither are *Blair* or *La Follette* confined to strictly internal party operations. *Jones,* 530 U.S. at 576 n. 7.

The LP requires that candidates representing the LP shall be members of the LP, and further that in order to become a member of the LP one must subscribe to or affirm a "non-aggression pledge."[20] The State has advanced no reason why the LP cannot, as *Ray* did, require candidates for partisan office to execute a pledge it requires of all members of the LP who wish to be candidates, and to exclude from the ballot any candidate who refuses to do so.

V. WHETHER I-872 UNCONSTITUTIONALLY LIMITS BALLOT ACCESS RIGHTS

Of core concern to any ballot access analysis is the requirement that the election laws "do not operate to freeze the political status quo … [and at the same time]

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[20] See, Exhibit E to Declaration of Richard Shepard. (CD 51)

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recognize[] the potential fluidity of American political life." *Jenness v. Fortson*, 403 U.S. 431, 438-439 (U.S., 1971) I-872 fails both tests.

The State implies that ballot access is a party rights issue, when in fact it is a candidate's rights and voter's rights issue. *Dart v. Brown*, 717 F.2d 1491, 1499 (5th Cir., 1983)("If it had no candidate to offer, a political party would neither seek nor gain access to the ballot.")[21] "Restrictions on access to the ballot burden two distinct and fundamental rights, the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) I-872 interferes with the associational rights of candidates and their supporters by forcing all candidates to run as independents, i.e., statutorily disconnecting the political party from the candidate and the election process itself.[22] It also undermines the right of voters to cast their votes effectively by limiting their substantive choices at the general election (the one that counts) to two only.[23]

Only A "Modicum of Support" May Be Required for Ballot Access

The State relies on *Munro*, which held, *inter alia*, "We think that the State can properly reserve the general election ballot 'for major struggles,' . . . by conditioning access to that ballot on a showing of a modicum of voter support."[24] *Id.* at 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974))" The State suggests the "major struggles" language here justifies the "top two" provisions of I-872. (CD 65, at 20) The State again relies on *Munro* to argue that a state can require

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[21] This is why individual party plaintiffs Ruth Bennett and J. Mills are in the case.

[22] See, Parts I, II, and IV, supra.

[23] See, Part I, supra. Some opponents of I-872 have called it "the People's No-Choice Initiative."

[24] The "modicum of support" test at issue in *Munro* is the so-called "one-percent" rule, which required all candidates to poll at least 1% of the total vote cast for the office to advance to the general election ballot. It was not, as the State seems to imply, placing first or second in the contest.

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candidates to demonstrate a "modicum of community support in order to advance to the general election." *Munro,* 479 U.S. at 197. (CD 65, at 29)

But access rights to the general election ballot are not predicated on a candidate's ranking within a field of candidates after a primary election. Nothing in *Munro* (or any of the other ballot access cases) suggests that a state can require more than a "modicum of support" for access to the general election ballot. The Supreme Court has signaled that 5% is probably the highest limit it is likely to approve. *Storer v. Brown*, 415 U.S. 724, 739 (U.S., 1974)(footnote omitted) Regardless of the method of calculation used, I-872 will require between 20% and 35% to advance to the general election.[25]

I-872 Improperly Allows Candidates Only One Route To The General Election Ballot

The defendants argue since I-872 "treats all candidates the same" (CD 65, at 31), cf., Grange Brief (CD 70, at 2) the political parties cannot claim any discrimination. This is precisely the problem. Under I-872 there is only one route to the general election ballot, by coming in first or second in the primary.[26]

> "The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. … Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes*, [393 U.S. 23 (1968)]." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

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[25] See, Exhibit C to Declaration of Richard Shepard (CD 51), and Declaration of Richard Winger, filed herewith.

[26] While I-872 does not address the "write-in candidate" statute, R.C.W. § 29A.24.311, which allows a candidate to seek direct access to the general election ballot by write-in votes, the State's position that the minor party nominating statutes have been "impliedly amended" may mean that the write-in statutes have also been affected. Regardless, the LP notes that write-ins are disfavored as a meaningful mechanism for ballot access. "[I]n *Lubin v. Panish*, 415 U.S. 709 (1974), the Court characterized as "dubious at best" the intimation that a write-in provision was an acceptable means of ballot access: "The realities of the electoral process... strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.... That disparity would, itself, give rise to constitutional questions...." Id., at 719 n. 5." *McCarthy v. Briscoe*, 429 U.S. 1317, 1321 (U.S., 1976) In any event, the write-in statute has nothing to do with the right to ***appear*** on the general election ballot.

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818 So. Yakima Ave., #200
Tacoma, WA 98405
(253) 383-2235

> This observation applies equally to independent or unaffiliated candidates.
>
> It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. Cf. *American Party of Texas v. White*, 415 U.S. 767 (1974). But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.

Storer v. Brown, 415 U.S. 724, 745 (U.S., 1974) (cited with approval in *McCarthy v. Briscoe*, 429 U.S. 1317, 1320 (U.S., 1976))

The number and reasonableness of alternative routes to the general election ballot has been a major factor in the result of several ballot access cases, e.g., *Jenness*, supra, *Storer,* supra, *American Party*, supra, and *McCarthy*, supra. *Burdick v. Takushi*, 504 U.S. 428 (1992), which upheld Hawaii's elimination of the write-in route, noted Hawaii had 3 alternative routes to the ballot. None of the ballot access cases suggest that the state may provide only one route to the general election ballot and then limit that general election ballot only to two candidates who have obtained the most votes in a prior popularity contest.[27] Even the infamous *"nonpartisan* blanket primary" paragraph in *Jones* 530 U.S. at 585, required two alternative routes.

I-872 Sets An Unconstitutional Time For Federal Elections

"A primary is a first stage in the public process by which voters elect candidates to public office." I-872 § 7(1) The Grange refers to the "top two" system as a "two-stage" public election process. (CD 70, at 13, 28, 33, 34) The State argues "[t]he general election is a 'runoff' between the two candidates gaining the most votes in the primary." (CD 65, at 8)

Foster v. Love, 522 U.S. 67 (U.S., 1997) addressed the timing of federal elections and held that the first Tuesday after the first Monday in November of even numbered

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[27] *Foster v. Love*, 522 U.S. 67 (U.S., 1997), the only Supreme Court case addressing an election system remotely similar to I-872, related to "the day" for federal elections, not access to the final ballot. See, discussion regarding time for federal elections, infra.

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818 So. Yakima Ave., #200
Tacoma, WA 98405
(253) 383-2235

years was "*the day*" for federal elections. *Id.*, 522 U.S. at 71 (quotes in original, emphasis added). There is nothing in the U.S. Constitution or the U.S.C. that suggests federal elections can be held in two stages, much less over the course of six weeks. Further, to the extent runoffs are necessary, they must be held after "the day" for federal elections. 2 U.S.C. § 8 Accordingly I-872 violates federal law as to the time of elections for federal offices.[28]

I-872 Imposes Unconstitutional Qualifications For Federal Office

As above, placing first or second in the primary is the only way a candidate will appear on the general election ballot. By eliminating all other routes to the general election ballot, I-872 has added an unconstitutional "qualification of membership" in Congress, i.e., winning or placing in an expensive and non-dispositive popularity contest.

Powell v. McCormack, 395 U.S. 486 (1969), noted the framers considered a proposal to allow property ownership qualifications for membership in Congress:

> James Madison urged its rejection, stating that the proposal would vest
>
> "an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well *by limiting the number capable of being elected,* as the number authorised to elect. . . . It was a power also, which might be made subservient to the views of one faction agst. another. *Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of [a weaker] faction.*" [2 Records of the Federal Convention of 1787], at 249-250.
>
> Significantly, Madison's argument was not aimed at the imposition of a property qualification as such, but rather at the delegation to the Congress of the discretionary power to establish any qualifications.

Powell, 395 U.S. at 533-534(emphasis added)

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[28] Cf. Jones, 530 U.S. at 580 ("In effect, Proposition 198 has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the "basic function" of choosing their own leaders.")(citation omitted)

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818 So. Yakima Ave., #200
Tacoma, WA 98405
(253) 383-2235

I-872 creates an "artificial distinction" by "limiting the number capable of being elected" to two, in which "the stronger" (i.e., the better connected and better financed) ***will*** "keep out" the "weaker faction," in an election that the state itself calls a "qualifying" election. (CD 65, at 21)

At several times throughout *U.S. Term Limits V. Thornton,* 514 U.S. 779 (1995), the Supreme Court recognized the pernicious side effects of allowing Congress or the states to add qualifications to membership in Congress. The court recognized "the more practical concern that reposing the power to adopt qualifications in Congress would lead to a self-perpetuating body to the detriment of the new Republic." *Thornton*, 514 U.S. at 794, n. 10. (citing to *Powell,* 395 U.S. at 533-534) Again citing to *Powell* the court: "noted that 'restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society." *Thornton*, 514 U.S. at 795 (citing *Powell*, 395 U.S. at 543). I-872 will lead to a self-perpetuating governing bodies and is not even remotely necessary. It cannot be allowed to stand.

CONCLUSION

For the foregoing reasons I-872 should be found unconstitutional on its face and in its entirety as a deprivation of the Libertarian Party's rights under 42 U.S.C.§ 1983. The government defendants should be enjoined from implementing I-872 in any way.

DATED Wednesday, July 06, 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

SHEPARD LAW OFFICE, INC.
818 So. Yakima Ave., #200
Tacoma, WA 98405
(253) 383-2235