Nos. 05-35780 & 05-35774

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et. al.
PLAINTIFFS – APPELLEES

WASHINGTON DEMOCRATIC STATE CENTRAL COMMITTEE, et. al.
PLAINTIFF INTERVENORS – APPELLEES

LIBERTARIAN PARTY OF WASHINGTON STATE, et. al.
PLAINTIFF INTERVENORS – APPELLEES
v.
DEAN LOGAN, Manager of King County Records & Elections Div., et al.,
DEFENDANTS

STATE OF WASHINGTON, et. al.
DEFENDANT INTERVENORS – APPELLANTS

WASHINGTON STATE GRANGE, et. al.
DEFENDANT INTERVENORS – APPELLANTS

APPEAL FROM DECISION IN THE
U.S. DISTRICT COURT, WESTERN DISTRICT WASHINGTON

LIBERTARIAN PARTYS' RESPONSE BRIEF

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STATEMENT OF THE CASE

In 2003, after three legal challenges over several decades,[1] Washington's unique "blanket primary" system was held unconstitutional because it "prevents a party from picking its nominees."[2] In response, Washington voters adopted Initiative 872, which the sponsors called a "modified blanket primary"[3] system similar to but not quite like one used in the State of Louisiana,[4] and which was expressly designed to "look nearly identical to the blanket primary system."[5]

The State of Washington erroneously asserts that the *Reed*[6] decision left the state with two choices, to "use its primary to select party nominees," or alternatively, to "adopt a distinctly different primary, departing from the more typical and historical practice" where "voters would choose among all candidates for all offices, and their top two choices would advance without regard to political party affiliation."[7]

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1 *Anderson v. Milliken*, 59 P.2d 295 (WA 1936), *Heavey v. Chapman*, 611 P.2d 1256 (WA 1980), *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), cert. den. 540 U.S. 957, and cert. den. 541 U.S. 957 (2004) (hereinafter "*Reed*")

2 *Reed*, 343 F.3d at 1204.

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 primary introduced by I-872 and the Louisiana system is that Washington's has a primary in September followed a general election in November, while Louisiana now has a general election in November followed by a run-off in December. See, *Foster v. Love*, 522 U.S. 67 (U.S., 1997). This distinction has constitutional significance, as will be explained below.

5 State's Excerpt of Record 18 (hereinafter "SER").

6 See n. 1, supra.

7 See, Brief of Appellant, State of Washington, Sam Reed and Rob McKenna, p. 6-7 (hereinafter *State Brief*)

The State is wrong for two reasons. First, the State had a third constitutionally sound choice, which was to leave the blanket primary in place as a voluntary option for political parties, and to allow any political party who objected to "opt-out" and nominate candidates by convention as minor political parties in Washington had done for several decades.[8]

Second, if the State means the second option to describe I-872 it is mistaken. The second option is a truly *nonpartisan* system, something quite distinct from I-872. The State's assertion that "party preferences" are on primary ballots under I-872 "only as information for the voters"[9] begs the question – information as to what relevance? The district court observed the obvious truth, that "[p]arty affiliation undeniably plays a role in determining the candidate voters will select…."[10] By introducing party affiliation into a *nonpartisan* system, the Initiative sponsors rendered the second option *partisan,* and thus subject to the constitutional rights of the political parties and thus severely burdening their associational and ballot access rights.

The state Republican, Libertarian and Democratic Parties sued.[11] The trial court agreed the new system still interfered unconstitutionally with the political

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8 See, e.g., *Munro v. Socialist Worker's Party*, 479 U.S. 189 (1986). The "opt-out" alternative was proposed during the 2004 Washington State legislative session, see Initiative 313, at http://www.secstate.wa.gov/elections/initiatives/text/i313.pdf (last viewed 10/16/05). This "opt-out" alternative is more consistent with the "*nonpartisan* blanket primary" discussed in *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000) (hereinafter *Jones*), than the State's alleged second option. However, it was rejected, apparently because it was deemed too politically risky to incumbents.

9 State Brief, p 12.

10 SER 558.

11 SER 1-13, 70-84, 89-102.

parties' First Amendment right of expressive association and issued injunctions against the State of Washington.[12] Here, the State and the Washington State Grange appeal, essentially asserting they can change a leopard's spots with a glaze of wordplay and strained reasoning.

ISSUES

The Appellants basically argue a finding that Initiative 872 does not "nominate political party candidates for public office" will determine the case in Appellants' favor. The Libertarian Party submits this emphasis is a strained attempt to distract the court from the primary constitutional issue, which is whether I-872 improperly burdens on a political party's First Amendment right of "expressive association."[13]

Secondarily, the Libertarian Party asserts that I-872 sets constitutionally impermissible standards for political party access to a *partisan* general election ballot and violates federal law for federal candidates.

SUMMARY OF ARGUMENT

Political parties are an integral part of American governance. Initiative 872 creates a *partisan* election system that unconstitutionally converts the political parties' names and identities to the State's own use, thus severely burdening the

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12 SER 536-577.

13 See, e.g., *Jones*, 530 U.S. at 583-584 (general rule of speaker's autonomy forbids requiring candidates or political parties to appeal to "larger segment of the electorate"), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)(judicial deference given to association assertions regarding nature of expression and what would impair that expression); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)(fundamental rule of First Amendment is a speaker has the autonomy to choose the content of his own message); and see other cases following or relying on *Roberts v. U.S. Jaycees*, 468 U.S. 609 (U.S.1984).

expressive association rights of political parties. I-872 also destroys elections as a general forum for political expression and fosters unrestrained factionalism and party splintering.

In addition, I-872 deprives political parties of reasonable ballot access rights, by eliminating all mechanisms for political party ballot access (independent of any candidate ballot access rights), by establishing a "moving target" voter support threshold that is unconstitutionally vague and which in practice will be well in excess of the maximum constitutionally allowed for access to a *partisan* general election ballot. Finally, I-872 violates federal law by adopting unconstitutional qualifications for federal office and by setting an unconstitutional time for federal elections.

ARGUMENT

Initiative 872 Creates A "Partisan" *Election System*

POLITICAL PARTIES ARE AN INTEGRAL PART OF AMERICAN GOVERNANCE.

The State asserts that it may "adopt a new primary in which all the voters would choose among all candidates, with party nominations made irrelevant to qualifying candidates to the ballot."[14] The state also claims that the history of the direct primary does not require an election system that involves political party nominees.[15] However, Initiative 872 creates the "unimaginable."

> "Representative democracy in any populous unit of governance is *unimaginable* without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost

[14] State Brief, at 14

[15] State Brief, at 15-16

concurrent with the formation of the Republic itself."[16](emphasis added)

Since the beginning of the United States political parties have performed the important functions of aggregating, coordinating and reconciling various political interests and providing the electorate with discrete normative visions of government and public policy. Indeed, under the Madisonian system of separation of powers, checks and balances, political parties are among the few coordinating forces that make any government action possible.[17] It may also be argued they are the only such force that is directly accountable to the people on a regular basis.[18]

Even the Appellants admit political party labels provide voters with important information regarding candidates. In addition, political parties tie candidates together in pursuit of common goals and policies, which the voters can collectively reward or punish every two years.[19] Stated alternatively, parties play an essential role "in brokering group interests and solving voter's collective action problems. A polity without parties places a greater cognitive burden on individual voters and weakens the collective responsibility of political parties."[20] The cases decided by the Supreme Court "vigorously affirm the special place the First

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16 *Jones,* 530 U.S. at 574

17 See, e.g., E.E. Schattschneider, *Party Government*, 1 (1942); Clinton Rossiter, *Parties and Politics in America* (1960); John Aldrich, *Why Parties? The Origin And Transformation Of Political Parties In America* 18 (1995)

18 There are, for example, no provisions for periodic review or a public referendum on the United States Constitution or the Washington State Constitution.

19 *Ibid.,* n. 17.

20 Persily and Cain, *Symposium: Law and Political Parties: The Legal Status of Political Parties: a Reassessment of Competing Paradigms,* 100 Colum. L. Rev. 775, 787 (2000)

Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"[21]

The Libertarian Party does not argue, as the State seems to think, that political parties can freely dictate election system models to the State. A recent decision of the Supreme Court[22] has laid that idea to rest. However, any authority states may have to regulate elections does not allow them to interfere with the associational rights of political parties. The Supreme Court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution."[23]

The core problem with I-872 is not that it attempts to create a *nonpartisan* primary but that it steals political party identities and uses them to its own purpose; thus rendering the system not *nonpartisan* but *partisan*.

INITIATIVE 872 "NOMINATES" PARTISAN CANDIDATES

"The nature of the nominating procedure determines the nature of the party; he who can make the nomination is owner of the party."[24]

The State claims that use of the word "nomination" in connection with I-872 is "misleading" because the word does not appear in the text of the initiative.[25] This is nonsense. "Nominate" according to Black's Law Dictionary (5th Ed.),

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21 *Jones*, 530 U.S. at 575

22 *Clingman v Beaver*, ___ U.S. ___, 125 S. Ct. 2029; 161 L. Ed. 2d 920 (2005)

23 *Jones*, 530 S.Ct. at 573 (citing *Eu v. San Francisco Democratic Comm*., 489 U.S. 214 (1989) (hereinafter *Eu*), and *Democratic Party Of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (hereinafter *La Follette)* (footnote omitted)

24 E.E. Schattschneider, *Party Government* 64 (1942).

25 State Brief, at 17, n. 7

means: "To name, designate by name, appoint or propose for election or appointment." No litigant in this action has so far suggested that Initiative 872 does anything other than "name, designate by name, appoint or propose for election or appointment," candidates for partisan public office. Nobody has so far suggested that I-872 implemented the "*nonpartisan* blanket primary" system suggested in *Jones*.[26] In fact, the State explicitly denies it.[27]

Nonetheless, the State inexplicably argues a partisan "nominee" under I-872 is not a political party "nominee." As this court explained in response to a similar argument made by the State regarding the blanket primary, "that is the problem with the system, not a defense of it."[28]

Initiative 872 Unconstitutionally Converts The Political Parties' Names And Identities To The State's Own Use

I-872 DEPRIVES THE LIBERTARIAN PARTY OF ITS RIGHT TO REGULATE THE USE OF ITS NAME

The Libertarian Party requires as part of its internal rules that "[a]ll Libertarian candidates for partisan office shall be members of the Libertarian Party…." One becomes a member of the Libertarian Party by subscribing to or affirming a non-aggression pledge.[29] Contrary to the assertion of the Grange that the Libertarian Party has not established any trademark right,[30] the name "Libertarian Party" is a registered trademark,[31] and accordingly the LP has a

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26 530 U.S. at 585

27 State Brief, at 21-28.

28 *Reed*, 343 F.3d at 1204

29 SER 159, 162

30 Appellant Washington State Grange's Opening Brief, at 20 (hereinafter "*Grange Brief*")

31 SER 169-172

proprietary right to determine who may use the name and for what purposes the name may be used. The Grange's suggestion that the word "libertarian" may be generic is irrelevant. I-872 allows candidates to identify a "party preference," not a generic political philosophy.

The state focuses on a single case[32] (among several) involving the right of political parties to determine their association with particular candidates. 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*,[33] the Supreme Court held a requirement that candidates of a political party in a primary election pledge support to the party's 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."[34]

This party right to require conformity to party rule is not a function of state statute. *La Follette,*[35] held that Democratic Party rule, not state law, determined the rights of candidates. "On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its

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32 *Duke v Massey*, 87 F.3d 1226 (11th Cir. 1996)
33 343 U.S. 214 (1952)
34 *Blair*, 343 U.S. at 227
35 450 U.S. 107 (1981)

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.'"[36] And the holding of neither *Blair* nor *La Follette* is confined to strictly internal party operations.[37]

Federal courts have consistently held political parties have the right to insist on loyalty to party principles,[38] the right to require a loyalty pledge,[39] and the right to impose tests on candidates.[40] "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."[41]

I-872 deprives the LP of its ability to enforce its requirement that "Libertarian" candidates must be members of the Libertarian Party as well as its ability to regulate the use of the Libertarian Party name by non-members. 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. The State argues that the Libertarian Party's claim that it has the right to regulate and approve the use of its name in elections is a "sweeping assertion" with "staggering implications."[42] However,

"[A] single election in which the party nominee is selected by

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36 *La Follette,* 450 U.S. at 122 (citing to *Blair*, 343 U.S. *at 221-222*)

37 *Jones,* 530 U.S. at 576 n. 7

38 *Nader v. Schafer*, 417 F.Supp. 837, 847 (D.Conn. 1976), summarily aff'd 429 U.S. 989 (1976)

39 *Blair*, supra

40 *Duke v Smith* 13 F.2d 388, 391 n.3 (11th Cir. 1994)

41 *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment)

42 State Brief, at 39.

> 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.'"[43]

The Supreme Court's "expressive association" cases,[44] including *Jones*,[45] specifically reject all interferences with a political party's normative message on "speaker's autonomy" grounds. Contrary to the assertion of the State, there is nothing "sweeping" or "staggering" about this right. It is the very essence of the First Amendment.

THE STATE HAS NO RIGHT TO SEIZE POLITICAL PARTY NAMES.

The State deceptively asserts "party affiliation plays no role in determining which candidates advance to the general election," and then defends I-872 by claiming that a candidate's expression of "party preference" is "one possibly relevant piece of information about a candidate."[46] But if "party affiliation plays no role" in the election process how could a candidate's statement of "party preference" possibly be relevant? Why does the initiative provide for a statement of "party preference" and not provide that candidates should identify their favorite college football team or ice cream flavor? The answer is obvious. The latter information really isn't relevant and the former is relevant. As the trial court observed, "[p]arty affiliation undeniably plays a role…."[47]

The State asserts it has the prerogative to abandon the primary election

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43 *Jones*, at 530 U.S. at 579, (citing *Eu*, 489 U. S., at 231, n. 21)
44 See, n. 13, supra.
45 530 U.S., at 582-583
46 State Brief, at 29-30
47 SER 558.

system as a mechanism for selecting political party nominees.[48] This is not a new concept. "It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election *or by party convention.*"[49] (emphasis added)

The State Brief quotes a similar passage from *Jones*,[50] arguing it is "too plain for argument" that a state can require that all candidates be selected by primary.[51] But this is out of context. *Jones* quotes *Am. Party of Tex.* only in part, leaving out those parts of the statement that reflect the matter was not actually contested and the part that reflects a responsibility of the state to recognize party nominations by convention. If the "too plain" statements in *Jones* apply here at all it still does not follow that the State can eliminate both party primaries ***and*** conventions from a *partisan* election process. Indeed, neither *Am. Party of Tex.* nor *Jones* even suggest that a State can completely eliminate political parties from a *partisan* election system.

The new concept that the State is asking this court to approve, it seems for the first time in American law, is that it can seize or authorize others to seize upon political party labels for the State's own purposes and without the political party's permission or participation. Here the State is making the "sweeping assertion" with "staggering implications." The Libertarian Party has no doubt at least some members of the current Supreme Court would find the idea "*unimaginable*".[52]

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48 State Brief, at 16, 20-32

49 *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (U.S. 1974) (citing to *Storer v. Brown*, 415 U.S. 724, 733-736 (1974)

50 530 U.S., at 572

51 State Brief, at 21, 41

52 See, n. 16, supra, and accompanying text.

Of course the state can opt for a completely *nonpartisan* election system, without any political party recognition or involvement. Some state offices, such as Superintendent of Public Instruction, are already fully *nonpartisan*.[53] But I-872 does not convert other state offices to *nonpartisan* offices. Instead of eliminating partisan offices, I-872 steals partisan identities from the political parties and denies the political parties any meaningful mechanism by which to protect or define those identities.[54]

The State makes the interesting claim that the right of political parties to nominate is a "private" right, which right the state need not include in its election system.[55] Even if the State is correct[56], it ignores the obvious paradox of its argument. If the right to "nominate" is a private right then the right to use the party name in the nomination process is also a private right and the state has no right to use it or to allow others to use it. The State's claim also undermines the Grange's claim that political speech is not subject to trademark protection.

The State also defends I-872 by claiming that a candidate's party preference "may well be available to voters from other sources."[57] The obvious distinction is that "other sources" are not before this court, not state actors and not likely subject to constitutional limitations;[58] and further, do not carry the state imprimatur of legitimacy and/or prestige. As far as the Libertarian Party has been able to determine, there is no precedent and no legal authority for the State's proposed

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53 R.C.W. § 29A.52.111

54 The State admits under I-872 state offices are still "partisan" depending on what "sense" in which the statutes are interpreted. State Brief, at 19-20.

55 State Brief, at 18-19, 39-40

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

57 State Brief, at 19

58 "Other sources" may nonetheless be subject to trademark regulations

concept anywhere in the law. Indeed, most if not all of the "expressive association" cases from the Supreme Court hold directly to the contrary.[59]

The Washington State Grange argues at length about the First Amendment speech rights of candidates to state their "party preference" on the primary ballot.[60] However, it is not clear the Grange has standing to make these arguments. The Grange was admitted to this case on an oral motion[61] and thereafter filed Answers to the political parties' complaints.[62] However, it does not appear that the Grange has ever stated its interest in the case except as Initiative 872's sponsor. Insofar as the Libertarian Party can ascertain the Grange has never alleged or shown it is a candidate or represents a candidate who might have a First Amendment claim.

Assuming the Grange can establish it has standing to raise the claims of candidates, the "expressive association" cases clearly demonstrate that the association can determine the scope of the association and with whom it wants to associate.[63]

I-872 Severely Burdens The Associational Rights Of Political Parties

I-872 DESTROYS ELECTIONS AS A GENERAL FORUM FOR POLITICAL EXPRESSION

The fundamental premise of I-872 is that the purpose of elections is to elect public officials, not to serve as a general forum for political expression.[64] This

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59 See, n. 13, supra.

60 Grange Brief, at 15-26

61 SER 597

62 SER 103-132

63 See, n. 13, and especially *Dale*, 530 U.S. 640, supra.

64 The State argues, "lack of sufficient voter support is a perfectly sensible way to winnow candidates." State Brief, at 34 The Grange admits in its brief that the primary under I-872 is, in essence, a popularity contest. Grange Brief, at 3, 10, 26, 34, 36, 43

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.[65] The consequence is candidates often run (or not run) and voters often vote (or not vote) not to win or back a winner but to make a political statement.[66]

Five decades ago Professor McLuhan taught us "the medium is the message." The Initiative sponsors recognized that election systems are not merely administrative procedures but have substantive policy content when they argued in the Voter's Pamphlet: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters."[67] The Supreme Court has already found this is not a legitimate purpose.[68]

Some political actors such as the LP and its adherents are more interested in effectively promulgating an ideological message than in appealing to the consensus voter. The Supreme Court has recognized the right of individuals and political

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65 See e.g., Aldrich, n. 17, supra, at 12-13

66 See, e.g., *Eu*, 489 U.S., at 223 ("election campaign is a means of disseminating ideas as well as attaining political office"); and see, 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.").

67 SER 257

68 *Jones*, 530 U.S. 567, 580 (2000) (whole *purpose* of Proposition 198 was to favor nominees with "moderate" positions)

parties to do exactly that.

> "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.[69]

I-872 takes all of that away. 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," "Volvo," "Lexus," "Hummer" or "Mini Cooper" in the election that matters, the general election.[70] It deprives candidates of First Amendment rights of association by forcing them to run as independent candidates who can merely express a "party preference." It emasculates the First Amendment association and Fourteenth Amendment liberty rights of political parties by statutorily eliminating them from the *partisan* process in which they were 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 of expressive association.

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69 *Norman v Reed*, 502 U.S. 279, 288 (U.S., 1992) (citing to *Anderson v. Celebrezze*, 460 U.S. 780, 793-794 (1983); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)

70 "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

This is why I-872 must fail, to protect the expressive rights of the losers and the marginalized.

I-872 EXTINGUISHES THE FEW ASSOCIATIONAL RIGHTS THE LIBERTARIAN PARTY PREVIOUSLY HAD

While the State admits that the Progressive Era trend was to "take over" the party nominating process[71]—and incidentally the blanket primary was, until I-872, its crowning achievement[72]—the State is wrong to say that under I-872 parties were "restored to the position they enjoyed"[73] prior to the alleged reforms. Prior to the adoption of the direct primary at the beginning of the 20th century, and until the appearance of I-872, political party nominations had some legal significance regarding access to the general election ballot.[74] By the State's own admission,[75] I-872 renders the political party nominations they "enjoyed" entirely meaningless.

The Libertarian Party does not, as the State would have it, claim a right to ensure its nominees advance to the general election. The Libertarian Party knows all too well that its ballot access right is limited[76] to a "*reasonable* opportunity to

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71 State Brief, at 33

72 Allison, 36 Tulsa L.J. 59, 62; *Symposium: 1999-2000 Supreme Court Review: Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*

73 State Brief, at 33

74 See, e.g., McCrary, *Treatise on the American Law of Elections*, § 192 (1875)(party elections and conventions resulting from corruption void as against public policy)

75 State Brief, at 29, 47 (political affiliation plays "no role" in determining which candidates advance to the general election)

76 As a "minor" political party the Libertarian Party has more historical experience with ballot access issues than any other political party in this action.

place [its] candidates onto the ballot…."[77] But I-872 deprives the Libertarian Party of even that reasonable opportunity.

Contrary to the assertions of the Grange,[78] I-872 affords the Libertarian Party—the association as opposed to the candidate presuming to represent the association—nothing, not even a chance for access to the ballot. That chance goes to the candidate, who may or not express a "party preference" for the Libertarian Party. The State's claim that the Libertarian Party can still conduct nominating conventions is absolutely meaningless under I-872, as those nominated are given no official recognition or preference whatsoever. Further, there is nothing in the Initiative or the balance of Washington election law to prevent a candidate who HAS been nominated by the Libertarian Party from expressing a "party preference" for the Democratic Party or the Republican Party on the ballot, or vice-versa for that matter.

The State's claim that candidates who express a "preference" for the Libertarian Party have reasonable ballot access[79] is equally meaningless. Under I-872 whoever claims a "preference" for a political party is not likely to be concerned with party nominations. The candidate who wants to win will watch public opinion polling results and declare a preference for the political party then in favor with voters. That candidate has no particular reason to build a meaningful affiliation with the political party because she can switch to the "surer bet" at each new election. And so it will go under I-872, with "party preferences" becoming increasingly meaningless information in identifying a candidate's position because political parties will have increasingly less control over their own identity.

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77 State Brief, at 34 (citing to *Munro*, 479 U.S. at 193.)

78 Grange Brief, at 40

79 State Brief, 49-54

I-872 is a *partisan* sham on the voters that devaluates everything for which any political party stands. The state's argument there will be no "confused voter" under I-872[80] is frivolous. Because I-872 destroys the ability of political parties to protect their identity, voter confusion is the necessary result.

I-872 FOSTERS UNRESTRAINED FACTIONALISM AND PARTY SPLINTERING

Not only does I-872 destroy expressive rights, it fosters chaotic and disorderly elections, to the detriment of First Amendment rights 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."[81] While "states may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder…."[82] the primary system established by I-872 prevents the parties from settling their differences internally and actually encourages party splintering and unrestrained factionalism.[83]

The State has made no showing how voters can or will distinguish between a candidate who expresses a "party preference" without party support and one who has been nominated, endorsed or supported by a political party and who also expresses a "party preference" on the ballot for that political party. Even if a candidate could claim on the ballot that she was endorsed by a party, "The ability

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80 State Brief, at 37

81 *Storer v. Brown*, 415 U.S. 724, 735 (1974)

82 *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364 (1997)

83 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)

of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee."[84]

Indeed, I-872 removed the only statutory distinction that previously existed between party supported candidates and imposters. The result is a cacophony of undisciplined voices on an overcrowded primary ballot, all of which will confuse voters about the LP's message, and which risks "significant damage to the fabric of government".

I-872 Deprives the Libertarian Party Of Reasonable Ballot Access Rights

> "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."[85]

I-872 DISCRIMINATES AGAINST THE LIBERTARIAN PARTY BY PROVIDING ONLY ONE ROUTE TO THE BALLOT

The State argues since I-872 treats all political parties the same way it is constitutional.[86] This is nonsense. 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] recognize[] the potential fluidity of American political life."[87] I-872 fails both tests. Under I-872 there is only one route to the *partisan* general election ballot, by coming in first or second in the primary.[88]

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84 *Jones,* 530 U.S. at 580

85 *Williams v Rhodes,* 393 U.S. 23, 31, (1968)

86 State Brief, at 43

87 *Jenness v. Fortson,* 403 U.S. 431, 438-439 (U.S., 1971)

88 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

> "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*."[89]

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. … But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other."(citation omitted)[90]

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 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."[91]

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

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nominating statutes have been "impliedly amended" may mean that the write-in statutes have also been affected. In any event, the write-in statute has nothing to do with the right to ***appear*** on the general election ballot.

89 *Jenness*, 403 U.S. at 442 (citing to *Rhodes*, 393 U.S. 23 (1968))

90 *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))

91 *Brief of Appellee State of Washington*, Democratic Party of Washington v Reed (02-35428), at 47

allowing them to unite behind a single slate of candidates."[92] Implicit in that assertion 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.[93]

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.[94] *Burdick v. Takushi*,[95] 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 a *partisan* general election ballot and then limit that *partisan* general election ballot only to two candidates who have obtained the most votes in a prior popularity contest.[96] Even the infamous "*nonpartisan* blanket primary" paragraph in *Jones*,[97] contemplated two alternative routes. By allowing access to the *partisan* general election ballot by one route only I-872 fails to recognize the differences between political parties and thus discriminates against "third" political parties.

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92 *Id.*

93 SER 155-157

94 E.g., *Jenness*, supra, *Storer*, supra, *Am. Party of Tex.*, supra, and *McCarthy*, supra.

95 504 U.S. 428 (1992)

96 *Foster v. Love*, supra, 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.

97 530 U.S. at 585

THE STATE CANNOT REQUIRE MORE THAN A "MODICUM OF SUPPORT" FOR ACCESS TO A PARTISAN GENERAL ELECTION BALLOT.

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."[98] The State suggests the "major struggles" language here justifies the "top two" provisions of I-872. However, *Munro* was concerned with a rule that required all candidates to poll at least 1% of the total vote cast for the office to advance to the general election ballot; not, as the State seems to imply, placing first or second in a primary that "differs markedly"[99] from the blanket primary.

The State again relies on *Munro* to argue that a state can require candidates to demonstrate a "modicum of community support in order to advance to the general election."[100] The state even argues that candidates and parties showing a "modicum of support" can nonetheless be denied access to the general election ballot.[101] But each of the cases on which the State relies for the latter argument relates to some procedural technicality such as a filing deadline. Nothing in *Munro* or any of the other ballot access cases suggests that a state can require more than a "modicum of support" from voters for access to a *partisan* general election ballot.

For the offices of U.S. Senator and Governor, 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.[102] As can be seen from the historical survey, in order

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98 State Brief at 31 (citing to *Munro,* 479 U.S., at 196) (quoting *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974))

99 State Brief, at 5

100 State Brief at 51 (citing to *Munro,* 479 U.S. at 197)

101 State Brief at 51-52.

102 SER 173

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. The Supreme Court has signaled that 5% is probably the highest ballot access limit it is likely to approve.[103] Lest the defendants argue that the other ballot access cases involved signature requirements and not primary vote totals, the *Munro* court was "unpersuaded, …, that the differences between the two mechanisms are of constitutional dimension"[104]

I-872 REPLACES THE "MODICUM OF SUPPORT" TEST WITH AN UNCONSTITUTIONALLY VAGUE "MOVING TARGET"

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,"[105] all candidates now face a ballot access threshold that is a moving target, which target is dependant on factors wholly outside the control of the individual candidates or the political parties, individually or collectively.

In a three-candidate race for a partisan office a candidate would likely 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 and not third party candidates, typically range between 4% and 21% of

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103 *Storer v Brown*, 415 U.S. 724, 739 (U.S., 1974)(footnote omitted)

104 479 U.S. at 197

105 See, e.g., *Munro,* supra.

the total vote.[106]

The void-for-vagueness doctrine is applicable to laws regulating conduct protected by the First Amendment.[107] "[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."[108] A statute is unconstitutionally vague if it does not give "a person of ordinary intelligence fair notice" of the statute's requirements.[109]

> "[S]tricter standards of permissible statutory vagueness may be applied to a statute 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.' … '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."[110]

A vague statute is not reasonably necessary to achieve a State's interest in regulating ballot access.[111] By presenting the LP with a moving target for access to the general election ballot, I-872 is unconstitutionally vague.

I-872 Violates Federal Law For Federal Offices

The United States Constitution[112] authorizes Congress to pre-empt state law

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106 SER 155-157

107 *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

108 *Baggett v. Bullitt*, 377 U.S. 360, 367, (1964) (citations omitted).

109 *United States v Harriss*, 347 U.S. 612, 617 (1954)

110 *Cramp v. Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278, 287-288 (1961)(citation omitted)

111 *Duke v. Connell*, 790 F. Supp. 50, 53-54 (DRI 1992)

112 Art. I, § 4, cl. 1

regarding the time, place and manner of elections. Under that power Congress has preempted state law and determined that Representatives, Senators and Presidential electors should all be elected on the second Tuesday of the November in each affected year.[113] Congress has also preempted state law by providing, in the event no candidate obtains a majority or other "failure to elect" a state may hold a "runoff" after the general election.[114]

Aside from thus authorizing runoffs, Congress has not authorized any state regulations that purport to "winnow" the field of candidates who may appear on any ballot. Implicitly, Congress has recognized the right of voters to voluntarily associate for the purpose of "winnowing" the field through the mechanism of political parties. Congress has not authorized the States to adopt their own "winnowing" mechanisms for the general election ballot. Put simply, 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 that the Tenth Amendment reserved to the states.[115]

I-872 IMPOSES UNCONSTITUTIONAL QUALIFICATIONS FOR FEDERAL OFFICE

Since placing first or second in the primary is the only way a candidate will appear on the general election ballot and I-872 eliminated 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-***

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113 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1

114 2 U.S.C.A. § 8; *Foster v. Love*, 522 U.S. 67, 71-72, 118 S.Ct. 464, n. 3 (1997)

115 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)

dispositive popularity contest.

Powell v. McCormack[116] noted the framers had considered a proposal to allow property ownership qualifications for membership in Congress. The court continued:

"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.*'

> 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." (emphasis added)[117]

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" (i.e., underfinanced and/or espousing unpopular ideas) in an election that the State itself calls a "qualifying primary."[118]

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116 395 U.S. 486 (1969)

117 *Powell*, 395 U.S. at 533-534 (citing to 2 Records of the Federal Convention of 1787, at 249-250)

118 State Brief at 5, 26, 29, 32, 48

As the Grange freely admits,[119] I-872 essentially creates a popularity contest. But the Grange probably does not want to admit the obvious result of popularity contests, which is that glib, well-financed and telegenic candidates will nearly always move to the general election and thus into government. Rich and varied normative political discourse, including the voices of the poor, rejected and marginalized, the very thing the First Amendment was created to protect, if it survives at all, will survive only in the halls of academia.

Throughout *Thornton* 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."[120] 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.'"'"[121] I-872 will lead to a self-perpetuating governing bodies and is not even remotely necessary.

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."[122] The State argues "[t]he general election is a 'runoff' between the two candidates gaining the most votes in the primary."[123]

Foster v. Love[124] addressed the timing of federal elections and held that the

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119 See, n. 25, supra
120 514 U.S. at 794, n. 10 (citing to *Powell,* 395 U.S. at 533-534)
121 514 U.S. at 795 (citing *Powell*, 395 U.S. at 543)
122 I-872 § 7(1)
123 State Brief at 9, 54
124 522 U.S. 67 (U.S., 1997)

first Tuesday after the first Monday in November of even numbered years was "*the day*" for federal elections.[125] 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.[126] Accordingly I-872 violates federal law as to the time of elections for federal offices because the election is effectively moved to September.[127]

The Libertarian Party Should Be Awarded Its Attorney Fees For This Appeal

If the Court determines that Initiative 872 violates the First Amendment, the Libertarian Party should be given an award of attorneys' fees and costs as the prevailing parties.[128] Intervenors may recover attorneys' fees and costs under § 1988 when the Intervenors play a significant role in the litigation at issue.[129] "[A] court is expected to award such fees [under § 1988] to the prevailing party unless there is some special circumstance which would justify the court's refusal."[130] A

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125 *Id.*, 522 U.S. at 71 (quotes in original, emphasis added)

126 2 U.S.C. § 8

127 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)

128 "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . ." 42 U.S.C. § 1988(b).

129 *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1534-35 (9th Cir. 1985).

130 *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1534 (9th Cir. 1993).

prevailing party is any party that succeeds on any significant issue in the litigation to the benefit of that party.[131]

The Court's determination that Initiative 872 burdens the Libertarian Party's First Amendment rights would constitute success on the primary issue in this litigation and would immediately benefit the Libertarian Party. No special circumstances make an award of attorneys' fees and costs unjust.

The Court should award reasonable attorneys' fees and costs to the Libertarian Party for this appeal and remand this matter to the district court with instructions to award the Libertarian Party appropriate attorneys' fees and costs for the proceedings below.[132]

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131 *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 789 (1989); *G & G Fire Sprinklers v. Bradshaw*, 156 F.3d 893, 906 (9th Cir. 1998); *Goehring v. Brophy*, 94 F.3d 1294, 1304 (9th Cir. 1996)

132 *Harris v. County of Riverside*, 904 F.2d 497, 504 (9th Cir. 1990)

CONCLUSION

For all the foregoing reasons, this court should affirm the decision of the trial court.

RESPECTFULLY SUBMITTED, this ____ day of October, 2005.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1

I certify that pursuant to F.R.A.P. 32(a)(7)(C) and Circuit Rule 32-1, the attached Response Brief is proportionately spaced, has a typeface of 14 points or more, in Times New Roman font style, and contains 6432 words.

DATED this ____ day of October, 2005.

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