HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

vs.

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

Defendants,

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-TSZ

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: WEDNESDAY, JULY 13, 2005

WITH ORAL ARGUMENT

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I. INTRODUCTION AND RELIEF REQUESTED

This case presents once more the question whether the State of Washington ("the State") may force the Washington State Republican Party and its adherents (collectively, "the Party") to have their standard-bearers chosen by persons who are unaffiliated with the Party, and who may even be antagonistic to its programs and objectives.

In 2000, the U.S. Supreme Court prohibited states from adulterating the message of political parties through "forced association" in the guise of a "blanket primary." *See California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"). Following *Jones*, the Ninth Circuit struck down Washington's blanket primary in 2003 because "[t]he right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office." *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 , *cert. denied sub nom., Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004) ("*Reed*"). In response to *Reed*, the State adopted the "modified blanket primary."[1]

This case also presents the related question whether the State may further infringe on the Party's First Amendment rights by forcing the Party to associate with candidates who may not share its core values and whose candidacy is intended to modify the Party's message and will confuse voters. Under the First Amendment, it is clear that a candidate may not force himself or herself upon, or misrepresent an affiliation with, the Republican Party, and that the State is likewise barred from forcing a candidate upon an unwilling Party.

In November 2004, the State enacted Initiative 872 ("I-872") (also known as the modified blanket primary and now codified in Title 29A RCW), which was intended to (1) prevent the Party and its adherents from selecting their nominees for elected partisan office, and (2) force the Party to be associated publicly with candidates who have neither been

[1]The primary adopted by I-872 has been variously referred to as the "modified blanket primary," the "People's Choice Primary," the "Cajun Primary," and the "Top Two Primary." It is unconstitutional under any pseudonym.

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nominated by the Party nor qualified under Party rules. Such forced association alters the political message and agenda of the Party and confuses the voting public with respect to what the Party and its adherents stand for. The Party and its adherents seek this Court's protection of their First Amendment rights to advocate and promote their vision for effective government without censorship or interference by governmental officials acting under color of state law.

The Plaintiffs move for an order declaring Initiative 872 and the "filing statute" unconstitutional because they invade fundamental rights of political association, and the state can show no "compelling interest" that is "narrowly tailored" to justify its infringement on core First Amendment rights. If the court grants the requested relief, Washington will have a primary election this fall, but one that respects the right of political association and the right of political parties to define the scope of their association. The Plaintiffs move for an order of summary judgment and permanent injunction against the implementation of any portion of I-872, or the State's candidate filing statute. (RCW 29A.24.030 and RCW 29A.24.031.)

The State's invasion of the Plaintiffs' First Amendment rights also violates their civil rights under 42 U.S.C. §1983. *See Democratic Party of Washington v. Reed*, 388 F.3d 1281, 1285 (9th Cir. 2005); *See also Branti v. Finkel*, 445 U.S. 507 (1980) (civil rights violated where employees discharged based on political beliefs).

II. FACTUAL BACKGROUND

Initiative 872, as set forth in both Sections 2 and 18, was expressly intended to defeat the First Amendment rights of the Party and its adherents:

> The Ninth Circuit Court of Appeals has threatened [the blanket primary] system through a decision, which, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective . . . .
>
> ***
>
> This act shall become effective only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003)[,] holding the blanket primary election system in Washington state invalid[,] becomes final and a Final Judgment is entered to that effect.

Declaration of John J. White, Jr. in Support of Motion for Preliminary Injunction (hereinafter

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referred to as "White Decl."), Ex. 1 at 27 & 29.[2] The initiative sponsor described I-872 as a "modified blanket primary," promising voters that it would look and operate much like the old blanket primary. *See* White Decl., Ex. 2, Ex. 3 at 2 & 5, Ex. 4. The Voter's Pamphlet statement in support of I-872 trumpets the message adulteration intent: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." White Decl., Ex. 1 at 12. The purpose was to supplant the standard bearer of the Republican Party and its adherents with someone else: "This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leadership." White Decl., Ex. 3 at 6-7. The sponsor pointed to a gubernatorial race where a major party candidate received less than 40% of the vote in the general election as an example of why I-872 was needed. *See* White Decl., Ex. 3 at 5. Elsewhere in its promotional documents for I-872, the sponsor explained that "[candidates] will not be able to win the primary by appealing only to party activists." White Decl., Ex. 4 at 2.

Under RCW 29A.04.025, defendants (also referred to herein as "the County Auditors") are election officers in the State, have overall responsibility to conduct primary elections within their respective counties, and, consistent with the rules established by the Secretary of State ("the Secretary"), provide and tabulate ballots for such elections. The County Auditors will conduct partisan primaries in September 2005.

Under state election laws, the Party is required to advance its candidates for congressional, state and county offices by means of partisan political primaries administered by the Secretary and the County Auditors. *See* RCW 29A.52.116 ("Major political party candidates for all partisan elected offices . . . must be nominated at primaries held under this chapter.").

The Party notified the County Auditors of its rules governing the eligibility of

[2]Mr. White's declaration was filed on May 26, 2005 as Document 8 on the Court's docket and will not be re-filed with the present motion.

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candidates to be associated with the Republican Party and the nomination of its candidates. *See* White Decl., Exs. 5-7. Four of the defendants responded: "At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary." White Decl., Ex. 8.

RCW 29A.52.112 also allows all primary election voters, regardless of political affiliation, to determine which Republican will appear on the general election ballot for a partisan office. Candidates who identify their "party preference" as "Republican" will carry the Republican standard in the general election.[3] The Secretary has asserted that, under the new modified blanket primary, only the two candidates who receive the most votes in the primary will advance to the general election, even if both candidates are associated with the same political party.

On May 18, 2005, the Party conducted precinct caucuses to elect delegates to nominating conventions in King and Snohomish counties. On June 11, 2005, the King County Republican Party nominated candidates for partisan offices up for election in November 2005. *See* Supplemental Declaration of John J. White, Jr., Ex. 1. Special central committee meetings will be held in several counties in late June to nominate the Republican candidate for a vacant seat in the 19th Legislative District.

The Secretary has published an election calendar for 2005. *See* White Decl., Ex. 9. Key dates are rapidly approaching. The filing period for partisan offices to be filled this year runs from July 25-29. Under the Secretary's schedule, vacancies on the Republican ticket must be filled by August 8. County Auditors must make available absentee ballots for the primary election no later than August 31 and, by September 2, must mail absentee ballots to voters who have requested them.

III. STANDARD FOR SUMMARY JUDGMENT AND EVIDENTIARY BURDEN

"Summary judgment is appropriate if, viewing the evidence in the light most favorable

[3] A candidate is prohibited from changing his "party preference" after the primary. *See* Emergency WAC 434-230-040, adopted May 18, 2005.

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to the nonmoving party, there are no genuine issues of material fact remaining for trial, and the moving party is entitled to judgment as a matter of law." *Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1359 (9th Cir. 1994). In ruling on cross-motions for summary judgment, the Court must evaluate each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1078 (9th Cir. 2001).

As with the Party's challenge to the original blanket primary in *Reed*, this case is a facial challenge to the constitutionality of the modified blanket primary. *See Reed*, 343 F.3d at 1203 ("The Supreme Court does not set out an analytic scheme whereby the political parties submitted evidence establishing that they were burdened. Instead, *Jones* infers the burden from the face of the blanket primary statutes. We accordingly follow the same analytic approach as *Jones*.").

The constitutionality of the modified blanket primary is ripe for adjudication, as the threat to the Republican Party's associational rights is more than hypothetical. The Supreme Court has repeatedly held that imminent injury to established rights warrants the federal courts' intervention. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.'" *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (finding controversy justiciable where injury to First Amendment protected rights imminent) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). The press has already reported that at least one candidate may run as a Republican, notwithstanding the nomination of another. *See* White Suppl. Decl., Ex. 1.[4]

[4]The Secretary's emergency regulations confirm that there is an immediate and ongoing invasion of First Amendment rights through the State's modified blanket primary. WAC 434-230-170 mandates that a candidate's "party preference . . . be listed exactly as provided by the candidate on the declaration of candidacy." Filing for partisan offices will begin on July 25. This regulation strips the Republican Party of the right to determine the scope of its association, and instead compels the Party to be associated on the state's ballot with any candidate

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If the State burdens core First Amendment rights, the burden may be sustained only if the State demonstrates a "compelling interest" that is "narrowly tailored." *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214, 225 (1989) ("Because the [state action] burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest." In *Eu*, California failed to demonstrate a compelling interest, including what made its system "so peculiar" that California's unique invasion of First Amendment rights was necessary. *Id.* at 226.); *Reed*, *supra* at 1203 (The Washington blanket primary burdened core speech, and the question is "whether the state satisfied its burden of showing narrow tailoring toward a compelling state interest.") No state has a primary system similar to Washington's. The modified blanket primary burdens core First Amendment rights and the State bears the same burden of showing both a compelling interest and narrow tailoring.

IV. LEGAL ARGUMENT

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

Yes. The "modified blanket primary" adopted by I-872 is materially indistinguishable from the blanket primary struck down by the Ninth Circuit in *Reed*. Re-naming the primary does not change its effect.

1. The modified blanket primary nominates the Republican Party's standard-bearer in the general election and continues the same invasion of First Amendment rights that prompted the Ninth Circuit to strike down Washington's original blanket primary.

As under the former blanket primary, the only way for Republican candidates to reach the general election ballot is through the primary. The Secretary and the County Auditors, acting under state law, permit no nomination process other than the primary. Defendants Logan, Kimsey, Dalton and Terwilliger all assert that they are "not aware of any language associated with the Initiative that contemplates a *partisan nomination process separate from*

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who "prefers" the Republican name, even if the candidate espouses positions directly at odds with the goals and message of the Republican Party and its supporters.

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the primary." White Decl., Ex. 8 (emphasis added).

Whether voters nominate one Republican or two to advance to the general election, they determine which candidates will carry the Republican Party's standard in the general election.[5] Initiative 872 grafted a change of nomenclature onto the State's former blanket primary and allows two nominees from a single party to advance to the general election. However, the bulk of Washington's law and the status of candidates selected at the primary as Republican nominees remain unchanged. Under the state constitution, it is the Republican Party that nominates successors to fill a vacancy in the partisan offices that are the subject of the modified blanket primary. *See* Const. art. II, § 15. Further, the state constitution requires that the "person appointed to fill the vacancy must be from . . . the same political party as the legislator or partisan county elective officer whose office has been vacated." *Id.* Candidates selected by the modified blanket primary will be the nominees of the Party.

Prior to the primary, the County Auditors are required to publish notice of the election, which must contain "the proper party designation" of each candidate. RCW 29A.52.311. Candidates selected in the modified blanket primary will carry the Republican name in the general election. A candidate who has expressed a political party "preference" for the Republican Party on the declaration of candidacy will have that preference "shown after the name of the candidate on the primary and general election ballots." RCW 29A.52.112. The party designation is to inform voters which party the candidate identifies with. *See* RCW 29A.52.112(3) ("Any party or independent preferences are shown for the information of voters only . . . .").

The initiative sponsor's promotional materials described the modified blanket primary as a "new nominating system" and a "different nominating system," to be effective if the Supreme Court did not uphold the old blanket primary.

> If the Supreme Court refuses to hear the case on review or hears the appeal and declares the blanket primary invalid, Washington state will have to adopt a

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[5]Washington's constitution expressly acknowledges that there may be more than one individual nominated on behalf of a political party. *See* Const. art. II, § 15.

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> different nominating system for partisan offices. The Legislature would have to adopt a new nominating system for partisan offices - or the voters could do this through the initiative process.

White Decl., Ex. 3.

The State asserts in its answer that the primary "does not select . . . party nominees." Answer of State Intervenors, ¶ 19. It apparently believes that using terms such as "winnowing" rather than "nominating" accomplishes this result. *See* RCW 29A.04.127; White Decl., Ex. 1 at 27 (Sec. 5 of I-872). This case is not the first time the State has argued that Washington's primary election system does not select party nominees. It is the third, and the State's argument has been rejected both prior times. In its *amicus curiae* brief before the Supreme Court in *Jones*, the State described "the winnowing of candidates for the general election" as the only "aspect of party associational activities affected by the blanket primary." Brief of the States of Washington & Alaska as *Amicus Curiae* in Support of Respondents, 1999 U.S. Briefs 401 at *10. In *Reed*, the State argued that Washington's prior blanket primary should be distinguished from California's invalidated primary because Washington does not register voters by party, and thus "winners of the primary are the 'nominees' not of the parties but of the electorate." *Reed* 343 F.3d at 1203 (internal quotation marks and citations omitted). The State then characterized the blanket primary as "a '*nonpartisan* blanket primary' that under *Jones* does not violate the parties' associational rights." *Id.* (emphasis in original). The Ninth Circuit characterized these as "distinctions without a difference." The attempts to distinguish I-872's modified blanket primary from the blanket primary invalidated in *Reed* are as unavailing.

In its promotional material for I-872, the initiative sponsor claimed that it "specifically drafted Initiative 872 to conform to" the Supreme Court's description of a "nonpartisan blanket primary" and that the initiative does not violate the Party's First Amendment rights "[b]ecause the voters are not selecting party nominees." White Decl., Ex. 4. In *Reed*, the State unsuccessfully relied upon the same *dicta* from *Jones*:

> Finally, we may observe that even if all these state interests were compelling ones, [California's blanket primary] is not a narrowly tailored means of

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> furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.

Jones, 530 U.S. at 585-86 (emphasis in original).

The system described by the Court and Washington's modified blanket primary are dramatically different. In the Supreme Court's hypothetical system, the voters choose among candidates who have been previously nominated by each political party. *See Jones*, 530 U.S. at 598 n.8 (Stephens, J., dissenting) ("Under the Court's reasoning . . . [the State has the option] . . . to have what the Court calls a 'nonpartisan primary' . . . in which candidates previously nominated by the various political parties and independent candidates compete."). [6] Unlike the system described by the Court, the Republican Party in Washington must allow any candidate who declares a "preference" for the Party and prevails in the primary, in which unaffiliated voters and members of rival parties vote, to represent the Party at the general election.

Although the State contends that "Washington law neither requires political parties to nominate candidates for office, nor prevents them from doing so if they choose" (Answer of State Intervenors, ¶ 16), in reality the Party is provided no mechanism or right to select its own candidates under Washington's modified blanket primary. The State attempts to convert "nominate" to "endorse." The two are not the same and the ability to do one does not excuse a State restriction on the other. *Jones,* 530 U.S. at 580-581. *See also Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989). (California's closed primary system to nominate Democratic candidates did not save ban on endorsement by Democratic Central Committee.)

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[6] Justice Stevens correctly observed that a nonpartisan primary is, in reality, "a general election with a runoff." *Id.*

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There is no constitutionally significant difference between Washington's new modified blanket primary and the previous blanket primary held unconstitutional by the Ninth Circuit. Indeed, the Voters' Pamphlet statement prepared by I-872's proponents stated that "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary." White Decl., Ex. 1 at 12. As in *Reed*, in which the State characterized candidates advancing to the general election as "nominees not of the parties but of the electorate," I-872's re-characterization of nominees as "candidates" of the electorate identifies "the problem with the system, not a defense of it." *Reed*, 343 F.3d at 1204. Voters of any political party, and even those antagonistic to the Republican Party, are still free to vote for candidates identified as Republican on the ballot and to therefore determine which Republican candidate will advance to the general election. "Put simply," the modified blanket primary follows the blanket primary in "prevent[ing] a party from picking its nominees." *Id.* It is unconstitutional for the same reason.

2. The express purpose of the modified blanket primary is to alter the message of the Republican Party and invade the right of association by advancing the political interests of candidates who would not be selected by the Republican Party and its adherents.

According to the sponsors' official statement in support of I-872, "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." White Decl., Ex. 1 at 12. Note that "*Parties will have to recruit*." The intent is to change the Republican Party and its message by changing its standard bearers. The sponsors make clear the goal of modifying the message of the Republican Party.

> The initiative should force the political parties to compete more effectively for these offices. Unfortunately, we have seen recent races for Governor where one of the major parties nominated a candidate that received less than 40% of the vote in the general election. Under this initiative, parties should seek candidates with broad public support who can survive a competitive primary.

White Decl., Ex. 3.

As with the blanket primary before it, the modified blanket primary seeks to require the Republican Party to "substitute someone else's message for [its] own, which the general rule

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of speaker's autonomy forbids." *Reed*, 343 F.3d at 1206 (internal quotation marks and citation omitted).

Initiative 872's effort to adulterate the Republican Party's message is a direct challenge to the courts' role as protectors of rights guaranteed under the federal constitution. The Initiative's stated purpose was to defy the Ninth Circuit's decision in *Reed*: "The Ninth Circuit Court of Appeals has threatened [the blanket primary] system . . . ." White Decl., Ex. 1 at 27 (Sec. 2 of I-872). The official ballot statement in support of the modified blanket primary underscores this intent to flout the Ninth Circuit's upholding of the Republican Party's right to nominate its candidates:

> Last year the state party bosses won their lawsuit against the blanket primary . . . . Most of us believe that [the] freedom to select any candidate in the primary is a basic right. Don't be forced to choose from only one party's slate of candidates in the primary.
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> ***
>
> The September primary this year gave the state party bosses more control over who appears on our general election ballot at the expense of the average voter. *I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary.*

White Decl., Ex. 1 at 12 (emphasis added). The Ninth Circuit expressly addressed this point under the original blanket primary: "The Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party." *Reed*, 343 F.3d at 1204. The modified blanket primary attempts to supplant the Republican Party's choice of its spokesman in the general election with someone else's choice, in direct contravention of the line of Supreme Court cases that "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *Id.* (quoting *Jones*, 530 U.S. at 575).

The modified blanket primary touts "the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." White Decl., Ex. 1 at 27 (Sec. 3(3) of I-872). Preserving the ability of unaffiliated

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and rival party voters to continue to select the Republican Party standard-bearer was a key purpose underlying the modified blanket primary. The sponsor explained, "Voters do not want to be restricted in the primary to voting on the candidates of only one party because, for many voters, this prevents them from expressing support for all the candidates they want to see elected." White Decl., Ex. 4. Both *Jones* and *Reed* expressly rejected this "right" as a legitimate basis for invading First Amendment rights:

> Defendants argue that . . . the blanket primary "promotes fundamental fairness because it permits all voters, regardless of party affiliation, to participate in all stages" [quoting brief of defendant Reed] . . . . [This] amount[s] to the same interest California urged in *Jones*, categorically rejected because "a nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." Providing increased "voter choice" "is hardly a compelling state interest, if indeed it is even a legitimate one."

Reed, 343 F.3d at 1205 (quoting *Jones*, 530 U.S. at 583). The Grange and the State have no more legitimate interest in adulterating the selection of the Republican Party's standard-bearer than when the Ninth Circuit struck down the blanket primary.

The State's position in this case, disavowing any direct infringement of the constitutional right of the Party and its adherents to further their "program for what they see as good governance," *Reed*, 343 F.3d at 1204, is strikingly similar to that of the State of Texas in the "white-only Democratic primary" cases. *See Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). In *Herndon*, the Court invalidated a state statute prohibiting African-Americans from voting in the primary elections. After *Herndon* was decided, Texas immediately passed a statute enabling political parties to pass resolutions to exclude African-Americans from voting in the primary. Although Texas argued that the resulting racial discrimination was not state action, the Court in *Condon* recognized that the so-called private action was in fact enabled by the statute and struck down the resolutions. The *Allwright* Court held that although primaries in Texas were "political party affairs, handled by party, not governmental, officers," 321 U.S. at 657, the state's delegation of power to a political party to determine the qualifications of primary election

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voters made the party's actions the action of the State. The "private" choices of unaffiliated or rival party voters and candidates resulting in forced association is similarly enabled by the modified blanket primary, and thus are similarly attributable to the State.[7]

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

Yes. Political parties have the inherent power to nominate their candidates for public office, because that is the basic function of a political party. If Washington has abandoned a "nominating primary," that power devolves to the political parties.

1. Although a state may require a political party to nominate its candidates through a state-administered partisan primary, a party's right to nominate its candidates pre-dates partisan primaries and exists independent of a state-mandated primary.

The Supreme Court in *Jones* recognized that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electoral candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." 530 U.S. at 574; *see also Ray v. Blair*, 343 U.S. 214, 220-21 (1952) ("As is well known, political parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the rapidly increasing population . . . so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable.")

Prior to the institution of primary elections, political parties held caucuses or conventions to nominate their candidates for partisan offices. *See, e.g., Ray*, 343 U.S. at 221 ("The party conventions of locally chosen delegates, from the county to the national level, succeeded the caucuses of self-appointed legislators or other interested individuals."); *Britton v. Bd. of Election Comm'rs*, 129 Cal. 337, 339, 61 P. 115 (1900) ("Conventions of political

[7] According to *Jones*, the *Allwright* and *Terry* decisions "do not stand for the proposition that party affairs are public affairs" that preclude a political party from excluding nonmembers. *Jones*, 530 U.S. at 573. Instead, they "simply prevent exclusion that violates some independent constitutional proscription." *Id.* n.5.

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parties, consisting of representatives of the voters of such parties, assembled to deliberate and place in nomination their candidates for various public offices, have long been known in the history of this country.")

"Dissatisfaction with the manipulation of conventions caused that system to be largely superceded by the direct primary." *Ray*, 343 U.S. at 221. Washington's initial direct primary election system was enacted in 1907. *See State ex rel. Zent v. Nichols*, 50 Wash. 508, 517, 97 P. 728 (1908). It is indisputable that a state "may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Jones*, 530 U.S. at 572. A state's regulation of a political party's "internal processes" of selecting its candidates, however, cannot bypass Constitutional limits. *See id.* at 573.

2. If the modified blanket primary does not nominate political party candidates, Washington has abandoned a partisan nominating primary, and each political party has the right to nominate through other means, including conventions.

According to the Supreme Court, "the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences,'" *Jones*, 530 U.S. at 575 (quoting *Eu*, 489 U.S. at 224), is "the 'basic function of a political party.'" *Jones*, 530 U.S. at 581 (quoting *Kusper*, 414 U.S. at 58); *see also Reed*, 343 F.3d at 1204. In *Jones*, the Court used interchangeably the phrases "selecting a candidate," "selecting a nominee," "selecting a standard bearer," and "choosing a leader." The Republican Party's exercise of this basic function, when choosing its nominee, "is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* at 575 (internal quotation marks and citation omitted). The Party's nominee "becomes [its] ambassador to the general electorate in winning it over to the party's views." *Id.*[8]

[8]In contrast, the purpose of California's blanket primary in *Jones*, Washington's blanket primary in *Reed*, and the modified blanket primary in this case is to preclude the political parties' candidates from winning the electorate over to the parties' views, but rather to produce candidates who merely reflect the views of the electorate.

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The State's assertion that the Party is free under the modified blanket primary to "nominate" candidates for office either confuses or conflates the verbs "nominate" and "endorse." If the modified blanket primary does not nominate party candidates, the Party's "nomination" of a candidate is nothing more, in effect, than an endorsement. *Jones* rejected the idea that a party's ability to endorse a candidate was constitutionally equivalent to its right to choose its own leader: "There is simply no substitute for a party's selecting its own candidates." 530 U.S. at 580-581.

Under RCW 29A.04.086, major party status depends on a party's "nominee" receiving at least five percent of the vote in the general election for at least one of a variety of state-wide elected offices. If the Republican Party must have a "nominee" in order to retain its major party statute, and the State has no involvement in the Party's nomination process, who but the Party may adopt rules governing nomination?

The power to nominate candidates is an inherent power of a political party. *See Jones*, 530 U.S. at 581; *Reed*, 343 F.3d at 1204 (describing the nomination of candidates as "the basic function of a political party"). Washington's original direct primary law, adopted in 1907, required that the Republican Party nominate its candidates at a primary election, rather than through conventions, as had been done in the past. The direct primary law confirmed the power of a political party to "perform all other functions inherent to such organizations, the same as though [the direct primary] had not been passed: Provided, that in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election." *State ex rel. Wells v. Dykeman*, 70 Wash. 599, 601, 127 P. 218 (1912) (quoting Wash. Code § 4826 (Remington & Ballinger)). By expressly limiting the Party's authority to nominate its candidates by convention, the original direct primary law clearly indicates that, absent a nominating primary, the Party's right to independently nominate its candidates through a party convention is within its inherent power.

Washington's constitution also expressly recognizes the continuing power of political parties to "nominate" candidates. *See* Const. art. II, § 15 (setting forth a process by which a

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political party nominates candidates to fill vacancies in office held by elected officials from its party). Prior to the adoption of Article II, Section 15 as part of the state constitution, similar provisions existed in Washington's election statutes dating at least as far back as 1890. *See State ex rel. Ewing v. Reeves*, 15 Wn.2d 75, 80, 129 P.2d 805 (1942) (quoting Rem. Rev. Stat. § 5176 (Laws of 1890, chapter 13, § 12, p. 404)).

3. Washington has no compelling interest in stripping the Republican Party of the right to nominate its candidates only in some instances, nor to attempt to strip the Republican Party of the ability to perform the functions inherent in a political party.

Initiative 872 left untouched the procedures for nominating candidates for President and Vice-President. To participate in nominating the Republican candidate for President, voters must affirmatively, and publicly, affiliate with the Republican Party. *See* RCW 29A.56.050. Similarly, the State also authorizes the Republican Party to nominate its slate of Presidential electors. RCW 29A.56.320. The State, therefore, does not recognize a categorical, across-the-board right of unaffiliated or rival party voters to select Republican nominees.

Initiative 872 also left untouched provisions of the state constitution providing for nomination of candidates by the Republican Party. Vacancies in partisan office are filled through a multi-step process that begins with nomination of three candidates by the same political party as the previous holder of the office:

> [T]he *person appointed to fill the vacancy* must be from . . . *the same political party* as the . . . officer whose office has been vacated, and *shall be one of three persons who shall be nominated by the county central committee of that party*, and [if the relevant legislative body does not act], the *governor shall . . . from the list of nominees* provided for herein, *appoint a person . . . of the same political party* . . . [I]n case of a vacancy occurring in the office of joint senator, or joint representative, *the vacancy shall be filled from a list of three nominees selected by the state central committee . . .*

Const. art. II, § 15 (emphasis added).

For the office of President, and in the event of a post-election vacancy in the partisan offices subject to the modified blanket primary, the Republican Party selects its nominees. Through the modified blanket primary, however, the State seeks to deprive the Republican Party of both the right to nominate its candidates in other circumstances and to establish rules

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governing who may participate in the selection of its nominees.

In addition to stripping from the Republican Party its right to "perform all functions inherent in [a political party] organization," Section 14 of I-872 also purports to limit the Republican Party to adopting rules governing only its nonstatutory functions. This appears to preclude adoption of rules to carry out the constitutionally-mandated procedures for filling vacancies in partisan office, as well as precluding party rules governing nomination of Republican Presidential electors, another statutory function. *See* RCW 29A.56.360; White Decl., Ex. 1 at 28. Thus, under the modified blanket primary, the Party seems to retain the power to nominate Presidential candidates, Presidential electors, and candidates to fill vacancies in elected office, but may no longer establish the rules for their nomination.

The attempt to eliminate the Republican Party's authority to carry out the "functions inherent" in a political party, alone, would be enough to invalidate the initiative. *See Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 227 (1989) ("[A] State may enact laws to 'prevent the disruption of the political parties from without' but not . . . laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" (quoting *Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986))).

The burden is on the State to demonstrate a compelling interest in striking the right to nominate or restricting the ability of the party to carry out the "functions inherent" in a political party. *See Jones*, 530 U.S. at 581-82. This burden is heightened where the State has selectively stricken the right to nominate in some instances, but not all.

C. If the primary system under Initiative 872 nominates political party candidates for public office, does Initiative 872 violate the First Amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees?

Yes. By forcing the Republican Party to have its nominees selected by voters who either have no affiliation with the party or actively oppose its agenda, the modified blanket primary suffers from the same fatal flaws as Washington's original blanket primary. Both *Jones* and *Reed* compel the conclusion that the modified blanket primary violates the Party's First Amendment rights of association.

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In *Reed*, the Ninth Circuit held that Washington could not force the Republican Party and its adherents to adulterate their nomination process. The *Reed* decision overturned Washington's blanket primary system, which – like I-872 – prevented the Party from controlling its own nomination process. The court, rejecting a litany of "compelling interests" advanced by the State to justify its invasion of First Amendment rights, stated that "[t]he remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests is to vote for someone else, not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-1207.[9]

In *Jones*, the Supreme Court held that forced political association with primary voters violates First Amendment principles set forth in its earlier cases because it requires "political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Jones*, 530 U.S. at 577. The Supreme Court also noted that

> a corollary of the right to associate is the right not to associate. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.
>
> In no area is the political association's right to exclude more important than in the process of selecting its nominee.

530 U.S. at 574-575 (citations and quotation marks omitted). The Ninth Circuit explicitly followed *Jones* in its *Reed* decision. *See Reed*, 343 F.3d at 1201.

In a recent decision, *Clingman v. Beaver*, 125 S. Ct. 2029, 2005 U.S. LEXIS 4181 (May 23, 2005), the Supreme Court again recognized the danger of opening a party's nominating primary to "all registered voters regardless of party affiliation": "the candidate who emerges from the [party's] primary may be unconcerned with, if not hostile to, the political preferences

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[9] "The members of the Grange have a First Amendment right to control its membership and message so that it is not swamped by new members with some urban or foreign policy agenda. Likewise, the people in the Democratic, Republican, and Libertarian Parties have First Amendment rights to control their nominating processes so that they are not controlled by Grangers." *Reed*, 343 F.3d at 1206.

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of the majority of the [party's] members." *Id.*, 2005 U.S. LEXIS 4181 at *25. The Court characterized as important Oklahoma's interest in avoiding "primary election outcomes which would tend to confuse or mislead the general voting population to the extent it relies on party labels as representative of certain ideologies." *Id.*, 2005 U.S. LEXIS at *26. The modified blanket primary retains partisan party labels to inform voters of candidates' party ideology, while denying the political parties the ability to define that ideology.

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

Yes. Washington's filing statute, RCW 29A.24.030, forces the Republican Party to associate on the primary and general election ballots with any candidate who expresses a "preference" for the Republican Party.

Jones and *Reed* make clear that the State is prohibited from conducting a primary that forces the Republican Party to associate with all voters in nominating its candidates. The filing statutes under both I-872 and prior state law also represent an unconstitutional effort by the State to force the Party to be affiliated with candidates who may not be qualified under Party rules to run as "Republican" candidates. *See* RCW 29A.24.030 and .031. Both statutes force the Party to be publicly associated with any candidate who seeks to appropriate the Republican Party's name, regardless of whether they share or oppose Republican positions. Any candidate, regardless of his relationship to the Republican Party and even those antagonistic to the Party, may designate himself as a Republican candidate and thus appear on the primary ballot as a standard bearer for the Party. Forced association with a candidate during the Party's nomination process is no less a violation of the First Amendment right to exclude recognized in *Jones* and *Reed* than is forced association with voters. Holding that David Duke did not have "the right to associate with an 'unwilling partner,'" the Eleventh Circuit, in *Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996), recognized that "[t]he Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs." Similarly, the District of Columbia Circuit stated:

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> [I]t is the *sine qua non* of a political party that it represents a particular political viewpoint. And it is the purpose of a party convention to decide on that viewpoint, in part by deciding which candidate will bear its standard: the liberal or the conservative, the free trader or the protectionist, the internationalist or the isolationist.
>
> ***
>
> The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define itself.

LaRouche v. Fowler, 152 F.3d 974, 995-96 (D.C. Cir. 1998). A prospective candidate has no right to force himself upon an unwilling political party.

A political party's choice of its candidates is the most effective way in which the party can communicate to the voters what the party represents. "[I]t is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 575. The Ninth Circuit has recognized the importance of party designation as a matter of law and that regulations affecting the use of party labels affect "core political speech" because the labels designate the views of party candidates. *See Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) (citing *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)). State election laws that "stifle core political speech" constitute "severe speech restrictions." *Rubin*, 308 F.3d at 1015.

In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Sixth Circuit struck down Ohio's election statute that prohibited non-party candidates from using the designation "Independent" next to their names on the ballot. The court relied in part on expert testimony on the value of party labels. *See Rosen*, 970 F.2d at 172-73. For example:

> [P]arty candidates are afforded a "voting cue" on the ballot in the form of a party label which research indicates is the most important determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth.

Rosen, 970 F.2d at 172. Similarly, the Supreme Court has acknowledged that "to the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v.*

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Republican Party, 479 U.S. 208, 220 (1986). In this case, the State attempts to dilute the "voting cue" provided to voters by allowing any candidate to appropriate the label "Republican," whether that candidate supports or opposes the political philosophy of the Republican Party and its adherents.[10]

In fact, the stated intent of I-872 was to force the Party to modify its message or have a modified message forced upon it by the simple expedient of eliminating the Party's selected spokesmen in favor of spokesmen selected by non-adherents of the Party: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." White Decl., Ex. 1 at 12, Ex. 4. This attempt at forced message modification was rejected as a legitimate state interest by both the Supreme Court in *Jones* and the Ninth Circuit in *Reed*.

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

Yes. The modified blanket primary effectively raises threshold for general election ballot access far above the maximum threshold permitted by the Supreme Court. The Court has consistently held that excessively high barriers to minor party access to the general election ballot violate the First Amendment.

"States may condition access to the general election ballot by a minor or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) (upholding Washington's then one percent threshold for qualification of primary candidates to the general election ballot); *see also Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding Georgia's five percent petition requirement for access to the general election ballot).

States are not free, however, to set the bar for general election ballot access very high. This is "because an election campaign is an effective platform for the expression of views

[10]The Secretary's emergency regulations provide further evidence of the importance of party identification on the ballot as a voting cue. WAC 434-230-040 prohibits a candidate from changing his "party preference" between the primary and general elections. If the purpose of listing "party preference" is merely for the candidate to provide information to voters, voters should be made aware of any change in the candidate's preference, especially if the change occurs between the primary and general elections.

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on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787-788 (1983); *see also Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[An] election campaign is a means of disseminating ideas as well as attaining political office. . . . Overbroad restrictions on ballot access jeopardize this form of political expression.").

"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." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (striking down Ohio's fifteen percent requirement for general election ballot access as violating the First Amendment). The modified blanket primary creates an effective barrier much higher than the one percent approved in *Munro*, the five percent approved in *Jenness*, and the fifteen percent rejected in *Williams*. Under the modified blanket primary, minor parties will have to *actually outpoll* all but one of the candidates put forward by the Republican and Democratic parties to reach the general election.

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

Yes. The filing statutes under both I-872 and prior state law not only unconstitutionally force the Republican Party to associate with candidates who oppose or do not share the Party's political philosophy, but also limit the Party's ballot access for its nominees. The State contends that the modified blanket primary does not nominate Republican Party candidates for public office and the Party is free to nominate its own candidates. Because the filing statute, RCW 29A.24.030, allows any candidate to appropriate the Party's name as the candidate's "preference," the Party's "nominee" will share the label "Republican" with other candidates, all of whom will be considered by the voting public to represent the Republican Party. Should one of the candidates who "prefer" the Republican Party advance to the general election, and the Party's nominee not advance, the Party has been denied access to the general election ballot. Whether a state has deprived

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a party of general election ballot access in violation of the First Amendment is answered by reviewing the totality of the state's statutes governing ballot access. *See Williams*, 393 U.S. at 32.

In addition, dilution of the Party's vote in the State's partisan primary carries with it the risk that the Party will be denied a place on the general election ballot to the extent that only the "top two" vote-getters will appear on the general election ballot. For example, if seven candidates carrying the Republican name each receive ten percent of the vote under the modified blanket primary, and two candidates of other parties each receive fifteen percent, there would be no Republican candidate on the general election ballot, despite the receipt of seventy percent of the total vote by candidates labeled as Republicans. The risk of dilution of the Republican Party vote among multiple candidates in the modified blanket primary is real. In 1996, there would have been no Republican on the general election ballot for governor because 8 candidates divided the Republican primary vote. White Suppl. Decl., Ex. 2. The eventual winner in the 1980 gubernatorial election, John Spellman, would not have made the general election ballot. White Suppl. Decl., Ex. 3. Whenever multiple candidates bearing the Republican label run in the primary, the risk of a vote-split that would deprive the Republican Party of general election ballot access increases, with the State prohibiting any means for the Party and its adherents to avoid the harm.

G. Should Initiative 872 be invalidated in its entirety?

Yes. Although in ordinary circumstances only the specific part of an enactment that is unconstitutional will be invalidated, severance is not possible when the connection of the unconstitutional provision to the remainder of the enactment is so strong that it cannot "be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *Guard v. Jackson*, 83 Wn. App. 325, 333, 921 P.2d 544 (1996) (internal quotation marks and citation omitted). The very purpose of I-872 was to re-institute the former system that forced the Republican Party to associate with both

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voters and candidates who do not share its views of the views of its adherents. The materials produced by the sponsors and the official statement in the Voter's Pamphlet make that crystal clear. It cannot be believed that voters would have passed the initiative stripped of its operative and unconstitutional provisions. Furthermore, once the unconstitutional portions are stricken, what is left is duplication of existing statutes with slightly different numbering. The Court should not assume that the voters would have adopted an initiative that renumbered sections of the election law.

IV. CONCLUSION

I-872 attempts again to force the Republican Party to allow non-party adherents to select its nominees and to affiliate with any candidate who claims the Party's label. By doing so, the modified blanket primary, like the blanket primary, seeks to change the political message of the Republican Party. The result in this case should be no different than the result in *Reed*. The Court should grant summary judgment to the Party, enjoining the State from implementing I-872, carrying out a primary under its terms, or forcing the Republican Party to associate with candidates who are not authorized to represent it to the electorate.

DATED this 17th day of June, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2005, I electronically filed the foregoing Plaintiffs' Motion for Summary Judgment, the Supplemental Declaration of John J. White, Jr., and the [Proposed] Order Granting Plaintiffs' Motion for Summary Judgment and Permanent Injunction, with the clerk of the Court using the CM/ECF system which will send notification of such filing electronically to the following:

- David T. McDonald and Jay Carlson, attorneys for the Democratic Central Committee;
- Richard Dale Shepard, attorney for the Libertarian Party;
- Curtis G. Wyrick, attorney for Clark County Auditor;
- Ronald S. Marshall, attorney for Cowlitz County Auditor;
- H. Steward Menefee and James R. Baker, attorneys for Grays Harbor County Auditor;
- Norm Maleng, attorney for Dean Logan, King County Records & Elections;
- Janice E. Ellis, Gordon W. Sivley and Robert Tad Seder, attorneys for Snohomish County Auditor;
- Steven J. Kinn, attorney for Spokane County Auditor;
- Rob McKenna, Attorney General;
- Maureen A. Hart, Solicitor General;
- James K. Pharris, Sr. Assistant Attorney General; and
- Jeffrey T. Even, Assistant Attorney General;
- Thomas F. Ahearne, Attorney for Defendant-Intervenor Washington State Grange;
- David Alvarez, attorney for Jefferson County Auditor.

I sent the above-mentioned by facsimile and first class United States Mail, postage prepaid, to defendants as follows:

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DATED this 17th day of June, 2005.

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