No. 05-35774

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*
Appellees/Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, *et al.*
Appellees/Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, *et al.*,
Appellees/Plaintiff Intervenors,

v.

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

STATE OF WASHINGTON, *et al.*
Appellants/Defendant Intervenors,

WASHINGTON STATE GRANGE,
Appellant/Defendant Intervenor.

On Appeal from The United States District Court
for the Western District of Washington at Seattle
No. C05-0927Z
The Honorable Thomas Zilly, United States District Court Judge

RESPONSE BRIEF OF WASHINGTON STATE REPUBLICAN PARTY, *et al.* TO OPENING BRIEF OF WASHINGTON STATE GRANGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

State Regulations

Other Authorities

I. STATEMENT OF ISSUES FOR REVIEW

A. May the State compel the Republican Party to be associated on the general election ballot and other official state election publications with candidates who have not demonstrated of support among Republican voters, but who nonetheless seek to appropriate the Republican Party name?

B. Does the First Amendment protect the right of the Republican Party to define the extent of its association, including the right to exclude rival party and unaffiliated voters from selecting the candidates who will carry the Republican standard in the general election?

C. Where a cornerstone I-872's scheme for partisan primaries is its re-definition of "partisan office," can all references to a candidate's partisan affiliation be severed from the primary system without the Court re-writing the initiative?

D. Does Washington's primary election system violate the Republican Party's equal protection rights by allowing minor political parties to nominate candidates and control their message, but denying the same right to the Party?

E. Does Washington's primary election system impose unreasonable barriers to general election ballot access for both minor and major political parties?

F. Should the Republican Party be awarded its costs and attorneys' fees under 42 U.S.C. § 1988 for the Grange's and State's repeat violation of its civil rights?

II. STATEMENT OF THE CASE

In 2003, this Court struck down Washington's blanket primary because it violated the First Amendment right of the Republican Party and its adherents to select the candidates who would carry the Republican standard in the general election. *See Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004), *cert. denied sub nom., Washington State Grange v.*

Washington State Democratic Party, 541 U.S. 957 (2004) ("*Reed*"). This appeal 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" or "the Republican 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, but this time under Washington's "modified blanket primary."[1]

This appeal also presents a related question: whether the State may further infringe on the Party's First Amendment rights by forcing the Party to associate on the State's official election ballot and other state-sponsored election materials with candidates who have not demonstrated even a modicum of support among Republicans, may not share its core values, and whose candidacy will confuse voters and is intended to modify the Party's message. Under the First Amendment, it is clear that a candidate may not force himself upon the Republican Party, and that the State is likewise barred from forcing a candidate upon an unwilling Party.

In 2000, the Supreme Court prohibited states from adulterating the message of political parties through "forced association" in the guise of a "blanket primary." *See*

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[1] The primary system under I-872 has been described by its proponents under a variety of names, including the "modified blanket primary," (ER 18) the "People's Choice Initiative," (ER 21) the "Cajun Primary," (ER 150) the "Qualifying Primary," (ER 28) and the "Top Two Primary." (ER141)

California Democratic Party v. Jones, 530 U.S. 567 (2000) ("*Jones*"). Following *Jones*, this Court struck down Washington's blanket primary in *Reed* 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." *Reed*, 343 F.3d at 1204. In response to *Reed*, defendant-intervenor Washington State Grange ("the Grange") drafted, sponsored, and promoted a citizens' initiative, Initiative 872 ("I-872"), to overturn this Court's recognition of the Party's First Amendment rights. Under the modified blanket primary (adopted in November 2004), no partisan nominating process is envisioned apart from the state-sponsored primary.

I-872 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 nominated by the Party nor qualified under Party rules to carry the Republican standard. The Party filed this lawsuit on May 19, 2005 to obtain protection of its First Amendment rights to advocate and promote its vision for effective government without censorship or interference by governmental officials acting under color of state law. (Excerpts of Record for

Appellant State of Washington 1-13; hereinafter referred to as "ER"[2])

On May 26, the Party moved for a preliminary injunction. At a status conference on June 7, the district court granted the motions to intervene by the Washington State Democratic Central Committee, the Libertarian Party of Washington State, the State, and the Grange. The court established a briefing schedule for the Republican, Democratic, and Libertarian Parties' motions for summary judgment and continued the Republican Party's motion for a preliminary injunction to July 13. After hearing argument, the district court entered an order granting the political parties' motions for summary judgment and granting a preliminary injunction on July 15. *See Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005). (ER 536-75) The court entered a permanent injunction on July 29 (ER 576-77) and, on August 12, stayed further proceedings pending this appeal regarding the Republican Party's claims that the candidate filing statute under the "Montana-style" primary election system, RCW 29A.24.031, is also unconstitutional and that I-872 violates the Party's right to equal protection. (ER 586-88)

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[2] The Excerpts of Record submitted by the Washington State Grange will be referred to herein as "Grange ER."

III. STATEMENT OF FACTS

A. The Grange sponsored I-872 to eliminate the Party's First Amendment rights of association.

After Washington's prior blanket primary was declared unconstitutional in *Reed* and before the Supreme Court denied *certiorari*, the Grange filed I-872 on January 8, 2004 with the Secretary of State ("the Secretary"). (ER 420, 512-13) The express language of I-872 evinced an intent to defeat this Court's recognition in *Reed* of 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.

I-872, §§ 2, 18. (ER 258, 260)

In the 2004 legislative session, the State adopted a new primary system referred to as a "Montana primary" because of its similarities to the primary system in that state. *See, e.g.*, RCW 29A.36.104 & .106. Under the "Montana primary," any voter

may participate in the selection of a major party's nominees by selecting that party's ballot. Although voters are limited to one party's ballot for the primary, a voter's choice of ballot is private and no public declaration of affiliation is required. Minor party nominees under the Montana system are selected through a nominating convention and then appear on the general election ballot. *See* RCW 29A.20.121 & .141.

After the 2004 primary elections were conducted under the Montana system, voters approved I-872 on November 2, 2004. (ER 428) The initiative redefined "partisan office" and "primary election":

> **Sec. 4.** A new section is added to chapter 29A.04 RCW to read as follows:
>
> "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:
>
> (1) United States senator and United States representative;
>
> (2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;
>
> (3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.
>
> **Sec. 5.** RCW 29A.04.127 and 2003 c 111 s 122 are each amended to read as follows:
>
> "Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) for public office ((~~at the polls~~)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office

without any limitation based on party preference or affiliation, of either the voter or the candidate.

I-872, §§ 4, 5. (ER 258)

The Grange, as 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. (ER 18, 22, 25, 28) The Voter's Pamphlet statement in support of I-872 trumpeted the Grange's the intent to use State law to adulterate the Party's message: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." (ER 257) 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." (ER 22-23) Elsewhere in its promotional documents for I-872, the Grange explained that "[candidates] will not be able to win the primary by appealing only to party activists." (ER 29)

I-872 authorized a candidate for partisan office to "indicate his or her major or minor party preference" when filing for candidacy. I-872, § 9(3). (ER 259) That "preference" would then be "shown after the name of the candidate on the primary and general election ballots." I-872, § 7(3). (ER 258) The Secretary's rules

purporting to implement I-872 prohibited a candidate from changing his or her party preference after the primary election. *See* WAC 434-230-040. (ER 376)

I-872 is a "partisan" primary and grafted itself onto a much wider body of law that expressly recognizes that "Republican" candidates are representatives of the Republican Party. For example, the State Constitution authorizes the Party to nominate the successors to public officers elected under the Republican banner. *See* WASH. CONST. art. II, § 15 ("... 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, and shall be one of three persons who shall be nominated by the county central committee of that party . . . ."). "Major political party" status depends "at least one nominee for president, vice president, United States senator, or a statewide office receiv[ing] at least five percent of the total vote cast." RCW 29A.04.086. A legislator's ability to raise campaign money depends, in part, on being one of the "members of a major political party in the state senate or state house." *See* RCW 42.17.020(10); *see also* RCW 42.17.640. Initiative 872 itself recognizes that elected officials are "of" the Republican Party. *See* I-872, § 15(2) (describing the effect of a vacancy upon "the term of the successor who is *of the same party* as the incumbent" (emphasis added)). (ER 260)

B. The Secretary of State promulgated regulations eliminating minor party convention rights on the eve of this litigation to avoid Equal Protection argument.

In the 2005 legislative session, the Secretary attempted to remedy technical and substantive defects in I-872. The Secretary initially sought to amend existing statutes regarding primary elections by sponsoring legislation to "implement" I-872. (ER 244-46) According to the Secretary, the legislation would, among other things, "eliminate[] the minor party and independent candidate convention process." (ER 246) The Secretary's Elections Program Coordinator characterized the legislation as "changing the way minor parties . . . gain access to the ballot." (ER 250) In a December 1, 2004 e-mail sent to local elections officials, the Secretary's Legislative Liaison confirmed that a portion of the Secretary's bill, including the portion eliminating the minor party convention process, would require a two-thirds majority vote because it would change language contained in I-872. (ER 239-43)

The Secretary was aware that I-872's sponsors viewed the initiative as making no change in the use of conventions to nominate minor party candidates. On March 8, 2005, Katie Blinn, an attorney in the Secretary of State's office, circulated to key staff in the office (including Secretary Reed), the following "Frequently Asked Question[]" from the "I-872 website":

Would this proposal eliminate minor party candidates from the

primary or general election ballot?

> No. Minor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the primary ballot for each office (as they do now). . . .

(ER 251) (emphasis in original) Ms. Blinn explained that the legislature was relying on this language to take the position that the Secretary's proposed bill, eliminating minor party nominating conventions, would amend I-872 and, as a result, would require a two-thirds majority vote. In response, the special assistant to the director of elections, stated, "This is not good news." (ER 251)

The Secretary's office then decided that if the legislature would not "fix" the problems with I-872, the Secretary would do so by regulation. In a March 22 e-mail to county election officials, Nick Handy, the Secretary's Director of Elections, described the Secretary's bill as

> suffering from two distinct ailments. First, after the rough session last year on the primary, this Legislature lacks the political will to deal with the primary again. Second, some legislators may actually be willing to make the problems worse to strengthen the political parties' ability to challenge the initiative.

(ER 237-38) Mr. Handy then disclosed the Secretary's inclination "to solve the problems relating to the initiative through the rulemaking process." (ER 238) This inclination was strengthened two days later when Representative Kathy Haigh notified the Secretary that she could not get enough support to pass the Secretary's

proposed bill. (ER 247-49) At that point, however, I-872 was still considered not to have eliminated minor party convention rights.

As late as April 19, Ms. Blinn was advising other election officials that I-872 did not address nominating conventions for minor parties. (ER 234) However, as litigation approached, the State's view of the effect of I-872 on minor party convention rights changed radically. In her power point presentation at the May 12 "Elections Conference" for county elections officials, Ms. Blinn predicted that the political parties would "argue that the nominating system for minor party and independent candidates should still be required" and that "[i]f minor parties can hold nominating conventions, major parties should be allowed to also." (ER 235-36) To avoid that argument, the Secretary prepared emergency regulations on an expedited basis, in part to be in place prior to this lawsuit. (ER 233)

The emergency regulations were adopted on May 18, 2005, one day before this lawsuit was filed. (ER 365) In one of those new regulations, WAC 434-215-015, the Secretary abolished the minor party nominating convention rights that I-872's sponsors intended to continue. The regulation stated that these rights, and the right to control the use of a minor party's name, as provided in RCW 29A.20.110 through 29A.20.201, "are limited to candidates for President and Vice-President of the United States." (ER 372-73)

C. Local elections officials acknowledged no right to nominate candidates apart from the modified blanket primary.

The County Auditors[3] are election officers in the State and have overall responsibility to conduct primary elections within their respective counties, consistent with the rules established by the Secretary. *See* RCW 29A.04.025. Because the Party is required to advance its candidates for congressional, state and county offices to the general election by means of partisan primaries administered by the Secretary and the County Auditors, *see* I-872, § 7(2), (ER 258) it notified the County Auditors of its rules governing the eligibility of candidates to be associated with the Republican Party and the nomination of its candidates. (ER 15, 31-44) The response of the County Auditors (after consultation with the Secretary) – "At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary" (ER 46-53) – demonstrates that any *partisan* primary under I-872 would have the *effect* of selecting the Republican standard-bearers for the general election.

IV. SUMMARY OF ARGUMENT

The modified blanket primary represents another attempt to violate the

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[3] A Stipulation and Agreed Order of Substitution and Dismissal was entered on July 1, 2005, whereby the State was substituted as party defendant and the County Auditors were dismissed. *See* Docket No. 67.

Republican Party's First Amendment rights of association and speech. These rights, recognized by the Supreme Court in *Jones* and this Court in *Reed*, cannot be infringed by creative word-play or trumped by purported First Amendment interests of candidates to represent political parties with whom they have no affiliation. The purpose and effect of I-872 was to flout this Court's decision in *Reed* and prevent the Republican Party from selecting its standard-bearers.

The unconstitutional provisions of I-872 permeate the initiative, and it cannot be believed that the voters would have enacted it without those provisions. The Grange's argument that the voters intended to enact a non-partisan primary system is contradicted by express language in the initiative itself and the voters' pamphlet.

I-872 left untouched the minor parties' rights to nominating conventions and to protect the misappropriation of their names. The resulting unequal treatment between the minor parties and the major parties burdens the Republican Party's right to nominate its candidates and violates the Fourteenth Amendment's equal protection clause.. The State's last-second attempt to amend the initiative to remove minor party convention rights reveals the lack of any State interest in maintaining this unequal treatment.

Washington's modified blanket primary permits only two candidates to advance to the general election. In order for the Republican Party to obtain general

election ballot access in a three candidate race, its nominee must obtain more than one-third of the vote. This threshold greatly exceeds any previously approved as a valid exercise of a state's authority to limit the general election ballot to candidates and parties who have demonstrated a modicum of support among the electorate. The modified blanket primary's "top two only" provision violates the right of political parties to reasonable access to the general election ballot.

The modified blanket primary invades protected First Amendment rights and violates 42 U.S.C. § 1983, as did the "blanket primary" before it. The Party is entitled to recover its costs and attorneys' fees here and in the related appeal by the State, as it did in the prior litigation before this Court.

V. ARGUMENT

A. The State bears the burden of proving that its infringement of the Republican Party's essential functions is justified by a compelling State interest and is narrowly tailored.

The Court reviews the district court's grant of summary judgment *de novo*. *See Reed*, 343 F.3d at 1202. Statutes that even appear to infringe on First Amendment rights do not enjoy the same strong presumption of validity as do enactments in other areas. *See Schneider v. State*, 308 U.S. 147, 161 (1939). If the State severely 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; *see also Reed*, 343 F.3d at 1203 (because Washington's blanket primary burdened core speech and associational rights, the State was required to "satisf[y] 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.

The Grange argues that because candidates' First Amendment rights are involved, the State bears no such burden, and that an ordinary balancing test applies. The Grange misreads *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998). In *LaRouche*, Lyndon LaRouche challenged the Democratic Party's internal rules, under which the Democratic Party determined that LaRouche was not eligible to represent the party as a candidate for President. LaRouche contended that the internal rules were subject to strict scrutiny, requiring the Democratic Party to show that the rules were narrowly tailored to serve a compelling interest. The court ruled that while such

a standard was appropriate "for a challenge to a state law *by* a citizen or political party asserting First Amendment rights," the Democratic Party was not required to show a compelling justification for its internal rules because of its associational rights. *LaRouche*, 152 F.3d at 994-95 (emphasis in original). This case involves a First Amendment challenge to a state law by political parties; hence, strict scrutiny applies.

Were the Grange to challenge the Republican Party's right to exclude a particular candidate based on the candidate's belief, an ordinary balancing test would apply and the Grange would still not prevail. In *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996), the Eleventh Circuit weighed David Duke's interests against the Republican Party's interests: "Although Duke is correct in identifying his First and Fourteenth Amendment interests, those interests do not trump the Republican Party's right to identify its membership based on political beliefs nor the state's interests in protecting the Republican Party's right to define itself." *Id.* at 1232-33.

B. The district court correctly held that I-872 violates the First Amendment by giving individual candidates the right to create an association with the Republican Party in order to advance the candidate's individual interests, regardless of whether the Republican Party wishes to be associated with the candidate or his message.

1. The Republican Party's First Amendment right to identify those who constitute its membership based on political belief trumps any free speech interests of non-affiliated candidates to have the name of the Republican Party conjoined with their names on official State election materials.

Jones and *Reed* make clear that the State is prohibited from conducting a primary that forces the Republican Party to associate with rival party and unaffiliated voters in nominating its candidates.

> [T]he First Amendment protects the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. That is to say, 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.

Jones, 530 U.S. at 574 (internal quotation marks and citations omitted); *see also Reed*, 343 F.3d at 1204. According to the Supreme Court, "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Jones*, 530 U.S. at 575.

Section 9(3) of I-872 represents an unconstitutional effort by the State to deny

the Republican Party the "right to exclude" by forcing the Party to be affiliated with candidates who may not be qualified under Party rules to run as "Republican" candidates. Under that provision, a candidate for partisan office "who desires to have his or her name printed on the ballot . . . shall complete and file a declaration of candidacy," which includes "a place for the candidate to indicate his or her major or minor party preference, or independent status." I-872, § 9(3). (ER 259) The candidate's "political preference [must] appear on the primary and general election ballot *in conjunction with his or her name.*" *Id.*, § 4 (emphasis added); *see also id.*, § 7(3). (ER 258) "Conjunction" means "the act of joining; the state of being joined." AMERICAN HERITAGE DICT. 399 (3d ed. 1992). The candidate's "preference" must also appear in the official voters' pamphlet. I-872, § 11. (ER 259) I-872 forces the Republican Party to be publicly associated on official state election materials with any candidate who seeks to appropriate the Republican Party's name, regardless of whether the candidate shares or opposes Republican positions.

The Grange argues that permitting the Party to define the scope of its association by limiting use of the Republican Party's name on state-sponsored ballots and publications to candidates who qualify as Republicans under Party rules violates the First Amendment speech rights of candidates. The Grange is wrong. The injunction granted by the district court does nothing to prevent candidates from

communicating their qualifications or political party preferences to voters. Instead, the injunction prevents the State from forcing an association between a candidate and the Party on official ballots or other publicly-funded election materials. Such forced association is no less a violation of the First Amendment right to exclude recognized in *Jones* and *Reed* than is forced association with voters.

In *Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996), the Eleventh Circuit 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." Although David Duke expressly claimed a First Amendment right to associate with the Republican Party, the court upheld the Party's right to reject Duke as a candidate because Duke did not have "the right to associate with an 'unwilling partner'" and his "interests [did] not trump the Republican Party's right to identify its membership based on political beliefs." *Id.* at 1232-34.

In *LaRouche*, the District of Columbia Circuit described the First Amendment interests of Lyndon LaRouche and his supporters:

> LaRouche and his supporters plainly do have First Amendment interests at stake. But if the restrictions imposed on [them] are viewed from the standpoint of the "state's" electoral process as a whole – that is, as a combination of ballot access provided through both political party nomination and independent candidacy – it is not necessarily clear that the restrictions on [them] were "severe." LaRouche's adherents still retained the right to express their political views by supporting other

> Democratic nominees, even if they could not nominate LaRouche. And LaRouche retained the right to run, and his supporters the right to vote for him, as either a third-party or independent candidate.

LaRouche, 152 F.3d at 993-94 (internal footnotes omitted). Similarly, the *Duke v. Massey* court observed:

> [T]his court has previously determined that any burden on [voters who support Duke] is "considerably attenuated" and possibly nonexistent.
>
> ***
>
> . . . Duke supporters do not have a First Amendment right to associate with him as a Republican Party presidential candidate. Duke's supporters were not foreclosed from supporting him as an independent candidate, or as a third party candidate in the general election.

Duke v. Massey, 87 F.3d at 1233.

The slight burden on a candidate who is prevented from forcing an association with an unwilling political party is contrasted in *LaRouche* to the severe burden such a forced association places upon a political party:

> [T]he Party's interest is not merely legitimate. Here, the associational rights of the Democratic National Party are at their zenith. The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define itself. . . .
>
> ***
>
> . . . . By narrowing the field of those who represent it, the Party seeks to define its values, distinguish them from those of its competitors, and thereby attract like-minder voters. At the same time, it seeks to prevent confusion among those voters by excluding from its list of potential

> presidential nominees those who do not share those values. . . .
>
> ***
>
> [The Party is not] required to accept LaRouche's selfdesignation [sic] as the final word on the matter. Rather, the Party's "freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.'"

LaRouche, 152 F.3d at 995-97 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986)).

LaRouche and *Duke v. Massey* are consistent with the approach taken by the Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). The Court there upheld Minnesota's law prohibiting an individual from appearing on the ballot as the candidate of more than one party, concluding that a political party cannot use the First Amendment to force an association with a candidate on official state ballots. The Court noted that the New Party was free to try to persuade the candidate in question to run under its banner rather than that of another party. *See id.* at 360. *LaRouche* and *Duke v. Massey* simply apply the same principle to situations where a political party has chosen to associate with another candidate. In Washington, candidates whose "preference" is the Republican Party are free to seek the Republican nomination (*i.e.*, to persuade the Party to accept them as its standard bearers), but they cannot force an association with the Party if the Party selects other

candidates.

Jones and *Reed*, and the long line of cases preceding them, recognize that nominating candidates is a basic political party function, protected by the First Amendment. *See Jones*, 530 U.S. at 581; *Reed*, 343 F.3d at 1204. It is essential for the Party to be able to exclude those hostile or indifferent to its principles at the "moment of choosing the party's nominee, [which] 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.'" *Jones*, 530 U.S. at 575 (quoting *Tashjian*, 479 U.S. at 216). Because the nominee "becomes the party's ambassador to the general electorate in winning it over to the party's views," a state's regulation of "'the identity of the party's leaders . . . may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message.'" *Jones*, 530 U.S. at 575, 579 (quoting *Eu*, 489 U.S. at 231 n.21). Neither *Jones* nor *Reed* even hint that a candidate may hijack a party's name. Courts facing attempted hijackings by candidates have resoundingly affirmed a political party's right to determine who may – and who may not – associate with it. *See LaRouche, supra*; *Duke v. Massey, supra*; *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992) (barring David Duke as GOP candidate).

This Court 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 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*, 479 U.S. at 220. 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.[4]

The Republican Party name has meaning and electoral value:

> . . . Parties are known by names . . . which distinguish and differentiate the various parties in the public mind. The name "Democratic" is an important distinguishing mark of the party which carries that appellation, as "Republican" . . . [is] of [an]other similar large organized group[] of voters. Through custom and usage certain rights attach to the use of a party name and emblem.
>
> It is a matter of common knowledge that in campaigns at general elections such terms as "Democrat," "Democrats" and "Democratic" have been used for such a length of time as to render their beginnings almost in "time out of memory" to connote the Democratic Party, its members and candidates. The same observation is equally true of "Republican," "Republicans" and "Republican Party."

Plonski v. Flynn, 222 N.Y.S.2d 542, 544-45 (1961) (quoting *Chambers v. Greenman Ass'n*, 58 N.Y.S.2d 637, 641 (1945)). Recognizing the value of party labels, I-872 acknowledges that candidates will be "trading" on the reputation and name of the Republican Party – it expressly states that party labels are "for the information of voters." I-872, § 7(3). (ER 258) The "information" is no more and no less than an

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[4] 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.

association of the candidate with the Republican Party's philosophy and positions.

2. The Republican Party also has the right to prevent the State from allowing disaffected and opportunistic candidates to appropriate the Republican Party name under the common law of trademarks.

The Grange argues that the Party's case is based largely "on notions of trademark protection such as dilution, confusion, misappropriation, infringement, and unfair competition" and that such "notions do not trump the First Amendment free speech rights of persons running for office." Grange Br. at 20-21.[5] The Grange appears to misunderstand the nature of this case – the Party has not alleged an infringement of its trademark. The Party's challenge to I-872 is supported by innumerable cases addressing political parties' associational rights. Even so, the

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[5] Ironically, one of the cases cited by the Grange in another part of its brief, *see* Grange Br. at 42, demonstrates that the concepts of confusion and misappropriation are not limited to trademark law. In *Dart v. Brown*, 717 F.2d 1491 (5th Cir. 1983), the Fifth Circuit observed:

> It is evident that if candidate political "party" affiliation is to be designated on the ballot, the potential exists for voter *confusion* or *deception* unless there are some restrictions on what constitutes a political "party" for these purposes. A political party implies a relatively numerous group of people, associated together for common political purposes, with some sort of organization actively functioning in the political arena. For the state's ballot to represent that a candidate is affiliated with a particular political party, when in fact there is no such party in the commonly understood sense of the word, as the obvious potential for causing voter *deception* and *confusion*.

Id. at 1508 (emphasis added).

Party is entitled to control the use of its name, including prohibiting the use of its name by unaffiliated candidates, under the common law of trademarks. In its pursuit of this red herring, the Grange fails to recognize the distinction between federal trademark law, which constitutionally can only apply to interstate commerce, *see* U.S. CONST. art. I, § 8, cl. 3; 15 U.S.C. § 1114, and the common law of trademarks.

The Washington Supreme Court has held that a non-profit fraternal organization "is entitled to relief when its name or one so similar as to be deceiving is adopted by another organization and used in a manner which is confusing and deceiving to the public and is detrimental to the organization already using the name." *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wn.2d 28, 35, 381 P.2d 130, 135 (1963). The *Grand Lodge* case was briefed by the Democratic Party in the district court and was cited in the court's opinion in support of its statement that "[e]ven non-commercial associations are entitled to protect their name against misappropriation and misuse." *Logan*, 377 F. Supp. 2d at 926-27. The Grange fails to address or distinguish *Grand Lodge* on this key point of its argument.

In *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 513 F.2d 1226 (9th Cir. 1975), this Court adopted, *per curiam*, the opinion of the district court in *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 354

F. Supp. 61 (N.D. Cal. 1972). The *Jaycees* district court stated that "the common law of trademark infringement and unfair competition is replete with cases holding that benevolent, religious, charitable or fraternal organizations are entitled to injunctive relief protecting against the continued use of their name by local chapters which disaffiliate." *Jaycees*, 354 F. Supp. at 71; *see also Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1091 n.17 (9th Cir. 1986) (quoting *Jaycees*). Again, the Grange is strangely silent regarding this relevant authority, which presumably it would invoke to protect the use of *its* name should a splinter group of Grangers emerge.

3. The Grange erroneously relies upon the silence of *Jones* and *Reed* regarding I-872's creative nomenclature.

The Grange complains that the political parties and the district court relied on *Jones* and *Reed* when neither case "dealt with the issue of whether the First Amendment allows a person running for office to tell voters the political party he or she *prefers*." Grange Br. at 24 (emphasis in original). While *Jones* and *Reed* did not address a "modified blanket primary" in which a candidate identifies his or her party "preference" rather than a party "designation," both decisions applied long-established principles of political parties' associational rights to the blanket primary systems of California and Washington. Those principles equally apply to

Washington's modified blanket primary.

In addition, the Grange misapprehends the district court's decision and the Party's argument. The Party argued, and the district court agreed, that a candidate has no right to associate with a political party that is an "unwilling partner," citing *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992) and *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996). *See, e.g.*, *Logan*, 377 F. Supp. 2d at 922-23. The Grange chose to ignore both *Duke* decisions in its brief. The Grange similarly fails to address and distinguish two Supreme Court decisions relied upon by the district court, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Gp.*, 515 U.S. 557 (1995) and *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), both of which protect the right of private associations to exclude groups or individuals whose presence would express a message at odds with the position or policy of the associations. The Grange's repeated failure to address relevant, and in several instances, binding legal authority that contradicts its arguments represents either careless legal work or an attempt to mislead this Court.

The relief granted by the district court prevents the State from forcibly associating the Republican Party with candidates on the ballot and voters' pamphlet. It does not impinge on candidates' rights. A candidate who fails to obtain nomination as a Republican can run as an independent and inform voters (in privately-funded campaign materials) that he or she identifies with, or "prefers" the Republican Party,

or find another party with which to identify. The candidate's voice is not silenced. The relief granted prevents the State from associating the Republican Party with rejected or impostor candidates in official election publications.

C. The district court correctly held that the modified blanket primary burdens core First Amendment speech by allowing rival party and unaffiliated voters to participate in choosing the Republican Party's standard-bearers for the general election.

1. Verbal sleight-of-hand does not change the fact that the modified blanket primary selects the Republican Party's standard bearers.

The Grange contends that the language of I-872 provides no support for the district court's holding that the modified blanket primary nominates the standard bearers of the Republican Party. Apart from arguing that RCW 29A.52.116 is irrelevant because it was enacted by the legislature *after* I-872 was filed, the Grange simply ignores Washington's constitution, other statutes, and the language of the initiative itself that demonstrate that Republican candidates selected at the primary are nominees of the Republican Party. 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.[6] Under Washington's

[6] Washington's constitution expressly acknowledges that there may be more than one individual nominated by a political party. *See* WASH. CONST. art. II, § 15.

constitution, it is the Republican Party that nominates successors to fill a vacancy in a partisan office held by a Republican – 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." WASH. CONST. art. II, § 15.

"Major political party" status depends "at least one nominee for president, vice president, United States senator, or a statewide office receiv[ing] at least five percent of the total vote cast." RCW 29A.04.086. "[M]embers of a major political party" in the legislature may form a "caucus" committee to raise campaign money. *See* RCW 42.17.020(10) & .640. Before the primary, the County Auditors are required to publish notice of the election, which must contain "the proper party designation" of each candidate. *See* RCW 29A.52.311. Section 15 of I-872 retains the following language from RCW 42.12.040(2):

> If a vacancy occurs in any legislative office or in any partisan county office . . . , the term of the successor who is *of the same party as the incumbent* may commence once he or she has qualified . . . .

(ER 259-60) (emphasis added) 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." I-872, § 7(3); *see also* I-872, § 4. (ER 258) The Secretary's "Explanatory Statement" in the voters' pamphlet described the primary election ballot under I-872

as including "all candidates filing for office, including both major party and minor party candidates and independents." (ER 256) Candidates selected in the modified blanket primary will thus carry the Republican name in the general election.

2. The Grange's reliance on the *dicta* in *Jones* is misplaced because the Grange has failed to identify any compelling State interests that justify the burden I-872 places upon the Party's associational rights.

The Grange argues that I-872 does not select nominees of the Republican Party because it "specifically drafted Initiative 872 to conform to" the Supreme Court's description of a "nonpartisan" blanket primary. Grange Br. at 34. The Grange's argument illustrates the shortcomings of attempting to rely upon *dicta* for subsequent cases. In *Jones*, the Court rejected California's arguments that its interests in the blanket primary were compelling, and then observed that

> *even if* all these state interests were compelling ones, [California's blanket primary] is not a narrowly tailored means of 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 (first emphasis added). The Court's observations provide

a textbook example of *dicta*. *Jones* did not involve a nonpartisan blanket primary, and thus the possible attributes and constitutional deficiencies of such a system were not before the Court. "It is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994). The *dicta* in *Jones* is not binding precedent and has no more authority than Justice Stevens' description of a "nonpartisan primary" in his *Jones* dissent. *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.").

The Grange misread the *dicta* when drafting I-872 in its effort to strip any meaning from the Supreme Court's reference to "nomination by established parties." The Grange misreads it now. In its dogged misinterpretation of the *dicta* in *Jones*, the Grange disregards *Jones*' central holding, that political parties have a First Amendment right to choose their standard bearers. Any restrictions on that right must be justified by compelling state interests that are narrowly tailored. Even if the *dicta* in *Jones* were binding upon this Court, it would not apply because neither the Grange nor the State have identified *any* state interests, compelling or not, that justify the burdens placed upon the Party's associational rights by I-872.

Although neither relied upon by the Grange in the district court nor raised in its opening brief, the initiative itself appears to identify the following interests:

> The rights of Washington voters are protected by its constitution and laws and include the following fundamental rights:
>
> (1) The right of qualified voters to vote at all elections;
>
> (2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;
>
> (3) 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.

I-872, § 3. (ER 258) Even if these "fundamental rights" could be characterized as "interests," they are neither compelling nor narrowly tailored when applied to a primary election. The rights "to vote at all elections" and to "absolute secrecy in preparing and depositing [a] ballot" at an election are guaranteed under Washington's constitution. WASH. CONST. art. VI, §§ 1, 6. These rights, however, in no way provide any justification for the modified blanket primary. The right to vote at all elections and the so-called "right" to vote for any candidate without limitations, when applied to a primary election, amount 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." Provide increased "voter choice" "is hardly a compelling state interest, if indeed it is even a

> legitimate one." The supposed unfairness of depriving those voters who do not choose to affiliate with a party from picking its nominee "seems to use less unfair than permitting nonparty members to hijack the party."

Reed, 343 F.3d at 1205 (internal footnote markers omitted) (quoting *Jones*, 530 U.S. at 583-84). The interest of allowing voters "full participation in the election process without forcing them to publicly reveal their political party affiliation" was also rejected by the Court in *Reed* as applied to primaries:

> "[W]e do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a 'compelling' one." Washington law expressly requires the State to provide the parties, upon request, with the partisan affiliations expressed by voters in the presidential primary. It is only in general elections that the Washington Constitution broadly protects voters' secrecy as to their partisan preferences. Primaries are distinguishable, under the Washington Constitution, because "it is not the purpose of the primary election to elect officers."

Id. (internal footnote markers omitted) (quoting *Jones*, 530 U.S. at 585 and *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 P. 728, 731 (1908)).

If the primary under I-872 were truly a *nonpartisan* primary and voters were not selecting the Party's nominees, then the Party has the right to select its own nominees and to have that those nominees, and only those nominees, recognized by the State as "Republican" candidates. The initiative, however, prevents this by allowing *any* candidate to appropriate the Republican name. *See* I-872, § 9(3). (ER 259) Ironically, the Grange makes much of the fact that the Republican Party held

a nominating convention prior to the 2005 primary election. Prior to holding the convention, the Party wrote to the County Auditors to confirm that they would honor the Party's selection process and not allow any other candidates to represent an affiliation with the Republican Party on the official ballots. (ER 31-35) The Grange fails, however, to address the identical response of four of the County Auditors: "At this time, I am not aware of any language associated with the initiative that contemplates a partisan nomination process separate from the primary." (ER 46-53) In effect, the "nominating" convention could do nothing more than provide an endorsement of the Party's chosen candidate. According to the Supreme Court, "[t]he ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580.

As the district court found, 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." (ER 257) 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.

3. The clear intent of I-872 and the Grange was to modify the message of the Republican Party.

The Grange based its intervention in this case on its standing as I-872's sponsor of I-872, but now asks the Court to disregard its statements explaining the purpose and effect of the initiative. A sponsor's pre-enactment statements to the public, however, are relevant legislative history and can be consulted in interpreting a statute. *See Schwenk v. Hartford*, 204 F.3d 1187, 1199 (9th Cir. 2000) (bill sponsor's press release is "compelling" evidence of law's intent).

The Supreme Court also considers the historical context of statutes and the "specific sequence of events leading to the passage of the statute." *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1986). In *Aguillard*, the Court gave no deference to the stated purpose of Louisiana's "creation science" law as enhancing academic freedom, noting the contemporaneous and historical link between "the teachings of

certain religious denominations" and statutes regulating the teaching of evolution, and stating that it "need not be blind" to the law's real purpose. *Id.* at 590.

This Court need not be blind to the Grange's historical and *contemporaneous* opposition to political party rights and desire to advance its own political agenda by influencing candidate nominations. Immediately after *Reed* was decided, the Grange issued a press release:

> Grange leaders expressed disappointment at today's decision by the Ninth Circuit Court of Appeals to side with the political parties on the blanket primary appeal.... The Grange *vowed to preserve the [blanket] primary system*, either with an appeal . . . to the U.S. Supreme Court if necessary, or *through the Legislature*.

(ER 510) (emphasis added)[7] The Grange press release announcing its filing of I-872 stated:

> For seventy years under the blanket primary system, the voters of this state have chosen which candidates advance to the general election ballot. Now the major political parties are trying to take that away from the voters. [I-872] 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.
>
> The voters of Washington overwhelmingly support the blanket primary. In a blanket primary, the voter does not have to declare political party affiliation at any stage of the process and may vote for any candidate for

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[7] This press release is referenced in but was inadvertently omitted from the declaration, and is a public record available at http://www.wa-grange.org.press_releases/2003_09_13.htm.

any office on the primary ballot.

(ER 512) The initiative's stated purpose was to defy the this Court's decision in *Reed*: "The Ninth Circuit Court of Appeals has threatened [the blanket primary] system . . . ." I-872, § 2. (ER 258) The official ballot statement in support of I-872 underscores this intent to flout this Court's protection 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.
>
> ***
>
> 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.*

(ER 257)

The Grange's animus against political parties is such that it drafted I-872 to strip from the Republican Party its right to "perform all functions inherent in [a political party] organization." I-872, § 14. (ER 259) Section 14 of the initiative also purports to limit the Republican Party to adopting rules governing only its "nonstatutory functions." This appears to preclude adoption of rules, for example, to carry out the constitutionally-mandated procedures for filling vacancies in partisan

offices, as well as rules governing nomination of Republican Presidential electors. *See* RCW 29A.56.360.

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*, 489 U.S. at 227 ("[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*, 479 U.S. at 224)).

D. Severing the "partisan" affiliation provisions from an initiative explicitly amending Washington's partisan primary laws is not possible, because partisanship is an essential part of a partisan primary.

Severability of a state statute is a question of state law. Washington's Supreme Court recently described the test for severability:

> Ordinarily, only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact. An unconstitutional provision may not be severed, however, if its connection to the remaining, constitutionally sound provision is so strong "that it could not 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." Also, the court is obliged to strike down the entire act if the result of striking only the provision is to give the remainder of the statute a much broader scope.

In re Parentage of C.A.M.A., 154 Wn.2d 52, 67, 109 P.3d 405 (2005) (quoting *Guard*

v. Jackson, 83 Wn. App. 325, 333, 921 P.2d 544 (1996)).

The absence of a severability clause is some evidence that the voters would not have enacted the initiative without the inclusion of the unconstitutional provisions, but the presence or absence of the severability clause is not determinative. *See id.* at 67-68. Both Washington courts and this Court have consistently recognized that the role of the judiciary is to pass on the constitutionality of the law as adopted by the legislature, not to rewrite legislation. Where an unconstitutional provision is not severable, the proper remedy is to invalidate the enactment, not rewrite it. *See Griffin v. Eller*, 130 Wn.2d 58, 69-70, 922 P.2d 788 (1996); *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 821 (9th Cir. 1996) (declining to sever unconstitutional portions of ordinance that invaded First Amendment rights). In *Desert Outdoor Advertising*, this Court struck down the entirety of an ordinance because the definition section, among others, was unconstitutional.

The Grange contends that I-872 can be preserved by invalidating only its candidate "party preference" provisions. These provisions, however, permeate the initiative, and it cannot be imagined that I-872 would have passed without them.

The very definition of "partisan office" depends on the ability of a candidate to appropriate the Republican Party name and the State's publication of that affiliation on the primary and general election ballots. *See* I-872, § 4. (ER 258) The

definition of "primary" is also constitutionally infirm, because it attempts to enshrine in statute the "right" of voters to select the standard bearer of political parties with whom they are not affiliated. *See* I-872, § 5. Section 7 requires a candidate's party preference to be shown on the primary ballot. Section 9 expressly authorizes candidates to self-designate their party affiliation. (ER 259) These provisions were so important that I-872 added a section to state law requiring that the State publish the candidate's self-proclaimed party affiliation in the official voters' guide. *See* I-872, § 11. The district court noted that sections 4, 5, 7, 9, 11 and 12 of I-872 all invade protected First Amendment rights and correctly concluded that striking these unconstitutional portions would convert Washington's partisan primary to a nonpartisan primary. *See* 377 F. Supp. 2d at 931.

In essence, the Grange argues that the voters intended a nonpartisan primary. This ignores the clear language of the initiative and the Attorney General's "Explanatory Statement" for I-872, submitted to the voters as part of the voters' pamphlet. (ER 256) In describing the effect of I-872 to Washington's voters, the Attorney General represented, "This measure would change the system for conducting primaries and general elections for *partisan office*. The initiative would replace the system of separate primaries for each party . . . with a system in which all candidates for *partisan office* would appear together on the primary ballot." (Emphasis added)

Nowhere in its explanation did the Attorney General's office indicate that the initiative converted the partisan system to a nonpartisan system. Nonpartisan elections remain distinct under I-872. "This measure would not change the way that primaries or general elections are conducted for nonpartisan offices." (ER 256)

Reduced to its simplest expression, to find severability, the Court must conclude that "partisan" is mere surplusage in a "partisan primary."

E. Washington's primary election system violates the Republican Party's equal protection rights by allowing minor political parties to nominate candidates and control their message, but denying the same right to the Party.

This Court "'may affirm summary judgment on an alternative ground to that given by the district court if the record fairly supports the alternative ground.'" *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983, 1003 (9th Cir. 2005) (quoting *Gulf USA Corp. v. Fed. Ins. Co.*, 259 F.3d 1049, 1060 n.13 (9th Cir. 2001)). The district court did not reach the Republican Party's equal protection argument because it determined that I-872 was unconstitutional on other grounds and that minor parties were otherwise treated the same as other parties. *See Logan*, 377 F. Supp. 2d at 929.

The Party's First Amendment associational rights "are protected from unequal regulatory burdens under the Equal Protection Clause of the Fourteenth Amendment." *Schrader v. Blackwell*, 241 F.3d 783, 788 (6th Cir. 2001). When deciding whether a

law violates the Equal Protection Clause, a court must "look . . . to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). A law impairing "a fundamental political right" must be supported by interests that "meet close constitutional scrutiny." *Dunn*, 405 U.S. at 336 (quotation marks and citations omitted).

Washington's primary election system unlawfully discriminates against the Republican Party by authorizing minor political parties to nominate candidates through a convention process while at the same time denying a similar right to the Party. Under RCW 29A.20.121, "[a]ny nomination of a candidate for partisan public office by other than a major political party may be made only. . . [i]n a convention." The State also provides minor parties with a mechanism to protect themselves from individuals or groups who attempt to hijack the party name or force an association with the minor political party. RCW 29A.20.171(1) recognizes that there can be only one nominee of a minor political party for each office. RCW 29A.20.171(2) provides for "a judicial determination of the right to the name of a minor political party."

The district court held that I-872 repealed by implication these minor party rights. In its discussion, however, the court focused on how minor party candidates

advanced from the primary to the general election. *See Logan*, 377 F. Supp. 2d at 928. It appears the district court may have misread the nature of the Party's equal protection challenge to I-872. This challenge is not based on the manner in which minor party candidates advance to the general election, but on the retention under I-872 of each minor party's ability to nominate the only candidates authorized to use its name on the primary election ballot.[8] The court correctly noted that repeal by implication is strongly disfavored in Washington. *See Logan*, 377 F. Supp. 2d. at 928 (citing *State v. Lessley*, 118 Wn. 2d. 773, 782, 827 P.2d 996 (1992)). Given the consistent pre-litigation statements of the sponsor, the Secretary, and the state legislature, coupled with the silence of I-872 regarding minor party conventions, there was no repeal by implication.[9]

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[8] Allowing minor parties to nominate their candidates through conventions prior to the primary election is not inconsistent with the provisions of I-872. Under the former blanket primary, all of the candidates filing for partisan office were allowed to indicate a party designation in the same way that candidates indicate a party preference under I-872. *See* former RCW 29A.24.030 (2003). Nonetheless, a minor party was able to protect the use of its name if an unauthorized candidate appropriated the name on the filing form. *See* RCW 29A.20.170 (2003).

[9] If I-872 repealed by implication minor party nominating convention rights, that is simply another basis for striking down the initiative as unconstitutional. If I-872 stripped minor parties of the right to nominate, it directly interferes with their internal decision making and is unconstitutional. *See Eu*, 489 U.S. at 227.

When crafting I-872, the Grange intentionally left untouched the ability of minor parties to nominate a single candidate and have that single candidate appear on the primary election ballot. Answering a "Frequently Asked Question[]" about I-872, the Grange stated that "[m]inor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the primary ballot for each office (as they do now)." (ER 21, 25)

The Secretary also interpreted the initiative to leave minor party convention rights unaffected, proposing legislation that would "chang[e] the way minor parties or third parties gain access to the ballot." (ER 250) Washington's legislature, relying on the Grange's statements regarding the effect of I-872, agreed that striking minor party convention provisions would amend the initiative, requiring a two-thirds vote to pass. (ER 251)

Unable to persuade the legislature to eliminate minor party nominating conventions, and desiring to avoid an inevitable equal protection argument by the major political parties, the Secretary took matters into his own hands and adopted WAC 434-215-015. This action, however, is void because it exceeded the Secretary's statutory authority. "An agency may not promulgate a rule that amends or changes a legislative enactment." *Edelman v. State ex rel. Pub. Discl. Comm'n*, 152 Wn.2d

584, 591, 99 P.3d 386 (2004).[10]

The primary election system, which protects minor political parties' right of association, improperly denies the same protection to the Republican Party. This unequal treatment severely burdens the Party's First Amendment rights. In its rush to promulgate regulations eliminating minor party nominating rights, the State has effectly acknowledged that it has no interest in supporting the differing treatment of major and minor parties.

F. Washington's primary election system creates unreasonable barriers to ballot access for both minor and major political parties.

The district court also did not reach the claim that I-872 unreasonably limits access to the general election ballot to both minor and major parties, *see Logan*, 377 F. Supp. 2d at 929, which provides another ground for affirming the district court's order granting summary judgment.[11]

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[10] Even *if* the Secretary had the power to adopt WAC 434-215-015, the rule is entitled to no deference. "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

[11] The Grange selectively quotes the Party's counsel regarding the nature of the election process under I-872. *See* Grange Br. at 40. The sentence immediately following the quoted language states: "A combination of apparently muddled drafting and indifference to the constitutional limitations of state regulation of partisan activities has left the fate of Initiative 872 in doubt." (Grange ER 031)

"Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively . . . and may not survive scrutiny under the First and Fourteenth Amendments." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (internal citation omitted). "While there is no "litmus-paper test" for deciding a case like this, . . . States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Id.* at 194 (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 unreasonably high. This is "because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *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). A court must resolve a ballot-access challenge by a two-step process:

> It must first consider the character and magnitude of the asserted injury to the [plaintiff's constitutional] rights . . . . It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Celebrezze, 460 U.S. at 789. 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 would have to receive more votes than all but one of the candidates put forward by the Republican and Democratic parties to reach the general election.

Section 9(3) of I-872 not only unconstitutionally forces the Republican Party to associate with candidates who oppose or do not share the Party's political philosophy, but also limits the Party's ballot access for its nominees. The Grange 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 I-872 allows any candidate to appropriate the Party's name as the candidate's "preference," the Party's "nominee" will share the "Republican" label 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 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 eight candidates divided the Republican primary vote. (ER 144) The eventual winner in the 1980 gubernatorial election, John Spellman, would not have advanced to the general election ballot under I-872. (ER 150) 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.

Even under the most differential level of review, I-872's ballot access threshold fails. Neither the Grange nor the State introduced any evidence to show why Washington, alone among the fifty states, need set the bar for access to the general election ballot so high.

G. The State and Grange should be jointly and severably liable for the Party's attorneys' fees for this appeal.

This Court awarded the Republican Party its fees in the prior litigation with the State and the Grange regarding Washington's blanket primary. *See Washington State Democratic Party v. Reed*, 388 F.3d 1281 (9th Cir. 2005) ("*Reed II*") (opinion regarding fee award). The issues presented here are identical to those presented in the previous challenge to Washington's unconstitutional primary system.

The rule is well-established in this Circuit that "a prevailing party in a § 1983

action should ordinarily recover an attorney's fee unless special circumstances could render such an award unjust." *Reed II*, 388 F.3d at 1285 (internal quotation marks and citation omitted). This Court uses a two-part test "for determining when special circumstances exist: (1) whether allowing attorneys' fees would further the purposes of § 1988; and (2) whether the balance of the equities favors or disfavors the denial of fees." *Id.* In *Reed II*, the State relied upon *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996), to argue that special circumstances existed.

In *Thorsted*, the district court ruled on the constitutionality of a term limits initiative. The court specifically noted that the State had neither taken any action to enforce the law nor given any indication of an intent to do so. *See* 841 F. Supp. at 1084. In contrast here, the State expressly stated, through its county elections officials, that it intended to implement the "modified blanket primary." *Reed II* rejected the "special circumstances" analysis of *Thorsted* in the prior litigation between the same parties over the State's primary system, and this Court should likewise.

Nor is this a case of first impression. Both this Court and the United States Supreme Court have made it clear that Washington State may not force political parties to have their standard-bearers chosen by rival party and unaffiliated voters

under the First Amendment. The Grange's dissatisfaction with that result does not excuse a further attempt to violate protected civil rights.

In *Reed II*, this Court held that the Grange was not liable for the Republican Party's attorneys' fees for the prior appeal, concluding that "§ 1988 fee awards should be made against losing intervenors, "only where the intervenors' action was frivolous, unreasonable, or without foundation." *Reed II*, 388 F.3d at 1288. The circumstances in this case are different, and this Court should award fees against the Grange as well as the State.

In this case, the Grange was the driving force behind the enactment of I-872. It disagreed with this Court's decision in *Reed* and wanted to restore the blanket primary for its members and other Washington voters. Although this conduct might not alone give rise to liability under 42 U.S.C. § 1983, the Grange waived any quasi-legislative immunity it might otherwise be entitled to by *voluntarily* joining itself to this lawsuit *as a defendant* to defend the constitutionality of I-872 and by further initiating an independent appeal from that of the State. *See Planned Parenthood v. Attorney General of the State of N.J.*, 297 F.3d 253 (3rd Cir. 2002). In its answer to the Party's complaint, the Grange prayed for affirmative relief, asking the Court to declare "that Washington's election law as established by Initiative 872 does not deprive the plaintiffs of any legally cognizable rights protected by the constitution or

laws of the United States or the State of Washington." (ER 112) Moreover, the Grange requested "entry of a judgment awarding [it] recovery of its costs and attorney fees," presumably to be awarded against the political parties.

The Grange has asserted throughout this litigation, including this appeal, that the rights of its members trump the associational rights of the Republican Party and its members. In making its arguments on this appeal, the Grange completely ignores contrary, binding authority that was cited and relied upon by the political parties and the district court. Its arguments are unreasonable and without foundation.

In addition, the result of the Grange's separate appeal is that the Republican Party is forced to the additional expense of preparing a second brief, with the possibility that the additional expense may not be recoverable against the State. In *Reed II*, this Court relied upon *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) to determine that the Grange was not liable for the Party's fees on the appeal in *Reed*. *Zipes* is distinguishable, however, from the facts of the present case. In *Zipes*, a collective-bargaining agent ("IFFA") intervened in a Title VII class action to oppose a proposed settlement between Trans World Airlines and flight attendants who were terminated after they "became mothers" as part of a TWA policy. *Zipes*, 491 U.S. at 755-57. As intervenors, IFFA sought to protect the seniority rights of flight attendants not affected by the policy. *Id.* at 757. The Court determined that

IFFA was "blameless" because it "became a party to the lawsuit not because it bore any responsibility for the practice alleged to have violated Title VII, but because it sought to protect the bargained-for seniority rights of its employees." *Id.* at 762. In no way did IFFA seek to defend TWA's infringement of the flight attendants' rights under Title VII.

This case presents entirely different circumstances. After vigorously defending the former blanket primary in *Reed*, the Grange drafted and sponsored I-872 in order to "restore" the rights of *all* voters to participate in the selection of the Republican Party's nominees. After *Reed* was decided, the Grange vowed to preserve the blanket primary through legislative action. The Grange's conduct as the sponsor, and now defender, of the unconstitutional initiative cannot be construed as "innocent" or "blameless."

In *Planned Parenthood*, the Third Circuit read *Zipes* as establishing "the following rule: where a losing intervenor is 'innocent,' attorney's fees will not be awarded against that intervenor unless the intervention was frivolous, unreasonable, or without foundation." 297 F.3d at 264 (quoting *Mallory v. Harkness*, 923 F. Supp. 1546, 1553 (S.D. Fla. 1996), *aff'd*, 109 F.3d 771 (11th Cir. 1997)). This Court should follow *Planned Parenthood* in limiting the "frivolous, unreasonable, or without foundation" standard to "blameless" intervenors. The Grange should share the State's

liability for the Party's fees and costs.

VI. CONCLUSION

The district court correctly determined that I-872 violated the Republican Party's First Amendment rights of association by forcing the Party to associate with rival party and unaffiliated voters, and with candidates not qualified to carry the Republican name, at the critical point of choosing the Party's standard-bearers. The decision should be affirmed. The decision can also be affirmed on the alternative grounds that Washington's primary election system is unconstitutional in violating the Party's equal protection rights under the Fourteenth Amendment and in creating an unreasonable barrier to ballot access.

DATED this 17th day of October, 2005.

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Certificate of Compliance Pursuant to Fed. R. App. P.32(a)(7)(C) and Circuit Rule 32-1 for Case Number 05-35774

I certify that: Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached response brief is proportionately spaced, has a typeface of 14 points or more, Times New Roman font style, and contains 13,276 words.

October 17, 2005
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Appellee/Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, *et al.*,

Appellee/Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, *et al.*,

Appellee/Plaintiff Intervenors,

v.

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

Defendants,

STATE OF WASHINGTON, *et al.*,

Defendant Intervenors,

WASHINGTON STATE GRANGE,

Appellant/Defendant Intervenor.

No. 05-35774

(Dist. Ct. No. CV05-0927Z)

APPELLEE WASHINGTON STATE REPUBLICAN PARTY'S PROOF OF SERVICE

PURSUANT TO CIRCUIT RULE 25(d)(1)(B)(3)

The undersigned certifies that he caused to be served two true and correct copies of:

(1) Appellees Washington State Republican Party, *et al.* Response Brief to the Washington State Grange; and

(2) This Proof of Service

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