No. 05-35780

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 STATE OF WASHINGTON, *et al.*

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C. Does I-872 violate the Equal Protection Clause of the Fourteenth Amendment by allowing minor parties to nominate a single candidate to the primary ballot while denying the same right to the Republican Party?

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II. STATEMENT OF THE CASE

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 California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"). 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, *cert. denied sub nom., Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004) ("*Reed*") ("[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*, the State adopted the "modified blanket primary" through Initiative 872 ("I-872"), a citizens' initiative. Under the modified blanket primary, no partisan nominating process is envisioned or recognized apart from the State-sponsored primary. This appeal presents the same question, but under Washington's "modified blanket primary."[1]

This appeal raises a second, but related issue, whether the State of Washington ("the State") may further infringe on the Republican Party's First Amendment rights by forcing the Party to associate on the official election ballot and other state-sponsored election materials with candidates who have not demonstrated support

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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)

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.

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. (ER 1-13) 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 of Washington, and the Washington State 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 on the motions on July 13, 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)

III. STATEMENT OF FACTS

After Washington's prior blanket primary was declared unconstitutional in *Reed* and before the Supreme Court denied *certiorari*, the Washington State Grange ("the Grange") filed I-872 on January 8, 2004 with the Secretary of State ("the Secretary"). (ER 420, 512-13) 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.[2] *See, e.g.*, RCW 29A.36.104 & .106. Under the "Montana primary," a voter may participate in the selection of a major party's nominees by selecting that party's ballot. Voters are limited to a single major party's ballot for the primary, their 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.

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[2] The legislature had adopted the "Montana" system as a backup to a primary system very similar to I-872's modified blanket primary. The governor vetoed the "top two" portions of the legislation, expressing doubts about their constitutionality. (ER 361 - 64)

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)

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* Emergency WAC 434-230-040. (ER 376)

I-872 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.

I-872, §§ 2, 18. (ER 258, 260) From the outset, the sponsor and the State were aware of the political parties' objection because I-872 infringed on their nomination rights. (ER 26)

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 intent 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) The sponsors 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. (ER 25) 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." The qualifying primary was designed to give "voters the kind of control that they exercised for seventy years under the blanket primary." (ER 29)

Under RCW 29A.04.025, Washington's County Auditors[3] are state election officers and have overall responsibility to conduct primary elections within their respective counties, and, consistent with the rules established by the Secretary, provide and tabulate ballots for such elections. 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) ("Whenever candidates for a partisan office are to be

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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.

elected, the general election must be preceded by a primary conducted under this chapter."), 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) The response 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) – demonstrates that any *partisan* primary under I-872 would have the *effect* of selecting the Republican standard-bearers for the general election.

I-872 grafted itself onto a much wider body of law that expressly recognizes that "Republican" candidates are representatives of the 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 a "member[] of a major political

party in the state senate or state house of representatives." RCW 42.17.020(10); *see also* RCW 42.17.640. I-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)

IV. SUMMARY OF ARGUMENT

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.

I-872 was not intended to alter how minor political parties placed candidates on the primary ballot. It left intact and unamended the statute recognizing the right of minor political parties to nominate a single candidate to the primary. The Initiative's sponsor expressly represented that the new primary rules would not change minor party nomination rights. Both Washington's legislature and the Secretary of State have recognized that I-872 left the minor parties with the right to prevent usurpation of their names. By seeking to strip the power to nominate from the Republican Party, but preserving it for others, I-872 violates the Fourteenth Amendment's equal protection clause.

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 is expressly a partisan primary, and applies only to partisan offices. The forced association with candidates for partisan office under I-872's filing statute is the linchpin of the statutory scheme and cannot be severed from the balance of the statute. The Court should decline the State's invitation to sever the "partisan" from a partisan primary and thereby convert all Washington elective offices to nonpartisan.

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 Grange, as it did in the prior litigation before this Court.

V. ARGUMENT

A. Standard of review.

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 presumptions of validity as enactments in other areas. *See Schneider v. State*, 308 U.S. 147, 161 (1939). Instead, if a state law severely burdens core First Amendment rights, it can only be upheld if it survives "strict scrutiny" and the state demonstrates that it is supported by a compelling interest that is narrowly tailored. *See Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 225 (1989). Interference with the Republican Party's right to nominate its standard bearers is a severe burden. *See Reed*, 383 F.3d at 1203.

B. I-872 continues the State's effort to invade the Republican Party's core First Amendment rights at the critical moment when its standard-bearers for the general election are selected.

I-872 was motivated by, and expressly intended to defeat, this Court's decision in *Reed* that the First Amendment rights of the Republican Party were "thwarted because the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees." 343 F.3d at 1204. The Court need look no farther than the text of I-872 itself for confirmation:

> 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) The initiative did not present a different primary. It was the old, unconstitutional blanket primary repackaged with a different name. The sponsor's press release announcing I-872 is headed, "Grange files initiative to *preserve* state's primary system." (ER 512) (emphasis added) The sponsor also described the initiative as a "modified blanket primary." (ER 18) I-872's sponsor promised voters the "new" primary would look and operate much like the old blanket primary. (ER 22, 28)

Under I-872, state election officials clearly and consistently stated that there is "no partisan nomination process separate from the primary." (ER 46, 48, 50, 52) The sponsor, in its answer to the Republican complaint, admitted that I-872 "determines the two candidates or nominees for the general election ballot[,]" while denying that the primary selected the "candidate or nominee for any political party[.]" (ER 108, *ll.* 8-9) (emphases in original) This is the same defect this Court observed

in *Reed*:

> As for the State of Washington's argument that the party nominees chosen at blanket primaries "are the 'nominees' not of the parties but of the electorate," that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

343 F.3d at 1204 (footnote omitted).

1. The rights to free speech and association for political parties are derived from the First Amendment, and do not depend on statutory recognition by state statutes.

The right of individuals to join together as a political party to advance an agenda for governance is guaranteed by the First Amendment. Federally-protected constitutional rights do not depend on the existence or nonexistence of state statutes explicitly recognizing those rights. "The rights of political parties flow primarily from two constitutional sources: the right of association protected by the First and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment." *Republican Party of Ark. v. Faulkner County*, 49 F.3d 1289, 1292 (8th Cir. 1995). It is beyond debate that the ability to organize and operate political parties is protected by the U.S. Constitution. "The freedom of association protected by the First and Fourteenth Amendments includes partisan political organizations." *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986) (invalidating Connecticut statute inconsistent with Republican Party rule on who was eligible to select its

standard-bearer). In *Tashjian*, the Supreme Court noted that the Republican Party, not the state, has the right to determine who may associate with it. A "[p]arty's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals is protected by the Constitution." *Id.* at 224.

The Republican Party has been nominating candidates for federal and state offices since the 1850s, long before Washington enacted its first direct primary law in 1907. *See State ex rel. Zent v. Nichols*, 50 Wash. 508, 517, 97 P. 728 (1908). Before the adoption of the requirement to nominate by primary, political parties held caucuses or conventions to nominate their candidates for partisan offices. *See Ray v. Blair*, 343 U.S. 214, 221 (1952) ("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 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.").

The State acknowledges that party selection of nominees for public office predates the primary. *See* State Br. at 15. There is no dispute 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; *accord Republican Party of Ark.*, 49 F.3d at 1300-1301.

The core First Amendment rights guaranteed to political parties include the rights to:

- determine the scope of association, including the right to exclude certain voters at the critical moment when the party is selecting its standard-bearer. *See Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) ("The freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association."); *Reed*, 343 F.3d at 1204.

- define the party's message and exclude opinions that the party decides would be inconsistent with its message. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Gp.*, 515 U.S. 557 (1995) (Parade organizers had right to exclude group with message deemed inconsistent by organizers, notwithstanding contrary state statute); *Reed*, 343 F.3d at 1206-07; *LaRouche v. Fowler*, 152 F.3d 974, 995 (D.C. Cir. 1998) ("[I]t is the *sine qua non* of a political party that it represent a particular political viewpoint.").

- exclude candidates from the party. *See LaRouche, supra*; *Duke v. Massey*, 87 F.3d 1226, 1233 (11th Cir. 1996) ("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."); *Id.* at 1234 ("Duke does not have the right to associate with an 'unwilling partner.'").

- nominate candidates. *See Jones*, 530 U.S. at 575-576; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1977); *Reed*, 343 F.3d at 1204.

- endorse candidates, which is separate from the right to nominate candidates. *See Jones*, 530 U.S. at 580 ("The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee."); *Eu*, 489 U.S. at 226 n.16.

- reasonable access to general election ballot. *See Norman v. Reed*, 502 U.S. 279, 288-289 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986).

This Court has recognized the selection of candidates as the "basic function" of a political party. *See Reed*, 343 F.3d at 1204 (quoting *Jones*, 530 U.S. at 581). Section 14 of I-872 sought to delete language from Washington election law which explicitly recognized the authority of "each political party [to] . . . [p]erform all functions inherent in such organization." (ER 259) However, as made clear by the long line of federal cases, the Republican Party's right to perform its inherent functions flow not from the State, but from the Republican Party's constitutional right to associate and advance what it and its adherents see as the proper program for governance. *See Reed*, 343 F.3d at 1204; *see also Jones*, 530 U.S. at 572-573; *Eu*, 489 U.S. at 224; *Tashjian*, 479 U.S. at 214; *LaFollette*, 450 U.S. at 122.

The State is mistaken in suggesting that the result in *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996) had its genesis in statute, rather than the First Amendment right of the Republican Party to define the extent of its association. In *Duke v. Cleland*,

954 F.2d 1526 (1992), the predecessor case to *Duke v. Massey*, the Eleventh Circuit expressly stated that

> the Republican Party enjoys a constitutionally protected freedom which includes the right to identify the people who constitute this association that was formed for the purpose of advancing shared beliefs and to limit the association to those people only.

Id. at 1530. The exclusion of David Duke was immune from challenge by Duke and his supporters because "the Republican Party legitimately exercised its right 'to identify the people that constitute the association . . . .'" *Id.* at 1531 (quoting *LaFollette*, 450 U.S. at 122). In *Duke v. Massey*, the Eleventh Circuit concluded that although Georgia's statute implicated "state action" by expressly granting the Republican Party the power to exclude Duke from the Party, the First Amendment interests of Duke and his supporters "do not trump the Republican Party's right to identify its membership." 87 F.3d at 1232-33.

The State may not substitute its judgment for the Party's on who constitutes the association, whether the State seeks to contract or expand the definition. *See Jones, supra; Tashjian, supra; LaFollette, supra;* and *Reed, supra.* In *Jones* and *Reed*, the Supreme Court and this Court squarely faced the question of state-mandated affiliation with non-party voters at the crucial moment when a political party selected its standard bearers. Both concluded that the "associational 'interest' in selecting the

candidate of a group to which one does not belong . . . falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest." *Jones*, 530 U.S. at 573 n.5; *see Reed,* 343 F.3d at 1205-07. The Supreme Court's recent decision in *Clingman v. Beaver,* 125 S. Ct. 2029 (2005) is consistent with the views expressed in this long line of cases. The Court upheld Oklahoma's semi-closed primary against a challenge from the Libertarian Party and some voters formally affiliated with the Republican and Democratic Parties who wished to participate in the Libertarian Party primary. In doing so, the Supreme Court relied on its prior decisions, including *Jones*. *See, e.g., id.* at 2035.

The State may not enable others to misappropriate the Republican Party name on official state election materials.

2. Under whatever name, I-872 is a partisan primary that selects the candidates who will carry the Republican standard in the general election.

By its own terms, I-872 is a "partisan primary." *See* I-872 § 7(2). (ER 258) The State voters' pamphlet, recognizing the link between candidates and party, explained, "The primary ballot [under I-872] would include . . . major party and minor party candidates and independents." (ER 256)

By its terms and operation, I-872 determines which candidates will carry the Republican Party standard in the general election. *See* I-872, §4 ("a candidate may

indicate a political party preference . . . and have that preference appear on the . . . general election ballot."). (ER 258) The State's contention that I-872 is devoid of affiliation between candidates and the Republican Party is contrary to the initiative's language, the balance of Washington's election law and common sense. The candidate "party preference" provision, which vests the candidate with the authority to self-identify with a political party, creates an association between a candidate and the Republican Party. The assertion that the candidate's party identification is somehow immaterial or irrelevant is directly contradicted by the initiative's express language that the party identification is for the "information of the voters." *See* I-872 §7(3). (ER 258) That the candidate's designation of a political party is based on which political party best approximates the candidate's philosophy directly connects the Republican Party message with the candidate. A candidate who has designated "Republican" on the primary ballot and advances to the general election must continue to use the Republican designation in the general election. To implement I-872, the State adopted emergency regulations to prohibit candidates from changing the party designation under which they would appear on the ballot between the primary and general elections. *See* WAC 434-230-040. (ER 376) The prohibition on a candidate's changing his mind about which party best represents his personal political philosophy after the primary is not explicable if the designation is merely

intended to provide "information to the voters." It is explicable, however, if party designation creates an association between the candidate and the designated party, at least in the eyes of the voters participating in the primary. 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. *See* RCW 29A.52.311.

The State relies heavily on its asserted distinction between "nominating" and "winnowing" primaries and argues that Washington's system is a constitutionally distinguishable two-stage process through which the "voters elect candidates to pubic office." *See* I-872, §7(1). (ER 258) The State, however, has previously recognized that any primary, "nominating" or not, "winnows" candidates. In its *amicus curiae* brief to the U.S. 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 *Amici Curiae* in Support of Respondents, 1999 U.S. Briefs 401 at *10. There is no constitutional distinction. The Supreme Court recognizes that any primary "functions to winnow out" candidates. *Storer v. Brown*, 415 U.S. 724, 735 (1974). The combination of primary and general election enables the voters to "finally reject all but the chosen candidate" for public office. *Id.*

The primary is not an event that the Republican Party may opt in, or opt out of.

"Whenever candidates for partisan office are to be elected the general election must be preceded by a primary . . . ." I-872, §7(2). (ER 258) If one of the top two candidates advancing to the general election has designated "Republican" on his certificate of candidacy, the Republican name "will be shown after the name of the candidate on the . . . general election ballots." I-872, § 7(3). "The voters' pamphlet must also contain the political party preference" asserted by a candidate. I-872, § 11. (ER 259) There is no alternative nominating process envisioned under Washington law. (ER 46-53)

Except for changes in nomenclature to forcibly associate candidates with the Republican Party, I-872 mirrors the unconstitutional blanket primary. Under the former blanket primary, each primary voter could vote "for any candidate for each office, regardless of political affiliation." *Reed*, 343 F.3d at 1201 (quoting former RCW 29.18.200). Under the new, modified blanket primary, "[e]ach 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 § 5. (ER 258) 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 Texas statute prohibiting African-Americans from voting in the primary elections. The state then 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 the state's delegation of power to a political party to determine the qualifications of primary election voters made the party's actions the action of the State. Similarly, the "private" choices of unaffiliated or rival party voters and candidates resulting in forced association is enabled by the modified blanket primary, and thus are similarly attributable to the State.[4]

The partisan nature of the modified blanket primary is confirmed by other state law as well. "Major party" status is determined statutorily by the success of a party's *nominees*. *See* RCW 29A.04.086 (" 'Major political party' means a political party of

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[4] 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.

which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year."). U.S. Senate and statewide executive offices[5] are all partisan offices under I-872. *See* I-872, §4. (ER 258) The status of candidates elected under I-872 as party standard-bearers is further confirmed by the State Constitution granting the Republican Party the right to fill a vacancy in partisan office from among three individuals named by the party. *See* WASH. CONST. art. II, § 15. Washington's campaign finance regime for state legislative elections authorizes "caucus political committees" made up of "members of a major political party" in the state legislature. RCW 42.17.020(10).

Jones and *Reed* remain controlling law. The old blanket primary violated the First Amendment because it "denie[d] 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 is just another run at a partisan nominating system that makes the Republican candidate in the general election the nominee of the electorate, not the party. I-872 lists the "compelling" interests that motivated its enactment as "giving each voter a free choice among all candidates in the primary," "allowing the broadest possible

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[5] Except for the *nonpartisan* Superintendent of Public Instruction.

participation in the primary election," and keeping party identification secret. I-872, § 2. (ER 258) *Reed* expressly rejected each one as compelling state interests. To defend the former blanket primary, the State asserted that "the blanket primary 'promotes fundamental fairness because it permits all voters, regardless of party affiliation, to participate in all stages' [and] 'all the voters should help choose the nominees for all offices' to provide maximum choice." *Reed*, 343 F.3d at 1205 (footnotes omitted). This Court rejected these "interests" because they "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.' " *Id.* (quoting *Jones,* 530 U.S. at 583).

This Court also rejected the "privacy" claim as a compelling interest:

> 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 law to elect officers."

343 F.3d at 1205 (footnote marker omitted) (quoting *State ex rel. Zent v. Nichols,* 50 Wash. 508, 97 P. 728, 731 (Wash. 1908)). Washington's presidential preference

primary and its party disclosure requirements remain unchanged. I-872's declaration of intent amounts to no more than defiance of this Court's prior decision and an attempt at state nullification of a portion of the First Amendment.[6]

3. I-872's purpose is to modify the message of the Republican Party and change its standard bearers from those preferred by the party's supporters to those favored by outsiders.

Jones and *Reed* prohibit the State from using its primary to alter the political message (speech) advanced by a political party. *See Jones*, 530 U.S. at 587 (Kennedy, J., concurring) ("The true purpose [of California's blanket primary] is to force a political party to accept a candidate it may not want, and, by so doing, to change the party's doctrinal position on major issues."); *Reed*, 343 F.3d at 1206-1207 ("The 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.").

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[6] The federal courts look to declarations of intent by state legislatures, for example, when evaluating whether there is a legitimate secular purpose for laws that promote or inhibit religion, and will reject sham assertions. *See Edwards v. Aguillard*, 428 U.S. 578, 586-587 (1987). Here the expressed intent of the initiative itself, as well as published statements by its sponsor, demonstrates its prohibited, invasive intent. *See also Schwenk v. Hartford*, 204 F.3d 1187, 1199 (9th Cir. 2000) (bill sponsor's pre-enactment press release is "compelling" evidence of law's intent).

The following excerpts from the official Statement for Initiative Measure 872 make clear its purpose is to change standard bearers of the Republican Party, and thereby change its message.

- "[T]he state party bosses won their lawsuit against the blanket primary . . . ."

- The primary adopted after this Court's decision in *Reed* "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 . . . with the blanket primary."

- "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters."

- "whether it's one Republican and one Democrat . . . they will be *the candidates the voters most want*. (Emphasis in original)

(ER 257)

The Explanatory Statement in the State's voters' pamphlet confirms that I-872 will result in rival party and unaffiliated voters selecting the Republican standard-bearer. "Voters . . . would not be limited to a single party." (ER 256) Their participation is intended to change the Republican candidate in the general election. The initiative sponsor's website referenced a recent gubernatorial race where a major

party candidate received less than 40% of the general election vote, and stated that the modified blanket primary "should force the political parties to compete more effectively for these offices. . . . Under this initiative, parties should seek candidates with broad public support who can survive a competitive primary." (ER 25) I-872's goal, like that of the old blanket primary, is to change the Republican Party message by making its candidates more like the general electorate, and less like Republican voters. Elsewhere in its promotional documents for I-872, the sponsor explained that "[c]andidates will need to appeal to all the voters, *partisan and independent* alike. They will not be able to win the primary by appealing only to party activists." (ER 29) (emphasis added)[7] Under *Hurley*, the State may not substitute its judgment for that of the Republican Party regarding the message it advances. *See* 515 U.S. at 578. Although the State and Grange may urge that the Court disregard the method and words used to promote I-872, the Supreme Court in *Jones* expressly considered how California' blanket primary initiative was promoted in determining whether it invaded the political parties' First Amendment rights. *See Jones*, 530 U.S. at 570.

It is immaterial that the initiative avoids using the terms "nominate" or "nominee." In *Jones*, the Court used interchangeably the phrases "selecting a

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[7] The initiative also unconstitutionally seeks to redirect the focus of minor political parties from high-profile statewide and federal offices to lower level elected offices. (ER 29)

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.* I-872 determines the identity of the Republican standard-bearer.

4. Even were I-872 the first part in a two-part general election system, is still unconstitutional because the State both forces the Republican Party to be associated with candidates who are not its "nominees" and reduces the right to nominate to a right to endorse.

Selecting a candidate to advance the party's program for governance is the fundamental purpose of a political party. The Supreme Court has consistently held that "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. The Party has no other means to implement its program for governance. "There is simply no substitute for a party's selecting its own candidates." 530 U.S. at 580-581. Section 9(3) of I-872 forces the Republican Party to associate on the primary and general election ballots with any candidate who expresses a "preference" for the Republican Party.

A political party has the right to nominate under its own rules absent a valid state requirement of a primary to resolve the intraparty contest. *See, e.g., Ray v. Blair*, 343 U.S. 214, 220-21 (1952). Washington did not abolish the right to nominate when adopting its direct primary law in 1907. It merely required the Republican Party to determine its nominee through a public process. From 1907 onward, the "nominee" of the Republican party chosen at the primary appeared on the general election ballot. *See, e.g.,* RCW 29A.52.120 (2003). In its brief, the State maintains that I-872 "does not select party nominees" and "leaves the 'nomination' of political party candidates to the privately exercised discretion of each party." State Br. at 12. This assertion is contrary to the pre-litigation statements of County Auditors that there was no "language associated with the Initiative that contemplates a partisan nomination process separate from the primary." (ER 46-53) By allowing any candidate to appear on the primary ballot using the Republican name, the State strips all meaning from the Republican Party's right to nominate its candidates. The association of candidate and party under I-872 cannot be avoided by verbal sleight-of-hand. Even the Attorney General's official description connects the Party with the candidates on the I-872 ballot: "The primary ballot would include . . . major party and minor party candidates and independents." (ER 256)

Under I-872, the State would print the Republican Party name on the ballot in conjunction with the name of any candidate who expresses a "preference" for the Republican Party, without distinction from the Republican nominee. In doing so, it creates confusion and allows unauthorized persons to misappropriate the Republican

name for their own political gain. Under the *Duke* and *LaRouche* line of cases, a candidate may not force himself on an unwilling party as a matter of First Amendment law. Washington courts have previously recognized that candidates do not have an unlimited right to use any name they please on the State's official ballots. *See State ex rel. LaFollette v. Hinkle,* 131 Wash. 86, 93, 229 Pac. 317 (1924) (enjoining State from printing names of candidates under "LaFollette State Party" name). The Supreme Court has addressed the right of association between candidates and parties, and concluded that one cannot use the First Amendment to force an association with the other on official state ballots. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (Minnesota anti-fusion statute upheld against challenge that it interfered with party's right to associate with candidate). In *Timmons*, the Court noted that the New Party was free to try to persuade the candidate in question to run under its banner rather than another party's. The situation for candidates is similar. In Washington, candidates whose "preference" is the Republican Party are free to seek the Republican nomination, but cannot appropriate the name if the Republican Party selects another standard-bearer. *See Timmons*, 520 U.S. at 359.

Washington places value on "the right to the exclusive use of an established name" for non-commercial associations. *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge,* 62 Wn. 2d 28, 44, 381 P.2d 130 (1963). "The underlying concept is that of unfair competition in matters in which the public generally may be deceived or misled." *Id.* at 35.

The State acknowledges the historical connection between the use of the name "Republican" on the general election ballot and the nominee of the Republican Party. State Br. 5, 15-16. Under *Grand Lodge*, the use by one of a name that is identical to or indistinguishable from an established name causes confusion and diverts support from the legitimate organization. *See* 62 Wn. 2d at 36, 44-45. Under I-872, the State would publish official elections material linking the Republican Party with any candidate, affiliated or not, and without distinction between the Party nominee and usurpers of the name. There can be no principled debate about association of "Republican" on a ballot with the "Republican Party."

> 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 the 'Republican Party'.

Chambers v. Greenman, 58 N.Y.S.2d 637 (N.Y. Misc. 1945). It is precisely because the name "Republican" on the ballot connotes the Republican Party and its positions that a candidate would express a "preference" for the Party. If a candidate expressing a "preference" for the Republican Party did not wish to connote his affiliation with the Party and its message, the only other rational alternative explanations are rank political opportunism (*i.e.*, misappropriation of the name for personal political gain) or an effort to redefine the Party's message. Established First Amendment precedent bars the State from using its official ballot to further political opportunism or to

redefine the Republican message. If the State is correct in asserting that candidates claiming a preference for the Republican Party are not affiliated with the Party, the use of the name amounts to a fraud upon the voting public. In *United State Jaycees v. San Francisco Junior Chamber of Commerce*, 354 F. Supp. 61, 72 (N.D. Cal. 1972), *aff'd and opinion adopted*, 513 F.2d 1226 (9th Cir. 1975), the court rejected a claim of a disaffiliated member of the Jaycees organization from continuing to use the "Jaycees" name under common law of trademark. The court relied on a much earlier decision regarding the use of the name "Elks" by a group that disaffiliated from the national organization:

> Such use by seceding members, over whom the order has no further control, has obviously every element of unfairness that would arise from use by strangers. . . .
>
> Upon separation from the order, their use of the name applicable to members of the order amounts to a fraud upon the order and upon the public and should be enjoined.

Id. at 71 (quoting *Grand Lodge, v. Eureka Lodge No. 5,* 114 F.2d 46, 48 (4th Cir. 1940). The State proposes to publish the name "Republican" or one of its traditional abbreviations on the ballot and voters' guide. Even 60 years ago, the court in *Greenman v. Chambers* noted the association between the name Republican and the Republican Party was nearly from "time out of memory." 58 N.Y.S.2d at 641. The *Jaycees* court directly addressed the existence of confusion as a question of law, and concluded that the use of the same name, in the same context, created prohibited confusion. *See* 354 F. Supp. at 78. It cannot be otherwise here, where the express

purpose behind the use of the Republican name is to provide "information" about the candidate to the voters on the same ballot where the Republican nominee will appear.

C. I-872 violates the equal protection clause and sets an unconstitutionally high bar for access to the general election ballot.

The modified blanket primary is unconstitutional for reasons even beyond those found by the District Court. I-872 left untouched minor party nominating rights for the primary ballot, while stripping the Republican Party of those rights. There is no constitutional basis for depriving the adherents of the Republican Party the right to nominate their standard-bearers, while retaining that right for adherents of other political parties. 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.

Washington's primary system could exclude parties from the partisan general election ballot even though they have the support of up to one-third of the voters. Such a high bar to general election ballot access is an unreasonable restriction, and much higher than the thresholds that have received approval from the Supreme Court.

I-872 is invalid on these bases as well, even if the Court were to conclude that I-872 did not invade core First Amendment rights. An appellate 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)).

When crafting I-872, its sponsors intentionally left untouched the ability of minor parties to nominate a single candidate and have that single candidate appear on the primary election ballot. Among the Frequently Asked Questions posed and answered by I-872's sponsor was the following

> **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 25)

For many years, each of Washington's minor parties had has the right to hold a convention to nominate its sole candidate to appear on the primary election ballot. *See* RCW 29A.20.121 and former RCW 29.24.020; *see also Munro*, 479 U.S. at 191. It is clear that the sponsor neither intended to affect traditional minor party convention rights nor interpreted the legislation's language to do so.

It is not only I-872's sponsor who interpreted the initiative to leave minor party convention rights unaffected. During the 2005 legislative session, the Secretary of State proposed legislation that would have deleted the statutory provisions regarding minor party nomination rights. Washington's legislature, relying on the sponsor's statements regarding the effect of I-872, determined that striking those provisions would be an amendment to the initiative, requiring a two-thirds vote of the

legislature. (ER 251) In fact, in February 2005, the Secretary confirmed that the legislation would change the minor party convention system. His office stated that "we are in the process of passing legislation to . . . chang[e] the way minor parties or third parties gain access to the ballot. They used to have a petition and convention system. The new legislation removes all these requirements . . . ." (ER 250)

The district court held that I-872 repealed by implication the minor party convention rights. The court focused on how minor party candidates advanced from the primary to the general election. *See* 377 F. Supp. 2d at 928. In doing so, it appears the court misconstrued the nature of the Party's equal protection challenge, which is not based on minor party candidates advancing to the general election, but on the retention of minor parties' ability under I-872 to nominate the only candidates authorized to use their name on the primary election ballot. The court correctly noted that repeal by implication is disfavored strongly in Washington. *See* 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 state legislature, and the Secretary of State, coupled with the silence of I-872 regarding minor party conventions, there was no repeal by implication.[8]

Violation of the right of the Republican Party to reasonable access to the

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[8] If the minor party convention rights were impliedly repealed by I-872, that is simply another basis for striking down the statute as unconstitutional. If I-872 stripped minor parties of the right to nominate, that is a direct interference with their internal decision making and unconstitutional under the U.S. Supreme Court decision in *Eu*, 479 U.S. at 227, 230-231.

general election ballot is another, independent ground to conclude that I-872 invades constitutionally protected rights.

The State may establish reasonable regulations for ballot access and limit access to its ballot to those political parties that have demonstrated a substantial modicum of support among the electorate. *See Munro*, 479 U.S. at 193. However, the State may not set a threshold for ballot access that is unreasonably high. *See Williams v. Rhodes*, 393 U.S. 23 (1968). The general election ballot access threshold approved in *Munro* was 1%. The Supreme Court has approved ballot access thresholds as high as five percent. *See, e.g., Jenness v. Fortson*, 403 U.S. 431 (1971). Ballot access thresholds that exceed a reasonable level are unconstitutional. *See Williams*, 393 U.S. at 31; *Anderson v. Cellebrezze*, 460 U.S. 780 (1983). I-872 presents a variable threshold for a political party to obtain ballot access for its nominees. In a three-way primary, the Republican nominee must obtain more than one-third of the vote to obtain access to the general election ballot. The Supreme Court has never approved a ballot access threshold anywhere near one-third of the vote. Washington introduced no evidence to show why it, alone among the fifty states, need set the bar for access to the general election ballot so high.

D. I-872's unconstitutional provisions are not severable and the Court should decline the State's invitation to rewrite the initiative to replace Washington's partisan election system with a nonpartisan one.

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.3rd 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. *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. 3rd 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 the ordinance because the definition section, among others, was unconstitutional. The very definition of "partisan office" in I-872 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

ballot. The definition of "primary" is also constitutionally infirm, because it attempts to enshrine in statute, contrary to the First Amendment, the "right" of voters to select the standard bearer of political parties with whom they are not affiliated. Noting that sections 4, 5, 7, 9, 11 and 12 of I-872 all invade protected First Amendment rights, the district court correctly concluded that striking these unconstitutional portions would convert Washington's partisan primary to a nonpartisan primary. *See* 377 F. Supp. 2d at 931.

The State contends that the voters intended a nonpartisan primary. This argument ignores the clear language of the initiative. The State's severance argument even ignores the Attorney General's Explanatory Statement for I-872, submitted to the voters as part of the voters' pamphlet. (ER 256) 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. The Republican Party is entitled to recover its costs and reasonable attorneys' fees for this repeat invasion of its civil rights by the State.

This Court awarded the Republican Party its fees in the prior litigation with the State regarding Washington's blanket primary. *See Washington State Democratic Party v. Reed*, 388 F.3d 1281 (9th Cir. 2005)(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 plaintiff is presumptively entitled to costs, including reasonable attorneys fees, for violations of the Civil Rights Act, under 42 U.S.C. §1988. *See Thorsted v. Gregoire*, 841 F. Supp. 1068, 1083 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996). Only where "special circumstances would render an award unjust" should a prevailing plaintiff be denied its attorney's fees. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

In *Thorsted*, the court was called upon to rule on the constitutionality of Washington's term limits initiative. The state had taken no steps to enforce the law, and had given no indication that it planned any immediate steps to do so. The court specifically noted that the defendants had taken no action to enforce the law. *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" and adopted regulations to carry out the statute.

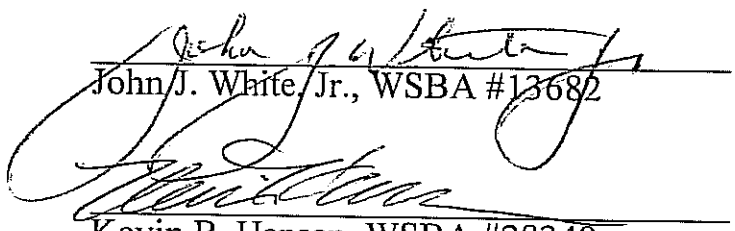
Nor is this a case of first impression. Both this Court and the United States Supreme Court have made it clear that the State may not force political parties to have

their standard-bearers chosen by rival party and unaffiliated voters under the First Amendment. Dissatisfaction with result does not excuse a further attempt to violate protected civil rights. Finally, and most importantly, this Court in *Reed* rejected applying the "special circumstances" analysis of *Thorsted* in the prior litigation between the parties over the State's primary system, and the Court should do so again.

VI. CONCLUSION

The "modified blanket primary" sponsored by the Grange and adopted by the State is a direct attempt at state nullification of First Amendment rights of the Republican Party and its adherents. Its defense rests on verbal sleight-of-hand. However expressed, I-872 selects the Republican standard-bearer as did its unconstitutional predecessor, the unmodified blanket primary. As its predecessor, the modified blanket primary forces the Republican Party to be affiliated with rival party voters, and forces the Republican Party to be affiliated on the state election ballot and other official state election publications with candidates whom it may decide are outside the scope of the association. The Grange and State continue to attempt to substitute their preference for what the Republican Party should be and how it speaks to the voters for the Party's own. The effort violated the First Amendment two years ago, and still does so today. The decision of the District Court should be affirmed, and the Republican Party should be awarded its costs and fees on this appeal.

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 05-35780

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 10,214 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. 05-35780

(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 State of Washington; and

(2) This Proof of Service

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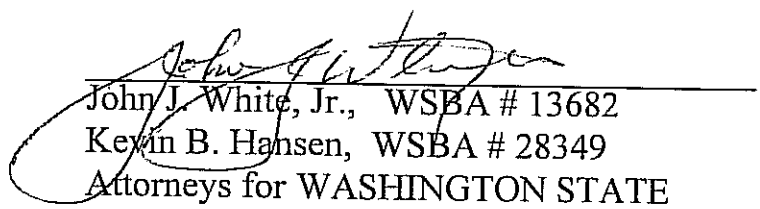

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