The Honorable THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors

v.

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

STATE OF WASHINGTON, et al.,

Defendant Intervenors

WASHINGTON STATE GRANGE,

Defendant Intervenors.

NO. 05-0927-Z

STATE'S RESPONSE TO MOTIONS OF REPUBLICAN, LIBERTARIAN, AND DEMOCRATIC PARTIES FOR SUMMARY JUDGMENT, AND STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT

STATE'S MOTION TO STRIKE REPUBLICAN PARTY'S SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: WEDNESDAY, JULY 13, 2005

WITH ORAL ARGUMENT

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I. INTRODUCTION AND RELIEF REQUESTED

In this case, the Republican, Democratic, and Libertarian Parties seek to invalidate Washington's new system for selecting candidates for public office as enacted by the voters in Initiative Measure No. 872 ("Initiative 872" or "I-872") in November of 2004.[1] In this facial challenge, they assert that the implementation of Initiative 872 will impair their federally protected rights of free speech, freedom of association, and equal protection. All three political parties have filed motions for summary judgment on the constitutionality of I-872.

These motions should be denied. Instead, the court should grant the State's motion for summary judgment in its favor that Initiative 872 is facially constitutional and may be implemented without violating the constitutional rights of the political parties.

II. STANDARD FOR SUMMARY JUDGMENT; EVIDENTIARY BURDEN

The State agrees with the Republican Party Motion ("Republican Mot." at 7-8) that "[s]ummary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact remaining for trial, and the moving party is entitled to judgment as a matter of law." *Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1359 (9th Cir. 1994).

This is a facial challenge to Initiative 872 and may be resolved by examining the Initiative and related Washington laws in light of the constitutional provisions cited by the Plaintiffs. A facial challenge is difficult to mount successfully, since the challenger must establish "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The fact that

[1] The Initiative was passed by a 60% to 40% margin, and carried *all* of Washington's 39 counties. Election results are available online at the Secretary of State's Web site, at http://vote.wa.gov/general/measures.aspx?a=872#map. The Voters Pamphlet for the 2004 election, containing the full text of Initiative 872 in addition to explanatory material supplied to the voters, is Exhibit A to the Declaration of James K. Pharris accompanying this Response.

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a challenged statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it facially invalid. *Id.*

The State agrees with the political parties that this case is ripe for adjudication, as the State is preparing to conduct a primary and a general election in 2005 under the system established by Initiative 872. A number of offices will be filled at that election, including county offices and legislative positions. In 2006, even more federal, state, and local offices will be on the ballot. It would be in the State's interest to remove any remaining doubts about the State's authority to implement I-872.

The political parties bear the burden of demonstrating that I-872 violates constitutional constraints. For the reasons set forth below, the State submits that the Initiative is entirely consistent with constitutional requirements and does not burden any First Amendment interests of the political parties. Even if that were not the case, however, it is inaccurate to suggest that any burden on free speech or freedom of association rights results in a requirement that the State demonstrate a "compelling interest" that is "narrowly tailored" in order to sustain the validity of the challenged statute. Republican Mot. at 9. As recent Supreme Court case law clarifies, the "compelling interest" test is required only if the State law *severely* burdens the associational interests of the parties. *Clingman v. Beaver*, 544 U.S. ___, 125 S. Ct. 2029, 2038 (2005); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). The Court can and should determine as a matter of law that Initiative 872 places no significant, and certainly no "severe," burdens on associational rights of the parties.

III. BACKGROUND

A. Washington's "Blanket" Primary Declared Unconstitutional

In September 2003, the Ninth Circuit Court of Appeals struck down Washington's blanket primary (which had been in use since 1935) as a result of a suit brought by Washington's three largest political parties. *Democratic Party of Wash. State v. Reed*

("*Wash. Demo.*"), 343 F.3d 1198 (9th Cir. 2003), *cert. denied, Reed v. Democratic Party of Wash.*, 540 U.S. 1213, 124 S. Ct. 1412, 158 L. Ed. 2d 140; *Wash. State Grange v. Wash. State Democratic Party*, 541 U.S. 957, 124 S. Ct. 1663, 158 L. Ed. 2d 392 (2004). The Ninth Circuit based its decision on a finding that Washington's blanket primary was "materially indistinguishable" from a California version of the blanket primary struck down by the Supreme Court in *California Democratic Party v. Jones* ("*Cal. Demo.*"), 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000). *Wash. Demo.*, 343 F.3d at 1203.

As discussed in more detail below, Washington's blanket primary combined two constitutionally significant features: (1) unrestricted voter participation based on party affiliation in the primary, and (2) competition between nominees of different parties in the general election. In the primary, candidates designated their party on their declarations of candidacy.[2] Voters could vote for any candidate of any party for each office on the ballot. For each office, the candidate gaining the most votes among the candidates designating a particular party qualified for the general election ballot, subject to the requirement of gaining at least 1% of the total vote cast for that office. Thus, the blanket primary was designed to, and did, advance to the general election ballot a candidate representing each of the major political parties (and, if they qualified, no more than one candidate representing each minor party).

The blanket primary was struck down because the Court found that (1) it nominated party candidates for public office by making the party designation a critical factor in determining which candidates qualified for the general election ballot, and (2) the blanket primary system, against the will of the major parties, forced each of them to share the nomination of their candidates with persons affiliated with other parties or with no party at

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[2] Minor parties and independent candidates were permitted to nominate candidates by convention, but a minor party nominee still had to obtain 1% of the total vote for candidates for that office in the primary in order to qualify for the general election ballot. This feature of the Washington law was discussed, and upheld, in *Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986).

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all. The Ninth Circuit found (following similar findings by the Supreme Court concerning California's primary) that this election system violated the rights of free speech and free association of the political parties. On remand, this Court entered an order enjoining Washington's blanket primary.

B. State Enacts "Montana" Primary For 2004

The injunction against the blanket primary left Washington without a working election system. The 2004 Session of the Washington State Legislature remedied this by enacting Senate Bill 6453, approved by the Governor on April 1, 2004. A copy of this legislation is attached as Exhibit B to the Declaration of James K. Pharris accompanying this Response. As passed by both houses of the Legislature, SB 6453 enacted, as a first preference, a "top two" primary which preserved the right of voters to vote freely for any candidate for any public office, but provided that the top two vote-getters for each office in the primary would advance to the general election regardless of party preference. Laws of 2004, ch. 271, §§ 1-57.

Aware that the political parties would probably challenge the constitutionality of this system, the Legislature also enacted a "backup" plan to take effect if the "top two" system were invalidated. The "backup" plan was a "Montana-style" primary in which each major party would have a separate ballot in the primary, in addition to a ballot listing nonpartisan offices. A voter could choose one of the party ballots to vote for the candidates of that party for partisan offices, but could not (as in the blanket primary) vote for candidates of different parties for various offices. Every voter was entitled to vote on the nonpartisan offices. Laws of 2004, ch. 271, §§ 102-193.

When SB 6453 reached the Governor, he exercised his "section veto" and vetoed out of the bill all references to the "top two" primary. The remainder of the bill, consisting of the

"Montana" primary provisions, was approved by the Governor. As a result of the veto, the Montana primary was used in 2004.[3]

C. Voters Adopt "Top Two" Primary Through Initiative 872

The "Montana" primary proved unpopular with the voters. In the November 2004 election, they enacted Initiative 872, instituting a "top two" primary similar to the one contained in the vetoed sections of SB 6453.[4]

The "top two" system established in Initiative 872 allows voters to participate fully in the primary by eliminating party affiliation as a factor in determining whether candidates advance to the general election ballot. The general election is a "runoff" between the two candidates gaining the most votes in the primary.[5] The major features of the Initiative are:

- The term "partisan office" is redefined to mean "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." I-872, § 4.
- The terms "primary" and "primary election" are defined as "a procedure for winnowing candidates for public office 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 of affiliation, of either the voter or the candidate." I-872, § 5.
- For any office in which a primary is held, "only the names of the top two candidates will appear on the general election ballot, subject to the requirement that a candidate must gain at least 1% of the total vote." (Note that political party preference plays no part in determining which candidates will advance to the general election.) I-872, § 6.
- The primary is "a first stage in the public process by which voters elect candidates to public office." I-872, § 7(1).
- For a partisan office as defined above, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will

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[3] The validity of the Governor's veto was challenged but upheld by the State Supreme Court. *Wash. State Grange v. Locke*, 153 Wn.2d 475, 105 P.3d 9 (2005).

[4] Initiative 872 is Laws of 2005, chapter 2. Its provisions have not yet been codified in the Revised Code of Washington as of this writing, although some of them amend existing codified sections.

[5] As discussed more fully below, this primary operates precisely the same as primaries conducted for nonpartisan offices in Washington.

be shown after the name of the candidate on the primary and general election ballots. "Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters." I-872, § 7(3).

- A number of pre-existing statutes were amended to conform to the "top two" system or were repealed as inconsistent with it.[6]

To implement the Initiative, the Secretary of State adopted emergency rules on May 18, 2005. The rules are Exhibit C to the Declaration of James K. Pharris accompanying this Response. In part, the purpose of the rules is to instruct election officials which statutes may still be implemented following the enactment of I-872, and which are now limited in their scope, or are no longer operable.[7]

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[6] A number of sections of Initiative 872 amend statutes repealed by the 2004 Legislature, during the time the Initiative was in circulation for signatures. Laws of 2004, ch. 271, § 193. Initiative 872 was drafted, filed with the Secretary of State, and was already circulating for voter signatures when the 2004 primary legislation was enacted, and thus, I-872 obviously had no opportunity to repeal or amend all the statutes added to the code by SB 6453, including the ones creating a "Montana" primary. All of these sections, accordingly, remain "on the books." Under these circumstances, the fact that two pieces of legislation essentially "passed each other in the night" does not prevent the provisions of the Initiative approved by the voters from taking effect. When a legislative body amends a repealed statute, the inquiry becomes one of legislative intent. Where the legislative body, here the people, clearly sets forth its purpose and fully provides for the subject, it is reasonable to conclude that the intent was to make the statute enforceable as stated in the more recent act, technical deficiencies aside. Norman J. Singer, Sutherland Statutes and Statutory Construction, § 22:3 (updated March 2005). "The reference to the repealed statute is dismissed as surplusage and the will of the legislature as embodied in the provisions of the attempted amendment is enforced as an independent act." *Id.* (citing, *inter alia*, *Whitfield v. Davies*, 78 Wash. 256, 259, 138 P. 883 (1914)). The people's legislative intent is clearly expressed within I-872. Particularly under these circumstances, in which two legislative processes temporally overlapped, the technical happenstance that some statutes were repealed while the measure was pending does not prevent the measure enacted by the voters from taking effect. *See also* RCW 1.12.025(2) (recognizing that where the same session of the legislature both amends and repeals the same statute, the resulting law depends upon a determination of legislative intent).

To the extent these pre-existing statutes can be harmonized with Initiative 872, they remain in effect. However, to the extent that the pre-existing statutes are cannot be reconciled with I-872, they are impliedly amended or impliedly repealed by the initiative, and no longer enforced. This principle of interpretation is consistent with Washington case law. *See, e.g., In re Chi-Dooh Li*, 79 Wn.2d 561, 488 P.2d 259 (1971). The same principle is followed by the federal courts. *Moyle v. Dir., Office of Workers' Comp. Programs*, 147 F.3d 1116 (9th Cir. 1998).

[7] Initiative 872 does not amend the statutes governing how the special primary for the office of U.S. President will be conducted. The Presidential election process, involving nominations by the national parties, is *sui generis* and is obviously not subject to state-by-state regulation.

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IV. STATE'S MOTION TO STRIKE PLAINTIFF REPUBLICAN PARTY'S SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

The Defendant Intervenor State of Washington moves to strike the Plaintiff Republican Party's "Supplement to Motion for Summary Judgment" filed in this case on June 23, 2005. The basis for this motion is that the Supplement is untimely, prejudicial to the Defendants, and contrary to this Court's Scheduling Order.

In a scheduling Order established after full consultation with all parties, the Court set Friday, June 17, as the deadline for the Plaintiffs and the Plaintiff Intervenors to file summary judgment motions and supporting documents. The responses of the Defendants are due on Friday, July 1. On Friday, June 17, the Plaintiff Republican Party filed a Motion for Summary Judgment, together with appropriate supporting documents. The Motion was filed within the time limits and within the page length limits established by the Court.

On Thursday, June 23, the Republican Party filed another document styled "Plaintiffs' Supplement to Motion for Summary Judgment," together with a declaration attaching a number of documents. The Supplement was filed nearly a week beyond the deadline for summary judgment motions. The proffered rationale for filing the late document (set forth in the document's introduction) is that the Republican Party received documents from the Secretary of State on June 20, 2005, in response to an earlier public records request, and that the Supplement was filed to deal with additional issues raised by the documents supplied to the Republican Party after the June 17 motion deadline.

The documents add nothing to assist the Court in resolving the issues raised in this case.[8] They consist of e-mail and other correspondence among employees of the Secretary of State (sometimes including employees of the legislature or other agencies) describing and summarizing the provisions of Initiative 872, discussing the desirability of "cleanup"

[8] The documents in question are found in Exhibit C to the Declaration of Kevin Hansen, filed as Document 64 in this matter on June 23, 2005.

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legislation to implement Initiative 872 and to eliminate statutory language rendered obsolete by the Initiative, and discussions of rules adopted by the Secretary of State to facilitate the implementation of the Initiative.

The "cleanup" legislation was introduced early in the 2005 Session of the State Legislature, and its history (it was not enacted) is a matter of public record. The Secretary of State's emergency rules implementing Initiative 872 were adopted on May 18, and their contents were a matter of public record when this case was filed on May 20. Even a cursory reading of the rules reveals that they were promulgated to implement Initiative 872, partly by clarifying that election officials and candidates are no longer obligated to follow older statutes rendered meaningless or obsolete by the enactment of the Initiative.

All of the arguments raised in the June 23 "Supplement" could and should have been raised and discussed in the Republican Party's June 17 Motion. The Party knew what the rules said, and had full opportunity to discuss how the rules affected the operation of Washington elections, and whether the result was somehow to deny equal treatment to the Republican Party. The Supplement offers no new information to the Court beyond a series of casual expressions of opinion by various staff members on issues relating to the implementation of the Initiative.[9]

The question before the Court is the facial validity of Initiative 872. The materials submitted with the Supplement have no bearing on that question, even indirectly. However, it would take valuable time and briefing space to respond to the points raised in the

[9] The Republican Party seems to treat these casual exchanges as "admissions" by state officers somehow affecting the way in which state law should be interpreted. Accepting for argument's sake the dubious proposition that a party's "admissions" on points of law are binding on the Court, or even probative, the Republican Party offers no proof that any of the statements in question were made by officers authorized to speak for the State of Washington. The context makes it clear that the state employees were speaking only as individuals to one another. Furthermore, the employees clearly were not "speaking agents" of the Washington State Grange, the other Intervenor Defendant.

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Supplement. The State respectfully requests that the Court strike the Supplement as untimely.

V. ARGUMENT

A. Discussion Of Agreed Statement Of Issues

1. The primary system established by Initiative 872 does not nominate political party candidates for public office.

By enacting I-872, Washington voters separated the public process of electing candidates to public office from the private process by which political parties select their nominees. This essential change in public policy is the most basic characteristic of I-872, representing a fundamental change in the nature of primaries in Washington's electoral system. In making this change, the voters made their decision to select one of two basic approaches to conducting primary elections left open to states in the wake of *California Democratic Party v. Jones* as followed by the United States Court of Appeals for the Ninth Circuit in *Democratic Party of Washington v. Reed*. Following the results of that litigation, Washington voters could choose either to keep the Montana primary, in which the candidates appearing on the general election ballot would be determined through a party nominating primary (in which only voters selecting a particular party's ballot would be allowed to participate in selecting that party's candidates), or to adopt a new primary in which all the voters would choose among all candidates, with party nominations made irrelevant to qualifying candidates to the ballot. The voters overwhelming selected the latter.

a. Washington's blanket primary combined voter choice with the guarantee that one candidate of each major party would advance to the general election.

As noted above, from 1935 until recently, Washington used a system known colloquially as the "blanket primary." Laws of 1935, ch. 26 (Initiative Measure to the Legislature No. 2). The blanket primary consisted of two essential features: (1) The names of all candidates, of every political party, appeared together on the primary ballot, and all

voters were permitted to select from among all candidates without any limitation based upon party affiliation of either the candidate or the voter; but (2) based on the results of the election, one candidate of each major political party (and any minor party candidates who qualified) would advance to the general election. Laws of 1935 ch. 26, § 3 (most recently codified as RCW 29A.52.130) (all properly registered voters may select among all candidates for each office); RCW 29A.36.190 (describing which candidates advanced to the general election). That is, one Democrat and one Republican (and one candidate of any other party that may have qualified as a major party at any given time) would be guaranteed a spot on the general election ballot, without regard to the relative level of support earned by each individual candidate.

In a decision applied to Washington by a subsequent Ninth Circuit opinion, the United States Supreme Court determined that states may not combine those two features, but may choose between them. *Cal. Demo.*, 530 U.S. 567. That is, states may either permit all voters to choose from among all candidates at the primary, or the state may choose to use primaries as a method of nominating candidates for public office and then place those nominees on the general election ballot. Washington's voters, through I-872, chose the first option, thereby deciding to elect their public officials without using party nominations as a means of determining which candidates will appear on the general election ballot.

The United States Supreme Court made clear the choice between these two distinctly different approaches to primaries when it struck down California's version of the blanket primary. *Id.* The Court premised its analysis upon the determination that California's blanket primary was used to select party nominees, since the primary method by which a candidate would qualify to appear on the general election ballot was by winning a party primary. *Id.* at 569-70.[10] The Court recognized that "States have a major role to play in

[10] The other method was to qualify as an independent through a petition process. *Cal. Demo.* 530 U.S. at 569-70.

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structuring and monitoring the election process, including primaries,"[11] that it is "'too plain for argument,' . . . 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." *Id.* at 572 (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 781, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974) (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 237, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) (Scalia, J., dissenting)). But where the process for selecting party nominees included permitting every voter to select among all candidates, as under the blanket primary, the Court found a violation of the parties' associational rights. *Cal. Demo.*, 530 U.S. at 577.

The Court then spelled out an alternative approach, which alternative Washington voters ultimately selected through I-872. The Court observed that a state could permit all voters to select from among all candidates at the primary in the following manner:

> Respondents could protect them all [referring to state interests] 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 [political] 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.

Id. at 585 (emphasis by the Court). The Court then explained, "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*." *Id.* at 585-86 (emphasis added).

The Ninth Circuit determined that Washington's blanket primary, like California's, was used to select political party nominees. *Wash. Demo.*, 343 F.3d at 1203-04. The Court reasoned that distinctions between California's system and Washington's were immaterial,

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[11] *Cal. Demo.*, 530 U.S. at 572 (citing *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed.2d 245 (1992), *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986)).

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rejecting the argument that Washington did not use the blanket primary to select party nominees. *Id.*[12]

The gist of the holdings in *Cal. Demo.* and *Wash. Demo.* is therefore that, even though states possess broad authority over the electoral process,[13] states cannot combine two features in the same primary system. That is, they cannot simultaneously use the primary to select party nominees and permit all voters to choose from among all candidates at the primary; the states must choose one approach or the other.

b. Forced to choose between preserving voter choice and using primaries to nominate party candidates, Washington voters chose to preserve voter choice.

At the 2004 general election, Washington voters selected an approach that preserved maximum voter choice rather than interparty competition in the general election. The language of I-872 makes this choice clear in several respects. The voters, through the Initiative, explained the new and fundamentally different nature of the primary established by I-872: "A primary is a first stage in the public process by which voters elect candidates to public office." I-872, § 7(1). The voters determined that the primary would no longer constitute a mechanism for the selection of party nominees, but rather it would be transformed into a "first stage" in electing candidates for office. The voters changed the statutory definition of "primary" to reflect this fundamental shift in its purpose:

> "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 limitation based on party preference or affiliation, of either the voter or the candidate.

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[12] The Ninth Circuit noted the language in *Cal. Demo.* referring to a "nonpartisan blanket primary" in which "voters can vote for anyone on the primary ballot, and then the top vote-getters regardless of party run against each other in the general election. *Wash. Demo.* 343 F.3d at 1203. The guarantee of one place on the general election ballot for each political party is, indeed, the key distinction between a party nominating primary and a "nonpartisan blanket primary," which led the Ninth Circuit to conclude that Washington's prior system used the primary to select party nominees. *Id.*

[13] *Cal. Demo.*, 530 U.S. at 569-70.

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I-872, § 5 (amending RCW 29A.04.127; deletions of prior statutory language shown in strikeout; additions of language underlined). To complete the transition away from a system in which party nominations determined access to the general election ballot, the voters also provided, "For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot". I-872, § 6(1). I-872 supplants the prior rule that the candidate receiving the highest number of votes of each party—the party nominee—would advance. I-872, § 17(4) (repealing RCW 29A.36.190).[14] The Secretary of State reiterated this point in an administrative rule that captures the understanding of the state's chief election officer as to the nature of the new primary: "Pursuant to chapter 2, Laws of 2005 [I-872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." WAC 434-262-012 (reproduced in Decl. of James K. Pharris, Ex. C).

Finally, the voters made clear their objective of promoting voter choice over party nominations, through policy statements set forth in the initiative. The initiative's intent section clearly addresses the concern of "protect[ing] each voter's right to vote for any candidate for any office." I-872, § 2. "[T]his People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington." *Id.* Among the interests the Initiative advances was the protection of several voter rights,

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[14] I-872 was drafted before the enactment of the 2004 Legislation that resulted in the Montana Primary. Accordingly, it did not repeal RCW 29A.36.191, a provision of the 2004 Act. As the later-enacted statute, however, I-872 supersedes the earlier provision of RCW 29A.36.191. *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 708, 601 P.2d 501 (1979) (setting forth the standard for the implied repeal of a statute when "'(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction'").

In addition, the Voters Pamphlet statement in favor of I-872 makes clear that the elimination of a guarantee of one Democrat and one Republican on the general election ballot—of, in other words, party nominations—was one of the major objectives of the Initiative. "No political party is guaranteed a spot on the general election ballot." Statement for Initiative 872, Voters Pamphlet 12 (2004), attached as Ex. A to James K. Pharris Declaration.

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including, "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(3).

c. Under Initiative 872, parties choose their own nominees; the primary is not used for this purpose.

The elimination of Washington's traditional blanket primary forced Washington voters to choose between two strikingly different visions of a primary. The voters were forced to choose between voter choice and party nominations, and chose voter choice.

The Supreme Court's decision in *Cal. Demo.* made it clear that states need not structure their electoral process around party nominations and party primaries. Clearly if a state chooses to utilize a party nomination system to qualify candidates for the general election ballot, the state may require that the nominees be selected by primary as a way of assuring that intraparty disputes are resolved in a democratic manner. If the State chooses such a system, then it must respect the associational rights of the parties that such a system implicates. *Cal. Demo.*, 530 U.S. at 572. The State need not structure ballot access around party nominations, however. As an alternative, the Court offered the option that the voters selected when they enacted I-872: that the State completely decouple the process for deciding which candidates appear on the general election ballot from any party nominating process. *Id.* at 585-86 (quoted above at p. 14).

The political parties read a requirement that is not there into this portion of the *Cal. Demo.* case. The political parties postulate that the option of a qualifying primary suggested by the Court is limited to a system in which the political parties first nominate their candidates, and then only those nominees are permitted access to the primary ballot. Republican Mot. at 12; Democratic Mot. at 16-17.[15] Very much the contrary, the Court

[15] The political parties also attempt to minimize the significance of this part of the Supreme Court's decision by characterizing it as dicta. The passage at issue, however, formed a key portion of the Court's substantive analysis by explaining why, in the Court's view, California's blanket primary was not narrowly tailored to the interests the state argued that it advanced. *Cal. Demo.*, 530 U.S. at 585. Even if its characterization as dicta was correct, it would not follow that lower courts should ignore this analysis. *Gen.*

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states that separate party nominating processes might be used for determining candidate ballot access. It did not state that such a process was a mandatory element in a "nonpartisan" primary system. The Court used the permissive word "may" in stating that a primary "*may* include nomination by established parties". *Cal. Demo.*, 530 U.S. at 585. It seems clear that if the Court had intended to describe a mandatory requirement that it would have used mandatory, rather than permissive, language.

The political parties put much stock in the dissenting opinion of Justice Stevens in this regard, assuming that the Court's majority silently adopted an assumption that appears in a footnote to that dissent. Justice Stevens described a "nonpartisan primary" as, "a system presently used in Louisiana—in which candidates previously nominated by the various political parties and independent candidates compete." *Id.* at 598 n.8 (Stevens, J., dissenting). Their reliance upon the dissent is incorrect for several reasons. Most obviously, the description by Justice Stevens occurs in a dissent. A dissenting opinion does not speak for the Court. Further, to the extent that the dissenting opinion assumes that party nominees *would*, rather than merely *could*, be part of the system, there is no indication the Court's majority shared the assumption, since the opinion of the Court used permissive language. Next, although Justice Stevens described Louisiana's system as including a party nominating process, Louisiana law does not provide for party nominations separate from the primary. *See* La. Rev. State. Ann. § 18:461 (setting forth the manner in which candidates qualify to the primary ballot); La. Rev. State. Ann. § 18:465 (describing nominating petition). Finally, in context, Justice Stevens' argument is more of a warning against another argument that the political parties have advanced, not an embrace of their view that the opinion requires a party nominating process in order for a "top two" primary to be valid. The quoted language comes immediately after a sentence in which Justice Stevens warns against a "slippery slope"

Elec. Co. v. Joiner, 522 U.S. 136, 151 n.2, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (Stevens, J., concurring in part and dissenting in part).

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approach to reviewing state primary systems. He warns against concluding that, "the only nominating options open for the States to choose without party consent are: (1) not to have primary elections; or (2) to have what the Court calls a 'nonpartisan primary'". *Cal. Demo.*, 530 U.S. at 598 n.8. Justice Stevens opposed the notion that the parties could simply "order up" the form of primary they prefer as if the state were a short order cook. *Id.* In context, it makes little sense to read the dissent as requiring precisely what Justice Stevens warned against—the authority of the parties to dictate the process despite the provisions of state law.

Under I-872's approach of using a "qualifying primary" rather than a "nominating primary," party nominations are irrelevant to the process of deciding which candidates appear on the general election ballot. The candidates who appear on the general election ballot are selected by the *voters at large*, not by the parties or by the voters as party members. The top two candidates, without regard to party affiliation, advance to the general election. I-872, § 6(1); *see also*, I-872, § 7. Since party affiliation plays no role in determining which candidates advance to the general election, the primary established by this Initiative cannot in any way be regarded as determining party nominees.[16]

The political parties make much of the fact that a candidate's party preference appears on the ballot, but this feature falls far short of making I-872's primary a device for selecting party nominees. The Initiative requires the declaration of candidacy form to include a space in which candidates for partisan office may "indicate his or her major or minor party preference, or independent status." I-872, § 9(3) (amending RCW 29A.24.030). Under I-872, this statement of party preference plays no role in determining which candidates

[16] The Democratic Party suggests that candidates selected under the new top two primary will be "political party candidates" because RCW 29A.52.116 states that "[m]ajor political party candidates for all partisan elected offices . . . must be nominated at primaries held under this chapter." Democratic Mot. at 15. RCW 29A.52.116 was enacted in 2004 as a part of the Montana primary system, which clearly was a party nominating system. The quoted language is clearly inconsistent with the system established in I-872, and should be regarded as obsolete. RCW 42.17.510(1), requiring sponsors of public advertising concerning a candidate to clearly identify the candidate's political party, also dates back well before the enactment of I-872. This statute is still enforceable because it is not directly contradictory to I-872, but neither can it serve as evidence that candidates are "nominees" of political parties.

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advance to the general election. The candidates with the two highest vote totals will qualify for the general election, without reference to party preference. The optional statement of political preference is provided solely to the voters as one possibly relevant piece of information about the candidate. A statement by the *candidate* as to his or her own preferences, provided as information to the voters, does not equate with a statement that the candidate has been nominated, endorsed, or supported by any political party, and no reasonable voter would believe otherwise.

Moreover, nothing prevents political parties from nominating candidates. They may certainly do so if they choose. But what the political parties seek, and what the State need not afford them, is a right to gain a place on the general election ballot for their nominees. They can point to no authority establishing that political party nominations *must*, as opposed to merely *may*, be used to determine which candidates appear on the general election ballot. Indeed, case law clearly establishes that while political parties have a right to a reasonable opportunity for their candidates to appear on the general election ballot, they have no absolute right for them to actually do so. *Munro v. Socialist Workers Party*, 479 U.S. at 193 (states may condition general election ballot access upon a showing of a modicum of public support). "We think that the State can properly reserve the general election ballot 'for major struggles,' . . . by conditioning access to that ballot on a showing of a modicum of voter support." *Id.* at 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)).

Washington's voters have clearly decided that the "major struggles" to reserve for the general election ballot are those between the two candidates garnering the strongest support, regardless of party, rather than among those candidates nominated by political parties. So long as the system provides a reasonable opportunity to the political parties through which their candidates can enter the competition for voter support, their rights are held intact.

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The primary established by I-872 is a "qualifying primary," through which the voters determine which candidates advance to the general election without regard to party affiliation, and for this reason, the I-872 primary does not constitute a party nominating primary. Washington's voters have clearly decided on a system in which voters winnow the field of possible candidates themselves, rather than to assign that role to the political parties. There is no reason why they cannot make this choice.

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

The United States Supreme Court has explicitly rejected the notion that a political party has an unconditional right to "nominate" a candidate and then to demand that this candidate appear on the general election ballot. A party's right to make its own nominating decisions does not mean, "that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." *Timmons v. Twin Cities Area New Party*, 520 U.S. at 359. The Court noted several reasons why a party's choice might not be permitted to appear on the ballot, including ineligibility, unwillingness, or selection by another party. *Id.* In the context of I-872 we can add another possibility: the candidate might be rejected by the voters. Of all the reasons that justify excluding a candidate from the general election ballot, this may ultimately be the best one, particularly where the party's choice of candidate receives unfettered access to a primary at which all voters are permitted to participate.

The Republican Party argument is built upon a very broad interpretation of the parties' asserted "right to nominate," claiming that the State has "stripped" the parties of this right if the State fails to provide some mechanism on the ballot to reflect the results of the party nomination process. Republican Mot. at 16-19. The Libertarian Party offers a somewhat more cryptic version of the same argument, concentrating on its desire to nominate candidates by convention and suggesting that as a smaller party, the Libertarians would be

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injured by the implementation of I-872 to a greater extent than the two larger parties. Libertarian Party Mot. ("Libertarian Mot.") at 9-12.[17] The Democratic Party argues, like the other two parties, for a constitutional "right to nominate" candidates for public office, and suggests that a "top two" primary would harm parties by favoring "rogue" and "raider" candidates not preferred by the parties. Democratic Mot. at 17-19.

Neither *Cal. Demo.* nor any of the other cases cited by the parties establishes a "right to nominate" in the sense of a right to (1) select the party's favored candidate for each office and (2) expect the State to accommodate that choice either by placing the favored candidates on the general election ballot or by excluding disfavored "competing" candidates from the primary ballot. Their analysis suggests that all three parties are hopelessly stuck "in the box" of assuming that elections are all about choosing from among the "nominees" of political parties, with potential competition silenced or marginalized.

The case law teaches that where party nomination is the organizing principle of a state's election system, the state cannot impose severe and unwanted burdens on the process of selecting each party's "standard bearers." The courts found that, by forcing the parties to accept the participation of non-members and "crossover" voters in nominating their candidates, Washington's blanket primary violated the parties' rights. However, the case law does not establish that party nomination must be the organizing principle of a state's election system. The most common example of this principle is the concept of a *nonpartisan office*,

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[17] The argument that I-872 harms the rights of minor parties is discussed in Issue No. 5, below. Two side points bear additional discussion. First, the Libertarians incorrectly suggest that by adopting rules to implement the Initiative, the Secretary of State is attempting to "repeal" a statute. Libertarian Mot. at 11. The Secretary of State does not assert such authority. The statute permitting minor parties to nominate candidates by convention, and to have these candidates appear on the general election ballot, is directly inconsistent with the "top two" primary established in the Initiative. Thus, the earlier statute is impliedly amended (though it may still have some force as it relates to presidential nominations). The Libertarians also assert "judicial estoppel" against the Secretary of State, suggesting that the State is obligated not to take a different position than that taken in prior litigation, citing, *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). Libertarian Mot. at 12. *Rissetto* (whose facts are very different from those presented here) does not preclude the state from asserting that a statute previously in force has been limited or superseded by the enactment of a later statute on the same subject.

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in which officers are selected without reference to their party affiliation. The political parties have never seriously argued that making an office nonpartisan is unconstitutional because it denies the parties the "right to nominate" candidates for such offices.[18]

The nonpartisan office system is the clear model for the "top two" primary established by Initiative 872, and the Initiative uses the same statutory language to describe how candidates will qualify for the general election ballot for both nonpartisan and for partisan (partisan in the sense adopted by the Initiative) offices. I-872, § 6, amending RCW 29A.36.170. The question then becomes whether, merely by allowing candidates to state an optional political party preference on the ballot for certain offices, the parties' asserted "right to nominate" fully attaches to those offices.

The answer is surely no. Unlike the Montana primary system, or the blanket primary, Initiative 872 in no way uses party affiliation as an organizing principle for narrowing the field of candidates for the general election ballot. The winnowing of candidates occurs without reference to party affiliation, and party preference is provided merely as additional information to voters in both the primary and general elections. I-872, § 7(3). Thus, the two candidates qualifying for the general election for an office are in no sense the "nominees" of any political party.

This point could be illustrated by the following model. Assume that the following five candidates have filed for an office under Washington's new system:

Candidate A, Independent
Candidate B, Independent
Candidate C, Republican
Candidate D, Republican
Candidate E, Democratic

[18] Washington law places no restrictions on the right of a political party to support or endorse candidates for nonpartisan office, or on the right of a candidate for nonpartisan office to publicly identify party preference. However, the ballot does not formally reflect the party preference of a candidate for nonpartisan office. RCW 29A.52.210-.240.

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Assume further that the Republican Party has, by a convention or some other internal process, selected Candidate C as its preferred candidate for the office, while the Democratic Party has endorsed Candidate E. Through the internal process each party has selected, the "right to nominate" of each party has been fully satisfied. Washington law in no way limits or burdens the right of any party to use such processes. In the primary, Candidate C could be described as the "nominee" of the Republican Party and Candidate E as the "nominee" of the Democratic Party, because the parties have so declared (with no interference or involvement by the State). Party nominee status may certainly affect the politics of the campaign, but it plays no part in the way the ballot is constructed, or in the way the election is conducted.

Suppose the top two vote-getters in the primary are A and B, both Independent candidates, so that these two candidates will appear on the general election ballot. Does this situation violate the "rights" of the Republican and Democratic parties to have their "nominees" on the ballot? No, they have fully exercised their "nomination" right, and may continue to exercise their rights of free speech and freedom of assembly in the general election, by supporting A or B or by devoting their energies to other offices.

In the alternative, suppose the top two vote-getters in the primary are C and D, both of whom have stated a party preference of "Republican." Are C and D *both* "Republican nominees" in the general election? No, unless the party chooses to make them so. The situation is precisely the same as it would be if two well-known Republicans were the finalists for a non-partisan office, such as state superintendent of public instruction or mayor of a city. The situation is politically interesting, both for Republicans and for Democrats (who have no standard bearer in such an election), but this does not make it unconstitutional.

Even if the two finalists are C and E, a Republican and a Democrat, both favored by their parties, they are the "nominees" of the parties because the parties made them so, not because they won the primary and advanced to the general election. The system is open to full participation by all parties, and all parties are legally treated exactly the same.

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Thus, it is hard to imagine that a "top two" system must, as a matter of constitutional law, accommodate the asserted "right," for instance, of the Republicans in the hypothetical case above, to select Candidate C for the office in question *and to exclude Candidate D from the primary ballot, or at least to force D to choose a party preference other than Republican.* If C and D are in fact preferred by the Republican Party, do they not both have the right to say so publicly, and to have this fact published in an open public forum such as the ballot or the voters' pamphlet? The give-and-take of the campaign provides ample opportunity for each political party to express its preference, if it chooses to do so.

The model of the nonpartisan primary shows that states need not organize their elections around party nominations. Yet, the political parties here suggest that even the faintest whiff of state recognition of the party preference of candidates triggers the parties' right to commandeer the election process and reduce the State's general election to a choice among candidates selected by the parties. None of the authorities they cite support such a view.

3. If the primary system under Initiative 872 nominates political party candidates for public office, Initiative 872 does not violate the First Amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees.

The short answer to Issue No. 3, of course, is that it is based upon an incorrect premise: I-872 does not, in fact, nominate political party candidates for public office, as discussed above. However, if the Court found that the existence of a candidate's option to express a political party preference on the ballot, no matter how tangential to the operation of the election system, were sufficient to render the "top two" primary a party nomination system, that would indeed trigger a need to respect the associational interests of the political parties.[19]

[19] It would not necessarily follow that I-872 is unconstitutional in its entirety, of course, as discussed below.

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The points raised by the political parties on this issue apply, of course, only if the Court first found that I-872 constituted a "party nomination" system. Without such a finding, the Democratic Party's arguments about "crossover" voting (Democratic Mot. at 19-20) are simply irrelevant, as are the Libertarians' complaints about State interference with party membership (Libertarian Mot. at 12-13), and the Republican Party's assertions that I-872 interferes with their right to "perform [the] functions inherent in a political party" (Republican Mot. at 20).[20]

4. Washington's filing statute does not impose forced association of political parties with candidates in violation of the parties' First Amendment associational rights.

Again, the political parties insist on viewing all elections through the lens of the "traditional" U.S. election system, in which party members nominate candidates (whether through caucus and convention or through primaries), and these party candidates then compete (along with independent candidates in some cases) in the general election. The parties apparently refuse to accept any other way of organizing an election. The Republican Party argues that the qualifying primary violates the party's First Amendment associational rights by compelling forced association with "any candidate who seeks to appropriate the Republican Party's name."[21] Republican Mot. at 22. The Libertarian Party asserts that its name is a registered trademark, and that no one can claim to represent the Party without

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[20] It is unclear what point the Republicans are trying to make with their reference to the Presidential nominating process or to the language in Washington's State Constitution (article II, sec. 15), which gives political parties a role in choosing appointed replacements to fill certain partisan offices when a mid-term vacancy occurs. As noted elsewhere, Initiative 872 does not purport to change the way Washington participates in the nomination of candidates for President, nor does the Initiative purport to alter the constitutionally assigned role of the parties in filling mid-term vacancies. The fact that the political parties play a special role in filling vacancies by appointment in certain circumstances does not mean that the State must also grant parties a central role in nominating candidates for all partisan offices.

[21] The Initiative allows a candidate to indicate a "party preference" without specifying whether the "preference" relates to a specific organized party, a newly-created organization, or even a generic political philosophy. I-872, § 9(3), amending RCW 29A.24.030. It seems unlikely that the two largest parties could assert "ownership" of the generic terms "Republican" and "Democratic," but these are questions to be resolved as I-872 is applied.

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being a member. Libertarian Mot. at 14-15. The Democratic Party asserts another version of "brand name" control, suggesting that the very expression of a candidate of a preference such as "Democratic" forces an unwanted association between that candidate and the organized Democratic Party. Democratic Mot. at 21.[22]

The determinative question regarding "forced association" is not whether a potential candidate can indicate a party preference independent of the party's nominating process. Forced association relates to whether the State may force a party to nominate an unwanted candidate, or may force the party to admit unwanted non-members to the candidate selection process. As noted above, Initiative 872 does neither. In fact, by making party nominations an entirely private process, left to determination by party rules and policies, the State is far less intrusive than those states that require parties to nominate by primary, for instance, even if the parties would prefer to nominate by convention.

In this case, the parties seek relief beyond protecting their rights to nominate candidates. They wish to exclude all other candidates on the primary ballot from using similar party preferences. The implication of their argument is that candidates for public offices who do not receive the party's nomination should, as a matter of constitutional law, be restrained from revealing their political party preferences on the ballot.

The Supreme Court has recognized that a free and open debate on the qualifications of candidates is "integral to the operation of the system of government established by our Constitution," and that burdens on candidate access to the ballot directly burden the voters' ability to voice preferences. *Duke v. Massey*, 87 F.3d 1226, 1233 (11th Cir. 1996) (citing *Buckley v. Valeo*, 424 U.S. 1, 14, 94, 96 S. Ct. 612, 623, 670-71, 46 L. Ed. 2d 659 (1976)).

In *Duke*, the Eleventh Circuit construed as constitutional a Georgia state statute explicitly granting veto authority to the presidential candidate selection committee

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[22] There are no reported appellate cases in which parties asserted a general right to restrain citizens from publicly identifying themselves as adherents of the party.

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(Committee) for the Republican Party. The Committee voted to exclude Duke from the Republican presidential primary ballot. The candidate Duke and voters sued to invalidate the state law on the grounds that it violated the First and Fourteenth Amendment rights of association. Duke contended that, because the statute grants the Committee "unfettered discretion" to grant or deny ballot access, it is unconstitutional in that it allows the Committee members to exclude candidates based on the content of their speech and infringed his right to freedom of association. Had Duke prevailed, the Georgia Republican Party may have been forced to accept Duke as their nominee. The Court disagreed with Duke, and found that Georgia's statute struck a reasonable balance between the rights of candidates and the rights of political parties.

The *Duke* case does not stand for the proposition that a party has a broad constitutional right to restrict candidates for office from using the party's name. First, in *Duke*, the rights afforded were statutory in nature, and the Court did not reach the question whether Georgia might have been constitutionally compelled to exclude Duke from the ballot. Second, *Duke* involved the party's nomination for the office of president, a quintessential party nomination process which is national in scope and largely beyond the regulatory powers of the states. Third, the question in *Duke* was whether a particular candidate could be considered a Republican for the purpose of allowing him to compete for the nomination of that party. By contrast, I-872 does not involve the selection of party nominees for public office. Since no party nomination is involved, there is no "association" between the party and any candidate for office, except when the party voluntarily creates such an association.

5. Initiative 872's limitation of access to the general election ballot to only the top two vote-getters in the primary for partisan office does not unconstitutionally limit ballot access for minor political parties.

Initiative 872 provides *all* candidates with virtually automatic access to a ballot through which those candidates can campaign among the entire pool of registered voters.

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This automatic access to compete for the favor of *all* voters—not merely those voters willing to confine themselves to the choices offered on a ballot dedicated to a specific party—fully satisfies the right of all candidates to reasonable ballot access. Whether such candidates advance from that point is determined by their success in winning the support of the voters, not upon any unconstitutional restriction on ballot access. Accordingly, I-872's limitation of access to the general election ballot to only two candidates does not unconstitutionally limit ballot access for any candidate—whether that candidate's preference is for a major party, a minor party, or independent status.

This conclusion flows from the fundamentally different nature of the top-two primary as a vehicle for electing candidates without regard to party nomination. It also finds direct support in a prior decision in which the United States Supreme Court considered Washington's prior blanket primary. In *Munro v. Socialist Workers Party*, the Court rejected a challenge by a minor party to the requirement under Washington's prior blanket primary that a candidate garner at least 1% of the total votes cast (in addition to more votes than any other candidate of that party) in order to advance to the general election. *Id.*, 479 U.S. at 191.

The Court noted that the blanket primary was fundamentally different than primaries in which voters were restricted to ballots containing only the candidates of a single party, in this critical respect. The Court observed, "[b]ecause Washington provides a 'blanket primary,' minor party candidates can campaign among the entire pool of registered voters." *Id.* at 197. As the Court further noted, "To be sure, candidates must demonstrate, through their ability to secure votes at the primary election, that they enjoy a modicum of community support in order to advance to the general election. But requiring candidates to demonstrate such support is precisely what we have held States are permitted to do." *Id.* at 197-98. Since every voter at the primary is free to cast his or vote for any candidate, providing access to that ballot permits the candidate to compete for support among all voters and fully satisfies their constitutional right to ballot access. *Id.* at 198 (noting that "every supporter of the Party

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in the State is free to cast his or her ballot for the Party's candidates.") The candidate's challenge at that point is to earn the voters' support, not to compete on a separate playing field.

Reported cases regarding ballot access traditionally involve claims very different from those asserted in this case. Generally, the argument in a ballot access case concerns a claim by a minor party or independent candidate that a state has established requirements that are too stringent for a candidate to appear on a ballot, even if that candidate can prove a modicum of public support. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (concerning state law requirements faced by independent presidential candidate to appear on the ballot); *see also, Libertarian Party of Washington v. Munro*, 31 F.3d 759, 765 (9th Cir. 1994) (upholding Washington's law on minor party ballot access). In such cases, the concern is the degree to which a ballot access law limits "the field of candidates from which voters might choose." *Anderson*, 460 U.S. at 786.

This is not a concern with regard to Initiative 872, which treats major party candidates and minor party candidates the same. All candidates appear on the primary ballot, where they compete for the support of all voters—not merely of voters affiliated with a single party or willing to accept a ballot limited to candidates affiliated with a single party. I-872, § 5 (amending RCW 29A.04.127) ("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"). The Initiative contains no threshold requirement for appearing on the primary ballot, other than filing a declaration of candidacy and paying the applicable fee. I-872, § 9 (amending RCW 29A.24.030) (describing declaration of candidacy). Under I-872, candidates who express a preference for a minor party compete in precisely the same way as candidates who express a preference for a major party, or no preference at all. "The primary ballot would include all candidates filing for the office, including both major party and minor party candidates and independents. Voters would be

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permitted to vote for any candidate for any office, and would not be limited to a single party." Explanatory Statement for Initiative 872, Voters Pamphlet 11 (2004), attached as Ex. A to James K. Pharris Declaration.[23]

The political parties can scarcely argue that a system that treats all candidates the same discriminates against any of them. Under I-872, all candidates appear on the primary ballot and compete among all the voters. There is no difference in this regard between candidates who express a preference for a major party, a minor party, or no party at all. Any general expectation as to how certain candidates will fare when seeking voter support is beside the point; the constitution may guarantee a candidate a right to a reasonable opportunity to appear on the ballot, but it does not guarantee him or her a right to success once presented there.[24]

In this regard, it is important to reflect on the fundamental difference that Initiative 872 makes as to the role of the primary in the overall electoral process. Primaries are often thought of as a mechanism by which the field of candidates is narrowed for the general election by selecting one candidate from each party to advance. By adopting I-872, Washington voters chose a distinctly different approach. Under I-872, all candidates compete in a manner that makes the primary a literal "first stage" in an electoral process. The voters no longer winnow candidates based upon party affiliation, but upon which candidates garner the most support without regard to party. I-872 establishes a system that in important ways bears more resemblance to a general election followed by a runoff than it

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[23] While I-872 did not repeal provisions of the 2004 Montana Primary Act that treated minor parties differently, I-872 clearly supplanted such inconsistent provisions. *See* footnote 14, above.

[24] It is no answer to suggest that voter turnout may be lower at a primary. Not only is this observation speculative when the primary serves a different role with more opportunities for broad voter participation than in a single-party primary system, but it is irrelevant to constitutional analysis. In *Munro*, the Supreme Court rejected the notion that lower primary turnout provided a basis for challenging the blanket primary as it then existed. "We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election." *Munro*, 479 U.S. at 198.

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does to a traditional party primary. *See* I-872, § 5 (amending RCW 29A.04.127) (changing definition of "primary" to reflect this two-stage approach to the general election). Since all candidates compete for the support of all voters at that first round, there is no constitutionally significant difference between the ballot access afforded to any candidates based upon their party preference.

This observation also addresses the objection offered by the Plaintiff Republican Party that this system fails to guarantee access to the general election ballot to the candidate they designate as their nominee. Plaintiffs' Mot. for SJ at 25-26. The Republicans are wrong for the same reason that I-872 does not unconstitutionally deny access to the general election ballot to minor party candidates. Political parties, as a purely private process divorced from the formal mechanics of the electoral system, are perfectly free to nominate any candidates they wish. Once nominated, I-872 offers them virtually automatic access to a ballot through which they can compete for the support of all voters. They need only file a declaration of candidacy and pay the fee. I-872, § 9 (amending RCW 29A.24.030). It is true that once on that ballot the system does not guarantee that those candidates will find favor with the voters—but no candidate has a constitutional right to voter support, only to a reasonable opportunity to compete for it. Just as I-872 places all candidates on an even playing field no matter what their partisan affiliation, so too does it guarantee major party "nominees" the same right to compete for support among the full pool of all the voters as every other candidate.[25]

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[25] The Republicans contend that if more candidates express a preference for one party than another, that somehow party support might be "diluted" in a way that precludes their preferred candidate from advancing. Plaintiffs' Mot. for SJ at 26. This objection, however, fundamentally misconstrues the nature of the electoral process the voters chose. By adopting I-872, the voters rejected a party nominating model in favor of permitting them the fullest choice among candidates. Accordingly, voters who cast a vote under a top-two primary demonstrate support for a *candidate*, not a *political party*. Party support is not "diluted" in any meaningful way because the voters are called upon to choose among candidates, not parties.

Moreover, the concept of vote dilution is not relevant to this context. That concept arises in cases brought under the Voting Rights Act, in which the issue is whether a typical election standard or practice denies political opportunity on the basis of race. Even in that context, proof that the group alleged to experience vote dilution votes cohesively is a necessary element. *Thornburg v. Gingles*, 478 U.S. 30, 49-50, 106 S. Ct. 2752, 92

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I-872 "virtually guarantees . . . candidate access to a statewide ballot." *Munro*, 479 U.S. at 199. It can hardly be argued that any candidate's right to ballot access is denied because, under I-872, "they must channel their expressive activity into a campaign at the primary as opposed to the general election." *Id.* As the Court concluded, "Washington simply has not substantially burdened the 'availability of political opportunity'." *Id.* (quoting *Lubin v. Panish*, 415 U.S. 709, 716, 94 S. Ct. 1315, 39 L. Ed. 2d 702 (1974)).

B. Initiative 872 Is Severable

The Republican Party suggests that if any portion of Initiative 872 is unconstitutional, the entire Initiative must be struck down, based on the notion that the unconstitutional portions of the Initiative were the very ones the voters most wanted to enact, and that they would not have enacted the remainder without them. Republican Mot. at 26-27. The Republicans are not specific as to which portions of the Initiative are the most (or the last) susceptible to constitutional scrutiny.

In fact, both state and federal case law dictate that if only a portion of the Initiative is unconstitutional, the Court should save the remaining portions "unless the invalid provisions are unseverable and it cannot reasonably be believed that the . . . elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972), citing *Boeing Co. v. State*, 74 Wn.2d 82, 442 P.2d 970 (1968). In this regard, the presence or absence of an express "severability clause" is just one element to consider in determining the legislative intent. The federal courts will also sever laws and uphold portions where it appears that the legislative body would have preferred "half a loaf" to none at all. *See, e.g., Denver Area*

L. Ed. 2d 25 (1986). In this facial challenge to I-872, such a factual predicate may not be presumed, particularly in light of Washington's long history of permitting voters to choose from among all candidates. Were it not an established preference of Washington voters to vote for, for example, a Democrat in one race and a Republican in another, the political parties would have had no objection to the original blanket primary, much less this one. It therefore cannot be presumed that the number of candidates expressing any particular party preference has any impact on which candidates ultimately advance to the general election.

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Educ. Telecomm. Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996); *New York v. United States*, 505 U.S. 144, 122 S. Ct. 2408, 120 L. Ed. 2d 120 (1992); *Shouse v. Pierce County*, 559 F.2d 1142 (9th Cir. 1977).

In this case the portions of Initiative 872 that appears to draw the most fire are Sections 7 and 9, the provisions that permit candidates to declare their "political party preference" and provide that this information will appear on the ballot. While the State believes these provisions are well within the State's constitutional authority, a "top two" primary could still be conducted even if it were found necessary to limit the extent to which some or all candidates could state their "political party preference."

The language of the Initiative itself confirms that the voters' primary purpose in enacting Initiative 872 was to allow "the broadest possible participation in the primary election" (I-872, Section 2, quoting from *Heavey v. Chapman*, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980)) and to preserve the "right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation." I-872, § 3(3). If the Court were to find that some other detail of the statute causes constitutional problems, the Court should allow the State to adjust the specific problem found while maintaining the basic machinery of the "top two" primary. Any other result would force an unwanted election system on Washington's voters beyond any constitutional necessity to do so.

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VI. CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of Defendants and Defendant Intervenors, and deny the motions of the political parties.

DATED this _____ day of July, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participant(s): Frederick Alan Johnson, Prosecuting Attorney, PO Box 397, Cathlamet, WA 98612.

Executed this 1st day of July, 2005, at Olympia, Washington.

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