

USCA DOCKET #
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**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
CIVIL APPEALS DOCKETING STATEMENT**

<p><b>TITLE IN FULL:</b></p> <p>WASHINGTON STATE REPUBLICAN PARTY, et al.,</p> <p align="right">Plaintiffs,</p> <p>WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,</p> <p align="right">Plaintiff Intervenors,</p> <p>LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,</p> <p align="right">Plaintiff Intervenors,</p> <p align="center">v.</p> <p>DEAN LOGAN, King County Records &amp; Elections Division Manager; et al.,</p> <p align="right">Defendants,</p> <p>STATE OF WASHINGTON, et al.,</p> <p align="right">Defendant Intervenors,</p> <p>WASHINGTON STATE GRANGE,</p> <p align="right">Defendant Intervenor.</p>	<p>DISTRICT: W.D. of Washington</p> <p>JUDGE: Hon. Thomas S. Zilly</p>
	<p>DISTRICT COURT NUMBER: C05-927Z</p>
	<p>DATE NOTICE OF APPEAL FILED: July 29, 2005</p> <p>IS THIS A CROSS-APPEAL? <input type="checkbox"/> YES</p>
	<p>IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):</p> <p align="center">-None-</p>

**BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:**  
 Plaintiffs, and Plaintiff-Intervenors, challenged constitutionality of Initiative Measure 872, a statutory enactment adopted by Washington’s voters at the November 2004 general election. That initiative established a new system for conducting primary elections, known as the “top-two” primary. The district court declared that top-two election system unconstitutional on its face and immediately enjoined its implementation.

**PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:**  
 Whether district court erred in declaring Washington State’s top-two election system unconstitutional on its face and immediately enjoining its implementation.

**PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POSTJUDGMENT MOTIONS):**

**DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:**

Possibility of settlement

Likelihood that intervening precedent will control outcome of appeal

Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify):  
 Appeal from permanent injunction. A motion for expedited consideration of this appeal is likely.

Any other information relevant to the inclusion of this case in the Mediation Program

Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

**LOWER COURT INFORMATION**

JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
<input checked="" type="checkbox"/> FEDERAL QUESTION	<input checked="" type="checkbox"/> FINAL DECISION OF DISTRICT COURT	<input type="checkbox"/> DEFAULT JUDGMENT	<input type="checkbox"/> DAMAGES: SOUGHT \$ AWARDED \$
<input type="checkbox"/> DIVERSITY	<input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT	<input type="checkbox"/> DISMISSAL/JURISDICTION	<input checked="" type="checkbox"/> INJUNCTIONS:
<input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):	<input type="checkbox"/> DISMISSAL/MERITS	<input type="checkbox"/> PRELIMINARY
	<input type="checkbox"/> OTHER (SPECIFY):	<input checked="" type="checkbox"/> SUMMARY JUDGMENT	<input checked="" type="checkbox"/> PERMANENT
		<input type="checkbox"/> JUDGMENT/COURT DECISION	<input checked="" type="checkbox"/> GRANTED
		<input type="checkbox"/> JUDGMENT/JURY VERDICT	<input type="checkbox"/> DENIED
		<input type="checkbox"/> DECLARATORY JUDGMENT	<input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ AWARDED \$
		<input type="checkbox"/> JUDGMENT AS A MATTER OF LAW	<input type="checkbox"/> PENDING
		<input checked="" type="checkbox"/> OTHER (SPECIFY): Injunction against implementation of Washington State’s top-two election system as unconstitutional	<input type="checkbox"/> COSTS: \$ _____

<b>CERTIFICATION OF COUNSEL</b>	
<b>I CERTIFY THAT:</b>	
1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.	
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).	
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.	
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.	
<u>/s/ Jeffrey T. Even</u> Signature	<u>July 29, 2005</u> Date
<b>COUNSEL WHO COMPLETED THIS FORM</b>	
NAME: Jeffrey T. Even	
FIRM: Office of the Attorney General of the State of Washington	
ADDRESS: PO Box 40100, Olympia, WA 98504-0100	
E-MAIL: <a href="mailto:jeffe@atg.wa.gov">jeffe@atg.wa.gov</a>	
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<b>*THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL*</b> <b>*IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS*</b>	

**CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 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:

1. Richard Shepard ([richard@shepardlawoffice.com](mailto:richard@shepardlawoffice.com))
2. Jay Carlson ([jcarlson@prestongates.com](mailto:jcarlson@prestongates.com))
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9. James Kendrick Pharris ([jamesp@atg.wa.gov](mailto:jamesp@atg.wa.gov))

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

Executed this 29th day of July, 2005, at Olympia, Washington.

s/ Jeffrey T. Even  
WSBA #20367  
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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

REPRESENTATION STATEMENT

REPRESENTATION STATEMENT

The undersigned represent that the respective parties to this action are represented as follows:

**1. Appellants, (Intervenor-Defendants below) State of Washington, Secretary of State Sam Reed, Attorney General Rob McKenna:<sup>1</sup>**

Rob McKenna  
Attorney General

Maureen A. Hart  
Solicitor General

James K. Pharris  
Senior Assistant Attorney General

Jeffrey T. Even  
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**2. Plaintiffs, Washington State Republican Party, Christopher Vance, Bertabelle Hubka, Steve Neighbors, Brent Boger, Mary Collins, and Michael Young:**

John J. White, Jr.  
Kevin B. Hansen  
Livengood, Fitzgerald & Alskog, PLLC  
121 Third Avenue  
PO Box 908  
Kirkland, WA 98083-0908

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<sup>1</sup> Pursuant to a stipulated order, the State of Washington was substituted as a defendant for all county auditors, who were the defendants originally named in the Complaint. Accordingly, the county auditors are no longer parties for purposes of appeal, and the State is the defendant as if the State had originally been named in that capacity.



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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WASHINGTON STATE REPUBLICAN  
PARTY, et al.,

Plaintiffs,

and

WASHINGTON STATE DEMOCRATIC  
CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF  
WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

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

Defendants,

STATE OF WASHINGTON,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE,

Defendant Intervenors.

No. C05-927Z

ORDER



1 **I. Introduction**

2 On May 19, 2005, the Washington State Republican Party (the “Republican Party”)  
3 filed this action against Dean Logan, King County Records and Elections Division Manager  
4 and the Auditors of eight other counties. Complaint, docket no. 1. The Republican Party’s  
5 Complaint challenges Initiative 872 on the basis of the First and Fourteenth Amendments to  
6 the United States Constitution. The Washington State Democratic Central Committee (the  
7 “Democratic Party”) and the Washington State Libertarian Party (the “Libertarian Party”)  
8 have now intervened as Plaintiffs and also contend that Initiative 872 is unconstitutional.  
9 See docket nos. 2, 3.

10 Plaintiff Republican Party contends that Initiative 872 is unconstitutional because the  
11 Initiative prevents voters who share party affiliation from selecting their party’s nominees.  
12 The Republican Party also alleges that Initiative 872 forces the Party to be associated  
13 publicly with candidates who have not been nominated by the Party, who will alter the  
14 political message and agenda the Party seeks to advance, and who will confuse the voting  
15 public with respect to what the Party and its adherents stand for.

16 The Democratic Party contends portions of Initiative 872 are unconstitutional to the  
17 extent that they authorize the County Auditors to permit non-affiliates of the Democratic  
18 Party to participate in its nomination process, and to the extent Initiative 872 allows cross-  
19 over voting in violation of the Party’s associational rights.

20 The Libertarian Party claims that Initiative 872 is unconstitutional because it “places  
21 impermissible limits on access to the general election ballot” contrary to the United States  
22 Constitution, and allows a person to appropriate the Libertarian Party label without  
23 compliance with its nominating rules and without allowing the Party to define what the Party  
24 label means.

1 The State of Washington and the Washington State Grange (the “Grange”) have also  
2 intervened as Defendants. See Order, docket no. 30; see also Minute Entry, docket no. 45.  
3 The State of Washington and the Grange contend that Initiative 872 is constitutional.

4 This case presents a classic conflict between the rights of the voters to establish by  
5 initiative a new system for conducting primaries and general elections for partisan offices,  
6 and the rights of political parties to control the nomination of partisan candidates for elective  
7 office and to protect their rights of association. Primaries constitute a “crucial juncture” in  
8 the elective process and a “vital forum” for expressive association among voters and political  
9 parties. Clingman v. Beaver, \_\_\_ U.S. \_\_\_, 125 S. Ct. 2029, 2042 (May 23, 2005)  
10 (O’Connor, J., concurring). The voters by Initiative 872 seek to create a system “that best  
11 protects the rights of voters to make such choices, increases voter participation, and advances  
12 compelling interests of the state of Washington.” Initiative 872, Sec. 2.<sup>1</sup>

13 Plaintiffs seek to have Initiative 872 declared unconstitutional under the United States  
14 Constitution as constituting an illegal nomination process, as requiring an unconstitutional  
15 “forced association,” and for violating equal protection under the law. The recent  
16 invalidation of the Washington blanket primary forced Washington voters to choose between  
17 two strikingly different versions of a primary election. The voters were forced to choose  
18 between voter choice and party nominations, and the voters chose voter choice.

19 In considering the issues presented in this case, the Court does not begin with a clean  
20 slate. Rather, the United States Constitution and binding court precedent have created the  
21 landscape for deciding these important issues.

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25 <sup>1</sup> The Text of Initiative 872 can be found at Wash. Rev. Code. Ann. § 29A.52 (West  
26 Supp. 2005). Throughout this Order, the Court will cite to the text of Initiative 872 as  
“Initiative 872, Sec. \_\_\_”.

## 1 II. History of Washington's Primary Process

2 For over 100 years, Washington has had a partisan election system. Historically,  
 3 voters at the general election were provided a choice between representatives of each  
 4 qualifying political party. From 1890 through 1907, candidates for partisan offices were  
 5 chosen either by convention or by petition. In 1907, the Washington State Legislature  
 6 established the first direct primary system for partisan candidates, requiring political parties  
 7 to choose their representative through a public primary. See State ex rel. Wells v. Dykeman,  
 8 70 Wash. 599 (1912). In this system separate ballots were printed for each political party  
 9 and voters could only cast ballots in one party's primary.

10 Washington State's "blanket primary"<sup>2</sup> system was first established in 1935. Except

11 \_\_\_\_\_  
 12 <sup>2</sup> In a "closed" primary, only voters who register as members of a party may vote in  
 13 primaries to select that party's candidates. In an "open" primary, the voter can choose the ballot  
 14 of any party but then is limited to the candidates on that party's ballot. In a "blanket primary,"  
 15 a voter can vote for candidates of any party on the same ballot. In a "nonpartisan blanket  
 16 primary," voters can vote for anyone on the primary ballot, and the top vote-getters, regardless  
 17 of party, run against each other in the general election. See Reed v. Democratic Party of Wash.,  
 18 343 F.3d 1198, 1203 (9th Cir. 2003).

19 Currently, thirty seven states conduct some type of closed primary. Ala. Code § 17-16-  
 20 14(b); Alaska Stat. § 15.25.010; Ariz. Rev. Stat. § 16-467; Ark. Code Ann. §§ 7-7-307, 7-7-308;  
 21 Cal. Elec. Code § 2151; Colo. Rev. Stat. §§ 1-7-201, 1-2-218.5; Conn. Gen. Stat. § 9-431; Del.  
 22 Code Ann. tit. 15, § 3161; Fla. Stat. Ann. § 101.021; 10 Ill. Comp. Stat. 5/7-43(a); Ind. Code  
 23 § 3-10-1-6; Iowa Code Ann. §§ 43.41, 43.42; Kan. Stat. Ann. § 25-3301; Ky. Rev. Stat. Ann.  
 24 § 116.055; Me. Rev. Stat. Ann. tit. 21-A, § 340; Md. Code Ann., Election Law, § 8-802; Mass.  
 25 Gen. Laws Ann. ch. 53 § 37; Miss. Code Ann. § 23-15-575; Neb. Rev. Stat. § 32-912; Nev. Rev.  
 26 Stat. 293.287; N.H. Rev. Stat. Ann § 654.34(II); N.J. Stat. Ann. § 19:23-45.1; N.M. Stat. Ann.  
 § 1-12-7; N.Y. Elec. Laws § 1-104(9); N.C. Gen. Stat. § 163-59; Ohio Rev. Code Ann.  
 § 3513.19; Okla. Stat. tit. 26, § 1-104; Or. Rev. Stat. § 254.365; 25 Pa. Cons. Stat. Ann. § 2832;  
 R.I. Gen. Laws §§ 17-15-21, 17-15-24, 17-9.1-23; S.C. Code Ann. § 7-9-20; S.D. Codified Laws  
 § 12-6-26; Tenn. Code Ann. § 2-7-115; Tex. Elec. Code Ann. §§ 162.003, 162.012, 162.013;  
 Utah Code Ann. §§ 20A-3-104.5, 20A-3-202; W. Va. Code § 3-1-35; Wyo. Stat. Ann. § 22-5-  
 212.

23 Eleven states conduct open primaries. Ga. Code Ann. § 21-2-224; Haw. Rev. Stat. § 12-  
 24 31; Idaho Code §§ 34-402, 34-404, 34-904; Mich. Comp. Laws § 168.576; Minn. Stat.  
 25 § 204D.08; Mo. Rev. Stat. § 115.397; Mont. Code Ann. § 13-10-301; N.D. Cent. Code § 16.1-  
 11-22; Vt. Stat. Ann. tit. 17, § 2363; Va. Code Ann. § 24.2-530; Wis. Stat. §§ 5.37, 6.80.

26 Two states conduct so-called nonpartisan blanket primaries. Louisiana is the only state  
 other than Washington to conduct such a primary. La. Rev. Stat. Ann. §§ 18:401, 18:481,

1 for presidential primaries,<sup>3</sup> all properly registered voters could vote for their choice at any  
2 primary for “any candidate for each office, regardless of political affiliation and without a  
3 declaration of political faith or adherence on the part of the voter.” Wash. Rev. Code Ann.  
4 § 29.18.200 (West 2003). As a result, each voter received a ballot listing all candidates of all  
5 parties and could vote for any candidate as opposed to getting an exclusively Republican,  
6 Democratic, or other party ballot. Under the blanket primary system, voters could choose  
7 candidates from some parties for some positions, others for other positions, and engage in  
8 cross-over voting or “ticket splitting.” Wash. Rev. Code Ann. § 29.18.200 (West 2003).  
9 Under the blanket primary system, minor parties selected their nominees at conventions prior  
10 to the date of the primary. Wash. Rev. Code Ann. § 29.24.020 (West 2003). These  
11 nominees would be placed on the ballot for the primary election. To be placed on the  
12 general election ballot, under the prior blanket primary procedure, minor party nominees had  
13 to receive a number of votes equal to at least one percent of the total number cast for all  
14 candidates for that position. Wash. Rev. Code Ann. § 29.30.095 (West 2003).<sup>4</sup>

15 In 2000, the United States Supreme Court held that California’s blanket primary,  
16 similar in many respects to Washington’s blanket primary, was unconstitutional. California  
17 Democratic Party v. Jones, 530 U.S. 567 (2000). The Supreme Court held that the California  
18 blanket primary placed a severe burden on political parties’ right of association, was not

19 \_\_\_\_\_  
20 18:482.

21 All states but Louisiana and Washington limit voters to voting in only one political  
party’s primary.

22 <sup>3</sup> None of the primary systems addressed in this Order affect Presidential and Vice  
23 Presidential primaries. These primaries are addressed by a separate system found in Wash. Rev.  
Code § 29A.56.010, et seq.

24 <sup>4</sup> A “major political party” [is] a political party of which at least one nominee for  
25 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  
26 year.” Wash. Rev. Code § 29A.04.086. A minor political party is “a political organization other  
than a major political party.” Wash. Rev. Code § 29A.04.097.

1 narrowly tailored to achieve a compelling state interest, and was therefore unconstitutional.  
2 Id. at 582-85.

3 In 2003, relying on Jones, the Ninth Circuit Court of Appeals held that Washington's  
4 blanket primary system was unconstitutional in Democratic Party of Washington v. Reed,  
5 343 F.3d 1198 (2003), cert. denied, 540 U.S. 1213 (2004). The Ninth Circuit stated that  
6 Washington's primary system was "materially indistinguishable" from the invalidated  
7 California system. Id. at 1203. As a result, Washington's blanket primary that had been  
8 used for over sixty-five years was held unconstitutional and the State was legally enjoined  
9 from "conducting the challenged primary in future elections." Amended Judgment,  
10 Washington State Democratic Party v. Reed, No. C00-5419FDB (W.D. Wash. May 13,  
11 2004).

12 On January 8, 2004, the Grange filed Initiative 872 with the Secretary of State (the  
13 "Secretary").<sup>5</sup> Dembowski Decl., docket nos. 68 and 69, Ex. F. Initiative 872 proposed a  
14 "top two" primary system in which a properly registered voter has "the right to cast a vote  
15 for any candidate for each office without any limitation based on party preference or  
16 affiliation of either the voter or the candidate." Initiative 872, Sec. 5.<sup>6</sup> Initiative 872 defines

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17  
18 <sup>5</sup> The Washington Constitution was amended in 1912 to allow direct government by the  
19 people in the form of popularly enacted initiatives and referendums on laws passed by the  
20 Legislature. Wash. Const. art. II, § 1 ("the people reserve to themselves the power to propose  
21 bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also  
22 reserve power, at their own option, to approve or reject at the polls any act, item, section, or part  
23 of any bill, act, or law passed by the legislature"). The initiative process allows the electorate  
24 to petition to place proposed legislation on the ballot. If the initiative's supporters timely file  
25 a petition with signatures of legal voters equaling eight percent of the votes cast for the office  
26 of governor at the last regular gubernatorial election, the proposed legislation is placed on the  
ballot. Wash. Rev. Code §§ 29A.72.150, 29A.72.250. Voters are then able to directly vote on  
the proposed legislation at the next general election or special election called by the Legislature.  
Since the State adopted the initiative process in 1912, voters have approved sixty-one statewide  
initiatives.

<sup>6</sup> The primary system proposed by Initiative 872 has been referred to as the "modified  
blanket primary," the "People's Choice Initiative," and the "top two" primary. For purposes of  
this Order the Court will refer to the primary system under attack in this litigation as simply  
Initiative 872.

1 a partisan primary as a “procedure for winnowing candidates for public office to a final list  
2 of two as part of a special or general election.” Id.

3 While sponsors of Initiative 872 were gathering signatures,<sup>7</sup> the Washington State  
4 Legislature was faced with the task of developing a new primary system in Washington State  
5 after the Reed decision invalidated the blanket primary. On March 10, 2004, the Legislature  
6 enacted a bill which would have provided for two alternative primary systems. E.S.B. 6453,  
7 58th Leg., 2004 Reg. Sess. (Wash. 2004). Part I of the bill provided for a “Louisiana” style  
8 primary system, commonly referred to as the “top two” approach. See id., Part I. Under the  
9 top two approach, a registered voter would be permitted to cast a vote for each office  
10 appearing on the ballot without any limitation based on the party preference of either the  
11 voter or the candidate. Id., § 5. The top two candidates would then proceed to the general  
12 election.<sup>8</sup>

13 Aware that the political parties would probably challenge the constitutionality of the  
14 top two system, the Legislature also enacted a “backup plan” to take effect if the top two  
15 system was invalidated. Id., Part II. Under this alternative, also referred to as the “Montana  
16 system,” candidates qualify for the general election through a process in which voters are not  
17 required to register with a party, but choose among candidates of a single party. Their  
18 choice of the ballot selected is not public. Under this backup plan, major political party  
19 candidates for partisan offices would be nominated by way of a primary election in which a  
20 voter would have to choose a political party’s ballot and could only vote for candidates on

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22  
23 <sup>7</sup> To begin the process of placing a proposed initiative on the ballot, a legal voter must  
24 file with the Secretary a legible copy of the proposed measure accompanied by an affidavit that  
25 the proposer is a legal voter and the requisite filing fee. Wash. Rev. Code § 29A.72.010. This  
26 filing must be made within ten months of the date of the election at which the measure is to be  
submitted to a vote. Wash. Rev. Code § 29A.72.030.

<sup>8</sup> The top two system passed by the Legislature is similar, although not identical, to the  
primary system proposed in Initiative 872.

1 that party's ballot. Id., § 126.<sup>9</sup> Under the Montana system, minor party candidates would be  
2 nominated by a party nominating convention, Wash. Rev. Code § 29A.20.121(1), and the  
3 minor party candidate selected would be placed on the ballot for the general election. Wash.  
4 Rev. Code §§ 29A.20.121; 29A.20.141. Minor party candidates will appear only on the  
5 general election ballot under the Montana system.

6 On April 1, 2004, Governor Gary Locke vetoed the top two approach. E.S.B. 6453,  
7 58th Leg., 2004 Reg. Sess. (Wash. 2004) (Governor's Veto Message). As a result, the  
8 Montana primary system took effect and was used by Washington voters in the primary  
9 election in the fall of 2004.

10 On November 2, 2004, Initiative 872 was approved by the voters by almost  
11 60 percent. Dembowksi Decl., docket nos. 68 and 69, Ex. J (Washington State Election  
12 Measures Results). Initiative 872 became effective on December 2, 2004, thirty days after it  
13 was approved in the 2004 general election. Wash. Const. art. II, § 1.<sup>10</sup>

14 Initiative 872 provides the process for the selection of candidates for partisan office in  
15 Washington. A "major political party" means a political party of which at least one nominee  
16 for President, Vice President, United States Senator, or a statewide office received at least  
17 five percent of the total vote cast at the last preceding state general election in an even  
18 numbered year. Wash. Rev. Code § 29A.04.086. A "minor political party" is any political  
19 organization other than a major political party. Wash. Rev. Code § 29A.04.097.

20 Initiative 872 did not explicitly amend or repeal any sections of the Revised Code of  
21 Washington regulating the nomination of minor party candidates. Initiative 872, Sec. 17;  
22 Wash. Rev. Code §§ 29A.20.110 - 29A.20.201. The party nominating procedures

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23  
24 <sup>9</sup> Under the categories of primary the Court has identified, the Montana primary system  
can be categorized as an open primary.

25 <sup>10</sup> Initiative 872 also does not amend the statutes governing how the special primary for  
26 the office of U.S. President will be conducted. The Presidential election process, involving  
nominations by the national parties, is not subject to state-by-state regulation.

1 established by the Montana primary system were not in existence at the time Initiative 872  
2 was filed, making it impossible for the Initiative to have repealed or otherwise addressed  
3 these procedures. In addition, Initiative 872 did not refer to, repeal, or amend related  
4 sections of the Revised Code of Washington in existence at the time of the filing of the  
5 Initiative in January 2004. These provisions, which were part of the blanket primary, see  
6 Wash. Rev. Code Ann. §§ 29.24.020, 29.30.005, 29.30.095 (West 2003), provided in  
7 substance that minor party candidates would be nominated at party conventions. If a minor  
8 party candidate received one percent of the vote in the primary, that candidate would appear  
9 on the general election ballot.<sup>11</sup>

10 In the 2005 legislative session, the Secretary sponsored legislation in both the State  
11 House and the Senate to “implement” Initiative 872. See H.B. 1750, 59th Leg., 2005 Reg.  
12 Sess. (Wash. 2005); S.B. 5745, 59th Leg., 2005 Reg. Sess. (Wash. 2005). These bills would  
13 have eliminated minor party nominating conventions, other than for President and Vice  
14 President. H.B. 1750, Sec. 9. The Legislature did not enact any legislation dealing with  
15 Initiative 872 in 2005.<sup>12</sup>

16 On May 18, 2005, the Secretary adopted emergency regulations relating to primary  
17 elections in Washington. One of these regulations, Wash. Admin. Code § 434-215-015,  
18 purports to abolish the minor party convention rights that were not addressed in the text of  
19

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20 <sup>11</sup> The Reed court decision did not address the provisions relating to minor party  
21 candidates.

22 <sup>12</sup> E-mail correspondence from individuals within the state government indicates that at  
23 least some believed any changes made to Initiative 872 would have to be made by a two-thirds  
24 majority vote of the Legislature. Hansen Decl., docket no. 64, Ex. 3 at 22-23 (E-mail from Rep.  
25 Kathy Haigh to Bob Terwilliger). Another internal e-mail indicates that some state legislators  
26 believed that any legislation that would change the minor party nominating procedure would also  
have to pass by a two-thirds majority. Id. at 26 (E-mail from John Pearson to Katie Blinn).  
Article II, Section 41, of the Washington State Constitution provides that no act, law or bill  
enacted by a majority of voters can be amended or repealed within two years of its enactment  
except by a two-thirds vote of the Legislature. Wash. Const. art. II, § 41.



1 Initiative 872 or by the Washington Legislature during 2004. Pharris Decl., docket no. 66,  
2 Ex. C (New Section: WAC 434-215-015).

3 **III. Issues Presented and Relief Requested**

4 Pursuant to the Court's request, the parties have stipulated that the following legal  
5 issues should be addressed at this time.

- 6 1. Does the primary system established by Initiative 872 nominate political party  
7 candidates for public office?
- 8 2. If the primary system under Initiative 872 does not nominate political party  
9 candidates for public office, does each political party have the right to select for  
10 itself the only candidate who will be associated with it on either a primary or  
11 general election ballot?
- 12 3. If the primary system under Initiative 872 nominates political party candidates  
13 for public office, does Initiative 872 violate the First Amendment by compelling  
14 a political party to associate with unaffiliated voters and members of other  
15 political parties in the selection of its nominees?
- 16 4. Does Washington's filing statute impose forced association of political parties  
17 with candidates in violation of the parties' First Amendment associational  
18 rights?
- 19 5. Does Initiative 872's limitation of access to the general election ballot to only  
20 the top two vote-getters in the primary for partisan office unconstitutionally  
21 limit ballot access for minor political parties?

22 See Stipulated Statement of Legal Issues, docket no. 40. In addition, the parties have briefed  
23 the issue of whether Initiative 872 is severable if the Court finds portions of the Initiative  
24 unconstitutional. Plaintiffs Republican Party, Democratic Party and Libertarian Party move  
25 the Court for Summary Judgment in their facial challenge to Initiative 872.

1 Plaintiff Republican Party asks the Court for a ruling as a matter of law that Initiative  
2 872 and Washington’s filing statutes, Wash. Rev. Code §§ 29A.24.030, 29A.24.031, impose  
3 an unconstitutional burden on First Amendment rights. Plaintiff moves for a permanent  
4 injunction preventing any partisan election pursuant to Initiative 872, or the identification of  
5 any candidate as “Republican,” if not authorized by the Republican Party.

6 Plaintiff Democratic Party asks the Court for a ruling as a matter of law that Initiative  
7 872 burdens First Amendment rights by (1) allowing any candidate, regardless of their party  
8 affiliation or relationship to the party, to self-identify as a member of a political party and to  
9 appear on the primary and general election ballots as a candidate for that party; and (2)  
10 allowing any voter, regardless of party affiliation, to vote for any political party candidate in  
11 the primary election. Plaintiff moves for a permanent injunction preventing the State of  
12 Washington or any political subdivision of the State from enforcing or implementing Initiative  
13 872 at any primary or general election.

14 Plaintiff Libertarian Party asks the Court for a ruling as a matter of law that Initiative  
15 872 and Washington’s filing statutes, Wash. Rev. Code §§ 29A.24.030, 29A.24.031, impose  
16 an unconstitutional burden on First Amendment rights and unconstitutionally limit minor  
17 party ballot access. Plaintiff moves for a permanent injunction preventing a partisan election  
18 under Initiative 872; the identification as “Libertarian” of any unauthorized candidate; and  
19 any election which requires more than a “modicum of support” to secure general election  
20 ballot access.

21 The State of Washington and the Grange oppose Plaintiffs’ Motions for Summary  
22 Judgment and the relief requested by the Plaintiffs. The Defendants contend Initiative 872  
23 does not impose a burden on First Amendment associational rights, and request the Court  
24 enter an Order and Judgment in their favor.

1 **IV. Supplemental Request**

2 In addition to the issues addressed in opening briefs, the Republican Party submitted a  
3 Supplement to its Motion for Summary Judgment, docket no. 63. In the Supplement, the  
4 Republican Party requests a finding that Initiative 872 is unconstitutional because it violates  
5 the right to equal protection under the law, in violation of the United States Constitution. The  
6 Republican Party contends that “Initiative 872 violates the Equal Protection clause by  
7 allowing minor political parties to nominate candidates and control their message, but denying  
8 the same right to the [major political parties.]” See Republican Supplement, docket no. 63,  
9 at 4.

10 The Republican Party’s Supplement was filed on June 23, 2005, after the deadline for  
11 Opening Briefs. The State of Washington has moved to strike the Republican Party’s  
12 Supplement, see Motion to Strike, docket no. 65, and argues the Supplemental filing is  
13 untimely and prejudicial. Id. at 10. The Republican Party argues that the Court should  
14 consider its additional argument and notes that its equal protection argument was raised in its  
15 Complaint, docket no. 1, at ¶¶ 22-23, and previous Motion for Preliminary Injunction, docket  
16 no. 7, at 10.

17 The Court finds that the Republican’s Supplement to Summary Judgment Motion,  
18 docket no. 63, provided adequate notice to the Defendant State of Washington and the  
19 Defendant Washington State Grange. The Supplement raises important issues of equal  
20 protection related to the treatment of minor parties under Initiative 872.

21 The Court DENIES the Motion to Strike, docket no. 65.

22 **V. Legal Standard**

23 This is a facial challenge to Initiative 872, which Plaintiffs allege burdens the exercise  
24 of their First Amendment rights. All parties agree that this facial challenge is ripe for  
25  
26

1 adjudication,<sup>13</sup> and that the alleged “threat” to the political parties’ associational rights is more  
2 than hypothetical. The allegation of imminent injury to established First Amendment rights  
3 warrants intervention by the federal courts. See Buckley v. Valeo, 424 U.S. 1, 117 (1976).

4 Our constitutional system does not authorize the judiciary to sit as a superlegislature to  
5 judge the wisdom or desirability of legislative or initiative policy decisions. See Heller v.  
6 Doe, 509 U.S. 312, 319 (1993). Rather, courts must give state statutes and lawfully enacted  
7 initiatives a strong presumption of validity. See Broadrick v. Oklahoma, 413 U.S. 601, 611-  
8 13 (1973). The presumption of validity is especially strong in this case because Plaintiffs are  
9 making a facial challenge to Initiative 872. See United States v. Salerno, 481 U.S. 739, 745  
10 (1987).

11 In a facial challenge, there is no analytic scheme whereby the political parties must  
12 submit evidence establishing that they have been harmed. See Reed, 343 F.3d at 1203.  
13 Rather, the Court evaluates the challenged statute on its face, in light of the constitutional  
14 burdens or infringements alleged. Id. Plaintiffs in this case allege that Initiative 872 burdens  
15 their First Amendment associational rights by allowing non-affiliates of the party to  
16 participate in a party’s nominee selection process and forcing a party to associate with a  
17 candidate other than those selected by the party.

18 Where a statutory scheme imposes a severe burden on core First Amendment rights,  
19 the scheme must be found unconstitutional unless the State affirmatively demonstrates that  
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23 <sup>13</sup> A statute may be challenged in two distinct ways. First, a statute may be challenged  
24 on its face, whereby a court examines solely the text of the document to determine its  
25 constitutionality. Second, a statute may be challenged as it is applied. In an “as applied”  
26 challenge, a court considers the constitutionality of a statute as it has been applied to the parties  
to the action. The Court has previously directed the parties to limit their briefs to Plaintiffs’  
facial challenge of Initiative 872. The Court reserved issues related to Plaintiffs’ as applied  
challenge.

1 the scheme is narrowly tailored to advance a compelling state interest.<sup>14</sup> Reed, 343 F.3d at  
2 1204. In Reed, the Ninth Circuit discussed the applicable framework for this Court’s review:

3 This is a facial challenge to a statute burdening the exercise of a  
4 First Amendment right . . . . In Jones, the Court read the state  
5 blanket primary statutes, determined that on their face they restrict  
6 free association, accordingly subjected them to strict scrutiny, and  
7 only then looked at the evidence to determine whether the State  
8 satisfied its burden of showing narrow tailoring toward a compelling  
9 state interest.

10 343 F.3d at 1203. A “[c]onstitutional challenge to specific provisions of a State’s election  
11 laws . . . cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid  
12 restrictions.” Tashjian v. Republican Party of Conn., 479 U.S. 208, 213-14 (1986) (quoting  
13 Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (internal citations and quotations  
14 omitted)).

15 Instead, a court . . . must first consider the character and magnitude  
16 of the asserted injury to the rights protected by the First and  
17 Fourteenth Amendments that the plaintiff seeks to vindicate. It must  
18 then identify and evaluate the precise interests put forward by the  
19 State as justifications for the burden imposed by its rule. In passing  
20 judgment, the Court must not only determine the legitimacy and  
21 strength of each of those interests, it must also consider the extent to  
22 which those interests make it necessary to burden the plaintiff’s  
23 rights.

24 Tashjian, 479 U.S. at 214 (quoting Anderson, 460 U.S. at 789).

25 The nature of the asserted First Amendment interest in this case is evident: “freedom to  
26 engage in association for the advancement of beliefs and ideas is an inseparable aspect of the  
‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces  
freedom of speech.” Tashjian, 479 U.S. at 214 (quoting NAACP v. Alabama ex rel.  
Patterson, 357 U.S. 449, 460 (1958)). The freedom to join together in furtherance of common

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<sup>14</sup> The State and the Grange argue that a facial challenge requires the challenger to establish “that no set of circumstances exists under which the Act would be valid.” E.g., State Response, docket no. 65, at 4 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)). Because Plaintiffs challenge to Initiative 872 raises First Amendment rights, the Court will subject any restrictions on free association to strict scrutiny. Reed, 343 F.3d at 1203.

1 political beliefs “necessarily presupposes the freedom to identify the people who constitute  
2 the association.” Tashjian, 479 U.S. at 214-15. “[A] corollary of the right to associate is the  
3 right not to associate.” Jones, 530 U.S. at 574 (emphasis added).

4 **A. California Democratic Party v. Jones**

5 Prior to 1996, political party nominees in California were determined in a “closed”  
6 partisan primary, in which only persons who were members of the political party (i.e., who  
7 had declared affiliation with that party when they registered to vote) could vote for the party’s  
8 nominee. See Cal. Elec. Code Ann. § 2151 (West 1996). In 1996, California voters adopted  
9 Proposition 198, which changed the California partisan primary from a closed primary to a  
10 blanket primary. Under Proposition 198, “all persons entitled to vote, including those not  
11 affiliated with any political party,” had the right to vote “for any candidate regardless of the  
12 candidate’s political affiliation.” Cal. Elec. Code Ann. § 2001 (West Supp. 2000). The  
13 candidate of each party winning the greatest number of votes became “the nominee of that  
14 party at the ensuing general election.” Cal. Elec. Code Ann. § 15451 (West 1996).  
15 California law expressly provided that the name of the candidate of each party with the most  
16 votes was the party’s “nominee.” Id. Proposition 198 was promoted as a measure that would  
17 “weaken” party “hard-liners” and ease the way for “moderate problem-solvers.” See Jones,  
18 530 U.S. at 570. Four political parties brought suit in California alleging the blanket primary  
19 adopted by Proposition 198 violated their First Amendment rights of association.

20 The United States Supreme Court in Jones recognized the “major role [the States have]  
21 to play in structuring and monitoring the election process, including primaries,” and the  
22 State’s ability to “require parties to use the primary format for selecting their nominees.”  
23 Jones, 530 U.S. at 572. Nevertheless, the Court held the California blanket primary  
24 unconstitutional. The Supreme Court held that “when States regulate parties’ internal  
25 processes, they must act within the limits imposed by the Constitution.” Jones, 530 U.S. at  
26 573.

1 Representative democracy in any populous unit of governance is  
2 unimaginable without the ability of citizens to band together in  
3 promoting among the electorate candidates who espouse their  
4 political views. The formation of national political parties was  
5 almost concurrent with the formation of the Republic itself.  
6 Consistent with this tradition, the Court has recognized that the First  
7 Amendment protects the freedom to join together in furtherance of  
8 common political beliefs, which necessarily presupposes the  
9 freedom to identify the people who constitute the association, and to  
10 limit the association to those people only.

11 Id. at 574. The Jones Court held that “[i]n no area is the political association’s right to  
12 exclude more important than in the process of selecting its nominee,” id. at 575, and  
13 concluded that the ability of a political party to select its “own candidate,” or “nominee,”  
14 unquestionably implicates associational freedom. See id. at 575-76. Proposition 198, by  
15 allowing all voters to vote for any candidate regardless of political affiliation, violated the  
16 First Amendment associational rights of the political parties, and forced “political parties to  
17 associate with—to have their nominees, and hence their positions, determined by—those  
18 who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated  
19 with a rival.” Id. at 577.

20 **B. Democratic Party v. Reed**

21 Washington State’s blanket primary differed from California’s blanket primary in that  
22 it did not explicitly name the candidate of each party with the most votes as its “nominee.”  
23 Compare Cal. Elec. Code Ann. § 15451. Under Washington’s blanket primary, “all properly  
24 registered voters” could vote at any primary “for any candidate for each office, regardless of  
25 political affiliation and without a declaration of political faith or adherence on the part of the  
26 voter.” Wash. Rev. Code Ann. § 29.18.200 (West 2003). To reach the general election  
ballot, a candidate had to receive a plurality of the votes cast for candidates of his or her  
party, and at least one percent of the total votes cast at the primary for all candidates for that  
office. Wash. Rev. Code Ann. § 29.30.095 (West 2003).

1 Because all candidates from all parties were listed on the primary ballot, and were  
2 voted on by all registered voters, the Ninth Circuit concluded that Washington's blanket  
3 primary was "materially indistinguishable" from California's blanket primary. Reed, 343  
4 F.3d at 1203. The Ninth Circuit held that Washington's blanket primary was "on its face an  
5 unconstitutional burden on the rights of free association" of the political parties. Id. at 1207.

6 The State of Washington argued in Reed that Washington's blanket primary was  
7 distinguishable from California's blanket primary because Washington does not register  
8 voters by party, and because winners of the primary are "nominees' not of the parties but of  
9 the electorate." Id. at 1203. As such, the State argued Washington's primary was a  
10 *nonpartisan* blanket primary. Id. The Ninth Circuit disagreed, concluding that Washington's  
11 blanket primary denied "party adherents the opportunity to nominate their party's candidate  
12 free of the risk of being swamped by voters whose preference is for the other party." Id. at  
13 1204.

14 The right of people adhering to a political party to freely associate  
15 is not limited to getting together for cocktails and canapés. Party  
16 adherents are entitled to associate to choose their party's nominees  
for public office. \* \* \* Put simply, the blanket primary prevents a  
party from picking its nominees.

17 Id. The Ninth Circuit concluded that the First Amendment's protection of freedom of  
18 association required invalidation of Washington's blanket primary. Id. As a result,  
19 Washington's blanket primary was held unconstitutional and the State was enjoined from  
20 using the blanket primary system in the future.

## 21 **VI. Analysis of Initiative 872**

### 22 **A. Does the primary system established by Initiative 872 nominate political party 23 candidates for public office?**

24 The parties dispute whether the primary system under Initiative 872 "nominates"  
25 political party candidates for public office, and whether it violates the First Amendment  
26



1 associational rights of the political parties. This inquiry is important because under Jones,  
2 primary voters at large may not choose a party's nominee. 530 U.S. at 585-86.

3 The 2004 Voters' Pamphlet description of Initiative 872 stated:

4 Initiative Measure No. 872 concerns elections to partisan offices.

5 This measure would allow voters to select among all candidates in  
6 a primary. Ballots would indicate candidates' party preference. The  
7 two candidates receiving most votes advance to the general election  
8 regardless of party.

9 Pharris Decl., docket no. 66, Ex. A (2004 Voters' Pamphlet at 10).

10 **1. Statutory Modifications**

11 Initiative 872 added a new definition for "Partisan office" in Wash. Rev. Code  
12 § 29A.04, and modified the definition of "Primary" in Wash. Rev. Code § 29A.04.127, as  
13 follows:

14 **Sec. 4.** A new section is added to chapter 29A.04 RCW to  
15 read as follows:

16 "Partisan office" means a public office for which a candidate  
17 may indicate a political party preference on his or her declaration of  
18 candidacy and have that preference appear on the primary and  
19 general election ballot in conjunction with his or her name. The  
20 following are partisan offices:

- 21 (1) United States senator and United States representative;
- 22 (2) All state offices, including legislative, except (a) judicial  
23 offices and (b) the office of superintendent of public instruction;
- 24 (3) All county offices except (a) judicial offices and (b) those  
25 offices for which a county home rule charter provides otherwise.

26 **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.

See Initiative 872, Secs. 4-5. The State and County Auditors recognize no nomination  
process for a major party other than by the primary. White Decl., docket no. 8, Ex. 8 (County  
Auditors "not aware of any language associated with the Initiative that contemplates a

1 partisan nominating process separate from the primary.”). Under Initiative 872, the only way  
2 for a partisan candidate to reach the general election is through the “top two” primary.

3 The Grange alleges that the Initiative 872 primary “determines the two candidates or  
4 nominees for the general election ballot, while allowing each candidate to disclose to the  
5 voters his or her own political preference.” See Answer, docket no. 37, at ¶ 16 (emphasis  
6 added). Nevertheless, the Grange contends that determining the “candidates or nominees” for  
7 the general election does not select the candidate or nominee for any political party. Id.

8 The State of Washington argues that Initiative 872 does not “nominate” political party  
9 candidates for public office, and does not create a nominating primary. Rather, the State  
10 contends that Initiative 872 makes “party nominations . . . irrelevant to qualifying candidates  
11 to the ballot.” See State Response, docket no. 65, at 12. The State urges that unlike a  
12 “nominating” primary, Initiative 872 is a “winnowing” primary in which the primary voters  
13 do not choose the party’s nominee. Changes by the Initiative to Wash. Rev. Code  
14 § 29A.04.127 revised “nominating” to “winnowing.”<sup>15</sup> The Republican Party argues that  
15 calling the primary a “winnowing primary,” rather than a “nominating primary,” does not  
16 distinguish the Initiative 872 primary system from the blanket primaries rejected in Jones and  
17 Reed, and does not change the fact that Initiative 872’s primary nominates candidates. All  
18 Plaintiffs argue that the Court must analyze the framework of the Initiative, rather than

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19  
20 <sup>15</sup> However, similar changes were not made to other statutes which require the major  
21 parties to advance candidates for Congressional, State and County offices by means of these  
22 partisan nominating primaries: “[m]ajor political party candidates for all partisan elected  
23 offices, except for president and vice president . . . must be nominated at primaries held under  
24 this chapter.” Wash. Rev. Code § 29A.52.116; see also Wash. Rev. Code § 29A.52.111. The  
25 State of Washington argues that Wash. Rev. Code § 29A.52.116 is “clearly inconsistent with the  
26 system established under I-872, and should be regarded as obsolete.” See State Response,  
docket no. 65, at 19 n.16. This provision could not have been expressly repealed by Initiative  
872 because it was enacted after the filing of Initiative 872. Plaintiffs rely on Wash. Rev. Code  
§ 29A.52.116 as support for their argument that Initiative 872 is a “nominating” primary. This  
argument is unpersuasive because that statute had not even been enacted when the Initiative was  
filed. However, for the reasons stated in this opinion the Court concludes that Wash. Rev. Code  
§ 29A.52.116 is not in conflict with the Initiative.

1 changes to statutory wording, in determining its effect and possible burden on First  
2 Amendment rights.

3 The Republican Party notes that the State unsuccessfully proffered its “winnowing”  
4 arguments in Jones.<sup>16</sup> All Plaintiffs suggest the change of “nominating” to “winnowing” is a  
5 change without a difference. The Democratic Party argues that Initiative 872 engages in  
6 “word-play,” attempting to transform the constitutionality of Washington’s nominating  
7 procedure by avoiding the word “nominate.” See Democratic Party Opening Br., docket no.  
8 55, at 15.<sup>17</sup> The Democratic Party argues that “tinker[ing] with the wording of the definition  
9 of ‘primary’ to avoid using the word ‘nominating’” does not alter the substance of the primary  
10 as a nominating procedure. Id.

11 All Plaintiffs urge the Court to conclude that the primary under Initiative 872 is a  
12 “nominating” primary, because it results in the selection of political party nominees, and  
13 because the State and County Auditors, acting pursuant to state law, permit no nomination  
14 process other than by the primary.

## 15 2. Political Party Function

16 “[A] basic function of a political party is to select the candidates for public office to be  
17 offered to the voters at general elections.” Clingman, 125 S. Ct. at 2042 (O’Connor, J.,  
18 concurring) (quoting Kusper v. Pontikes, 414 U.S. 51, 58 (1973)). Political parties are  
19 entitled to First Amendment protections for any process which chooses the party’s nominee.  
20 See Jones, 530 U.S. at 575. The party’s “nominee” has also been referred to as the political  
21 party’s “own candidate,” id. (quoting Tashjian, 479 U.S. at 235-36 (Scalia, J., dissenting)),

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22  
23 <sup>16</sup> In its *amicus curiae* brief before the Supreme Court in Jones, the State described “the  
24 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, 2000 WL 340240, at \*10.

25 <sup>17</sup> “Nominate” means “[t]o propose by name as a candidate, especially for election.” The  
26 American Heritage Dictionary of the English Language (4th ed. 2000). “Winnow” means  
“[t]o rid of undesirable parts,” or “[t]o separate the good from the bad.” Id.

1 “standard bearer,” Timmons, 520 U.S. at 359, “choice,” id. at 372 (Stevens, J., dissenting),  
2 “ambassador to the general electorate,” Jones, 530 U.S. at 575, and the “standard bearer who  
3 best represents the party’s ideologies and preferences.” Eu v. San Francisco County  
4 Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (internal quotations omitted).

5 The State contends that by Initiative 872, the State completely decoupled the process  
6 for deciding which candidates appear on the general election ballot from any party’s  
7 nominating process. See State Response, docket no. 65, at 17. The State argues that the  
8 political parties remain free to select their own nominees, and to advocate on their behalf in  
9 the “qualifying” primary. See id. Alternatively stated, the State argues that when forced to  
10 choose between (1) preserving voter choice; and (2) using primaries to nominate party  
11 candidates, voters chose to preserve voter choice. However, this misapprehends the choice  
12 available to voters after Jones and Reed. A political party does not have a constitutional right  
13 to have its candidate on the general election ballot; however, it does have a constitutional  
14 right to nominate its “standard bearer.” Timmons, 520 U.S. at 359. The position advocated  
15 by the State transforms the party’s right to “nominate” into a right to endorse. The Supreme  
16 Court rejected a similar argument with regard to California’s Proposition 198: “[t]he ability of  
17 the party leadership to endorse a candidate is simply no substitute for the party members’  
18 ability to choose their own nominee.” Jones, 530 U.S. at 580. To relegate the members of a  
19 political party to a role of mere support for their preferred “standard bearer,” would deny a  
20 party its role in selecting its representative. Party members associational right to choose the  
21 “standard bearer” of the party cannot be so infringed, nor can the ability to nominate a party’s  
22 chosen candidate be so easily disposed of.

23 “There is simply no substitute for a party’s selecting its own candidates.” Jones, 530  
24 U.S. at 581.

### 3. Selection by Voters at Large

1           3.       **Selection by Voters at Large**  
2           The State of Washington and the Grange also argue that “[t]he candidates who appear  
3 on the general election ballot are selected by the voters at large, not by the parties or by the  
4 voters as party members,” and therefore the candidates are not the parties’ nominees. See  
5 State Response, docket no. 65, at 19 (emphasis omitted). The Grange argues that Initiative  
6 872 allows candidates to disclose the political party that the candidate prefers, and that unlike  
7 the blanket primary invalidated in Reed, Initiative 872 “does not require or force any political  
8 party to do anything.” See Grange Response, docket no. 70, at 32 (emphasis omitted). These  
9 arguments have already been rejected by the Ninth Circuit in Reed. 343 F.3d at 1204 (“As  
10 for the State of Washington’s argument that the party nominees chosen at blanket primaries  
11 ‘are the nominees not of the parties but of the electorate,’ that is the problem with the system,  
12 not a defense of it.”). That conclusion is equally applicable here. The fact that voters at large  
13 will select the party’s candidate indicates the Initiative 872 primary serves a nominating  
14 function. The major political parties may not be deprived of their rights simply because the  
15 primary system “does not require or force [the parties] to do anything.”

16           It is similarly unhelpful to rename the nominating primary a “qualifying” primary. The  
17 Court must necessarily look beyond the characterization of the Initiative by its backers.  
18 Where the primary system under Initiative 872 selects from a slate of party candidates to  
19 advance two candidates to the general election, the system has the legal effect of  
20 “nominating” the party representatives in the partisan election.

### 4. Political “Preference” of Party Candidates

21           4.       **Political “Preference” of Party Candidates**  
22           The State argues that “[s]ince party affiliation plays no role in determining which  
23 candidates advance to the general election, the primary established by [Initiative 872] cannot  
24 in any way be regarded as determining party nominees,” and that a statement of “party  
25 preference” does not imply nomination, endorsement, or support of any political party. See  
26 State Response, docket no. 65, at 19-20. The Grange also argues that any statement of party

1 preference by a candidate is absolutely protected by the First Amendment. These arguments  
2 also must fail. Party affiliation undeniably plays a role in determining the candidate voters  
3 will select, whether it is characterized as “affiliation” or “preference.” Tashjian, 479 U.S. at  
4 220. Party labels provide a shorthand designation of the views of party candidates on matters  
5 of public concern and play a role in the exercise of voting rights. Id. Candidates identified  
6 with their “preferred” party designation will “carry [the party] standard in the general  
7 election.” See Republican Opening Brief, docket no. 49, at 7. Any attempt to distinguish a  
8 “preferred” party from an “affiliated” party is unavailing in light of Washington law. See  
9 Wash. Rev. Code § 29A.24.030 (“Included on the standard form shall be . . . [f]or partisan  
10 offices only, a place for the candidate to indicate his or her major or minor party preference,  
11 or independent status”); Wash. Rev. Code § 29A.52.311 (County Auditors required to publish  
12 notice of the election with “the proper party designation” of each candidate); Wash Rev. Code  
13 § 29A.52.112(3) (Candidate expressing a political party “preference” will have that  
14 preference “shown after the name of the candidate on the primary and general election  
15 ballots.”); see also Pharris Decl., docket no. 66, Ex. A (2004 Voters’ Pamphlet at 11) (“The  
16 primary ballot [under Initiative 872] would include . . . major party and minor party  
17 candidates and independents.”).

18 The association of a candidate with a particular party may be the single most effective  
19 way to communicate to voters what the candidate represents. See Rosen v. Brown, 970 F.2d  
20 169, 172 (6th Cir. 1992) (“[P]arty candidates are afforded a ‘voting cue’ on the ballot in the  
21 form of a party label which research indicates is the most important determinant of voting  
22 behavior. Many voters do not know who the candidates are or who they will vote for until  
23 they enter the voting booth.”).

24 The Grange’s characterization of ballot labels of “party preference” as a permissible  
25 exercise of free speech must also fail. An individual has no right to associate with a political  
26 party that is an “unwilling partner.” See Duke v. Cleland, 954 F.2d 1526, 1530 (11th Cir.

1 1992), cert. denied, 502 U.S. 1086 (1992). This is not an infringement on the candidate’s  
2 rights because the political party has a right “to identify the people who constitute the  
3 association and to limit the association to those people only.” Id. at 1531 (internal quotations  
4 omitted). Free speech rights of a candidate “do not trump the [political party’s] right to  
5 identify its membership based on political beliefs . . . .” Duke v. Massey, 87 F.3d 1226,  
6 1232-33 (11th Cir. 1996). A candidate’s free speech right to express a “preference” for a  
7 political party does not extend to disrupting the party’s First Amendment associational rights.  
8 See generally Storer v. Brown, 415 U.S. 724, 736 (1974) (upholding California statute  
9 designed to protect the parties and party system against the disorganizing effect of  
10 independent candidacies launched by unsuccessful putative party nominees).

11 **5. The Jones Dicta: “Nonpartisan Blanket Primary”**

12 The Court in Jones suggested in dicta that a “nonpartisan blanket primary” could  
13 protect important state interests and voter choice, with “all the characteristics of the partisan  
14 blanket primary, save the constitutionally crucial one: Primary voters are not choosing a  
15 party’s nominee.” Jones, 530 U.S. at 585-86.

16 The State and the Grange rely heavily on the following statement from Jones:

17 [California] could protect [its interests] by resorting to a *nonpartisan*  
18 blanket primary. Generally speaking, under such a system, the State  
19 determines what qualifications it requires for a candidate to have a  
20 place on the primary ballot – which may include nomination by  
21 established parties and voter-petition requirements for independent  
22 candidates. Each voter, regardless of party affiliation, may then vote  
23 for any candidate, and the top two vote getters (or however many the  
24 State prescribes) then move on to the general election. This system  
25 has all the characteristics of the partisan blanket primary, save the  
26 constitutionally crucial one: Primary voters are not choosing a  
party’s nominee. Under a nonpartisan blanket primary, a State may  
ensure more choice, greater participation, increased “privacy,” and  
a sense of “fairness” – all without severely burdening a political  
party’s First Amendment right of association.

16 Jones, 530 U.S. at 585-86. According to the Grange, which sponsored Initiative 872, it  
25 “specifically drafted Initiative 872 to conform to [the Supreme Court ruling in Jones,]” and its  
26

1 description of a *nonpartisan* blanket primary. See White Decl., docket no. 8, Ex. 4  
2 (“Advantages of a Qualifying Primary for Washington State”).

3 The Court gives great weight to the Jones Court’s suggestion in analyzing the  
4 constitutionality of Initiative 872. However, a careful analysis of Jones and this “suggestion”  
5 indicates that it cannot save Initiative 872 from its demise.

6 Initiative 872 does not establish a “nonpartisan blanket primary.” Primary voters are  
7 choosing a party’s nominee. Initiative 872 burdens the rights of the political parties to choose  
8 their own nominee by compelling the parties to accept any candidate who declares a  
9 “preference” for the party, and allowing unaffiliated voters to participate in the selection of  
10 the party’s candidate.

11 Plaintiffs’ claim that Initiative 872 “denies party adherents the opportunity to nominate  
12 their party’s candidate free of the risk of being swamped by voters whose preference is for the  
13 other party,” see Reed, 343 F.3d at 1204, is well grounded. Jones allows little room for  
14 “outside” involvement in “intraparty” competition. See Jones, 530 U.S. at 572. This is  
15 confirmed by Justice Stevens’ dissenting opinion. See id. at 598, n. 8 (“It is arguable that,  
16 under the Court’s reasoning combined with Tashjian, the only nominating options open for  
17 the States to choose without party consent are (1) to not have primary elections; or (2) to have  
18 what the Court calls a ‘nonpartisan blanket primary’ . . . in which candidates previously  
19 nominated by the various political parties and independent candidates compete.”) (Stevens, J.,  
20 dissenting).

## 21 **6. Initiative 872 Nominates Candidates**

22 In all constitutionally relevant respects, Initiative 872 is identical to the blanket  
23 primary invalidated in Reed: (1) Initiative 872 allows candidates to designate a party  
24 preference when filing for office, without participation or consent of the party;<sup>18</sup> (2) requires

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25  
26 <sup>18</sup> The parties disagree as to whether minor party candidates are nominated through the  
nominating process described in Wash. Rev. Code §§ 29A.20.110 through 29A.20.201. See



1 that political party candidates be nominated in Washington's primary; (3) identifies  
2 candidates on the primary ballot with party preference; (4) allows voters to vote for any  
3 candidate for any office without regard to party preference; (5) allows the use of an open,  
4 consolidated primary ballot that is not limited by political party and allows crossover voting;  
5 and (6) advances candidates to the general election based on open, "blanket" voting.

6 Because Initiative 872 constitutes a nominating process, the Court must address the  
7 question of Plaintiffs' associational rights, and the extent of the burden imposed on those  
8 rights by Initiative 872.<sup>19</sup>

9 **B. Does Initiative 872 violate the First Amendment by compelling a political party to**  
10 **associate with unaffiliated voters and members of other political parties in the**  
11 **selection of its nominees?**

12 Plaintiffs argue Initiative 872 imposes an unconstitutional burden on the political  
13 parties' First Amendment associational rights by (1) interfering with the parties' right to  
14 determine the limits of voter association in the selection of the party candidates; and (2)

15  
16 \_\_\_\_\_  
17 Section VI.C, *infra*. The parties also disagree as to the applicability of Initiative 872 to minor  
18 parties.

19 <sup>19</sup> The political parties argue in the alternative that if Initiative 872 is not a nominating  
20 primary, it would be unconstitutional for violation of the parties' First Amendment  
21 associational right to select candidates for public office. It is well settled that political parties  
22 have a constitutionally protected right to nominate their candidates for partisan office. *See*  
23 *Jones*, 530 U.S. at 575; *Clingman*, 125 S. Ct. at 2042 (O'Connor, J., concurring) (a basic  
24 function of a political party is to select candidates to be offered to voters in general elections);  
25 *Eu*, 489 U.S. at 224 (party entitled to select the "standard bearer who best represents the party's  
26 ideologies and preferences.").

27 First Amendment associational rights are no less protected where the State effects a  
28 primary system that eliminates the party's right to nominate its own candidates. In such a  
29 circumstance, the affected political party is entitled to hold a caucus or convention to nominate  
30 its candidates for partisan office. Similarly, the party is entitled to prevent non-affiliated  
31 candidates from expressing a party preference or affiliation on the primary or general election  
32 ballot. The choice of party nominee is "the crucial juncture at which the appeal to common  
33 principles may be translated into concerted action, and hence to political power in the  
34 community." *Jones*, 530 U.S. at 575 (internal quotation marks and citation omitted). The State  
35 cannot deprive political parties of their right to choose the candidate of their choice.

1 imposing forced political association with any candidate who may self-designate a party  
2 “preference,” which will be displayed on the ballot.<sup>20</sup>

3 **1. Candidate Selection**

4 The freedom to join together in furtherance of common political beliefs “necessarily  
5 presupposes the freedom to identify the people who constitute the association,” Tashjian, 479  
6 U.S. at 214, and “the right not to associate” with individuals who do not share common  
7 beliefs. Jones, 530 U.S. at 574.

8 Freedom of association would prove an empty guarantee if  
9 associations could not limit control over their decisions to those who  
10 share the interests and persuasions that underlie the association’s  
11 being.

12 Id. at 574-75. “[A] basic function of a political party is to select the candidates for public  
13 office to be offered to the voters at general elections.” Clingman, 125 S. Ct. at 2042  
14 (O’Connor, J., concurring) (internal quotations omitted). First Amendment associational  
15 rights in this context allow the party to select the “standard bearer who best represents the  
16 party’s ideologies and preferences.” Eu, 489 U.S. at 224.

17 Initiative 872 nominates political party candidates for office, and allows voters to  
18 choose any candidate, regardless of political affiliation. Initiative 872 therefore  
19 impermissibly “denies party adherents the opportunity to nominate their party’s candidate free  
20 of the risk of being swamped by voters whose preference is for the other party.” Reed, 343  
21 F.3d at 1204. “In no area is the political association’s right to exclude more important than in  
22 the process of selecting its nominee.” Jones, 530 U.S. at 575.

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23 <sup>20</sup> The State of Washington admits that “if the Court found . . . a [non-party] candidate’s  
24 option to express a political party preference . . . sufficient to render the ‘top two’ primary a  
25 party nomination system, that would indeed trigger a need to respect the associational interests  
26 of the political parties.” See State Response, docket no. 65, at 25. However, the State contends  
that it would not necessarily follow that Initiative 872 is unconstitutional. Id. at 25 n. 19;  
see also Section VII, infra.

1 Where a statutory scheme imposes a severe burden on core First Amendment rights,  
2 the scheme must be found unconstitutional unless the State affirmatively demonstrates that  
3 the scheme is narrowly tailored to advance a compelling state interest. Reed, 343 F.3d at  
4 1204. The State of Washington and the Washington State Grange argue that Initiative 872  
5 does not impose a severe burden on core First Amendment rights, but do not argue that  
6 Initiative 872 is narrowly tailored to meet a compelling state interest. The Court concludes as  
7 a matter of law that Initiative 872 “forces political parties to associate with—to have their  
8 nominees, and hence their positions, determined by—those who, at best, have refused to  
9 affiliate with the party, and, at worst, have expressly affiliated with a rival.” Jones, 530 U.S.  
10 at 577.

## 11 2. Candidate Party Preference

12 Plaintiffs argue that Washington’s filing statute, Wash. Rev. Code § 29A.24.030,<sup>21</sup>  
13 violates the parties’ First Amendment associational rights by forcing the political parties to  
14 associate with any candidate who expresses a “preference” for a political party. Initiative 872  
15 provides that any candidate may self-designate a party preference and that party’s name will  
16 be printed on public ballots and in voters’ guides after the candidate’s name. See Wash. Rev.

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17  
18 <sup>21</sup> Initiative 872 revised Wash. Rev. Code § 29A.24.030, Washington’s filing statute, to  
19 include on the ballot “a place for the candidate to indicate his or her major or minor party  
20 preference, or independent status,” see Initiative 872, Sec. 9(3), without “cognizance” of the  
21 statute’s repeal by 2004 c 271 § 193 in favor of Washington’s new filing statute: Wash. Rev.  
22 Code § 29A.24.031. See Wash. Rev. Code § 29A.24.030, Reviser’s Note. Under statutory rules  
of construction in Wash. Rev. Code § 1.12.025, amended statute Wash. Rev. Code § 29A.24.030  
was given effect as amended by Initiative 872. See Wash. Rev. Code § 29A.24.030,  
Reviser’s Note; see also Initiative 872, Sec. 9(3).

23 The difference between Washington’s two filing statutes is not significant to the Court’s  
24 analysis. Compare Wash. Rev. Code § 29A.24.030 (“major or minor party preference”) with  
25 Wash. Rev. Code § 29A.24.031 (“party designation”). The parties base their analysis on  
26 Washington’s filing statute as amended by Initiative 872, see Democratic Party Opening Br.,  
docket no. 55, at 20-21; or both statutes together. See Republican Opening Br., docket no. 49,  
at 8-11. The Court, however, will limit its consideration to Washington’s filing statute as  
amended by Initiative 872: Wash. Rev. Code § 29A.24.030.

1 Code § 29A.24.030 (“Included on the standard form shall be . . . [f]or partisan offices only, a  
2 place for the candidate to indicate his or her major or minor party preference, or independent  
3 status”); Wash Rev. Code § 29A.52.112 (Candidate expressing a political party “preference”  
4 will have that preference “shown after the name of the candidate on the primary and general  
5 election ballots.”). County Auditors are also required to publish notice of the election with  
6 “the proper party designation” of each candidate. Wash. Rev. Code § 29A.52.311.

7 In this case the political parties seek relief beyond protecting their rights to nominate  
8 candidates. The parties seek to exclude all other candidates on the primary ballot from using  
9 similar party preferences. Neither the State nor the Grange disputes that a political party has  
10 an inherent right to nominate its own candidates. See State Response, docket no. 65, at 24;  
11 Grange Response, docket no. 70, at 27. The right to nominate is a constitutionally protected  
12 right of association. Under Initiative 872, political parties are given no choice with respect to  
13 whether such public association is made. The parties argue that the filing statutes force the  
14 parties to be affiliated with candidates that may qualify under party rules, or may be hostile to  
15 the party. The Defendants argue that “forced association” will not occur because “party  
16 preference” statements do not imply the nomination, endorsement, or support of any political  
17 party. See State Response, docket no. 65, at 20. However, rather than meet their burden to  
18 justify Initiative 872, the State and the Grange argue that candidates who appear on the  
19 primary and general election ballots are not candidates “of the party,” even though they are  
20 identified on the ballot as associated with the party. This defense was previously rejected in  
21 Reed. 343 F.3d at 1204; see also Section VI.A.3, supra.

22 Party affiliation plays a role in determining which candidates voters select, whether  
23 characterized as “affiliation” or “preference.” Tashjian, 479 U.S. at 220. The top two nature  
24 of the primary does not cure this defect. Parties cannot be forced to associate on a ballot with  
25 unwanted party adherents. See Section VI.A.4, supra. The right to select the candidate that  
26 will appear on the ballot is important to political parties that invest substantial money and

1 effort in developing a party name. Party name and affiliation communicate meaningful  
2 political information to the electorate.<sup>22</sup> The Democratic Party argues that it has expended  
3 considerable time and expense to develop a coherent set of goals and principles that guide the  
4 party, and that candidates asserting an affiliation with the party will receive numerous votes  
5 based solely on their proclaimed affiliation with the party, and implied adoption of its  
6 message and principles. Even non-commercial associations are entitled to protect their name  
7 against misappropriation and misuse. See, e.g., Most Worshipful Prince Hall Grand Lodge v.  
8 Most Worshipful Universal Grand Lodge, 62 Wash. 2d 28, 35 (Wash. 1963) (“The underlying  
9 concept is that of unfair competition in matters in which the public generally may be deceived  
10 or misled.”); Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 566  
11 (1995) (private association could not be required to admit a parade contingent expressing  
12 message not of the organizers’ choosing); Boy Scouts of Am. v. Dale, 530 U.S. 640, 659  
13 (2000) (First Amendment protects Boy Scouts’ right to exclude leader whose presence would  
14 express a message at odds with Boy Scout policies). The Court is persuaded by Plaintiffs’  
15 arguments that allowing any candidate, including those who may oppose party principles and  
16 goals, to appear on the ballot with a party designation will foster confusion and dilute the  
17 party’s ability to rally support behind its candidates.

18 Initiative 872 imposes a severe burden on the Plaintiffs’ First Amendment right to  
19 associate on two separate grounds: (1) Initiative 872 forces political parties’ to have their  
20 nominees chosen by voters who have refused to affiliate with the party and may have  
21 affiliated with a rival; and (2) Initiative 872 forces the parties to associate with any candidate  
22 who expresses a party “preference.” Because Initiative 872 is not narrowly tailored to  
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24 <sup>22</sup> The Libertarian Party notes that the name “Libertarian Party” is a registered  
25 trademark, and accordingly argues that the Libertarian Party has a proprietary right to determine  
26 who may use the name, and for what purposes it may be used. See Libertarian Opening Br.,  
docket no. 52, at 14.

1 advance a compelling state interest, the Court concludes that it is unconstitutional. Reed, 343  
2 F.3d at 1203-04.

3 **C. Initiative 872 and Minor Parties**

4 The various parties in this litigation dispute Initiative 872's impact on minor parties.  
5 The Plaintiffs argue that Initiative 872's provision that only the top two candidates in the  
6 primary will be placed on the general ballot unconstitutionally restricts minor parties' access  
7 to the ballot. Additionally, in its Supplement to its Motion for Summary Judgment, the  
8 Republican Party requests a finding that Initiative 872 is unconstitutional because it violates  
9 the constitutional right to equal protection under the law. The Republican Party contends that  
10 "Initiative 872 violates the Equal Protection Clause by allowing minor political parties to  
11 nominate candidates and control their message, but denying the same right to the [major  
12 political parties.]" See Republican Supplement, docket no. 63, at 4. The Grange and the  
13 State argue that Initiative 872 supplanted and superseded any inconsistent provisions in the  
14 Revised Code of Washington, including those that treat minor parties differently. See State  
15 Response, docket no. 65, at 31 n.23; Grange Response, docket no. 70, at 21 n.30.

16 In order to evaluate the parties' allegations regarding Initiative 872's treatment of  
17 minor parties, the Court must determine whether Initiative 872 would provide different rights  
18 to the various political parties. The question presented is whether Initiative 872 repealed  
19 expressly or by implication the minor party nominating provisions.<sup>23</sup>

20 Initiative 872 did not expressly repeal, amend, or otherwise address the minor party  
21 nominating statutes, Wash. Rev. Code §§ 29A.20.110-29A.20.201. Initiative 872, Sec. 17.  
22 The State and the Grange contend that Initiative 872 repealed by implication all of the  
23

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24 <sup>23</sup> The Montana system, adopted in 2004, treats minor party nominees differently. Under  
25 the Montana system, minor party nominees would still be selected through a nominating  
26 convention. Wash. Rev. Code § 29A.20.121(1). However, they would then proceed directly  
to the general ballot after submitting a nominating petition containing the requisite number of  
signatures. Wash. Rev. Code §§ 29A.20.121, 29A.20.141.

1 previous minor party nominating statutes because the Initiative covers the entire subject  
2 matter of primary and general election procedures and was intended to supersede the prior  
3 legislation on the subject.

4 The language of Initiative 872 appears to preclude minor party nominees from  
5 appearing on the general election ballot without first having appeared on a primary election  
6 ballot. Section 5 of Initiative 872 defines a primary as “a procedure for winnowing  
7 candidates for public office to a final list of two as part of a special or general election.”  
8 Initiative 872, Sec. 5. The language of a “final list of two” candidates for “public office” does  
9 not appear to leave room for additional, minor party candidates on the general election ballot.  
10 Section 6(1) states that, “[f]or any office for which a primary was held, only the names of the  
11 top two candidates will appear on the general election ballot.” Initiative 872, Sec. 6(1). This  
12 language implies that in an election for any office in which a primary was held, only two  
13 candidates may appear on the general election ballot. Initiative 872, Sec. 7(2) (“Whenever  
14 candidates for a partisan office are to be elected, the general election must be preceded by a  
15 primary conducted under this chapter. Based upon votes cast at the primary, the top two  
16 candidates will be certified as qualified to appear on the general election ballot . . .”). Finally,  
17 Section 9(3) refers to minor party candidates and provides that the form for declaration of  
18 candidacy must have, “[f]or partisan offices only, a place for the candidate to indicate his or  
19 her major or minor party preference, or independent status.” Initiative 872, Sec. 9(3).

20 The State of Washington 2004 Voter’s Pamphlet states in part that “[t]he initiative  
21 would replace the system of separate primaries for each party” and that “[t]he primary ballot  
22 would include all candidates filing for the office, including both major party and minor party  
23 candidates and independents.” Pharris Decl., docket no. 66, Ex. A (2004 Voters Pamphlet at  
24 11). Finally, the explanation statement provides “[t]he measure would replace existing  
25  
26

1 provisions that candidates of each major political party, as well as any minor party or  
2 independent candidates who qualify, appear on the general election ballot.”<sup>24</sup> Id.

3 The Montana system’s provision dictating that minor party candidates proceed directly  
4 to the general election ballot is in direct conflict with the primary system enacted under  
5 Initiative 872 in which all candidates for partisan office must submit to the primary in order to  
6 winnow the final list down to two. Similarly, under the prior blanket primary system, minor  
7 party nominees advanced to the general ballot if they received at least one percent of the total  
8 vote cast in the primary for that office. This provision is also inconsistent with Initiative  
9 872’s provisions allowing only the top two candidates to advance to the general election.

10 Repeal by implication is strongly disfavored. State v. Lessley, 118 Wash. 2d 773, 782  
11 (1992); Washington State Welfare Rights Org. v. State, 82 Wash. 2d 437, 439 (1973) (internal  
12 citations omitted). Under Washington law, a statute will be deemed to be impliedly repealed  
13 only if: “[T]he later act covers the entire subject matter of the earlier legislation, is complete  
14 in itself, and is evidently intended to supersede the prior legislation on the subject, or unless  
15 the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by  
16 a fair and reasonable construction, be reconciled and both given effect.” Washington  
17 Federation of State Employees v. The Office of Financial Management, 121 Wash. 2d 152,  
18 165 (1993).

19 The Court concludes as a matter of law that it was the intent of the voters who enacted  
20 Initiative 872 that it be a complete act in itself and cover the entire subject matter of earlier  
21 legislation governing minor parties.<sup>25</sup>

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22  
23 <sup>24</sup> When the language of an initiative is ambiguous, the Court may look to the voters’  
24 pamphlet to ascertain the intent of the voters who approved it. Sane Transit v. Sound Transit,  
151 Wash. 2d 60, 90 (2004) (citing Amalgamated Transit Union Local 587 v. State, 142 Wash.  
2d 183, 205-06 (2000)).

25 <sup>25</sup> The Court reluctantly holds that Initiative 872 repealed by implication the minor party  
26 nominating statutes. There are undoubtedly many voters in Washington whose political  
philosophies do not neatly square with those of either of the two major political parties, as well



1 Because the Court declares Initiative 872 unconstitutional on other grounds, and  
2 further concludes that minor parties would be treated the same as all other parties if it was  
3 constitutional, the Court does not reach the equal protection argument raised by the  
4 Republican Party. Similarly, the Court does not reach the minor party ballot access issue.

5 **VII. The Severability of Initiative 872**

6 If any portions of Initiative 872 are unconstitutional, the Court must determine whether  
7 the unconstitutional provisions can be severed from the remaining constitutional provisions.  
8 The State, the Grange, and the Democratic Party all contend that Initiative 872 is severable.  
9 The Republican Party argues that it is not severable.

10 Washington law governs the question of the severability of a Washington initiative. In  
11 In re Parentage of C.A.M.A., 154 Wash. 2d 52 (2005), the Washington Supreme Court

12  
13  
14 as voters who find these parties' philosophies antithetical to their own vision of good  
15 governance. For many voters, the minor parties have provided a vital means to advocate on  
16 behalf of their vision for this State. The Supreme Court has noted that minor parties have played  
17 an indispensable role in the nation's political process:

18 All political ideas cannot and should not be channeled into the  
19 programs of our two major parties. History has amply proved the  
20 virtue of political activity by minority, dissident groups, who  
21 innumerable times have been in the vanguard of democratic thought  
22 and whose programs were ultimately accepted . . . The absence of  
23 such voices would be a symptom of grave illness in our society.

24 Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957). Initiative 872, if otherwise valid  
25 would significantly alter Washington State's political landscape and severely limit the important  
26 role of minor parties in the State's political process. This would remove from the general  
election the ability to choose candidates from a broad political spectrum. The scope of voters'  
disenfranchisement would be enormous. As Governor Locke noted in vetoing a similar top two  
alternative in 2004:

Minority parties bring diverse perspectives to political debate and  
additional choice to voters. They should not be foreclosed from  
meaningful participation in the democratic process.

E.S.B. 6453, 58th Leg., 2004 Reg. Sess. (Wash. 2004) (Governor's Veto Message). However,  
whether and to what extent the State should limit minority participation is obviously a policy  
issue to be decided by the Legislature or by the voters by Initiative.

1 described the test to determine whether unconstitutional statutory provisions can be severed  
2 as follows:

3 Ordinarily, only the part of an enactment that is constitutionally  
4 infirm will be invalidated, leaving the rest intact. An  
5 unconstitutional provision may not be severed, however, if its  
6 connection to the remaining, constitutionally sound provision is so  
7 strong “that it could not be believed that the legislature would have  
8 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.

9 Guard v. Jackson, 83 Wash. App. 325, 333 (1996) (footnotes omitted) (quoting Leonard v.  
10 City of Spokane, 127 Wash. 2d 194, 201 (1995)).

11 In addition, unless the Court can conclude that the voters in the initiative process  
12 would have passed Initiative 872 absent any unconstitutional provisions, the proper remedy is  
13 invalidation rather than changing the Initiative. Griffin v. Eller, 130 Wash. 2d 58, 69-70  
14 (1996). See also National Advertising Co. v. Orange, 861 F.2d 246 (9th Cir. 1988).

15 Initiative 872 does not have a severability clause. The presence of an applicable  
16 severability clause is some evidence that the voters would have enacted the constitutional  
17 portions of the Initiative without the unconstitutional portions, but a severability clause is not  
18 necessary in order to meet the severability test. See In re Parentage of C.A.M.A., 154  
19 Wash. 2d at 67-68.

20 When determining if the Initiative is severable, the Court must take care not to rewrite  
21 legislation. “Under our constitutional framework, federal courts do not sit as councils of  
22 revision, empowered to rewrite legislation in accord with their own conceptions of prudent  
23 public policy.” United States v. Rutherford, 442 U.S. 544, 555 (1979). To apply these rules  
24 in the context of this case, the Court must look at what must be severed for Initiative 872 to  
25 meet constitutional standards and how the remainder of the Initiative would realize the intent  
26 of voters who enacted it. The suggestions for severance offered by the parties fall short.

1 The State argues that the Court should “allow the State to adjust the specific problem  
2 the Court found [in Initiative 872] while maintaining the basic machinery of the ‘top two’  
3 primary.” State Response, docket no. 65, at 34. The State suggests that “the portions of  
4 Initiative 872 that appears [sic] to draw the most fire are Sections 7 and 9, the provisions that  
5 permit candidates to declare their ‘political party preference’ and provide that this information  
6 will appear on the ballot.” Id.

7 The Grange argues that the Court should preserve Sections 1 and 2 of the Initiative,  
8 which it argues express the Initiative’s intent. Grange’s Response, docket no. 70, at 38. The  
9 Grange also argues that the only allegedly offending sections of Initiative 872 are Section  
10 7(3), providing for candidates to indicate a political preference which will be shown on  
11 ballots “for the information of the voters,” and Section 11, which provides that the  
12 candidate’s party “preference” will be included in the State voters’ pamphlet. Id. at 36.

13 The Democratic Party argues that if the Court concludes that the voters were primarily  
14 interested in limiting the number of candidates on the general election ballot to no more than  
15 two and that voters viewed as only incidental the creation of a non-party member’s right to  
16 choose a party’s candidate, the Court could sever the Initiative. Democratic Reply, docket no.  
17 75, at 10. The Democratic Party argues that the Court “need only hold that the Initiative’s  
18 requirement that a political party name be printed after a candidate’s name is applicable if,  
19 and only if, the candidate has first been selected by the political party whose name he or she  
20 seeks to invoke, pursuant to the rules of that party.” Id. Implementing this recommendation  
21 would require the Court to fundamentally rewrite the Initiative.

22 Several portions of Initiative 872 are unconstitutional because they violate Plaintiffs’  
23 First Amendment rights. In order to sever the offending sections of Initiative 872, the Court  
24 would need to sever most of Section 4, which defines a “partisan office” as one “for which a  
25 candidate may indicate a political party preference on his or her declaration of candidacy and  
26 have that preference appear on the primary and general election ballot in conjunction with his

1 or her name”; Section 5, which redefines Primary or Primary Election, replaces “nominating”  
2 with “winnowing,” and allows the right to cast a vote for any candidate for each office  
3 without any limitation based on party preference or affiliation, of either the voter or the  
4 candidate; Sections 7(2) and (3), which affix a candidate’s party preference next to that  
5 candidate’s name on both the primary and the general election ballot; Section 9(3), which  
6 provides a place on the declaration of candidacy for a candidate to state his or her major or  
7 minor party preference; Section 11, which states that the voters’ pamphlet must also contain  
8 the political party preference or independent status of the candidate where the candidate  
9 expresses a preference; and Section 12, which provides that the certified list of candidates  
10 shall include each candidates’ party preference. Initiative 872, Secs. 4, 5, 7(2), 7(3), 9(3), 11,  
11 12. The effect of these deletions would be to substantially dismantle the partisan primary  
12 system adopted by Initiative 872. These deletions would eliminate any reference to party  
13 preference or affiliation, and would convert a partisan election process into a nonpartisan  
14 election process.

15 The Court must determine whether the connection between the potentially severable  
16 parts “and the remaining constitutionally sound provision is so strong ‘that it could not be  
17 believed that [the voters] would have passed one without the other; or where the part  
18 eliminated is so intimately connected with the balance of the act as to make it useless to  
19 accomplish the purposes of [the voters].’” Guard v. Jackson, 83 Wash. App. 325, 333 (1996).  
20 “When the people approve an initiative measure, they exercise the same power of sovereignty  
21 as the legislature does when it enacts a statute. Once enacted, initiatives are interpreted  
22 according to the same rules of statutory construction as apply to the legislature's enactments.  
23 Thus, the court’s aim is to determine the collective intent of the people who enacted the  
24 measure.” McGowan v. State, 148 Wash. 2d 278, 288 (2002) (internal citations omitted).  
25 The Court may look to the plain language of the Initiative itself in order to determine the  
26 intent of the voters who enacted it. Id.

1 The Court concludes as a matter of law that Initiative 872 is not severable. The  
2 deletion of the unconstitutional portions of the Initiative leaves virtually nothing left of the  
3 system approved by the voters.

#### 4 **VIII. Effect of the Invalidity of Initiative 872**

5 Declaring Initiative 872 unconstitutional will not leave Washington without a primary  
6 system. Enjoining the implementation of Initiative 872 will return Washington to the  
7 Montana primary system enacted before Initiative 872 was approved by the voters.

8 The effect of the invalidity of a state statute is governed by state law. Erie R. Co. v.  
9 Tompkins, 304 U.S. 64, 78 (1938). Washington law holds that an invalid statute is a nullity.  
10 “It is as inoperative as if it had never been passed.” State v. Speed, 96 Wash. 2d 838, 843  
11 (1982) (citing State ex. rel. Evans v. Brotherhood of Friends, 41 Wash. 2d 133, 143 (1952)).  
12 The Washington Supreme Court has held that the natural effect of this rule is that once the  
13 invalid statute has been declared a nullity, it leaves the law as it stood prior to the enactment  
14 of the invalid statute. Id. (citing Boeing Co. v. State, 74 Wash. 2d 82, 89 (1968)). In this  
15 case, the Court’s holding that Initiative 872 is unconstitutional renders it a nullity, including  
16 any provisions within it purporting to repeal sections of the Revised Code of Washington.  
17 Therefore, the law as it existed before the passage of Initiative 872, including the Montana  
18 primary system, stands as if Initiative 872 had never been approved.

#### 19 **IX. Conclusion**

20 For the reasons stated in this Order, the Court concludes as follows:

- 21 1. The implementation of Initiative 872 will severely burden the First Amendment  
22 rights of Washington’s political parties by (a) allowing any voter, regardless of  
23 their affiliation to a party, to choose a party’s nominee, Jones, 530 U.S. at 586;  
24 and (b) allowing any candidate, regardless of party affiliation or relationship to  
25 a party, to self-identify as a member of a political party and to appear on the  
26

1 primary and general election ballots as a candidate for that party. Reed, 343  
2 F.3d at 1204.

3 2. Initiative 872 is not narrowly tailored to serve any legitimate and compelling  
4 state interest. Timmons, 520 U.S. at 358.

5 3. Initiative 872 is unconstitutional in violation of the First Amendment to the  
6 United States Constitution.

7 For the reasons set forth herein, the Court GRANTS Plaintiffs' Motions for Summary  
8 Judgment, docket nos. 49, 52, and 55 to the extent provided in this Order, and DENIES the  
9 State's Cross-Motion for Summary Judgment, docket no. 65.

10 The Court hereby GRANTS all Plaintiffs a Preliminary Injunction as follows:

11 1. The Court enjoins the State of Washington, or any political subdivision of the  
12 State, from enforcing, implementing, or conducting any election pursuant to the  
13 provisions of Initiative 872, as codified in Title 29A, Wash. Rev. Code.

14 2. The Court enjoins the State of Washington, or any political subdivision of the  
15 State, from enforcing or implementing the filing statute under Initiative 872,  
16 Wash. Rev. Code § 29A.24.030, as part of any primary or general election.

17 3. This injunction shall remain in effect until a permanent injunction is entered  
18 consistent with this Order.

19 4. Plaintiffs are directed to prepare, serve, and file a proposed permanent  
20 injunction consistent with this Order by July 22, 2005. Defendants may file any  
21 objection by July 27, 2005 and the Court will thereafter enter a permanent  
22 injunction.

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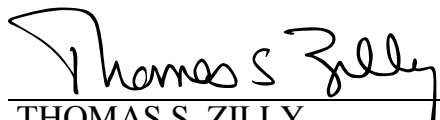
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IT IS SO ORDERED.

DATED this 15th of July, 2005.

  
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THOMAS S. ZILLY  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WASHINGTON STATE REPUBLICAN  
PARTY, et al.,

Plaintiffs,

and

WASHINGTON STATE DEMOCRATIC  
CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF  
WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

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

Defendants,

STATE OF WASHINGTON,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE,

Defendant Intervenors.

No. C05-927Z

PERMANENT INJUNCTION



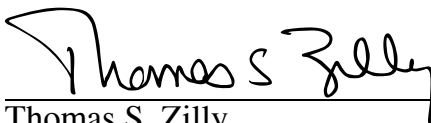
1 This matter comes before the Court on Plaintiffs' Proposed Permanent Injunction,  
2 docket no. 88, submitted in response to this Court's Order and Preliminary Injunction, docket  
3 no. 87, filed on July 15, 2005.

4 The Court hereby incorporates by reference its Order, docket no. 87, and enters the  
5 following Permanent Injunction:

- 6 1. The Court enjoins the State of Washington, or any political subdivision of the  
7 State, from enforcing, implementing, or conducting any election pursuant to the  
8 provisions of Initiative 872, as codified in Title 29A, Wash. Rev. Code.
- 9 2. The Court enjoins the State of Washington, or any political subdivision of the  
10 State, from enforcing or implementing the filing statute under Initiative 872,  
11 Wash. Rev. Code § 29A.24.030, as part of any primary or general election.
- 12 3. The Court enjoins the State of Washington, or any political subdivision of the  
13 State, from refusing to recognize the validity of any minor party or independent  
14 candidate nominating convention held on or before August 27, 2005, on the  
15 grounds that the convention did not comply with the dates set forth in Wash.  
16 Rev. Code § 29A.20.121, provided that the notice provisions of Wash. Rev.  
17 Code § 29A.20.131 have been complied with and the convention otherwise  
18 complies with Title 29A.20, Wash. Rev. Code.
- 19 4. The Court retains jurisdiction in this action to enforce the terms of this  
20 injunction.

21 IT IS SO ORDERED.

22 DATED this 29th of July, 2005.

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25 Thomas S. Zilly  
26 United States District Judge