NOS. 05-35780 & 05-35774

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

v.

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

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

WASHINGTON STATE GRANGE,
Appelant/Defendant Intervenor

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE
No. C05-0927
The Honorable Thomas S. Zilly
United States District Court Judge

BRIEF OF APPELLANTS, STATE OF WASHINGTON, SAM REED, AND ROB MCKENNA

ROB MCKENNA
Attorney General
MAUREEN A. HART, WSBA #7831
Solicitor General
JEFFREY T. EVEN, WSBA #20367
Assistant Attorney General
JAMES K. PHARRIS, WSBA #5313
Sr. Assistant Attorney General
P.O. Box 40100
Olympia, WA 98504-0100
(360) 586-0728

I. NATURE OF THE CASE

In November 2004, the voters of Washington enacted a new primary election system through an initiative measure (Initiative Measure 872, or I-872). I-872 changed Washington's practice of using the primary to select political party nominees to compete in the general election. Instead, under I-872, the two candidates gaining the most votes in the primary for a given office, without regard to political party affiliation, advance to the general election. The Republican, Democratic, and Libertarian Parties challenge the right of the State and its voters to select such a primary election system.

The fact that primary elections historically have been used to nominate party candidates to the general election ballot does not mean that such primaries are the only constitutionally permissible form of primary, that only political party nominees may be given access to a primary election ballot, or that only political party nominees may be allowed to advance to the general election ballot.

II. STATEMENT OF JURISDICTION

The district court properly exercised jurisdiction in this case pursuant to 28 U.S.C. §§ 1331, 2201, and 2202. The district court's grant of injunctive relief is presently appealable under 28 U.S.C. § 1292(a)(1). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §§ 41 and 1294.

The district court entered its order invalidating the primary established by I-872 and granting a preliminary injunction on July 15, 2005. ER 536-75. The district court entered a permanent injunction on July 29, 2005. ER 576-77. The State of Washington, Attorney General Rob McKenna, and Secretary of State Sam Reed timely filed their notice of appeal on July 29, 2005. ER 580-81; Fed. R. Civ. P. 4(a)(1).

III. STATEMENT OF THE ISSUES

The parties stipulated below that this case presents the following issues. ER 133-36.

1. Does the primary system established by I-872 nominate political party candidates for public office?

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

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

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

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

6. If any portion of I-872 is unconstitutional, are the remaining portions severable?[1]

IV. REVIEWABILITY AND STANDARD OF REVIEW

Each of the issues on appeal presents a question of law, which this Court reviews *de novo*. *United States v. Carranza*, 289 F.3d 634, 643 (9th Cir. 2002) (constitutionality of a statute reviewed *de novo*); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001) (en banc) (question of statutory interpretation reviewed *de novo*). This Court reviews grants of injunctive relief *de novo* where that relief rests solely on conclusions of law, and the facts are either established or undisputed. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). The district court's conclusions of law are reviewed *de novo*. *Brown v.*

[1] Issue No. 6 was not a part of the stipulation below, but arose as the parties briefed and argued the other issues.

California Dep't of Transp., 321 F.3d 1217, 1221 (9th Cir. 2003). The district court's grant of summary judgment is reviewed *de novo*. *Carson Harbor Village*, 270 F.2d at 870.

V. STATEMENT OF THE CASE

A. Systems For Conducting Primaries In Washington

The Washington State Republican Party brought this action challenging I-872, a ballot measure approved by Washington's voters in November 2004. A copy of the initiative is attached as Appendix A and is also contained in the record at ER 258-60. Through that initiative, the voters established a system for conducting primary elections with several key features:

- First, any candidate seeking to run for public office would be free to do so, with no petition, convention, or nominating procedure required to obtain ballot access;[2]
- Second, all voters would be free to fully participate in the primary, with the ability to choose from among all candidates for all offices;
- Third, the two candidates receiving the most votes at the primary would qualify to advance to the general election, without regard to party affiliation;
- Fourth, candidates for partisan offices could indicate their party preference on the ballot, but that preference would be shown only for the information of

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[2] At the same time, nothing in I-872 precludes political parties from selecting, by nomination or otherwise, a party candidate who may then file for a spot on the primary election ballot.

> voters and would not determine which candidates would advance to the general election.

2005 Wash. Sess. Laws, ch. 2; ER 258-60 (text of I-872).

Referred to as a "top two" or "qualifying" primary, the system established by I-872 differs markedly from primary election systems used in Washington in recent years. Until ruled unconstitutional in 2003, Washington had a "blanket primary," under which one candidate of each major party was guaranteed a place on the general election ballot. Although, like I-872, the blanket primary permitted all voters to fully participate in this critical stage of the electoral process by choosing from among all candidates, the guarantee of a place on the ballot for one candidate of each party—no matter the relative support of the various candidates—made the blanket primary a party nominating system. *Democratic Party of Washington State v. Reed* (*Wash. Demo.*), 343 F.3d 1198, 1203 (9th Cir. 2003), *cert. denied, Reed v. Democratic Party of Washington*, 540 U.S. 1213, 124 S. Ct. 1412, 158 L. Ed. 2d 140 (2004), *and cert. denied*, *Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957, 124 S. Ct. 1663, 158 L. Ed. 2d 392 (2004).

Washington's former blanket primary combined two constitutionally significant features: (1) unrestricted voter participation in the primary, including

the freedom to choose among all candidates for all offices without restriction based on party, and (2) competition between nominees of different parties in the general election. This combination of features led to invalidating the blanket primary. The ability of all voters to choose from among all candidates, coupled with a guarantee that one candidate of each major party would advance to the general election, convinced this Court (relying upon a prior United States Supreme Court decision striking down California's blanket primary), that the system unconstitutionally opened participation in party nominating decisions to voters who were not party members, in violation of the associational rights of political parties. *Id.*

The invalidation of Washington's blanket primary left the State with two choices. First, it could use its primary to select party nominees, thereby ensuring interparty competition at the general election, but sacrificing the opportunity for all voters to choose among all candidates at the primary. Second, it could adopt a distinctly different primary, departing from the more typical and historical practice of using a primary election to select party nominees. Under this distinctly different approach, the primary would not serve to select party nominees for the general election ballot. Party affiliation would not determine which candidates would advance to the general election. Instead, under such a system, the voters would

choose among all candidates for all offices, and their top two choices would advance without regard to political party affiliation.

In response to this Court's decision invalidating the blanket primary, the Washington Legislature initially adopted a preferred nonpartisan primary and "backup" partisan primary system. 2004 Wash. Sess. Laws, ch. 271; ER 261-364. As passed by both houses of the Legislature, the bill enacted, as a first preference, a "top two" primary similar to I-872 that preserved the right of voters to vote freely for any candidate for public office, but provided that the top two vote-getters for each office would advance to the general election without regard to party affiliation. 2004 Wash. Sess. Laws, ch. 271, §§ 1-57; ER 263-303.

Aware that the political parties would probably challenge the constitutionality of this system, the Legislature also enacted a "backup" plan to take effect if the "top two" system was invalidated. The "backup" was the "Montana" primary under which each major party would have a separate ballot in the primary, in addition to a ballot listing nonpartisan offices.[3] A voter could choose one of the party ballots to vote for the candidates of that party for partisan offices, but could not vote for candidates of different parties for various offices.

[3] This system is also sometimes described as the "pick-a-party" primary. See the Secretary of State's explanation of this system posted to his office website, located at http://www.secstate.wa.gov/documentvault/838.pdf (visited Sept. 15, 2005).

Every voter could vote for nonpartisan offices and measures. 2004 Wash. Sess. Laws, ch. 271, §§ 102-193; ER 304-60.

The Montana system essentially is a traditional partisan primary election system. Under that system, election officials prepare separate ballots for each major political party, with only candidates affiliated with a particular party appearing on those ballots. Voters were required to select the ballot of a single party, and their choices were limited to candidates of that party. Alternatively, voters could select a ballot containing only nonpartisan offices and measures. The top candidate of each party would advance to the general election.

When this legislation reached the Governor's desk, he exercised his "section veto" and vetoed out of the bill all references to the "top two" primary. The Governor signed into law the remainder of the bill, consisting of the "Montana" primary provisions. ER 361-64 (Governor Locke's veto message). The validity of the Governor's veto was challenged, but upheld by the Washington Supreme Court. *Washington State Grange v. Locke*, 153 Wash. 2d 475, 105 P.3d 9 (2005). As a result, Washington used the "Montana" primary in 2004.

While the Legislature debated the bill that eventually resulted in a "Montana primary," an initiative was already in circulation to get rid of the "Montana primary" brought into effect by the Governor's veto and, instead, adopt a "top two"

system. This system allows voters to participate fully in the primary by eliminating party affiliation as a factor in determining whether candidates advance to the general election ballot. The general election is a "runoff" between the two candidates gaining the most votes in the primary. ER 254-60 (Voters Pamphlet pages related to I-872). Washington's voters adopted I-872 at the 2004 general election. ER 428. By doing so, they opted to return to a system under which they—and not the political parties—would retain maximum choice over candidates for public office.

B. Procedural Background

The Washington State Republican Party, together with several of its members and officers, commenced this action on May 19, 2005, by filing a complaint for declaratory and injunctive relief challenging the constitutionality of I-872. ER 1-13. The Democratic Party and the Libertarian Party, together with individuals affiliated with each party, intervened as plaintiffs. ER 68-69 (order granting Libertarian Party's Motion to Intervene); ER 85-86 (order granting Democratic Party's Motion to Intervene). Both parties filed complaints substantially similar to that of the Republican Party. ER 70-84 (Libertarians' Compl.); ER 89-102 (Democrats' Compl.). The complaints originally named

several county auditors and other local election officials as defendants. ER 1-13, 70-84, 89-102.

At the same time, the State of Washington and two of its elected officials, Secretary of State Sam Reed and Attorney General Rob McKenna, intervened in defense of I-872. ER 87-88 (order granting State's intervention). The organization that sponsored I-872, the Washington State Grange, also intervened in support of the measure. ER 597 (civil docket entry reflecting minute order granting oral motion to intervene). All parties stipulated to an order substituting the State for the original county auditor defendants, "as though it were the original defendant, for all purposes." ER 531. The county auditors were accordingly dismissed and are no longer parties. ER 531-32.

At the trial court's direction,[4] the parties submitted a Stipulated Statement of Legal Issues (ER 133-35) and submitted the case on summary judgment.[5] The

[4] ER 597 (minute entry dated June 7, 2005).

[5] On appeal, the State has included within the excerpts of record copies of all declarations relied upon in support of summary judgment. Some exhibits to declarations were duplicative, however, and the excerpts accordingly include only one copy of each such exhibit. The omitted exhibits are the same as other included exhibits, as follows:

- Declaration of John J. White, Jr. (ER 14-59), Ex. 1, is the same as Declaration of James K. Pharris (ER 254-60), Ex. A;

district court issued an order on July 15, 2005, ruling in favor of the political parties. ER 536-75. A copy of that order is attached as Appendix B. The court granted summary judgment in favor of the three political parties and entered a preliminary injunction against the enforcement or implementation of I-872. ER 574. The court subsequently converted the preliminary injunction into a permanent one on July 29, 2005. ER 576-77. The result was to set aside I-872 and the top two primary it established, and to reinstate the "Montana" "pick-a-party" primary previously in effect as a result of the 2004 legislation. ER 573. The State and the Grange appealed from both orders. ER 578-82.[6]

- Declaration of Richard Shepard (ER 151-74), Ex. A and Ex. D, are the same as Declaration of James K. Pharris (ER 261-384), Ex. B and Ex. C, respectively;
- Declaration of David T. McDonald (ER 200-25), Ex. C, is the same as Declaration of James K. Pharris (ER 365-84), Ex. C;
- Declaration of Rod Dembowski (ER 385-494), Ex. I and Ex. M, are the same as Declaration of James K. Pharris (ER 261-384), Ex. B and Ex. C, respectively.

[6] After the entry of the July 15, 2005, orders and the filing of both appeals, the Republican Party plaintiffs sought clarification as to whether the court had decided two additional issues: (1) a challenge to the "Montana" primary filing statute, and (2) an equal protection argument. The trial court entered an order on August 12, 2005, clarifying that it had not reached the "Montana" primary challenge issues because they had not been properly raised, and clarified that it did not reach the equal protection issue, having resolved the case on other grounds. ER 587. The court imposed a stay on further proceedings pending the resolution of these appeals. ER 587.

VI. STATEMENT OF FACTS

This case was presented as a facial challenge to the validity of I-872. The relevant facts are those set forth in the Statement Of The Case.

VII. SUMMARY OF ARGUMENT

In contrast to the election systems used by almost every other state, Washington's I-872 does not use the primary election to select party nominees for public office. The initiative leaves the "nomination" of political party candidates to the privately exercised discretion of each party. Candidates qualify for the general election ballot by gaining either the highest or the second-highest votes for an office in a primary in which all voters are free to participate. All primaries are conducted as nonpartisan primaries with the only reference to political party that, for certain offices, any candidate on the primary election ballot may express his or her preference for a political party or independence. These political party preferences, if any, are printed on the ballot only as information for the voters. Therefore, I-872 does not enact a system in which party candidates are nominated for the general election ballot.

I-872 does not create an unconstitutional "association" between a candidate and a party merely by allowing candidates to state on the ballot their personal preference for a particular political party, if any. This mere statement does not

interfere with the rights of parties to select or support their preferred candidates or to conduct their internal affairs. States may constitutionally provide voters with important information about candidates for office (such as their personal party preference), without converting a primary election into a party nominating system.

Nor does I-872 adversely affect the rights of minor parties and their adherents to participate in the political system, because all parties and candidates are treated equally under the initiative. The constitution does not require states to treat minor parties more favorably than other parties with respect to ballot access.

For these reasons, I-872 should be sustained in its entirety. To the extent that any portion of I-872 is deemed unconstitutional, the initiative should be deemed severable. The State should be allowed to implement any portions of the initiative that are constitutional and furthers broad voter choice as the most important goal underlying adoption of the measure.

VIII. ARGUMENT

A. I-872 Does Not Nominate Political Party Nominees For Public Office

By enacting I-872, Washington voters separated the public process of electing candidates to public office from the internal processes by which political parties select their nominees. This essential change in public policy is the most basic characteristic of I-872, representing a fundamental change in the nature of

primaries in Washington's electoral system. In making this change, the voters made their decision to select one of two basic approaches to conducting primary elections left open to states in the wake of *California Democratic Party v. Jones* (*Cal. Demo.*), 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000), as followed by this Court in *Democratic Party of Washington v. Reed*. Washington could choose either to keep the Montana primary, in which the candidates appearing on the general election ballot would be determined through a party nominating primary (in which only voters selecting a particular party's ballot would be allowed to participate in selecting that party's candidates), or to adopt a new primary in which all the voters would choose among all candidates, with party nominations made irrelevant to qualifying candidates to the ballot. The voters overwhelmingly selected the latter.

By enacting I-872, Washington voters selected an approach that preserves maximum voter choice rather than guaranteeing interparty competition in the general election. The language of I-872 makes this choice clear in several respects. The voters, through the initiative, explained the new and fundamentally different nature of the primary established by I-872: "A primary is a first stage in the public process by which voters elect candidates to public office." I-872, § 7(1) (ER 258). The voters determined that the primary would no longer constitute a mechanism

for the selection of party nominees, but rather it would be transformed into a "first stage" in electing candidates for office.

1. The Traditional Use Of Primaries As Party Nominating Devices Should Not Obscure The Flexibility Of The States To Fashion Different Primary Election Systems

The historical use of the primary as a method for including voters in the process of selecting party nominees may color thinking and expectations of the role that primaries ordinarily play in an election system. It is important, then, to keep in mind that the historical or typical use of primaries to nominate party candidates to the general election ballot, while certainly permissible, is not the only constitutionally sound form that primary election systems may take. I-872 permissibly serves a distinctly different purpose.

Until the turn of the twentieth century, political parties selected their nominees for office through caucuses and conventions, with no government involvement in the process. These systems of selection by party activists came under criticism as corrupt and undemocratic. "The direct primary was born as a tool to take the nominating process out of the hands of the party elites and place it into the hands of the general electorate." Lauren Hancock, Note, *The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights When the Primary Election Process is Construed Along a Continuum*, 88 Minn. L. Rev.

159, 164-65 (2003) (citing Paul Allen Beck & Frank J. Sorauf, *Party Politics in America* 232-34 (7th ed. 1992)).

Primaries originated as an effort to open the nominating process to all party members. Wisconsin, where the noted Progressive Robert M. La Follette was governor, enacted the first primary legislation in 1902. "This effort was [La Follette's] attempt to return to the earliest principles of democracy by going 'back to the people' to nominate the parties' candidates for election." Hancock, 88 Minn. L. Rev. at 165. The initial vision, therefore, was that primaries constituted the process under which all of the Republican voters on the one hand, and all of the Democratic voters on the other, would engage in separate processes to select "their" nominees, who in turn would square off against each other in the general election.

It does not follow from this history that states *must* use a primary election system for the purpose of selecting party nominees, and the I-872 primary system does not. The primary established by I-872 is distinctly different, and it confuses, rather than enlightens, the discussion to think of it in terms of the type of institution envisioned by La Follette and the Progressive reformers. Dissatisfied by the constraints placed on voter choice if the primary is used to select party nominees (*Cal. Demo.*, 530 U.S. at 575), Washington's voters enacted I-872 in

order to establish a system under which the voters would choose among *all* candidates in order to decide which ones they most supported. Under this system, the primary would simply constitute the first stage of a two-stage electoral process not dictated by party affiliation. ER 257 (Voters Pamphlet statement for I-872).[7]

When the voters enacted I-872, they abandoned the notion of a primary used for choosing party nominees. They replaced the traditional notion of the nominating primary with a new vision of the primary as a preliminary winnowing process. Under this new vision, the voters would select the candidates they prefer to advance to the general election, without regard to party.

Perhaps influenced by the traditional use of primary elections, the district court embraced two erroneous assumptions of the political parties in invalidating this new and different use of a primary. First, the court assumed that because nominating candidates for election is a function of political parties, it also must be the function of a primary. ER 555 (trial court order noting that candidate nomination is a basic function of political parties). The associational rights of political parties that form the basis of the decisions in *Cal. Demo.* and *Wash. Demo.*, derive from the nature of the parties as private organizations. *Cal. Demo.*,

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[7] The word "nomination" appears nowhere in the text of I-872, and it is misleading to continue to characterize the new primary it established as "nominating" candidates.

530 U.S. at 574 (political parties are formed when voters "join together in furtherance of common political beliefs"); *Wash. Demo.*, 343 F.3d at 1204 (describing the activities engaged in privately by individuals who choose to actively participate in political parties). Simply because nomination is important to private groups, it does not follow that a primary election system must provide the avenue for making such nominations. States are free to choose a different structure through which voters may select their public officials.

Second, the court below erroneously assumed that permitting candidates to inform the voters of the candidate's personal party preference is tantamount to using the primary to select party nominees. The district court observed that, "[p]arty affiliation undeniably plays a role in determining the candidate voters will select . . . ." ER 558. The fact that this information is permitted and voters may find it useful does not mean that voters are choosing "party nominees."

To illustrate this point, Washington elects numerous offices on a nonpartisan basis. These include judges, many local offices, and even one statewide executive branch office (the superintendent of public instruction). Wash. Rev. Code § 29A.52.111. As in I-872, the top two candidates advance to the general election.

Wash. Rev. Code § 29A.36.171.[8] While the ballot for such offices does not include information on a candidate's party preference, such information may well be available to voters from other sources. The political parties could not seriously contend, however, that the mere fact that voters might be aware of a nonpartisan candidate's party preference and use that information in deciding which candidates to vote for transforms the primary for nonpartisan offices into a party nominating device.

Likewise, the mere fact that such information is provided on the ballot as information for voters cannot transform a primary into a method for selecting party nominees. Properly viewed then, I-872 redefines "partisan offices" in such a way that these offices are filled in exactly the same way as nonpartisan offices, with the exception that candidates are allowed the option of showing their political party preference on the ballot as information for the voters. After the enactment of I-872, certain offices are "partisan" only in the sense that candidates are not precluded from indicating a personal party preference, but they are not "partisan"

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[8] The cited statute is a provision of the 2004 "Montana" primary legislation. I-872 amended a prior version of that statute, Wash. Rev. Code § 29A.36.170, to make it broadly applicable to partisan and nonpartisan offices. ER 258 (amending Wash. Rev. Code § 29A.36.170). This provision illustrates that the basic approach of I-872 was to make the procedures for conducting primaries for nonpartisan offices applicable to partisan offices as well, thus reinforcing the principle that the primary is not used to nominate a party's candidates.

in the sense that the candidates are necessarily party nominees, or that party nomination qualifies them for the general election ballot. 2005 Wash. Sess. Laws, ch. 2, § 4; ER 258 (text of I-872).

There is a long history of association between state-conducted primaries and political party nominations. This association is not constitutionally compelled, however, and states retain the authority to structure their elections in other ways.

2. Exercising Flexibility, Washington Voters Permissibly Jettisoned A Nominating Primary And Adopted A Winnowing Primary

In *Cal. Demo.*, the United States Supreme Court determined that states may either permit all voters to choose from among all candidates at the primary, or the states may choose to use primaries as a method of nominating candidates for public office and then place those nominees on the general election ballot. *Cal. Demo.*, 530 U.S. at 577. Washington's voters, through I-872, chose the first option, thereby deciding to elect their public officials without using party nominations as a means of determining which candidates will appear on the general election ballot.

The United States Supreme Court made clear the permissible choice between these two distinctly different approaches to primaries when it struck down California's version of the blanket primary. *Id.* The Court premised its analysis upon the determination that California's blanket primary was used to select party

nominees, since the principal method by which a candidate would qualify to appear on the general election ballot was by winning a party primary. *Id.* at 569-70.[9] The Court recognized that "States have a major role to play in structuring and monitoring the election process, including primaries",[10] that it is "too plain for argument that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Id.* at 572 (internal punctuation omitted) (quoting *American Party of Texas v. White*, 415 U.S. 767, 781, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974) (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 237, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) (Scalia, J., dissenting)). But where the process for selecting party nominees included permitting every voter to select among all candidates, as under the blanket primary, the Court found a violation of the parties' associational rights. *Cal. Demo.*, 530 U.S. at 577.

The Supreme Court's decision in *Cal. Demo.* made it clear that Washington's choice is constitutionally permissible—states need not structure their electoral process around party nominations and party primaries. As an alternative,

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

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

the Court offered the option that the voters selected when they enacted I-872, that the State decouple the process for deciding which candidates appear on the general election ballot from a party nominating process. *Cal. Demo.*, 530 U.S. at 585-86.

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

> Respondents could protect them all [referring to state interests] by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established [political] parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election.

Id. at 585. The Court then explained: "This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: *Primary voters are not choosing a party's nominee*." *Id.* at 585-86 (emphasis added).

The essence of the holdings in *Cal. Demo.* and *Wash. Demo.* is therefore that, even though states possess broad authority over the electoral process,[11] states cannot combine two features in the same primary system. That is, they cannot simultaneously use the primary to select party nominees and permit all voters to

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

choose from among all candidates at the primary; the states must choose one approach or the other. Washington chose the latter.

I-872 changed the statutory definition of "primary" to reflect the voters' fundamental shift in its purpose:

> "Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) for public office ((~~at the polls~~)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

I-872, § 5 (ER 258) (amending Wash. Rev. Code § 29A.04.127; deletions of prior statutory language shown in strikeout; additions of language underlined). To complete the transition away from a system in which party nominations determined access to the general election ballot, the voters also provided: "For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot". I-872, § 6(1) (ER 258) (amending Wash. Rev. Code § 29A.36.170). I-872 supplants the prior rule that the candidate receiving the highest number of votes of each party—the party nominee—would advance. I-872, § 17(4) (ER 260) (repealing Wash. Rev. Code § 29A.36.190).[12] The

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[12] I-872 was drafted before the enactment of the 2004 legislation that resulted in the Montana primary. Accordingly, it did not repeal Wash. Rev. Code § 29A.36.191, a provision of the 2004 act. As the later-enacted statute, however,

Secretary of State reiterated this point in an administrative rule that captures the understanding of the State's chief election officer as to the nature of the new primary: "Pursuant to chapter 2, Laws of 2005 [I-872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." Wash. Admin. Code § 434-262-012 (ER 380).[13]

Finally, the voters made clear their objective of promoting voter choice over party nominations through policy statements set forth in the initiative. The initiative's intent section clearly addresses the concern of "protect[ing] each

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I-872 supersedes the earlier provision of Wash. Rev. Code § 29A.36.191. *ASARCO, Inc. v. Air Quality Coalition*, 92 Wash. 2d 685, 708, 601 P.2d 501 (1979) (setting forth the standard for the implied repeal of a statute when "(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.").

In addition, the Voters Pamphlet statement in favor of I-872 makes clear that the elimination of a guarantee of one Democrat and one Republican on the general election ballot—of, in other words, party nominations—was one of the major objectives of the initiative. "No political party is guaranteed a spot on the general election ballot." ER 257 (Statement for Initiative 872, Voters Pamphlet 12 (2004)).

[13] The Secretary's rules, promulgated to implement I-872, were repealed following the trial court's decision in this case. They remain, however, the Secretary's authoritative statement as to how he construes the initiative, and they, or rules like them, could be reenacted if this Court upholds the constitutionality of the initiative.

voter's right to vote for any candidate for any office." I-872, § 2 (ER 258). "[T]his People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington." I-872, § 2 (ER 258). Among the interests the initiative advances was the protection of several voter rights, including, "[t]he right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." I-872, § 3(3) (ER 258).

The Ninth Circuit determined that Washington's former blanket primary, like California's, was used to select political party nominees. *Wash. Demo.*, 343 F.3d at 1203-04. The Court reasoned that distinctions between California's system and Washington's were immaterial, rejecting the argument that Washington did not use the blanket primary to select party nominees. *Id.* The Ninth Circuit noted the language in *Cal. Demo.* referring to a "nonpartisan blanket primary" in which "voters can vote for anyone on the primary ballot, and then the top vote-getters regardless of party run against each other in the general election." *Id.* at 1203. The guarantee of one place on the general election ballot for each political party is, indeed, the key distinction between a party nominating primary and a "nonpartisan

blanket primary," which led the Ninth Circuit to conclude that Washington's prior system used the primary to select party nominees. *Id.*

The political parties and the court below read a nonexistent requirement into the Court's endorsement of the top two primary in *Cal. Demo.*—that the option of a qualifying primary suggested by the court is limited to a system in which the political parties first nominate their candidates, and then *only* those nominees are permitted access to the primary ballot. Very much to the contrary, the Court states that separate party nominating processes might be used for determining candidate access to the primary election ballot. It plainly does not state that only candidates nominated by the political parties may have access to the primary election ballot.

The Court explained that states could protect all of the interests that underlay the former blanket primary through a system like I-872. *Cal. Demo.*, 530 U.S. at 585. Although the political parties deride this portion of the Court's opinion as dicta, it formed a critical component of the Court's analysis of the blanket primary and it is eminently sound. The Court noted that the blanket primary promoted several legitimate interests, including "promoting fairness, affording voters greater choice, increasing voter participation, and protecting [voter] privacy." *Id.* at 584. The Court embraced the qualifying primary in explaining why the blanket primary was not narrowly tailored to further those interests. *Id.* at 585. The Court

explained that all of those interests would be served by a primary in which voters were free to choose from among all candidates, but only the top two candidates advanced. *Id.* If, as the political parties argue, the Court meant simply that the states could enact such a system if the primary election ballot was limited only to party nominees, then the system would not advance all of those interests. In particular, such a system would not serve the states' interest in affording voters greater choice and increasing voter participation.

In context, the Court cannot have meant that states were constitutionally required to limit their "nonpartisan" primaries to candidates previously selected by private party processes. The Court used the permissive word "may" in stating that a primary "*may* include nomination by established parties". *Cal. Demo.,* 530 U.S. at 585. It seems clear that if the Court had intended to describe a mandatory requirement that it would have used mandatory, rather than permissive, language.

The political parties put much stock in the dissenting opinion of Justice Stevens in this regard, assuming that the Court's majority silently adopted an assumption that appears in a footnote to that dissent. Justice Stevens described a "nonpartisan primary" as, "a system presently used in Louisiana—in which candidates previously nominated by the various political parties and independent candidates compete." *Id.* at 598 n.8 (Stevens, J., dissenting). Their reliance upon

the dissent is incorrect for several reasons. Most obviously, the description by Justice Stevens occurs in a dissent. A dissenting opinion does not speak for the Court. Further, to the extent that the dissenting opinion assumes that party nominees *would*, rather than merely *could*, be part of the system, there is no indication the Court's majority shared the assumption, since the opinion of the Court used permissive language. Next, although Justice Stevens described Louisiana's system as including a party nominating process, Louisiana law does not provide for party nominations separate from the primary. *See* La. Rev. Stat. Ann. § 18:461 (setting forth the manner in which candidates qualify to the primary ballot); La. Rev. Stat. Ann. § 18:465 (describing nominating petition). Finally, in context, Justice Stevens' argument is more of a warning against another argument that the political parties have advanced than an embrace of their view that the opinion requires a party nominating process in order for a "top two" primary to be valid. The quoted language comes immediately after a sentence in which Justice Stevens warns against a "slippery slope" approach to reviewing state primary systems. He warns against concluding that, "the only nominating options open for the States to choose without party consent are: (1) not to have primary elections, or (2) to have what the Court calls a 'nonpartisan primary'". *Cal. Demo.,* 530 U.S. at 598 n.8. Justice Stevens opposed the notion that the parties could simply "order

up" the form of primary they prefer. *Id.* In context, it makes little sense to read the dissent as requiring precisely what Justice Stevens warned against—the authority of the parties to dictate the process despite the provisions of state law.

Under I-872's approach of using a "qualifying primary" rather than a "nominating primary," party nominations do not determine which candidates will advance to the general election ballot. At the same time, nothing in I-872 precludes parties from nominating their candidates who may then file for office and appear on the primary election ballot. The candidates who appear on the general election ballot are selected by the *voters at large*, not by the parties or by the voters acting as party members. The top two candidates, without regard to party affiliation, advance to the general election. I-872, § 6(1) (ER 258); *see also* I-872, § 7 (ER 258). Since party affiliation plays no role in determining which candidates advance to the general election, the primary established by this initiative cannot in any way be regarded as determining party nominees.[14]

[14] The Democratic Party suggested below that candidates selected under the new top two primary will be "political party candidates" because Wash. Rev. Code § 29A.52.116 states that, "[m]ajor political party candidates for all partisan elected offices . . . must be nominated at primaries held under this chapter." That statute was enacted in 2004 as a part of the Montana primary system, which clearly was a party nominating system. The quoted language is clearly inconsistent with the system established in I-872 and should be regarded as obsolete. Wash. Rev. Code § 42.17.510(1), requiring sponsors of public

The political parties make much of the fact that a candidate's party preference appears on the ballot, but this feature falls far short of making I-872's primary a device for selecting party nominees. The initiative requires the declaration of candidacy form to include a space in which candidates for partisan office may "indicate his or her major or minor party preference, or independent status." I-872, § 9(3) (ER 259) (amending Wash. Rev. Code § 29A.24.030). Under I-872, this statement of party preference does not determine which candidates advance to the general election. The candidates with the two highest vote totals will qualify for the general election, without reference to party preference. The optional statement of political preference is provided solely to the voters as one possibly relevant piece of information about the candidate. A statement by the *candidate* as to his or her own preferences, provided as information to the voters, does not equate with a statement that the candidate has been nominated, endorsed, or supported by any political party, and no reasonable voter would believe otherwise.

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advertising concerning a candidate to clearly identify the candidate's political party, also dates back well before the enactment of I-872. This statute is still enforceable because it is not directly contradictory to I-872, but neither can it serve as evidence that candidates are "nominees" of political parties.

Nothing prevents political parties from nominating candidates.[15] They may certainly do so if they choose. But what the political parties seek, and what the State need not afford them, is a right to have only party nominees on the primary election ballot, or to secure a place on the general election ballot for their nominees, regardless of whether those nominees earn the support of the voters. The parties can point to no authority establishing that political party nominations *must*—as opposed to merely *may*—be used to determine which candidates appear on the general election ballot. Indeed, case law clearly establishes that while political parties have a right to a reasonable opportunity for their candidates to appear on the general election ballot, they have no absolute right for them to actually do so. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986) (states may condition general election ballot access upon a showing of a modicum of public support). "We think that the State can properly reserve the general election ballot 'for major struggles' . . . by conditioning access to that ballot on a showing of a modicum of voter support." *Id.* at 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)).

[15] The term "nomination" is no longer useful in discussing the mechanics of the top two primary.

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

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

B. I-872 Does Not Impair The Associational Rights Of Political Parties

Neither the political parties nor the trial court gives I-872 credit for the fact that I-872, in addition to establishing a nonpartisan basis for winnowing candidates for public office, restores to the political parties their unfettered freedom to determine, by whatever process they choose, which candidates to support in the primary and in the general election. As noted earlier, I-872 reverses the trend

begun in the Progressive Era where states "take over" the party nominating process and open it up to wider voter participation. Under I-872, parties are restored to the position they enjoyed prior to Progressive Era reforms: they can choose their favored candidates for office in any way they like. The role they play under I-872 is substantially similar to the roles they played before they were required to conduct primaries.

The political parties have made two basic contentions to the effect that the system established by I-872 denies their constitutional rights to free association: (1) that the system bypasses and thus impairs their asserted constitutional right to nominate candidates, and (2) that I-872, by permitting candidates to state a party preference on the ballot, inevitably compels the parties to associate with candidates not of their choosing.

1. The Associational Rights Of Political Parties Do Not Include The Right To Have Their Nominees Advance To The General Election Ballot

The political parties appear to assert that their right to freedom of association includes the right to ensure that their nominees advance to the general election ballot. It does not. The United States Supreme Court has explicitly rejected the notion that a political party has an unconditional right to "nominate" a candidate and then to demand that this candidate's name appear on the general election

ballot. A party's right to make its own nominating decisions does not mean "that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). The *Timmons* Court noted several reasons why a party's choice might not be permitted to appear on the ballot, including ineligibility, unwillingness, or selection by another party. *Id.* In the context of I-872, there is another possibility: that the party's chosen candidate might not gain enough votes to participate in the general election. Indeed, lack of sufficient voter support is a perfectly sensible way to winnow candidates, particularly where candidates of all stripes participate in a primary in which all voters are free to participate. Compared with this principle, party affiliation is a relatively arbitrary basis for determining which candidates should advance to the general election.

The case law teaches that where party nomination is the organizing principle of a state's election process, parties have a right to a reasonable opportunity to place their candidates onto the ballot, but they enjoy no constitutional guarantee of success. *Munro*, 479 U.S. at 193 (stating that the parties' rights "are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively"). The states can impose reasonable requirements for ballot access and, while those requirements may not unduly restrict political opportunity, the parties

enjoy no *per se* right for their preferred candidates to appear on the general election ballot. *Id.* I-872 allows any candidate, including party nominees, to appear on the primary election ballot and vie freely for a spot on the general election ballot. The constitution requires no more.

Again, however, the law does not support the notion that party nomination must be the organizing principle of a state's primary election process. While states may choose to organize their elections around party nominations, they are not constitutionally compelled to do so, and Washington has not. The most common example of an alternative principle is the nonpartisan office in which officers are selected without reference to party affiliation. The political parties have not argued, and could not successfully argue, that making an office nonpartisan infringes on parties' associational rights because to do so would deny them the right to nominate candidates to appear on the general election ballot for such offices.[16] Yet their argument here is not different in any significant sense.

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[16] Washington law places no restriction on the right of a political party to support or endorse candidates for nonpartisan office or on the right of a candidate for nonpartisan office to publicly identify a party preference. However, the ballot would not formally reflect the party preference of a candidate for nonpartisan office. Wash. Rev. Code §§ 29A.52.210-.240.

2. Permitting Candidates To State Their Personal Party Preference, If Any, On The Primary Election Ballot Does Not Unconstitutionally Infringe On The Associational Rights Of Parties

The intent of I-872 is to conduct elections for partisan offices in the same manner as for nonpartisan, while allowing candidates to have their political preferences reflected on the ballot. The parties argue that this single factor transforms the election into a process in which an utterly different set of constitutional principles apply, and that states must show a compelling interest in order to justify giving this information to voters.

The parties have not shown how I-872 would actually harm their associational rights in this respect, apparently regarding the proposition as self-evident. Implied in their argument is that the "top two" primary under I-872 would confuse the voters as to which candidates are preferred by the party, and that this confusion somehow would amount to compelling the party's association with disfavored candidates.

Both arguments arise from the fallacious premise that primaries are inherently and unavoidably mechanisms for nominating political party candidates for office and that voters would understand them to be so. First, as discussed above, states do not have a constitutional obligation to assist political parties in

nominating their candidates or granting them access to the general election ballot. *Timmons*. A state may select an election process that winnows the field of candidates without using party nomination as the mechanism for doing so. So long as parties have a full opportunity to participate in the system established by state law, their associational rights are fully accommodated. *Munro*, 479 U.S. at 197 (states are not required to automatically place party nominees onto the ballot).

Second, the parties have made no showing (and it is certainly far from self-evident) that voters cannot distinguish between a party nominating process (say, a party convention) endorsing Candidate A and a state-operated primary resulting in the qualification of Candidate B to compete in the general election. The mere fact that B may publicly identify a preference for the same party as A does not make B the party's nominee, or confuse voters as to whether A or B is the party's preferred candidate. Any reasonably informed voter would be aware of the difference. In addition, the "confused voter" argument depends for its force entirely on the fact that primaries historically were used to nominate political party candidates and the notion that this historic "norm" will lead voters to assume that a "top two" primary serves the same purpose. There is no basis for this assumption.

The implications of accepting the parties' argument are harsh for states exploring their options for structuring the elections of state officers. If the mere

public identification of a candidate as preferring a political party infringes on associational rights of political parties, states are effectively limited to (1) conducting no primary, leaving parties free to nominate candidates by convention or caucus, or (2) conducting a party nominating process that largely defers to party choice in structuring the primary. But even where a state chooses to structure its electoral process around party nominations, the state is not required to defer to party desires in the manner of conducting primaries. *See Clingman v. Beaver*, ___ U.S. ___, 125 S. Ct. 2029, 2035, 161 L. Ed. 2d 920 (2005) (state was not required to structure its primary the way the political party demanded); *see also Cal. Demo.*, 530 U.S. at 598 (Stevens, J., dissenting) ("the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections"). Sovereign states should be free to seek other ways of choosing their officers, so long as they do not intrude on the legitimate speech or associational rights of political parties and other private organizations.

In the trial court, the political parties argued not only that I-872 would violate their candidate nomination rights, but also that it would "force" an unwanted association between parties and candidates. They argued that candidates expressing a party preference were "appropriating" the party name, and the

Libertarian Party asserted that its name was a registered trademark.[17] The parties expressed this argument as a challenge to section 9 of I-872, which permits candidates to express a party preference when filing for office. ER 563.

Since I-872 does not establish a method for selecting party nominees, it does not "force" any party to "associate" with anybody as its nominee. I-872 makes "nomination" an entirely private process, leaving each political party free to structure its candidate selection process as it pleases. Parties are free to associate, or not associate, with any candidate as they please. Yet, the parties argue that the danger of "forced association" entitles them to exclude from the ballot any candidate filing for office and seeking to express a preference for a given party, unless the party has consented to that candidate's use of the party name. Such a sweeping assertion carries staggering implications as to the ability of voters to choose the individuals to serve in public office.

In making this surprisingly broad assertion, the parties have relied primarily on a case relating to the candidacy of David Duke for President of the United States. In *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996), the Eleventh Circuit

[17] I-872 allows a candidate to indicate a "party preference" without specifying whether the "preference" relates to a specific organized party, a newly-created organization, or even a generic political philosophy. I-872, § 9(3) (amending Wash. Rev. Code § 29A.24.030). It seems unlikely that the two major national parties could assert "ownership" of the generic terms "Republican" and "Democratic."

upheld a Georgia state statute explicitly granting authority to the presidential candidate selection committee for the Republican Party to strike candidates from the presidential primary ballot. The Committee had voted to exclude David Duke from the Republican presidential primary ballot. The candidate and his supporters sued to invalidate the state law on the ground that it violated their constitutional rights. The trial courts and the Eleventh Circuit upheld the statute.

The *Duke* case does not stand for the proposition that a party has a constitutional right to restrict candidates for office from using the party's name. First, in *Duke*, the rights were statutory in nature, and the courts did not decide that Georgia was constitutionally compelled to exclude Duke from the ballot. Second, the question in *Duke* was whether a particular candidate could be considered a Republican for the purpose of allowing him to compete for the nomination of that party. *Duke* establishes no broad constitutional right for a political party to control the use of its name, nor have the parties cited any other cases establishing such a right.

Merely allowing a candidate to express a party preference does not establish any "association" between the candidate and the party. In a state using a party nominating primary, the party affiliation of the candidate is significant, because candidates filing as Democrats will be seeking the nomination of the Democratic

Party (voters registered as Democrats, or voters electing to use the Democratic Party ballot), while candidates filing as Republicans will be appealing to an entirely different subset of voters. In the "top two" primary established by I-872, the voters are not differentiated by party, and the sole purpose of indicating a party preference is to give the voters a bit of information about the candidate. Voters will understand that the information concerns the candidate's party preference, not the party's candidate preference. As the measure states, "[a]ny party or independent preferences are shown for the information of voters only . . . ." I-872, § 7(3) (ER 258). In no sense does this create a constitutionally significant "association" between the candidate and the party.

Even within the context of a system in which the primary is used to select party nominees, political parties are not afforded what might be described as a "constitutional veto" over all candidates who seek their nomination. Near the beginning of the Supreme Court's decision in *Cal. Demo.*, the Court observed, "[w]e have considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Cal. Demo.*, 530 U.S. at 572 (citations omitted). The clear implication of this language is that states may force parties to "open up" their nominating processes to all party

members, even if the parties would prefer not to do so. This principle is inconsistent with any claim that parties can prevent all candidates but those authorized by the party from publicly claiming even a preference for that party.[18]

This is even clearer—indeed the issue does not even arise—when the primary system is divorced from the concept of party nominations. The parties seek to control who may even claim a preference for a particular party in a system that does not utilize the concept of party nomination in determining which candidates will advance to the general election.

C. I-872 Does Not Unconstitutionally Distinguish Between Major And Minor Political Parties

The political parties raised two arguments below relating to the effect of I-872 on minor political parties. Both arguments were premised on the view that

[18] The trial court did not reach the Republicans' apparent effort to claim exclusive control over the use of the party name, even in the context of the "Montana" primary. ER 587 (district court order, issued after the filing of the notices of appeal, clarifying that the court "did not decide whether the 'Montana' primary filing statue, Wash. Rev. Code § 29A.24.031, was unconstitutional as part of the 'Montana' primary system"). The parties' asserted right to control the ability of candidates to identify themselves through the use of such generic preferences as "Republican" and "Democratic" would be even weaker in that context, in which primary participation is restricted to individuals who affiliate with a specific party by deciding to vote a ballot limited to candidates of that party. The Supreme Court has clearly explained that states may require parties to open their nominating process to all voters choosing to affiliate with that party. *Cal. Demo.*, 530 U.S. at 572. This principle is inconsistent with any claim that parties may limit the field of candidates in the primary election.

the initiative would affect minor parties differently from major parties. The Republican Party asserted that a surviving vestige of pre-initiative law would require minor parties to nominate candidates by convention, while denying this option to major parties. The Libertarian Party asserted that a "top two" system would harm the interests of minor parties by making it more difficult for their candidates to qualify for the general election ballot. ER 566 (district court's summary of the parties' contentions).

The district court did not reach the merits of either argument because the court correctly concluded that I-872 treats major political parties and minor political parties the same way. Therefore, I-872 places no special burdens on minor parties, treating candidates of all parties alike. Futhermore, since the court found that the statute asserted to require minor parties to nominate by conventions had been impliedly repealed (see discussion below), there was no basis for the argument that the law disfavored major parties either. ER 568-69 (concluding that I-872 impliedly repealed pre-existing statutes describing how minor party candidates qualified to the ballot).

1. Washington Traditionally Required Minor Parties To Nominate Candidates By Convention

Consideration of the political parties' arguments regarding the effect of I-872 on minor political parties requires a brief examination of how minor parties qualified candidates to the ballot under prior law. Under Washington's former blanket primary system, candidates of major political parties, such as the Republicans and Democrats, simply filed declarations of candidacy and then appeared on the primary ballot.[19] Minor parties, in contrast, first nominated candidates through a convention process that occurred before the primary. Candidates who received a minor party nomination through such a convention, including obtaining a sufficient number of petition signatures of registered voters, would appear on the primary ballot. *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 760-61 (9th Cir. 1994). To advance to the general election ballot, a candidate needed to receive both a plurality of the votes cast for candidates of his

[19] State law defines major political parties as those parties for whom at least one candidate for a statewide partisan office received at least 5 percent of the vote at the last previous general election held in an even-numbered year. Wash. Rev. Code § 29A.04.086. All other political parties are "minor political parties." Wash. Rev. Code § 29A.04.097. Currently, only the Democratic and Republican Parties qualify as major political parties. Although the Libertarian Party enjoyed major party status for a time, it currently qualifies as a minor party. Although I-872 neither repealed nor amended the statutes defining major and minor political parties, the initiative established an election system that treats them in exactly the same way.

or her party, and at least one percent of the total votes cast at the primary for all candidates for that office. *Wash. Demo.*, 343 F.3d at 1201. In the case of minor party and independent candidates, the blanket primary therefore served the purpose of screening those candidates to determine whether they could demonstrate sufficient voter support to advance to the general election. *Munro*, 479 U.S. at 196.

The 2004 legislation that resulted in the "Montana" or "pick-a-party" primary continued the convention requirement for minor party and independent candidates. Wash. Rev. Code § 29A.20.121. Under that system, however, voters were limited to selecting the ballot of a single major party in order to select that party's nominees. Wash. Rev. Code § 29A.36.104 (describing ballot formats for "Montana" primary). The Legislature accordingly provided that candidates nominated at minor party or independent conventions would proceed directly to the general election ballot, rather than appear on the primary ballot as under the blanket primary. Wash. Rev. Code § 29A.36.201. Thus, under both the blanket primary and the Montana primary, minor party and independent candidates qualified to the ballot through a convention process, while major party candidates were nominated in the primary.

2. I-872 Impliedly Repealed Minor Party Convention Statutes

The district court correctly ruled that I-872 impliedly repealed the minor party convention requirements and, therefore, treated all candidates the same without any distinction between major and minor parties. ER 568-69. As the trial court explained, "it was the intent of the voters who enacted I-872 that it be a complete act in itself and cover the entire subject matter of earlier legislation governing minor parties." ER 568.[20] Under Washington law, a statute is impliedly repealed when:

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[20] To some extent, the voters' effort to do so was complicated by the timing of the measure. I-872 was drafted, and petition circulation began, prior to the enactment by the Legislature of the "Montana" primary system. Thus, I-872 obviously had no opportunity to repeal or amend all the statutes added to the code by that legislation. Under these circumstances, the fact that two pieces of legislation essentially "passed in the night" does not prevent the provisions of the initiative approved by the voters from taking effect. Additionally, in some instances, the legislative act repealed statutes that I-872 amended. When a legislative body amends a repealed statute, the inquiry becomes one of legislative intent. Where the legislative body, here the people, clearly sets forth its purpose and fully provides for the subject, it is reasonable to conclude that the intent was to make the statute enforceable as stated in the more recent act. 1A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 22:3 (6th ed. Mar. 2005). "The reference to the repealed statute is dismissed as surplusage and the will of the legislature embodied in the provisions of the attempted amendment is enforced as an independent act." 1A Singer at § 22:3 (footnote omitted) (citing, *inter alia*, *Whitfield v. Davies*, 78 Wash. 256, 259, 138 P. 883 (1914)). The application of this rule is particularly important as it relates to the interaction of an initiative with a legislative action that occurred while the initiative was pending. *See Coppernoll v. Reed*, No. 76818-8, 2005 WL 2150637 at *3 (Wash. Sept. 8, 2005) (noting the "constitutional preeminence of the right of initiative"). The people's legislative

> [t]he later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, or [when] the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect.

Washington Fed'n of State Employees v. Office of Fin. Mgmt., 121 Wash. 2d 152, 165, 849 P.2d 1201 (1993).

The central vision of I-872 was to create a primary system divorced from party nominations, in which all candidates compete, and the top two advance without regard for party. This vision is inherently inconsistent with qualifying minor party candidates to the general election ballot by convention.[21] The initiative amended the definition of "primary" to describe it as a "winnowing" process, in which party preference would play no role in determining which candidates advance to the general election. I-872, § 5 (amending Wash. Rev. Code § 29A.04.127) (ER 258). It provided that "*only* the names of the top two

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intent is clearly expressed within I-872. Particularly, under these circumstances in which two legislative processes temporally overlapped, the technical happenstance that some statutes were repealed while the measure was pending does not prevent the measure enacted by the voters from taking effect. *See also* Wash. Rev. Code § 1.12.025(2) (recognizing that where the same session of the Legislature both amends and repeals the same statute, the resulting law depends upon a determination of legislative intent).

[21] However, minor parties are, of course, free to choose candidates who file and participate in the primary election on the same basis as any other candidates.

candidates [from the primary] will appear on the general election ballot." I-872, § 6 (ER 258) (emphasis added) (amending Wash. Rev. Code § 29A.36.170); *see also* I-872, § 7(2) ("Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot[.]"). As explained to the voters in the statewide Voters Pamphlet, "[t]he initiative would replace the system of separate primaries for each party . . . with a system in which all candidates for each partisan office would appear together on the primary ballot. . . . The primary ballot would include all candidates filing for the office, including both major and minor party candidates and independents." ER 256 (Voters Pamphlet explanatory statement).

Both the text of I-872 and its legislative history therefore make clear that the top two qualifying primary applied to *all* candidates, with no exception for minor party or independent candidates to qualify to the ballot through a convention process. The district court, therefore, correctly concluded that I-872 impliedly repealed all prior inconsistent statutes, and that it precludes minor party nominees

from appearing on the ballot without first having appeared on a primary election ballot.[22] ER 567.

3. I-872 Does Not Violate Equal Protection

The Republican Party's equal protection argument falls once it is clear that I-872 treats major and minor political parties the same as a result of the implied repeal of minor party convention statutes. They can scarcely argue that a system that treats all candidates the same discriminates against any of them. Under I-872, all candidates appear on the primary ballot and compete among all the voters. There is no difference in this regard between candidates who express a preference for a major party, a minor party, or no party at all.

4. I-872 Does Not Deny Candidates Who Express A Preference For Minor Political Parties Reasonable Access To The Ballot

The Libertarians contend that, because all candidates appear on the primary ballot together and only the top two advance, their right to ballot access is somehow restricted. Quite to the contrary, by eliminating the convention requirement, I-872 made it easier for candidates who prefer a minor party to appear on a ballot and compete for the support of all voters.

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[22] This implied repeal does not affect minor party and independent convention statutes to the extent that they relate to candidates for president and vice president of the United States, since those candidates do not qualify through a primary process. *See* Wash. Rev. Code § 29A.56.320.

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

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

The Court noted that the blanket primary was fundamentally different than primaries in which voters were restricted to ballots containing only the candidates of a single party, in this critical respect. The Court observed, "[b]ecause Washington provides a 'blanket primary,' minor party candidates can campaign among the entire pool of registered voters." *Id.* at 197. As the Court further noted:

> To be sure, candidates must demonstrate, through their ability to secure votes at the primary election, that they enjoy a modicum of community support in order to advance to the general election. But requiring candidates to demonstrate such support is precisely what we have held States are permitted to do.

Id. at 197-98. Since every voter at the primary is free to cast his or her vote for any candidate, providing access to that ballot permits the candidate to compete for support among all voters and fully satisfies their constitutional right to ballot access. *Id.* at 198 (noting that "every supporter of the Party in the State is free to cast his or her ballot for the Party's candidates"). The candidate's challenge at that point is to earn the voters' support, not to compete on a separate playing field.

Reported cases regarding ballot access traditionally involve claims very different from those asserted in this case. Generally, the argument in a ballot access case concerns a claim by a minor party or independent candidate that a state has established requirements that are too stringent for a candidate to appear on a ballot, even if that candidate can prove a modicum of public support. *See, e.g.,*

Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (concerning state law requirements faced by independent presidential candidate to appear on the ballot); *see also Libertarian Party of Washington*, 31 F.3d at 765 (upholding Washington's law on minor party ballot access). In such cases, the concern is the degree to which a ballot access law limits "the field of candidates from which voters might choose." *Anderson*, 460 U.S. at 786.

This is not a concern with regard to I-872, which treats major party candidates and minor party candidates the same. All candidates appear on the primary ballot where they compete for the support of all voters—not merely of voters affiliated with a single party or willing to cast a ballot limited to candidates affiliated with a single party. I-872, § 5 (amending Wash. Rev. Code § 29A.04.127) ("Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate."). The initiative contains no threshold requirement for appearing on the primary ballot, other than filing a declaration of candidacy and paying the applicable fee. I-872, § 9 (amending Wash. Rev. Code § 29A.24.030) (describing declaration of candidacy). Under I-872, candidates who express a preference for a minor party compete in precisely the same way as candidates who express a preference for a major party, or no preference at all. "The primary ballot

would include all candidates filing for the office, including both major party and minor party candidates and independents. Voters would be permitted to vote for any candidate for any office, and would not be limited to a single party." ER 256 (Explanatory Statement for I-872). Any general expectation as to how certain candidates will fare when seeking voter support is beside the point; the constitution may guarantee a candidate a right to a reasonable opportunity to appear on the ballot, but it does not guarantee him or her a right to success once presented there.[23]

In this regard, it is important to reflect again on the fundamental difference that I-872 makes as to the role of the primary in the overall electoral process. Primaries are often thought of as a mechanism by which the field of candidates is narrowed for the general election by selecting one candidate from each party to advance. By adopting I-872, Washington voters chose a distinctly different approach. Under I-872, all candidates compete in a manner that makes the primary

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

a literal "first stage" in an electoral process. The voters no longer winnow candidates based upon party affiliation, but upon which candidates garner the most support without regard to party. I-872 establishes a system that in important ways bears more resemblance to a general election followed by a runoff than it does to a traditional party primary. *See* I-872, § 5 (amending Wash. Rev. Code § 29A.04.127) (changing definition of "primary" to reflect this two-stage approach to the general election). Since all candidates compete for the support of all voters at that first round, there is no constitutionally significant difference between the ballot access afforded to any candidates based upon their party preference.

The United States Supreme Court held that the former blanket primary "virtually guarantees . . . candidate access to a statewide ballot." *Munro*, 479 U.S. at 199. It can hardly be argued that any candidate's right to ballot access is denied because, under I-872, "they must channel their expressive activity into a campaign at the primary as opposed to the general election." *Id.* As the Court concluded, "Washington simply has not substantially burdened the 'availability of political opportunity.'" *Id.* (quoting *Lubin v. Panish*, 415 U.S. 709, 716, 94 S. Ct. 1315, 39 L. Ed. 2d 702 (1974)). The top two primary established by I-872 goes even further in guaranteeing ballot access to any candidate—major party, minor party, or independent.

D. To The Extent That Any Portion Of I-872 Is Deemed Unconstitutional, The Remainder Should Be Permitted To Take Effect

If only a portion of the initiative is unconstitutional, the Court should save the remaining portions "unless the invalid provisions are unseverable and it cannot reasonably be believed that the . . . elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *State v. Anderson*, 81 Wash. 2d 234, 236, 501 P.2d 184 (1972), citing *Boeing Co. v. State*, 74 Wash. 2d 82, 442 P.2d 970 (1968). The presence or absence of an express "severability clause" is one element to consider in determining the legislative intent, but such a clause is not necessary in order to meet the severability test. *United States v. Hoffman*, 116 P.3d 999, 1008 (Wash. 2005). The Fifth Circuit upheld Louisiana's similar top two primary on a severability analysis, when a portion of their system was found to conflict with a federal statute regarding uniform federal election dates (a concern that does not arise in this case). The court reasoned that, since the remainder of the act was complete within itself, it could be given effect with the problematic provision excised. *Love v. Foster*, 147 F.3d 383, 386 (5th Cir. 1998).

In this case, the portions of I-872 that form the basis for challenge are sections 7 and 9, the provisions that permit candidates to declare their "political

party preference" and provide that this information will appear on the ballot. While the State believes these provisions are well within the State's constitutional authority, a "top two" primary could still be conducted, even if it were found necessary to limit the extent to which some or all candidates could state their "political party preference."

The language of the initiative itself confirms that the voters' primary purpose in enacting I-872 was to allow "the broadest possible participation in the primary election" (I-872, § 2, quoting from *Heavey v. Chapman*, 93 Wash. 2d 700, 705, 611 P.2d 1256 (1980)), and to preserve the "right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation." I-872, § 3(3). Any other result would force an unwanted election system on Washington's voters beyond any constitutional necessity to do so.

IX. CONCLUSION

For these reasons, this Court should reverse the decision of the district court, declare I-872 constitutional, and vacate the injunctive relief granted by the district court.

RESPECTFULLY SUBMITTED this 16th day of September, 2005.

ROB MCKENNA
Washington State Attorney General

____
MAUREEN A. HART, WSBA #7831
Washington State Solicitor General

____
JAMES K. PHARRIS, WSBA #5313
Sr. Assistant Attorney General

____
JEFFREY T. EVEN, WSBA #20367
Assistant Attorney General
P.O. Box 40100
Olympia, WA 98504-0100
360-753-2536

Counsel for Appellants State of
Washington, Rob McKenna, and Sam Reed

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