NO. _____

# IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

*Petitioners*,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS, WASHINGTON STATE GRANGE,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI**

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## APPENDIX

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United States Court of Appeals, Ninth Circuit.

WASHINGTON STATE REPUBLICAN PARTY; Diane Tebelius; Bertabelle Hubka; Steve Neighbors; Mike Gaston; Marcy Collins; Michael Young, Plaintiffs-Appellees,

and Washington State Democratic Central Committee; Paul Berendt; Libertarian Party of Washington State; Ruth Bennett; J.S. Mills, Plaintiffs-Intervenors-

Appellees,

v.

State of WASHINGTON; Rob McKenna, Attorney General; Sam Reed, Secretary of State; Washington State Grange, Defendants-Intervenors-Appellants.

**Nos. 05-35774, 05-35780.**

Argued and Submitted Feb. 6, 2006.

Filed Aug. 22, 2006.

**Background:** State political party brought § 1983 action for declaratory and injunctive relief, challenging constitutionality of state's modified blanket primary system, which was adopted through passage of initiative in general election, and other political parties intervened. The United States District Court for the Western District of Washington, Thomas S. Zilly, J., 377 F. Supp. 2d 907, granted political parties' motions for summary judgment and issued preliminary injunction barring enforcement of initiative, and subsequently made injunction permanent. State and initiative's sponsor appealed.

**Holdings:** The Court of Appeals, Fisher, Circuit Judge, held that:

(1) state system imposed severe burden on political parties' associational rights;

(2) state system violated political parties' association rights; and

(3) unconstitutional portions of initiative could not be severed under Washington law, and therefore initiative was unconstitutional in its entirety.

Affirmed.

Rob McKenna, Maureen A. Hart, Jeffrey T. Even and James K. Pharris (argued), Office of the Washington Attorney General, Olympia, WA, for the State of Washington (defendant-intervenor-appellant).

Thomas F. Ahearne (argued), Ramsey Ramerman and Rodrick J. Dembowski, Foster Pepper & Shefelman PLLC, Seattle, WA, for the Washington State Grange (defendant-intervenor-appellant).

John J. White, Jr. (argued) and Kevin B. Hansen, Livengood, Fitzgerald & Alskog, Kirkland, WA, for the Washington State Republican Party (plaintiff-appellee).

David T. McDonald (argued) and Jay Carlson, Preston Gates & Ellis, LLP, Seattle, WA, for the Washington State Democratic Central Committee (plaintiff-intervenor-appellee).

Richard Shepard (argued), Shepard Law Office, Inc., Tacoma, WA, for the Libertarian Party of Washington State (plaintiff-intervenor-appellee).

Appeal from the United States District Court for the Western District of Washington; Thomas S. Zilly, District Judge, Presiding. D.C. No. CV-05-00927-TSZ.

Before D.W. NELSON, PAMELA ANN RYMER and RAYMOND C. FISHER, Circuit Judges.

FISHER, Circuit Judge.

For the second time in three years, political parties in Washington State are challenging the constitutionality of their state's partisan primary system, which was enacted as a result of the passage of Initiative 872 in the November 2004 state general election. In 2003, we concluded that Washington's previous "blanket" primary system was unconstitutional because it was "materially indistinguishable from the California scheme held to violate the constitutional right of free association in *Jones." Democratic Party of Wash. v. Reed,* 343 F.3d 1198, 1203 (9th Cir. 2003) (relying on *Cal. Democratic Party v. Jones,* 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000)).

There are differences between Washington's pre-*Reed* blanket primary and the "modified" blanket primary being challenged in this case, and we are mindful that Initiative 872 reflects the political will of a majority of Washington voters. Nonetheless, although attempting to craft a primary system that does not unconstitutionally burden political parties' right of association under the First and Fourteenth Amendments, Initiative 872 fails to do so. Rather, the Initiative retains a partisan primary, in which each candidate may self-identify with a particular party regardless of that party's willingness to be

associated with that candidate. The State of Washington and Initiative 872's sponsor, the Washington State Grange (the Grange),[1] have not identified any compelling state interests-apart from those the Supreme Court rejected in *Jones*-that would justify the Initiative's severe burden on the political parties' associational rights; nor is Initiative 872's modified blanket primary narrowly tailored. We cannot sever the unconstitutional provisions from Initiative 872 because "it cannot reasonably be believed that" Washington voters would have passed Initiative 872 without its unconstitutional provisions. *McGowan v. State,* 148 Wash. 2d 278, 60 P.3d 67, 75 (2002). Accordingly, we hold that Washington's modified blanket primary as enacted by Initiative 872 is unconstitutional and affirm the district court's permanent injunction against the implementation of the Initiative.

## I. BACKGROUND

To understand the flaw in Initiative 872's partisan primary system, it is helpful to review the nature and structure of the primary process in general. A political primary is often thought of as a "meeting of the registered voters of a political party for the purpose of nominating candidates . . ."; and a common definition of a primary election is a

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[1] The Washington State Grange is a subsidiary organization of the National Grange, which is described by its Washington chapter as "America's oldest farm-based fraternal organization" and as "a non-partisan, grassroots advocacy group for rural citizens with both legislative programs and community activities." Washington State Grange, *What is the Grange,* Official Website *at http://www.wa-grange.org/whats-the-grange.htm*.

"preliminary election in which voters nominate party candidates for office." American Heritage College Dictionary 1086 (3d ed. 2000). The Supreme Court has characterized a candidate nominated in a primary as the party's "standard bearer," *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997), or "ambassador to the general electorate in winning it over to the party's views," *Jones,* 530 U.S. at 575, 120 S. Ct. 2402. In states that have adopted a "closed" primary system, each party (or traditionally at least each of the two major parties) selects its nominees who are to appear on the general election ballot as that party's candidates for particular offices. This type of primary is referred to as "closed" because only voters who formally associate themselves with a party in some fashion in advance of the primary may vote in that party's primary and thereby select the party's nominee. *See Jones,* 530 U.S. at 577, 120 S. Ct. 2402; *see also* Alexander J. Bott, Handbook of United States Election Laws and Practices: Political Rights 21, 43, 139 (1990).

Although many states employ a closed primary, other alternative primary systems have been and continue to be used in some states. One such alternative used to be the "blanket" primary, until the California version was held unconstitutional in *Jones.* In contrast to closed primaries where each party's nominee is selected by voters pre-affiliated with that party who vote only in that party's primary, a blanket primary system uses a common primary ballot shared by all candidates for particular elective offices. All voters, regardless of their own political party affiliations (if any),

could-until *Jones*-vote for any candidate appearing on the blanket primary ballot regardless of that candidate's designated political party affiliation.[2] The candidate who received the greatest number of votes in relation to other candidates with the same party affiliation would become that party's nominee who would advance to the general election ballot. For example, each of the Democratic and Republican candidates with the greatest number of votes in the blanket primary would appear as the only candidate identified with that particular party designation on the general ballot. *See Jones,* 530 U.S. at 570, 120 S. Ct. 2402. The Supreme Court, however, held that California's blanket primary violated the state political parties' right of association under the First and Fourteenth Amendments, because allowing nonparty members to vote for party candidates forced a party's members to associate with voters who were members of rival parties in the selection of that party's nominee for the general election. *See id.* at 577, 120 S. Ct. 2402.

Invoking *Jones,* the political parties in Washington challenged the blanket primary that had operated in that state since 1935. *See Reed,* 343 F.3d at 1201. Like the California primary, the Washington primary at issue in *Reed* advanced each of the top primary election vote-getters within the same party to the general election ballot. *See id.*[3] We

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[2] For example, a primary voter could "split the ticket" between a Republican gubernatorial candidate, a Democratic candidate for attorney general and a Libertarian candidate for secretary of state.

[3] "Minor" political parties were treated somewhat differently under Washington's pre-*Reed* blanket primary in

held Washington's blanket primary unconstitutional in 2003 because it was "materially indistinguishable from the California scheme" that the Supreme Court invalidated in *Jones*. *Id.* at 1203.[4]

In the aftermath of *Reed,* two parallel efforts ensued to create a replacement primary system-one undertaken by the Washington state legislature and the other a ballot initiative sponsored by the Grange. In January 2004, the Grange filed the text of what was to become Initiative 872 on the November 2004 Washington ballot with the Washington Secretary of State. Initiative 872 made a number of changes to Washington's previous blanket primary system; but significantly, it retained the partisan nature of the primary. As the official voters' pamphlet explaining Initiative 872 stated, the Initiative "concerns elections for *partisan* offices" and "would change the system used for conducting primaries and general elections for *partisan* offices." (Emphasis added.)[5]

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that they were allowed to avoid splintering their limited constituency at the blanket primary stage. They held their own nominating conventions prior to the blanket primary, and the single candidate each such minor party selected by convention would advance from the blanket primary to the general election ballot if he or she obtained at least one percent of the blanket primary vote. *See, e.g.,* Wash. Rev. Code §§ 29.24.020, 29.30.095 (1993).

[4] Although California explicitly labeled those candidates who advanced to the general elections as "the nominee of [a] party," *Jones,* 530 U.S. at 570, 120 S. Ct. 2402, a term Washington did not use, we concluded that Washington's avoidance of the label "nominee" was a "distinction[ ] without a difference." *Reed,* 343 F.3d at 1203.

[5] The Grange sponsored a website-*http://www.blanketprimary.org/*-as part of its advocacy efforts on behalf of

Two of the most important proposed changes were: (1) the redefinition of "partisan office" as "a public office for which a candidate may indicate a political party preference";[6] and (2) the adoption of a "top two" rule whereby the two candidates with the greatest number of votes in the primary advance to the general election regardless of their expressed party preference. Under the Initiative 872 primary system, therefore, those candidates expressing a particular party "preference" would be self-identified

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Initiative 872. In early 2004, the "Frequently Asked Questions" portion of that website characterized the primary system that would be enacted by the Initiative as follows:

> The proposed initiative would replace the current nominating system with a qualifying primary, similar to the nonpartisan primaries used for city, school district, and judicial offices. As in those primaries, the two candidates who receive the greatest number of votes would advance to the general election. Candidates for partisan offices would continue to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots . . . .

At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary).

[6] Ballots for partisan office under Washington's pre-*Reed* primary system simply listed a political party or independent designation next to a candidate's name. *See* Wash. Rev. Code § 29.30.020(3) (1993) (repealed 2004); *see also Reed,* 343 F.3d at 1201 & n.3.

only;[7] and the winner of the largest number of votes among candidates with the same party preference would no longer be guaranteed a place on the general election ballot-an entitlement limited to the two top vote getters overall. Indeed, two candidates with the same party preference could be the only candidates for a particular office appearing on the general election ballot.[8]

In March 2004, the Washington legislature adopted two alternative primary systems, subject to the outcome of the vote on Initiative 872 in the November 2004 general election. As its first choice, the legislature adopted a "top two" primary system similar, though not identical, to the one the Grange proposed in Initiative 872.[9] As a precaution in case the anticipated legal challenges to the "top two" system proved successful, the legislature also adopted a "backup" primary system-the so called "Montana" primary-which is essentially a type of open primary.[10]

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[7] The candidates' party preference designation on the ballot cannot be changed between the primary and general elections. *See infra* note 16.

[8] For example, if the 1996 gubernatorial primary had been conducted under the aegis of Initiative 872, two Democratic candidates-Gary Locke and Norman Rice-and no Republican candidate would have advanced from the primary to the general election.

[9] A "top two" primary is also sometimes referred to as a "Cajun" or "Louisiana" primary, after the only other state that employs a similar sort of primary.

[10] *Jones* described an open primary as follows:

Governor Gary Locke vetoed the "top two" primary system in April 2004, so the "Montana" primary became Washington's primary system for the fall 2004 elections. Nevertheless, Initiative 872 passed with nearly 60 per cent of the vote in the November 2004 general election and became effective as Washington law in December 2004. The Washington legislature did not pass any other measure concerning the state's primary system in the first half of 2005, although the secretary of state did promulgate emergency regulations relating to Initiative 872 in May 2005.

The Washington State Republican Party (the Republican Party) filed suit in federal district court in May 2005, seeking a declaratory judgment and injunctive relief under 42 U.S.C. § 1983 against a number of county auditors with respect to the enforcement of Initiative 872 and the conduct of primary elections. The Washington State Democratic Central Committee (the Democratic Party) and the Libertarian Party of Washington State (the Libertarian Party) moved to intervene as plaintiffs. The State of Washington and the Grange moved to intervene as defendants. The district court granted

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> An open primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees *for all offices*. He may not, for example support a Republican nominee for Governor and a Democratic nominee for attorney general.

530 U.S. at 576 n.6, 120 S. Ct. 2402. *See also* Bott, *Handbook of United States Election Laws and Practices* 21, 138.

all of the motions to intervene and accepted the substitution of the State of Washington as a defendant in lieu of the county auditors, who dropped out as parties to this litigation.

In July 2005, the district court granted the political parties' motions for summary judgment and issued a preliminary injunction enjoining the enforcement of Initiative 872, *see Wash. State Republican Party v. Logan,* 377 F. Supp. 2d 907, 932 (W.D. Wash. 2005), and made the injunction permanent on July 29, 2005. Both the State of Washington and the Washington State Grange filed timely notices of appeal. We now affirm the district court's permanent injunction because the Initiative 872 primary unconstitutionally burdens the Washington state political parties' associational rights by permitting candidates to identify their party "preference" on the ballot, notwithstanding that party's own preference.[11]

## II. DISCUSSION

### A. Standard of Review

"We review a summary judgment [order] granting or denying a permanent injunction for abuse of discretion and application of the correct legal principles." *Fortyune v. Am. Multi-Cinema, Inc.,* 364 F.3d 1075, 1079 (9th Cir. 2004) (quoting *EEOC v. Goodyear Aerospace Corp.,* 813 F.2d 1539, 1544 (9th Cir. 1987)). However, "any determination

[11] The motion of FairVote-The Center for Voting and Democracy and others for leave to file a brief of *amici curiae* is granted, but we do not consider issues raised by amici that are beyond those argued by the parties.

underlying the grant of an injunction [is reviewed under] the standard that applies to that determination." *Ting v. AT & T,* 319 F.3d 1126, 1134-35 (9th Cir.2003). Accordingly, the district court's findings of fact are reviewed for clear error while questions of law are reviewed de novo. *See id.* at 1135.

The constitutionality of a state law is reviewed de novo. *See Am. Acad. of Pain Mgmt. v. Joseph,* 353 F.3d 1099, 1103 (9th Cir. 2004). "[W]e review the application of facts to law on free speech questions de novo." *Brown v. Cal. Dep't of Transp.,* 321 F.3d 1217, 1221 (9th Cir. 2003) (citing *Planned Parenthood v. Am. Coalition of Life Activists,* 290 F.3d 1058, 1070 (9th Cir. 2002) (en banc)). Lastly, "severability is a question of state law that we review de novo." *Ariz. Libertarian Party, Inc. v. Bayless,* 351 F.3d 1277, 1283 (9th Cir. 2003) (per curiam).

**B. Right of Association**

"[T]he freedom to join together in furtherance of common political beliefs"-to form and join political parties-falls squarely within the right of association protected by the First Amendment and the Due Process Clause of the Fourteenth Amendment against interference by the states. *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 214, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986); *see also NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). "Representative democracy in any populous unit of governance is unimaginable without" such freedom. *Jones,* 530 U.S. at 574, 120 S. Ct. 2402. The right of association protects not only the activities of party stalwarts who

"devote substantial portions of their lives to furthering [their party's] political and organizational goals," but also the more limited associational ties of those who "limit their participation [in the party] to casting their votes for some or all of the [p]arty's candidates." *Tashijan*, 479 U.S. at 215, 107 S. Ct. 544. Indeed, even if "it is made quite easy for a voter to change his party affiliation the day of the primary," that eleventh hour "cross[ing] over" still constitutes an act of association in that the voter "must formally become a member of the party." *Jones,* 530 U.S. at 577, 120 S. Ct. 2402 (emphasis omitted).

The principle underlying the breadth of the right of association is one of mutuality: both the putative party member and the political party must consent to the associational tie. Accordingly, the freedom to associate necessarily includes some freedom to exclude others from the association. *See id.* at 574, 120 S. Ct. 2402. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 122 n.22, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981) (quoting Laurence H. Tribe, *American Constitutional Law* 791 (1978)). Neither voters nor political candidates can force a political party to accept them against the will of the party. *See Tashijan*, 479 U.S. at 215 n.6, 107 S. Ct. 544 ("[A] nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications."); *see also Duke v.*

*Cleland,* 954 F.2d 1526, 1531 (11th Cir. 1992) ("[David] Duke has no right to associate with the Republican Party if the Republican Party has identified Duke as ideologically outside the party.").

The right of association, however, especially when it intersects with the public electoral process, is not "boundless." *Clingman v. Beaver,* 544 U.S. 581, 589, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005). "States have a major role to play in structuring and monitoring the election process, including primaries." *Jones,* 530 U.S. at 572, 120 S. Ct. 2402. Constitutionally permissible state regulations touching upon political party affairs include those "requir[ing] parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion," "requir[ing] parties to demonstrate a significant modicum of support before allowing their candidates a place on [the general election] ballot" and "requir[ing] party registration a reasonable period of time before a primary election" in order to prevent "party raiding."[12] *Id.* (internal quotation marks and citations omitted). Accordingly, when we are faced with a state electoral law that allegedly violates associational rights:

> we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and

[12] Party raiding is "a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary." *Jones,* 530 U.S. at 572, 120 S. Ct. 2402.

> consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrict-tions.

*Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) (internal quotation marks and citations omitted). Therefore, we must first determine whether Initiative 872 severely burdens the Washington political parties' associational rights; if it does, we must then determine whether a compelling state interest justifies that burden and whether Initiative 872 is narrowly tailored to further that state interest.

**1. Severe burden**

Washington and the Grange contend that Initiative 872 does not severely burden the political parties' associational rights. They point to dictum in *Jones* discussing with approval a *nonpartisan* blanket primary, *see* 530 U.S. at 585-86, 120 S. Ct. 2402, and argue that Initiative 872 created just such a primary. We disagree, because the primary under Initiative 872 is not the kind of nonpartisan election *Jones* contemplated.

The *Jones* dictum is found in that part of the opinion discussing the state interests California had

identified in defense of its blanket primary. The Court identified four legitimate state interests that might justify allowing voters to vote for any candidate regardless of the candidate's party affiliation-"promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy"-but denied that these were compelling reasons to burden political parties' associational rights "*in the circumstances of [that] case*." 530 U.S. at 584, 120 S. Ct. 2402. The Court went on to reason, however, that even if these four interests *were* compelling, California's blanket primary was "not a narrowly tailored means of furthering them":

> Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot-which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. 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.

*Id.* at 585-86, 120 S. Ct. 2402. In light of this statement, we agree that to the extent Initiative 872 can be fairly characterized as enacting a nonpartisan blanket primary, *Jones* would lead us to uphold Washington's modified blanket primary.[13]

Initiative 872 resembles the *Jones* hypothetical nonpartisan blanket primary in some respects, but it differs in at least one crucial aspect. On the one hand, the "top two" feature of Initiative 872 seems indistinguishable from that referred to in *Jones,* as does the aspect of Initiative 872 that allows "[e]ach voter, regardless of party affiliation, [to] vote for any candidate." 530 U.S. at 585, 120 S. Ct. 2402. However, the crucial point of divergence between Initiative 872 and *Jones* lies in the concept of partisanship. Although the Court did not specify in what sense it was using the term "nonpartisan," an election is customarily nonpartisan if candidates' party affiliations are not identified on the ballot. *See* Bott, Handbook of United States Election Laws and

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[13] The Republican Party emphasizes that the statement in *Jones* is only dictum. But as we have recognized, Supreme Court dicta is generally entitled to "great weight," *Coeur D'Alene Tribe of Idaho v. Hammond,* 384 F.3d 674, 683 (9th Cir. 2004), and "appropriate deference," *United States v. Montero-Camargo,* 208 F.3d 1122, 1132 n.17 (9th Cir. 2000). "[W]e do not blandly shrug them off because they were not a holding," *id.* (internal quotation marks omitted), and therefore we accord the *Jones* dictum the persuasive authority that it is due.

Practices 145 ("Nonpartisan elections are ones in which persons running for public office have their names listed on the ballot but not their party affiliation."). *Jones'* use of "nonpartisan" also appears to contemplate elections in which primary voters play no role in the nomination of any candidate as the representative of a political party. *See Jones,* 530 U.S. at 585-86, 120 S. Ct. 2402 (asserting that the "constitutionally crucial" element in the inquiry is the parties' choice of their own representative, and noting that states may condition access to a nonpartisan primary ballot in part on prior and independent nomination by an established political party). We therefore understand the Court to align the term "nonpartisan" with the process of nominating a candidate to appear on a general ballot, without thereby nominating a candidate to represent a political party as its standard bearer.[14]

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[14] The political parties argue that not only is Initiative 872 a partisan blanket primary, but it is indistinguishable from the primaries invalidated by *Jones* and *Reed* because it "nominates" candidates for the general election. Washington and the Grange counter that Initiative 872 merely "winnows" candidates. This debate is not particularly illuminating because "nominate" and "winnow" are two sides of the same coin-candidates who are not nominated are necessarily winnowed-and the Supreme Court has used both terms to describe the function of primaries. *See, e.g., Storer v. Brown,* 415 U.S. 724, 734, 735, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) ("After long experience, California came to the direct party primary as a desirable way of nominating candidates for public office . . . . The direct party primary . . . functions to winnow out and finally reject all but the chosen candidates.").

Furthermore, even if Initiative 872's modified blanket primary can be said to "nominate" candidates, it does so in a way that is distinguishable from Washington's pre-*Reed* or

In contrast to the *Jones* hypothetical primary, the primary envisioned by Initiative 872 is still overtly partisan. The Initiative redefined the concept of "partisan office," but those offices remain partisan and so does the primary.[15] By including candidates' self-identified political party preferences on the primary ballot, Washington permits all voters to select individuals who may effectively become the parties' standard bearers in the general election. Whether or not the primary candidate is a party's nominee, any candidate may appear on the ballot showing that party as his or her "preference" and (if one of the two top vote getters) may emerge as the only one bearing that designation in the general election. Whether or not the party wants to be associated with that candidate, the party designation is a powerful, partisan message that voters may rely upon in casting a vote-in the primary and in the general election. The Initiative thus perpetuates the "constitutionally crucial" flaw *Jones* found in

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California's pre-*Jones* blanket primaries. Unlike those primaries, the top vote-getters in each party under Initiative 872 are not guaranteed a place on the general election ballot; candidates advance only if they finish in the top two overall. There is therefore a real possibility that one of the political parties' top vote-getters will not even make it into general election or that two candidates from the same party will advance. This is not a situation squarely contemplated by *Jones* or the cases upon which it relies, all of which share the underlying assumption that only one candidate emerges from a partisan primary as the party's nominee. *See Jones,* 530 U.S. at 575, 120 S. Ct. 2402 ("In no area is the political association's right to exclude more important than in the process of selecting *its nominee*.") (emphasis added) (citing cases).

[15] *See supra* note 5 and accompanying text.

California's partisan primary system. Not only does a candidate's expression of a party preference on the ballot cause the primary to remain partisan, but in effect it forces political parties to be associated with self-identified candidates not of the parties' choosing. This constitutes a severe burden upon the parties' associational rights.

Washington and the Grange argue against interpreting the Initiative 872 primary as partisan, and assert that a party "preference" is distinguishable from a party "designation" or some other stronger affirmative indication of party affiliation, such as membership. Such a distinction exists as a matter of logic, but it is not meaningful in the circumstances of this case. The district court came to the commonsense conclusion that "[p]arty affiliation plays a role in determining which candidates voters select, whether characterized as 'affiliation' or 'preference.' " *Wash. State Republican Party v. Logan,* 377 F. Supp. 2d 907, 926 (W.D. Wash. 2005). Washington urges that a candidate's political party preference simply provides "information for the voters." But a statement of party preference on the ballot is more than mere voter information. It represents an expression of partisanship and occupies a privileged position as the only information about the candidates (apart from their names) that appears on the primary ballot. Moreover, it also carries over onto the general election ballot.[16]

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[16] The Washington Secretary of State appears implicitly to have recognized that voters' reliance on candidates' party preferences was comparable to their reliance on candidates'

Importantly, "party labels provide a shorthand designation of the views of party candidates on matters of public concern . . . ." *Tashijan*, 479 U.S. at 220, 107 S. Ct. 544. Voters rely on party labels on the ballot in deciding for whom to vote. This political reality is illustrated by the Sixth Circuit's decision in *Rosen v. Brown,* 970 F.2d 169 (6th Cir. 1992). *Rosen* held unconstitutional the provision in Ohio's election law that "prohibit[ed] nonparty candidates for elective office from having the designation Independent or Independent candidate placed on the ballot next to their name." *Id.* at 171. The court relied on evidence that

> [v]oting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting . . . . [T]he tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level.

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party designations, by amending Wash. Admin. Code § 434-230-040 (2005) to read as follows: "A candidate for partisan office who indicated a party preference on the declaration of candidacy *may not change the party preference between the primary election and the general election.*" (Emphasis added.) The regulation previously stated that "[n]o person who has offered himself or herself as a candidate for the nomination of one party at the primary, shall have his or her name printed on the ballot of the succeeding general election as the candidate of another political party." Wash. Admin. Code § 434-230-040 (1997).

*Id.* at 172. Thus voters "are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior." *Id.* Similarly, to the extent Initiative 182 allows candidates to self-identify with a particular party-even if only as a "preference"-it cloaks them with a powerful voting cue linked to that party.

Given that the statement of party preference is the *sole* indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate. The practical result of a primary conducted pursuant to Initiative 872 is that a political party's members are unilaterally associated on an undifferentiated basis with *all* candidates who, at their discretion, "prefer" that party.

A hypothetical may help illustrate the situation confronting the political parties and the voters of Washington in an Initiative 872 primary. Let us assume the Republican Party holds its own privately run party convention prior to the modified blanket primary to select the Party's nominee for the primary ballot for a particular state office. *Cf. Jones,* 530 U.S. at 585, 120 S. Ct. 2402 (noting that candidates appearing on a nonpartisan blanket primary ballot may be nominated by established political parties).[17] Let us further assume that two

[17] In fact, the Washington State Republican and Democratic Parties adopted contingency rules in anticipation of

Republican candidates (both of whom are bona fide party members)-Candidate C, a conservative, and Candidate M, a moderate-compete against one another for the nomination and that Candidate C wins the Republican nomination at the convention. Lastly, let us assume the existence of a third candidate-Candidate W, a wild-eyed radical-who purports to "prefer" the Republican Party but who is not a Party member, whose views are anathema to the Party's membership and who does not participate in the Party's convention process. Despite Candidate C's party nomination, Candidate M and Candidate W decide that they want to appear on the primary ballot.[18] Given these assumptions, how would each of these candidates be designated on the ballot, and

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Initiative 872's enactment whereby those parties would select their nominees for state offices through private nominating conventions conducted before the state-run blanket primary.

[18] It is quite easy to put one's name on the Washington partisan primary ballot with any given political party preference under Initiative 872. All that is required is (1) a declaration of registered voter status in the appropriate jurisdiction (along with an address in that jurisdiction); (2) a declaration of the position the candidate seeks; (3) *a declaration of party preference* or independent status; (4) a filing fee; and (5) a signed declaration that the candidate will support the Constitution and the laws of the United States and Washington State. The emergency regulations promulgated by the Washington Secretary of State in May 2005 confirmed the parties' inability to control who runs using their name: "neither endorsement by a political party nor a nominating convention are [sic] required in order to file a declaration of candidacy and appear on the primary election ballot." Wash. Admin. Code § 434-215-015 (2005).

how would voters be able to distinguish among them?[19]

Presented with this scenario at oral argument, the State of Washington conceded that all three candidates would be designated in an identical fashion on the primary ballot-all would be shown to have "Republican" as their "party preference."[20] This

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[19] The questions posed by this hypothetical illustrate that a number of the arguments advanced by the State of Washington and the political parties need not be settled in order to resolve the central issue on appeal. First, the State of Washington argues that states are not compelled to provide political parties with a publicly financed primary to select party nominees and that by enacting the provisions of Initiative 872, it is "getting out of the 'party nomination' business." However, the inclusion of candidates' party preferences on the primary ballot suggests that Washington has not gotten out of the party nomination business entirely because Initiative 872 permits "spoiler" candidates from the same party and nonparty members to present themselves on an equal footing with party nominees on the ballot.

Second, Washington argues that "the associational rights of political parties do not include the right to have their nominees advance to the general election ballot." But even if we construed the political parties' argument to be that they have a right to have their respective nominees appear on the general election ballot, that argument misses the mark because it only addresses the "top two" nature of the Initiative 872 primary. The concern in this case is not that the top two vote-getters advance from the primary to the general election. Rather, it is that Initiative 872 provides candidates with a designated space on the ballot to express their party preference, notwithstanding the political parties' unwillingness to associate with a particular candidate or nominate that person as a standard bearer.

[20] The text of Initiative 872 does not itself clearly prescribe how the candidates' party preferences are to be worded on the primary ballot, nor do the Washington Secretary

is the essence of Initiative 872's constitutional flaw. Because candidates can freely designate their political party preferences on the primary ballot, but the ballot does not show which candidates are the political parties' official nominees (or even true party members), voters cannot differentiate (1) bona fide party members such as Candidates C and M from outsiders who purportedly prefer the party such as Candidate W; or (2) party nominees such as Candidate C from "spoiler" intraparty challengers such as Candidate M.[21] The net effect is that parties do not choose who associates with them and runs using their name; that choice is left to the candidates and forced upon the parties by the listing of a candidate's name "in conjunction with" that of the party on the primary ballot. Wash. Rev. Code § 29A.04.110 (2004). Such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights. *See Tashijan*, 479 U.S. at 215 n.6, 107 S. Ct. 544; *Duke*, 954 F.2d at 1531.

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of State's emergency rules, issued on May 18, 2005, implementing the provisions of Initiative 872. For instance, the ballots could indicate party preference with letters like "D" and "R" or abbreviations like "Dem." and "Rep." following the names of the primary candidates, without stating that they are "preferences" only. For purposes of this appeal, however, we assume that the ballots clearly state that a particular candidate "prefers" a particular party.

[21] The second of these two scenarios of voter confusion would not be present if a party did not nominate a single standard bearer in a private convention prior to the modified blanket primary, but that would not cure the first problem.

In so holding, we do not question a political candidate's fundamental right to express a political viewpoint, including a political preference, more generally. *See, e.g., Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971) ("[I]t can hardly be doubted that the [First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."). We are not deciding that an expression of a party preference other than as a ballot designation-such as in campaign literature or advertising, a candidate statement in the voters' pamphlet or a news conference-constitutes a forced association between the candidate stating the preference and the political party being preferred. Rather, we are focused on the specific primary election ballot created by Initiative 872, and the one-sided expression of party preferences on that ballot. There is a constitutionally significant distinction between ballots and other vehicles for political expression. "Ballots serve primarily to elect candidates, not as forums for political expression." *Timmons,* 520 U.S. at 363, 117 S. Ct. 1364. Here the ballot communicates a political association that may be unreciprocated and misleading to the voters, to the detriment of the political parties and their bona fide members.

The State of Washington attempts to counter our concern with this one-sidedness by itself invoking *Timmons*. It suggests that the lack of distinction between Candidates C, M and W on the primary ballot could be cured by the more detailed candidate statements that would likely reveal party membership and a candidate's status as a political

party's nominee. Washington also contends that it is permissible to place candidates' party preferences on the ballot without regard to the parties' candidate preferences, because parties have no more right to use the ballot to send a message to voters than other politically minded, nonparty organizations do. *Cf. id.* We address and reject each of these contentions in turn.

Candidate statements cannot cure Initiative 872's one-sided party-preference labeling on the primary ballot. As previously discussed, political parties' names matter; they are shorthand identifiers that voters traditionally rely upon to signal a candidate's substantive and ideological positions. *See Rosen,* 970 F.2d at 172. For some voters, the party label may be enough; other voters may seek out more information about a candidate. As the Supreme Court observed in *Tashijan*, "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." 479 U.S. at 220, 107 S. Ct. 544. When the Libertarian Party challenged Oklahoma's semi-closed primary law by seeking to open the Libertarian Party primary beyond registered Libertarians and independents to *all* voters regardless of affiliation, the Court expressed its concern about the possibility of voters' being misled by party labels: "Opening the [Libertarian Party's] primary to all voters not only would render the [Libertarian Party's] *imprimatur* an unreliable index of its candidate's actual political philosophy, but it

also would make registered party affiliations significantly less meaningful . . . ." *Clingman*, 544 U.S. at 595, 125 S. Ct. 2029 (internal quotation marks omitted).

A party should not be placed in the position of having to overcome a false association between itself and a candidate by relying on the candidate's off-ballot clarifying statements.[22] It is too much to expect candidate statements to clear up the confusion engendered by the primary ballot regarding who is the "real" Republican, Democratic or Libertarian standard bearer for his or her respective party, never mind whom party members would acknowledge as a fellow member.[23]

We are similarly unconvinced by Washington's argument that the political parties' associational

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[22] Although the political parties have not expressed their argument in exactly these terms, we note that the Supreme Court has long recognized that "the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.,* 475 U.S. 1, 16, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986). When a law "impermissibly requires [someone] to associate with speech with which [he or she] may disagree," that person "may be forced either to appear to agree . . . or to respond." *Id.* at 15, 106 S. Ct. 903. "That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16, 106 S. Ct. 903.

[23] We recognize that party affiliations and political views of candidates in races for high profile state offices, such as governor, will be widely and publicly known, and in such cases, voters may not be relying on the party preference designation on the ballot. However, the same cannot be said for lower profile state offices where the expression of party preference on the ballot may well provide the decisive "voting cue." *Rosen,* 970 F.2d at 172.

rights are not severely burdened because their inability to indicate their candidate preference on the primary ballot is no different from the inability of other, nonparty organizations, such as labor unions or better business bureaus, to indicate their candidate preferences. First, Washington's argument is undermined by the fact that Initiative 872 singles out candidates' political party preferences to be listed on the primary ballot, but not preferences with respect to any other organization. Second, a political party is historically different from other organizations with political interests in that it nominates candidates to run for political office in the party's name.[24] *See Jones,* 530 U.S. at 575-77, 120 S. Ct. 2402; *Kusper v. Pontikes*, 414 U.S. 51, 58, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973) ("Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections."). We therefore reject the premise of an equivalency between political parties and other organizations that lies at the heart of Washington's argument.

In sum, because a party label-even if expressed more ambiguously as a party preference-conveys to voters "a shorthand designation of the views of party candidates on matters of public concern," *Tashijan*, 479 U.S. at 220,

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[24] Like political parties, other organizations with political interests-from the National Rifle Association to the Sierra Club-may endorse candidates for office, but endorsement is not the equivalent of nomination. *Cf. Jones,* 530 U.S. at 580, 120 S. Ct. 2402 ("The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.").

107 S. Ct. 544, Initiative 872's party "preference" designation allows some candidates to create a mistaken impression of their true relationship with a political party. That severe burden on parties' associational rights is not negated by requiring voters to rely on candidates' or parties' off-ballot statements to clarify the nature or even lack of an actual party association.

#### 2. Compelling state interest and narrow tailoring

Washington and the Grange have focused their arguments on appeal on the contention that Initiative 872 does not severely burden the political parties' associational rights at all. They have not articulated any compelling state interest that justifies such a burden. To the extent that we can read compelling state interests between the lines of their arguments-essentially those interests articulated and found inadequate by the Supreme Court in *Jones*-we conclude that such interests could be sufficiently served by a more narrowly tailored primary system. One obvious approach would be to create a true nonpartisan primary, such as the one discussed in *Jones,* where only a candidate's name without any party preference or designation appears on the ballot. Therefore, we hold that the modified blanket primary enacted by Initiative 872 in November 2004 is unconstitutional.

### C. Severing Unconstitutional Provisions

As a fallback position, Washington and the Grange argue that any unconstitutional provisions in Initiative 872-namely those that provide for the designation of candidate party preferences-can be

severed from the rest of the Initiative. Following Washington law, which guides our severability inquiry, *see Ariz. Libertarian Party, Inc. v. Bayless,* 351 F.3d 1277, 1283 (9th Cir. 2003) (per curiam), we conclude that it is not possible to sever the constitutionally deficient portions from the rest of Initiative 872.

The Washington Supreme Court has set forth its state severability doctrine as follows:

> [A]n act or statute is not unconstitutional in its entirety unless invalid provisions are unseverable and it cannot reasonably be believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes. A severability clause may provide the assurance that the legislative body would have enacted remaining sections even if others are found invalid. It is not necessarily dispositive on that question, though . . . . The independence of the valid from the invalid parts of an act does not depend on their being located in separate sections. The invalid provision must be grammatically, functionally, and volitionally severable.

*McGowan v. State,* 148 Wash. 2d 278, 60 P.3d 67, 75 (2002) (internal punctuation marks, footnote and citations omitted).[25]

Conceptually speaking, severing all references to party preference from Initiative 872 seems fairly straightforward even though, as a practical matter, a fair number of provisions or portions of provisions would have to be severed.[26] However, even if we assume without deciding that the problematic provisions are "grammatically" or even "functionally" severable,[27] they are not "volitionally" severable. Volitional severability is another way of stating the *McGowan* requirement that "it cannot reasonably be believed" that Washington voters would have passed the remaining portions of Initiative 872 without the excised party preference provisions. *Id.*

Even if we grant Washington and the Grange's argument that Washington voters understood that Initiative 872 redefined candidate partisanship (i.e., as a party preference rather than as a stronger form of party affiliation), excising all mentions of party

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[25] Initiative 872 contains no severability clause, although under *McGowan,* this fact is not dispositive. 60 P.3d at 75.

[26] The district court identified Sections 4, 5, 7(2), 7(3), 9(3), 11 and 12 as provisions of Initiative 872 that were "potentially severable." We need not decide whether or not the district court accurately identified all of the Initiative's provisions that are "potentially severable" because Initiative 872 fails the volitional prong of *McGowan.*

[27] We understand functional severability to be a restatement of the *McGowan* requirement that "elimination of the invalid part would [not] render the remaining part useless to accomplish the legislative purposes." 60 P.3d at 75.

preference from the modified blanket primary would transform a partisan primary into a nonpartisan one. It is not reasonable to believe that Washington voters would have passed Initiative 872 if they knew it would result in nonpartisan primaries for all statewide offices. Because the party preference provisions in Initiative 872 do not pass the volitional severability test in *McGowan,* we conclude that Initiative 872 cannot be saved by severing its provisions for candidate party preferences. We hold that Initiative 872 is unconstitutional in its entirety.[28]

## III. CONCLUSION

Although the Constitution grants States "a broad power . . . to regulate the time, place, and manner of elections[, that power] does not justify, without more, the abridgement of fundamental rights, such as . . . the freedom of political association." *Tashijan*, 479 U.S. at 217, 107 S. Ct. 544 (internal citations omitted). A political party's "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 224, 107 S. Ct. 544. Initiative 872 severely burdens the Washington political parties' associational rights by allowing all candidates to state their party preferences on the primary ballot. This one-sided statement of party preferences on the ballot has the potential to force a

[28] Because we have held Initiative 872 to be unconstitutional under the First and Fourteenth Amendments, we do not reach any of the other arguments that the political parties advance with respect to Initiative 872.

political party into an unwanted association with a candidate who may be anathema to everything the party stands for. We hold that Initiative 872 is unconstitutional in its entirety because the party preference provisions are not severable from the rest of Initiative 872 under Washington law. The judgment of the district court is affirmed.

**AFFIRMED.**

United States District Court, W.D. Washington.

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. C 05-927Z.**

July 15, 2005.

**Background:** Major political parties sued State of Washington, seeking determination that initiative governing primary elections violated their First Amendment rights. Parties moved and cross moved for summary judgment.

**Holdings:** The District Court, Zilly, J., held that:

(1) initiative involved nomination of candidates, which was fundamental associational right of political parties protected by First Amendment;

(2) associational rights of parties was violated when initiative provided that voters of any or no political party could vote in primary for any candidate running for particular office, regardless of party preference indicated by candidate;

(3) associational rights were also violated through provision allowing for candidates to self identify themselves as preferring particular party, regardless of whether party approved of candidate;

(4) provisions of state statutes governing ballot placement of minority parties were preempted, precluding argument by major parties that initiative violated their equal protection rights by allowing minority party statutory procedure from which they were now excluded; and

(5) constitutional provisions could not be separated from unconstitutional provisions.

Judgment for political parties.

John James White, Jr., Kevin B. Hansen, Livengood, Carter, Tjossem, Fitzgerald & Alskog, Kirkland, WA, David Thomas McDonald, Jay S Carlson, Preston Gates & Ellis, Seattle, WA, Richard Dale Shepard, Shepard Law Office Inc., Tacoma, WA, for Plaintiff.

Janine Joly, Thomas William Kuffel, King County Courthouse Civil Division, Seattle, WA, Thomas Fitzgerald Ahearne, Foster Pepper & Shefelman,

Seattle, WA, Gordon W. Sivley, Robert Tad Seder, Snohomish County Prosecuting Attorney Civil Division, Everett, WA, Steven James Kinn, Spokane County Prosecutor's Office, Spokane, WA, Curtis Guy Wyrick, Clark County Prosecuting Attorney's Office, Vancouver, WA, Ronald S. Marshall, Cowlitz County Prosecutor's Office, Kelso, WA, James Garnet Baker, Grays Harbor Prosecuting Attorney's Office, Montesano, WA, Frederick Alan Johnson, Wahkiakum County Prosecuting Attorney, Cathlamet, WA, David W. Alvarez, Jefferson County Prosecuting Attorney's Office, Port Townsend, WA, for Defendants.

James Kendrick Pharris, Jeffrey T. Even, Maureen Alice Hart, Attorney General of Washington, Olympia, WA, for Defendant Intervenors.

ORDER

ZILLY, District Judge.

## IV. INTRODUCTION

On May 19, 2005, the Washington State Republican Party (the "Republican Party") filed this action against Dean Logan, King County Records and Elections Division Manager and the Auditors of eight other counties. Complaint, docket no. 1. The Republican Party's Complaint challenges Initiative 872 on the basis of the First and Fourteenth Amendments to the United States Constitution. The Washington State Democratic Central Committee (the "Democratic Party") and the Washington State Libertarian Party (the "Libertarian Party") have now

intervened as Plaintiffs and also contend that Initiative 872 is unconstitutional. *See* docket nos. 2, 3.

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

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

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

The State of Washington and the Washington State Grange (the "Grange") have also intervened as Defendants. *See* Order, docket no. 30; *see also* Minute Entry, docket no. 45. The State of

Washington and the Grange contend that Initiative 872 is constitutional.

This case presents a classic conflict between the rights of the voters to establish by initiative a new system for conducting primaries and general elections for partisan offices, and the rights of political parties to control the nomination of partisan candidates for elective office and to protect their rights of association. Primaries constitute a "crucial juncture" in the elective process and a "vital forum" for expressive association among voters and political parties. *Clingman v. Beaver,* --- U.S. ---, 125 S. Ct. 2029, 2042, 161 L. Ed. 2d 920 (2005) (O'Connor, J., concurring). The voters by Initiative 872 seek to create 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." Initiative 872, Sec. 2.[1]

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

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[1] The Text of Initiative 872 can be found at Wash. Rev. Code. Ann. § 29A.52 (West Supp. 2005). Throughout this Order, the Court will cite to the text of Initiative 872 as "Initiative 872, Sec. __".

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

## V. HISTORY OF WASHINGTON'S PRIMARY PROCESS

For over 100 years, Washington has had a partisan election system. Historically, voters at the general election were provided a choice between representatives of each qualifying political party. From 1890 through 1907, candidates for partisan offices were chosen either by convention or by petition. In 1907, the Washington State Legislature established the first direct primary system for partisan candidates, requiring political parties to choose their representative through a public primary. *See State ex rel. Wells v. Dykeman,* 70 Wash. 599, 127 P. 218 (1912). In this system separate ballots were printed for each political party and voters could only cast ballots in one party's primary.

Washington State's "blanket primary"[2] system

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

was first established in 1935. Except for presidential primaries,[3] all properly registered voters could vote

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Currently, thirty seven states conduct some type of closed primary. Ala. Code § 17-16-14(b); Alaska Stat. § 15.25.010; Ariz. Rev. Stat. § 16-467; Ark. Code Ann. §§ 7-7-307, 7-7-308; Cal. Elec. Code § 2151; Colo. Rev. Stat. §§ 1-7-201, 1-2-218.5; Conn. Gen. Stat. § 9-431; Del. Code Ann. tit. 15, § 3161; Fla. Stat. Ann. § 101.021; 10 Ill. Comp. Stat. 5/7-43(a); Ind. Code § 3-10-1-6; Iowa Code Ann. §§ 43.41, 43.42; Kan. Stat. Ann. § 25-3301; Ky. Rev. Stat. Ann. § 116.055; Me. Rev. Stat. Ann. tit. 21-A, § 340; Md. Code Ann., Election Law, § 8-802; Mass. Gen. Laws Ann. ch. 53 § 37; Miss. Code Ann. § 23-15-575; Neb. Rev. Stat. § 32-912; Nev. Rev. 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.

Eleven states conduct open primaries. Ga. Code Ann. § 21-2-224; Haw. Rev. Stat. § 12-31; Idaho Code §§ 34-402, 34-404, 34-904; Mich. Comp. Laws § 168.576; Minn. Stat. § 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.

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, 18:482.

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

[3] None of the primary systems addressed in this Order affect Presidential and Vice Presidential primaries. These primaries are addressed by a separate system found in Wash. Rev. Code § 29A.56.010, *et seq*.

for their choice at any primary for "any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." Wash. Rev. Code Ann. § 29.18.200 (West 2003). As a result, each voter received a ballot listing all candidates of all parties and could vote for any candidate as opposed to getting an exclusively Republican, Democratic, or other party ballot. Under the blanket primary system, voters could choose candidates from some parties for some positions, others for other positions, and engage in cross-over voting or "ticket splitting." Wash. Rev. Code Ann. § 29.18.200 (2003). Under the blanket primary system, minor parties selected their nominees at conventions prior to the date of the primary. Wash. Rev. Code Ann. § 29.24.020 (2003). These nominees would be placed on the ballot for the primary election. To be placed on the general election ballot, under the prior blanket primary procedure, minor party nominees had to receive a number of votes equal to at least one percent of the total number cast for all candidates for that position. Wash. Rev. Code Ann. § 29.30.095 (2003).[4]

In 2000, the United States Supreme Court held that California's blanket primary, similar in many respects to Washington's blanket primary, was

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[4] A " 'major political party' [is] a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year." 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.

unconstitutional. *California Democratic Party v. Jones,* 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000). The Supreme Court held that the California blanket primary placed a severe burden on political parties' right of association, was not narrowly tailored to achieve a compelling state interest, and was therefore unconstitutional. *Id.* at 582-85, 120 S. Ct. 2402.

In 2003, relying on *Jones,* the Ninth Circuit Court of Appeals held that Washington's blanket primary system was unconstitutional in *Democratic Party of Washington v. Reed,* 343 F.3d 1198 (9th Cir. 2003), *cert. denied,* 540 U.S. 1213, 124 S. Ct. 1412, 158 L. Ed. 2d 140 (2004). The Ninth Circuit stated that Washington's primary system was "materially indistinguishable" from the invalidated California system. *Id.* at 1203. As a result, Washington's blanket primary that had been used for over sixty-five years was held unconstitutional and the State was legally enjoined from "conducting the challenged primary in future elections." Amended Judgment, *Washington State Democratic Party v. Reed,* No. C00-5419FDB (W.D. Wash. May 13, 2004).

On January 8, 2004, the Grange filed Initiative 872 with the Secretary of State (the "Secretary").[5] Dembowski Decl., docket nos. 68 and

[5] The Washington Constitution was amended in 1912 to allow direct government by the people in the form of popularly enacted initiatives and referendums on laws passed by the Legislature. Wash. Const. art. II, § 1 ("the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law

69, Ex. F. Initiative 872 proposed a "top two" primary system in which a properly registered 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." Initiative 872, Sec. 5.[6] Initiative 872 defines a partisan primary as a "procedure for winnowing candidates for public office to a final list of two as part of a special or general election." *Id.*

While sponsors of Initiative 872 were gathering signatures,[7] the Washington State Legislature was faced with the task of developing a new primary system in Washington State after the

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passed by the legislature"). The initiative process allows the electorate to petition to place proposed legislation on the ballot. If the initiative's supporters timely file a petition with signatures of legal voters equaling eight percent of the votes cast for the office 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.

[6] 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.

[7] To begin the process of placing a proposed initiative on the ballot, a legal voter must file with the Secretary a legible copy of the proposed measure accompanied by an affidavit that the proposer is a legal voter and the requisite filing fee. Wash. Rev. Code § 29A.72.010. This 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.

*Reed* decision invalidated the blanket primary. On March 10, 2004, the Legislature enacted a bill which would have provided for two alternative primary systems. E.S.B. 6453, 58th Leg., 2004 Reg. Sess. (Wash. 2004). Part I of the bill provided for a "Louisiana" style primary system, commonly referred to as the "top two" approach. *See id.,* Part I. Under the top two approach, a registered voter would be permitted to cast a vote for each office appearing on the ballot without any limitation based on the party preference of either the voter or the candidate. *Id.,* § 5. The top two candidates would then proceed to the general election.[8]

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

[8] The top two system passed by the Legislature is similar, although not identical, to the primary system proposed in Initiative 872.

§ 126.[9] Under the Montana system, minor party candidates would be nominated by a party nominating convention, Wash. Rev. Code § 29A.20.121(1), and the minor party candidate selected would be placed on the ballot for the general election. Wash. Rev. Code §§ 29A.20.121; 29A.20.141. Minor party candidates will appear only on the general election ballot under the Montana system.

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

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

Initiative 872 provides the process for the selection of candidates for partisan office in Washington. A "major political party" means a

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[9] Under the categories of primary the Court has identified, the Montana primary system can be categorized as an open primary.

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

political party of which at least one nominee for President, Vice President, United States Senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even numbered year. Wash. Rev. Code § 29A.04.086. A "minor political party" is any political organization other than a major political party. Wash. Rev. Code § 29A.04.097.

Initiative 872 did not explicitly amend or repeal any sections of the Revised Code of Washington regulating the nomination of minor party candidates. Initiative 872, Sec. 17; Wash. Rev. Code §§ 29A.20.110-29A.20.201. The party nominating procedures established by the Montana primary system were not in existence at the time Initiative 872 was filed, making it impossible for the Initiative to have repealed or otherwise addressed these procedures. In addition, Initiative 872 did not refer to, repeal, or amend related sections of the Revised Code of Washington in existence at the time of the filing of the Initiative in January 2004. These provisions, which were part of the blanket primary, *see* Wash. Rev. Code Ann. §§ 29.24.020, 29.30.005, 29.30.095 (West 2003), provided in substance that minor party candidates would be nominated at party conventions. If a minor party candidate received one percent of the vote in the primary, that candidate would appear on the general election ballot.[11]

In the 2005 legislative session, the Secretary sponsored legislation in both the State House and

[11] The *Reed* court decision did not address the provisions relating to minor party candidates.

the Senate to "implement" Initiative 872. *See* H.B. 1750, 59th Leg., 2005 Reg. Sess. (Wash.2005); S.B. 5745, 59th Leg., 2005 Reg. Sess. (Wash. 2005). These bills would have eliminated minor party nominating conventions, other than for President and Vice President. H.B. 1750, Sec. 9. The Legislature did not enact any legislation dealing with Initiative 872 in 2005.[12]

On May 18, 2005, the Secretary adopted emergency regulations relating to primary elections in Washington. One of these regulations, Wash. Admin. Code § 434-215-015, purports to abolish the minor party convention rights that were not addressed in the text of Initiative 872 or by the Washington Legislature during 2004. Pharris Decl., docket no. 66, Ex. C (New Section: WAC 434-215-015).

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[12] E-mail correspondence from individuals within the state government indicates that at least some believed any changes made to Initiative 872 would have to be made by a two-thirds majority vote of the Legislature. Hansen Decl., docket no. 64, Ex. 3 at 22-23 (E-mail from Rep. Kathy Haigh to Bob Terwilliger). Another internal e-mail indicates that some state legislators 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.

## VI. ISSUES PRESENTED AND RELIEF REQUESTED

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

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

2. If the primary system under Initiative 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 Initiative 872 nominates political party candidates for public office, does Initiative 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 Initiative 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?

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

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

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

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

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

## VII. SUPPLEMENTAL REQUEST

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

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

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

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

## VIII. LEGAL STANDARD

This is a facial challenge to Initiative 872, which Plaintiffs allege burdens the exercise of their First Amendment rights. All parties agree that this facial challenge is ripe for adjudication,[13] and that

[13] A statute may be challenged in two distinct ways. First, a statute may be challenged on its face, whereby a court examines solely the text of the document to determine its constitutionality. Second, a statute may be challenged as it is applied. In an "as applied" 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

the alleged "threat" to the political parties' associational rights is more than hypothetical. The allegation of imminent injury to established First Amendment rights warrants intervention by the federal courts. *See Buckley v. Valeo,* 424 U.S. 1, 117, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

Our constitutional system does not authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative or initiative policy decisions. *See Heller v. Doe,* 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Rather, courts must give state statutes and lawfully enacted initiatives a strong presumption of validity. *See Broadrick v. Oklahoma,* 413 U.S. 601, 611-13, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). The presumption of validity is especially strong in this case because Plaintiffs are making a facial challenge to Initiative 872. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

In a facial challenge, there is no analytic scheme whereby the political parties must submit evidence establishing that they have been harmed. *See Reed,* 343 F.3d at 1203. Rather, the Court evaluates the challenged statute on its face, in light of the constitutional burdens or infringements alleged. *Id.* Plaintiffs in this case allege that Initiative 872 burdens their First Amendment associational rights by allowing non-affiliates of the party to participate in a party's nominee selection

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parties to limit their briefs to Plaintiffs' facial challenge of Initiative 872. The Court reserved issues related to Plaintiffs' as applied challenge.

process and forcing a party to associate with a candidate other than those selected by the party.

Where a statutory scheme imposes a severe burden on core First Amendment rights, the scheme must be found unconstitutional unless the State affirmatively demonstrates that the scheme is narrowly tailored to advance a compelling state interest.[14] *Reed,* 343 F.3d at 1204. In *Reed,* the Ninth Circuit discussed the applicable framework for this Court's review:

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

343 F.3d at 1203. A "[c]onstitutional challenge to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that

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[14] 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, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (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.

will separate valid from invalid restrictions." *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 213-14, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (internal citations and quotations omitted)).

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

*Tashjian*, 479 U.S. at 214, 107 S. Ct. 544 (quoting *Anderson,* 460 U.S. at 789, 103 S. Ct. 1564).

The nature of the asserted First Amendment interest in this case is evident: "freedom to 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, 107 S. Ct. 544 (quoting *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)). The freedom to join together in furtherance of common

political beliefs "necessarily presupposes the freedom to identify the people who constitute the association." *Tashjian,* 479 U.S. at 214-15, 107 S. Ct. 544. "[A] corollary of the right to associate is the right *not* to associate." *Jones,* 530 U.S. at 574, 120 S. Ct. 2402 (emphasis added).

### A. California Democratic Party v. Jones

Prior to 1996, political party nominees in California were determined in a "closed" partisan primary, in which only persons who were members of the political party (i.e., who had declared affiliation with that party when they registered to vote) could vote for the party's nominee. *See* Cal. Elec. Code Ann. § 2151 (West 1996). In 1996, California voters adopted Proposition 198, which changed the California partisan primary from a closed primary to a blanket primary. Under Proposition 198, "all persons entitled to vote, including those not affiliated with any political party," had the right to vote "for any candidate regardless of the candidate's political affiliation." Cal. Elec. Code Ann. § 2001 (West Supp. 2000). The candidate of each party winning the greatest number of votes became "the nominee of that party at the ensuing general election." Cal. Elec. Code Ann. § 15451 (West 1996). California law expressly provided that the name of the candidate of each party with the most votes was the party's "nominee." *Id.* Proposition 198 was promoted as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers." *See Jones,* 530 U.S. at 570,

120 S. Ct. 2402. Four political parties brought suit in California alleging the blanket primary adopted by Proposition 198 violated their First Amendment rights of association.

The United States Supreme Court in *Jones* recognized the "major role [the States have] to play in structuring and monitoring the election process, including primaries," and the State's ability to "require parties to use the primary format for selecting their nominees." *Jones,* 530 U.S. at 572, 120 S. Ct. 2402. Nevertheless, the Court held the California blanket primary unconstitutional. The Supreme Court held that "when States regulate parties' internal processes, they must act within the limits imposed by the Constitution." *Jones,* 530 U.S. at 573, 120 S. Ct. 2402.

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

*Id.* at 574, 120 S. Ct. 2402. The *Jones* Court held that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee," *id.* at 575, 120 S. Ct. 2402, and concluded that the ability of a political party to select its "own candidate," or "nominee," unquestionably implicates associational freedom. *See id.* at 575-76, 120 S. Ct. 2402. Proposition 198, by allowing all voters to vote for any candidate regardless of political affiliation, violated the First Amendment associational rights of the political parties, and forced "political parties to associate with-to have their nominees, and hence their positions, determined by-those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id.* at 577, 120 S. Ct. 2402.

### *B. Democratic Party v. Reed*

Washington State's blanket primary differed from California's blanket primary in that it did not explicitly name the candidate of each party with the most votes as its "nominee." *Compare* Cal. Elec. Code Ann. § 15451. Under Washington's blanket primary, "all properly registered voters" could vote at any primary "for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the 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).

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

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

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

*Id.* The Ninth Circuit concluded that the First Amendment's protection of freedom of association

required invalidation of Washington's blanket primary. *Id.* As a result, Washington's blanket primary was held unconstitutional and the State was enjoined from using the blanket primary system in the future.

## IX. ANALYSIS OF INITIATIVE 872

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

The parties dispute whether the primary system under Initiative 872 "nominates" political party candidates for public office, and whether it violates the First Amendment associational rights of the political parties. This inquiry is important because under *Jones,* primary voters at large may not choose a party's nominee. 530 U.S. at 585-86, 120 S. Ct. 2402.

The 2004 Voters' Pamphlet description of Initiative 872 stated:

> Initiative Measure No. 872 concerns elections to partisan offices.
>
> This measure would allow voters to select among all candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving most votes advance to the general election regardless of party.

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

### 1. Statutory Modifications

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

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

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

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

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

The State of Washington argues that Initiative 872 does not "nominate" political party candidates for public office, and does not create a nominating primary. Rather, the State contends that Initiative 872 makes "party nominations . . . irrelevant to qualifying candidates to the ballot." *See* State Response, docket no. 65, at 12. The State urges that unlike a "nominating" primary, Initiative 872 is a

"winnowing" primary in which the primary voters do not choose the party's nominee. Changes by the Initiative to Wash. Rev. Code § 29A.04.127 revised "nominating" to "winnowing."[15] The Republican Party argues that calling the primary a "winnowing primary," rather than a "nominating primary," does not distinguish the Initiative 872 primary system from the blanket primaries rejected in *Jones* and *Reed,* and does not change the fact that Initiative 872's primary nominates candidates. All Plaintiffs argue that the Court must analyze the framework of the Initiative, rather than changes to statutory wording, in determining its effect and possible burden on First Amendment rights.

The Republican Party notes that the State unsuccessfully proffered its "winnowing" arguments

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[15] However, similar changes were not made to other statutes which require the major parties to advance candidates for Congressional, State and County offices by means of these partisan nominating primaries: "[m]ajor political party candidates for all partisan elected offices, except for president and vice president . . . must be nominated at primaries held under this chapter." Wash. Rev. Code § 29A.52.116; *see also* Wash. Rev. Code § 29A.52.111. The State of Washington argues that Wash. Rev. Code § 29A.52.116 is "clearly inconsistent with the 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.

in *Jones*[16] All Plaintiffs suggest the change of "nominating" to "winnowing" is a change without a difference. The Democratic Party argues that Initiative 872 engages in "word-play," attempting to transform the constitutionality of Washington's nominating procedure by avoiding the word "nominate." *See* Democratic Party Opening Br., docket no. 55, at 15.[17] The Democratic Party argues that "tinker[ing] with the wording of the definition of 'primary' to avoid using the word 'nominating' " does not alter the substance of the primary as a nominating procedure. *Id.*

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

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[16] In its amicus curiae brief before the Supreme Court in *Jones,* the State described "the winnowing of candidates for the general election" as the only "aspect of party associational activities affected by the blanket primary." Brief of the States of Washington & Alaska as Amici Curiae in Support of Respondents, 2000 WL 340240 at *10.

[17] "Nominate" means "[t]o propose by name as a candidate, especially for election." The 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.*

### 2. Political Party Function

"[A] basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." *Clingman,* 125 S. Ct. at 2042 (O'Connor, J., concurring) (quoting *Kusper v. Pontikes,* 414 U.S. 51, 58, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973)). Political parties are entitled to First Amendment protections for any process which chooses the party's nominee. *See Jones,* 530 U.S. at 575, 120 S. Ct. 2402. The party's "nominee" has also been referred to as the political party's "own candidate," *id.* (quoting *Tashjian,* 479 U.S. at 235-36, 107 S. Ct. 544 (Scalia, J., dissenting)), "standard bearer," *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997), "choice," *id.* at 372, 117 S. Ct. 1364 (Stevens, J., dissenting), "ambassador to the general electorate," *Jones,* 530 U.S. at 575, 120 S. Ct. 2402, and the "standard bearer who best represents the party's ideologies and preferences." *Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214, 224, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (internal quotations omitted).

The State contends that by Initiative 872, the State completely decoupled the process for deciding which candidates appear on the general election ballot from any party's nominating process. *See* State Response, docket no. 65, at 17. The State argues that the political parties remain free to select their own nominees, and to advocate on their behalf in the "qualifying" primary. *See id.* Alternatively stated, the State argues that when forced to choose between (1) preserving voter choice; and (2) using primaries to nominate party candidates, voters

chose to preserve voter choice. However, this misapprehends the choice available to voters after *Jones* and *Reed*. A political party *does not* have a constitutional right to have its candidate on the general election ballot; however, it *does* have a constitutional right to nominate its "standard bearer." *Timmons,* 520 U.S. at 359, 117 S. Ct. 1364. The position advocated by the State transforms the party's right to "nominate" into a right to endorse. The Supreme Court rejected a similar argument with regard to California's Proposition 198: "[t]he ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones,* 530 U.S. at 580, 120 S. Ct. 2402. To relegate the members of a political party to a role of mere support for their preferred "standard bearer," would deny a party its role in selecting its representative. Party members associational right to choose the "standard bearer" of the party cannot be so infringed, nor can the ability to nominate a party's chosen candidate be so easily disposed of.

"There is simply no substitute for a party's selecting its own candidates." *Jones,* 530 U.S. at 581, 120 S. Ct. 2402.

**3. Selection by Voters at Large**

The State of Washington and the Grange also argue that "[t]he candidates who appear on the general election ballot are selected by the voters at large, not by the parties or by the voters as party members," and therefore the candidates are not the parties' nominees. *See* State Response, docket no. 65, at 19 (emphasis omitted). The Grange

argues that Initiative 872 allows candidates to disclose the political party that the candidate prefers, and that unlike the blanket primary invalidated in *Reed,* Initiative 872 "does not require or force any political party to do anything." *See* Grange Response, docket no. 70, at 32 (emphasis omitted). These arguments have already been rejected by the Ninth Circuit in *Reed,* 343 F.3d at 1204 ("As for the State of Washington's argument that the party nominees chosen at blanket primaries 'are the nominees not of the parties but of the electorate,' that is the problem with the system, not a defense of it."). That conclusion is equally applicable here. The fact that voters at large will select the party's candidate indicates the Initiative 872 primary serves a nominating function. The major political parties may not be deprived of their rights simply because the primary system "does not require or force [the parties] to do anything."

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

**4. Political "Preference" of Party Candidates**

The State argues that "[s]ince party affiliation plays no role in determining which candidates advance to the general election, the primary

established by [Initiative 872] cannot in any way be regarded as determining party nominees," and that a statement of "party preference" does not imply nomination, endorsement, or support of any political party. *See* State Response, docket no. 65, at 19-20. The Grange also argues that any statement of party preference by a candidate is absolutely protected by the First Amendment. These arguments also must fail. Party affiliation undeniably plays a role in determining the candidate voters will select, whether it is characterized as "affiliation" or "preference." *Tashjian,* 479 U.S. at 220, 107 S. Ct. 544. Party labels provide a shorthand designation of the views of party candidates on matters of public concern and play a role in the exercise of voting rights. *Id.* Candidates identified with their "preferred" party designation will "carry [the party] standard in the general election." *See* Republican Opening Brief, docket no. 49, at 7. Any attempt to distinguish a "preferred" party from an "affiliated" party is unavailing in light of Washington law. *See* Wash. Rev. Code § 29A.24.030 ("Included on the standard form shall be . . . [f]or partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status"); Wash. Rev. Code § 29A.52.311 (County Auditors required to publish notice of the election with "the proper party designation" of each candidate); Wash Rev. Code § 29A.52.112(3) (Candidate expressing a political party "preference" will have that preference "shown after the name of the candidate on the primary and general election ballots."); *see also* Pharris Decl., docket no. 66, Ex. A (2004 Voters' Pamphlet at 11) ("The primary ballot [under

Initiative 872] would include . . . major party and minor party candidates and independents.").

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

The Grange's characterization of ballot labels of "party preference" as a permissible exercise of free speech must also fail. An individual has no right to associate with a political party that is an "unwilling partner." *See Duke v. Cleland,* 954 F.2d 1526, 1530 (11th Cir. 1992), *cert. denied,* 502 U.S. 1086, 112 S. Ct. 1152, 117 L. Ed. 2d 279 (1992). This is not an infringement on the candidate's rights because the political party has a right "to identify the people who constitute the association and to limit the association to those people only." *Id.* at 1531 (internal quotations omitted). Free speech rights of a candidate "do not trump the [political party's] right to identify its membership based on political beliefs . . . . " *Duke v. Massey,* 87 F.3d 1226, 1232-33 (11th Cir. 1996). A candidate's free speech right to express a "preference" for a political party does not extend to disrupting the party's First Amendment associational rights. *See generally Storer v. Brown,* 415 U.S. 724, 736, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) (upholding California statute designed to protect the parties and party system against the

disorganizing effect of independent candidacies launched by unsuccessful putative party nominees).

**5. The *Jones* Dicta: "Nonpartisan Blanket Primary"**

The Court in *Jones* suggested in dicta that a "nonpartisan blanket primary" could protect important state interests and voter choice, with "all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Jones,* 530 U.S. at 585-86, 120 S. Ct. 2402.

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

> [California] could protect [its 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 parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. 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.

*Jones,* 530 U.S. at 585-86, 120 S. Ct. 2402. According to the Grange, which sponsored Initiative 872, it "specifically drafted Initiative 872 to conform to [the Supreme Court ruling in *Jones,*]" and its description of a *nonpartisan* blanket primary. *See* White Decl., docket no.8, Ex. 4 ("Advantages of a Qualifying Primary for Washington State").

The Court gives great weight to the *Jones* Court's suggestion in analyzing the constitutionality of Initiative 872. However, a careful analysis of *Jones* and this "suggestion" indicates that it cannot save Initiative 872 from its demise.

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

Plaintiffs' claim that Initiative 872 "denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party," *see Reed,* 343 F.3d at 1204, is well grounded. *Jones* allows little room for "outside" involvement in "intraparty" competition. *See Jones,* 530 U.S. at 572, 120 S. Ct. 2402. This is confirmed by Justice

Stevens' dissenting opinion. *See id.* at 598, n. 8, 120 S. Ct. 2402 ("It is arguable that, under the Court's reasoning combined with *Tashjian,* the only nominating options open for the States to choose without party consent are (1) to not have primary elections; or (2) to have what the Court calls a 'nonpartisan blanket primary' . . . in which candidates previously nominated by the various political parties and independent candidates compete.") (Stevens, J., dissenting).

**6. Initiative 872 Nominates Candidates**

In all constitutionally relevant respects, Initiative 872 is identical to the blanket primary invalidated in *Reed:* (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party;[18] (2) requires that political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

Because Initiative 872 constitutes a

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[18] 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* Section VI.C, *infra.* The parties also disagree as to the applicability of Initiative 872 to minor parties.

nominating process, the Court must address the question of Plaintiffs' associational rights, and the extent of the burden imposed on those rights by Initiative 872.[19]

## B. Does Initiative 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?

Plaintiffs argue Initiative 872 imposes an

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[19] The political parties argue in the alternative that if Initiative 872 is *not* a nominating primary, it would be unconstitutional for violation of the parties' First Amendment associational right to select candidates for public office. It is well settled that political parties have a constitutionally protected right to nominate their candidates for partisan office. *See Jones,* 530 U.S. at 575, 120 S. Ct. 2402; *Clingman,* 125 S. Ct. at 2042 (O'Connor, J., concurring) (a basic function of a political party is to select candidates to be offered to voters in general elections); *Eu,* 489 U.S. at 224, 109 S. Ct. 1013 (party entitled to select the "standard bearer who best represents the party's ideologies and preferences.").

First Amendment associational rights are no less protected where the State effects a primary system that eliminates the party's right to nominate its own candidates. In such a circumstance, the affected political party is entitled to hold a caucus or convention to nominate its candidates for partisan office. Similarly, the party is entitled to prevent non-affiliated candidates from expressing a party preference or affiliation on the primary or general election ballot. The choice of party nominee is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Jones,* 530 U.S. at 575, 120 S. Ct. 2402 (internal quotation marks and citation omitted). The State cannot deprive political parties of their right to choose the candidate of their choice.

unconstitutional burden on the political parties' First Amendment associational rights by (1) interfering with the parties' right to determine the limits of voter association in the selection of the party candidates; and (2) imposing forced political association with any candidate who may self-designate a party "preference," which will be displayed on the ballot.[20]

**1. Candidate Selection**

The freedom to join together in furtherance of common political beliefs "necessarily presupposes the freedom to identify the people who constitute the association," *Tashjian,* 479 U.S. at 214, 107 S. Ct. 544, and "the right not to associate" with individuals who do not share common beliefs. *Jones,* 530 U.S. at 574, 120 S. Ct. 2402.

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

*Id.* at 574-75, 120 S. Ct. 2402. "[A] basic function of a political party is to select the candidates for public office to be offered to the voters at general elections."

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[20] The State of Washington admits that "if the Court found . . . a [non-party] candidate's option to express a political party preference . . . sufficient to render the 'top two' primary a party nomination system, that would indeed trigger a need to respect the associational interests of the political parties." *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.*

*Clingman,* 125 S. Ct. at 2042 (O'Connor, J., concurring) (internal quotations omitted). First Amendment associational rights in this context allow the party to select the "standard bearer who best represents the party's ideologies and preferences." *Eu,* 489 U.S. at 224, 109 S. Ct. 1013.

Initiative 872 nominates political party candidates for office, and allows voters to choose any candidate, regardless of political affiliation. Initiative 872 therefore impermissibly "denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party." *Reed,* 343 F.3d at 1204. "In no area is the political association's right to exclude more important than in the process of selecting its nominee." *Jones,* 530 U.S. at 575, 120 S. Ct. 2402.

Where a statutory scheme imposes a severe burden on core First Amendment rights, the scheme must be found unconstitutional unless the State affirmatively demonstrates that the scheme is narrowly tailored to advance a compelling state interest. *Reed,* 343 F.3d at 1204. The State of Washington and the Washington State Grange argue that Initiative 872 does not impose a severe burden on core First Amendment rights, but do not argue that Initiative 872 is narrowly tailored to meet a compelling state interest. The Court concludes as a matter of law that Initiative 872 "forces political parties to associate with-to have their nominees, and hence their positions, determined by-those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Jones,* 530 U.S. at 577, 120 S. Ct. 2402.

### 2. Candidate Party Preference

Plaintiffs argue that Washington's filing statute, Wash. Rev. Code § 29A.24.030,[21] violates the parties' First Amendment associational rights by forcing the political parties to associate with any candidate who expresses a "preference" for a political party. Initiative 872 provides that any candidate may self-designate a party preference and that party's name will be printed on public ballots and in voters' guides after the candidate's name. *See* Wash. Rev. Code § 29A.24.030 ("Included on the standard form shall be . . . [f]or partisan offices only, a place for the candidate to indicate his or her major

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[21] Initiative 872 revised Wash. Rev. Code § 29A.24.030, Washington's filing statute, to include on the ballot "a place for the candidate to indicate his or her major or minor party preference, or independent status," *see* Initiative 872, Sec. 9(3), without "cognizance" of the statute's repeal by 2004 c 271§ 193 in favor of Washington's new filing statute: Wash. Rev. 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).

The difference between Washington's two filing statutes is not significant to the Court's analysis. *Compare* Wash. Rev. Code § 29A.24.030 ("major or minor party preference") *with* Wash. Rev. Code § 29A.24.031 ("party designation"). The parties base their analysis on 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.

or minor party preference, or independent status"); Wash Rev. Code § 29A.52.112 (Candidate expressing a political party "preference" will have that preference "shown after the name of the candidate on the primary and general election ballots."). County Auditors are also required to publish notice of the election with "the proper party designation" of each candidate. Wash. Rev. Code § 29A.52.311.

In this case the political parties seek relief beyond protecting their rights to nominate candidates. The parties seek to exclude all other candidates on the primary ballot from using similar party preferences. Neither the State nor the Grange disputes that a political party has an inherent right to nominate its own candidates. *See* State Response, docket no. 65, at 24; Grange Response, docket no. 70, at 27. The right to nominate is a constitutionally protected right of association. Under Initiative 872, political parties are given no choice with respect to whether such public association is made. The parties argue that the filing statutes force the parties to be affiliated with candidates that may qualify under party rules, or may be hostile to the party. The Defendants argue that "forced association" will not occur because "party preference" statements do not imply the nomination, endorsement, or support of any political party. *See* State Response, docket no. 65, at 20. However, rather than meet their burden to justify Initiative 872, the State and the Grange argue that candidates who appear on the primary and general election ballots are not candidates "of the party," even though they are

identified on the ballot as associated with the party. This defense was previously rejected in *Reed.* 343 F.3d at 1204; *see also* Section VI.A.3, *supra.*

Party affiliation plays a role in determining which candidates voters select, whether characterized as "affiliation" or "preference." *Tashjian,* 479 U.S. at 220, 107 S. Ct. 544. The top two nature of the primary does not cure this defect. Parties cannot be forced to associate on a ballot with unwanted party adherents. *See* Section VI.A.4, *supra.* The right to select the candidate that will appear on the ballot is important to political parties that invest substantial money and effort in developing a party name. Party name and affiliation communicate meaningful political information to the electorate.[22] The Democratic Party argues that it has expended considerable time and expense to develop a coherent set of goals and principles that guide the party, and that candidates asserting an affiliation with the party will receive numerous votes based solely on their proclaimed affiliation with the party, and implied adoption of its message and principles. Even non-commercial associations are entitled to protect their name against misappropriation and misuse. *See, e.g., Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge,* 62 Wash. 2d 28, 35, 381 P.2d 130 (Wash. 1963) ("The underlying

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[22] The Libertarian Party notes that the name "Libertarian Party" is a registered trademark, and accordingly argues that the Libertarian Party has a proprietary right to determine who may use the name, and for what purposes it may be used. *See* Libertarian Opening Br., docket no. 52, at 14.

concept is that of unfair competition in matters in which the public generally may be deceived or misled."); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 566, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (private association could not be required to admit a parade contingent expressing message not of the organizers' choosing); *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 659, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) (First Amendment protects Boy Scouts' right to exclude leader whose presence would express a message at odds with Boy Scout policies). The Court is persuaded by Plaintiffs' arguments that allowing *any* candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates.

Initiative 872 imposes a severe burden on the Plaintiffs' First Amendment right to associate on two separate grounds: (1) Initiative 872 forces political parties' to have their nominees chosen by voters who have refused to affiliate with the party and may have affiliated with a rival; and (2) Initiative 872 forces the parties to associate with any candidate who expresses a party "preference." Because Initiative 872 is not narrowly tailored to advance a compelling state interest, the Court concludes that it is unconstitutional. *Reed,* 343 F.3d at 1203-04.

### C. Initiative 872 and Minor Parties

The various parties in this litigation dispute Initiative 872's impact on minor parties. The Plaintiffs argue that Initiative 872's provision that only the top two candidates in the primary will be

placed on the general ballot unconstitutionally restricts minor parties' access to the ballot. Additionally, in its Supplement to its Motion for Summary Judgment, the Republican Party requests a finding that Initiative 872 is unconstitutional because it violates the constitutional right to equal protection under the law. The Republican Party contends that "Initiative 872 violates the Equal Protection Clause by allowing minor political parties to nominate candidates and control their message, but denying the same right to the [major political parties.]" *See* Republican Supplement, docket no. 63, at 4. The Grange and the State argue that Initiative 872 supplanted and superseded any inconsistent provisions in the Revised Code of Washington, including those that treat minor parties differently. *See* State Response, docket no. 65, at 31 n.23; Grange Response, docket no. 70, at 21 n.30.

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

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[23] The Montana system, adopted in 2004, treats minor party nominees differently. Under the Montana system, minor party nominees would still be selected through a nominating 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.

Initiative 872 did not expressly repeal, amend, or otherwise address the minor party nominating statutes, Wash. Rev. Code §§ 29A.20.110-29A.20.201. Initiative 872, Sec. 17. The State and the Grange contend that Initiative 872 repealed by implication all of the previous minor party nominating statutes because the Initiative covers the entire subject matter of primary and general election procedures and was intended to supersede the prior legislation on the subject.

The language of Initiative 872 appears to preclude minor party nominees from appearing on the general election ballot without first having appeared on a primary election ballot. Section 5 of Initiative 872 defines a primary as "a procedure for winnowing candidates for public office to a final list of two as part of a special or general election." Initiative 872, Sec. 5. The language of a "final list of two" candidates for "public office" does not appear to leave room for additional, minor party candidates on the general election ballot. Section 6(1) states that, "[f]or any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot." Initiative 872, Sec. 6(1). This language implies that in an election for any office in which a primary was held, only two candidates may appear on the general election ballot. Initiative 872, Sec. 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 . . ."). Finally, Section 9(3) refers to minor party candidates and

provides that the form for declaration of candidacy must have, "[f]or partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status." Initiative 872, Sec. 9(3).

The State of Washington 2004 Voter's Pamphlet states in part that "[t]he initiative would replace the system of separate primaries for each party" and that "[t]he primary ballot would include all candidates filing for the office, including both major party and minor party candidates and independents." Pharris Decl., docket no. 66, Ex. A (2004 Voters Pamphlet at 11). Finally, the explanation statement provides "[t]he measure would replace existing provisions that candidates of each major political party, as well as any minor party or independent candidates who qualify, appear on the general election ballot."[24] *Id.*

The Montana system's provision dictating that minor party candidates proceed directly to the general election ballot is in direct conflict with the primary system enacted under Initiative 872 in which all candidates for partisan office must submit to the primary in order to winnow the final list down to two. Similarly, under the prior blanket primary system, minor party nominees advanced to the general ballot if they received at least one percent of

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[24] When the language of an initiative is ambiguous, the Court may look to the voters' pamphlet to ascertain the intent of the voters who approved it. *Sane Transit v. Sound Transit,* 151 Wash. 2d 60, 90, 85 P.3d 346 (2004) (citing *Amalgamated Transit Union Local 587 v. State,* 142 Wash. 2d 183, 205-06, 11 P.3d 762 (2000)).

the total vote cast in the primary for that office. This provision is also inconsistent with Initiative 872's provisions allowing only the top two candidates to advance to the general election.

Repeal by implication is strongly disfavored. *State v. Lessley,* 118 Wash. 2d 773, 782, 827 P.2d 996 (1992); *Washington State Welfare Rights Org. v. State,* 82 Wash. 2d 437, 439, 511 P.2d 990 (1973) (internal citations omitted). Under Washington law, a statute will be deemed to be impliedly repealed only if: "[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 unless 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 Federation of State Employees v. The Office of Financial Management,* 121 Wash. 2d 152, 165, 849 P.2d 1201 (1993).

The Court concludes as a matter of law that it was the intent of the voters who enacted Initiative 872 that it be a complete act in itself and cover the entire subject matter of earlier legislation governing minor parties.[25]

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[25] The Court reluctantly holds that Initiative 872 repealed by implication the minor party 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 as voters who find these parties' philosophies antithetical to their own vision of good governance. For many voters, the minor parties have provided a vital means to advocate on behalf of their vision for this State. The Supreme Court has noted that minor parties

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

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have played an indispensable role in the nation's political process:

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

*Sweezy v. New Hampshire,* 354 U.S. 234, 250-51, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957). Initiative 872, if otherwise valid would significantly alter Washington State's political landscape and severely limit the important 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.

## X. THE SEVERABILITY OF INITIATIVE 872

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

Washington law governs the question of the severability of a Washington initiative. In *In re Parentage of C.A.M.A.,* 154 Wash. 2d 52, 109 P.3d 405 (2005), the Washington Supreme Court described the test to determine whether unconstitutional statutory provisions can be severed as follows:

> Ordinarily, only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact. An unconstitutional provision may not be severed, however, if its connection to the remaining, constitutionally sound provision is so strong "that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." Also, the court is obliged to strike down the entire act if the result of striking only the provision is to give the remainder of the statute a much broader scope.

*Guard v. Jackson,* 83 Wash. App. 325, 333, 921 P.2d 544 (1996) (footnotes omitted) (quoting *Leonard v. City of Spokane,* 127 Wash. 2d 194, 201, 897 P.2d 358 (1995)).

In addition, unless the Court can conclude that the voters in the initiative process would have passed Initiative 872 absent any unconstitutional provisions, the proper remedy is invalidation rather than changing the Initiative. *Griffin v. Eller,* 130 Wash. 2d 58, 69-70, 922 P.2d 788 (1996). *See also National Advertising Co. v. Orange,* 861 F.2d 246 (9th Cir. 1988).

Initiative 872 does not have a severability clause. The presence of an applicable severability clause is some evidence that the voters would have enacted the constitutional portions of the Initiative without the unconstitutional portions, but a severability clause is not necessary in order to meet the severability test. *See In re Parentage of C.A.M.A.,* 154 Wash. 2d at 67-68, 109 P.3d 405.

When determining if the Initiative is severable, the Court must take care not to rewrite legislation. "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford,* 442 U.S. 544, 555, 99 S. Ct. 2470, 61 L. Ed. 2d 68 (1979). To apply these rules in the context of this case, the Court must look at what must be severed for Initiative 872 to meet

constitutional standards and how the remainder of the Initiative would realize the intent of voters who enacted it. The suggestions for severance offered by the parties fall short.

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

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

The Democratic Party argues that if the Court concludes that the voters were primarily interested in limiting the number of candidates on the general election ballot to no more than two and that voters viewed as only incidental the creation of a non-party member's right to choose a party's candidate, the Court could sever the Initiative. Democratic Reply, docket no. 75, at 10. The Democratic Party argues

that the Court "need only hold that the Initiative's requirement that a political party name be printed after a candidate's name is applicable if, and only if, the candidate has first been selected by the political party whose name he or she seeks to invoke, pursuant to the rules of that party." *Id.* Implementing this recommendation would require the Court to fundamentally rewrite the Initiative.

Several portions of Initiative 872 are unconstitutional because they violate Plaintiffs' First Amendment rights. In order to sever the offending sections of Initiative 872, the Court would need to sever most of Section 4, which defines a "partisan office" as one "for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name"; Section 5, which redefines Primary or Primary Election, replaces "nominating" with "winnowing," and allows 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; Sections 7(2) and (3), which affix a candidate's party preference next to that candidate's name on both the primary and the general election ballot; Section 9(3), which provides a place on the declaration of candidacy for a candidate to state his or her major or minor party preference; Section 11, which states that the voters' pamphlet must also contain the political party preference or independent status of the candidate where the candidate expresses a preference; and Section 12, which provides that the certified list of candidates shall include each candidates' party

preference. Initiative 872, Secs. 4, 5, 7(2), 7(3), 9(3), 11, 12. The effect of these deletions would be to substantially dismantle the partisan primary system adopted by Initiative 872. These deletions would eliminate any reference to party preference or affiliation, and would convert a partisan election process into a nonpartisan election process.

The Court must determine whether the connection between the potentially severable parts "and the remaining constitutionally sound provision is so strong 'that it could not be believed that [the voters] would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of [the voters].' " *Guard v. Jackson,* 83 Wash. App. 325, 333, 921 P.2d 544 (1996). "When the people approve an initiative measure, they exercise the same power of sovereignty as the legislature does when it enacts a statute. Once enacted, initiatives are interpreted according to the same rules of statutory construction as apply to the legislature's enactments. Thus, the court's aim is to determine the collective intent of the people who enacted the measure." *McGowan v. State,* 148 Wash. 2d 278, 288, 60 P.3d 67 (2002) (internal citations omitted). The Court may look to the plain language of the Initiative itself in order to determine the intent of the voters who enacted it. *Id.*

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

## XI. EFFECT OF THE INVALIDITY OF INITIATIVE 872

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

The effect of the invalidity of a state statute is governed by state law. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Washington law holds that an invalid statute is a nullity. "It is as inoperative as if it had never been passed." *State v. Speed,* 96 Wash. 2d 838, 843, 640 P.2d 13 (1982) (citing *State ex. rel. Evans v. Brotherhood of Friends,* 41 Wash. 2d 133, 143, 247 P.2d 787 (1952)). The Washington Supreme Court has held that the natural effect of this rule is that once the invalid statute has been declared a nullity, it leaves the law as it stood prior to the enactment of the invalid statute. *Id.* (citing *Boeing Co. v. State,* 74 Wash. 2d 82, 89, 442 P.2d 970 (1968)). In this case, the Court's holding that Initiative 872 is unconstitutional renders it a nullity, including any provisions within it purporting to repeal sections of the Revised Code of Washington. Therefore, the law as it existed before the passage of Initiative 872, including the Montana primary system, stands as if Initiative 872 had never been approved.

## XII. CONCLUSION

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

1. The implementation of Initiative 872 will severely burden the First Amendment rights of Washington's political parties by (a) allowing any voter, regardless of their affiliation to a party, to choose a party's nominee, *Jones,* 530 U.S. at 586, 120 S. Ct. 2402; and (b) allowing any candidate, regardless of party affiliation or relationship to a party, to self-identify as a member of a political party and to appear on the primary and general election ballots as a candidate for that party. *Reed,* 343 F.3d at 1204.

2. Initiative 872 is not narrowly tailored to serve any legitimate and compelling state interest. *Timmons,* 520 U.S. at 358, 117 S. Ct. 1364.

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

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

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

1. The Court enjoins the State of Washington, or any political subdivision of the State, from enforcing, implementing, or conducting any election

pursuant to the provisions of Initiative 872, as codified in Title 29A, Wash. Rev. Code.

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

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

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

**IT IS SO ORDERED.**

**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**

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

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

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

2. The Court enjoins the State of Washington, or any political subdivision of the State, from enforcing or implementing the filing statute

under Initiative 872, Wash. Rev. Code § 29A.24.030, as part of any primary or general election.

3. The Court enjoins the State of Washington, or any political subdivision of the State, from refusing to recognize the validity of any minor party or independent candidate nominating convention held on or before August 27, 2005, on the grounds that the convention did not comply with the dates set forth in Wash. Rev. Code § 29A.20.121, provided that the notice provisions of Wash. Rev. Code § 29A.20.131 have been complied with and the convention otherwise complies with Title 29A.20, Wash. Rev. Code.

4. The Court retains jurisdiction in this action to enforce the terms of this injunction.

IT IS SO ORDERED.

DATED this 29th of July, 2005.

// s //

Thomas S. Zilly
United States District Judge

## CONSTITUTION OF THE UNITED STATES

### AMENDMENT I

**FREEDOM OF RELIGION, SPEECH, AND OF THE PRESS.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**Wash. Rev. Code 29A.04.086**[1]
**Major political party**

"Major political party" means a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. A political party qualifying as a major political party under this section retains such status until the next even-year election at which a candidate of that party does not achieve at least five percent of the vote for one of the previously specified offices. If none of these offices appear on the ballot in an even-year general election, the major party retains its status as a major party through that election. However, a political party of which no nominee received at least ten percent of the total vote cast may forgo its status as a major political party by filing with the secretary of state an appropriate party rule within sixty days of attaining major party status under this section, or within fifteen days of June 10, 2004, whichever is later. [2004 c 271 § 103.]

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[1] Bracketed material in statutes appears in originals.

**Wash. Rev. Code 29A.04.097**
**Minor political party.**

"Minor political party" means a political organization other than a major political party. [2003 c 111 § 116. Prior: 1965 c 9 § 29.01.100; prior: 1955 c 102 § 8; prior: 1907 c 209 § 26, part; RRS § 5203, part. Formerly RCW 29.01.100.]

**Wash. Rev. Code 29A.04.110**
**Partisan office**
***(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)***

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

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

**Wash. Rev. Code 29A.04.127**
**Primary**
***(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)***

"Primary" or "primary election" means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate. [2005 c 2 § 5 (Initiative Measure No. 872, approved November 2, 2004); 2003 c 111 § 122. Prior: 1965 c 9 § 29.01.130; prior: 1907 c 209 § 1, part; RRS § 5177(a). See also 1950 ex.s. c 14 § 2. Formerly RCW 29.01.130.]

**Wash. Rev. Code 29A.04.128**
**Primary**

"Primary" or "primary election" means a statutory procedure for nominating candidates to public office at the polls. [2004 c 271 § 152.]

**Wash. Rev. Code 29A.04.206**
**Voters' rights**
***(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)***

The rights of Washington voters are protected by its constitution and laws and include the following fundamental rights:

(1) The right of qualified voters to vote at all elections;

(2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;

(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate. [2005 c 2 § 3 (Initiative Measure No. 872, approved November 2, 2004).]

**Wash. Rev. Code 29A.20.121**
**Nomination by convention or write-in—Dates—Special filing period**
***(Effective until January 1, 2007.)***

(1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the last Saturday in June and not later than the first Saturday in July or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with RCW 29A.28.041; (b) as provided by RCW 29A.60.021; or (c) as otherwise provided in this section. Minor political party and independent candidates may appear only on the general election ballot.

(2) Nominations of candidates for president and vice president of the United States other than by a major political party may be made either at a convention conducted under subsection (1) of this

section, or at a similar convention taking place not earlier than the first Sunday in July and not later than seventy days before the general election. Conventions held during this time period may not nominate candidates for any public office other than president and vice president of the United States, except as provided in subsection (3) of this section.

(3) If a special filing period for a partisan office is opened under RCW 29A.24.211, candidates of minor political parties and independent candidates may file for office during that special filing period. The names of those candidates may not appear on the general election ballot unless they are nominated by convention held no later than five days after the close of the special filing period and a certificate of nomination is filed with the filing officer no later than three days after the convention. The requirements of RCW 29A.20.131 do not apply to such a convention.

(4) A minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position. For the purpose of nominating candidates for the offices of president and vice president, United States senator, United States representative, or a statewide office, a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention obtained in support of the candidate or candidates in order to obtain the number required by RCW 29A.20.141. For all other offices for which nominations are made, signatures of the requisite

number of registered voters must be obtained at a single convention. [2004 c 271 § 110.]

**Wash. Rev. Code 29A.20.121**
**Nomination by convention or write-in—Dates—Special filing period**
***(Effective January 1, 2007.)***

(1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the first Saturday in May and not later than the second Saturday in May or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with RCW 29A.28.041; (b) as provided by RCW 29A.60.021; or (c) as otherwise provided in this section. Minor political party and independent candidates may appear only on the general election ballot.

(2) Nominations of candidates for president and vice president of the United States other than by a major political party may be made either at a convention conducted under subsection (1) of this section, or at a similar convention taking place not earlier than the first Saturday in June and not later than the fourth Saturday in July. Conventions held during this time period may not nominate candidates for any public office other than president and vice president of the United States, except as provided in subsection (3) of this section.

(3) If a special filing period for a partisan office is opened under RCW 29A.24.211, candidates of minor political parties and independent candidates may file for office during that special filing period. The names of those candidates may not appear on the general election ballot unless they are nominated by convention held no later than five days after the close of the special filing period and a certificate of nomination is filed with the filing officer no later than three days after the convention. The requirements of RCW 29A.20.131 do not apply to such a convention.

(4) A minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position. For the purpose of nominating candidates for the offices of president and vice president, United States senator, United States representative, or a statewide office, a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention obtained in support of the candidate or candidates in order to obtain the number required by RCW 29A.20.141. For all other offices for which nominations are made, signatures of the requisite number of registered voters must be obtained at a single convention. [2006 c 344 § 4; 2004 c 271 § 110.]

**Wash. Rev. Code 29A.24.030**
**Declaration of candidacy**
***(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)***

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under *RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and

swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in *RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process. [2005 c 2 § 9 (Initiative Measure No. 872, approved November 2, 2004); 2003 c 111 § 603; 2002 c 140 § 1; 1990 c 59 § 82. Formerly RCW 29.15.010.]

**Wash. Rev. Code 29A.24.031**
**Declaration of candidacy**

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) A place for the candidate to indicate a party designation, if applicable;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.091;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.091.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process. [2004 c 271 § 158.]

**Wash. Rev. Code 29A.36.010**
**Certifying primary candidates**
**(*Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)***

On or before the day following the last day allowed for candidates to withdraw under *RCW 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party preference or independent designation as shown on filed declarations. [2005 c 2 § 12 (Initiative Measure No. 872, approved November 2, 2004); 2003 c 111 § 901. Prior: 1990 c 59 § 8; 1965 ex.s. c 103 § 4; 1965 c 9 § 29.27.020; prior: 1949 c 161 § 10, part; 1947 c 234 § 2, part; 1935 c 26 § 1, part; 1921 c 178 § 4, part; 1907 c 209 § 8, part; Rem.Supp. 1949 § 5185, part. Formerly RCW 29.27.020.]

**Wash. Rev. Code 29A.36.170**
**Top two candidates qualified for general election—Exception**
**(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)**

(1) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes

will appear first and the candidate who received the next greatest number of votes will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for an office for which no primary was held, the names of the candidates shall be listed in the order determined under *RCW 29A.36.130.

(2) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed for that position on the ballot at the general election. [2005 c 2 § 6 (Initiative Measure No. 872, approved November 2, 2004); 2003 c 111 § 917. Prior: 1992 c 181 § 2; 1990 c 59 § 95. Formerly RCW 29.30.085.]

**Wash. Rev. Code 29A.36.171**
**Nonpartisan candidates qualified for general election**

(1) Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan office for which a primary was held, only the names of the candidate who received the greatest number of votes and the candidate who received the next greatest number of

votes for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted, no candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary. On the ballot at the general election for any other nonpartisan office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.131.

(2) On the ballot at the general election for the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, judge of the district court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed under the title of the office for that position. [2004 c 271 § 170.]

**Wash. Rev. Code 29A.36.191**
**Partisan candidates qualified for general election**

The name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless, at the preceding primary, the candidate receives a number of votes equal to at least one percent of the total number of votes cast for all candidates for that office and a plurality of the votes cast by voters affiliated with that party for

candidates for that office affiliated with that party. [2004 c 271 § 133.]

**Wash. Rev. Code 29A.36.201**
**Names qualified to appear on election ballot**

The names of the persons certified as nominees by the secretary of state or the county canvassing board shall be printed on the ballot at the ensuing election.

No name of any candidate whose nomination at a primary is required by law shall be placed upon the ballot at a general or special election unless it appears upon the certificate of either (1) the secretary of state, or (2) the county canvassing board, or (3) a minor party convention or the state or county central committee of a major political party to fill a vacancy on its ticket under RCW 29A.28.021.

Excluding the office of precinct committee officer or a temporary elected position such as a charter review board member or freeholder, a candidate's name shall not appear more than once upon a ballot for a position regularly nominated or elected at the same election. [2004 c 271 § 171.]

**Wash. Rev. Code 29A.52.111**
**Application of chapter—Exceptions**

Candidates for the following offices shall be nominated at partisan primaries held pursuant to the provisions of this chapter:

(1) Congressional offices;

(2) All state offices except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise. [2004 c 271 § 173.]

**Wash. Rev. Code 29A.52.116**
**Application of chapter—Exceptions**

Major political party candidates for all partisan elected offices, except for president and vice president, precinct committee officer, and offices exempted from the primary under *RCW 29A.52.011, must be nominated at primaries held under this chapter. [2004 c 271 § 139.]

**Wash. Rev. Code 29A.52.231**
**Nonpartisan offices specified**

The offices of superintendent of public instruction, justice of the supreme court, judge of the court of appeals, judge of the superior court, and

judge of the district court shall be nonpartisan and the candidates therefor shall be nominated and elected as such.

All city, town, and special purpose district elective offices shall be nonpartisan and the candidates therefor shall be nominated and elected as such. [2004 c 271 § 174.]

## INITIATIVE 872

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal, hereby certify that, according to the records on file in my office, the attached copy of Initiative Measure No. 872 to the People is a true and correct copy as it was received by this office.

AN ACT Relating to elections and primaries; amending RCW 29A.04.127, 29A.36.170, 29A.04.310, 29A.24.030, 29A.24.210, 29A.36.010, 29A.52.010, 29A.80.010, and 42.12.040; adding a new section to chapter 29A.04 RCW; adding a new section to chapter 29A.52 RCW; adding a new section to chapter 29A.32 RCW; creating new sections; repealing RCW 29A.04.157, 29A.28.010, 29A.28.020, and 29A.36.190; and providing for contingent effect.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

### TITLE

**NEW SECTION. Sec. 1.** This act may be known and cited as the People's Choice Initiative of 2004.

LEGISLATIVE INTENT: PROTECTING VOTERS' RIGHTS AND CHOICE

**NEW SECTION. Sec. 2.** The Washington Constitution and laws protect each voter's right to vote for any candidate for any office. The Washington State Supreme Court has upheld the blanket primary as protecting compelling state interests "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the

primary." Heavey v. Chapman, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980). The Ninth Circuit Court of Appeals has threatened this system through a decision, that, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective 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.

**WASHINGTON VOTERS' RIGHTS**

**NEW SECTION. Sec. 3.** The rights of Washington voters are protected by its Constitution and laws and include the following fundamental rights:

(1) The right of qualified voters to vote at all elections;

(2) The right of absolute secrecy of the vote. No voter may be required to

disclose political faith or adherence in order to vote;

(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

**DEFINITIONS**

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

"Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general

election ballot in conjunction with his or her name. The following are partisan offices:

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

**Sec. 5.** RCW 29A.04.127 and 2003 c 111 § 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.

**Sec. 6.** RCW 29A.36.170 and 2003 c 111 § 917 are each amended to read as follows:

(1) ((Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan)) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name((s)) of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes ((for that office shall appear under the title of that office, and the names shall appear in that

order. If a primary was conducted,)) will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for ((any other nonpartisan)) an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.130.(2) ((On the ballot at the general election)) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed ((under the title of the office)) for that position on the ballot at the general election.

**NEW SECTION. Sec. 7.** A new section is added to chapter 29A.52 RCW to read as follows:

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

(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, unless only one candidate qualifies as provided in RCW 29A.36.170.

(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and

general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

**CONFORMING AMENDMENTS**

**Sec. 8.** RCW 29A.04.310 and 2003 c 111 § 143 are each amended to read as follows:

((Nominating)) Primaries for general elections to be held in November must be held on:

(1) The third Tuesday of the preceding September; or ((on))

(2) The seventh Tuesday immediately preceding ((such)) that general election, whichever occurs first.

**Sec. 9.** RCW 29A.24.030 and 2003 c 111 § 603 are each amended to read as follows:

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the

office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate ((a)) his or her major or minor party ((designation, if applicable)) preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

**Sec. 10.** RCW 29A.24.210 and 2003 c 111 § 621 are each amended to read as follows:

Filings for a partisan elective office shall be opened for a period of three normal business days whenever, on or after the first day of the regular filing period and before the sixth Tuesday prior to ((a primary)) an election, a vacancy occurs in that office, leaving an unexpired term to be filled by an election for which filings have not been held.

Any ((such)) special three-day filing period shall be fixed by the election officer with whom declarations of candidacy for that office are filed. The election officer shall give notice of the special three-day filing period by notifying the press, radio, and television in the county or counties involved, and by ((such)) any other means as may be required by law.

Candidacies validly filed within the special three-day filing period shall appear on the primary or general election ballot as if filed during the regular filing period.

The procedures for filings for partisan offices where a vacancy occurs under this section or a void in candidacy occurs under RCW 29A.24.140 must be substantially similar to the procedures for nonpartisan offices under RCW 29A.24.150 through 29A.24.170.

**NEW SECTION. Sec. 11.** A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

**Sec. 12.** RCW 29A.36.010 and 2003 c 111 § 901 are each amended to read as follows:

On or before the day following the last day allowed for ((political parties to fill vacancies in the ticket as provided by RCW 29A.28.010)) candidates to withdraw under RCW 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party ((designation, if any)) preference or independent designation as shown on filed declarations.

**Sec. 13.** RCW 29A.52.010 and 2003 c 111 § 1301 are each amended to read as follows:

Whenever it shall be necessary to hold a special election in an odd-numbered year to fill an unexpired term of any office which is scheduled to be voted upon for a full term in an even-numbered year, no ((September)) primary election shall be held in the odd-numbered year if, after the last day allowed for candidates to withdraw, ((either of the following circumstances exist:

(1) No more than one candidate of each qualified political party has filed a declaration of candidacy for the same partisan office to be filled; or

(2))) no more than two candidates have filed a declaration of candidacy for a single ((nonpartisan)) office to be filled.

In ((either)) this event, the officer with whom the declarations of candidacy were filed shall immediately notify all candidates concerned and the

names of the candidates that would have been printed upon the ((September)) primary ballot, but for the provisions of this section, shall be printed as ((nominees)) candidates for the positions sought upon the ((November)) general election ballot.

**Sec. 14.** RCW 29A.80.010 and 2003 c 111 § 2001 are each amended to read as follows:

(((1))) Each political party organization may((:

(a) Make its own)) adopt rules ((and regulations; and

(b) Perform all functions inherent in such an organization.

(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in RCW 29A.28.010)) governing its own organization and the nonstatutory functions of that organization.

**Sec. 15.** RCW 42.12.040 and 2003 c 238 § 4 are each amended to read as follows:

(1) If a vacancy occurs in any partisan elective office in the executive or legislative branches of state government or in any partisan county elective office before the sixth Tuesday prior to the ((primary for the)) next general election following the occurrence of the vacancy, a successor shall be elected to that office at that general election. Except during the last year of the term of office, if such a vacancy occurs on or after the sixth Tuesday prior to the ((primary for that)) general election, the election of the successor shall occur at the next succeeding general election. The elected successor shall hold office for the remainder of the unexpired term. This section shall not apply to any vacancy occurring in a charter

county ((which)) that has charter provisions inconsistent with this section.

(2) If a vacancy occurs in any legislative office or in any partisan county office after the general election in a year that the position appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified as defined in RCW ((29.01.135)) 29A.04.133 and shall continue through the term for which he or she was elected.

## CODIFICATION AND REPEALS

**NEW SECTION. Sec. 16.** The code reviser shall revise the caption of any section of Title 29A RCW as needed to reflect changes made through this Initiative.

**NEW SECTION. Sec. 17.** The following acts or parts of acts are each repealed:

(1) RCW 29A.04.157 (September primary) and 2003 c 111 § 128;

(2) RCW 29A.28.010 (Major party ticket) and 2003 c 111 § 701, 1990 c 59 § 102, 1977 ex.s. c 329 § 12, & 1965 c 9 § 29.18.150;

(3) RCW 29A.28.020 (Death or disqualification--Correcting ballots--Counting votes already cast) and 2003 c 111 § 702, 2001 c 46 § 4, & 1977 ex.s. c 329 § 13; and

(4) RCW 29A.36.190 (Partisan candidates qualified for general election) and 2003 c 111 § 919.

**NEW SECTION. Sec. 18.** This act takes effect only if the Ninth Circuit Court of Appeals' decision in

Democratic Party of Washington State v. Reed, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect.