NOS. 05-35780 & 05-35774

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

v.

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

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

WASHINGTON STATE GRANGE,
Appellant/Defendant Intervenor

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

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

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I. INTRODUCTION

There is more than one way to conduct elections. By enacting Initiative 872 (I-872), Washington's voters adopted a new system for conducting primary elections that departs markedly from the approach states commonly take in conducting elections. Appellees, the Republican, Democratic, and Libertarian Parties, continue to view primaries through the lens of past practice, challenging I-872 based on narrow assumptions that the electoral process must be organized in a particular way. Nothing in the constitution mandates that the purpose of a primary election must be to nominate political party candidates. To the contrary, the states and their voters are free to adopt a new and different form of primary in which political party nominations play no role in determining which candidates shall appear on the ballot.[1]

[1] Two appeals were filed in this case, one by the State and the other by the Washington State Grange. Docket Nos. 05-35774 (Grange's appeal) and 05-35780 (State's appeal). Although the issues raised in the two appeals are substantially the same, the Republican and Democratic Parties have each chosen to file two separate briefs, one in response to each Appellant Brief. To avoid confusion, references in this Reply Brief to prior briefs will use the following format:

- The opening briefs of the State and Grange will be cited as the "State's Brief" and "Grange's Brief," respectively;
- The political parties' briefs responding to the State will be cited as "Rep. Resp./State," and "Dem. Resp./State," respectively;
- The political parties' briefs responding to the Grange will be cited as "Rep. Resp./Grange," and "Dem. Resp./Grange," respectively; and

II. ARGUMENT

A. Under Initiative 872, The Primary Is Not Used To Select The Nominees Of Political Parties

1. Political Party Nominations Are Not Used To Determine Which Candidates Appear On The General Election Ballot

Unable or unwilling to deal with the significant ways in which I-872 changes Washington's election system, the Respondent political parties, for the most part, simply pretend that they are fighting yesterday's battle. Thus, they rehash arguments made in opposition to Washington's former blanket primary.

In a half-hearted attempt to show that I-872 establishes a "party nomination" process, the Democratic and Libertarian Parties engage in word play on the word "nominate". Quoting from dictionary definitions, they argue that I-872 "nominates" candidates for public office. Dem. Resp./State at 16-17; Libertarian Brief at 6-7. Whether I-872 establishes a "nomination" process in an abstract sense is immaterial. The important point is that I-872 does not result in advancing to the general election ballot candidates who are *nominees of political parties*, even if they could be described in some sense as "nominees" for public office.

The Republican Party discusses the issue more extensively, arguing first that it is somehow in the very nature of a "partisan office" to select party standard-

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- The brief of the Libertarian Party, which filed a single brief under both appeals, will be cited as "Libertarian Brief".

bearers for office. Rep. Resp./State at 18-19. This argument simply ignores that I-872 has redefined the term "partisan office" to avoid the use of a party nominating primary.[2]

Second, the Republican Party contends that permitting a candidate to designate a party preference and show that preference on the ballot somehow renders that candidate the standard bearer for the party if the candidate qualifies for the general election ballot. Rep. Resp./State at 18-21. In effect, they contend, any candidate who expresses a preference for the Republican Party is, *ipso facto*, seeking the "nomination" of the Republican Party. This contention ignores that I-872 provides party preferences solely as information for the voters, and these serve no function in determining which candidates advance to the general election. ER 258 (I-872, §§ 6, 7). Under I-872, it is possible that both candidates advancing to the general election for a given office will express the same party preference. Does that make them both "nominees" or "standard bearers" of that party? This analysis makes no sense, and compels the conclusion that I-872 does not operate to nominate political party candidates for office. I-872 organizes Washington's election system around different principles (that is, gaining either the most votes or

[2] The initiative defines "partisan office" as "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". ER 258 (I-872, § 4).

the second most votes in the primary), and political party preference, if a candidates lists one at all, is not determinative of the outcome of the election. Candidates who compete in an I-872 primary are not competing for the "nomination" of a political party and do not become "standard bearers" of that party unless the party, by some private process, confers that status on them.

Third, the Republican Party recycles an argument that I-872 "forcibly" associates the Republican Party with candidates who choose to list "Republican" as their preferred party. Rep. Resp./State at 21-22. They do not explain how merely allowing candidates to state a party preference does the party this alleged constitutional harm.[3] The purpose of I-872 is not to impose unwanted standard bearers on the parties or to require the parties to claim any candidate as their own,

[3] The Republican Party also compares the State's position to the State of Texas' defense of "white only" primaries in the early twentieth century. Rep. Resp./State at 21-22. This comparison makes no sense. In cases such as *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944), and *Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953), the State of Texas was attempting to officially accommodate the decisions of state political parties to exclude racial minorities from participating in the party nominating process. By contrast, Washington's purpose in enacting I-872 is to include all voters in the primary, eliminating political affiliation as the determining factor in deciding which candidates should qualify for the general election. Washington's position here is more closely comparable to that of the plaintiffs in the "white primary" cases, because the State here, like the plaintiffs there, seeks to open the primary to all the people.

but to allow the general electorate to winnow the candidates for the general election without reference to political party affiliation.[4]

2. The Top-Two Primary Differs Substantially From The Blanket Primary Because It Is Not Used To Select Party Nominees

Continuing their apparent strategy of attacking I-872 by affixing "bad" labels to it, the Republican and Democratic Parties assert that I-872 is essentially indistinguishable from Washington's former blanket primary. The Republicans argue that "except for changes in nomenclature . . . I-872 mirrors the unconstitutional blanket primary". Rep. Resp./State at 21. The Democrats state that "Initiative 872 re-imposes a blanket primary in Washington". Dem. Resp./State at 6-7. The reasoning is that (1) as in the former blanket primary, all voters may participate in the primary for all offices, regardless of party affiliation, and (2) the sponsors told the voters that I-872 would be similar to the blanket primary. *Id.*

These arguments overlook that Washington's blanket primary was not struck down because it allowed broad voter participation in the primary election, but because it also operated like a traditional party primary by qualifying one

[4] The Republicans also assert that I-872 is a "party nomination" system because one or two provisions of Washington law make oblique references to party nomination. Rep. Resp./State at 22-23. The laws cited predate I-872, and are either rendered obsolete by I-872 or must be re-interpreted in light of the change in Washington's election system.

candidate of each party for the general election. The key holding in this Court's decision invalidating the blanket primary is that it was "materially indistinguishable" from the California primary struck down by the Supreme Court in 2000. *Democratic Party of Washington State v. Reed* (*Wash. Demo.*), 343 F.3d 1198, 1203 (9th Cir. 2003), *cert. denied*, *Reed v. Democratic Party of Washington*, 540 U.S. 1213, 124 S. Ct. 1412, 158 L. Ed. 2d 140 (2004), *and cert. denied*, *Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957, 124 S. Ct. 1663, 158 L. Ed. 2d 392 (2004). The Supreme Court, in turn, invalidated California's blanket primary because it was -used to choose each political party's candidates for public office. *California Democratic Party v. Jones* (*Cal. Demo.*), 530 U.S. 567, 569-70, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000).

I-872 corrects the constitutional problem presented by the blanket primary by removing the critical feature causing the problem: using the primary to nominate political party candidates. Under I-872, candidates qualify for the general election ballot by being one of the top two vote-getters in the primary, with political party affiliation playing no role in making that determination. I-872 operates exactly like primaries for *nonpartisan* office, with the sole difference being that, for some offices, candidates may provide the voters with information about their political party preferences.

By enacting I-872, the people of Washington found a way to regain the broad public participation all voters could exercise in primaries conducted under the former blanket primary law. In that sense, the sponsors of the initiative were correct in telling the voters that I-872 would restore some of the blanket primary's advantageous features. However, this fact should not obscure that I-872 restored broad public participation at a price: removing political party nomination from the public election process. This is the choice federal case law left to Washington, and the choice exercised by the enactment of I-872.

3. Initiative 872 Is Not Subject To Strict Scrutiny

The Democratic Party asserts that I-872 is subject to a "strict scrutiny" standard, because the law "severely burdens" the constitutional rights of the parties. Dem. Resp./State at 12-16. Without expressly mentioning the "strict scrutiny" standard, the Libertarian Party also asserts that its rights are "severely burdened" by I-872. Libertarian Brief at 13-19. Neither party makes a convincing showing that the initiative places a severe burden on constitutional rights of free speech or association.

A state law is subject to strict scrutiny only if it *severely* burdens constitutional rights. In *Clingman v. Beaver*, __U.S. __, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005), the Supreme Court upheld an Oklahoma law precluding the

Libertarian Party from inviting registered members of other parties to participate in the party's primary. In reaching that decision, the Court held that the Oklahoma law did not severely burden party rights and therefore was not subject to the "strict scrutiny" standard. *See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997), upholding, on a "rational basis" standard, a Minnesota statute prohibiting the use of "fusion" nominations.

The parties offer several theories as to why their constitutional rights are severely burdened by I-872. The Democrats posit a right of political parties to "nominate their candidates for elective office". Dem. Resp./State at 13. If they are asserting their right to designate candidates who will receive party support and to campaign for those candidates, they are certainly correct, but I-872 does not burden that right, even slightly. On the other hand, if the party is asserting a right to choose candidates and to commandeer the state election machinery to place those candidates on the general election ballot, there is no authority establishing such a right. In light of such cases as *Clingman* and *Timmons*, it is unlikely that such a broad assertion is sound.

Second, the Democratic Party asserts a right to "limit the candidates with whom [political parties] will be associated". Dem. Resp./State at 15. This is essentially another version of the argument that permitting a candidate to list the

candidate's political party preference in and of itself creates an "association" of constitutional scope between the candidate and the party. None of the cases cited support this proposition. *Cal. Demo.* struck down a California law requiring political parties to include non-members in what was clearly a party nomination process. *Cal. Demo.*, 530 U.S. at 586. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986), again, involved a quarrel between the state and a political party over who should participate in the party's nominating process. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 116, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981), involved participation in party nominations for the office of United States President, clearly a "party nomination" process. And *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), involved a private organization's right to exclude unwanted groups from a privately sponsored parade. Washington is not attempting, through I-872, to dictate who may participate in any private party's "parade" but merely (to extend the analogy) to hold a publicly sponsored "parade" open to all citizens, while leaving the political parties free to participate in the event in any way they choose.[5]

[5] The Libertarian Party makes some interesting arguments, but none are

In other states (and in Washington in former times), primaries have been an unstable blend of public and private processes, with the courts repeatedly called on to maintain the invisible line between the associational rights of the parties as private organizations and the prerogatives of the states to determine their election structures. The cases cited above are all examples of that tension. I-872 seeks to eliminate the unstable element by separating the public election process from the private nomination process, allowing the people to operate the public primary while the parties sponsor and manage their own "parades". Far from severely burdening the rights of the parties, I-872 is designed to accommodate those rights by getting the state out of the "party nomination" business. Thus, there is no reason to apply the "strict scrutiny" test to such a law.

B. States Are Not Required To Structure Their Electoral Systems Around Party Nominations

The State began the argument section of its opening brief with a discussion of the fact that the traditional uses of primaries as party nominating devices should

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established in federal constitutional law. Libertarian Brief at 13-19. The Libertarians assert that I-872 would "destroy elections as a general forum for public expression", that it would "extinguish the few associational rights" the Libertarian Party ever had, and that would lead to "unrestrained factionalism and party splintering". These are simply hyperbole. An election under I-872 would serve as a "forum for public expression" to the same extent as any other election, but the fact remains that the overriding purpose of an election is to choose public officers. Likewise, political parties and all other citizens remain free to associate and participate in the election process.

not obscure the fact that states may lawfully fashion election systems not built around party nomination as an organizing principle. State's Brief at 15-20. None of the political parties seriously attempts to refute this argument.

The Republican Party tries to meet this burden by arguing (1) that parties derive their constitutional rights from the constitution, and (2) that parties were engaged in nominating candidates before the State conducted primaries. Rep. Resp./State at 13-18. These are true propositions, but they prove nothing of use in this case. The State is not contesting the right of political parties to organize, operate, and choose candidates for public office, and I-872 leaves those rights intact. I-872 does not impair the right of any political party to determine the scope of association, select standard bearers, define the party's message, or exclude candidates from the party.

However, the Republican Party argument seems designed to lead to the inference that because political parties are organized for the purpose of "nominating" candidates, the State has a constitutional obligation to recognize this nomination process and reflect its results on the general election ballot. None of the authorities cited supports this inference, however. States can conduct non-partisan elections, in which any "party nomination" process occurs privately and is

legally separated from the formal election process. I-872 establishes one type of such an election.

The Libertarian Party takes a similar leap in logic, suggesting that the historically important role of political parties in American governance somehow precludes states from adopting election systems not designed around party nomination. Libertarian Brief at 4-6. This argument is derived from political science theory rather than law, and falls far short of showing why a state may not seek to privatize the role of political parties while establishing an election process that is open to all voters at each stage.

The Democratic Party, like the Republican Party, simply assumes that a party's "right to nominate" trumps any state attempt to establish a system in which the general election ballot does not include candidates "nominated" by political parties. Dem. Resp./State at 13-16. All of the cases cited by the Democratic Party concerned election systems that did use primaries to nominate political party candidates, and involved the extent to which a state had to accommodate the private preferences of the political parties in structuring those nominations.

I-872 establishes an election process for public office, but it does not establish a "political party nomination" process. Under I-872, the primary is organized around candidates, not parties. Candidates conduct their campaigns, at

both stages of the election, among all the voters, and not among the members of a particular party. This system does not impair the full and vigorous exercise of the constitutional rights of speech and association by the political parties.

Traditional primaries (still used in most states) are the substitutes and successors of party caucuses and conventions. They assure that all voters *affiliated with a given party* have the opportunity to participate in that party's nomination process, and they implicitly anoint certain political parties with semi-official status by incorporating their nomination process into the public election system. Such systems are not constitutionally compelled, however, and states are free to seek other—still more open—ways to conduct their elections. None of the parties has cited authority to the contrary.

C. The Objective Of Initiative 872 Is To Permit Voters To Choose Their Elected Officials

The text of I-872 makes clear that its objective was to establish a new system for conducting primary elections that would both preserve the ability of voters to choose from among all candidates at the primary, and comply with this Court's prior decision regarding the blanket primary. ER 258 (I-872, § 2). The Republicans go so far as to suggest that there is something nefarious about an initiative that is designed to cure constitutional defects of a prior law, as established by a prior court decision. Rep. Resp./State at 11-12. By enacting

I-872, Washington's voters decided to cure the problem that led to the invalidation of the blanket primary by using it as a vehicle for winnowing the field of candidates, rather than as a method of selecting party nominees.

The political parties suggest that the purpose of I-872 was to change the message of the political parties. I-872, however, is not about the political parties or their messages; it is about candidates for office and the ability of voters to freely choose among them.

When Washington courts seek to determine the intent of an initiative, they look first to the language of the initiative itself. *McGowan v. State*, 148 Wash. 2d 278, 288, 60 P.3d 67 (2002) ("If the language is plain and unambiguous, the intent is gleaned from the language of the measure, and the court need go no further."). The voters' intent is plainly stated within I-872's own provisions. The purpose of the measure was to protect the rights of voters to choose among all candidates for every office. ER 258 (I-872, § 2) (intent section of initiative). The initiative declared that among the rights of voters it sought to protect was "the right to cast a vote for any candidate for each office without limitation based on party preference or affiliation, of either the voter or the candidate". ER 258 (I-872, § 3(3)). The text of the initiative, therefore, makes clear its intent to promote the freedom of choice among voters; the measure quite simply is not about the political parties.

Even if the initiative were somehow amenable to more than one interpretation as to its intent, Washington courts would consult the official Voters' Pamphlet. *Parents Involved in Comty. Sch. v. Seattle Sch. Dist. 1*, 149 Wash. 2d 660, 671, 72 P.3d 151 (2003). The Voters' Pamphlet, however, suggests nothing more than the text of the initiative: that the purpose of the measure was to maximize voter choice. The argument in favor of the initiative stressed the "freedom to select any candidate in the primary", calling it "a basic right". ER 257.

The parties liken I-872 to the California initiative invalidated in *Cal. Demo*., but the similarity is superficial at most. In that case, among the state interests that California asserted in support of the prior blanket primary, was encouraging political parties to nominate more moderate candidates. *Cal. Demo.*, 530 U.S. at 580. This purpose was offered to the voters as one of the basic reasons for supporting the measure. *Id.* In contrast, I-872 was clearly motivated by a desire to maximize voter choice. ER 258 (I-872, §§ 2-3) (stating purposes of the initiative). It does not do so by affecting party nominating decisions, but by making those decisions irrelevant to the question of which candidates appear on the ballot. The purpose of I-872 is to maximize voter choice, not to affect party nominating decisions. *Id.*

D. Initiative 872 Raises No Equal Protection Issue Because It Treats All Candidates and All Parties The Same

1. Initiative 872 Impliedly Repealed Minor Party Convention Statutes

The Republicans, but not the Democrats or Libertarians, alternatively argue that I-872 denies them equal protection. Their argument depends upon the notion that I-872 treats major parties differently than minor parties. They argue that, under I-872, candidates who express a preference for a major party appear on the primary ballot, while those who prefer a minor party continue (as under prior law) to qualify to the ballot through minor party nominating conventions.

The district court correctly rejected this argument, concluding that I-872 impliedly repealed prior statutes that called for minor party nominating conventions. ER 568-69. As explained in the State's opening brief, a statute is impliedly repealed under Washington law when either the later act covers the subject matter of prior legislation and was intended to supersede prior law, or when the two acts are so clearly inconsistent that they cannot be reconciled. *Washington Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wash. 2d 152, 165, 849

P.2d 1201 (1993); *see, generally,* State's Brief at 46-49 (implied repeal of minor party convention statutes).[6]

The Republicans fail to suggest any way in which I-872 could be reconciled with prior law regarding minor party nominating conventions. I-872 expressly provides that the *only* names that can appear on the general election ballot are those of the candidates who place in the top two in the primary. ER 258 (I-872, § 6) (amending Wash. Rev. Code § 29A.36.170). In contrast, the prior law provided that the *only* way for a minor party or independent candidate to qualify to the general election ballot was through a minor party nominating convention. Wash. Rev. Code § 29A.36.201. These statutes are mutually exclusive. Since I-872 specifies, in so many words, that the only candidates who may appear on a general election ballot are those who finish first or second in the primary (ER 258 (I-872, § 6)), the statute providing that nominees of minor party conventions also appear, cannot be given effect. Under the standard established by the Washington Supreme Court, the prior law is clearly repealed by implication since the statutes are so clearly inconsistent that they cannot be reconciled. *Washington Fed'n of State Employees,* 121 Wash. 2d at 165.

[6] The conclusion that I-872 impliedly repealed the minor party convention statutes is also consistent with the rule that, "[w]herever possible, it is the duty of [the] court to construe a statute so as to uphold its constitutionality." *In re the Pers. Restraint Petition of Matteson,* 142 Wash. 2d 298, 307, 12 P.3d 585 (2000).

The Republicans only offer weak attempts at rejoinder. They first contend that the initiative sponsors did not intend to impliedly repeal the minor party convention statutes, citing a website maintained by the Grange. Rep. Resp./State at 34. Under Washington law, however, the relevant "legislative intent" behind an initiative measure is the intent of the *voters*, not of the sponsors. *McGowan*, 148 Wash. 2d at 288 ("[T]he court's aim is to determine the collective intent of the people who enacted the measure."). Where that intent is clearly expressed in the text of the measure, then the court goes no further. *Washington Ass'n of Neighborhood Stores v. State*, 149 Wash. 2d 359, 366, 70 P.3d 920 (2003). "In all cases, an initiative should be read as an average informed voter would read it." *Id.* The text of the measure clearly states that the only candidates who would appear on the general election ballot under I-872 are the top two finishers in the primary. ER 258 (I-872, § 6). The voters' intent was clear.

Isolated statements by sponsors are not particularly reliable indicators of what the voters intended in any event. The Washington court has cautioned that, even in the context of a legislative bill, "even a legislator's comments from the floor of the Legislature are not necessarily indicative of legislative intent". *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wash. 2d 46, 63, 821 P.2d 18 (1991). The actual text of the initiative, rather than a statement by a sponsor, controls the

interpretation of the law. "If the language of a statute is clear on its face, courts must give effect to its plain meaning and should assume the Legislature [or, here, the voters] means exactly what it says." *State v. Chapman*, 140 Wash. 2d 436, 450, 998 P.2d 282 (2000). Washington courts do not look to extrinsic sources, such as statements of sponsors, when the statutory language is clear. *City of Tacoma v. State*, 117 Wash. 2d 348, 356, 816 P.2d 7 (1991) (recourse to the Voters' Pamphlet is not necessary to interpret an initiative when the initiative's language is clear).

Similarly, the Republicans err in suggesting that the fact that legislation was proposed in 2005, but not enacted by the Legislature, to repeal the minor party convention statutes, somehow indicates that I-872 did not impliedly repeal them. At the time of the 2005 legislative session, no court had yet ruled that implied repeal had occurred. Even if a statute is impliedly repealed, there is nothing odd about suggesting that the Legislature remove it from the books—in fact, such a suggestion is all the more apt in that case so that the codified statutes will accurately reflect the status of the law.

In responding to the appeal filed by the sponsor—but not the State's appeal—the Republicans suggest that the Secretary of State attempted to repeal the minor party convention statutes by administrative rule. Rep. Resp./Grange at 10-

11. It goes without saying that administrative rules do not repeal statutes. The implied repeal of the minor party convention statutes is plain from the face of the statutes themselves, reading I-872 along with prior law. Washington law clearly authorizes state agencies to adopt administrative rules that explain an agency's interpretation of the law. "Legislative authorization for an agency to interpret the law under which the agency operates and to make known to the public its interpretation of that law is normally implied from the powers expressly granted to the agency by the legislature." *Ass'n of Washington Bus. v. State*, __ Wash. 2d __, 120 P.3d 46, 50 (2005) (quoting Arthur Earl Bonfield, *State Administrative Rule Making* § 6.9.1, at 280 (1986)). The purpose of adopting an administrative rule regarding minor party conventions, therefore, was to tell the world (including both the political parties and county election officials) how the Secretary reconciled the obvious conflict between I-872 and prior law. "'Every legislature wants agencies to determine the meaning of the law they must enforce and to inform the public of their interpretations so that members of the public may follow the law.'" *Id.* (also quoting Bonfield, *supra*).

The Republicans also suggest that the district court must have misunderstood their argument, since they intended to base their equal protection argument "on the retention of minor parties' ability under I-872 to nominate the

only candidates authorized to use their name on the primary election ballot". Rep. Resp./State at 35. Since I-872 impliedly repealed the statutes that previously provided for such conventions, this argument amounts to a distinction without a difference.

In footnote, the Republicans offer the alternative theory that if the minor party convention statutes were repealed, this would also render the initiative unconstitutional for somehow interfering with the minor parties' internal decision making. Rep. Resp./State at 35 n.8. This argument also fails because all that the repeal of those statutes does is put the major and minor parties on equal footing. Both parties remain free to take whatever internal actions they choose, including holding conventions to nominate candidates. All that I-872 does is to separate that function from the process of conducting the election, and it does so in the same way without regard to whether the party is major or minor.[7]

[7] The Libertarians, in sharp contrast to the Republicans, concede that I-872 impliedly repealed the statutes that previously provided for minor party conventions. Libertarian Brief at 19 (noting that I-872 provides for only route to the general election ballot). Instead of arguing that I-872 treats major and minor parties differently, they contend that because the only way a candidate can appear on the general election ballot is by placing first or second in the primary, access to the general election ballot is too difficult. *Id.* at 19-24. This argument is discussed in the next section of this reply brief.

2. Initiative 872 Does Not Establish An Unconstitutionally High Ballot Access Requirement

The Republicans, joined by the Libertarians, contend that I-872 establishes an unreasonably high access requirement for the general election ballot.[8] This issue does not arise in this case, however, because, under I-872, *every* candidate can appear on a ballot to compete for the votes of *all* voters, simply by filing for office. *See* State's Brief, at 49-54.

For their argument, the parties rely entirely upon cases in which the only way that a candidate could compete for the votes of the entire electorate was by appearing on the general election ballot. The conventional approach to conducting a primary, after all, is for candidates to compete for a party nomination on a ballot that is restricted to a single party. As the State noted in its opening brief, when the primary is open to participation by all voters, then a candidate's right to reasonable access to the ballot is fully satisfied when he or she appears on the *primary* ballot. *Munro v. Socialist Workers Party*, 479 U.S. 189, 199, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986) (noting that, under Washington's prior blanket primary, the law "virtually guarantees . . . candidate access to a statewide ballot" and that the

[8] Although the Republicans offer this theory under the heading of an equal protection argument, it is not actually an equal protection concept. *Anderson v. Celebrezze*, 460 U.S. 780, 787 n.7, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) ("[W]e base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis.").

candidates' rights are not remotely violated simply because "they must channel their expressive activity into a campaign at the primary as opposed to the general election"). Neither the Republicans nor the Libertarians attempt to rebut this point; they simply ignore it.

E. Initiative 872 Neither Establishes Unconstitutional Qualifications For Federal Offices Nor Sets An Impermissible Date For Federal Elections

1. Initiative 872 Does Not Establish Any Qualification For Federal Office

The Libertarians, but not the Democrats or Republicans, argue that I-872 somehow establishes an unconstitutional qualification for federal office. In doing so, they confuse the general ability of the states to provide structure to the electoral process with an attempt to establish qualifications for office.

The constitution sets forth qualifications for serving in federal office, including age, citizenship, and residence requirements for members of Congress. U.S. Const. art. I, § 2 (House of Representatives); U.S. Const. art. I, § 3 (United States Senate). Similar requirements are also established for the President. U.S. Const. art. II, § 1 (qualifications of President). These qualifications are exclusive. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837-38, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995) (holding that state laws establishing term limits for members of

Congress are unconstitutional as establishing additional qualifications for federal office).

The Qualifications Clauses, however, do not prohibit the states from enacting statutes that provide form and structure to the electoral process. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974). Procedural requirements do not add qualifications for serving in office. *U.S. Term Limits*, 514 U.S. at 834.

This Court has concluded that a state law establishes an unconstitutional additional qualification for federal office only if the law establishes an absolute bar to candidates who would otherwise qualify under the Qualifications Clauses, or has the likely effect of handicapping an otherwise qualified class of candidates. *Schaefer v. Townsend*, 215 F.3d 1031, 1035 (9th Cir. 2000). I-872 does neither. No candidate is absolutely barred from victory—only those who do not acquire enough votes, which is a fundamental principle underlying the concept of holding elections. Neither does it handicap any class of candidates—again, only those who fail to earn voter support. Other circuits similarly reject the notion that procedural requirements for conducting an election establish unconstitutional qualifications.

Biener v. Calio, 361 F.3d 206, 212 (3rd Cir. 2004) (holding that Delaware's filing fee did not establish a qualification for office, noting that, "even after *Thornton*, states still have the right to regulate elections by imposing reasonable requirements on candidates"). *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 777 (7th Cir. 1997) (procedural requirements, such as ballot access requirements, do not establish qualifications for federal office). *See also Springer v. Balough*, 96 F. Supp. 2d 1250, 1257 (N.D. Okla. 2000) (procedural requirements do not violate a constitutional provision describing the qualifications for holding office).

2. Initiative 872 Does Not Establish A Non-Uniform Federal Election Day

The Libertarians also argue that I-872 establishes a different date for conducting federal elections than the date prescribed by federal law, a claim in which the other parties do not join. I-872, however, makes no change in the date on which elections are conducted.

Federal law specifies a uniform date for conducting federal elections to be "the Tuesday next after the 1st Monday in November". 2 U.S.C. § 7 (House of Representatives); *see also* 2 U.S.C. § 1 (setting elections for senators on the same date). This is precisely the same date set in state law. Wash. Rev. Code § 29A.04.321(1).

The principal case upon which the Libertarians rely in contending that the State has established a different election date than the uniform date for federal elections, undermines—rather than supports—their argument. *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997). That case concerned a Louisiana law under which any candidate who received a majority of the vote at the primary was declared elected, and the office would not appear on the general election ballot. *Id.*, 522 U.S. at 70. The Court declared that system to be in conflict with federal statute because it often resulted in the final selection of an office holder prior to the uniform federal election date. *Id.* at 74. I-872, however, always leaves the final determination to the general election, even if a single candidate receives a majority of the vote at the primary. ER 258 (I-872, § 6) (providing that the top two candidates at the primary advance to the general election, with no exception for candidates who receive a majority at the primary).

This Court has followed *Foster* and concluded that a state law conflicts with the federal statutes only if the election is fully completed prior to federal election day. *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) (citing *Foster*, 522 U.S. at 71-72, holding that Oregon's statute calling for all elections to be conducted by mail did not conflict with federal law by permitting voting on a date other than federal election day); *accord Millsaps v. Thompson*,

259 F.3d 535, 546 (6th Cir. 2001) ("[S]o long as a State does not conclude an election prior to federal election day, the State's law will not 'actually conflict' with federal law."); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) (state law conflicts with the federal statute only if the final selection of the winner is made before federal election day).

III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 4th day of November, 2005.

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Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 05-35780

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply Brief of Appellants State of Washington, Sam Reed and Rob McKenna is proportionately spaced, has a typeface of 14 points or more and contains 6,331 words.

Date

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