IN THE UNITED STATES DISTRICT COURT FOR
THE 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, and STATE OF WASHINGTON, Defendant Intervenors, and WASHINGTON STATE GRANGE, Defendant Intervenors.	Case No. C05-927Z Seattle, Washington July 13, 2005

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by computer-aided stenography.

THE COURT: Good morning, ladies and gentlemen. Please be seated. Will the clerk call the calendar.

THE CLERK: Case C05-927, Washington State Republican Party versus Dean Logan. Counsel, please make your appearance.

MR. WHITE: John White for the Republican Party.

MR. McDONALD: David McDonald and Jay Carlson for the

Washington State Democratic Central Committee.

MR. HANSEN: Kevin Hansen for the Republican Party.

MR. PHARRIS: Jim Pharris for the State of Washington and the counties.

MR. AHEARNE: Tom Ahearne for the initiative sponsor, Washington State Grange.

THE COURT: All right. And we have the Libertarian party of Washington state. Their lawyer apparently is not here for argument this morning. The record should reflect we've waited over 10 minutes, and I think we need to start.

The first matter that I wanted to discuss was the stipulation and agreed order of substitution and dismissal. This would have the effect of dismissing the individual auditor defendants, because they agreed to be bound by the Court's ruling and will rely on the State of Washington to defend them.

As I understand it, it has been approved by all the counties but Kittitas and it is apparently Kittitas' intent to do so, but has not yet given a written agreement, is that correct?

MR. WHITE: Your Honor, Kittitas County was not originally named, because we did not know they were having a primary this fall. I found that out this week. I've contacted the prosecutor, and he's indicated he will sign a stipulation.

THE COURT: But you haven't even named Kittitas?

MR. WHITE: We have not named them, that is correct.

THE COURT: Not. Then we don't need to -- you don't

need to name them, do you?

MR. WHITE: I don't think so, Your Honor, but they have agreed to be bound by the result.

THE COURT: All right. Any objection to the -- and perhaps just by letter agreement you can work that out, and I don't need to do anything further. But any objection to the proposed order as stipulated -- approving the stipulation and agreed order of dismissal of the other county record managers or auditors? Hearing none, it will be signed.

All right. I've indicated to the lawyers the division of the arguments. We're going to hear first from the plaintiffs. Then we'll hear from the state and the Grange. We'll permit rebuttal from the plaintiffs. And because the state has cross moved for summary judgment, we'll permit the state to reply.

And we've set generous time limits for the parties, which I think will enable us to sort through the various issues that have been presented. So let's proceed.

MR. WHITE: Good morning, Your Honor. I'm John White. I'm here today representing the Washington State Republican Party. This case is a facial challenge to Washington state's modified blanket primary adopted under Initiative 872.

It's important to note that in analyzing Washington's prior version of the blanket primary the Ninth Circuit in Reed noted that the Supreme Court didn't set out any analytical scheme. In fact, the Supreme Court inferred a burden on the party's

associational rights under the blanket primary statutes. Therefore, it is a facial challenge.

Reviewing the statement of the sponsors of Initiative 872 in support of the initiative in the ballot, the voter's pamphlet from the State of Washington is replete with evidence of intent and anticipated effect to modify the message of the political parties by changing and altering the standard bearer selected by them.

The text of the initiative itself, citing the state constitution and prior state cases, is clear evidence that Initiative 872 was intended to be, and was, in open defiance of the First Amendment decisions in both Jones and the Reed cases.

THE COURT: Well, how is it that the text is an open defiance? Help me understand that.

MR. WHITE: Under Section 3, Your Honor, in declaring the rights of Washington voters, it declares in Section 3, sub 3, 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.

And both Jones and Reed said that political parties, as part of their First Amendment rights of association, are entitled to define the scope of that association and to exclude from the selection of its standard bearers persons who are not affiliated with the party, or who hold views that are antithetical to the party.

In fact, the Jones Court held that there was no heavier burden on a party's associational freedom than forced association that has the likely and intended outcome of changing the party's message.

In the Grange's materials on its web site in support of Initiative 872, the Grange made clear that it has opposed single party primaries.

THE COURT: I'm a little reluctant to take what someone said on their web site -- is that an official web site of the Grange?

MR. WHITE: That was the official Initiative 872 web site, Your Honor. And under the cases in -- in particular, the Louisiana creation science legislation case, the Supreme Court and other courts have held that the statements of a sponsor of legislation are entitled to significant weight in evaluating its intent and effect.

And where the Grange through the official web site for Initiative 872 and through its official announcements and press releases regarding I-872 and its legislative program indicates that the purpose is because the Grange opposes the Republican Party selecting its own nominee, that is important information as to the intent and purpose underlying the statute.

The fact that that may not appear in the statutory language itself is not essential, because, as the Edwards case, involving the creation science legislation, said, the Court should not be

blind to the actual intent of the legislation and the real purpose.

And that even though it may not be expressly stated in the legislative history or in the legislation itself, that that is something the Court should consider, and is important to consider, in evaluating the constitutionality of statutes that impinge on the First Amendment.

As far as the need for a factual record here and whether there's an adequate record, Your Honor, I direct the Court's attention to Boy Scouts of America versus Dale, involving again a First Amendment rights of association case.

The Supreme Court, in evaluating and analyzing Boy Scouts of America, the factual record consisted of the identity of the Boy Scouts, the Boy Scout oath and the general mission of the Boy Scouts.

Here we have the identity of the Republican Party, Your Honor. Everyone concedes it's a major political party under Washington state law. There is very little question as to the intent or the purpose or the position of the Republican Party with respect to the participation of unaffiliated or rival party voters, or candidates who do not have sufficient support from the Republican Party to run or participate in the primary.

In the four-plus years of litigation in the prior case, Reed, the state party's rules very clearly set out the Republican party's associational issues.

And finally, the general mission of the Republican Party to advance a particular set of principles and political agenda through electing officials is also clear from the record. There's no question that the Court is able to, on this record, make a final decision.

And as to the state's contention or Grange's contention that they are better suited to decide or define the scope of association, again, in the Boy Scouts of America case, the Court stated, As you give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.

And in the Boy Scouts of America case, Your Honor, the Court then cited to the LaFollette case from the Supreme Court in 1981 involving who could or could not participate in connection with the nomination of the Democratic candidate for the presidency.

THE COURT: Well, you contend that this is a nominating initiative. Is there anything in the text of the initiative that provides that it's a nominating initiative?

MR. WHITE: Well, Your Honor, if you take a look at a comparison here, this chart between the modified blanket primary and the blanket primary -- prior blanket primary statute, you start off with --

THE COURT: Let me just ask the question again. Maybe you didn't understand it. Is there anything in the text that

says this is a nominating initiative?

MR. WHITE: Is there express assertion that this nominates candidates? No, Your Honor. But it doesn't need to be. The effect of the statute is that it selects the Republican Party standard bearer, and that is sufficient to bring this within the scope of the cases involving associational rights and the restrictions on state intervention in political parties defining the scope of their association.

THE COURT: Excuse me for just a moment. I see that Mr. Shepard has arrived. Do you want to make your appearance for the record, sir?

MR. SHEPARD: Oh, I'm sorry, Your Honor. Richard Shepard for the Libertarian Party. I'm sorry I'm late. Lots of traffic.

THE COURT: Lots of traffic. That's why you start early these days. Thank you and welcome. All right. Go ahead.

MR. WHITE: And the --

THE COURT: The initiative changed the language, took out of the statute the nominating language and replaced it with winnowing. What is the significance of that?

MR. WHITE: None, Your Honor.

THE COURT: Well, those words mean different things, do they not?

MR. WHITE: Well, Your Honor, in connection with the prior version of the blanket primary the state defended the prior

version of the blanket primary on the grounds it was a winnowing process. And --

THE COURT: Well, the prior blanket primary used the word nominating and essentially said that that was a nominating process, did it not?

MR. WHITE: Yes, it did, Your Honor.

THE COURT: Do we have that language in the initiative?

MR. WHITE: That it is a nominating primary in the initiative itself? No, Your Honor, that word --

THE COURT: Do we have that language anywhere in the statutes that remain?

MR. WHITE: Yes, Your Honor.

THE COURT: Where?

MR. WHITE: Initiative 872 left in place, it did not repeal, many of the statutes that had been adopted as part of the legislative session in 2004. The Washington state constitution recognizes that candidates who are elected are affiliates and are representatives of the Washington State Republican Party.

Again, Section -- Article 2, Section 15 of the state constitution provides political parties nominate successors to candidates where that elected official is of the same political party as that organization filling the vacancy.

What Initiative 872 did, Your Honor, is it changed a couple of words and grafted that word change onto an overall partisan nominating system, and constitutional rights, Your Honor, ought

not and are not turned on fine points of wordplay.

In large measure, Your Honor, Initiative 872 is a modern version of the second round of the whites only primary cases in the South. In Nixon verdict Herndon, this is the United States Supreme Court, struck down the whites only primary cases, saying you have deprived blacks and other minority voters of their constitutional rights.

Several of the southern states then turned around and said, all right, we will vest in the political parties the right to determine who can participate in their primaries, and the political parties excluded blacks.

Mr. Nixon brought another case challenging the action. And the Supreme Court said, "The argument for respondents is, however, that identity of a result has been attained through essential diversity of method."

In a later case also involving civil rights, Smith versus Allwright, the Court stated, "Constitutional rights would be of little value if they could thus be indirectly denied."

What the state has done is eliminated the word "nominating" but left the overall structure in place, and this is part of why it's so important to focus on the purpose and the intent of the initiative, because the purpose and intent of the initiative was to invade the political party's rights.

THE COURT: Well, let me ask you this: The initiative did repeal some express provisions of the former law, is that

right?

MR. WHITE: It did, Your Honor.

THE COURT: All right. It did not repeal expressly RCW 29A.52.111, candidates for the following offices shall be nominated in partisan primaries, and it did not by its terms nominate -- repeal RCW 28A.52.116, which says that major political parties must be nominated at primaries.

Now, my question to you is are those -- and the state's position, I believe, is that they're clearly inconsistent with the initiative, and, therefore, they're repealed by the initiative, even though the initiative didn't expressly refer to them.

What do you think about that argument?

MR. WHITE: Well, Your Honor, as the Democrats pointed out in their brief, and perhaps Mr. McDonald will be better able to speak to that particular question, there is a way to read those statutes together without making them inconsistent.

And --

THE COURT: Well, I don't think that it will be a first that the Republican Party had to rely on the Democratic Party to make an argument of any kind. What's your response? We've got people in the back that need to find a seat, or we're going to open the courtroom next to us and you can sit there and listen via the audio.

MR. WHITE: I think --

THE COURT: The question that's difficult to understand, so help me, when the initiative doesn't repeal something, but appears to be inconsistent with the initiative, what's the legal effect?

MR. WHITE: Well, Your Honor, under Washington state law the goal is to harmonize statutes, and there is a presumption under Washington law against implied repeal. And --

THE COURT: Well, wait. But the initiative struck through in Section 5 "nominating" and put in there "winnowing" in describing what a primary election means. That's pretty clear, isn't it, that they wanted in the initiative to attempt to eliminate a concept that the primary would be a nominating process?

MR. WHITE: No, Your Honor, I don't think that that was their intent. Their intent was not to eliminate the primary as a nominating process. The intent of the initiative sponsors was to eliminate the political party's ability to control the nomination of their own candidates.

The issue of 87 --

THE COURT: You and Mr. McDonald's party have been holding conventions and nominating people already, have you not, this year?

MR. WHITE: Yes, we have, Your Honor.

THE COURT: Well, then why is it that the primary that might occur under this initiative would be a nominating process,

if you've already gone through that process?

MR. WHITE: Because, Your Honor, is that under the initiative in Sections 3, 4, 5, 7, 9 and 11 it recounts that candidates may self-designate their political party. Are not the state -- as the letters from the county auditors indicate, we'll give no respect to the nominating acts of the Republican or Democratic Party.

Instead, the state attempts to reduce the right to nominate to a right to endorse. And as the Supreme Court noted in the Eu decision, the right to nominate and the right to endorse are separate and independent rights.

And that, Your Honor, is why the candidate's self-designation, the filing statute portion of Initiative 872, is also unconstitutional, because the state is compelling the Republican Party to affiliate with candidates whether or not the Republican Party wants those candidates to carry its banner in any way, shape or form.

That brings us to the David Duke line of cases, Duke versus Massey, Duke versus Cleland, where the Eleventh Circuit held that David Duke did not have a First Amendment right to forcibly associate with the Republican Party in his effort to run for the presidency.

Now, the District of Columbia Circuit in LaRouche versus Fowler also held that Lynden LaRouche did not have a right to force himself on the Democratic Party. And that is exactly what

Initiative 872 is doing. It expressly says that candidates have the right to force an association with the Republican Party, and that's not what the First Amendment allows.

THE COURT: Well, it seems to me that there basically are two arguments that have been briefed and raised. One deals with this nominating issue and one deals with this forced association problem, if you will, that's been raised by the briefs. I'm trying to focus us first on the nominating issue.

Let me ask the bottom line question to you: Is the -- are the earlier statutes still on the books as far as the Republican Party is concerned, so that major political parties must nominate through the primary system, or have they been, by implication, repealed?

MR. WHITE: We do not believe they have been repealed, Your Honor. Implied repeal is disfavored. And they have not been repealed. They're still on the books. The sponsors of Initiative 872 were aware of those statutes at the time Initiative 872 was submitted for the ballot. They were aware of the statutes. They were aware that they existed. They elected not to submit an initiative that would address those statutes.

THE COURT: Well, let me ask in a related way two other questions that I hope everyone will have an opportunity to respond to. That is, you're asking that I declare unconstitutional the filing statute.

MR. WHITE: Absolutely, Your Honor.

THE COURT: All right. Absolutely. And I'm trying to understand which filing statute you're taking aim at.

MR. WHITE: Your Honor, both filing statutes, both the filing statute under Initiative 872 and the filing statute under the prior Montana primary are unconstitutional because they force the Republican Party to associate with candidates with whom it may not wish to associate.

So whether under Montana or I-872, the state's filing statute violates the associational rights of the Republican Party.

THE COURT: Have you in this litigation challenged the filing statute under the Montana system that would be in effect if the initiative were struck down?

MR. WHITE: Yes, Your Honor. Both in the motion for preliminary injunction and in connection with our motion for summary judgment, and I believe our complaint as well.

THE COURT: The I-872 filing statute, which I believe requires for partisan offices that a candidate indicate his or her major or minor party preference, you believe that's unconstitutional, is that right?

MR. WHITE: That is correct, Your Honor, because under Initiative 872 that candidate's party preference must be listed on the ballot. It must be listed in the voter's pamphlet.

And with respect to the claim that those statutes aren't constitutional, Your Honor, at page 12 of our complaint we request a judgment declaring 29A.24.030 and 29A.24.031

unconstitutional to the extent that they authorize placing on the primary ballot the name of any candidate carrying the party's name who is not qualified under the rules of the primary to stand for office.

THE COURT: All right. Here's my problem. There's another filing statute, 29.15.010. That was the old filing statute. It was repealed in 2004 by the legislature. But as I understand it, the code reviser has taken the position, perhaps properly so, that this old filing statute, 29.15.010, springs back to life in light of I-872.

Now, help me understand how these things spring back to life. And do you agree or disagree with the code reviser?

MR. WHITE: Well, Your Honor, there was a complete recodification of Title 29 into Title 29A. That's why the -- that's why the code title has been changed. And we believe that the prior filing statute was superseded by the new filing statute. And I can't recall -- I think it's 29A.24.031 was the legislature's repeal.

THE COURT: Give it to me again.

MR. WHITE: 29A.24.031 was adopted by the legislature.

THE COURT: That's the Montana filing?

MR. WHITE: That's the Montana filing statute. As a replacement to the prior statutory scheme. And to the extent, Your Honor, that 29.15 might leap back to life if 29A.24.031 is declared unconstitutional, its text is identical and it would be

unconstitutional as well. Because it also compels the party to associate with the candidate based on the candidate's self-designation as a Republican.

THE COURT: That gets into our association problem. But in terms of the filing statute itself, 29A.24.031, the Montana filing statute, just says it will have a place for a candidate to indicate party designation. It doesn't require a person to do so.

Is that the same language as the Initiative I-872 has? In I-872 the filing statute, as I understand it, codified at 29A.24.030 says for partisan offices a place where the candidate -- in other words, the ballot should have a place where the candidate to indicate -- or the filing document form shall have a place for the candidate to indicate his or her major or minor party preference.

Is there a difference between that and indicating a party designation?

MR. WHITE: Your Honor, we submit there is none. It's another example of attempts at clever wordplay to conceal an invasion of First Amendment rights. And what the state is going to do under Initiative 872 is print any candidate's name who files for partisan office claiming an affiliation with the Republican Party.

And if you take a look at the historical cases out of Ohio, party designation on the ballot, and the Tashjian case as well,

is an important voting cue, and what the state is attempting to do through Initiative 872 is allow candidates to make a determination whom the Republican Party has elected to affiliate with, not the Republican Party and its adherents.

And both Jones and Reed teach that it is the right of the Republican Party to determine who its standard bearer will be, not an individual candidate who may want to assume the benefits and appropriate the name of the Republican Party for his own individual political benefit.

THE COURT: Let me ask you this: If I were to conclude, as you urge, that the initiative is unconstitutional and the filing statute under the initiative and the filing statute under the Montana system is unconstitutional, do we have a filing statute?

MR. WHITE: Your Honor, the request for the injunction is really quite specific, and that is that the filing statute is unconstitutional to the extent it authorizes a candidate to appropriate the Republican Party name who is not authorized to use that name under party rule.

THE COURT: I suppose you'd accept the friendly amendments of the Democrats and the Libertarians could make the same argument?

MR. WHITE: Well, the Democratic rule is a little bit different from ours, but I believe that the Democrats and Libertarians both adhere to that position. The Libertarians'

argument, if I understand it correctly, is they wish to continue to maintain the right to nominate their candidates.

THE COURT: Tell me how you think the initiative affected minor parties in the State of Washington and the primary process for them?

MR. WHITE: Your Honor, I think the initiative had no impact on the minor political parties with respect to their nomination rights. The initiative made no reference to the minor party convention rights. And the Initiative 872 web site expressly disclaimed any effect on minor party convention rights.

THE COURT: Well, it's not true to say that the initiative made no mention of minor parties, is it?

MR. WHITE: I stand corrected. They made no mention of minor party nomination rights. And the initiative sponsors initially disclaimed any effect on how minor parties nominated their candidates.

THE COURT: Well, let's look at the language of the initiative, because I think you're mistaken. At Section 9, subsection 3 of the initiative it says, I read, quote, "For partisan offices only, the place for the candidate to indicate his or her major or minor party preference, or independent status."

So doesn't that indicate a clear intent that this initiative is to affect the rights of minor parties, as well as major parties?

MR. WHITE: I don't think it does, Your Honor, because the initiative does not make any reference to the minor party nomination conventions. It does not repeal that particular statute. If you take a look again at the Grange's official web site on Initiative 872 --

THE COURT: This case isn't going to be decided by Grange's official web site. It's going to be decided by the text of the initiative and the Constitution.

MR. WHITE: Well, Your Honor, I think --

THE COURT: Your position is it doesn't affect minority parties?

MR. WHITE: Our position is that the initiative did not change minor party nomination rights, and there is nothing in that particular language that you have quoted that says that a candidate who expresses a minor party preference must not have been nominated under the minor party convention statutes.

And given that there is a construction of the statute that preserves a portion that was not expressly repealed, that that would be the appropriate interpretation of the statute. A candidate may express a minor party preference. However, in order to express that minor party preference, there's another statute on the books that says he must have been nominated by that minor party.

THE COURT: Well, under the Montana system the -- help me remember. Under the Montana system they went from convention

directly to the general election, the minor parties, did they not, if they got one percent of the vote? Under the old blanket primary, they went to the primary. If they got one percent, the minor party candidate was able to get on the general ballot.

MR. WHITE: Yes, Your Honor.

THE COURT: All right. Under the Montana system adopted in 2004, they go directly to the general ballot, do they not?

MR. WHITE: That's correct. The one candidate nominated by the minor parties would advance directly to the ballots.

THE COURT: Are you suggesting that under initiative I-872 that minor party candidates will still go directly to the general and won't be in the primary and be subject to this top two qualifying language?

MR. WHITE: No, Your Honor. What I'm suggesting is that the minor parties will proceed to the modified blanket primary ballot. But that under the existing statutes, the minor parties will have control and be able to have a single candidate appear using their name on the modified blanket primary ballot. And that is a different result from the rights that are granted to the Republican Party.

THE COURT: But under Initiative 872, do the minor party candidates' names, are they placed on the primary ballot?

MR. WHITE: Yes, they are, Your Honor.

THE COURT: And so they would be subject to the top two selection process, would they not?

MR. WHITE: Yes, Your Honor.

THE COURT: And so instead of having a minor candidate who could either under the old blanket go to the general, if they got one percent of the vote, or under the new Montana, where they didn't have to go to the primary at all, haven't we, by this initiative, substantially changed what minor candidates -- minor party candidates' rights are, because they would be excluded from the general, unless they received either the most votes or the second most votes for that office?

MR. WHITE: That, Your Honor, is yet another independent basis for striking down I-872, and that is that in essence what Initiative 872 has done is changed from the one percent ballot access requirement under the old blanket primary and the new direct access to the ballot through the convention process under the Montana primary. And, in essence, raised the threshold for getting onto the general election ballot to 30 or 40 percent. And there are no cases that have authorized a ballot access figure that high.

And that's an argument that --

THE COURT: If the Court is correct in this, and I'm not sure that I am at this point, but then you wouldn't have an equal protection argument, because they'd be treated just like the Republicans. Minor parties, major parties, they'd all be treated the same, the top two proceed to the general, is that right?

MR. WHITE: No, Your Honor. Because under the filing

statute under Initiative 872 we could have 15 people file for an office as Republicans -- and I would direct the Court's attention to the 1996 gubernatorial election and the primary results submitted as part of my declaration in support of summary judgment.

In that case, the Republican Party, if I remember right, it was either seven or eight candidates who divided up the Republican vote. Had the modified blanket primary been in place that year, no Republican candidate would have advanced to the general election, because the two Democratic candidates in the primary received higher vote totals than any of the Republican candidates.

And that's why that filing statute is such a risk, is because we have no control over limiting the number of persons who can carry our name forward and split our vote, with the resulting risks that we may be denied a place in the general election ballot.

The example given in the brief, Your Honor, is assume there are 10 Republican candidates running and two Democrats. The 10 Republican candidates each get about seven percent of the vote. The two Democratic candidates get 15 percent of the vote.

Under the general election ballot with a modified blanket primary, there were two Democrats and no Republicans on the general election ballot.

THE COURT: Well, under the peoples choice initiative

that's what they intended. What's wrong with that?

MR. WHITE: I agree, Your Honor, that that's what they intended, and what they've done is deprived the Republican Party of their right to define the scope of its association. It's denying the Republican Party the right to exclude, which both Jones and Reed and Hurley and Boy Scouts of America versus Dale all say is a core First Amendment right of an organization. And for a political party, the Supreme Court has said the right to exclude is at its most urgent when the Republican Party is selecting its standard bearer.

And the person who comes out of that primary, if any, in the top two carrying the Republican name is carrying the Republican name and is the Republican Party representative to the voters.

THE COURT: I think I understand your arguments on why it's unconstitutional. Is there any way to sever out the portions which you claim are -- violate the Constitution?

MR. WHITE: No, Your Honor, I don't believe there are. And if you take a look at Initiative 872 and its purpose, if you sever out the portions that the state and Grange belatedly urge could be severed out, what you're left with is an abandonment of a nominating primary altogether and a reversion to a convention system.

In essence, what the Grange and state ask the Court to do is preserve Initiative 872 by vesting exclusive nominating power in the party bosses who were specifically referenced in the

initiative as one of the driving forces behind its proposed adoption.

THE COURT: What would be your position if I-872 said that only persons who received the nomination of their parties, whether it's a major party or minor party, could have their designations indicated on the ballot at a primary, and then we had a top two election, would that be all right?

MR. WHITE: If that had been what the initiative said, it may very well have been constitutional.

THE COURT: You don't claim that any party has the right to be on the general ballot, is that right? Let me ask it a different way: Do you claim that a political party has the right to be on the November ballot?

MR. WHITE: Well, Your Honor, the courts have consistently held that the state has the right to regulate ballot access so that it is not confusing to the voters or, I think one of the analogies was, as long as a football field.

So the state has a legitimate interest in keeping the ballot limited to those political parties who have demonstrated a modicum of support among the electorate at large. We think the Republican Party has demonstrated that necessary modicum of support. And historically the State of Washington has determined a modicum of support that is adequate to get to the general election ballot at one percent.

THE COURT: Mr. White, I asked a question, a very simple

question, does the Republican Party, the Democratic Party, does any party have a constitutional right to be on the general ballot?

MR. WHITE: I guess, Your Honor, I'd answer it depends on the structure of the state's election system. Does it have an absolute right to ballot access? No. The state has an interest in limiting ballot access to those parties that have a modicum of support.

Now, Your Honor, I see my time is up, so I yield to Mr. McDonald.

THE COURT: All right.

MR. McDONALD: Your Honor, my name is David McDonald. I represent the Democratic Party. If I could touch on a couple of the questions which you've asked and at least give you the Democratic Party's position.

We do not contend that we have an absolute right to be on the general election ballot. If 872 had in fact specified that the only candidates appearing on the primary ballot with a partisan label were those who had been selected pursuant to party rule, we believe the initiative wouldn't have been constitutional subject to the argument of third parties and minor parties that it was creating too steep an access bar for them to get there. But --

THE COURT: Would you still have the crossover right to associate problem that the blanket primaries have?

MR. McDONALD: No, no, no, because the right -- the

crossover issue becomes a constitutional problem when it adulterates the selection process of the candidate that's carrying the party's message.

If that selection process has already taken place, the crossover is fine. If the state wants to have essentially two general elections, a practice general election in September and a real general election in November, they can do so, as long as they have preserved the party's nominating rights.

And as I think we said in our brief, one of the -- if you were doing an implied repeal of these statutes, I think where you would direct your efforts is to impliedly repealing the portion of the statute -- the existing statute which says that party nomination has to be done at primaries. You don't have to go the additional step of saying that nomination is completely forbidden by the statute.

I also --

THE COURT: I did ask some questions about whether these statutes that weren't repealed were implicitly repealed. What is your party's position on that subject?

MR. McDONALD: I think something that is irretrievably inconsistent with the language of the initiative is repealed if the resulting system is something that the voters would have wanted.

THE COURT: Well, let me just read 29A.52.116.

MR. McDONALD: Yes.

THE COURT: Major -- and I'm going to paraphrase. Major and political party candidates for all partisan elected offices must be nominated at primaries. Is that inconsistent with the initiative?

MR. McDONALD: The -- I think the nominated at partisan primaries is probably inconsistent. I'm not sure that nominated is inconsistent. And in fact, to go back to the filing statutes that existed under the blanket primary, which, as you've noted, had a substantial similarity to what is proposed by the initiative, under those filing statutes, when a minor party candidate showed up, they in fact had to produce a certificate of nomination from a convention.

You couldn't just show up and say I'm the candidate of the Green Party and get it printed on the ballot unless you had a certificate of nomination. And if two people showed up trying to claim to be the Green Party, there is a statutory procedure for Superior Court within 10 days to sort that out.

Now, there's no mention of this -- I don't think there's any mention in the language of the initiative about repealing those rights as they respect minor parties. There clearly is a mention of putting minor parties on the primary ballot and going back to the system.

In fact, most of the advertising about this -- I think the -- I realize we're not going to decide it based on the FAQS, but the presentation really was to continue with respect to minor parties

and much of the system that was in place with the blanket primary, the thrust was to continue it as much as possible.

I think the implication -- the clear implication for a voter would seem to me to be that minor parties were going to go back to what they were before, that they were going to be on the primary ballot, but, of course, they had their nominating rights, because that's what they've always had.

THE COURT: Well, did the initiative affect minor parties?

MR. McDONALD: Yes, it moved them from the general back to the primary.

THE COURT: And did it move them from having one percent and proceeding on to having to receive the top -- one of the top two positions?

MR. McDONALD: Yes, I believe that is also the thrust of the --

THE COURT: From your party's standpoint, what filing statutes do you challenge and what filing statutes do you think would remain?

MR. McDONALD: Our position is essentially the same as the Republicans with respect to the filing statutes. That to the extent they allow a candidate to file and use our name without permission, that they are unconstitutional, as long as we're not unreasonable about the procedures that we have for getting permission.

Now, under the Democratic Party rules, it doesn't, in practice, make any difference, because our rule is the signature of one person who thinks they're a democrat is sufficient indication of support. So we're on -- and so your filing document qualifies under our rules. But legally we agree with them. And that's been the case all along.

I think the difference is --

THE COURT: What filing statute would be in effect if the Court were to rule unconstitutional the initiative filing statute? What's left?

MR. McDONALD: I think the filing statute that was passed under the Montana would be -- would be constitutional and on the books, except to the extent that someone tried to file who did not have a threshold support.

THE COURT: Well, the Montana --

MR. McDONALD: The Republicans might challenge it, but if I could --

THE COURT: If I could just -- as I understand the Montana filing statute, which is found at 29A.24.031, that requires on a standard form that a place for the party -- a candidate to indicate a party designation.

MR. McDONALD: Yes.

THE COURT: Doesn't that have the same problem that the filing statute under the initiative has, as far as you're concerned?

MR. McDONALD: It has the problem of threshold support if there's a party rule in place, yes. The saving grace it has, at least from the Democratic Party's point of view, and I think constitutionally, is under the Montana system the members of the party will eventually select who gets to use the name and go forward. Which is a totally different situation than what we have under 872.

THE COURT: All right. Thank you. I understand your position on that subject.

MR. McDONALD: I wanted to return also to a question that you had raised earlier with Mr. White with respect to whether this was a nominating primary -- whether the text of the initiative indicated that this was a nominating primary.

There are two things about that: First, I don't think whether it's a nominating primary or not really addresses the substance of the constitutional issue. The issue is is somebody adulterating the selection of candidates to be associated with.

Second, the Grange itself, in its answer to the various parties' complaints, made a point of affirmatively asserting that under 872 the primary determines the two candidates or nominees for the general election ballot. They're not disputing that it's a nominating process, except to the extent they think that it's some type of magic pixie dust that solves the constitutional problem. But in general, yes, it's a nominating process.

I wanted to also go to kind of a top-level point, if I could.

Our party, and I suspect the other parties, have a very general goal and purpose of bringing together a group of people, finding a common set of issues, finding a team of people who will speak to those issues publicly, persuade the public to elect the team, and the team goes to government and translates those issues into law as much as possible.

And at the end of the day, that's really what this initiative goes to frustrate. The initiative tries to keep you from having a team. It's intended -- it's intended to say don't have a situation in which basically you think you like the Democratic candidates more than you like the Republican candidates, or the Libertarian candidates.

But, instead, let's try to make those party labels as meaningless as possible, and say you like Joe, you like Sam, or you like Mary, or you like Joan, or whatever. And that's fine for a general election process. It may even be fine for a practice general election process.

But to try to hijack the name of the parties and let anybody use them and make it impossible for the parties to carry out what's really a basic political goal is the fundamental problem with the initiative.

Now, the Ninth Circuit in Reed, I think they were very clear, a party has a right to nominate.

THE COURT: Well, you've done that, have you not? Haven't you had a nominating convention? Haven't you nominated

candidates? Won't those persons file for election? Won't they select your party as their label, their preference?

MR. McDONALD: Those people, yes. The question comes up --

THE COURT: Why aren't the goals that you're espousing then, why can't they be presented to the voters, if you will, through the media, through all sorts of preelection campaign?

MR. McDONALD: They can be presented if we don't have somebody also claiming to be part of the team who's interfering with the message.

THE COURT: Well, didn't you just tell me a couple of minutes ago that anybody who espouses to be a Democrat can say they're a democrat?

MR. McDONALD: Under the rules of the party, anybody who espouses to be a democrat is a member of the Democratic Party, number one. Number two, if there is a public primary which selects a nominee and which is constitutional, under our rules any one of those people can file.

But if there is no such primary, our rules do not allow multiple filings by Democrats, because we want to pick the best messenger at that point in what is a very complicated environment.

I mean, the world is a sound bite for politics these days. And the more confusion that happens the harder it is for us to get our message out. And that's what this interferes with.

And if I could return as well to the nomination issue. Yes, we have a right to nominate that is acknowledged, but the defenders of this initiative want to convert the right to nominate into an endorsement.

I mean, Secretary Reed said as recently as this week that the nominating conventions are nothing more than an endorsement. And unless we can limit the person who appears on the ballot as a Democrat to the person that was nominated by the party, he's right, it really is just an endorsement.

But the Supreme Court has said that an endorsement is not a substitution -- not an acceptable substitute for a nominating right. And I think you have correctly said it earlier, that there are really two issues in this case.

One of them is the pixie dust argument that this is not a nominating convention -- or, excuse me, a nominating primary, and the second one is that there's a forced association. And it seems to me that with respect to the forced association, it should be very clear that there is.

I mean, for as long as this area has been a state there have been candidates and Democratic Party and Republican Party. Those names have been there. Under existing state law standard abbreviations exist for those names. People, when they go on the ballot, are associated with those names.

Yes, under the prior blanket primary system there might be multiple ones in the primary, but when you went forward to an

anybody can vote situation, there was an association between the names and the parties.

And to sort of say we're going to wave our hands and ignore the fact that printing Democrat after your name implies an association seems to me to be a bit much. It seems if I put MD after my name it implies I'm a doctor.

Now, I can argue all I want that you ought to know that I really didn't mean it that way, but the fact of the matter is from common usage it would be associated in the public mind with that.

THE COURT: Well, let me ask you to respond to the state's argument, and I think the Grange's argument, that Justice Scalia in his dicta in Jones essentially teed up what the sponsors of the initiative say is what the initiative does.

Let me read it to you.

MR. McDONALD: Mm-hmm.

THE COURT: This is at page 2414 of the Supreme Court Reporter. Proposition 198 -- talking about the California proposition -- is not narrowly tailored. Respondents could protect themselves, respondents being the state of California, by resorting to a non-partisan 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 nominating -- nomination by established parties and voter petition requirements.

Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote-getters then move on to the general election. This system has all the characteristics of a partisan blanket primary, save the constitutionally critical one, primary voters are not choosing a party nominee.

Well, why isn't the initiative essentially what Justice Scalia is saying or suggesting might work?

MR. McDONALD: I think Justice Scalia is stating the only thing that is really consistent with the opinion that he wrote. Namely, if you create a system in which non-members are not interfering with or not participating in a party's right to nominate, you can do what you want thereafter.

There may be more than one way to avoid interfering with that right. You may not have to simply allow a nominating convention. In fact, the state could pass a requirement that 15 percent of the registered members of a party sign a petition. That that person goes on the ballot whether or not the formal structure has nominated them. That would also satisfy Scalia's dicta, because only registered members of the party were participating in this election.

What he doesn't do -- he does not say you can do any system you want as long as you can wordplay it so that you don't use the word "nomination" and it will be constitutionally valid.

THE COURT: Let me ask you this: Would a procedure where parties could nominate, as you've done in your conventions

-- there would be no party label on the ballot, and we had the top two, so that there would be -- your nominee would be a candidate, but so would maybe others who would argue that they were of your party, or elsewhere, but it wouldn't be on the ballot, would that be constitutionally correct?

MR. McDONALD: If you're asking me whether a non-partisan system for non-partisan offices would be constitutional, I believe the answer is yes.

THE COURT: No, I'm asking you whether a non-partisan system for partisan offices would be constitutional.

MR. McDONALD: And the answer to that question would be no, because there would be an association that is essentially -- there are two things about it. One, there's an association that's essentially forced because people are still using the party name. And, actually, let me back up one step. I'm answering your question in the very, very abstract, and not with respect to severance. Because I don't think there's any way to sever this --

THE COURT: Well, that's why I asked the question, because I have to decide, if it's unconstitutional, whether I can sever out portions. If I severed out the preference portion and say everybody gets to put their name on the ballot if they want to pay the filing fee, you nominated your candidates at convention and the top two proceed, what's wrong with that?

MR. McDONALD: Let me answer that specifically with

respect to severance then as opposed to the more abstract. The result that you would arrive at is not one that you can reasonably believe the legislative body, in this case the public, would have adopted when you look at the framework that is left. The fund-raising mechanisms of the state are tied to major political party status. There are caucuses of the legislature that are tied to that.

There are replacement provisions of the state constitution that are tied to that. There are a number of other aspects that -- I think it's a stretch to say that if the public had known that -- if they had been offered up an attempt to convert this to non-partisan, but leave all these other things in place, that they would have decided to do that, when in fact the purpose, the very purpose of the -- well, the description, and this is not from the web page, Your Honor, this is from the Attorney General's description of what would come in place in the voter's pamphlet, so this is what was shown to the voters, the Attorney General's statement indicated to the voters under the effect of the proposed measure that becomes law, says that the result would be a system in which all candidates for each partisan office would appear together on the primary ballot.

Candidates would be permitted to express a party preference or record themselves independent and their preference or status would appear on the ballot. The primary ballot would include all candidates filing for the office, including both major party and

minor party candidates and independents. Voters would be permitted to vote for any candidate for any office and would not be limited to a single party.

Given the number of times that party preference, party candidate is mentioned in that description of the system, I think it really is approaching judicial law writing to start stripping out all the party stuff and leave the result, because this was --

THE COURT: Well, it wasn't party stuff anyway. It was a preference and a candidate doesn't have to express that preference. If I were to find that the initiative is unconstitutional, if I merely eliminated any right to select a preference on the ballot form itself, why wouldn't that pass constitutional muster?

MR. McDONALD: How is that intrinsically different than leaving it the way it is, but only allowing the people who are authorized to use the name to use it? Because right now anybody --

THE COURT: Well, let me ask you this: Would that approach be constitutionally acceptable?

MR. McDONALD: Yeah. Anybody --

THE COURT: So either way -- either way your position would be it would be constitutional, either no preference at all, or --

MR. McDONALD: No, I'm not --

THE COURT: I thought that's what you said. Let me just

tee you up and then you can tell me what you don't like and what you like. If we have a system that we struck down, severed any right to select a preference on the ballot, or we did a little judicial rewriting and required that only the party nominee's party would be put on the ballot, would either or both of those be constitutional?

MR. McDONALD: The latter system would, from the Democratic Party's point of view, be constitutional. The minor party would have an issue. There's a threshold issue with respect to Republicans. But the latter system would be constitutional.

And it would not interfere with anybody's right to run for office, because they can always file as an independent, and under the Secretary of State's emergency regulations they don't have to have a convention or anything else. They just file. So we're not talking about peoples' right to run for office. We're talking about peoples' right to use that name.

Now, under the former situation, where you try to just excise out and have nothing appear on the ballot, unless you're going to go on and excise out all the other things that depend upon the party preference that was stated on the ballot, such as whether you are a major political party, whether --

THE COURT: It doesn't matter, does it?

MR. McDONALD: Yes, it does, because you can't be a major political party unless your nominee on the ballot has

received five percent of the vote. Caucuses of the legislature are determined according to party affiliation.

Initiative 134 grants special fund-raising rights to -- and distribution rights to caucuses of major political parties in the legislature, in addition to the parties themselves.

The state constitution requires that if an office becomes vacant that was partisan, and these would still be defined as partisan offices, there just wouldn't be any preference shown, that you replace it -- that the party submits a list of nominations to replace a person from their party.

So the end result of what you would be doing would be a situation in which the voter is kept in the dark about the party preference, but the rest of the system depends on knowing that party preference.

And it doesn't add anything for the voters beyond -- that is any better, I think, than what -- the results you would arrive at if you went with the second course, and simply said we're going to treat major parties and minor parties like we did under the blanket -- like we treated minor parties under the blanket primary. If you wanted to use a party's name, you show up with a certificate of nomination.

THE COURT: That would be a rewrite of the statute, would it not, as opposed to a severance of a portion of the initiative? I understand why you like it better.

MR. McDONALD: No, it would be --

THE COURT: For one of the issues that you all have briefed, and I need to decide, is if the initiative is unconstitutional, can the offending sections be severed out, or does it all have to be stricken down.

So let's go back to the -- to that portion which would require or allow the person to state a preference. If we struck that down, would it be constitutionally valid?

MR. McDONALD: I'm not evading your question, but I think the part that you would strike down is not the part that says that you can state a preference. It's the part that says the state will print that preference, that you're guaranteed that that preference will be printed on the ballot.

Because if you took out the latter portion, then any argument for implied repeal of convention nominating rights and minor party name protection rights would disappear, because you just have the right to state it, but you don't have the right to have it on the ballot unless you have the other qualifications.

And then I think you would arrive at a constitutional system where to prevent equal protection arguments major and minor parties would have the same name protection rights. Major parties could set their own rules for conventions. Minor parties might have ones that are set by statute, and so on.

THE COURT: I'm looking at the filing statute under the new initiative, and it's 29A.24.030 and part sub 3, if you want to find it there. If we just struck that subpart 3 for partisan

offices only, a place for the candidate to indicate his or her major or minor party preference or independent status, if we just struck that, wouldn't we be taking an initiative which may be unconstitutional and saving it from its total demise by severance of that subparagraph?

MR. McDONALD: No, you'd be raising additional constitutional questions. There might be state court questions about whether it's constitutional under the state statute to do that with respect to all these offices that have been defined to be partisan.

And you would be raising questions of the state advertising -- you would be changing all the state advertising statute, which requires that partisan identification be on there so people know who they're voting for. You would be running the risk of a lot of side effects.

THE COURT: Well, this is a declaration of candidacy. Someone who wants to appear on the primary ballot for some office other than president, vice-president or an office for which ownership of property is a prerequisite, has to fill out this standard form.

And one of the real problems, as I understand it, is you're taking offense with the concept that someone can indicate that they're a Democrat when you haven't nominated them.

MR. McDONALD: Yes, that is what we take offense at. I need to sit down so that Mr. Shepard can have his time. Let me

summarize on this point. And I'm not sure that I think you can do it, but if you did it, the result would have a whole bunch of collateral effects, might have -- that may be negative. It might have some state constitutional implications.

And I think for me at least it is difficult to assume that the voters would have done that, given this state's history of having partisan office. There's not an indication in the voting pattern that I can see that the voters wanted to remove the idea of having a party label on the ballot.

What they wanted to do was to be able to zig-zag among people with party labels. If the Grange had wanted it to be --

THE COURT: Isn't what 60 percent wanted to do is have the top two proceed to the general. And even when the legislature in 2004 passed its bill, it had two alternatives, the top two --

MR. McDONALD: Yes.

THE COURT: -- and the Montana primary. And the governor struck down and vetoed the top two. But the voters in November of 2004 said we want the top two system. Isn't that right?

MR. McDONALD: Yes, that is correct. But it's also correct that at the time the voters did that they had three major political parties and not two. And they may well have just wanted only just two major parties to go forward.

There's just nothing in the debate that says they wanted to

get rid of party labels. The Libertarians were a major party in 2004. They lost their status.

THE COURT: I understand. But they might get their status back.

MR. McDONALD: And in which case scoping from the top three to the -- from three major parties to two might still have a valid purpose. I just think if we get into severance arguments that you minimize -- you try to minimize doing something the voters didn't want, and you try to minimize the risk of side effects. Or else we don't sever it, we send it back, and say figure it out again.

THE COURT: All right. Thank you.

MR. McDONALD: I've exceeded my time, I'm sure. So let me let Mr. Shepard get up. Thank you, Your Honor.

MR. SHEPARD: Good morning, Your Honor. I'm Richard Shepard. I'm here on behalf of the Libertarian Party plaintiffs. Before I get into my prepared remarks, there are a couple of things I wanted to say that have come up over the course of the morning.

And the first is I want to respond to the proposition or suggestion that the reason that the voters voted for 872 is because they wanted the top two. I don't think so.

I suggest to you that the reason that the voters voted for 872 is because they wanted an unconstitutional primary system back, and they thought -- they bought the Grange's argument lock,

stock and barrel that it could happen. The fact is because we're here it's not going to happen.

Now, you asked also about the idea that there was some sort of a right to appear on the ballot. What the right is is a reasonable opportunity to appear on the ballot. And I emphasize reasonable. And that's very clearly articulated in the Rhodes case and in the Jenness case.

If you have a system that -- that closes the ballot down to one or two political parties and there's other parties that want to get on the ballot, it's unconstitutional. That's the plain meaning of Rhodes.

Jenness -- Jenness was the one that followed on the heels and more or less put the sides on the frame of the house that Rhodes built. It basically said that the -- that there -- that, A, the valid access system has -- cannot freeze the status quo, and it has to provide some flexibility for the -- for lack of a better word, vagaries of American politics.

872, when you reduce it to its essence, freezes the status quo to the middle of the political spectrum. And that's plainly obvious even in the materials that are in the voter's pamphlet. Now, by the way, that's another point. The voter's pamphlet is something that this Court can resort to to determine the intent of the voters. That's a matter of state law.

There's several cases -- I know I cited one, I think the Democrats did -- that are for the proposition that what the voter

pamphlet says is an expression of legislative intent. And I should point out, by the way, that the voter's pamphlet specifically refers voters to the Grange web site, which has the frequently asked questions that Mr. White was talking about.

Now, the other point I want to get to is this idea of implied repeal. In order for that to work out -- in order for that doctrine to apply at all -- and my colleagues are correct, it's a disfavored doctrine -- you have to have an initiative or legislation that covers the spectrum, covers the entire subject area, and I submit that this legislation, this initiative does not do that for all the reasons that Mr. McDonald got finished telling you about, the campaign finance rules, the caucus rules.

I just noticed in preparing for this is that it's the major parties, not the minor parties, as it happens, have a right to observers at the logic and accuracy tests. They have a right to observe --

THE COURT: They've also got their own lawyers here. So why don't you tell me --

MR. SHEPARD: I know that.

THE COURT: -- what the minor parties --

MR. SHEPARD: Sometimes --

THE COURT: Let me ask you this: Did the Initiative 872 affect minor parties, and, if so, how?

MR. SHEPARD: It's wrote their death warrant. I mean, if you want a blunt answer, that's it.

THE COURT: I mean, the sponsors of the initiative say it's not going to affect -- it doesn't affect the minor parties. The Secretary of State apparently has a different view of that subject.

MR. SHEPARD: Well, I call your attention to the language in Jenness that talks about treating everybody the same might actually be a discrimination.

The minor parties don't have the ballot strength, they don't have public support that the other parties have. And this is -- it doesn't matter whether we're talking Libertarian, Green, Socialist, or whatever.

THE COURT: Well, Mr. Shepard, if the initiative does not affect the minor parties' positions, then wouldn't the Montana scheme apply to minor parties? And wouldn't they go to convention and directly to the general?

MR. SHEPARD: I submit, Your Honor, that that's a possibility, and it's certainly an interpretation. It's a reconciliation, which, by the way, is the more favored statutory construction in Washington, is to attempt to reconcile inconsistencies.

Then, yes, there could be an argument, and I think it's a reasonable alternative, far more reasonable than the one that the Secretary picked, to just put the minor party candidates on the general election ballot. Which then it runs in the face of this -- this -- I mean, the very name of the thing is the top

two.

On the other hand -- and the Grange argued this -- is it's conceivable that the -- that the Montana provisions were essentially superseded. There's this argument that if you have legislation passed after an initiative is filed and before it's adopted, that that legislation is essentially negated.

If that's the case, we're back to the minor party nominating statutes that applied under the blanket primary. And, actually, in some respects those were actually better for us because it didn't require as many signatures.

On the other hand, it's -- the difficulty is is that we don't have -- we would haven't a one percent rule anymore, we would have essentially a moving target, and to me that's a vagueness problem that can't be gotten around.

I also want to talk a little bit about this idea of the blanket primary -- I'm sorry, of valid access. We have under this system one way to get on the ballot. If you look at --

THE COURT: You're assuming that Initiative 872 swallowed you up?

MR. SHEPARD: Well, there is the --

THE COURT: You told me on the one hand that we shouldn't -- the initiative did not expressly repeal the code provisions that relate to minority parties -- minor parties, is that right?

MR. SHEPARD: That's right.

THE COURT: All right. And you told me just a few moments ago that the Court should be -- this implicit repealing of statutes is disfavored --

MR. SHEPARD: Right.

THE COURT: -- and the courts should almost never do it.

MR. SHEPARD: Right.

THE COURT: That being the case, isn't that where you would be -- I'm trying to understand what your position is.

MR. SHEPARD: Well, all right.

THE COURT: Is your position that it wasn't repealed implicitly, thus the old sections still apply to you?

MR. SHEPARD: Well, our position is that -- that either the Montana version of the minor party nominating statutes apply or the blanket primary version of the minor party nominating statutes apply. And the difference is how many signatures we have to get and whether we go to the minor party -- go to the primary, or whether we go to the general.

THE COURT: Help me understand -- if the initiative is implicitly repealed, then what you're saying is that the alternatives to fall back on would be the Montana scheme that was voted by the legislature in 2004, or, even before that, the blanket primary system for minor parties?

MR. SHEPARD: Right.

THE COURT: And what is the difference between those two, and why would the Court select one over the other, if I got

that far?

MR. SHEPARD: Well, I think first the determining factor is whether or not the argument that the adoption of 872 -- just the mere fact that it was adopted and it spoke to the same subject matter that ESB 6453 addressed, which is the Montana thing, if that implicitly repealed that statute, or that whole legislation, or superseded it or replaced it -- the Grange has a note about that in their footnote in their brief.

If it did that, then we're still left with the minor party nominating statutes that were in place under the minor blanket primary. And I want to be clear about something on that, is that those nominating statutes were the only thing that were constitutional under the blanket primary, was those minor party nominating statutes.

The problem for the Libertarians occurred when they achieved major party status, because they lost the power to control their nominations, which is what the Democrats and Republicans are arguing about this time. We argued about it, I guess all we argued about, last time.

I want to -- I want to get to one point, and that -- and that has to do with this idea of maybe, maybe the, quote, non-partisan system that Justice Scalia was talking about can be somehow or other salvaged from this system -- from this mess.

And I think at some level it's true that if you -- if you find that the minor party statutes are still -- are still viable,

then you're also going to have to find that the Democrats and Republicans have the same right to nominate, and that then those nominees appear on the ballot, along with anybody else who wants to file as an independent.

The only problem that I see about that, and it's a potential one, because I don't know specifically if the answer to that isn't the foster versus love problem. And that is that the election day has to be on November -- the second Tuesday after the first -- I'm sorry, the first Tuesday after the first Monday in November, and then if there's going to be a runoff, if this is going to be a top two kind of system, it is indeed a runoff, occurs after that.

So it's my position that if the Court is going to try and fashion a remedy that's going to track on that paragraph, then it's going to have to say that the primary doesn't occur in September, it occurs in November, and there's a runoff in January or December, which is what Louisiana does. They don't like it, but that's what they do.

And there's -- I guess you'll need to look at Foster as to why they did. But it has to do with the qualifications clause and the limitations in the federal constitution on how much both the Congress and the states can tinker with the process of electing federal candidates, or elect federal officeholders.

Actually, I think that pretty much concludes my remarks. Well, I'm going to say this, Your Honor, it wasn't hyperbole to

say that this was a death warrant for the Libertarians. And it has to do with this issue of 30 or 40 percent.

The Grange suggests in its materials that minor parties would still be able to place candidates on the ballot under what the California Democratic versus Jones case refers to as safe districts, that is, those districts where there's one party dominant.

And the fallacy of that argument is obvious on its face. The districts are safe because there's no candidate of a different party that has a meaningful chance of winning. But if the Republicans can't do it, where does anybody get the idea that the Libertarians or the Greens or anybody else is going to be able to do it?

And in fact the probability is that the two candidates that would proceed to the election under top two would be members of the dominant political party, whichever one it was. And what that suggests is a third equal protection issue, and that is is that the -- the minor political parties would only be given meaningful opportunities in certain geographical districts, which raises all sorts of apportionment issues that I don't think we want to get into, or redistricting issues.

I think that's all. Thank you.

THE COURT: We'll take a morning recess. We'll take approximately 15 minutes. We'll be in recess.

(Recess.)

THE COURT: Please be seated, ladies and gentlemen.

MR. PHARRIS: May it please the Court, Jim Pharris from the Washington State Attorney General's office here on behalf of the state and representing the interests also of the county election officials that were named in the case.

The Court has had a lot of discussion with the attorneys for the parties, and I don't want to go over too much of that again. I will hit some of the high spots and, of course, will be available to answer questions that the Court might have.

We're here today because of the decisions of the -- first, of the Supreme Court in California Democratic Party versus Jones, and then subsequently the Ninth Circuit in Washington Democratic Party versus Reed, because they invalidated Washington State's old blanket primary, which had been in place since 1935 and was used here up through 2003.

So I think the first thing we need to do is see what the real holdings of those cases were and start from there, because I think that's where the Washington state legislature and then the sponsors of Initiative 872 started out.

You look to see, well, what was wrong with what we were doing before and what can we do to correct it. Those are certainly not bad motives. They're obviously what a responsible state would do.

In the opening paragraph of the majority opinion in the California case, Justice Scalia says that there are two ways in

California to qualify for the ballot in the law that he was then examining, to be the nominee of a political party or to qualify as an independent candidate.

The rest of his analysis is clearly bent -- or built on the notion that what California had was a political system in which political parties nominated candidates for office through a primary, and then those candidates appeared on the general election ballot, together with independent candidates that they had had to qualify.

And then -- so that was what you had preexisting a California blanket primary, a system in which a party nominated its slate of candidates through a primary, a closed primary originally, and then the general election ballot was a vote among those nominated candidates, candidates of parties very clearly, and whatever independent candidates had qualified for the ballot.

California, through its blanket primary, the Court held, had opened up each party's nominating process to non-members. Sort of like forcing two clubs to open their doors to one another, even though they would ordinarily compete with each other, and allow people to move back and forth in any way they liked, participating in both, or all three, or however many, nominating processes there were.

So what the Court found was it had a nominating process, it was built on party nomination, and then with the blanket primary you opened it up, so that registered members, California had

voter registration, party registration, registered Democrats could vote in the Republican primary and vice versa. So that's what the Court found was the problem with what California had done.

It had a party nominating process, and that it invaded the rights of the parties to have some general control to make sure that only party members, or those who met party rules, were participating in each party's nominating progress. The parties didn't consent to that, so the Court found that the California statute was unconstitutional.

The follow-up on the Washington case was simply --

THE COURT: Well, let's just talk about Proposition 198 for a moment. As I understand it, in that proposition all persons entitled to vote, regardless of their political affiliation, could vote for any candidate, regardless of that candidate's political affiliation.

MR. PHARRIS: That's correct.

THE COURT: And second, the candidate of each party winning the greatest number of votes was or became by California law the nominee.

MR. PHARRIS: That is correct.

THE COURT: So that nominee is a bad word if we're going to have people able to -- I mean, that was critical to their decision, was it not?

MR. PHARRIS: And I think it was critical. And I think

it was fairly clear, reading California law, that they became the nominee of the party, because that's how they got onto the ballot, was getting more votes than any other candidate with that party designation.

Now, Washington had a blanket primary that worked much the same. Really the only significant difference that we have is we didn't have party registration. So we argued that the voters, because they were a sort of undifferentiated mass of people who had not -- had no -- there's no official party affiliation in this state, we didn't have the same crossover problem that California had.

THE COURT: To understand what Reed was addressing, why don't you explain to me, as you understand it, the blanket primary that was at issue in Reed that was held unconstitutional.

MR. PHARRIS: Okay. And I think what we had here in Washington also was candidates file for office based on self-designation for a party. So voters could vote without -- without -- they didn't register by party and were not limited to the ballot of any single party. They could vote for any office or any candidate of any party designation.

So they could vote for a Democrat for U.S. senator, a Republican for governor, a Libertarian for --

THE COURT: It sounds like Initiative 872. What's the difference?

MR. PHARRIS: I will get to that in just a moment.

There is big difference. And the other key feature of the blanket primary was like California's blanket primary. How did you decide who qualified for the November ballot?

Well, it was the person who got the plurality of votes of candidates designating -- self-designating a particular political party. And so that the top voting Democrat went on the November ballot. Let's put aside the word "nominee." And I think that's a problem word. It has no constitutional significance as such, I think.

The top Republican went on as the Republican candidate. The top Libertarian, or whatever major party. Minor parties were treated slightly differently, in that they got to nominate a single candidate who went on that primary ballot. And so they didn't have the prospect of potentially dividing their small vote several different ways in the primary.

And then if -- every candidate had to get one percent. That, of course, was rarely a problem with Democrats or Republicans. For minor parties it was something of an issue. But in recent years some parties have almost always qualified in races, if they filed at all.

And so the November ballot showed one Republican at most, one Democrat at most, and one representative of any minor party who had then qualified in the primary. Washington really didn't truly have independents before, which you really did if you organized your own minor party and were treated as one. But

essentially that was the way to get on the ballot as an independent. You simply were the Jack Jones party, or whatever it was.

The new primary that Washington has now enacted voters --

THE COURT: Just so we're clear, are you talking about the Montana primary that the legislature did, or the initiative?

MR. PHARRIS: Let's go very quickly over to the initiative, because I think we know the history.

THE COURT: All right.

MR. PHARRIS: In 2004, after the old blanket primary was invalidated, the legislature, including the Governor in the legislative process, enacted a -- what turned out to be a Montana style primary, in which this time clearly had candidates of parties.

Voters had to select the ballot of one party or another. There was no party registrations. They did it at the polls. But they couldn't vote -- couldn't crossover. They had to vote for only Democrats, only Republicans, whatever ballots there were. Anyone could vote for non-partisan offices if they were on the ballot.

Then, of course -- then it was pretty obvious that the people who got the most votes of each party's primary, because they clearly were separate primaries, were the ones who were the nominees of the parties and qualified for the general election. That was used in 2004. So in the 2004 election that was the

system that was used.

Also, at the November 2004 election, the voters threw that system out. They enacted Initiative 872, which enacts -- provides for yet a different kind of primary.

THE COURT: Let me ask you -- the Democratic Party in their brief makes a statement that I-872 is a replacement primary. It did not repeal the Montana primary. I'm not entirely sure I understand that distinction.

But from the state's standpoint, what was the legal effect of the voters adopting I-872 as it relates to the Montana primary?

MR. PHARRIS: Our position is that it repeals any inconsistent provisions of the Montana primary. And this would be true -- well, let me give a specific circumstance. And I think this really has to be true the way we work the initiative process.

Initiatives are originally filed with the Secretary of State's office not more than four or less than 10 months before the election, otherwise you would not have the initiative on the ballot.

Obviously since you have -- at that time you needed some 200,000 signatures on your initiative. You wanted to use as much of that time as you can. So there's much great advantage to filing early in the year.

Initiative 872 was filed in January of 2004. And, of course, once the initiative is filed it's text is fixed. You can't come

back and fiddle it and amend it.

And, of course, in January of 2004 the Montana style primary had not been enacted. It was still a gleam in the Governor's eye. And so there was no way for the initiative to include language repealing bills that the legislature had not even enacted.

So there is --

THE COURT: Well, let me interrupt you right there, because I think it's the Grange in their brief, in one of their footnotes, makes the point that the legislature could not have changed something that was -- that the legal effect of filing the referendum language kind of has some importance, and that the legislature couldn't have changed it to try and thwart the efforts, if you will.

Do you agree with that or not?

MR. PHARRIS: I think that's true. There's a constitutional principle there which is when you have an initiative pending the legislature ought not to be able to simply subvert it by passing inconsistent legislation in the meantime, and then when the initiative passes, somebody jumps in from the side and says, oh, this is unconstitutional, or you've got a problem of inconsistent statutes.

THE COURT: All right. So let's fast forward now to November 2004. The initiative passes. What has happened to the Montana primary that was adopted by the legislature? Has it been

repealed?

MR. PHARRIS: Those laws, first of all, have not been expressly repealed. They're still in the code. Of course, the new code hasn't been published, but --

THE COURT: Well, some of the --

MR. PHARRIS: When it is --

THE COURT: They were expressly repealed, were they not?

MR. PHARRIS: There are -- there are some earlier statutes, of course, that 872 did repeal, because it knew about them, or amended. However, they couldn't pick up any of the ones that were enacted in 2004.

So I think the position has to be because you can't have both a Montana primary and a top two primary, you can't have two systems, you've got to have one or the other, it's fairly Black letter law that to the extent you've got multiple laws on the books that conflict, the later -- some people say the more specific, but that's hard to find here, so the later will prevail. That's the last expression of legislative intent.

And so I think obviously to the extent you -- it is true also that you try to harmonize. And I think that particularly circumstances here make fair of the argument, it's true, implied repeal is disfavored. You don't assume that the legislature by not repealing something automatically intended to replace it. But here it was the voters. And the voters didn't have a chance to deal with the Montana primary.

So they passed this new primary with a 60 percent vote, and it has a very different characteristic from both the blanket primary that was in effect before 2003 and the Montana primary in 2004.

Now, that is that party no longer has any relevance to qualifying from the primary to the general election ballot. Instead of the plurality of people designating or being associated with a party -- of each party qualifying for the ballot, you simply take all of the votes, each candidate stands on his or her own, and you take the top two.

There is still a one percent requirement. So that if number two only gets one-half a percent, they don't qualify. But otherwise the top two candidates, regardless of party and having nothing to do with party designation, advance.

Now, I might indicate that the model for this is not very far away. It's the way Washington runs its non-partisan primaries for non-partisan office. So, for instance, for the office of the mayor of Seattle or the office of superintendent of public instruction, that's the way you do it. There are no party designations.

THE COURT: Well, we don't get into the First Amendment association rights of political parties, the whole constitutional landscape that Jones talked about in the California case and the Reed case talked about in connection with a blanket primary. So the fact that we do it that way for non-partisan races doesn't

really answer the question.

MR. PHARRIS: It doesn't, I agree that it doesn't completely answer the question, but it does indicate that there is more than one way of running an election. So I think it would answer any argument -- and I don't see it clearly made, but I see it maybe implied in a couple of the briefs -- that somehow the parties have an absolute constitutional right to get their candidates onto the general election ballot.

THE COURT: Well, I don't think they have the right. I think the Timmons case said that. I asked the question earlier, and I got kind of vague answers. But I think that it's been pretty clearly established.

But don't the political parties have a right to have their nominee designated for the primary?

MR. PHARRIS: I don't see any law that indicates that they do. Unless, of course, you run a primary that in which the way you qualify for the general election ballot is to be a party nominee.

THE COURT: Tell me how the initiative differs in a material way from the blanket primary that was struck down in Reed?

MR. PHARRIS: It differs in -- I'd say the primary way is that the system for qualifying candidates for the general election ballot changes completely. Instead of being built on party designation and plurality among candidates who chose party

designation, it's chosen entirely on who gets the two top total votes in the primary.

There is a possibility of candidates expressing a party preference, but that preference is irrelevant in calculating who will get to the general election ballot.

The other thing that I think is important is that Initiative 872 also redefines what partisan office is, and specifically indicates that the expression of a candidate's preference is purely for the information to the voters.

And here again I think we can assume the voters understand the laws they pass and that they can understand the difference between seeing a little word beside a candidate's name and understanding that the fact that that person has listed Socialist Workers or Green or Democrat doesn't mean they are the nominee of that party. It doesn't necessarily even mean they are members of that party.

It simply indicates, as the law provides, that the candidate on the filing form indicated a desire -- or indicated a preference for that political party over any others. Obviously that's completely optional. The candidates can also leave that blank, or indicate they are independent candidates.

I think what the law is trying to accommodate, of course, is two things. One, give a little bit of information to the voters so that -- I think the state recognizes parties exist. We know they exist.

But, on the other hand, I think the intent here was to have a system in which we don't completely blind ourselves to the existence of parties, but we remove the state electoral process, we decouple that from the way the parties operate in choosing their candidates, so that they can have a nomination or an endorsement -- I agree, as far as I'm concerned, they are the same. And I discussed the Eu case, which I think really doesn't make any difference here.

But they could do that, but it has nothing to do with the way the voters select their candidates to go on the November election ballot, except, of course, insofar as political parties are free to participate in the primary and the general election by supporting candidates, by advocating, you know, positions, all the various things parties do.

But the people did not want to have a system under which the primary was one in which they had to organize themselves and divide themselves into separate parties for that party nominating process. They were looking for another way to organize it, and I think they found it.

THE COURT: Well, let me address the Reed case, which, of course, struck down the blanket primary. And Reed has two, if not three, main reasons why it was struck down. So I want to read to you a little language from Reed and then ask you why it does or does not apply to I-872.

First, at page 343 F.3d, at 1204, and actually all of these

are coming from the same page, the Reed Court said the Washington scheme -- now they were talking about the blanket primary, of course -- 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.

MR. PHARRIS: Right.

THE COURT: Let's stop right there.

MR. PHARRIS: I think --

THE COURT: How does Initiative I-872 avoid that problem?

MR. PHARRIS: The blanket primary ran into that problem because the way the party -- the primary system is organized candidates who designated the term "Republican" were in effect competing with each other for what could be called the Republican nomination for the office. Probably was called that by most people.

Under the new system there is no such thing as a Republican -- you don't qualify by becoming the Republican nominee. If you are the Republican nominee, it's because the party gave you that role through a private process.

And as far as the election system itself is concerned, we no longer interfere in any way with that nomination process. The Court found in Reed that the party primary was a nomination process, even though it was somewhat tentatively compared to California, or other states, and that it still resulted in

selecting a standard bearer for each party for each office. That's no longer true with Initiative 872, and that's the difference.

THE COURT: Well, the initiative did not strike down other provisions under Washington law which, in effect, say that parties' candidates will be nominated through the primary process.

MR. PHARRIS: I don't --

THE COURT: Are those implicitly repealed?

MR. PHARRIS: I think they're implicitly repealed.

THE COURT: This is what you told me we -- first of all, we should be reluctant to implicitly repeal anything.

MR. PHARRIS: You should be reluctant to do it, but I think you have to do it with any that are consistent with the way Initiative 872 works. And I think particularly you should be dubious of the parties who are so eager to find force in those statutes, because the reason they want to do it is because they want to kill the whole primary and go back to Montana, or something else. Not because they really want those statutes to be in effect.

And all -- there's a combination of things. First of all, those that are part of the Montana primary obviously should be understood as relating specifically to that primary.

The ones the Court quoted earlier, for instance, saying the major party candidates will be nominated through the primary,

that's part of the Montana primary language adopted in 2004. And under the Montana primary that made sense, because it was a party primary.

That doesn't make any sense anymore. So that's one I think you could not hold to be in place anymore. It's inconsistent with the way the top two are organized. And to say that it stands somehow as just a sort of statement about intent I think completely undercuts the purpose of the initiative. So I think that one has to yield.

THE COURT: Let me just find that reference. RCW 28A -- 29, I'm sorry, A.52.116 and .111, major political party candidates for all partisan elected offices, except for president, vice-president, must be nominated at primaries held under this statute.

Now, that wasn't expressly repealed. And the initiative did repeal some things.

MR. PHARRIS: Right. But that's part of the 2004 statute.

THE COURT: But that was in the law before then as well, was it not?

MR. PHARRIS: No, I don't believe it was in there before.

THE COURT: It wasn't in the blanket primary provisions?

MR. PHARRIS: No. There was no explicit -- as I recall, under the blanket primary there was no explicit statement about

major parties nominating that way. Now, there was an older provision, that's true --

THE COURT: Well --

MR. PHARRIS: And there were minor party provisions also.

THE COURT: All right. The Reed Court also told us that the blanket primary there at issue forces petitioners, who were the various political parties, from adulterating their candidacy selection process, the basic function of a political party, according to the Court, by opening it up to persons wholly unaffiliated with the party.

And the major parties that you've heard this morning argue that there might be six or eight or ten people who file and say their preference is one major political party or another. And now why doesn't I-872 essentially do the same thing, that is, allow persons wholly unaffiliated with the Republican Party to select a nominee?

MR. PHARRIS: Because I-872 no longer puts the state in the selection of party nominee business, which the old blanket primary, according to the Reed case, did. So what --

THE COURT: And so who nominates them then?

MR. PHARRIS: The parties nominate them. They're free to -- the parties -- for offices up to 2005, I think the parties have all had conventions, they indicated who their preferred candidates are. It's just that that doesn't have anything to do

with the election system.

THE COURT: Well, what about their argument that they have a right to freely associate with whom they wish and they have a right not to associate with whom they wish not to associate with.

If people come in -- they've nominated someone for a particular office. Five other people come in and say they're a member of the same party. Doesn't Jones and Reed suggest strongly that that would not be permitted under the Constitution?

MR. PHARRIS: I don't think so, Your Honor. First of all, at least Jones and Reed don't hold that, because that wasn't before them. But I think that the language that the Court read to counsel earlier in which Justice Scalia in his now famous dictum indicates something that he thinks might be another avenue for the states to take indicates, you know, potentially these same issues would be present.

I could also point out, of course, Louisiana has been operating a version of this system for 25 years. It has not been struck down. I don't know why, but it has not.

I do want to stop and correct one misimpression, since I'm discussing that, about Foster versus Love, and that's just to indicate that I think Mr. Shepard is misreading the Supreme Court case there.

The reason that the Louisiana primary was struck down on the date of election issue -- and I want to point out that's not an

issue here at all -- was not because they were a top two primary, it was that Louisiana has another wrinkle, which Washington does not adopt in Initiative 872, which is that in Louisiana, if a candidate in the primary gets 50 percent -- more than 50 percent of the vote, that candidate is declared elected and is simply given the certificate of election.

So the way Louisiana ran its blanket primary or its -- excuse me, it's wide open primary, and up until the Foster versus Love decision in '96 or '97, if any candidate got more than 50 percent of the vote in the October primary, they were simply declared elected, and they didn't even appear on the November ballot.

The Supreme Court found that was inconsistent with federal statutes, which say that federal officers, that is, members of the full house of Congress, have to be elected on the first Tuesday after the first Monday.

So that was the only problem with Louisiana. It was that extra twist that they put in the system of saying that there's no -- you simply go -- the election is over if somebody gets more than 50 percent in the primary. That's not present here. So I don't think that's any additional basis for worrying about this statute.

Now, that was --

THE COURT: The state raises in kind of the burden of proof your suggestion that if any -- if the statute can -- if the initiative can be approved on any basis that I would have to

approve it.

And the parties seem to suggest, and the Jones case seems to suggest, that if the initiative in this case would affect the freedom of association rights of a political party, that it would -- the Jones Court says we can think of no heavier burden on a political party's associational freedom. Proposition 198 is, therefore, unconstitutional unless it is narrowly tailored to serve a compelling state interest.

Now, those seem to conflict a little bit in terms of what the burden is. Can you help me sort through --

MR. PHARRIS: What you --

THE COURT: -- what I see as a conflict?

MR. PHARRIS: On the one hand is the general proposition that any statute is entitled to an assumption -- a presumption that it's constitutional, and that there's a heavy burden of showing that it's unconstitutional. That's true under both federal and state law.

There is also a provision when you're dealing with certain civil rights provisions that if you're -- and I think in Clingman versus Beaver, the recent case involving Oklahoma's primary reiterates this fact -- if you are seriously impacting a party's associational rights, or other rights -- it has to be more than just a small or slight impact -- then the burden shifts to the state to show a compelling state interest for -- to uphold that serious impairment of the party's rights.

THE COURT: Have you offered me anything in your brief to show how you've attempted to narrowly tailor this initiative? Of course, the state didn't enact it. I understand that. But it's as if the state did.

MR. PHARRIS: Well, the state enacted it, but the legislature -- I don't think the narrow tailoring comes into effect here, because the state has not seriously burdened the party's right of association.

What Initiative 872 does is give to the parties back entirely their right to nominate candidates and their right of free association. It says the state is going to get out of the business.

Because what states have been doing for the last century through primaries is sort of interfering with parties' nomination processes to the extent of forcing the parties to open it up to all voters, then you get into issues of party registration, whether you're going to have selection of an open primary where people select, a ballot, who gets to vote, can independents vote in the Republican primary, as in Tashjian, can Republicans vote in the Libertarian primary, as in Clingman.

What 872 says is we're going to get out of that business. We don't want to get into the business of being partly involved in party nominating processes and partly not. We're simply going to leave to the parties how they nominate candidates for office.

We're not going to use our primary to chose those candidates.

We're going to set up a system in which we winnow the candidates for the general election in a different way. It has nothing to do with party --

THE COURT: Well, but to the extent you permit anybody to state a preference and that preference is put on the ballot, aren't you very much in the business of affecting the party's right to freedom of association?

I understand your nomination argument. But in the freedom of association hasn't the Supreme Court on numerous occasions recognized a long-standing right of political parties to associate with whom they wish and not to have to associate on a public ballot with people they don't want to associate with?

And couldn't this initiative, if it had been drafted so as to permit only the nominated party person to be listed, have been more narrowly tailored to perhaps pass constitutional muster?

MR. PHARRIS: I don't know if that would be more narrowly tailored. I think wide and narrow can be in the mind of the beholder. I think that would have been constitutional. It's not what the people -- a feature the people chose.

I think Justice Scalia's dictum indicates that that might be one option, but he does indicate it's an option, not -- not an essential part of that non-partisan blanket primary.

And I don't think there is any case law that squarely holds that parties have such strong or such broad associational rights that simply allowing a candidate to publicly state that he or she

prefers that party violates that right.

The nearest thing that's been pointed to here is the cases involving David Duke, but easily distinguishable. First of all, it's a presidential race, which is always of its own. And there the issue was upholding a Georgia state which voluntarily accorded the parties that right, so you didn't have a constitutional issue.

And in any case, the question there -- and, you know, I will admit possibly under some applications of this statute parties might assert that some specific candidate is injuring their rights by expressing a preference for that party. I don't -- it seems like a very difficult argument to support. But that's a possibility. That would be an as-applied challenge in a specific case.

What the parties are saying here is we don't want to object to someone because he claims to be a Republican and he really is not. They want to say we even want to object to people who absolutely and clearly and by anyone's definition are Republicans and meet our definition and are members of our party and maybe serve as an officer of that party, but they didn't get our nomination, and, therefore, we have the right to exclude that person from the use of our name. I don't know of any case that suggests that party rights extend to that point.

THE COURT: Let me change subjects for a moment and ask you about the minor parties and to what extent the initiative

dealt with that subject.

MR. PHARRIS: Well, the initiative does not expressly deal with the subject very much, except in the language the Court read, which indicates that upon filing a candidate can express a major or minor party preference.

So the initiative obviously is aware that there's such a thing as a minor party. I think it's clear from that language what the initiative intended, and I'm talking about the text of the initiative, which is what we should be looking at, that minor parties should be treated like anyone else.

THE COURT: That's a huge change for minor parties, is it not, under Washington law?

MR. PHARRIS: Well, but then Initiative 872 represents a huge changes for all parties. The major parties are here because it represents a big change for them, too. What this does do -- and unlike the blanket primary or the Montana primary, both of them treated minor parties in special and different ways from major parties.

The blanket primary favored -- gave a little advantage to the minor parties by allowing them to have conventions and get their candidate on -- you could get a single candidate onto the primary ballot. And then, of course, in the Montana primary -- most states have had a pretty negative experience if they have party ballots. Nobody wants to take a third-party ballot, because there's hardly any candidates on there.

And so they usually come up with an alternative system for treating minor parties. And the Montana system did that, too. It says minor parties could have a convention and get onto the general election ballot that way.

872 basically says we're out of the business of caring who's a party. We're out of the business of caring how parties nominate. There's -- you know, no matter what party you are or purport to be, and how you purport to be organized, it is not directly the concern of state law. That's a private matter. And minor parties are treated like anyone else.

So if somebody wants to file for office --

THE COURT: Mr. Pharris, whether you look at the Montana primary system, which, of course, was enacted after the initiative was filed, or you look at the blanket primary for minor parties, this initiative, which does not repeal anything about minor parties, substantially changes how they are treated under Washington law?

MR. PHARRIS: That's true.

THE COURT: Under the blanket primary they had a convention, they got on the primary, and if they got one percent, they got to the final election.

MR. PHARRIS: That's correct.

THE COURT: Under the Montana, they went directly to the general election?

MR. PHARRIS: Correct.

THE COURT: Here what the state is espousing, I gather, is that all of those sections in the code dealing with minor parties are implicitly repealed by the initiative?

MR. PHARRIS: Well, I guess a couple of things. One, there aren't a whole lot of them.

THE COURT: There are some pretty important ones for minor parties.

MR. PHARRIS: There's one -- the one -- the one that we're talking about was repealed and replaced by the Montana statute, so you've got an interesting question of what would happen now.

But I would say those statutes again cannot be implemented, that is, at least the ones providing for conventions cannot be implemented consistently with the theory of the top two. For one thing, the theory of the top two depends upon basically treating candidates -- dealing with candidates who are filing and ignoring parties.

THE COURT: Well, weren't the voters told --

MR. PHARRIS: And if you begin to get back into saying, okay, if you have a different party preference we'll let you get on the ballot a different way, I think that's an equal protection problem, as the major parties would be quick to point out.

THE COURT: Well, weren't the voters told loud and clear that Initiative 872 will not affect the rights of minor parties?

MR. PHARRIS: No, they were not.

THE COURT: They were not.

MR. PHARRIS: To the extent the language on the web site implied that, I would say it's simply wrong. There's language in the explanatory statement in which -- in our explanation we anticipated this issue, in which we said inconsistent language about major and minor parties, I've got it over here, is --

THE COURT: Well, in 2005 the Secretary of State for this state proposed legislation to deal with this minor party issue and whether it remained or didn't remain as a result of the initiative, and the legislature failed to act, is that right?

MR. PHARRIS: Right.

THE COURT: And I've read the correspondence and the emails that went back and forth, and there seemed to be a significant appreciation of the minor party issue and problem created by this initiative.

Now, the legislature did nothing, and now, as I understand it, you want me to essentially say that the Washington -- the WACs that were adopted on an emergency basis about three days before this lawsuit was filed somehow are going to be swept under the table and implicitly repeal or confirm the implicit repealing of all of these sections that deal with minor parties; is that where we are?

MR. PHARRIS: First of all, I want to indicate that we don't contend that the WACs somehow have independent significance. They were simply intended as instructions to try

to fill in the gaps until the election officers, or the Secretary of State, thought the election should be run. There was no intent to supersede the statute.

THE COURT: Well, you say there is no intent to supersede the statute. Where in I-872 is there anything that deals with minor parties and how they're going to be treated?

MR. PHARRIS: I think what you have to say is that they were impliedly changed by the way 872 changed the way the election was run. So, you know, it's not unusual when statutes are passed for them to miss some other statute that is somehow affected by what you're doing.

And I think what you need to -- first of all, does Initiative 872 set up a complete system? And I think it does. It sets up an easy to manage, easy to understand system of holding elections.

And if they didn't, if they were, first of all, the immediate preexisting statutes had all been amended in 2004, and there was no opportunity to amend them, even the ones that were older, I think you simply have to read them together, and unless you can somehow harmonize them, you'd have to conclude that they were impliedly repealed.

THE COURT: Well, didn't the Grange, the actual sponsor of the initiative, appear to contend that the minor party nominees would continue to appear on the primary ballot?

MR. PHARRIS: I don't know what the Grange intended.

And their attorney is here. If they did, they were wrong.

THE COURT: Let me ask you this, just because others have commented. If the initiative were to be declared unconstitutional in any respect, can it be severed such that it would -- the remaining portions would remain, and, if so, how?

MR. PHARRIS: It seems to me the only section that they are really indicating -- if the Court were to find that there seems to be -- that there's an associational right problem -- I don't think there is. But if it's there, it is because of the way the filing statute reads. As the Court discussed with counsel, Mr. McDonald specifically, it's that language in the initiative that allows candidates to express a party preference. It seems to me if that were amended or taken out all of their arguments would fall.

And I don't think there's really much doubt that if that were the only issue the people would still have passed this measure, despite what counsel says. I think their intent overall was to replace a party nominating system with one in which candidates were selected in another way.

And if that little bit of information that the state would like to put on the ballot under the initiative, if that's somehow amended, the basic top two system should be left in place.

What we do know is that the Montana system used in 2004 was pretty -- rejected by passage of the initiative, the 60/40. So I would very much hesitate to say that the result of Initiative 872

should be to go right back to what the people clearly did not want.

THE COURT: Thank you.

MR. PHARRIS: I have nothing more.

MR. AHEARNE: Thank you, Your Honor. Good morning. My name is Tom Ahearne, and I represent the Washington State Grange. I'd like to focus on the language of the statute the political parties are saying is unconstitutional on its face, and that's the Initiative 872.

And in the course of that discussion I think I can address the various questions and issues that have come up thus far this morning. I want to focus on the language, because both Jones and Reed make the language very clearly important.

Remember, with respect to Jones the Supreme Court explained at pages 569 and 570, I'm using the U.S. Reporter cite, it says that the California law -- Jones was regarding California law that provided that a candidate goes on the general ballot if, quote, he receives the nomination of a qualified political party by winning its primary, the party's primary, and the provision of California law that the candidate of each party who wins the greatest number of votes in the primary, quote, is the nominee of that party at the ensuing general election.

So the opening sentence of the Jones case states this case presents the question of whether the state of California may use so-called blanket primaries to determine a political party's

nominee for the general election.

In Reed the language of Washington's old blanket primary statute was basically the same. It provided that a candidate goes on the general election -- on the general ballot if he receives the nomination of a political party by winning its primary, the political party's primary, in September, and that the candidate of each party who wins the greatest number of votes in the primary is the nominee of that party in the ensuing general election.

We talked about the 1996 gubernatorial election. That is exactly what happened. Remember, Mr. Locke got first place, well, Mr. Rice got second place, and Ms. Craswell got third, but the second place winner did not go on the November ballot, because the first and second, Locke and Rice, were both Democrats. The Democratic nomination went to Mr. Locke. The Republican nomination went to Ms. Craswell. That was under the old blanket system.

The political parties argument is that the language of the statute at issue here, Initiative 872, is the same as the language of the statutes in Jones and Reed, and, therefore, has to be unconstitutional.

But the language of the initiative is not the same. The Grange specifically wrote the initiative to change the unconstitutional part that was found in Jones and Reed. The language of this initiative does not say that the winner of the

September primary is the party's nominee, the party's representative, a member of the party, the standard bearer of the party.

So what I would like to do is turn to the key sections of the language of the statute itself. I have a chart here. These are the two boxes that are actually in our brief, with some ellipses, Section 4, 5, 7 of the initiative. You know, it's kind of tedious.

THE COURT: I have it in front of me, so I'll be looking at the book. Just tell me the sections that you're using.

MR. AHEARNE: I'm using Section 4 of the initiative, where it starts by defining partisan office to mean a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name.

Then going to Section 5, it defines primary and primary election to mean a procedure for winnowing candidates for public office to a final list of two as part of a special and general election.

Then you get to Section 7, which is the heart -- given those two definitions, the heart of the initiative. Subparagraph 1, a primary is the 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. And 3, the 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 an appropriate abbreviation as set forth in rules of the Secretary of State. A candidate may express no party preference or an independent preference, and any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

Now, what the political parties don't like is they don't like the winnowing change, which, as Your Honor pointed out, was an express change from those statutes. It struck out nominating candidates in Section 5 and said winnowing candidates.

And they don't like this word --

THE COURT: The fact that they made a change in the words doesn't mean that the effect of this is not a nominating process, does it?

MR. AHEARNE: Well, it does precisely, because it also says this is a statement of a preference. It's not a statement of the nominee. It's not a statement that he's a member. I could say I prefer a Ford truck. That doesn't make me a member of Ford Motor Company, or I'm not a representative of Ford Motor Company.

For example, there's nothing that prohibits constitutionally

the state from saying, well, we will allow candidates to state the airplane manufacturer they prefer. Because, frankly, that's important. On this side of the mountains Boeing is important.

On other side, where they want the Airbus manufacturing facilities, it would be important to say Airbus. But that doesn't mean that they report the candidate elected, by saying they prefer Boeing or they Prefer Airbus, is now a representative or nominee of Airbus or Boeing.

The word "preference" has a specific meaning. And if I can just find the little chart here. Let's look at what prefer means. Prefer means to like better or best. To select in preference to another or others. To value more highly. To like better. The voters are presumed to know what they enacted.

As we point out in our brief at pages 18 through 19, Washington law holds that people are presumed to know what Washington law is. Washington law says that that statement on the declaration of candidacy is the party the candidate prefers. It is not that they are a member of that party. Not that they are affiliated with that party. Not that they are the nominee of that party. It is simply a preference.

Now, what the political parties want to do is they want to rewrite this language to provide for this being a party nominating primary. But they don't dispute anywhere the points we point out in our brief, pages -- page 14, that Washington law requires that state statutes be construed as being

constitutional, if possible.

The Washington law we point out at pages 18 to 19 says that Washington law presumes that voters know what the law says. It is presumed voters know the law they voted for just eight months ago that says it's a party preference. It's not a party nomination.

And the Washington rules of statutory construction apply. There has been talk this morning about, well, the voters -- the web site may have said certain things. The sponsor may have said certain things. Washington law is that sponsor's comments cannot change the text of an initiative.

THE COURT: All right. Well, was the initiative intended to change the law for minor parties?

MR. AHEARNE: It was intended to impose a top two system. To the extent minor parties under the old system were guaranteed a spot on the November ballot if they reached the one percent threshold, yes, as far as the November ballot is concerned it did.

Because if there's going to be a Republican -- assume that the Libertarians are correct in one thing they say, that oftentimes a Republican will receive one of the top two spots, and a Democrat will receive one of the top two spots, by definition guaranteeing the Libertarians a spot 3 is more than 2. So it is inconsistent, and that part is replaced.

But --

THE COURT: So the web site that your party had was in error, is that where we are?

MR. AHEARNE: Well, to the extent that you're reading it to imply that minor parties are going to treated the exact same on the general ballot, that would be incorrect. But they are treated the same with respect to primaries. In fact, they are allowed to have -- just like the Republicans and Democrats now, they have nominated their own people.

On June 11 the Republicans nominated their King County nominees. June, I think it was, 26 or 28th, something like that, the Democrats nominated theirs. The Libertarians can nominate their nominees. It doesn't guarantee the Libertarians a spot on the November ballot, though. And it doesn't guarantee anybody a spot on the November ballot.

Focusing on the language of the initiative -- now, I'd like to agree with the plaintiff Republican Party's lead counsel in how he interpreted this language. We pointed this out in our brief as well.

It is that Initiative 872 enacted a two-stage election, with a winnowing primary, under which all candidates who file would appear on the ballot in the first stage, and a runoff between the top two in the second stage. That is what this initiative does.

And, Your Honor, it mentioned the language of the Jones decision on the description of a non-partisan primary, or what a -- kind of blanket or modified blanket would be constitutional.

And I just want to start off by saying some people refer to it as like the Scalia comment. Because, remember, it wasn't just Justice Scalia. It was seven of the nine joined in this decision.

And it wasn't dictum. The purpose of the Supreme Court's decisions are to lay out guidelines and guidance for people to follow. And that is precisely what the Supreme Court did in Jones.

Here's the language that Your Honor had quoted in one of the questions earlier, and it talks about generally -- and this is a constitutional system. General speaking, under such a system the state determines what qualifications it requires for a candidate to have a place on the primary ballot. Initiative 872 does that.

It states that it may include nomination by established parties and voter petition requirements. It doesn't say it must include also a party nominating provision. And in fact here the parties have nominated, at least the Democrats and Republicans have.

So we meet the first part. The second part of what is a constitutional system under Jones is that each voter, regardless of party affiliation, may then vote for any candidate. That is what Initiative 872 does.

Next, the top two vote-getters, or however many the state prescribes, then move on to the general. That is what Initiative 872 does. Then finally the conclusion, the Supreme Court was

explaining to the people of our country what would be a constitutional blanket system.

This system, the one that 872 enacts, has all the characteristics of a partisan blanket primary, save the constitutionally critical one, that primary voters are not choosing a partisan nominee.

And that is precisely what the initiative language was tailored to accomplish.

THE COURT: Well, but who is selecting the party's nominee? Let's assume we now have five Republicans that filed and indicate a preference as Republicans and five that indicate a preference as Democrats, and the voters vote, and two people proceed to the general election.

Haven't the voters decided who that nominee is going to be for the general election?

MR. AHEARNE: The voters have decided who the top two candidates are to proceed to the November election.

THE COURT: I understand that. But haven't they also in the same process decided or chose which Republican, if any, and which Democrat, if any, will be the nominee or flag bearer for that office in the general?

MR. AHEARNE: No. And this is why: Remember, the parties are still allowed to nominate their own people. As briefing discusses -- King County is an example of that. Mr. Hammond got the King County Republican nomination for one of the

King County seats. Reagan Dunn, who wanted it, did not get the nomination.

Mr. Dunn, under this statute, can put his party preference. That isn't saying he's the standard bearer for the Republicans. He's not saying he's the nominee of the Republicans. He is doing exactly what the initiative allows, which is to disclose to voters truthfully the party you prefer. And the nominee is Mr. Hammond.

Now, the voters can decide in September that they don't want Mr. Hammond to proceed to the top two. They can decide it's going to be Mr. Dunn and some other candidate. The voters are not deciding in September who the parties' nominees are.

Mr. Pharris is exactly right. What Initiative 872 did is it took the September primary and no longer made it the parties' primary. It is now the peoples' primary. And the Republican party's lead counsel is exactly right, in that what this initiative did is it enacted a two-stage election, with the winnowing in the September primary, and then a runoff in the November stage. That is precisely what this initiative does.

And Your Honor has asked, well, what's the material difference between the old primary, the blanket primary that was ruled unconstitutional in Reed, and 872. And there's this chart that the plaintiffs have put up, which I'm assuming is the same as the one in their reply brief. And I won't go through all of the comparisons.

I'll just note for the first two, they say that 872 is similar to the old invalid blanket because they both are partisan primaries. But they ignore that the fact definition of partisan has been changed.

They say that they both designate the political party, but they ignore the fact that the meaning of the political party designation has been changed.

What are the material differences? Here are the two critical aspects of the blanket primary system that was ruled unconstitutional. One, with respect to voter choice, voters are free to choose among all declared candidates in the September primary.

And two -- and here's what the seven justices in Jones said is the constitutionally critical point, the result of the September primary was the selection of the political party's candidate for the November ballot.

872 changes that. And this chart shows the material changes. We have the old blanket system that I just went through. The current top two system. The choice is the same. Voters are free to choose among all declared candidates in the September primary.

But the result -- what seven of the nine justices said in Jones, the constitutionally critical point is the result is the September primary selects the two most popular candidates for the November ballot. It is not selecting the parties' nominees.

Now, I can go on to -- to the question about --

THE COURT: Is that table in your brief?

MR. AHEARNE: The table, Your Honor, is not in my brief. The choices one and two, one and two, that is in our brief. At the end of our describing the old blanket primary, we said the two critical aspects are one and two, the old blanket primary, the critical aspects one and two, and the current --

THE COURT: Why don't you leave a copy of that with the clerk.

MR. AHEARNE: I will, Your Honor.

THE COURT: Thank you.

MR. AHEARNE: To get into Your Honor's questions and some of the points raised by the other parties about whether the initiative supersedes the old statutes, the remaining statutes.

The Democrats and Republicans harp primarily on the provision of the Montana statute that says major parties must nominate through the primary. And the Libertarians talk about the provisions that allowed minor parties to have a guaranteed spot on the November ballot.

The fact of the matter is that those provisions are inconsistent with 872 being a winnowing primary, not a nominating primary, and being the top two vote-getters. Regardless of what parties they preferred, the top two vote-getters are in the November election. Going back to the 1996 example, it would have been Mr. Locke and Mr. Rice in a top two system.

As we explained on page 22 of our brief, at lines 11 through

26, the inconsistent provisions of existing law are superseded by the initiative. This isn't a question of the WACs superseding the initiative, or superseding those inconsistent provisions, it's the initiative, by being a replacement primary system, superseded the initiative.

THE COURT: The initiative replaced, according to you, the Montana system that the legislature had approved, is that right?

MR. AHEARNE: It is a replacement. It's a replacement of the existing primary system. The problem is the Montana statute didn't exist yet, but it's a replacement. And I would agree with the plaintiff intervenor Democrats, where they say Initiative 872 is a replacement primary system. That is precisely what it is.

And that --

THE COURT: What does it replace?

MR. AHEARNE: It replaced the primary system that existed.

THE COURT: And what was that? Was it the system that existed as of the time the initiative was filed, or the system that was in place at the time the initiative passed?

MR. AHEARNE: As a practical matter, when it became the effective law of the State of Washington on December 2 it replaced the primary system that existed on December 1. It is exactly as the plaintiff intervenor Democrats say, it is a

replacement primary system. It establishes a new primary system. It wipes the slate clean of anything that's inconsistent in existing law.

And the political parties say, well, Your Honor, the one rule of Washington construction is you're supposed to try to harmonize inconsistent provisions. You should be reluctant to find that that they were implicitly repealed.

But to follow up on the state's point, the whole reason they want to do that is so then Your Honor can find the statute unconstitutional and strike the whole thing down. And that violates even a more fundamental principle of Washington law, which is that you construe state statutes to be constitutional. You don't go around trying to construe them to make sure they are unconstitutional.

If I could just touch for a moment on whether you could sever -- I know my time is getting near noon. If I could talk about the severance issue. The text of this initiative makes it clear that the underlying purpose is for this to be a top two primary system.

And the fundamental objection the political parties have is to that one provision that states that a candidate can declare their preference on the declaration of candidacy. Your Honor was exactly correct. And if Your Honor believes that preference doesn't really mean what the dictionary says prefer means, it really means party nominee and party representative, and that's

what the voters must have intended because that's what the old law said -- Mr. McDonald talked about historically that's what the abbreviation was about then, so obviously the voters are too stupid to realize that they voted for a different law in November, and they don't realize what the actual law is, it's preference, not a nominee -- Your Honor can strike Section 9(3) of the initiative, and that takes out the preference designation, and that then renders inoperative the other parts of the initiative that talks about the preference of stating in the declaration of candidacy, because there is no preference stated in the declaration of candidacy if you sever out section 9(3).

The underlying purpose of the initiative is to provide a top two primary with the top two vote-getters.

THE COURT: Are you saying Section 9(3)?

MR. AHEARNE: I think we were having a slight disconnect, because I have a copy of actually the initiative itself. I'm talking about the initiative --

THE COURT: I have the section that it's in the book. Have they got different section numbers?

MR. AHEARNE: Well, I think you're referring to what would then be 29A.24.030, right?

THE COURT: I'm referring to what is --

MR. AHEARNE: 29A --

THE COURT: 29A --

MR. AHEARNE: 24.030.

THE COURT: Section 9(3) in the book says for partisan offices only a place for the candidate to indicate his or her major or minor party preference --

MR. AHEARNE: We're talking about the exact same provision.

THE COURT: All right. So you would have me excise that out if I found it unconstitutional?

MR. AHEARNE: I don't think you can construe it --

THE COURT: Well, I understand. I'm asking if you agree with that. I'm not saying that I'm going to rule that way. But if it were unconstitutional, your view is I could fix it all by striking that paragraph?

MR. AHEARNE: Sever out the unconstitutional part. As we explain in our brief, that's what Washington law intended --

THE COURT: Well, what would that do to the minor party business? I mean, that, it seems to me -- well, that's the only reference to minor parties in this whole statutory scheme that was adopted by the initiative.

If we strike that, where are we?

MR. AHEARNE: You don't have to have the word "minor party" in the initiative for the initiative to be inconsistent with and supersede the minor party provision. The minor -- to the extent the minor -- Your Honor, this is why I say that: The minor party provision before this initiative was adopted provided that all the minor party had to do was get one percent of the

ballot on the primary and they were guaranteed a spot on the November ballot.

THE COURT: Now they have to be top two?

MR. AHEARNE: Now they have to be top two.

THE COURT: Isn't that the death knell for minor parties?

MR. AHEARNE: Well --

THE COURT: As a practical matter?

MR. AHEARNE: Well, as a practical matter, there's nothing unconstitutional about having a two-stage system where you have a runoff. If this death knell argument actually made it unconstitutional, per se all runoff elections would be unconstitutional.

THE COURT: It may not be unconstitutional to have that system, but it seems to me to be a real stretch to say that we're going to reach that result by implicitly striking out a whole system that has been in existence in this state for a long time that granted minor parties the right either to go to the primary and then with one percent of the vote go to the general, or to go directly to the general. All of a sudden they now have to be in top two, or they're out of luck.

MR. AHEARNE: Your Honor, I don't see that to be a stretch, because by definition top two means top two. And you can't -- and to say that, well, the voters didn't realize that that meant it wasn't going to be top three, or that you can't

even imagine that the voters would have appreciated that the person who usually comes in third is not going to be part of the top two -- as Mr. Pharris stated, Initiative 872 is a new system.

As the Democrats have stated, it's a replacement primary system, and part of the replacement is, the most important part is, is now the top two in the September primary belongs to the people. It's their winnowing out the top two candidates. It's not any longer the parties nominating their candidate.

THE COURT: All right. Thank you. We're out of time this morning. How much time do we need for the rebuttals? I indicated that each side would have up to 15 minutes. Are you going to use all of that 15 minutes? I guess the issue is either we'll take a ten-minute break and just proceed, or we'll have you come back at 1:30.

MR. McDONALD: I do not anticipate a lengthy rebuttal.

THE COURT: Why don't we take a 10-minute recess and then we'll just proceed and I'll limit the rebuttal to not more than 15 minutes per table. All right. We'll be in recess.

(Recess.)

THE COURT: Please be seated, ladies and gentlemen.

MR. McDONALD: Your Honor, I will be very brief, and I'd like to start with the question of severance. There is an additional point that I want to make that was not made in our brief.

The requirement that a candidate be able to express a party

preference and have that preference appear on the ballot appears in several places in this initiative. Most notably in the definition of partisan office itself.

And I think in order to sever the association you'd have to sever the definition of partisan office. If you sever the definition of partisan office, then there would never be an occasion in which you would have a top two primary, because Section 7 of the initiative requires a top two primary whenever candidates for a partisan office are to be elected.

In other words, the only time in which it was intended to ever have the top two primary is if the candidate could in fact compel the printing of a party preference onto the ballot.

Second, I think it is disingenuous at best, and perhaps something else, for the Grange to refer to the dictionary definition of prefer to indicate that the voters should have understood that the system was being changed when in fact in their FAQ from their web site, which was attached to Mr. White's declaration, they had said at page 1, quote, candidates for partisan office would continue to identify a political party preference when they filed for office. They had said at page 2, would the primary ballot look any different to the voter? No.

And at number 5 they had said if Washington adopts a qualifying primary does this mean the offices become non-partisan? Answer, no. Candidates will continue to express a political party preference when they file for office, and that

party designation will appear on the ballot. An office would only become non-partisan if the legislature adopts a statute prohibiting party designations on the ballot for candidates for office.

A reasonable voter paying attention to this initiative I do not think would have understood that a radical change in the meaning of party labels on ballots was intended, and that we were somehow shifting our system, particularly with the use of the word "continue."

Second, I think the Court is -- certainly the Reed Court said, and I -- at the risk of overstating the import of questions by the Court, I think the Court has correctly identified --

THE COURT: Don't do that.

MR. McDONALD: I'm sure that you'll correct me if I do. The Court is correctly identifying that there is an issue here as to if the primary doesn't nominate the party candidates where does that nomination occur.

The Grange concedes that we have a right to nominate. The state tells you that nomination just means the same thing as endorsement. And I don't know the basis for making such a statement.

In everyday usage and as long as -- any meeting I've ever been in, nomination is a condition of running for office, if there's a nomination requirement. It is not a show of support. It is a precondition.

And I think when you say we have a right to nominate -- when the Ninth Circuit says we have a right to nominate, I think it in fact means we have a right to select those candidates that will run under our name.

Third, Montana -- there was a reference to Montana -- the Montana primary having been resoundingly rejected by the voters. Well, if that is true, it was resoundingly rejected by the voters based on representations made about the effect of the top two primary, which we're now being told are inadvertently perhaps, but, nonetheless, false representations about the impact on things like minor party and what the meaning of labels are.

I don't think it can be assumed that the voters would have rejected the Montana any more than -- if they knew the true circumstance, any more than I think it can be assumed that the voters would have passed a non-partisan primary system when they were told explicitly that that's not what they were doing in this FAQ.

And finally, so that the other parties will have a chance to do rebuttal as well, I want to indicate that the voters did have a chance to repeal Montana if they chose. There was a referendum filed on that bill.

It was -- the ability to do a referendum was challenged in Court, but the Supreme Court found that case to be moot because they couldn't get enough signatures to generate a referendum issue to stop the Montana primary from going into effect.

There's no real solid indication of unhappiness with the passage of Montana, other than an initiative went on the ballot and the new system was suggested. And unless the Court has a question for me, I'm going to step down now.

THE COURT: Well, tell me, as long as I have you there, from your vantage point what relief is it that you seek?

MR. McDONALD: I think the best relief, frankly, would be to strike the initiative, to enjoin the implementation of the initiative, because that puts into place a system that was thought out by the legislature to cover this contingency of what happens -- however they got there, with the governor's veto, or anything else, this was the system that was adopted by the legislature to cover the circumstance. And toying with the initiative, it runs some risks of collateral impact.

If that is not where the Court goes, then I think the logical next step is in fact to make the party nomination right effective and essentially -- effectively enjoin the auditors and the state from publishing or printing ballots and voter pamphlets and things with the party label, unless the candidate seeking to use it has qualified under the rules of the parties.

That allows every candidate still to run. They have full access to the ballot. The only thing that has changed is they can't compel an association. And I believe a fair reading under the Jones case is that that result would be a constitutional result.

THE COURT: Thank you.

MR. McDONALD: That would be my answer to your questions.

THE COURT: All right.

MR. McDONALD: Thank you, Your Honor.

THE COURT: Thank you.

MR. WHITE: Just a few points, Your Honor. During oral argument the state indicated they had anticipated the argument concerning the effect of this on minor party nomination rights, and then cited to some oblique language in the voter's pamphlet that the state now contends addresses this.

Your Honor, I suggest if the state had anticipated and intended that this repealed minor party nomination rights which were not expressed and referenced in the initiative, that in due deference to the information of the voters they should have indicated expressly that, that the initiative would abolish the minor party nomination rights that existed under prior law.

The second point, Your Honor, is that it's been argued that nomination has nothing to do with the election system. That's simply not the case. The definition of major political party under state law is still determined by a nominee receiving at least five percent of the vote, numerous campaign finance definitions relating to the conduct of our election system are tied to the definition of major political party status, and the constitutional provision regarding filling vacancies is still

there and is tied to the party affiliation of the candidate.

Really, the only thing that this does to the nomination of candidates is that it removes nomination of party candidates from the control and influence of the political parties themselves.

Mr. Ahearne suggested that the political parties are challenging the language of the initiative. No, Your Honor, we're not. It's not the language of the initiative that is the problem. It is simply its effect.

And one final point on severability, Mr. Ahearne suggested that, and we agree, that you strike 9(3) from the text of the initiative and that renders inoperative the portions of the statute that relate to it.

That includes the very definition of partisan office, which is conditioned on the candidate being able to indicate a party preference. That includes Section 7(2), which, as Mr. McDonald noted, ties the top two primary together. It also impacts Section 5 regarding how voters may vote, which is without regard or limitation to party preference.

The relief we request, Your Honor, is simple. Initiative 872 is unconstitutional and the filing statute under the Montana system is also unconstitutional, and the relief we request with respect to the filing statute is in our proposed order, and that is that the state be enjoined from identifying on any primary ballot a Republican candidate who's not been authorized to carry the Republican label under the rules of the Washington State

Republican Party.

THE COURT: Let me ask Mr. McDonald -- thank you. I want to go back to you just for a moment, Mr. McDonald. In your relief, are you asking that that Montana filing statute -- have you raised that issue?

MR. McDONALD: We join in support of the Republican Party on the principle, but, as I said, it has no practical effect under our rules.

MR. SHEPARD: The state argued that it doesn't interfere with the party's nomination process, but it also implicitly does not recognize the nominating process, and so the question becomes what's the point of the nominating process. Which I think is partly what Mr. White and Mr. McDonald are pointing to.

If there is a right to nominate, it has to mean something. And if they're going to recognize that we have a right to nominate, it has to mean something. And they're suggesting that it means that the right is tantamount to a right to endorse. And as we've already indicated, that's just not good enough.

Also, the -- the state is implicitly arguing that the parties haven't been harmed because the system, in Mr. Pharris' words, the state isn't in the business of party nominations anymore. Well -- and because of that, then they don't need to make any showing of state interest, or narrow tailoring, or any of that stuff.

In fact, as soon as the plaintiffs show any harm whatsoever,

the test is a balancing test, and the state has to make a showing, the parties make a showing, the Court weighs everything and comes out with a result. This is the test that's been articulated in Anderson versus Celebrezze. I believe it's in the materials. I think the Democrats cited to it.

But that is the test. Virtually every ballot access case, virtually every voting rights case, talks and cites to the Anderson versus Celebrezze test. And it is in the final analysis a balancing test.

Timmons talks about it. Clingman versus Beaver -- well, actually, I don't think Clingman does talk about it. But Timmons certainly does. Now, insofar as what's the harm, the harm is different treatment. The candidates, they get to state their association, but the political parties don't get to state theirs.

Now, there's also a corresponding violation, and that is if the candidate actually does want to affirmatively associate with the party, not just state a preference, but actually associate, seek the nomination and then present himself as the nominee, there's no mechanism for that.

Frankly, Your Honor, the entirety of 872 is an artful dodge of constitutional principles. And it's the same kind of artful dodge that we were presented with under the term limits cases.

Now, there it was a matter of fashioning a qualification as a valid access issue. Here what we're doing is fashioning an openly partisan system, and yet refusing to recognize commonly

understood partisan characteristics, that is, the process of nominating.

Now, one last point, under 872 the chances of the Libertarian Party ever becoming a major political party, if you'll recall, is defined in statute as a party whose candidate has obtained five percent -- five percent at the general election in a statewide race, by the way. We're not talking about District 27 or county council, we're talking about major statewide races, expensive races, hard-fought races.

And the chances of us ever getting -- moving from the minor party status up to the major party status is virtually extinguished. Yes, there's a theoretical possibility, but in practical terms it's meaningless.

That's all.

THE COURT: Thank you.

MR. PHARRIS: Your Honor, the main thing I think we need to keep in mind is Initiative 872 explicitly intended to occupy the field of election law, to set up a whole new system that was intended to be complete in and of itself and to supplant and replace -- it calls itself a replacement system -- any inconsistent prior laws.

And I think that has to be the watchword in dealing with the other statutes that have been cited here. Clearly this top two system was intended to replace anything that doesn't work in connection with it.

Now, a couple of things Mr. White pointed out just now. He gave a couple of references. One, there is some campaign finance laws that talk about political parties. I don't see that those are inconsistent in any way with the initiative.

They might give meaning -- the meaning of the relationship between a candidate and a party might need to be rethought when you're enforcing or administering those statutes, given the new top two system, but that doesn't mean that there's a problem, or that somehow they are any evidence that the Initiative 872 remains a party nominating system.

Likewise, the reference to Article 2, Section 15 of the state's constitution, which, as far as I know, is the only reference to parties having a nominating role, that's a very special circumstance.

When certain partisan offices are vacated by death or resignation, there's a system set up by which the party of the candidate who left office gets to nominate three candidates, and then the appointment is actually made depending on the nature -- particularly by a legislative body like the county commissioners.

So the parties are given a role constitutionally. Obviously that can't be amended or changed by the initiative. But there's nothing inconsistent with that it is a very special circumstance under which the parties will play a role. It's not at all inconsistent with the initiative. The initiative can work right alongside it.

So I don't see that as a problem at all, nor do I see that oblique reference to 2(15) to a nominating role of the parties as establishing somehow a constitutional authority, that somehow that implies parties have to have a more significant role than Initiative 872 gives them.

I think it's important to realize that under Initiative 872 you work around candidates, not parties. They can state a party preference, but you count the numbers by the candidates. And I think that a good example of that would be the 1996 primary that's been mentioned to the Court before.

If you had a top two primary and the same candidates were running -- first of all, it's very clear to point out that under a top two primary, and people understood that's what they had, the voting patterns might be different.

Not nearly so many people might have crossed over and voted for a candidate of a different party if they knew that the top two, regardless of party, were going to proceed.

But let's say just for hypothetical that the patterns would come out the same. Then what you would have had was two Democratic candidates progressing to the general election, and no party, including a major party, the Republican Party, would have been guaranteed a seat -- or a position on the November ballot.

So minor parties, major parties, that's the way the top two system works. Now, in any case, the very definition of minor party is a creature of state statute. We all know there are big

and little parties.

But that definition of major versus minor party is an artifact relating primarily to the previous law in which they were treated differently. Except perhaps the relationship to the presidential politics possibly with relationship to some of the campaign finance statutes, there's really no longer any reason in Washington law to have a distinction between major and minor parties. It survives because some of the language is still there, but there's really no operational difference.

Much -- Mr. Shepard again talked about the right to nominate. Of course, first of all, that's not a constitutional right. It's certainly not an express constitutional right. The right of parties have to be measured according to what's the controversy before the Court, what's the system that's being concerned, and in a -- as the Court found in the California case, when you have a party nominating system, the rights of parties are pretty significant, because, after all, the purpose of that system is to produce the nominations -- the nominees of the parties. That's no longer true under Initiative 872. And so the term right to nominate is not just a sort of abstract term.

And so I don't know whether nominate or endorse have different meanings. All I know is we have changed the law entirely here, and so you can't lift a phrase out of a case involving party nominations and talk about a right to nominate and try to apply it without very carefully analyzing what's

really going on here.

And what's going on here, as I understand it, is the right of any private association to assemble, to discuss together interests or issues of common interest, and to do whatever they're organized to do, presuming it's a lawful purpose. It's really no different than the Grange, or the Washington Education, Association, or the Boy Scouts, or any other club.

I don't see any real serious argument that Initiative 872 squashes the rights of parties any more than it squashes the right of any other private group to participate fully in the election system, but that system does not involve commandeering the system and using it as a way of advancing the party's own private choices as to who should be nominated.

Unless there are questions, I yield to Mr. Ahearne.

THE COURT: Thank you.

MR. AHEARNE: Your Honor, I'd like to make just three points with respect to something Mr. McDonald and Mr. White said. First, with respect to Mr. McDonald's comment that the voters had a chance to vote on the Montana primary with referendum, I represented Governor Locke in the State Supreme Court case regarding that referendum. That was dismissed as moot because the sponsor of that referendum, Mr. Pope, never bothered to gather signatures. I just didn't want the Court to misunderstand what was going on.

Second, I will agree with something Mr. McDonald said. He

points out that the primary objection that the parties have is the preference not being in the declaration of candidacy but the preference being on the ballot. Therefore, I would adopt, frankly, it's probably a better way, if the Court is going to sever, to sever out the provisions of the initiative that put that name -- or that preference on the ballot. You can sever out Section 4 and Section 7 of the ballot provision, and that leaves the top two primary system in place.

You don't have to sever out what Your Honor had suggested as the preference being on the declaration, because I have not heard any complaints about the preference being on the declaration of candidacy. The parties are saying their objection is being actually on the ballot.

The last point. Despite Mr. White's saying that, well, he's not challenging the language, but the effect is this is a facial challenge, that is how the parties have brought it, and the face of the language, as written, by this initiative establishes a top two system that complies with the description of a constitutional system in Jones.

If the political parties want a different election system to be written, they can go to the legislature to write a new system. They can go to the people with an initiative of their own to write a new system. But they can't go to the federal court to craft a new election law, because this law, as written, complies with what Jones has said was constitutional.

Therefore, I will just close that, as we noted under Cool Fuel, the Grange is entitled, like the state's motion, on -- as a matter of law, dismissing the case as a matter of law with prejudice.

Thank you, Your Honor.

THE COURT: Thank you. Well, obviously the Court is going to take the matter under advisement. I had earlier, not many weeks ago, set up a very ambitious briefing schedule. You all have stayed with it.

I also indicated that I would attempt to have a result for you by Friday. Whether or not we can accomplish that, it's not entirely clear, but clearly we will be working on this until we have an answer for you, and we will have an answer for you promptly.

MR. McDONALD: Your Honor, may I have one moment?

THE COURT: You can speak from there.

MR. McDONALD: In light of the comment that you just made, in the event that you are unable to reach a final decision by this week, there's also a preliminary injunction motion pending.

First Amendment cases presume irreparable injury, and if there is even a reasonable likelihood of success, as opposed to a probability of success, I think the parties would be entitled to that preliminary injunction to get us through the pendency of the filing period while you reached a final conclusion.

THE COURT: I'll get you through the primary period. We'll have an answer for you promptly. All right. We'll be in recess. Thank you again for the challenging issues, the good briefs that everybody wrote, and very well thought-out arguments you've presented today.

Thank you. We'll be in recess.

(Recess.)

CERTIFICATE

I, Joseph F. Roth, Official Court Reporter, do hereby certify that the foregoing transcript is correct.

S/Joseph F. Roth

Joseph F. Roth