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NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

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

Respondents.

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

BRIEF FOR THE PETITIONERS

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May 21, 2007

QUESTION PRESENTED

In *California Democratic Party v. Jones*, this Court recognized that, consistent with the First Amendment rights of political parties, a state may adopt a primary election system in which all voters may participate and the top vote recipients advance to the general election, so long as "primary voters are not choosing a party's nominee." *California Democratic Party v. Jones*, 530 U.S. 567, 585-86 (2000). Washington voters adopted a primary election system in which all qualified voters are allowed to vote for any candidate, and the two candidates receiving the most votes for a given office qualify for the general election ballot, without regard to party affiliation.

Does Washington's primary election system, in which all voters are allowed to vote for any candidate and in which the top two candidates advance to the general election regardless of party affiliation, violate the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot?

PARTIES

Petitioners:

The State of Washington; Rob McKenna, the Washington State Attorney General; and Sam Reed, the Washington State Secretary of State. These parties were Intervenor Defendants in the district court and Appellants in the Court of Appeals.[1]

Respondents:

(1) The Washington State Republican Party, Christopher Vance, Bertabelle Hubka, Steve Neighbors, Brent Boger, Mary Collins, and Michael Young, who were or are officers and adherents of the Republican Party. These parties were Plaintiffs in the district court and Appellees in the Court of Appeals.

(2) The Washington State Democratic Central Committee and Paul Berendt, who was Chairman of the Committee. These parties were Intervenor Plaintiffs in the district court and Appellees in the Court of Appeals.

(3) The Libertarian Party of Washington State, Ruth Bennett and J.S. Miles, who were or are officers and adherents of the Libertarian Party. These parties were Intervenor Plaintiffs in the district court and Appellees in the Court of Appeals.

(4) The Washington State Grange. This party

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[1] The original named Defendants in the district court were nine county election officers. By order of the district court, these parties were dismissed and the intervenor defendants identified above were substituted as Defendants. JA 821.

is the petitioner in *Washington State Grange v. Washington State Republican Party, et al.* (dkt no. 06-713). The Grange was an Intervenor Defendant in the district court and an Appellant in the Court of Appeals.

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BRIEF FOR THE PETITIONERS

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The opinion of the Ninth Circuit Court of Appeals is reported at 460 F.3d 1108 (9th Cir. 2006). Pet. App. 1a. (dkt no. 06-730) The opinion of the United States District Court for the Western District of Washington is reported at 377 F. Supp. 2d 907 (W.D. Wash. 2005). Pet. App. 35a (dkt no. 06-730).

JURISDICTION

The judgment of the court of appeals was entered August 22, 2006. The petition was filed on November 20, 2006, and granted on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

Wash. Rev. Code § 29A.52.127 (Initiative 872 § 5) provides:

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

Wash. Rev. Code § 29A.52.112 (Initiative 872 § 7) provides:

> "(1) A primary is a first stage in the public process by which voters elect candidates to public office.
>
> "(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in RCW 29A.36.170.
>
> "(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election

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

STATEMENT

For almost seventy years, from 1935 to 2003, Washington used a "blanket primary" system to nominate the candidates of political parties for public office. A blanket primary "allowed voters to select among a party's candidates on an office-by-office basis, such that a voter might effectively decide to be a Democrat for purposes of nominating a gubernatorial candidate, but a Republican for purposes of nominating a candidate for Attorney General." Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, And Partisan Competition*, 101 Colum. L. Rev. 274, 283 (2001).

After California adopted a blanket primary, the political parties challenged its constitutionality, and this Court ruled that permitting all voters to participate in the determination of each party's nominees violated the political parties' First Amendment right to freedom of association. *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000) (*Jones*). Based on *Jones*, the Court of Appeals invalidated Washington's blanket primary. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003), *cert. denied sub nom.*

Reed v. Democratic Party of Washington, 540 U.S. 1213 (2004), *and cert. denied by Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004).

Although *Jones* struck down California's blanket primary, the Court explained that states remained free to adopt a nonpartisan primary. *Jones*, 540 U.S. at 585. In a nonpartisan primary, "the State determines what qualifications it requires for a candidate to have a place on the primary ballot--which may include nomination by established parties and voter-petition requirements for independent candidates." *Id*. "Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election." *Id*. The difference between an impermissible blanket primary and a nonpartisan blanket primary is that in a nonpartisan primary "[p]rimary voters are not choosing a party's nominee." *Id*. at 586.

In 2004, the voters of Washington adopted Initiative 872, which established a top-two qualifying primary. Under Initiative 872, all candidates for a public office have access to the primary election ballot, and the two candidates receiving the highest number of votes advance to the general election--regardless of party affiliation. The question presented in this case is whether this primary election system violates the political parties' First Amendment right of association.

1. Development Of The Partisan Primary For Nominating Party Candidates

In the early days of the United States, candidates were not selected in primary elections. Candidates for local elections were "presented to the electorate upon their own announcement, upon the indorsement of mass meetings, or upon nomination by informal caucuses, ..." Charles Edward Merriam & Louise Overacker, *Primary Elections* 1 (1928). Candidates for state office "were generally named by a 'legislative caucus' composed of members of the party in the legislative body, or later by a 'mongrel caucus' in which legislators and outside representatives of the party united to select party nominees." *Id.* Later, the legislative caucus was replaced with a "system of representative party government . . . ." This resulted in nomination through a "delegate convention system . . . ." *Id.* These party conventions were generally not regulated by law. Thus, the party was "free to carry on the nominating process in such manner as party tradition, custom, or rules might provide." *Id.* at 2.

Also, in the early days of the Republic, the state did not prepare the election ballot. "[V]oters prepared their own ballots or used preprinted tickets offered by political parties." *Burdick v. Takushi*, 504 U.S. 428, 446 (1992) (Kennedy, J., dissenting) (citing L.E. Fredman, *The Australian Ballot: The Story of an American Reform* ix (1968)). "Typically, parties supplied the ballots . . . to the voter who intended to vote for them, either in advance of the election or near the polling place on the day of the election, and the voter then took it along to the ballot box." Alan Ware, *The American Direct Primary* 34 (2002). This

began to change in the 1880's with the introduction of the Australian Ballot. The Australian Ballot "was printed by the state, and not by the candidates or parties, it was available only at the place of balloting and at the time of voting, and a ballot paper could not legally be removed from the balloting place." *Id.* at 31-32.

One consequence of the Australian Ballot was that it gave the political parties legal standing. "Since the government was to print all ballots there must be a method of determining what names were to appear upon the ballot, and under what party designation . . . ." Merriam, at 24. Thus, "the law provided that nominations for office might be certified by party officers to the proper legal officers, and then be printed as the officially recognized party list of candidates." *Id.* "When the party was given a legal standing, the way was opened toward regulation of the entire nominating process." *Id.*

Part of this regulation consisted of requiring parties to use a primary election to select the party nominee for public office. The earlier systems of selection by party activists in caucus or conventions came under criticism as undemocratic. "The direct primary was born as a tool to take the nominating process out of the hands of the party elites and place it into the hands of the general electorate." Lauren Hancock, Notes, *The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights When the Primary Election is Construed Along a Continuum*, 88 Minn. L. Rev. 159, 164-65 (2003) (citing Paul Alan Beck & Frank J. Sorauf, *Party Politics in America*, 232-34 (7th ed. 1992)).

Most states have either a closed or an open primary. A closed primary is one "in which only previously registered party members may participate[.]" Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, And Partisan Competition*, 101 Colum. L. Rev. 274, 282 (2001). An open primary is one "in which voters are free on election day to select whichever party's nominating process they wish to participate in." *Id.*

It is important to note that primaries are neither the exclusive method of determining party nominees, nor is determining party nominees the exclusive purpose of a primary, or opening round, election. Austin Ranney, *Curing the Mischiefs of Faction*, 12-19 (1975) (recounting the historical development of party nominating methods from caucuses to conventions to primaries); Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 Mich. St. L. Rev. 327, 333 (2006) (noting the use in many states of a runoff system, in which the top two candidates advance to a "runoff" if no candidate receives a majority). Similarly, some states have experimented with additional systems for conducting elections, such as using cumulative voting and instant runoff voting.[2]

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[2] In a cumulative voting system, each voter may cast as many votes as there are seats to be filled, but may "cumulate" the votes by casting more than one for a single candidate. O'Neill, 2006 Mich. St. L. Rev. at 336. Several states use this system in local elections. *Id.* An instant runoff voting system permits voters to rank the candidates in order of preference, and if no candidate receives a majority among first choice votes,

2. Development Of The Primary Election In Washington

a. Early Nomination Of Candidates

Washington did not initially require a primary as part of its electoral process. Following statehood in 1889, political parties selected their nominees privately and simply filed their choices with state or local election officials, who printed general election ballots. Washington law provided that "[a]ny convention, primary meeting or primary election . . . may nominate candidates for public office, to be filled by election within the state." 1889-90 Wash. Sess. Laws, ch. XIII, § 2, page no. 400. If a party chose to nominate in a primary election, state law regulated the conduct of the election. 1889-90 Wash. Sess. Laws, ch. XIII, §§ 1-26, page nos. 419-27. "All nominations made by such convention, primary meeting or primary election [were] certified . . . to the secretary of state, or to the clerk of the board of county commissioners . . . ." 1889-90 Wash. Sess. Laws, ch. XIII, § 3, page nos. 400-01. The certification was to "contain the name of each person nominated . . . and the office for which he [was] named, and . . . designate[d], in not more than five words, the party or principle which such convention, primary meeting or primary election represent[ed] . . . ." *Id.* A candidate could also access the general

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then candidates are eliminated, and votes cast for them are redistributed according to the voters' second or subsequent preferences. O'Neill, 2006 Mich. St. L. Rev. at 334. Several states make use of this system to limited degrees, including Washington, in which certain local governments are authorized to implement it on a pilot project basis. Wash. Rev. Code § 29A.53.

election ballot, without being nominated at a convention, primary meeting, or primary election, by filing a certificate of nomination with a specific number of signatures. 1889-90 Wash. Sess. Laws, ch. XIII, § 5, page no. 401.

In 1907, the Washington Legislature required party nomination through a state-conducted primary election. Under the law, "all candidates for elective offices in this State . . . [were] nominated at a direct primary election held in pursuance of this act[.]" 1907 Wash. Sess. Laws, ch. 209, § 2, page no. 457. To appear on the ballot, a candidate was required to file a form declaring that he or she was "a member of [a specific] party" and requesting that his or her "name be printed upon the official primary ballot as provided by law as a candidate of the [specific] party . . . ." 1907 Wash. Sess. Laws, ch. 209, § 4, page no. 458. Separate ballots were printed for each party, and the voter "[had] the right to receive the ballot and only the ballot of the party for which he ask[ed.]" 1907 Wash. Sess. Laws, ch. 209, § 12, page no. 464. In cities and towns of a certain size, citizens were required to register to vote. 1889-90 Wash. Sess. Laws, ch. XIII, §§ 1-17, page nos. 414-19. However, voters were not required to register by party.[3]

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[3] In 1921, the Legislature enacted a statute providing for voters to state a political party affiliation when registering to vote. 1921 Wash. Sess. Laws, ch. 177, § 6, page no. 697 ("At the time of registering, each elector shall declare the name of the political party with which he intends to affiliate[.]") Opponents of party registration, however, successfully petitioned to place that act onto the ballot as a referendum, and the voters rejected party registration by almost a three to one margin. Referendum Measure 14B (summarized at the Web site of the Washington Secretary of State, at

State Ex. Rel. Arnold v. Mitchell, 55 Wash. 513, 104 P. 791 (1909) ("It will be seen that no reference is made to the party affiliation of the elector, nor is a disclosure upon that subject within the remotest purview of the law."). The candidates receiving a plurality of the votes for each office became the parties' nominees. 1907 Wash. Sess. Laws, ch. 209, § 23, page no. 468.

b. The Blanket Primary

In 1935, the Legislature adopted the blanket primary. 1935 Wash. Sess. Laws, ch. 26, §§ 1-5, page nos. 60-64. As it existed in 2003, the blanket primary provided: "Candidates for the following offices shall be nominated at partisan primaries held pursuant to the provisions of this chapter[.]" 2003 Wash. Sess. Laws, ch. 111, § 1302, page no. 795. The offices included congressional offices and most state and county offices. 2003 Wash. Sess. Laws, ch. 111, § 1302(1)-(3), page no. 795. Both major and minor parties were required to participate in the blanket primary. The law defined major party as "a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year[.]" 2003 Wash. Sess. Laws, ch. 111, § 115, page nos. 693-94. A minor political party was defined as "a political organization other than a

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http://www.secstate.wa.gov/elections/initiatives/statistics_referendummeasures.aspx) (visited May 17, 2007). As a result, the statute providing for voter registration by party never became law. *Id.*

major political party." 2003 Wash. Sess. Laws, ch. 111 § 116, page no. 694.

Although major and minor parties both participated in the blanket primary, it served a different function depending upon a party's classification. The blanket primary was a party nominating (partisan) primary for major parties. To appear on the primary ballot, a major party candidate was required to file a declaration of candidacy "indicat[ing] a party designation[.]" 2003 Wash. Sess. Laws, ch. 111, § 603(3), page no. 749. Then the "names of all candidates who . . . filed . . . a declaration of candidacy . . . appear[ed] on the appropriate ballot at the primary throughout the jurisdiction in which they [were] to be nominated." 2003 Wash. Sess. Laws, ch. 111, § 910, page nos. 771-72. A major party candidate advanced to the general election if he or she received "a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary." 2003 Wash. Sess. Laws, ch. 111, § 919, page no. 775. Thus, the winner of the primary of each major party was the party's nominee for the office in the general election.[4]

For minor parties, the blanket primary was a qualifying primary rather than a partisan primary that selected the party's nominee. Minor parties were required to nominate their candidates at a convention. 2003 Wash. Sess. Laws, ch. 111, §§ 505-

[4] To advance to the general election, a major party candidate had to receive "at least one percent of the total number [of votes] cast for all candidates for that position sought[.]" 2003 Wash. Sess. Laws, ch. 111, § 919, page no. 775. As a practical matter, major party candidates always satisfied the one percent requirement.

514, page nos. 744-47. "A minor political party [could] hold more than one convention but in no case [could] any such party nominate more than one candidate for any one partisan public office or position." 2003 Wash. Sess. Laws, ch. 111, § 506(4), page no. 745. The nominee of the minor party was also required to file a declaration of candidacy "indicat[ing] a party designation[.]" 2003 Wash. Sess. Laws, ch. 111, § 603(3), page no. 749. "[C]andidates who . . . were nominated as . . . minor party candidate [would] appear on the appropriate ballot at the primary throughout the jurisdiction in which they [were] to be nominated." 2003 Wash. Sess. Laws, ch. 111, § 910, page no. 771-72. A minor party nominee advance[d] to the general election if he or she receive[d] "at least one percent of the total number [of votes] cast for all candidates for that position sought[.]" 2003 Wash. Sess. Laws, ch. 111, § 919, page no 775.[5] Thus, the blanket primary did not nominate minor party candidates; rather, it determined whether they had sufficient support to qualify for the general election. *Munro v. Socialist Workers Party*, 479 U.S. 189, 197 (1986).

Under the blanket primary, "all properly registered voters [could] vote for their choice at any primary held under [the] title, for any candidate for

[5] To advance to the general election, a minor party nominee also had to receive "a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary." 2003 Wash. Sess. Laws, ch. 111, § 919, page no. 775. However, as a practical matter, the minor party candidate would always satisfy this requirement, because he or she was the nominee of the party, and the party could only nominate one candidate for each office. 2003 Wash. Sess. Laws, ch. 111 § 506(4), page nos. 744-45.

each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." 2003 Wash. Sess. Laws, ch. 111, § 1304, page no. 795. It was this feature of the California blanket primary, permitting voters not affiliated with the party to choose the party's nominee, that caused the Court to strike it down in *Jones*. Allowing voters who were not affiliated with the party to choose the party's nominees violated the party's First Amendment right of association by requiring "political parties to associate with-to have their nominees, and hence their positions, determined by-those who, at best, have refused to affiliate with the party[.]" *Jones*, 530 U.S. at 577. The Ninth Circuit struck down Washington's blanket primary for the same reason. *Democratic Party of Washington State*, 343 F.3d at 1203.

c. The Top-Two Qualifying Primary

Jones explained that states could adopt a nonpartisan primary in which "the State determines what qualifications it requires for a candidate to have a place on the primary ballot-which may include nomination by established parties and voter-petition requirements for independent candidates." *Id*. at 585. "Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote-getters (or however many the State prescribes) then move on to the general election." *Id*. In 2004, the voters of Washington adopted Initiative 872-the top-two qualifying primary. The stated purpose of the initiative was to adopt the nonpartisan primary described by this Court in *Jones*. JA 173-74.

Like the blanket primary, in the top-two qualifying primary, "[e]ach voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." Initiative 872 § 5. JA 412. However, the top-two qualifying primary differs in a constitutionally critical respect from the blanket primary: It does not nominate party candidates. Rather, the top-two qualifying primary election is a "procedure for winnowing candidates for public office to a final list of two as part of a special or general election." *Id*. Thus, after the primary, "only the names of the top two candidates will appear on the general election ballot[.]" Initiative 872 § 6. JA 412.

The top two primary differs from Washington's former blanket primary in other respects as well. In the blanket primary, a candidate was required to "indicate a party designation", 2003 Wash. Sess. Laws, ch. 111, § 603(3), page no. 749 and the candidate receiving the most votes among candidates designating the same party, advanced to the general election ballot. 2003 Wash. Sess. Laws, ch. 111, § 603(3), page no. 749. By contrast, in the top-two qualifying primary, a candidate may "indicate his or her major or minor party preference, or independent status[.]" Initiative 872 § 9(3). JA 415. And "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[.]" Initiative 872 § 7(3). JA 414. However, unlike the case with the blanket primary, the party preference, if any, indicated by the candidate has no

operative effect, beyond information. No candidate advances to the general election ballot based on the candidate's indication of his or her party preference. The top two vote-getters may have the same party preference.

Finally, the top-two qualifying primary eliminated the previous state regulation of the party nominating process. Initiative 872 repealed the laws governing party nomination of candidates. Initiative 872 amended state law to provide that:

RCW 29A.80.010 and 2003 c 111 s 2001 are each amended to read as follows:

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

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

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

~~(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in RCW 29A.28.010~~)) governing its own organization and the nonstatutory functions of that organization." Initiative 872 § 14. JA 418.

Thus, under Initiative 872, the parties are free to use any system they choose to nominate their candidates.[6] However, access to the general election

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[6] Although the initiative did not expressly repeal statutes governing minor party nominating conventions, the Secretary of State made clear the State's understanding that Initiative 872 impliedly repealed the minor party convention statutes. Wash. Admin. Code § 434-215-015. JA 595. Applying state law, the District Court concluded that Initiative 872 impliedly repealed the statutes providing for minor party

ballot is not based on party nomination. Any candidate may file a declaration of candidacy, and the top two candidates advance to the general election ballot regardless of their party preference.

3. Proceedings Below

a. The District Court

The Washington State Republican Party commenced this action in May 2005 in the United States District Court for the Western District of Washington. JA 1. The Washington State Democratic Central Committee and Libertarian Party of Washington State immediately moved to intervene as plaintiffs. JA 18. (Democratic Party); JA 39 (Libertarian Party). The complaints initially named as defendants only certain county election officials, omitting either the State or any State officials. The State, its Attorney General and its Secretary of State promptly moved to intervene. JA 135. The District Court granted that motion, simultaneously dismissing the county officials from the case and substituting the State and its officials as Defendants. JA 139, 821. The District Court also granted the motion of the Washington State Grange, sponsor of Initiative 872, to intervene as an additional Defendant. JA 232.

The political parties brought a facial challenge to the constitutionality of Initiative 872, before any election had been conducted pursuant to its terms.

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nominations through a convention process. "The Court concludes as a matter of law that it was the intent of the voters who enacted Initiative 872 that it be a complete act in itself and cover the entire subject matter of earlier legislation governing minor parties." Pet. App. 81a-83a (dkt no. 06-730).

JA 1. With the scheduled first use of Initiative 872's top-two qualifying primary fast approaching, the District Court adopted an expedited briefing schedule and hearing date in order to resolve the case on summary judgment. JA 232. The court additionally instructed the parties to prepare an agreed Stipulation of Legal Issues, outlining the issues to be resolved on summary judgment. JA 229. That stipulation essentially replaced the complaints and answers, much as a pretrial order might.

After a hearing, the District Court issued an order granting declaratory and injunctive relief in favor of the political parties. Pet. App. 35a (dkt no. 06-730). The District Court followed that order with a permanent injunction restraining Washington from implementing Initiative 872. Pet. App. 93a (dkt no. 06-730).

The district court focused on the fact that candidates could express a party preference, and it concluded that "[p]rimary voters are choosing a party's nominee." Pet. App. 71a (dkt no. 06-730). The district court reasoned that "Initiative 872 burdens the rights of the political parties to choose their own nominee by compelling the parties to accept any candidate who declares a 'preference' for the party, and allowing unaffiliated voters to participate in the selection of the party's candidate." Pet. App. 71a (dkt no. 06-730). The court concluded that "Initiative 872 imposes a severe burden on the Plaintiffs' First Amendment right to associate on two separate grounds[.]" Pet. App. 79a (dkt no. 06-730). First, "Initiative 872 forces political parties to have their nominees chosen by voters who have refused to affiliate with the party and may have affiliated with

a rival[.]" *Id.* Second, "Initiative 872 forces the parties to associate with any candidate who expresses a party 'preference.'" *Id.* The court concluded that Initiative 872 was unconstitutional because it was "not narrowly tailored to advance a compelling state interest[.]" *Id.*

b. The Ninth Circuit

The State and the Grange appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit, which affirmed. Pet. App. 1a (dkt no. 06-730). Like the District Court, the Ninth Circuit focused its analysis on the fact that candidates may state a party preference. According to the court, "[g]iven that the statement of party preference is the *sole* indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate." Pet. App. 22a (dkt no. 06-730). The court reasoned that the "practical result of a primary conducted pursuant to Initiative 872 is that a political party's members are unilaterally associated on an undifferentiated basis with *all* candidates who, at their discretion, 'prefer' that party." *Id.* According to the Ninth Circuit, the "[n]et effect is that parties do not choose who associates with them and runs using their name; that choice is left to the candidates and forced upon the parties by the listing of a candidate's name 'in conjunction with' that of the party on the primary ballot." Pet. App. 25a (dkt no. 06-730). The court concluded that "[s]uch an assertion of association by the candidates against the will of the parties and

their membership constitutes a severe burden on political parties' associational rights." *Id*.

The State filed a timely Petition For A Writ Of Certiorari, which was granted.

SUMMARY OF ARGUMENT

1. In the early days of the Republic, state government did not regulate how political parties chose their candidates. It was left entirely up to the parties. In Washington, in 1889, a party could nominate a candidate at a convention, primary meeting or primary election. Later, states began to require political parties to choose their nominees in primary elections governed by state law. The party nominees thus chosen would automatically advance to the general election ballot. Washington imposed the primary election requirement in 1907. This had the effect of combining the function of nominating party candidates for the general election ballot, and the function of winnowing the number of candidates who would appear on the general election ballot. And by this action, the political parties became part of the election machinery, not just purely private associations, and began to be regulated by the states.

The top-two qualifying primary established by Initiative 872 represents a major paradigm shift. Initiative 872 separates the function of choosing party candidates from the function of reducing the number of candidates on the general election ballot. Like Washington law in 1889, the Initiative removes the state entirely from the party nominating process. Parties are free to adopt any system they choose to select their candidates. The only function served by the top two primary is to winnow the number of

candidates who will advance to the general election. Under Initiative 872 only the top two vote-getters advance to the general election, regardless of party affiliation. Initiative 872 does not violate the political parties First Amendment right of association. Indeed, by removing the state from the party nominating process, the Initiative furthers important First Amendment rights of association.

2. In *California Democratic Party v. Jones*, 530 U.S. 567 (2000) the Court struck down California's blanket primary because voters who were not affiliated with a political party helped to choose the party's nominees in the primary election. This violated the party's First Amendment right of association. The Court explained that states were free to adopt a nonpartisan blanket primary. The difference between a nonpartisan blanket primary and a partisan blanket primary is that in a nonpartisan primary the voters are not choosing the nominee of the political party who will advance to the general election ballot. Instead, the top two vote-getters advance to the general election, regardless of party affiliation.

The top-two qualifying primary established by Initiative 872 is a nonpartisan primary. Candidates may access the primary election ballot simply by filing a declaration of candidacy. In the primary election, all the candidates compete for the votes of all the voters, and the top two vote-getters advance to the general election without regard to party affiliation. This system does not violate the parties' First Amendment right of association because the voters are not choosing the party nominee. Rather, the voters are reducing the number of candidates

who will advance to the general election to the top two vote-getters.

3. Initiative 872 furthers two fundamental First Amendment rights. The first is the right of individuals to associate for the advancement of political beliefs. The second is the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. The top two primary facilitates both of these fundamental rights by separating the process of choosing party nominees from the process of winnowing the field of candidates who can participate in the general election. The initiative advances the right of qualified voters to cast their votes effectively by providing broad access to the primary ballot, and by allowing voters to participate in the primary election without regard to their political persuasion. The Initiative advances the right of individuals to associate to advance their political beliefs both by providing broad access to the primary ballot, and by freeing political parties from government regulation of their nominating process. Under Initiative 872, political parties may use any system they choose to select their nominees.

4. Both the District Court and the Ninth Circuit erred in applying strict scrutiny to Initiative 872. In *Burdick v. Takushi,* 504 U.S. 428 (1992) the Court rejected the notion that all voting regulations are subject to strict scrutiny. Instead, the level of scrutiny depends on the extent to which the regulation burdens First Amendment rights. If the regulation imposes a severe restriction, it is subject to strict scrutiny. However, if the state only imposes reasonable, nondiscriminatory restrictions upon First Amendment rights, the State's important

regulatory interests are generally sufficient to justify the restrictions.

5. As part of Initiative 872, candidates are permitted, but not required, to state their party preference, if any, on their declaration of candidacy, and their indication of the party that they prefer will also appear on the ballot. The District Court and the Ninth Circuit both focused on this feature of the top-two qualifying primary to support their conclusions that it violated the parties' First Amendment right of association.

The District Court held that Initiative 872 forced an association on the political parties because primary voters were choosing a party's nominee. This conclusion is incorrect. The mistake the district court made was in assuming that the only function that a primary may serve is to nominate—that is choose—the candidates of a political party, who then will appear on the general election ballot. Although this is one function that a primary may serve, it is not the only one. A primary, instead may determine whether a candidate nominated by a party will qualify to advance to the general election ballot. The Court recognized this function of a primary in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In *Munro* the Court upheld a provision of Washington's former blanket primary that required a minor party candidate, nominated at a minor party convention, to receive 1% of the votes cast at the primary election in order to advance to the general election. The primary did not nominate—that is choose—the minor party's candidate. It only determined whether the candidate chosen by the minor party would advance to the general election. The difference

between *Munro* and *Jones* is that in *Munro*, primary voters, who were not affiliated with the minor party, did not participate in selecting the minor party's candidate, and so there was no forced association. By contrast, in *Jones*, voters, who were not affiliated with the party, did participate in selecting the party's candidate, and so there was a forced association.

The top-two qualifying primary is like the primary approved in *Munro*. It does not nominate party candidates. Rather, it determines which candidates, from among candidates chosen by the parties (and others) will advance to the general election. And, under Initiative 872, the top two vote-getters advance to the general election, even if they both state a preference for the same party. For example, if the top two vote-getters both state a preference for the Republican Party, they will both advance. It may not be said then, that the voters in the top two primary are choosing the nominee of the Republican Party.

6. Unlike the District Court, the Ninth Circuit did not conclude that the top two primary nominates party candidates for the general election. Rather, it found that the statement of party preference creates the impression of associational ties between the candidate and the preferred party, which imposes a severe burden on the political parties. This conclusion also is incorrect. Initiative 872 carefully uses the term "preference" in describing what candidates may express. Washington's law allows candidates to express their "preferences" but takes no note of any candidate's "party membership" or "party affiliation." A

candidate expressing a "preference" for a party is in no sense representing himself to be a member of that party. It is also unlikely that voters will mistakenly consider a candidate's statement of party preference to be a statement that a candidate is the nominee of the party he or she prefers.

Even if the statement of the candidate's party preference creates an impression of association, the burden imposed on the party is slight in comparison to the burdens on parties that this Court has upheld. The Court has upheld laws imposing detailed requirements on how the parties may choose their candidates. Initiative 872 imposes no direct constraint on party activity at all. It merely allows, but does not require, a candidate to indicate his or her party preference on the ballot.

If Initiative 872 imposes any burden on the parties by allowing candidates to indicate their political party preference, that modest burden is justified by the State's interest in providing information to the voters about candidates for office. The State's interest in providing voters with a modicum of relevant information about the candidates, information that may assist voters in identifying and choosing among candidates on the primary and general election ballots, is sufficient to justify the regulation.

ARGUMENT

When Washington's blanket primary was struck down, the State was not required to adopt any particular plan to repair its election system. States have broad and express authority under the Constitution to prescribe the "times, places and manner of holding elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. In addition, states have even broader control over the election process for state offices. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005), *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217 (1986). The voters of Washington chose to adopt the top-two qualifying primary, a winnowing primary that does not violate the political parties' First Amendment right of association.

1. The Top-Two Qualifying Primary Is A Constitutionally Permissible Nonpartisan Primary System Described in *Jones*

In *Jones* the Court explained that states could adopt a nonpartisan primary system in which "the State determines what qualifications it requires for a candidate to have a place on the primary ballot", and that those qualifications "may include nomination by established parties and voter-petition requirements for independent candidates." *Jones*, 530 U.S. at 585. According to *Jones*, under such a system, "[e]ach voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election." *Id*. The Court further explained that "[t]his system has all the

characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Id*. at 585-86. The *Jones* Court described such a permissible primary as a "*nonpartisan* blanket primary", *Id*. at 585, "nonpartisan" meaning that "[p]rimary voters are not choosing a party's nominee." *Id*. In this respect, the Court made it plain that a primary system which allows all voters to vote without regard to party affiliation is not, itself, constitutionally problematic. Rather, the constitutional infirmity arises when such a system is employed to choose a party's nominee. *Id*.

The Court's description of a nonpartisan blanket primary in *Jones* also is reflected in the literature. A nonpartisan primary "allows voters to choose from the entire field of candidates and winnow them down to two for the general election. [It] operates like a two-stage general election. All candidates run against each other in the primary and the top two vote-getters, regardless of party, advance to the general election." Nathaniel Persily, T*oward A Functional Defense Of Political Party Autonomy*, 76 N.Y.U. L. Rev. 750, 783 (2001). In a nonpartisan primary, "[c]andidates qualify for the primary ballot under a neutral signature requirement or other criterion, and the top two candidates who garner votes in the primary advance to the general election." *Id*. Thus, the "candidates who advance to the general election may be from the same party or from different parties." *Id*. The rule

for advancement to the general election ballot "is simply that a candidate receiving the most or second-most votes in the primary earns a space on the general election ballot." *Id*.

The Court's discussion of the constitutionally permissible "*nonpartisan* blanket primary" in *Jones* does not require that the offices be labeled as nonpartisan. Rather, the nonpartisan nature of the primary is that the primary is not used to select a party's nominee to advance to the general election. *Jones*, 530 U.S. at 585.

In adopting the top-two qualifying primary, Washington's voters put in place the system favorably described in *Jones*. The top-two qualifying primary is, in the words of *Jones*, a "*nonpartisan* blanket primary." *Jones*, 530 U.S. at 585. Access to the primary election ballot is unrelated to party affiliation or party nomination, although a party's nominee certainly is entitled to a spot on the primary election ballot under the same standards as any other candidate. Candidates qualify for the ballot based on neutral criteria set out in the declaration of candidacy. Initiative 872 § 8. JA 414. All of the candidates on the primary ballot compete against one another, and the top two vote-getters advance to the general election.

The top-two qualifying primary is not a blanket primary of the sort struck down in *Jones*. The "major difference between [impermissible] blanket primaries and nonpartisan primaries is that in [impermissible] blanket primaries, the top vote receiver from each party becomes the party's general

election nominee[.]" Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. Econ. & Org. 304, 324 (1998). On the other hand, "in nonpartisan primaries, the top vote receiver in the primary wins the seat outright if he or she receives over 50% of the primary vote. Otherwise the top two vote receivers, regardless of party, meet in a runoff election." *Id.* Of course, under Initiative 872, the top two vote-getters advance to the general election, even if one receives over 50% of the vote. As *Jones* reflects, however, the crucial difference between an impermissible blanket primary and a permissible nonpartisan blanket primary, such as Washington's top-two qualifying primary, is that in a nonpartisan primary, the top two vote-getters advance regardless of party.

2. The Top-Two Qualifying Primary Furthers The Voters' Right To Cast Their Ballots Effectively And Furthers The Individual's Right Of Political Association

This case involves two distinct and fundamental rights. The first is "the right of individuals to associate for the advancement of political beliefs . . . ." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). The second is "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.* These two rights are "overlapping[.]" *Williams v. Rhodes,* 393 U.S. 23, 30 (1968).

However, there can be a tension between these two rights as they relate to primary elections. It is important to recall that a primary is "not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates." *Storer v. Brown* , 415 U.S. 724, 735 (1974). Thus, the ability to cast a vote in the primary and participate in the winnowing process is critical to the exercise of First Amendment rights.

In a closed primary, only registered party members may vote in the party's primary to choose the party's nominee. In an open primary, a voter must affiliate with a party by choosing only that party's primary ballot. Requiring party membership or affiliation to vote in a primary election furthers the right of individuals who wish to associate with a particular political party for the advancement of political beliefs. This is because only individuals who choose a particular party select that party's nominee.

But, the closed and open primaries put other qualified voters to "a hard choice[.]" *Jones* , 530 U.S. at 584. The only way these voters may participate in the winnowing process is to "join the party." *Id*. This is where the tension exists. Requiring party membership or affiliation to vote in a primary election diminishes the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Some voters may not wish to associate with any party, while others may wish to associate with a minor party that has difficulty obtaining access to the primary ballot. Other voters

may wish to support a variety of candidates for different offices who may be associated with two or more parties, but who possess qualities or advocate policies that appeal to voters beyond party lines.

The top two primary facilitates both of these fundamental rights by separating the process of choosing party candidates from the process of winnowing the field of candidates who can participate in the general election. Initiative 872 provides easy access to the ballot, and facilitates the right of qualified voters to cast their votes effectively by allowing all qualified voters to participate in the primary election, without regard to political persuasion. Initiative 872 also furthers the right of individuals to associate for the advancement of political beliefs, by providing broad access to the primary election ballot, including access by political party-selected candidates, and also by freeing political parties from state regulation of their nominating processes.

a. The Top-Two Qualifying Primary Furthers The Right Of Qualified Voters, Regardless Of Their Political Persuasion, To Cast Their Votes Effectively

Initiative 872 furthers the right of qualified voters, regardless of their political persuasion, to cast their votes effectively in two ways. First, in the top-two qualifying primary, there is broad access to the primary ballot. Second, voters are not limited to voting for the candidates of a single political party.

This Court has struck down laws that unreasonably limit ballot access, either to individual candidates or to political parties seeking to participate in an election. *Williams v. Rhodes*, 393 U.S. at 24 (striking down Ohio "election laws [that] made it virtually impossible for a new political party…or an old party . . . to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States."); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 187 (striking down Illinois election law "insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago" to appear on local election ballot); *Anderson v. Celebrezze*, 460 U.S. 780, 805-06 (1983) (striking down Ohio law establishing a "March filing deadline for independent candidates for the office of President of the United States" to appear on the ballot); *Norman v. Reed*, 502 U.S. 279, 293 (1992) (striking down Illinois law that "the failure of a party's organizers to obtain 25,000 signatures for each district in which they run candidates disqualifies the party's candidates in all races within the subdivision").

By restricting ballot access, the laws at issue in these cases decreased the spectrum of candidates who could seek election and thus, also decreased voter choice. These cases protected the associational rights of independent candidates and candidates of political parties to access the ballot, and the right of voters who wished to join together to support them. For example, in the *Illinois State Board of Elections* case, the Illinois law was challenged not only by two

small political parties, but also by an independent candidate and by voters seeking to support a candidate. *Illinois State Board of Elections*, 440 U.S. at 178. Thus, *Illinois State Board of Elections,* concerned the rights of individuals both to form parties and to support their favored candidates. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Id.* at 184.

Unlike the laws at issue in these cases, Initiative 872 facilitates ballot access and in doing so, facilitates voter choice. In the top-two qualifying primary, any candidate qualified to hold an office may file a declaration of candidacy, including candidates who are supported by a political party (large or small) or by an *ad hoc* political association. Initiative 872 § 9. JA 414. All candidates are subject to either a fee requirement or, in the alternative, to a requirement to file petition signatures equal in number to the dollar value of the fee for the office. Wash. Rev. Code § 29A.24.021. Unlike the Ohio and Illinois laws at issue in *Williams*, *Illinois State Board of Elections*, *Anderson*, and *Norman*, Washington imposes no higher barriers on any candidate based on party affiliation (or lack of it). And under Initiative 872, "[e]ach voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." Initiative 872 § 5. JA 412.

Thus, the top-two qualifying primary furthers, in two ways, the interests of qualified voters, regardless of their political persuasion, to cast their votes effectively. First, Initiative 872's unrestricted

ballot access ensures that no political party's or political association's candidate is kept off the ballot. *Williams*, 393 U.S. at 31 ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."). Second, voters are not limited to voting for the candidates of a single political party. *Id.* ("the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.").

b. The Top-Two Qualifying Primary Furthers the Right Of Individuals To Associate For The Advancement Of Political Beliefs

The top-two qualifying primary furthers the rights of individuals to associate to advance their political beliefs not only because, as previously explained, it provides broad access to the primary election ballot, but also because it ends state regulation of the party nominating process. This is much the same state of affairs as existed in the early history of the United States, and in the State of Washington, before the states made political parties an integral part of state election systems and began to regulate party nominating processes.

In the early days of the United States, states did not regulate political parties' nominating processes—indeed, ballots were supplied by the parties, not the states. Even when the state began printing ballots, the nominating process was largely unregulated.

Washington's election process at statehood is a good example. The state did not require the parties to use any particular process to nominate candidates. "Any convention, primary meeting or primary election . . . [could] nominate candidates for public office to be filled by election within the state." 1889-90 Wash. Sess. Laws, ch. XIII, § 2, page no. 400. And the general election ballot was not limited to candidates nominated by a political party. Any candidate could file a certificate of nomination if it was "signed by electors residing within the district or political division in and for which the officer or officers [were] to be elected . . . ." 1889-90 Wash. Sess. Laws, ch. XIII, § 5, page no. 401. To run for statewide office "the number of signatures [required could] not be less than one hundred[.]" *Id*. Candidates nominated by a party and candidates who filed a certificate of nomination with the required number of signatures were both required to "designate, in not more than five words, the party or principle" that represented the candidate. 1889-90 Wash. Sess. Laws, ch. XIII, §§ 3, 5, page no. 401. And this designation appeared on the general election ballot along with the candidate's name. 1889-90 Wash. Sess. Laws, ch. XIII, § 17, page no. 406.

The state did not conduct a primary or other preliminary election; however, if a party chose to nominate its candidate in a primary election, the law required the party to conduct the election in a specific way. 1889-90 Wash. Sess. Laws, ch. XIII, §§ 1-25, page no. 419. The primary was a purely private election. The party determined the persons "to act as judges" and "the qualifications required for

voters, in addition to those prescribed by law." 1889-90 Wash. Sess. Laws, ch. XIII, § 3, page no. 419. Beyond establishing rules for the private party primary, the State placed no significant constraints on the way parties selected their standard-bearers.

With the passage of time, however, states began to extend formal recognition to the role parties played in the election process. At the same time, states also began to regulate party nomination processes. "[P]rovison was made that . . . nominations might be made only by parties polling a certain percentage of the total vote, as an example, 2 per cent at the last general election." Charles Edward Merriam & Louise Overacker, *Primary Elections* 24 (1928). As a result, "the two leading parties, the Republican and Democratic, were given what amounted to legal recognition." *Id.* This had the effect of limiting the associational rights of minor parties because they could not get access to the ballot. When "the party was given legal standing, the way was opened toward regulation of the entire nominating process . . . .Parties of a certain size, which had been given a privileged position for their nominee on the ballot, were in return for this privilege, subjected to special restrictions." *Id.* at 24-25. Thus, the "party ceased to be a purely voluntary association and became a recognized part of the nominating [i.e., election] machinery." *Id.* at 25. As this Court explained in *Smith v. Allwright*, 321 U.S. 649, 660 (1944), "recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the

qualifications of primary elections is delegation of a state function that may make the party's action the action of the state."

This integral role of political parties in the state election process both justified and necessitated regulation of party nominating procedures, and the Court since has reviewed many state laws facilitating or regulating the nomination of political party candidates for office. *See*, e.g., *Munro*, 479 U.S. at 191-92 (upholding Washington statute requiring "as a precondition to general ballot access, the [minor party] nominee for an office appear on the primary election ballot and receive at least 1% of all votes cast for that particular office at the primary election"); *Tashjian*, 479 U.S. at 210-11 (striking down Connecticut statute "requiring voters in any party primary to be registered members of that party," which prohibited independent voters from participating in the party primary"); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 216 (1989) (striking down California statute prohibiting the "official governing bodies of political parties from endorsing candidates in party primaries [and dictating] the organization and composition of those bodies"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 (1997) (upholding Minnesota statute prohibiting "a candidate from appearing on the ballot as the candidate of more than one party"); *Clingman*, 544 U.S. 581, 584-85 (2005) (upholding Oklahoma statute providing "that only registered members of a political

party may vote in the party's primary . . . unless the party opens its primary to registered Independents" so that a party could not open its primary to registered members of another party).

All of these decisions involve regulation of state required primary elections that were used to nominate party candidates. In this respect, Initiative 872 represents a major paradigm shift. It does not require the nomination of party candidates through a state-run primary election system, nor does it function to select the party nominee. Rather, it returns the relationship between the political parties and the state to what existed before the state required a party primary nominating process, and returns to the parties the ability to select their nominees however they choose.

The top-two qualifying primary does not regulate how a political party selects its nominee. There is no requirement that a party use a primary to nominate its candidates. Indeed, if Initiative 872 had gone into effect, the Republican Party intended to nominate its candidates through a caucus and convention process. JA 83-83. Unlike the laws considered in *Jenness v. Fortson*, 403 U.S. 431 (1971) and *American Party of Texas v. White,* 416 U.S. 767 (1974) Initiative 872 imposes no signature requirements to access the ballot—except that required if a candidate cannot pay the filing fee. Unlike the laws considered in *Tashjian* and *Clingman*, Initiative 872 does not limit party association. If a party chooses to have independent voters or the voters of other political parties help select its nominee, it is free to do so. Unlike the law considered in *Timmons*, Initiative 872 does not limit

whom a party can nominate. And unlike the law considered in *Eu*, Initiative 872 does not limit the speech of party officials, or regulate how the party is organized.

In these respects, Initiative 872 furthers the rights of individuals to associate to advance their political beliefs: it provides broad ballot access and it frees parties from state regulation of their nominating processes, by separating the process of choosing party candidates from the process of winnowing the field of candidates who can participate in the general election.

Of course, separating the nominating process from the winnowing process means that the standard bearers of the major political parties no longer automatically advance to the general election. Under Initiative 872, only the top two vote-getters advance to the general election, regardless of party membership or affiliation. However, the political parties—both major and minor—have no First Amendment right of association that guarantees the right to have a candidate on the general election ballot. As the Court explained in *Munro*, "Washington was not required to afford such automatic access [to the general election ballot] and would have been entitled to insist on a more substantial showing of voter support." *Munro*, 479 U.S. at 197. "Because Washington provides a 'blanket primary,' [all] party candidates can campaign among the entire pool of registered voters . . . . .To be sure, candidates must demonstrate, through their ability to secure votes at the primary election, that they enjoy a modicum of community support in order to advance to the general election.

But requiring candidates to demonstrate such support is precisely what we have held States are permitted to do." *Id*. at 197-98. Under Initiative 872, candidates must show support of being the top two vote-getters, but the state is entitled to "reserve the general election ballot for major struggles[.]" *Id* at 196.

3. Permitting Candidates To State A Party Preference On The Ballot Does Not Violate The Parties' First Amendment Right Of Association

Initiative 872 permits, but does not require, candidates to state a "party preference" on their declaration of candidacy, which will be reflected on the ballot. Initiative 872 §§ 7(3), 9(3). JA 414-15. This is similar to the election law at statehood that required candidates nominated by a party and candidates who filed a certificate of nomination with the required number of signatures to "designate, in not more than five words, the party or principle" that represented the candidate, and this information appeared on the general election ballot. 1889-90 Wash. Sess. Laws, ch. XIII, §§ 3, 5, 17, page no. 401. Both the District Court and the Ninth Circuit focused on this provision of Initiative 872, and applied strict scrutiny, to support the conclusion that the initiative was unconstitutional. The lower court decisions are in error. Initiative 872 does not impose a substantial burden on the political parties, and is therefore not subject to strict scrutiny.

a. State Laws Regulating Elections Are Not Uniformly Subject To Strict Scrutiny

Both the District Court and the Ninth Circuit simply assumed, without analysis, that any burden on the First Amendment right of association is subject to strict scrutiny. Pet. App. 30a, 54a (dkt no. 06-730). There is no basis for this assumption. Challenges to election laws involve First Amendment claims because "[e]lection laws will invariably impose some burden upon individual voters." *Burdick v. Takushi,* 504 U.S. 428, 433 (1992). To "*subject every voting regulation to strict scrutiny* and to require that the regulation be narrowly tailored to advance a compelling state interest . . . *would tie the hands of States seeking* to assure that elections are operated equitably and efficiently." *Id.* (emphasis added). Rather than simply applying strict scrutiny, "a more flexible standard applies." *Id.* at 434.

Thus, when considering a challenge to a state election law, the court "must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule . . . ." *Id.* And the court must "[take] into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id., Id.* at 446 (Kennedy, J., dissenting).

"Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged

regulation burdens First and Fourteenth Amendment rights." *Id*. If the plaintiff's "rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id*. at 434. However, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id*.

Here, if the top-two qualifying primary imposes any burden on the associational rights of political parties, it is a modest one at best. And this modest burden on the parties is justified by the State's important interest in providing information to voters about candidates for public office.

b. Initiative 872 Does Not Force An Association On The Parties Because The Nominee Of The Party Is Not Chosen In The Primary

The district court concluded that Initiative 872 forced an association on the political parties because "[p]rimary voters are choosing a party's nominee." Pet. App. 71a (dkt no. 06-730). Thus, the District Court concluded that the top-two qualifying primary operated exactly like the blanket primary struck down in *Jones*. The District Court is incorrect. In the top-two qualifying primary, voters do not choose a party's nominee. Instead, the primary determines which two candidates will advance to the general election, regardless of any party affiliation.

The mistake the District Court made was in assuming that the only function that a primary may serve is to nominate-that is choose-the candidates of a political party. Nomination is certainly one function a primary may serve, but it is not the only one. A primary election can also determine whether a party's nominee will qualify to advance to the general election ballot. Washington's prior blanket primary performed both functions it nominated-that is chose-major party candidates, and it qualified candidates nominated by minor parties. Initiative 872 serves only the latter function as to all political parties.

This Court recognized the qualifying function of a primary in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In *Munro,* the Court upheld a provision of the blanket primary that required "that a minor-party candidate *be nominated by convention, but imposed the additional requirement* that, *as a precondition to general* [election] *ballot access,* the nominee for an office appear on the primary election ballot and receive at least 1% of all votes cast for that particular office at the primary election." *Munro*, 479 U.S. at 191-92. The blanket primary did not nominate-that is choose-the minor party candidate. The candidate was nominated at the party convention. The purpose of the primary was for candidates to "demonstrate, through their ability to secure votes at the primary election, that they enjoy a modicum of community support in order to advance to the general election." *Id*. at 197-98.

The difference between *Munro* and *Jones* is that in *Munro* voters were not choosing the minor party's candidate, so there was no forced association.

The minor party chose its candidate, and the voters determined whether the minor party candidate would advance to the general election. In contrast, in *Jones*, the voters were nominating-that is choosing-the candidates of the major parties for the general election. Since voters who were not affiliated with the major parties could choose the parties' nominees, *Jones* concluded that there was a violation of the parties' First Amendment rights.

Initiative 872 establishes a qualifying primary with respect to all parties. To qualify for the general election ballot, a candidate must be one of the top two vote-getters, regardless of any party affiliation. The best proof that Initiative 872 does not nominate a party's candidate is that no party's candidate is assured a place on the general election ballot. The top two vote-getters advance to the general election, regardless of party. For example, even if the top two vote-getters both state that their party preference is Republican, both will advance to the general election. As this example demonstrates, the top two primary is not used to nominate the Republican Party candidate for the general election. Rather, it only determines which two candidates will qualify for the general election. The Republican Party certainly recognizes this point. If Initiative 872 had gone into effect, it intended to nominate candidates through a caucus and convention process. JA 82-83.

Because Initiative 872 does not nominate the candidates of the parties, its does not create a forced association that caused the Court to strike down the blanket primary in *Jones*.

c. Allowing Candidates To State A Party Preference Does Not Impose A Substantial Burden On The Political Parties' Right of Association

The Ninth Circuit did not adopt the District Court's mistaken view that primary voters in Initiative 872 choose the political parties' nominees. Instead, the Ninth Circuit found that the statement of party preference "*creates the impression of associational ties* between the candidate and the preferred party . . . ." Pet. App. 22a (dkt no. 06-730) (emphasis added). The court concluded that this impression of associational ties imposes a severe burden on the political parties. Pet. App. 25a (dkt no. 06-730).

The Ninth Circuit is mistaken. Initiative 872 carefully uses the term "preference" in describing what candidates may express. Washington's law allows candidates to express their "preferences" but takes no note of any candidate's "party membership" or "party affiliation." A candidate expressing a "preference" for a party is in no sense representing himself to be a member of that party. Even more to the point, a candidate expressing a political party preference is not thereby serving a spokesman, representative, or standard-bearer of that party.

Moreover, it is unlikely that voters will mistakenly consider a statement of party preference to be a statement that the candidate is the nominee of the party he or she prefers. This "argument depends upon the belief that voters can be misled by

party labels. But our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Tashjian*, 479 U.S. at 220 (internal punctuation omitted). In addition, political parties retain "great latitude in [their] ability to communicate ideas to voters and candidates through [their] participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate . . . ." *Timmons*, 520 U.S. at 363.

The Ninth Circuit's conclusion is also flawed because candidates who are not nominees of political parties also have First Amendment rights. "Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms.…The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Republican Party of Minnesota v. White*, 536 U.S. 765, 781-782 (2002) (citations and internal punctuation omitted). Candidates have a First Amendment right to tell voters which party they prefer, or that they have no party preference. And the State's important interest in an informed electorate is furthered by allowing candidates to provide this information to voters on the election ballot.

The Ninth Circuit recognizes the speech rights of candidates and limits its holding to the fact that the statement of party preference appears on the ballot. According to the court, there is a constitutionally significant distinction between ballots and other vehicles for political expression. Pet. App. 26a (dkt no. 06-730). There is a distinction

between the ballot and other forms of communication because "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 363. Consequently, this distinction actually cuts against the Ninth Circuit's decision. Political parties do not have "a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate." *Id.* Thus, the fact that the statement of party preference is on the ballot does not make the statement of preference constitutionally suspect.

Indeed, in *Norman v. Reed*, 502 U.S. 279, 285 (1992) the Court struck down a state law that provided "that a 'new political party,' which petitioners sought to form, 'shall not bear the same name as, nor include the name of any established political party . . . .'" Ill. Rev. Stat., ch. 46, §§ 10-5 (1989). In *Norman*, the Harold Washington Party was established in the City of Chicago. Citizens filed a slate of candidates in Cook County under the Harold Washington Party. The state court prohibited the citizens from using the name Harold Washington Party on its slate, interpreting the statute as precluding the citizens from securing the Party's permission to use the name. The court held that "the State Supreme Court's inhospitable reading of § 10-5 sweeps broader than necessary to advance electoral order and accordingly violates the First Amendment right of political association." *Norman*, 502 U.S. at 290. Of course, *Norman* is quite different from the facts of this case because the statement of party preference is not a declaration that the candidate is the nominee of a party. However, the

decision below is inconsistent with *Norman*. Under the Ninth Circuit's theory, this Court would have sustained the statute as necessary to uphold the First Amendment right of association of the established Harold Washington Party.

Unlike the Republican and Democratic parties, the Libertarian Party owns the trademark Libertarian Party. JA 346. However, its trademark is not infringed or diluted by allowing candidates to indicate a party preference on the ballot. Trademark infringement and trademark dilution claims only apply to "uses in commerce[.]" 15 U.S.C. §§ 1114(1)(a), 1125(a)(1). Casting a ballot in an election is not commerce; it is part of the political process. *Tax Cap Committee v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D.Fla., 1996) ("Viewing the solicitation of signatures on the petitions [to place a constitutional amendment on the ballot] as a 'service', such a service is not being rendered in commerce, it is being rendered as part of the political process."); *American Family Life Ins. Co. v. Hagan*, 266 F. Supp.2d 682, 697 (N.D.Ohio, 2002) (solicitation of political contributions "is properly classified not as a commercial transaction at all, but completely noncommercial, political speech.").

d. If Initiative 872 Imposes A Burden On Political Parties, It Is Modest And Furthers the State's Interest In An Informed Electorate

If Initiative 872 imposes a burden on the political parties because a candidate may state a party preference, it is modest compared to burdens on political parties that this Court has upheld. To

begin with, the requirement that political parties nominate their candidates in a primary election is much more burdensome than Initiative 872, which does not regulate the party nominating process. Yet this Court has stated that it is "too plain for argument, for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Jones*, 530 U.S. at 572.

The Court has also upheld other burdens on association greater than that imposed by Initiative 872. *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding signature requirements to obtain a place on the ballot); *American Party of Texas v. White*, 416 U.S. 767 (1974) (same); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding the requirement that the nominee of a minor party receive one percent of the vote in the primary to advance to the general election); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding statute prohibiting a party from nominating a candidate who had been nominated by another political party); *Clingman v. Beaver*, 544 U.S. 581 (2005) (upholding statute prohibiting party from allowing members of other parties to participate in its primary).

In comparison with the restrictions discussed above, Initiative 872 places no direct constraints on party activity at all. It tangentially affects party affairs only by allowing (but not requiring) candidates to state a party preference and by reflecting this information on the ballot. The state has a rational basis for providing voters with a

modicum of relevant information about the candidates, information that may assist voters in identifying and choosing among candidates on the primary and general election ballots. Voters may be presumed to understand "political preference" for what it is, and to distinguish it from information about party support for candidates. Thus, any slight burden imposed on political parties by Initiative 872 serves a public purpose and is constitutionally justified.

CONCLUSION

For the foregoing reasons the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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