The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE,

Defendant Intervenor.

No. CV05-0927 JCC

PLAINTIFF INTERVENORS' OPPOSITION TO STATE OF WASHINGTON'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: September 17, 2010

ORAL ARGUMENT REQUESTED

CROSS-MOTION

There is no genuine issue of material fact whether as the State has implemented the Top Two primary system voters perceive that candidates identified on ballots as "(Prefers

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Democratic Party)" are nominated by, representative of, endorsed by, affiliated with or associated with the Democratic Party. The State has presented no evidence that voters perceive the candidates any other way. The evidence in fact indicates that voters do, and reasonably should, have such perceptions. The Democratic Party therefore not only asks that the State's Motion for Summary Judgment ("Motion") be denied; it also asks the Court to exercise its authority to grant to the non-moving party summary judgment that the State's implementation of the Top Two primary is unconstitutional.[1] The State also seeks summary judgment that its implementation of Precinct Committee Officer ("PCO") elections as a part of the Top Two Primary is constitutional because the Secretary of State unilaterally makes any voter who votes in a Democratic PCO race a member of the Democratic Party whether or not the Party wishes to associate with that voter. Manifestly the State is forcing associations on the Democratic Party. The State's Summary Judgment motion on PCO claims should be denied.

MEMORANDUM

I. Introduction

The State seeks summary judgment "upholding the State's implementation of I-872 in its entirety." Motion at 4. The State's Motion is based on its unsupported assertion that it implemented I-872 so as to "eliminate voter confusion" about whether candidates identified on primary and general election ballots are associated with the Democratic Party. *Id*. Contrary to the State's unsupported assertion, the available evidence indicates that confusion is expectable and likely and that actual confusion is abundant. Moreover, the results of several primary elections in 2010 demonstrate a high likelihood that the Democratic Party, its adherents and its candidates have been injured by this confusion. The State's motion for

[1] *See, e.g., Cool Fuel, Inc. v. Connett*, 685 F. 2d 309 (9th Cir. 1982) and proposed Fed.R.Civ.P. 56(f) (effective December 1, 2010). The State has had ample opportunity to develop and present its case on this jugular point.

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summary judgment should be denied and the State should be enjoined from printing on ballots and in voter's pamphlets a candidate's statement of party preference unless the political party so identified has consented to the use by the candidate of its name in such materials.

The State also seeks summary judgment that its Top Two related implementation of PCO elections is constitutional. The law is clear that the State may not allow non-members of a political party to vote in PCO elections as it does under the Top Two. The Secretary of State argues that he can declare unilaterally that all voters who vote in Democratic Party PCO elections are members of the Party by virtue of their vote in the PCO race. The State has no authority to define the membership of the Democratic Party absent the Party's consent. The State's motion should be denied.[2]

II. Statement of Facts

A The State's Ballot Design Uses the Candidate's Party Preference as the Candidate's Party Affiliation.

The State has completed its implementation of I-872. Declaration of David McDonald in Support of Opposition to Summary Judgment ("McDonald Decl."), Ex. 1 (Blinn Dep. 13:6-14:12). As implemented, ballots used in partisan primary and general elections are arranged so that partisan offices appear on the ballot before non-partisan offices and, unlike non-partisan offices, show a party preference in conjunction with each candidate's name. *Id.,* Ex. 2 (Reed Dep. 83:8-18). Partisan offices are identified by the phrase "Partisan Office" printed one or more times on the ballot. WAC 434-230-035(2). [3]

A "partisan office" is "[a]n elected office for which candidates run as representatives of a political party." *Id.,* Ex. 3 (Voting System Performance Guidelines, Appendix A: Glossary at A-14 (United States Election Assistance Commission, 2005)).[4,5] Under the Top

[2] The Party has separately filed a motion for summary judgment in its favor on PCO issues.
[3] All RCW and WAC's referenced in this motion are included in David McDonald's Declaration, ¶ 22, Ex. 21.
[4] The Election Assistance Commission based the definitions in its Glossary on, or extracted definitions from, a wide range of sources, found at pages A-20 to A-22 of the Glossary, including the National Association of

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Two Washington's elected offices continue to be overtly partisan. *Wash. State. Repub. Party v. State of Wash.*, 460 F.3d 1108, 1113 n.5, 1118 (9th Cir. 2006), *cert. granted*, *judgment vacated and case remanded*, 478 U.S. 1015.[6] The voters were told by Initiative proponents that passage of I-872 would mean that candidates would "continue" to appear on the ballot as they had in the past, i.e. as party candidates. *Id.*

RCW 29A.36.121(3) requires that: "*The political party* or independent candidacy *of each candidate* for partisan office *shall be indicated* next to the name of the candidate on the primary and election ballot." (Emphasis supplied). RCW 29A.36.121 pre-exists I-872 and was not amended, repealed or altered by it. I-872 begins:

> AN ACT Relating to elections and primaries; amending RCW 2 29A.04.127, 29A.36.170, 29A.04.310, 29A.24.030, 29A.24.210, 29A.36.010,29A.52.010, 29A.80.010, and 42.12.040; adding a new section to chapter 29A.04 RCW; adding a new section to chapter 29A.52 RCW; adding a new section to chapter 29A.32 RCW; creating new sections; repealing RCW 29A.04.157, 29A.28.010, 29A.28.020, and 29A.36.190; and providing for contingent effect.

Declaration of Catherine Blinn in Support of Motion for Summary Judgment, ("Blinn Decl.") Dkt. 241, Ex. A (Official Text of Initiative 872 1:1-7).[7]

Secretaries of State Election Reform Key Terms (February 2005).

[5] The State's expert, political science professor Todd Donovan, agreed with this definition. McDonald Decl. at Ex. 4 (Donovan Dep. 62:5-25). Donovan agrees that a "prefers XXX Party" statement is a party label on a ballot. *Id.* (Donovan Dep. 50:18-51:1). Dr. Donovan was retained by the State on February 5, 2010 to provide expert testimony in this case. A copy of this contract and curriculum vitae are attached the McDonald Declaration as Exhibits 5 and 6.

[6] The 9th Circuit vacated its opinion in light of the Supreme Court decision in this case. 545 F.3d 1125 (9th Cir. 2008). A vacated opinion has no precedential value, *see In re Danie*l, 771 F.2d 1352, 1361 n. 19 (9th Cir. 1985), but may have ongoing persuasive value, *see DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1447-48 and n.9 (9th Cir. 1996) (*citing Freschi v. Grand Coal Venture*, 767 F.2d 1041, 1051 (2d Cir.1985), *cert. granted*, *judgment vacated and case remanded for reconsideration in light of Randall v. Loftsgaarden*, 478 U.S. 1015, *opinion on remand*, 800 F.2d 305 (2d Cir.), *as amended*, 806 F.2d 17 (2d Cir.1986)) ("*Freschi* was vacated by the Supreme Court and remanded for reconsideration in light of *Randall*; however, *Randall* did not affect this portion of *Freschi*, and we find the Second Circuit's reasoning on the point persuasive.").

[7] The concept that the candidate's party preference statement is to be taken as a personal statement rather than one of party affiliation does not appear to have been raised during the campaign to pass I-872, only as a by-product of the current litigation. The campaign to pass I-872 emphasized that the candidates would have party affiliation: "All the voters will decide who is on the November ballot. *Whether it's one Republican and one Democrat, one major and one minor party, or even an Independent* — they will be the candidates the voters want the most." McDonald Decl., Ex. 7 (Rebuttal of Argument Against I-872, 2004 Online Voter's Guide) (emphasis supplied).

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In retaining the requirement that ballots identify a candidate's party affiliation voters continued a statutory requirement that has existed since Statehood. *See, e.g.*, McDonald Decl. at ¶ 9, Ex. 8 (Session Laws 1890, p. 406 ("Every ballot shall also contain the name of the party or principle which the candidates represent, as contained in the certificates of nomination"); RRS (1932 ed.) § 5187 ("He shall proceed to have printed a separate primary election ballot for each political party…") and § 5274 ("All nominations of any party or group of petitioners shall be placed under the title of such party…"); 1974 RCW 29.30.080(3) ("All nominations of any party or group of petitioners shall be placed under the title of such party…"); 1994 RCW 29.30.020 ("The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot"); 2003 Session Laws c. 111 § 912 (re-enacting RCW 29.30.020) (" The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot"); 2004 RCW 29A.36.121(3) (" The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot.")).

RCW 29A.52.112(3), adopted as part of I-872, provides:

> 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.

Until enjoined in 2005 the State proposed simply print the word "Democrat" or "Republican" after a candidate's name to implement RCW 29A.52.112(3). *See* Dkt. #8, Ex. 9 (Pg. 3 of 5) and http://apps.leg.wa.gov/documents/laws/wsr/2006/14/06-14-049.htm (showing declaration of candidacy at the time of the injunction, which provided:

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5. This office is:
☐ Nonpartisan, or
☐ Partisan, and I am: ☐ a candidate of the _____ party, or
☐ an independent candidate nominated pursuant to chapter 29.24 RCW

In the current implementation of I-872 election officials are told to print the candidate's party preference statement in lieu of rather than in addition to the required information about the candidate's political party or independent status, effectively making the party preference statement the party affiliation information the voter expects to see. WAC 434-230-015(6).

If there is a partisan office on the ballot, a single notice is printed before the first partisan office, reading: "READ: Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate." WAC 434-230-015(4)(a),(b). The notice is printed only once. The description "Partisan Office" is printed multiple times. WAC 434-230-035(2). *See, e.g.,* Blinn Decl., Exs. D (pp. 3-4, Spokane County Primary Election 2008) and F (Jefferson County General Election 2008). Both ballots tell the voter 8 times that the offices with party preference statements after the candidate's name are "partisan offices."

B. There is Evidence of Actual Confusion Among the Voters.

As implemented by the State, I-872 permits a candidate to state a party preference as part of filing his or her declaration of candidacy and have that statement printed after the candidate's name on ballots. RCW 29A.52.112(3).

These party preference statements are understood to mean that the candidate is the party's candidate. For example, on June 11, 2010, based on candidate filings the Spokane *Spokesman Review* reported:

> Last week, Eastern Washington *Democrats were scrambling to find one candidate* to challenge Republican Rep. Cathy McMorris Rodgers for her first term. *This week they have four* – a perennial candidate and a trio of novices,

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> one of them a relative newcomer, one known for telling television viewers about the weather and a third who lives on the other side of the state.

McDonald Decl. at Ex. 9 (emphasis supplied). In fact the Democratic Party had only one candidate, Clyde Cordero. Declaration of Dwight Pelz in Support of Opposition to Summary Judgment ("Pelz Decl."), ¶ 2, 4. Three candidates were denominated the Party's candidates as a result of the public's understanding that a candidate's party preference statement is a declaration that the candidate is a representative of the Party. Of those three self-declared candidates, one, the *Spokesman Review* reported, had been recently arrested for DUI and possession of marijuana and had allegedly engaged in sexual misconduct with a client—hardly the candidate the Party would choose for itself as its representative. Another, Daryl Romeyn, as noted by the Party's vice chair in the article, was unknown to the Party and had no apparent connection to the Party's issues.

Similarly, the Northwest Progressive Institute Blog's "Filing Week: Final Report (June 6, 2008) identified each candidate who stated a Democratic Party preference as a "Democrat" in the race and noted that "only the candidates that get the most votes will advance to the November general election, *regardless of party affiliation*." McDonald Decl., Ex. 10 (emphasis supplied). Candidates such as "Goodspaceguy Nelson" were presented to the public as representatives of the Democratic Party based on the general understanding of the meaning of preference statements in a candidate's declaration of candidacy.

Even sophisticated Washington voters perceive a link between party and candidate based on the ballot information. The State's own expert identifies the Democratic candidates on the ballot based on the party preference shown:

> Q. (by Mr. McDonald) At page 46 of your report, the last full sentence of the paragraph B says, "This would suggest that a reasonable person would conclude that most Democratic candidates listed on the Top Two general election ballot are in fact the official nominee of the Party." Which are the Democratic candidates listed on the ballot?
> A. Let me read the whole paragraph.
> Q. Sure.

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A. Okay, your question is which --
Q. You said the "Democratic candidates listed on the Top Two." Did you mean the candidates who had said they preferred the Democratic Party?
A. Yeah…

Id., Ex. 4 (Donovan Dep. 60:12-25).

Numerous additional examples reflecting general interpretation of party preference statements as indicating association between candidate and political party are cited in the Republican Party's Opposition to the State's Motion and will not be repeated here.

C. Public Perception that a Candidate's Preference Statement is a Statement of Party Affiliation is No Surprise.

The broad public perception that a preference statement is a statement of association between party and candidate is expectable. Beyond RCW 29A.36.121(3), pursuant to RCW 42.17.040(f), 42.17.510 and WAC 390-05-274 the candidate's statement of party preference in his or her declaration of candidacy is taken as the candidate's party affiliation in connection with all political advertising and on all forms filed in connection with campaign finance regulation.

In short, a voter familiar with the law is told that the party preference statement:

(a) means the candidate's party affiliation (WAC 390-05-274 (1));

(b) is to be used on all government forms, such as those required by RCW 42.17.040(f), as the answer to questions about the candidate's political party or affiliation (WAC 390-05-274(2));

(c) is required by law to be repeated, for the purpose of identifying the candidate's party affiliation, in all advertising supporting or opposing the candidate (RCW 42.17.510); and

(d) will be printed after the candidate's name on the ballot which is where the law requires the candidate's political party to be printed (RCW 29A.36.121(3)).

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The only data the State gathered regarding voter perception of the association between a candidate and the party based on the ballot result from a focus group done by Stewart Elway prior to the first Top Two primary in 2008. McDonald Decl., Ex. 1 (Blinn Dep. 33:15-34:5) ("It's the only data we have"). The Elway data does not support the State's assertion that its design "eliminate[s]" confusion. Rather it demonstrates confusion will result from the State's then proposed implementation.

Fifty-six percent of the participants in the Elway study indicated that the purpose of a Primary Election is to "designate the party nominees for the General Election." *Id.,* Ex. 11 (Elway Study, D-I_017157, #7). Forty-eight percent of participants believed that the statement "prefers XXX Party" after a candidate's name indicates that the candidate is endorsed by, represents or associated with that Party. Adding parentheses to the preference statement and retesting the same group after discussion indicated that at least 15% still believed that each candidate on the ballot is endorsed by, represents or is associated with the Party named in the "prefers" statement after the candidate's name. *Id.* (Elway Study, D-I_07160, #23(C),(D)).

The ballot designs tested in the Elway study did not have repeated references to the ballot being about candidates for "Partisan Office." The test was done in April, without the context of repeated statements of association because of the compelled use in political advertising of the candidate's preference statement as a statement of party affiliation. RCW 42.17.510, WAC 390-05-274.

State officials themselves interpreted candidate statements of party preference as assertions of party affiliation. In anticipation of its first Top Two primary, the State undertook a modest educational campaign about the new Top Two system. [8] The State's

[8] The State's media campaign cost about $773,000 including consultant fees. McDonald Decl., Ex. 12 (Email from James Pharris). That is about half what the Attorney-General spent on his reelection campaign that same year. The State's advertising campaign was dwarfed by the spending by candidates for Governor (in excess of $25,000,000), Congress ($12,300,000), and statewide ballot initiatives ($9,350,000), not to mention the spending

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Request for Proposal for its educational campaign, and the resulting contract, described its proposed Top Two Primary as a system in which the candidate makes a unilateral statement of party affiliation that will be shown on the ballot: "[A Top Two Primary] allows candidates to file for partisan office and list on the ballot a party affiliation, regardless of whether the candidate has been nominated or endorsed by that Party." McDonald Decl., Ex. 14 (RFP 8-02, Section 1.1) (Description of Top Two Primary). The State accepted an educational campaign designed to reinforce the perception that a candidate's preference statement is a statement of party affiliation:

> Key messages that will need to be conveyed for the primary include…Candidates decide their party affiliation, not political parties….Key messages that will need to be conveyed for the general election include…The candidate can designate party affiliation – or not—but party endorsements cannot be indicated on the ballot….

Id. (Media Plus "Technical Proposal", pg. 1).

The Republican Party's expert, Dr. Matt Manweller, found in experiments in 2009 that between 75% and 80% of his test subjects understood the Top Two primary ballot to indicate an association between the hypothetical candidate and the party preference after the candidate's name. Over 90% of those test subjects understood the general election ballots used by the State under the Top Two to indicate an association between candidates and parties. *Id.,* Ex. 16 (Manweller Rep., pp. 27-29).

Far from eliminating confusion, the State has either ignored it or propagated it. The State's has not done post-election testing of its ballot design to determine whether voters perceive the party preference statement on the ballot as indicating that a candidate is nominated by, endorsed by, affiliated with or associated with the party indicated. *Id.,* Ex. 1, 2, 17 (Blinn Dep. 19:17-23; Reed Dep. 52:15-18; Handy Dep. 57:13-21).

in Washington that year for Presidential candidates. *Id.,* Ex. 13.

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D. The Democratic Party Is Injured by the State's Implementation of the Top Two.

Prior to the primary, the Democratic Party nominates one candidate for each partisan office on the ballot. *Id.,* Ex. 18 (Pelz Dep. 29:14-30:15; Ex. 2 Rules for Nomination). Under the Top Two, in order to appear on the general election ballot, the Party's nominee must be one of the top two vote getters. The presence of candidates other than the Party's nominee on the primary ballot using the Democratic Party's name, particularly in "down ballot" races, causes the Democratic base vote to divide between the perceived "Democratic candidates" instead of consolidating in support of the Democratic nominee in the race, thereby reducing the nominee's vote and making it more difficult for the Party's nominee to qualify for the general election ballot. Pelz Decl. at ¶ 3.

Party labels—including party preference statements—are powerful cues which are used by voters to decide how to vote. The State's expert testifies:

> Q. Have there been any studies as to the extent to which people rely on shortcuts and heuristics?
> A. Yes. I've done some of them.
> Q. Is it a small percentage of the population that does that or is it a large percentage?
> A. It's a bit of a debate in the literature, I think…. I think the point isn't whether or not people use the cues, it's -- the debate's more how many. It's what are the most important ones or at what levels of election are they more relevant.
> Q. What are the most important ones?
> A. Party identification -- or party labels.
> Q. At what levels of election is that most important?
> A. Any partisan election. But yeah, it's probably, as you go down the ballot, more relevant than -- I mean, more information about the candidates' personalities are known at the top of the ballot.

Id., Ex. 4 (Donovan Dep. 32:22-33:15). The importance of party labels is well known. *See Wash. State. Repub. Party v. State of Wash.* at 1119; *see also Grange v Wash. State Repub. Party*, 128 S. Ct. 1184, 1199 (2008) (Scalia, J., dissenting):

> …[A]ll evidence suggests party labels are indeed a central consideration for most voters. See, e.g., id., at 804, n. 34; Rahn, *The Role of Partisan Stereotypes in Information Processing About Political Candidates*, 37Am. J.

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Pol. Sci. 472 (1993); Klein & Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 Pol. Research Q. 709 (2001).

The damage to the Party, its candidates and its members from unauthorized use of its name in lower profile races is not speculative. Here are some examples from this year.

1. 38th District (Jean Berkey)

The Democratic Party selected incumbent Senator Jean Berkey as its nominee for the partisan position of State Senator from the 38th District. Pelz Decl. at ¶ 4, Ex. A. Because of the State's Top Two implementation another candidate, Nick Harper, was also identified on the primary ballot as a Democrat. The final results of the primary for State Senate in the 38th District were:

Legislative District 38, State Senator (Partisan office, 4-year term) Snohomish*		
Candidate	**Vote**	**Vote %**
Nick Harper (Prefers Democratic Party)	7,193	35.09 %
Jean Berkey (Prefers Democratic Party)	6,591	32.16 %
Rod Rieger (Prefers Conservative Party)	6,713	32.75 %
Total Votes	**20,497**	**100.00%**

*denotes partial county
source of data (formatting changed slightly to compress space):
http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID=36&JurisdictionTypeID=5&JurisdictionID=63443&ViewMode=Results

Senator Berkey, the Party's nominee, failed to qualify for the general election by .59% or 122 votes. Nick Harper got over 7000 votes. Even a little confusion among Democratic voters can change the outcome of an election.

2. 22nd Legislative District

The Democratic Party nominated Stew Henderson for the position of Representative from the 22nd District. Pelz Decl. at ¶ 4, Ex. A. Five other candidates appeared on the same

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ballot associated with the Democratic Party (two directly and three by means of names incorporating the Democratic Party's name). The Party's nominee failed to advance to the general by 4% or 1372 votes. The five other candidates who were identified on the ballot as associated with the Democratic Party got 14,768 votes. Again, only a small amount of confusion among the Democratic base vote changed the outcome of this election.

Legislative District 22, State Representative Pos. 1 (Partisan office, 2-year term) Thurston*		
Candidate	**Vote**	**Vote %**
Steve Robinson (Prefers Progressive Dem Party)	1,741	5.06 %
Jeremy Miller (Prefers Demo Party)	514	1.49 %
F. G. (Fred) Jensen (Prefers Prolife Democrat Party)	390	1.13 %
Judi Hoefling (Prefers Democratic Party)	2,701	7.85 %
Jason Hearn (Prefers GOP Party)	11,796	34.28 %
Stew Henderson (Prefers Democratic Party)	7,950	23.10 %
Chris Reykdal (Prefers Democratic Party)	9,322	27.09 %
Total Votes	**34,414**	**100.00%**

* denotes partial county
source of data (formatting changed slightly to compress space):
http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID=36&JurisdictionTypeID=5&JurisdictionID=63427&ViewMode=Results

3. 5th Congressional District

As discussed earlier in this brief in the 5th Congressional District the Democratic Party nominated Clyde Cordero for Representative. However, the Democratic Party was forced by the State's implementation of the Top Two to have three other "Democratic candidates" on the ballot with Mr. Cordero. As a result of the Top Two implementation the Democratic

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Party will not be represented in the general election by its nominee, Clyde Cordero, a Desert Storm veteran. Instead, the Democratic vote split four ways and the Party will be represented by David Romeyn.[9]

Congressional District 5, U.S. Representative (Partisan office, 2-year term)
Adams*, Asotin, Columbia, Ferry, Garfield, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman*

Candidate	Vote	Vote %
Randall Yearout (Prefers Constitution Party)	10,635	6.26 %
Daryl Romeyn (Prefers Democratic Party)	21,091	12.42 %
David R. Fox (Prefers Democratic Party)	5,569	3.28 %
Clyde Cordero (Prefers Democratic Party)	10,787	6.35 %
Barbara Lampert (Prefers Democratic Party)	15,538	9.15 %
Cathy McMorris Rodgers (Prefers Republican Party)	106,191	62.53 %
Total Votes	169,811	100.00%

* denotes partial county
source of data (formatting changed slightly to compress space):
http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID=36&JurisdictionTypeID=3&JurisdictionID=151&ViewMode=Results

III. Law & Argument

The State's Motion for summary judgment should be denied. It is not supported by evidence, indeed it is contradicted by overwhelming evidence, and it is not well grounded in the law.

[9] In citing these examples the Democratic Party wants to be clear that it has no objection to the various candidates running for office or competing for the Party's nomination under the Party's rules or in a Primary such as Washington's previous primary where members of other parties are not allowed to vote to choose the Democratic Party's candidate.

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A. The State's Motion for Summary Judgment on Voter Confusion should be Denied.

1. *The Supreme Court's Opinion Denying the Facial Challenge Does Not Immunize the State's Implementation of I-872 From Challenge.*

The State's Motion is grounded in a view that the Supreme Court has blessed in advance the State's implementation of I-872 without regard to the implementation's actual impact. The State is wrong for at least two reasons. First, federal courts, including the Supreme Court, do not issue advisory opinions. *See Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942 (1968) (stating established principle that case and controversy requirement in Article III prohibits judicial courts from rendering advisory opinions); *Hillblom v. U.S.*, 896 F.2d 426, 431 (9th Cir. 1990) (holding appellant's request for "a judicial declaration outlining the permissible scope of future Congressional actions . . . clearly runs counter to the purposes of Article III jurisdiction."). What the State suggests is a "blueprint" is clearly identified by the Court as speculation relevant only to evaluating a facial challenge to a statute:

> As long as we are speculating about the form of the ballot—*and we can do no more than speculate in this facial challenge*—we must…ask whether the ballot could *conceivably* be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment.

Grange at 1194 (emphasis supplied).

Second, even if Justice Thomas' self-described speculation about a hypothetical implementation created a "safe harbor" the State did not use Justice Thomas's hypothetical implementation. For example, the State has at most one disclaimer on the ballot, not multiple disclaimers as hypothesized by Justice Thomas. It did not phrase the preference statement as suggested by Justice Thomas ("my party preference is the Republican Party"). Instead it follows the candidate's name with a statement by the State about the candidate ("John Smith (Prefers Democratic Party)").

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The Court in Grange did nothing more than hold that the State was entitled to an opportunity to implement the Top Two constitutionally even though four Justices expressed open skepticism that the State was particularly interested in designing constitutional ballots. *See id.* at 1197 (concurring opinion of Chief Justice Roberts, joined by Justice Alito, agreeing with Justice Scalia's statement in his dissenting opinion, joined by Justice Kennedy).

The State has now had almost three years to implement the Top Two. The question is no longer whether an idea might work *if* implemented. The issue is whether the actual implementation avoided severely burdening First Amendment rights. Clearly it did not.

2. *The State's Implementation Does Not Avoid Severely Burdening First Amendment Rights.*

The Supreme Court did not disagree with the Ninth Circuit's conclusion that if voters perceive party preference statements on the ballot as indicating an association between candidate and party then First Amendment rights are severely burdened. The Supreme Court reversed the Ninth Circuit because in a facial challenge the Ninth Circuit had nothing upon which to base its evaluation of the risk of such perceptions.

> Because respondents brought their suit as a facial challenge, we have no evidentiary record against which to assess their assertions that voters will be confused…and because there is no basis in this facial challenge for presuming that candidate's party-preference designations will confuse voters, I-872 does not on its face severely burden respondents' associational rights.

Id. at 1196. In the words of Justice Roberts "I cannot say on the present record that it would be impossible for the State…I would wait to see what the ballot says before deciding whether it is unconstitutional." *Id.* at 1197.

Now, the State has completed its implementation of I-872. Now, the case is about whether the State has implemented the Top Two such that the result "eliminates" the "*possibility* of widespread voter confusion", i.e. in Justice Roberts' words whether "the ballot is designed in such a manner that *no reasonable voter would believe* that the candidates listed

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there are nominees or members of, or otherwise associated with, the parties the candidates claimed to 'prefer.'" *Id.* (emphasis supplied). If not, then the State's implementation of I-872 severely burdens associational rights and is unconstitutional unless narrowly tailored to advance a compelling State interest.[10]

The State's implementation clearly fails this test. The State's own expert opined that reasonable voters would be confused:

> Q. …What is your opinion with regard to the statement that after looking at the ballot, no reasonable voter in Washington State will regard the listed candidates as members of or otherwise associated with the political parties that the candidates claim to prefer? …
> A. Social scientists don't ever talk in absolutes like that, so I would -- you know, and this gets to the report on voter confusion. On any ballot, any structure, you're still going to find some levels of confusion.

See McDonald Decl., Ex. 4 (Donovan Dep. 93:21-94:9).

The actual damage done to the Party in the 2010 primary, discussed above, is almost exactly the hypothetical damage anticipated by the Ninth Circuit:

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

Wash. State. Repub. Party v. State of Wash. at 1121 (footnote omitted).

[10] As Justice Scalia noted in his dissent, the State's implementation cannot be viewed as narrowly tailored if it omits a right of the Party to object to the use of its name in conjunction with candidates on the ballot and in state sponsored materials and no compelling interest has been identified. *Id.* at 1203.

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3. *Analyzing the State's Implementation Under the Sleekcraft Factors, it is Clear there is a Likelihood of Confusion.*

The State argues that the Court should apply an objective standard to evaluating the risk of voter confusion but offers no standard for the Court to apply. Courts hearing trademark infringement cases are called upon regularly to evaluate the likelihood of confusion when an unauthorized party uses the name or symbol of another and standards for such evaluation have been developed over the years. Although this is not a trademark case, in the words of Chief Justice Roberts at oral argument: "… [C]learly, it's just like a trademark case. I mean, they're claiming their people are going to be confused. They are going to think this person is affiliated with the Democratic or Republican Party when they may, in fact, not be at all." McDonald Decl., Ex. 19 (*Grange* Oral Argument Transcript at 26:23-27:3).

The Ninth Circuit has recently reaffirmed the principles by which courts should evaluate the likelihood of confusion:

> *Eight factors, sometimes referred to as the Sleekcraft* factors, guide the inquiry into whether a defendant's use of a mark is likely to confuse consumers: (1) the similarity of the marks; (2) the strength of the plaintiff's mark; (3) the proximity or relatedness of the goods or services; (4) the defendant's intent in selecting the mark; (5) evidence of actual confusion; (6) the marketing channels used; (7) the likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by purchasers of the de-fendant's product. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir.1979).
>
> … The *Sleekcraft* factors are not a scorecard, a bean-counter, or a checklist. *Thane*, 305 F.3d at 901. "Some factors are much more important than others, and the relative importance of each individual factor will be case-specific." *Brookfield Commc'ns*, 174 F.3d at 1054.

Fortune Dynamic, Inc. v. Victoria's Secret, -- F.3d --, 2010 WL 3258703 at *2 (9th Cir. Aug. 19, 2010) (attached as Ex. 20 to McDonald's Declaration).

Considering each of the *Sleekcraft* factors makes it clear that there is a likelihood of confusion arising from the State's implementation of I-872.

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a. Similarity of Mark

The State uses the exact name of a political party in its preference statement if a candidate so requests. The widespread use of the Democratic Party's name by the State is evident on the exemplar ballots submitted by the State in support of its motion.

b. Strength of Mark

The Democratic Party label is one of the strongest voting cues in influencing voter choice, as discussed above.

c. Proximity of Mark

The State and the Democratic Party use the party label for the same purpose and in the same potential transaction with a voter, to provide information about candidates and their positions and to influence the voter's decision about how to cast his or her vote.

d. Defendant's Intent in Selecting the Mark.

The State's intent in adopting I-872 was clearly to allow the party's labels to "continue" to be used by candidates and voters without having to comply with the constitutional safeguards required by the decision in *California Democratic Party v. Jones* and *Democratic Party v Reed*.

e. Evidence of Actual Confusion

There is substantial evidence that voters, media commentators and the populace at large assume that a candidate is associated with the Democratic Party if the candidate's declaration of candidacy and appearance on the ballot assert "prefers Democratic Party."

f. Marketing Channels Used

The Democratic Party and its candidates use the same channels as self-designated candidates use. When a candidate co-opts the Democratic Party's name by stating a preference for the Party on his or her declaration of candidacy state law requires that all

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political advertising about the candidate must also co-opt the Party's name. The offending use thus occurs in exactly the same channels as the authorized use.

g. Likelihood of Expansion

The Democratic Party intends to have authorized candidates associated with and nominated by the Party in every partisan race for the foreseeable future. The State also intends to let every candidate who so desires to use the Democratic Party's name on ballots, in advertising and in state published voting materials for the foreseeable future.

h. Degree of Care Exercised by Voters

There is no evidence to support a conclusion that voters exercise any heightened degree of care and seek out special meanings of party preference statements that the State seeks to add as a gloss to its use of the Democratic Party's name. The State's expert Donovan noted that "the relations between parties, candidates, and nominations in terms the political process and how those three entities interact is not something most Americans have detailed factual knowledge about." McDonald Decl., Ex. 4 (Donovan Dep. 79:4-7, 81:7-11). The State's Assistant Director of Elections doubts more than 25% of general election voters even use part of the State's voter's pamphlet. *Id.,* Ex. 1 (Blinn Dep. 78:20-79:6).

All of these factors confirm that the State's use on the ballot of the Democratic Party's name after candidate names is likely to cause confusion for voters about whether the candidate is nominated by, representative of, endorsed by, affiliated with or associated with the Democratic Party.

4. *The State's Disclaimer Does Not Eliminate the Possibility of Confusion.*

The State places great emphasis on its so-called disclaimer as eliminating all risk of confusion but is reluctant or unable to provide any evidence that its disclaimer is effective. On its face there is little reason to believe the "disclaimer" is a magic bullet.

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In the first place the notice does not by its terms point to the statement after a candidate's name on the ballot. It refers to a statement that the candidate has a right to make and leaves it up to the voter to speculate where that statement is made or appears.

Second, the notice is content neutral—it does not really say anything about whether a candidate is or is not associated with the party he or she claims to prefer. At best it says that the candidate may be associated with the party he or she prefers but is not necessarily associated with it, leaving the voter to draw his or her own conclusions when later confronted with the actual ballot in the act of voting. *See, e.g., id.,* Ex. 17 (Handy Dep. 52:23-53:15):

> We wanted -- we wanted the voters to understand that these were candidates making self-declarations of what their political party preferences were, and we wanted to have a disclaimer … to let the voters know that these designations were self-designations by the candidates and *did not necessarily affiliate* that candidate with the party, nor were these candidates, you know, that the nomination or the endorsement process hadn't occurred by the party…. (emphasis supplied)

Third, the State cannot eradicate an implication by fiat. It cannot simply assert that there is no implication, i.e. that people should not be confused no matter what the facts are, any more than it can legislate what people must think in any other domain.

Fourth, the isolated single use of the notice is simply overwhelmed by the number of references to the offices being partisan. Examination of the ballots submitted by the State highlight the State's awareness that a single use of a notice or instruction is likely to be ineffective. Compare the number of times voters are told to "vote for one" or the number of times voters are told that offices are partisan on ballots with the number of times the State disclaimer is printed. If the State really wanted its "disclaimer" to be effective it would print it in connection with every office, just as it prints the important instruction "vote for one" in connection with every office.

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5. *The Court may enjoin the entire current implementation of I-872.*

The State argues that the Court may not enjoin its entire implementation of I-872 even though that implementation may be unconstitutional. The State provides no support for its position. Nothing prevents the Court from examining the State's actual implementation after the fact and issuing such orders as the Court deems necessary to protect First Amendment rights from unwarranted invasion or future likely invasion.

In any event the State misapprehends the Party's request for relief at this stage. There is no assertion that limiting the general election candidates to two is unconstitutional; the issue is using the Party's name in conjunction with candidate names without the consent of the Party. The simple step of enjoining the State from printing a candidate's party preference in conjunction with the candidate's name on ballots and in voting materials unless the Democratic Party has consented to the usage, for example, is one step that helps mitigate the First Amendment burden. There may be other simple steps that, in the aggregate, sufficiently mitigate the burden that the rest of the implementation can proceed. The Party's requested injunction is intended to allow the Party and the State to explore and develop a workable system without the need to constantly return to Court.

B. The State's Motion for Summary Judgment on PCO Issues Should be Denied.

The Democratic Party made its own motion for summary judgment on the PCO issues. To minimize repetition the Party will reserve its principal arguments in connection with PCO issues for its Reply brief on its motion and simply note here:

The State argues that its implementation of PCO elections is constitutional because the Secretary of State has declared that anyone who votes for a Democratic PCO is affiliated with the Party for the length of time it takes to vote without regard to whether the Party agrees. Motion at 19; WAC 434-230-100(6). As the Supreme Court has made clear, the Secretary has no ability to unilaterally make voters members of the Democratic Party. *See, e.g. Tashjian v.*

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Republican Party of Conn., 479 U.S. 208, 214 (1986) ("As we have said, the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.'") (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981)); *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (stating freedom of association "'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.'") (also citing *La Follette*).

The State hands each voter in the primary a ballot allowing him or her to vote in the election of Democratic Precinct Committee Officers without taking any steps to determine that the voter is in fact affiliated with and entitled to vote in the election.

> Q. In implementing the Top Two Primary, has the Office of Secretary of State taken any steps to assure that voters who vote in PCO elections are affiliated with the political party whose PCO they are electing?
> A. Voters are instructed that if they consider themselves a Republican or a Democrat, they may vote for a candidate of that party.
> Q. Is that the extent of the State's efforts to assure that voters who cast ballots for PCO are affiliates of that political party?
> A. Yes.

McDonald Decl., Ex. 1 (Blinn Dep. 49:11-21). There is no significant difference between the State's implementation of PCO elections as part of the Top Two System and Arizona's unconstitutional implementation of PCO elections as part of its blanket primary system. *See Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277 (9th Cir. 2003). The State's motion should be denied.

In addition, it should be noted that the State's assertion that the Democratic Party seeks to have the Court legislate change is wrong. The injunction proposed by the Party allows the State to adopt a new way of electing PCOs if it chooses but it need not change the law to comply with the injunction. It only needs to follow the laws already on the books rather than blatantly ignoring them. The Party previously consented to RCW

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29A.52.151(1)(a) to the extent that it provides for a voter's affiliation with the Democratic Party to be inferred from the act of voting only for Democratic candidates in partisan races on a consolidated ballot. The State refuses to follow this statute in connection with PCO elections based upon the State's assertion that because of the adoption of the Top Two System there are no Democratic candidates on any primary election ballot except for PCO candidates. Manifestly this is a meritless position given that the Party nominates a candidate in virtually every partisan race.

The State's motion with regard to PCO races should be denied.

IV. Conclusion

The State should not be granted summary judgment in the face of overwhelming evidence that its implementation of the Top Two forces associations on the Democratic Party and allows the general public to select the Democratic Party's de facto nominee for the general election. The State's implementation, as feared, severely burdens the Democratic Party's associational rights. This is no longer an hypothetical case; it is an actual case. The State's Motion should be denied and it should be enjoined from causing further damage to fundamental First Amendment rights.

DATED this 13th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2010, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ David T. McDonald
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